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The Period of *Service,* not the Period of *Absence,* Is Subject to the Five-Year Limit under USERRA.

By Captain Samuel F. Wright, JAGC, USN (Ret.)[1]

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
1.7—USERRA regulations

Q: I am a Major in the Army Reserve and a life member of the Reserve Officers Association (ROA). I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).[2]

In January 2008, I began a new job at a major multinational corporation—let's call it Daddy Warbucks International (DWI). On October 1, 2009 I began a period of almost (but not quite) five years of voluntary active duty. I was on active duty continuously for four years, 11 months, and 28 days—from October 1, 2009 to September 28, 2014.

In July of 2009, I informed my direct supervisor and the personnel office at DWI that I would be entering active duty on October 1 of that year. I provided them a copy of my Army orders as soon as I had a copy available. My original orders were for two years. In September 2011, I informed DWI by certified mail that my Army orders had been extended indefinitely.

My last day at work, before going on active duty, was September 14, 2009. I needed a couple of weeks to get my affairs in order before going on active duty. I informed DWI that I would be leaving on September 14, although my active duty report date was October 1.

After I was released from active duty on September 28, I returned home and then applied for reemployment on October 14, 2014. The personnel office told me that I am not entitled to reemployment, and that I will not be reemployed, because I was gone for five years and one month and that I have exceeded USERRA's five-year limit.

Is the personnel office correct? Does the five-year limit only include my *period of service* in the uniformed services? Or is it a limit on the duration of my *absence from the civilian job* necessitated by the period of service?

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[2] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1300 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. ROA initiated this column in 1997 and we add new articles each week.

A: The personnel office is wrong. It is only the *period of service* that counts toward your five-year limit. Even if the entire period of almost five years counts toward the five-year limit, you are within the limit, albeit just barely.[3]

As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) on October 13, 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).[4]

As is explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit with respect to the employer relationship for which the individual seeks reemployment—more on this below.
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. Must have made a timely application for reemployment after release from the period of service.

It seems clear beyond any doubt that you meet four of the five conditions. You left your job for the purpose of service and gave prior notice. Leaving the civilian job 16 days before the start of the period of service (September 14, with the start of service on October 1) is not a problem.

Section 4331 of USERRA[5] gives the Secretary of Labor (in consultation with the Secretary of Defense) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The United States Department of Labor (DOL) published draft USERRA Regulations in September 2004. After considering the comments received and making a few adjustments, DOL published final USERRA Regulations on December 2005.

The USERRA Regulations are codified in Part 1002 of Title 20 of the Code of Federal Regulations (20 C.F.R. Part 1002). Here is the pertinent subsection of the Regulation: "If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is necessitated by the uniformed service." 20 C.F.R. 1002.74(b).

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[3] I invite the reader's attention to Law Review 201 (August 2005) for a definitive discussion of what counts and what does not count toward the five-year limit under USERRA. There are nine exemptions—kinds of service that do not count toward an individual's limit. The inactive duty training (drills) and active duty for training (annual training) that you performed between January 2008 (when you began your DWI job) and October 2009 (when you went on active duty) clearly do not count toward your five-year limit. *See* 38 U.S.C. 4312(c)(3). For purposes of this article, I am assuming that your period of four years, 11 months, and 28 days of service (October 2009 to September 2014) is not exempt and counts toward your limit with respect to your employment relationship with DWI.

[4] There are 49 titles (broad subject areas) in the United States Code, the official compilation of federal statutes of continuing or permanent significance.

[5] 38 U.S.C. 4331.

For purposes of this article, I will assume that the DD-214 that you received on September 28, 2014 (upon your release from active duty) shows that you served honorably and that you did not receive a disqualifying bad discharge from the Army. Your October 14 application for reemployment was clearly timely.[6] The only remaining issue is the five-year limit. If the limit includes the entire *period of absence* of five years and one month, you do not have the right to reemployment. If only the *period of service* counts toward the limit, you are within the limit and you have the right to reemployment at DWI. I think that it is abundantly clear that the *period of service* rule applies and is controlling and that you have the right to reemployment.

