Reserve Organization of America

LAW REVIEW[1] 26084
November 2026
My Voluntary Active Duty under 10 U.S.C. § 12301(d) Qualifies Me for Differential Pay under 5 U.S.C. § 5538 and for TAMP Benefits under 10 U.S.C. § 1145(a)(2)(G). Does that Mean that my Voluntary Active Duty Is Exempt from USERRA's Five-Year Limit? NO!

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.3.1.2—Character and duration of service.

Q: I am a Lieutenant Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).[3] I have read with great interest many of your "Law Review" articles about the Uniformed

[1] I invite the reader's attention to Law Center | ROA. You will find more than 2,300 "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), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 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 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 SWright@roa.org.

[3] Yes, enlisted personnel as well as officers are eligible to join ROA. Yes, soldiers in the ARNG, just like soldiers in the Army Reserve (USAR), are eligible to join ROA.

Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve our country in uniform.

I have read with great interest your Law Review 26024 (June 2026) and your Law Review 26050 (August 2026), about the issue of Transition Assistance Management Program (TAMP) for 180 days of free Department of Defense (DOD) medical and dental coverage, under the TRICARE program, and I have also read your detailed discussion of this important matter on your organization's website.[4] I have also read your Law Review 26023 (June 2026), about the 2025 United States Supreme Court decision *Feliciano v. Department of Transportation,* 605 U.S. 38 (2025).

In 2010, I left active duty and affiliated with the Army Reserve. At the same time, I started a new federal civilian job, and I still work for the same federal agency. My federal civilian career has been interrupted many times by periods of military training and service. Some of those military periods have been involuntary (like mobilizations), but most have been voluntary. I have read with great interest your Law Review 16043 (May 2016) and your Law Review 26020 (May 2026), concerning USERRA's five-year limit on the cumulative duration of an individual's periods of uniformed service relating to an employer relationship with a specific employer. I have carefully tracked my usage of the five-year limit, and I have not exceeded it, although I am getting close.

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4 https://tamp.roa.org/?_gl=1*w24upi*_ga*MTA2OTQwNjQyNy4xNzg1MzIzMDA1*_ga_NC4G93RZWM*czE3ODc0NDA1MTEkbzE1JGcxJHQxNzg3NDQwNjgxJGo2MCRsMCRoMA..

You have written that voluntary active duty under section 12301(d) of title 10 counts toward the individual's five-year limit unless the "Secretary concerned" (the Service Secretary) has made the determination that the period is exempt, under section 4312(c)(4)(B), 4312(c)(4)(C), 4312(c)(4)(D), or 4312(c)(4)(F). Section 4312(c)(4)(B) refers to periods of active duty (other than for training) being exempted from the computation of the individual's five-year limit in the case of a "war or national emergency declared by the President or the Congress."

If I am called to active duty voluntarily *during* a war or national emergency declared by the President or Congress, I qualify for differential pay from the federal agency that employs me and I qualify for TAMP benefits for the first 180 days after I leave active duty. It seems to me that I should also qualify for an exemption from the five-year limit. If my voluntary active duty under section 12301(d) qualifies me for differential pay and for TAMP benefits, it should also qualify me for an exemption from the five-year limit. Do you agree?

Answer, bottom line up front,

No, I do not agree. The wording of the two provisions is different, so the result is different.

Explanation:

Under section 5538(a) of title 5 of the United States Code, a federal civilian employee who is a member of a Reserve Component of the armed forces and who leaves his or her civilian job for active-duty

service and thereby loses pay (because the military pay less is less than the person's regular federal civilian pay) is entitled to differential pay if he or she left the federal civilian job for active duty under section 12304b of title 10 **or a provision of law referred to in section 101(a)(13)(B) of title 10.**[5]

Section 101(a)(13)(B) of title 10 reads as follows:

> The term "contingency operation" means a military operation that—
> **(A)**
> … or
> **(B)**
> results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 3713 of title 14, **or any other provision of law during a war or *during* a national emergency declared by the President or Congress.**[6]

In *Feliciano v. Department of Transportation,* the Supreme Court was called upon the determine the meaning of the word "during" in section 101(a)(13)(B). Not surprisingly, the Supreme Court determined that "during" means "after the thing referred to has started and before it has ended." "During" does not mean "because of."

