

LAW REVIEW¹ 23040

August 2023

If I Accept the Three-Year Appointment as the National Guard Property & Fiscal Officer for my State, Will I Have the Right to Reemployment under USERRA upon Release from Active Duty? By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.2.5—USERRA applies to executive employees.

1.1.3.3—USERRA applies to National Guard service.

1.3.1.1—Left job for service and gave prior notice to the employer.

1.3.1.2—Character and duration of service

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the Federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at <mailto:swright@roa.org>.

Q: I am a Colonel in the Army National Guard (ARNG)³ and a life member of the Reserve Organization of America (ROA).⁴ For many years, I have read and utilized your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) to manage my relationship with my civilian employer. I have worked for a major corporation (let us call it Daddy Warbucks Industries or DWI) since 1999. I have worked my way up the corporate ladder, and now I serve as the Comptroller of the corporation. I am a Certified Public Accountant by profession.

Within the National Guard Bureau, there is a division called “Property & Fiscal Operations Division.” The mission of that division has been defined as follows:

Mission: Assess, appoint, and train, officers to fill the fifty four Army National Guard and Air National Guard United States Property and Fiscal Officer positions that serve in the grade of Colonel within each of the fifty states, Puerto Rico, Guam, The US Virgin Islands, and the District of Columbia. Provide direction, guidance, and advice to the fifty four United States Property and Fiscal Officers. Direct the National Guard Bureau Property and Fiscal Operations Office in accomplishing all personnel actions, and all other administrative requirements relative to the United States Property and Fiscal Officers. Develop policy, regulation, and other guidance applicable to the United States Property and Fiscal Officers. Serve as the single point of contact for all agencies both internal and external to the National Guard Bureau, for all matters

³ The factual set-up for this article is hypothetical but realistic.

⁴ In 2018, ROA members amended the organization’s Constitution and expanded membership eligibility to include enlisted personnel as well as officers. The organization adopted the doing-business-as name of Reserve Organization of America to emphasize that the organization represents and admits to membership all past and present members of the uniformed services, from E-1 through O-10.

relative to the United States Property and Fiscal Officers. Advise the Chief of the National Guard Bureau and the Assistant Chief of the National Guard Bureau in all matters relative to the United States Property and Fiscal Officers. Serve as the Office of Primary Responsibility for all inquiries, investigations, and any other actions that impact the United States Property and Fiscal Officers.⁵

The NGB has asked me to volunteer to return to active duty for a three-year initial term, subject to renewal, to serve as the Property & Fiscal Officer (P&FO) of a major State, and I am seriously considering that offer. This would be a great way for me to cap off my ARNG career.

I discussed this opportunity at length with my colleague Mary Smith, the General Counsel (GC) of DWI. She told me that I do not have USERRA rights because I hold an executive position in the company, as Comptroller. She also said that I have already been away from my DWI job cumulatively for more than four years of “playing soldier” and that if I am away for even one more year, I will be beyond USERRA’s five-year limit. She told me that my three-year tour as P&FO will not be exempt from the five-year limit. She said that if I were to apply for a three-year military leave to serve as the PFO, the company would certainly deny the request. What do you say about this?

Answer, bottom line up front:

First, I strongly suggest that you not obtain or rely on legal advice from the employer’s GC. She represents the company’s interests, not your

⁵ See <https://www.nationalguard.mil/Leadership/Joint-Staff/J-8/Property-and-Fiscal-Operations/>.

interests. Second, USERRA most definitely applies to employees in executive positions, as well as employees in rank-and-file positions. Third, you do not need to ask for or receive the company's permission to absent yourself from work to perform uniformed service—you are only required to give prior notice to the company.

But Mary Smith is correct that there is a five-year cumulative limit on the duration of the periods of service that you can perform, with respect to your employer relationship with DWI, and still have the right to reemployment. There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit. *Your proposed three-year voluntary tour as P&FO is not exempt from the five-year limit.* If you have already used more than two years of your five-year limit, this three-year tour will put you over the limit, and you will not have the right to reemployment when you are released from active duty in late 2026.

Explanation

A. USERRA applies to executive-level employees.

The National Labor Relations Act and some other Federal employment laws apply only to rank-and-file employees, not executive, managerial, or professional employees, but USERRA applies to all employees of the employer, from the janitor to the president of the company. The pertinent section in the Department of Labor (DOL) USERRA regulation is as follows: “USERRA applies to all employees. There is no exclusion of executive, managerial, or professional employees.”⁶

⁶ 20 C.F.R. § 1002.43.

B. You are not required to request “military leave” from DWI. You are only required to give notice.

The appropriate section of the DOL USERRA regulation is as follows:

Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer’s permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.⁷

C. There is a cumulative five-year limit on the duration of the periods of service that you can perform, related to the employment relationship for which you seek reemployment. There are also nine exemptions from the five-year limit.