Section 4312(c) of USERRA sets forth the five-year limit and its exemptions 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*[7], 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, 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;

(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."

38 U.S.C. 4312(c) (emphasis supplied).

The DOL USERRA Regulation provides as follows concerning the "period of service" question:

[6] After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[7] Any military service that you performed prior to January 2008 (when you began your DWI job) is irrelevant because it does not relate to your employer relationship with DWI.

§ 1002.100 **Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?**

No. The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

20 C.F.R. 1002.100 (bold question in original).

The Department of Defense (DOD) recently published, for notice and comment, proposed USERRA regulations. The DOD draft regulations conflate the period of service with the period of absence and misstate the application of the five-year rule under USERRA. Together with the National Employment Lawyers Association (NELA), ROA has filed comments with DOD pointing out this error and other errors in the draft DOD USERRA regulations. We also pointed out that, with one exception[8] not here relevant, USERRA goes not give DOD rulemaking authority.

Here are the joint NELA-ROA comments on the proposed DOD USERRA regulations:

September 24, 2014

Submitted via http://www.regulations.gov

Department of Defense
c/o Federal Docket Management System Office
4800 Mark Center Drive
East Tower, Suite 02G09
Alexandria, VA 22350–3100

RE: RIN No. 0790–AJ00
Department of Defense Proposed Regulations Under USERRA

[8] Section 4312(b) of USERRA provides that the person leaving a civilian job for uniformed service is exempted from the requirement to give prior notice to the employer if giving such notice is "precluded by military necessity" or "otherwise impossible or unreasonable." Section 4312(b) provides: "No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. *A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense* and shall not be subject to judicial review." 38 U.S.C. 4312(b) (emphasis supplied). The doctrine of *expressio unius est exclusio alterius* (to express one is to exclude all the others) clearly applies here. By giving the Secretary of Defense the authority to promulgate regulations on one very specific point (identifying the circumstances under which giving prior notice to one's employer is *precluded by military necessity,* USERRA clearly means that the Secretary of Defense otherwise has no rulemaking authority under USERRA. Section 4331(a) of USERRA gives the Secretary of Labor the authority to promulgate USERRA regulations "in consultation with the Secretary of Defense." The Secretary of Labor did consult with the Secretary of Defense before promulgating the USERRA Regulations in 2005. I call upon the Secretary of Defense to abandon these ill-considered DOL proposed USERRA regulations.

To Whom This May Concern:

The purpose of this letter is to provide the Department of Defense (DoD) with the National Employment Lawyers Association's (NELA) and the Reserve Officers Association's (ROA) comments regarding DoD's proposed regulations concerning the Uniformed Services Employment and Reemployment Rights Act (USERRA).

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace, including claims arising under USERRA. NELA and its 69 circuit, state and local affiliates have a membership of over 4,000 attorneys who are dedicated to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States.

The Reserve Officers Association (ROA) was founded in 1922 by a group of Army Reserve officers who had served on active duty during World War I, at the request of their commander, General John J. Pershing. Captain Harry S. Truman was one of the founding members. As President, in 1950, he signed ROA's congressional charter. In accordance with that charter, ROA advocates the development and execution of laws and policies that will provide for adequate national defense. One of the most important of those laws is USERRA, 38 U.S.C. 4301-4335.

For more than 90 years, ROA has urged Congress to rely on the National Guard and Reserve (NG&R) as a cost-effective way to provide for the common defense. The vast majority of ROA's 52,000 members are active or retired NG&R officers. In 2013, ROA members amended the ROA Constitution and made non-commissioned officers (NCOs) eligible for ROA membership.

In 2009, ROA established the Service Members Law Center (SMLC), with Samuel F. Wright as the first Director. Each month, the SMLC receives and responds to between 500 and 1,000 inquiries about USERRA and other military-related laws, from service members, military family members, attorneys, employer congressional staffers, reporters, and others. Almost half of the inquiries are about USERRA.

