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Involuntary State Active Duty that you Perform as a National Guard Member Could Put you over the Five-Year Limit and Cause you To Lose your Civilian Job.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.3.3—USERRA applies to National Guard service.
1.3.1.2—Character and duration of service.
1.8—Relationship between USERRA and other laws/policies.

Q: I am a Sergeant Major (E-9) in the Army National Guard (ARNG) and a life member of the Reserve Organization of America (ROA).[3] I

[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.

[3] In 1922, a group of Army Reserve officers who were veterans of "The Great War" (as World War I was then known) met at the historic Willard Hotel in our nation's capital, at the invitation of General of the Armies John J. Pershing, who had commanded American forces in that recent war. General Pershing and all those who attended

am also a GS-14 for a federal executive agency. I joined ROA recently after I found some of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have found your articles to be most helpful to me in understanding and exercising my legal rights with respect to my civilian employer and my absences from work necessitated by my ARNG service.

I am particularly interested in your Law Review 24042 (August 2024). From Law Review 24042, I learned that USERRA was amended effective 1/5/2021 to make it apply to state active duty performed by National Guard members if the duty is for 14 consecutive days or more or if it is for a major disaster or national emergency declared by the President. I also learned from that article that a state statute cannot constitutionally be applied to the relationship between a federal employee (like me) and a federal agency. From other Law Review articles, I learned that USERRA's five-year limit counts *cumulative service* that the individual has served, with respect to the employer relationship for which the individual seeks reemployment.

I have read and reread your Law Review 16043 (May 2016), and I now fully understand what counts and what does not count in exhausting an individual's five-year limit with respect to a specific employer relationship. I have been a federal employee since 1999, and I recently added up all my military orders for periods of service since

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recognized that calling the recent war "the war to end all wars" was a dangerous conceit and that our nation needed t0 maintain readiness for future conflicts. The attendees agreed to create the Reserve Officers Association (ROA) to advocate for defense readiness. Captain Harry S. Truman was one of the founders of ROA in 1922. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the development and implementation of policies that will provide adequate national defense. In 2018, ROA members amended the ROA Constitution, making enlisted service members and veterans, as well as officers, eligible to join ROA. We adopted the "doing business as" name of Reserve Organization of America to emphasize that we represent and seek to recruit as members service members and veterans of all ranks (from E-1 to O-10) and all services.

1999. I found that I have exhausted four years, 11 months, and 21 days of my five-year limit on non-exempt military service periods since 1999. I have only nine days of headroom in my five-year limit with respect to the Federal Government as my employer.

During my lengthy career as a federal employee, I have been away from my civilian job many times for weekend drills, annual training, and special military training, as well as involuntary call-ups for service in Iraq (2003 and 2007) and Afghanistan (2010). I also volunteered for active duty several times, and I have been called involuntarily for state active duty for fires, floods, riots, and the response to the COVID-19 pandemic. I expect to remain active in the ARNG until I reach my Mandatory Removal Date (MRD) in 2028. I am concerned that in my final three years of ARNG service I could lose my civilian job if I am involuntarily called to state active duty and that involuntary period puts me over the five-year limit. Am I right to be concerned?

Answer, bottom line up front:

Yes, you are correct to be concerned. An involuntary call to state active duty, even for just a few days, could put you over the five-year limit.

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 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.[4]
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Until very recently, section 4303(13) of USERRA defined "service in the uniformed service" as follows:

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- The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford

[4] 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.

Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.[5]

On 1/5/2021, the President signed into law the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.[6] Section 7004 of that new law amended section 4303(13) of USERRA[7] by inserting the following after "full-time National Guard duty": "*State active duty for a period of 14 days or more,* State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. § 1601 et seq.), and State active duty in response to a major disaster declared by the President under Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5170)."[8]

Section 7004 also added a new subsection (15) to section 4303 of USERRA,[9] as follows:

- The term "State active duty" means training or other duty, other than inactive duty, performed by a member of the National Guard of a State—(A) not under section 502 of title 32 or under title 10; (B) in the service of the Governor of a State; and (C) for which the member is not entitled to pay from the Federal Government.

[5] 38 U.S.C. § 4303(13).
[6] Public Law 116-315, 134 Stat. 5058.
[7] 38 U.S.C. § 4303(13).
[8] 38 U.S.C. § 4303(13) (emphasis supplied).
[9] Section 7004 of the amending legislation redesignated former 38 U.S.C. § 4303(15) (defining the term "undue hardship) as 38 U.S.C. § 4303(16). With this change the definition of "uniformed services" previously at 38 U.S.C. § 4303(16) is now located at 38 U.S.C. § 4303(17).

Previously, USERRA did not protect the civilian jobs of National Guard members on State active duty. Effective 1/5/2021, USERRA applies to State active duty if the continuous period of State active duty lasts for fourteen days or more or if the State active duty is for a national emergency or major disaster declared by the President.[10]

The state active duty that you performed prior to 1/5/2021 does not count toward exhausting your five-year limit with respect to your employer relationship with the Federal Government, but state active duty that you have performed or will perform after that date does count.

Several years ago, there was a similar problem when Congress amended Title 10 of the United States Code in 2011, adding two new sections providing for involuntary call-up of Reserve Component service members for domestic emergencies and for pre-planned international operations. Congress should have amended section 4312(c) of USERRA at the same time, but that did not happen. Congress fixed this oversight four years later, amending section 4312(c) by adding those two Title 10 sections.[11] We need a similar fix for involuntary state active duty.

In the meantime, I suggest that you bring this concern to the attention of the Adjutant General of your state and ask to be excused from any call-ups to state active duty in your final three years of ARNG service. You might also consider transferring to the Army Reserve, if that is feasible at this late date in your military career. If the problem cannot be resolved, you might consider expediting your ARNG retirement.

[10] If the period of State active duty is for 14 continuous days or more, the State active duty is protected by USERRA even if it is not for a national emergency or major disaster declared by the President. If the State active duty is for a national emergency or major disaster declared by the President, the State active duty is protected by USERRA even if the continuous period of State active duty lasts for fewer than 14 days.

[11] *See* Law Review 17122 (December 2017).

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).[12]

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

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

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[13] uniformed services, you are eligible for membership in ROA,[14] 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 https://www.roa.org/page/memberoptions 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 20002[15]

[13] Congress recently established the United States Space Force as the eighth uniformed service.
[14] Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.
[15] You can also contribute on-line at www.roa.org.