[5] 5 U.S.C. § 5538 (emphasis supplied).
[6] 10 U.S.C. § 101(A)(13)(B) (emphasis supplied).

Mr. Feliciano was entitled to receive differential pay under section 5538 of title 5 for the period when he was away from his civilian job at the Department of Transportation **during** a period of national emergency. Mr. Feliciano was not required to prove that his active duty was **caused by** the national emergency that was in effect at the time.

By contrast, the wording of the pertinent section of USERRA is very different. One of the eight statutory exemptions from the five-year limit is for an individual who was "ordered to or retained on active duty (other than for training) **because of** a war or national emergency declared by the President or Congress, **as determined by the Secretary concerned."**[7]

To qualify for the exemption from the five-year limit under section 4312(c)(4)(B), you must demonstrate that your period of active duty was **because of** the national emergency. It is not sufficient to show that your active duty was during the national emergency. Moreover, the Service Secretary must make this determination.

President Bill Clinton signed USERRA into law on 10/13/1994, as a long-overdue update and rewrite of the 1940 reemployment statute. In the 32 years since USERRA was enacted, Congress has amended this law several times. The first amendments to USERRA were made in 1996.[8]

The legislative history of the 1996 amendments explains the purpose and effect of the pertinent amendment as follows:

[7] 38 U.S.C. § 4312(c)(4)(B) (emphasis supplied). The term "Secretary concerned" refers to the Service Secretary, like the Secretary of the Army.
[8] Public Law 104-275, title III, . § 311(4), Oct. 9, 1996; 110 Stat. 3334.

> The Committee bill [Senate Committee on Veterans Affairs] would amend section 4312(c)(4)(B) to require that for the exemption from the "5-year rule" to apply, the person affected would have to have been ordered or retained on active duty due to—and not merely coincident with—the war or national emergency.[9]

In the 32 years since Congress enacted USERRA in 1994, I have received and responded to thousands of USERRA inquiries. By far the most common issue that I have addressed is the five-year limit and the exemptions from the limit—the kinds of service that do not count toward exhausting an individual's five-year limit with a specific employer.

Yes, section 4312(c) (the five-year limit) is the most complicated part of USERRA, but this is not rocket science. You need to read the text of section 4312(c), and you need to read our Law Review 26020 (May 2026). If you still have questions after reading our Law Review 26020, you may contact me by email at SWright@roa.org. I will answer your questions at no charge.

Q: Is it necessary that I be a member of the Reserve Organization of America to read your "Law Review" articles or to ask questions about USERRA and other laws that are especially pertinent to those of us who serve our country in uniform?

[9] Senate Report, September 24, 1996 (S. Rep. 104-371). This is a report of the Senate Committee on Veterans Affairs. The complete text of the Report can be found in Appendix E-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 860 of the 2025 edition of the *Manual.*

A: No. The ROA Law Review Library is available for free to everyone, not just ROA members. If you contact me by email, I will respond, even if you are not already a member of ROA, but I will ask you to join ROA if you are not already a member. If you join ROA, preferably as a life member, you will find me more cheerful about sharing my time and expertise with you.

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

Here is a link to the Maher Legal Services website:

https://www.lawyersdefendingwarriors.com/about.

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of America (ROA) has built and maintained since 1997, adding new articles every month.

ROA is the only national military organization dedicated exclusively to America's reserve components — all eight of them. From the 6,179 members of the Coast Guard Reserve to the 329,705 soldiers of the Army National Guard, ROA exists to serve the nearly 773,000 men and women who answer the call while maintaining civilian lives. No other organization does what we do for the people we serve.

Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman, who, as President, signed ROA's congressional charter in 1950. That charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.

Beyond this library of legal resources, ROA files amicus curiae ("friend of the court") briefs in the Supreme Court and federal courts, and actively educates service members, military spouses, attorneys, employers, legislators, and others about the legal rights of those who serve — and how to enforce them. We provide this information to all service members, regardless of membership. But it's ROA members — through their dues and contributions — who make it possible.

Your membership makes the mission possible.

If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just $20 for a full year, or $450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. ROA has also recently expanded eligibility to include ancestors and lineal descendants of past or present service members, so families can stand with those who serve. Join online at Reserve Organization of America - ROA or call 800-809-9448. If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

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