Given its purpose, membership, and history, ROA, along with NELA, offers its unique perspective to the DoD in determining the appropriateness of the DoD USERRA regulations and in the drafting of such regulations.

I. NELA and ROA Recommend That The Authority Citation Cite Specific Sections Of USERRA Pertinent To The DoD's Role Under USERRA

Unlike the Department of Labor and the Office of Personnel Management, the DoD lacks broad substantive rulemaking authority under USERRA. *See* 38 U.S.C. § 4331. Because the DoD lacks such authority, the authority citation for the final rule should not cite, as does the proposed rule, the Act as codified at Chapter 43 of Title 38, United States Code. Instead, the authority citation should cite only provisions of USERRA pertinent to the DoD's role under the statute.

Provisions of USERRA assigning affirmative duties to the DoD are Sections 4312(b) and 4333. Section 4312(b) provides that determination of "military necessity" sufficient to excuse an employee from giving advance notice of uniformed service to his or her employer "shall be made pursuant to regulations

prescribed by the Secretary of Defense." Section 4333 directs the Secretary of Defense to take such actions as the Secretary deems appropriate to inform service members and employers of the rights, benefits, and obligations under USERRA.

Accordingly, NELA and ROA recommend that "38 U.S.C. §§ 4312(b) and 4333" replace "38 U.S.C. chapter 43" as the authority citation for the regulations.

II. NELA And ROA Recommend Deletion, Or In the Alternative, Clarification Of The Proposed Definition Of "Impossible or Unreasonable"

Because the DoD lacks authority to determine when giving of advance notice of uniformed service is excused as "impossible or unreasonable" under Section 4312(b) of USERRA, the DoD's proposed definition of the term should be omitted or, alternatively, redrafted as illustrative.

Section 4312(b) excuses providing an employer advance notice of military service "if the giving of such notice is precluded by military necessity or, under all relevant circumstances, the giving of such notice is otherwise impossible or unreasonable." While USERRA assigns the DoD rulemaking authority with respect to determination of "military necessity" as used in Section 4312(b), the Act grants the DoD no such authority regarding the term "impossible or unreasonable."

By giving the DoD rulemaking authority over the term "military necessity" as used in Section 4312(b) but not "impossible or unreasonable," USERRA reflects congressional intent to withhold such authority from the DoD as to the latter term. In such circumstances, the DoD should omit from the final rule the proposed definition of "impossible or unreasonable."

Alternatively, the pitfall of an authorized rule might be avoided by redrafting the proposed rule to state that the impossible or unreasonable circumstances described in the rule are illustrative and not intended as an exhaustive listing. Such flexibility is absent from the proposed rule. The proposed rule purports to provide a finite listing of impossible or unreasonable circumstances and omits the open-ended "under all the relevant circumstances" language of the statute.

III. NELA And ROA Recommend Omission Of The Term "Non-Career Service"

NELA and ROA respectfully object to use of the term "non-career service" in the proposed regulations. The term is unnecessary and only creates confusion.

Underscoring the unnecessariness of the term is its virtual absence from USERRA and its complete absence from regulations implementing the provisions of the statute. Only once does the term appear in USERRA; and it so appears not in any substantive provision of the Act but, rather, in a statement of purpose. There is no mention of the term in the comprehensive regulations implementing USERRA of the Department of Labor (20 C.F.R. Part 1002). Nor does the term appear in the USERRA regulations of the Office of Personnel Management (5 C.F.R. Part 353).

The sole reference to "noncareer service" in USERRA—in the statement of purpose at Section 4301(a)(1)—is nothing more than shorthand for service that does not exceed the Act's five-year service limit set forth at Section 4312(a)(2). As one court observed:

> The reference to "noncareer" military service in section 4301 is merely part of a statement of purpose. Section 4312(a) expressly governs whether a returning service member is

> "entitled to the reemployment rights and benefits and other employment benefits" of USERRA and contains no requirement that a service member be "noncareer" to be entitled to protection-at least not in those terms. *Id.* § 4312(a). Section 4312(a) achieves the stated purpose of section 4301 by imposing a time limitation: a service member's reemployment rights expire after five years of absence from employment due to uniformed service. *See id.* § 3412(a)(2), (c).

