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Only the Actual Period of Uniformed Service, Not the Longer Period of Absence from the Civilian Job, Counts Toward the 5-Year Limit.

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Q: In 2019, I left my job as a cook at a small restaurant to enlist in the Army—the Regular Army, not the Army Reserve or Army National

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>.

Guard. I was on active duty for exactly five years, from 10/1/2019 until 9/30/2024. After I was released from active duty, I chose not to affiliate with the Reserve or National Guard, and I was assigned to the Individual Ready Reserve (IRR). While I am in the IRR, it is unlikely but possible that I will be recalled to active duty. In October 2027, when I complete my eight-year enlistment, I expect that the Army will send me my honorable discharge in the mail.

In early 2019, I got interested in military service and visited an Army recruiter here in my hometown. I never intended to make the Army my career, but I thought that it was my duty to serve one honorable tour of active duty, and I did that. When I enlisted in 2019, I was only vaguely aware of the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I thought that the law only applied to National Guard and Reserve service members, not Regular Army service members like me.

In late November 2024, I found one of your “Law Review” articles about USERRA while doing Internet research, and then I found a whole series of very informative articles. What a great free resource!

When I enlisted in 2019, I informed Mr. Jones, the owner-operator of the restaurant, and he congratulated me for signing up to serve our country. On 9/15/2019, he treated me to a free dinner at his restaurant, after my last shift at the restaurant. I needed a few days off to get my affairs in order before I reported to Army basic training on 10/1/2019.

Five years later, I was released from active duty on 9/30/2024. As planned, I married my long-term girlfriend on 10/2/2024 and used the rest of October for our honeymoon. Starting on 11/1/2024, I spent several weeks looking for a job and did not find anything suitable. I visited Mr. Jones at his restaurant. He welcomed me home but told

me that he already had four qualified cooks at his restaurant and did not need another one.

After reading several of your “Law Review” articles, I realized that USERRA applies to service in the Active Component as well as the Reserve Component of the armed forces and that I had the right to reemployment at the restaurant. On 12/1/2024, I made a formal, written application for reemployment at the restaurant.³ I used the sample application letter that you included in Law Review 77 (June 2003). Mr. Jones responded with a short letter, stating that the reemployment statute applies only to Reserve and Guard service, not to Regular Army service. What do you say about that?

A: As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue update of and replacement for the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. The federal reemployment statute has applied to active duty since 1940. It was amended in 1955 to make it apply also to active duty for training and inactive duty training, the kinds of duty typically performed by National Guard and Reserve service members. USERRA definitely applies to Active Component as well as Reserve Component service.⁴

Q: Mr. Jones said that I do not have reemployment rights because I did not mention the statute, USERRA, when I left the employ of the restaurant in 2019 and I did not say anything about returning to work for the restaurant after completing my Army service. What do you say about that?

A: All that you were required to say to the employer in 2019 was that you were leaving your job to perform uniformed service.⁵ You did that.

³ After a period of service of 181 days or more, the returning veteran has 90 days to apply for reemployment. See 38 U.S.C. § 4312(e)(1)(D). Your application on day 61 was timely.

⁴ See Law Review 23001 (January 2023).

⁵ 38 U.S.C. § 4312(a)(1).

You were not required to inform the employer that you intended to seek reemployment after completing your service.⁶ You were not required to ask for or obtain the employer's permission before leaving the job for uniformed service.⁷

Q: Mr. Jones said that he cannot reemploy me now because all of the positions in the restaurant are filled with industrious employees who are doing well. What do you say about that?

A: Because you meet the five USERRA conditions, Mr. Jones is required to reemploy you promptly in an appropriate position of employment *even if that means displacing or laying off another person*. The pertinent section in the DOL USERRA regulation is as follows:

Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. *The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.*⁸

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and

⁶ See 20 C.F.R. § 1002.88.

⁷ See 20 C.F.R. § 1002.87.

⁸ 20 C.F.R. § 1002.139(a) (emphasis supplied).

recent cases show that the right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit⁹ has held:

Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that “the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee’s absence, even if reemployment might require the termination of that replacement employee.”¹⁰

The United States Court of Appeals for the Federal Circuit¹¹ has held:

The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols’ [Nichols was the returning veteran and plaintiff] former position was “unavailable” because it was occupied by another and thus it was within the department’s discretion to place Nichols in an equivalent position. This is incorrect. Nichols’ former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ... Although occupied by Walsh, Nichols’

⁹ The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

¹⁰ *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013).

¹¹ The Federal Circuit is the specialized federal appellate court that sits in our nation’s capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.¹²

Q: Mr. Jones pointed out that five years, two months, and 16 days elapsed between my last shift at the restaurant (on 9/15/2019) and 12/1/2024, when I applied for reemployment. He said that I am over the five-year limit by two months and 16 days. What do you say about that?

Only the actual period of uniformed service, not the longer period of absence from the civilian job, counts toward the five-year limit. You are within the limit, albeit just barely.

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;

¹² *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite the reader's attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln-St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.*, 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 1011 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981); *Jennings v. Illinois Office of Education*, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Muscianese v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

- **(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.¹³

The Department of Labor (DOL) USERRA Regulation makes it very clear that only the *period of service* is subject to the five-year limit, as follows:

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.¹⁴

You have used every day of your five-year limit, but you have not exceeded the five-year limit. The 15 days between your departure from

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

¹⁴ 20 C.F.R. § 1002.100 (bold question in original, emphasis by italics supplied). *See also United States v. Nevada*, 817 F. Supp. 2d 1230, 1239 (D. Nev. 2011). In that case, the individual's period of absence from the civilian job exceeded five years, but the period of uniformed service was within the five-year limit, albeit just barely.

your civilian job and your entry on active duty by reporting to basic training and the 61 days between your departure from active duty and your application for reemployment do not count toward exhausting your five-year limit.

If you meet the other four USERRA conditions,¹⁵ you are entitled to reemployment.

Conclusion

You clearly meet the five USERRA conditions for reemployment, and the restaurant owner-operator has the clear legal duty to reemploy you as of 12/1/2024, when you applied for reemployment. If the employer persists in his refusal to comply, you can sue him, either through the United States Department of Labor and the Department of Justice or through private counsel that you retain. Good luck, and please keep me informed of developments in this case.

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

¹⁵ You must have left the civilian job to perform uniformed service, and you clearly did that. You were required to give the employer prior oral or written notice. You were not required to tell the employer about the law or to predict that you would be returning to the company after completing your military service. 20 C.F.R. § 1002.88. You must have served honorably and have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. § 4304. You must have made a timely application for reemployment, and you clearly did.

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).¹⁶

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, 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.

¹⁶ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight¹⁷ uniformed services, you are eligible for membership in ROA,¹⁸ 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 20002¹⁹

¹⁷ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁸ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

¹⁹ You can also contribute on-line at www.roa.org.