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How Does USERRA Work if I Have Exhausted the Five-Year Limit with my Current Civilian Employer?
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1.3.1.1—Left job for service and gave prior notice.
1.3.1.2—Character and duration of service.
1.3.1.3—Timely application for reemployment.

Q: In January 2018, I started a new job with a major corporation, let us call it Daddy Warbucks Industries or DWI. A few weeks later, I got interested in military service, and I visited a Navy recruiter. In June 2018, I enlisted in the Navy. I was in the Delayed Entry Program (DEP)

[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 (VRRA—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 drafted the proposed VRRA 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 VRRA 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.

until I reported to basic training on 10/1/2018. On 9/1/2018, I gave prior notice, orally and in writing, to my DWI supervisor and the DWI personnel office that I would be leaving my job to go on active duty.

Because I chose the nuclear-power option, the enlistment contract that I signed required me to remain on active duty for at least six years, and I did that. I was on active duty from 10/1/2018 until 9/30/2024 when I was released from active duty. A few days later, and well within the 90-day deadline for applying for reemployment after a period of uniformed service that lasted for 181 days or more,[3] I applied for reemployment at DWI. The DWI personnel director told me that I do not have the right to reemployment with the company because under the Uniformed Services Employment and Reemployment Rights Act (USERRA) there is a five-year limit on the duration of an individual's period of uniformed service and that I had exceeded the limit.

When I met with the Navy recruiter in 2018, she told me that USERRA has a five-year limit on the duration of the period of service but there are eight statutory exemptions from the limit. She told me that one of the exemptions is for a service member's initial period of obligated active service and that this exemption would apply to me if I left active duty in 2024, at the end of my six-year term of initial obligated service. Is what the recruiter told me correct? Am I entitled to reemployment at DWI?

Answer, bottom line up front:

[3] 38 U.S.C. § 4312(e)(1)(D).

The recruiter was correct. Section 4312(c)(1) of USERRA[4] exempts that part of the service member's initial period of obligated service that exceeds five years from the computation of the five-year limit. You have not exceeded the five-year limit. If you have met the other four conditions for reemployment under USERRA, you are entitled to return to employment at DWI.

You must establish that you left your DWI job to perform service in the uniformed services.[5] You must establish that you gave DWI prior oral or written notice that you were leaving your job to perform uniformed service.[6] You must establish that you served honorably and that you did not receive a disqualifying bad discharge from the Navy.[7] Finally, you must establish that you applied for reemployment at DWI within 90 days after you were released from active duty on 9/30/2024.[8] It is clear that you met the five conditions and that you are entitled to prompt reemployment at DWI.

Explanation

Section 4312(c) of USERRA sets forth the five-year limit and its exemptions, as follows:

- 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

[4] 38 U.S.C. § 4312(c)(1).
[5] 38 U.S.C. § 4312(a).
[6] 38 U.S.C. § 4312(a)(1).
[7] 38 U.S.C. § 4304.
[8] 38 U.S.C. § 4312(e)(1)(D).

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;
  - **(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 [10 USCS § 12304];
  - **(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]

USERRA's legislative history explains that the basic limitation is five years but there are several statutory exemptions—kinds of service that do not count toward exhausting an individual's limit. The legislative history includes the following instructive paragraph:

> 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 [House Committee on Veterans' Affairs] 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 initial 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

[9] 38 U.S.C. § 4312(c) (emphasis supplied). *See 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 respect to a specific employer relationship.

active service obligation should have reemployment rights even if his or her period of continuous active service exceeds five years.[10]

Q: After I left active duty on 9/30/2024, I affiliated with the Navy Reserve. As a part-time Navy Reservist, I am required to participate in one "weekend" per month of inactive duty training (drills), and those drills are not always limited to Saturdays and Sundays. I am also required to participate in annual training each year, and that annual training is not necessarily limited to the traditional two-week duration. I am subject to involuntary recall to active duty in case of a national emergency, and I can voluntarily return to active duty.

How much "head room" do I have in my five-year limit with DWI? Will it be possible for me to continue my Navy service on a part-time basis and remain employed by DWI?

A: You have no headroom in your five-year limit. You have exhausted every day of the limit. Going forward, you will lose your DWI job if you are away from that job for even one day of military service *unless that service falls within one of the eight exemptions set forth in section 4312(c).*

Your annual training and inactive duty training periods do not count toward your five-year limit.[11] If you are recalled to active duty involuntarily, that period of service will not count toward your limit.[12] If you return to active duty voluntarily, your period of service can be exempt from the five-year limit if the Secretary of the Navy makes certain enumerated determinations.[13]

[10] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1) (emphasis supplied). This committee reported is reprinted in full in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 700 of the 2023 edition of the *Manual.*
[11] 38 U.S.C. § 4312(c)(3).
[12] 38 U.S.C. § 4312(c)(4)(A).
[13] 38 U.S.C. § 4312(c)(4)(B), (C), or (D).

Please read and reread our Law Review 16043 (May 2016). That article goes into detail on what counts and what does not count in exhausting your five-year limit.

Q: Is it possible for me to obtain a fresh five-year limit?

A: The only way that you can obtain a fresh five-year limit is to resign your DWI job and start a new employer relationship with a new employer.[14]

Please join or support ROA.

This article is one of 2,200-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 the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve 32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[15]

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

[14] The five-year limit applies "with respect to the employer relationship for which a person seeks reemployment." 38 U.S.C. § 4312(c).

[15] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

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, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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 eight[16] uniformed services, you are eligible for membership in ROA,[17] 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

[16] Congress recently established the United States Space Force as the eighth uniformed service.
[17] Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

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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:

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1 Constitution Ave. NE
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[18] You can also contribute on-line at www.roa.org.