United States v. Nevada, 817 F. Supp. 2d 1230, 1239 (D. Nev. 2011).

Furthermore, USERRA expressly prohibits denying the Act's protection on the basis of the nature of a person's uniformed service, including voluntary service, so long as the person's service does not exceed the five-year limit and the person meets the Act's pre- and post-service notice requirements. 38 U.S.C. § 4312(h).

If the DoD chooses to retain and define the term "non-career service," the definition of the term should be no more than a reference to service within USERRA's five-year limit. The proposed definition of the term is inconsistent with this approach, as it makes no reference to the five-year service limitation.

IV. NELA And ROA Recommend That Section 104.6(a)(iii)(A) Reflect That Advance Notice Of Service May Be Provided By An Officer Of The Uniformed Service Concerned

Because USERRA's reemployment-eligibility requirement of advance notice to an employer of an employee's military service can be met when an appropriate officer of the uniformed service concerned provides the notice, Section104.6(a)(2)(iii)(A) should so state.

Section 4312(a)(1) of USERRA permits either the employee or an appropriate officer of the uniformed service concerned to provide advance notice of the employee's service to the employer. Proposed Section 104.6(a)(iii)(A) states, however, that "employees must provide" the notice, and omits that an appropriate officer of the uniformed service concerned may provide the notice.

Accordingly, Section 104.6(a)(2)(iii)(A) should conform to Section 4312(a)(1) by stating advance notice of service may be furnished to the employer either by the employee or an appropriate officer of the uniformed service concerned.

V. NELA And ROA Object To Any Suggestion That Employees Give Employers At Least 30 Days' Advance Notice Of Service

The suggestion in Section 104.6(a)(2)(iii)(A)(*3*) that employees provide advance notice of service to their employees "at least 30 days prior to departure for uniformed service when feasible" conflicts with USERRA. USERRA's advance-notice-of-service requirement specifies no particular amount of time in advance of service that notice must be given to an employer.

While the proposed suggestion that employees provide at least 30 days' advance notice is hortatory, NELA and ROA are concerned an employee's failure to provide such a margin of advance notice may result in prejudice to the employee. Employers might view the regulatory recommendation as a gauge to apply in evaluating service member-employees. For instance, an employee might receive a negative performance review and consequent loss of a raise for not meeting the DoD's recommended notice standard.

VI. NELA And ROA Recommend Correction Of Section 104.6(a)(2)(iii)(B)(*2*) To Clarify That Duration Of A Period Of Service, Rather Than Length Of A Service-Related Absence, Can Trigger An Obligation To Submit Documentation To An Employer

Because only a period of uniformed service of more than 30 days can trigger an obligation of for a returning employee to submit certain service-related documentation to his or her employer upon request, Section 104.6(a)(2)(iii)(B)(*2*) needs to be clarified to so reflect. Rather than measuring just the length of the period of service, the proposed rule erroneously measures the length of the entire "absence from civilian employment due to uniformed service."

Section 4312(f)(1) of USERRA sets forth the documentation requirement and makes the requirement applicable to persons whose period of service in the uniformed services was for more than 30 days. 38 U.S.C. § 4312(f)(1). The statute thus looks to the duration of the period of service, rather than the length of a person's entire absence from civilian employment due to such service. The Labor Department's USERRA regulations are consistent with the statutory requirement. *See* 20 C.F.R. § 1002.121.

VII. NELA and ROA Object To Imposing On Service Members Any Requirement That Exceeds USERRA Requirements

NELA and ROA object to imposing on service members obligations concerning civilian employment not authorized by USERRA. By obliging all returning service members to give their employers "verification of absence due to uniformed service," proposed Section 104.6(a)(2)(iii)(B)(*2*)(*i*), as the DoD has acknowledged, exceeds USERRA's requirements.