Yes. To have the right to reemployment under USERRA, you must meet the five USERRA conditions.⁸ You must meet all five USERRA conditions, including the five-year limit.

⁷ 20 C.F.R. § 1002.87 (bold question in original).

⁸ You must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA. 38 U.S.C. § 4312(a). You must have given the employer prior oral or written notice. 38 U.S.C. § 4312(a)(1). You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. 38 U.S.C. § 4312(c). You must have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. § 4304. After release from the period of service, you must have made a timely application for reemployment. 38 U.S.C. § 4312(e). *See generally* Law Review 15116 (December 2015) for a detailed discussion of the USERRA eligibility criteria.

The five-year limit, and the exceptions to the limit, are set forth in section 4312(c) of USERRA, as follows:

(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed *services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—*

(1) *that is required, beyond five years, to complete an initial period of obligated service;*

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is—

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14 [14 USCS § 2127, 2128, 2308, 2309, 2314, or 3713];

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.⁹

Your proposed three-year active-duty tour, to serve as the P&FO, is not exempt from your five-year limit with respect to your employer relationship with DWI because this tour does not fit within any of the exemptions set forth in section 4312(c), copied above. If you have already used more than two years of your five-year limit, since you

⁹ 38 U.S.C. § 4312(c). See *generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting an individual's five-year limit with a specific employer.

were hired by DWI, this three-year tour will put you over the five-year limit and you will lose your right to reemployment at DWI.¹⁰

Q: But what about section 4312(c)(1)? The three-year active duty period that I may commit to is my *initial* active duty commitment because I may follow it with an additional period of another two or three years as the P&FO. I think that this three-year period does not put me over the five-year limit even if I have already exhausted more than two years of the limit. What do you think about that?

A: I think that the words of the statute (USERRA) do not support your interpretation. You performed your “initial period of obligated service” 25 years ago, when you enlisted. The three-year period of active duty that you will perform as the P&FO is not your “initial period of obligated service” and this exemption from the five-year limit does not apply.

Section 4303 of USERRA¹¹ defines 17 terms used in this law, but “initial” is not one of them. When a statute uses a term without defining it, courts routinely refer to general-purpose dictionaries to determine the meaning of a word or phrase used in a statute.¹²

Consulting a dictionary, we learn that “initial” can be used as a verb, a noun, or an adjective. When used as an adjective, as in this case, the

¹⁰ It is possible that the NGB will allow you to leave active duty early, just before you exceed the five-year threshold, to preserve your right to reemployment with DWI. I do not recommend that you depend upon the NGB to be so accommodating.

¹¹ 38 U.S.C. § 4303.

¹² See *Reading Law: The Interpretation of Legal Texts*, by Justice Antonin Scalia and Professor Bryan Garner, pages 70-77.

word means “of, relating to, or occurring at the beginning, first.”¹³ The example given is “the initial step in a process.”¹⁴

In determining the meaning of words used in a statute, courts often refer to the legislative history of the statute—legislative committee reports, floor debates, and other materials generated during the consideration of the statute in Congress. In its comprehensive report, the House Committee on Veterans’ Affairs stated:

In order, however, to ensure that the Armed Forces have an adequate supply of trained personnel, certain exceptions to the five years basic limitation would be established by the Committee bill. Section 4312(c)(1) would provide that the cumulative period of service may exceed five years if the additional time is necessary to complete an initial obligated service requirement. Because of the very high training costs for some military specialties, such as the Navy’s nuclear power program, the services sometimes impose active service obligations exceeding five years upon persons serving in those specialties. The intent of this section is to ensure that a person leaving active duty upon completion of his or her initial active service obligation should have reemployment rights even if his or her period of continuous active service exceeds five years.¹⁵

Q: The powers that be at the NGB really want me to sign up for this P&FO assignment because they have had difficulty finding a qualified candidate. When I raised my USERRA concern, a Colonel at the NGB

¹³ See <https://www.dictionary.com/browse/initial>.

¹⁴ *Id.*

¹⁵ House Report No. 103-65 (1), April 28, 1993, reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on pages 810-11 of the 2021 edition of the *Manual*.

told me that he can “guarantee” that my orders will contain “magic words” stating that the three-year period is exempt from the five-year limit. What do you think about that?

A: This P&FO tour does not qualify under section 4312(c)(1) or any other subsection of section 4312(c), and no “magic words” in the orders can make this tour exempt from the five-year limit.

Please join or support ROA

This article is one of 2,000-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service

members and educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight¹⁶ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002¹⁷

¹⁶ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁷ You can also contribute on-line at www.roa.org.