Section 4312(f)(1) of USERRA requires employees returning from service periods exceeding 30 days to furnish employers upon request documentation showing that their application for reemployment is timely; that they have not exceeded the five-year service limit; and that their separation or dismissal from service was not under disqualifying conditions.

Proposed Section 104.6(a)(2)(iii)(B)(*2*)(*i*) directly conflicts with Section 4312(f)(1). It is inconsistent with Section 4312(f)(1) because it would apply to service members returning from periods of service shorter than 31 days; it would apply in the absence of any employer request for documentation; and verification of absence due to uniformed service is not a category of documentation authorized by Section 4312(f)(1).

Because the proposal is inconsistent with USERRA, and because DoD in any event has no authority under USERRA to adopt regulations altering USERRA's requirements, the proposal should be discarded.

VIII. NELA And ROA Recommend Correction Of Section 104.6(a)(2)(iii)(C) To Clarify That The Length Of Service Periods Count Toward USERRA's Five-Year Cumulative Service Limit

Proposed Section 104.6(a)(2)(iii)(C) erroneously states that USERRA's five-year cumulative service limit is computed on the basis of "absences from each place of civilian employment, due to uniformed service." The five-year cumulative service limit is instead determined on the basis of the duration of non-exempt periods of service in a uniformed service performed during an employment relationship. 38 U.S.C. § 4312(c); 20 C.F.R. §§ 1002.100 to 1002.103.

Computation of the service limit does not include any portion of an employee's service-related absence other than "the time the employee actually spends performing service in the uniformed services." 20 C.F.R. § 1002.100. Nor is the service limit tied to any particular location of employment. Rather, the

service limit applies on a per-employment-relationship basis. 38 U.S.C. § 4312(c); 20 C.F.R. § 1002.101. Of course, too, periods of service exempted by Section 4312(c) of USERRA must be omitted from calculation of the service limit.

Accordingly, NELA and ROA recommend that the proposal be clarified to conform to USERRA's requirements for computation of the service limit.

IX. NELA And ROA Object To Requiring The Uniformed Services To Alter Service Members' Military Schedules At The Request Of Civilian Employers And In The Absence Of Service Members' Consent

NELA and ROA object to Section 104.6(b)(3) to the extent it requires that the military departments accede to civilian employers' unilaterally made requests to adjust Reservists' and National Guard members' "absences from civilian employment due to uniformed service."

USERRA is designed to encourage voluntary service in the Reserves and National Guard. *See* 38 U.S.C. § 4301(a). So long as an employee has not exceeded the five-year service limit, USERRA places no restriction on the timing, frequency, duration, or nature of the employee's service in the uniformed services. 38 U.S.C. § 4312(h). Nor does the Act grant a civilian employer any right to impose such a restriction. In fact, an employer acts unlawfully if it denies an employee permission to leave to perform military service. 20 C.F.R. § 1002.87.

Allowing the military departments to change service members' military schedules when unilaterally asked to do so by civilian employers may discourage the voluntarism that USERRA seeks to achieve. USERRA preserves the freedom of employees to volunteer to perform military service when they choose. Interference by employers in the scheduling of employees' military service would remove that freedom and potentially discourage employees from volunteering to perform military service.

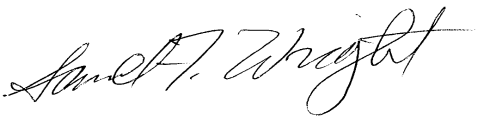
Such deleterious consequences could be avoided by requiring that a military department obtain a service member's consent prior to granting a request of the service member's civilian employer to change the service member's schedule.

X. Conclusion

For the above reasons, NELA and ROA request that the DoD give our comments careful and serious consideration and implement our recommendations in the final rules.

Respectfully submitted,





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