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The Assistant Secretary of the Air Force for Manpower & Reserve Affairs Has Exempted Certain Training Service from the Computation of an Individual’s Five-Year USERRA Limit. 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 Air National Guard and a life member of the Reserve Organization of America (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Recently, I saw a notice stating that: “On 21 May 2025, the Assistant Secretary of the Air Force for Manpower & Reserve Affairs signed a Memorandum for the Record (MFR) which exempts

¹ I invite the reader’s attention to www.roa.org/lawcenter. 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 Spouse 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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1,800 of the articles.

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 (VRRRA—the 1940 version of the federal reemployment statute) for 36 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 SWright@roa.org.

‘periods of service performed through in-residence Developmental Education (DE)’ from the 5-year cumulative limit.” What does this mean?

A: Any service member or veteran who meets the following conditions is entitled to reemployment under USERRA:

- a. Left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.³
- b. Gave the employer prior oral or written notice.⁴
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which the person seeks reemployment.⁵
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. After release from the period of service, has made a timely application for reemployment.⁷

If you meet these five conditions, you are entitled to prompt reinstatement in the job that you would have attained if you had remained continuously employed by the civilian employer, or another job (for which you are qualified) that is of like seniority, status, and pay.⁸ Upon reemployment, you are entitled to be treated as if you had

³ 38 U.S.C. § 4312(a).

⁴ 38 U.S.C. § 4312(a)(1).

⁵ 38 U.S.C. § 4312(c).

⁶ Disqualifying bad discharges include bad conduct discharges and dishonorable discharges (awarded by court martial for serious offenses) and other-than-honorable administrative discharges. 38 U.S.C. § 4304.

⁷ After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁸ 38 U.S.C. § 4313(a)(2)(A).

been continuously employed, for seniority and pension purposes in the civilian job.⁹

As I explain in detail in Law Review 16043 (May 2016) and many other articles, the five-year limit is cumulative with respect to the employer relationship for which you seek reemployment. When you start a new job with a new employer, you get a fresh five-year limit.

As I also explain in Law Review 16043, section 4312(c) of USERRA establishes eight exemptions from the five-year limit. That is, there are eight kinds of service that do not count toward exhausting your five-year limit with respect to a specific employer relationship. I have placed the entire text of section 4312(c) at the end of this article.

The pertinent exemption is set forth in section 4312(c)(3), as follows:

[Service] 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 [the Service Secretary, like the Secretary of the Air Force for you], to be necessary for professional development, or for completion of skill training or retraining [is exempt from the five-year limit].*¹⁰

The Secretary of the Air Force has delegated certain USERRA-related responsibilities to the Assistant Secretary of the Air Force for Manpower & Reserve Affairs, including the authority to make determinations that result in certain periods of uniformed service being

⁹ 38 U.S.C. § 4316(a), 4318.

¹⁰ 38 U.S.C. § 4312(c)(3) (emphasis supplied).

exempted from the five-year limit. As a result of the Memorandum for the Record (MFR) that you have quoted, periods of service performed through in-residence Developmental Education (DE) do not count toward exhausting an individual service member's five-year limit.

When you receive your orders for your next active duty period for developmental education, you should check to ensure that the orders include a statement to the effect that the period covered by the orders does not count toward exhausting your five-year limit with your current civilian employer. For example, the statement could be: "The service covered by these orders is for developmental education, and the Assistant Secretary of the Air Force (as delegated by the Secretary of the Air Force) has determined that service for developmental education is exempt from the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA), in accordance with section 4312(c)(3) of title 38 of the United States Code."

Q: I am already on active duty for developmental education, and my orders do not contain any such statement. What do I do now?

A: In that case, you need to request that a statement to that effect be included in the Department of Defense (DD)-214 that you receive at the end of the current active-duty period.

Q: My current orders for developmental education are only for nine months. Why does the USERRA five-year limit matter to me?

A: The five-year limit matters because the limit is cumulative, with respect to your current employer relationship. If you have already exhausted four years and three months of your five-year limit with

respect to your current employer relationship, this nine-month period will put you over the five-year limit with respect to your current employer relationship. Alternatively, if you are not close to the five-year limit now, but you plan to remain with the same employer and you are not near retirement from the Air National Guard, a future period of non-exempt service could put you over the limit. As I have explained in detail in Law Review 16043 (May 2016), you need to keep track of your “burn rate” of your five-year limit to maintain the option of returning to the same civilian employer after some future period of active duty.

Join the Organization That Fights for You

This article is one of more than 2,300 "Law Review" articles available at www.roa.org/lawcenter— a free legal resource that the Reserve Organization 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 roa.org/memberoptions 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Here is the entire text of section 4312(c) of USERRA (the five-year limit and its exemptions):

(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, 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 [the Service Secretary, like the Secretary of the Air Force for you], 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;

(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).

Please note that sections 4312(c)(4)(B), 4312(c)(4)(C), 4312(c)(4)(D), and 4312(c)(4)(F) also require a determination by the “Secretary concerned” (the Service Secretary) for a USERRA exemption to take effect.

Here is the entire text of the memorandum dated 5/21/2025, signed by the Acting Assistant Secretary of the Air Force for Manpower & Reserve Affairs, concerning the kinds of uniformed service that do not count toward exhausting an individual service member’s five-year limit with respect to a specific employer relationship:

DEPARTMENT OF THE AIR FORCE WASHINGTON DC OFFICE OF THE ASSISTANT SECRETARY MEMORANDUM FOR CHIEF OF STAFF OF THE AIR FORCE CHIEF OF SPACE OPERATIONS DIRECTOR, AIR NATIONAL GUARD CHIEF, AIR FORCE RESERVE FROM: SAF/MR 1660 Air Force Pentagon Washington, DC 20330-1660 May 21, 2025 SUBJECT: Civilian Reemployment Protections for Department of the Air Force Military Personnel References: (a) DoDI 1205.12 Civilian Employment and Reemployment Rights for Service Members, Former Service Members, and Applicants of the Uniformed Services, 15 Nov 2024 (b) SAF/MR Memorandum, Civilian Reemployment Protections for Department of the Air Force Military Personnel, 22 January 2022 This memorandum documents the current Department of the Air Force (DAF) policy regarding members' rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Title 38, United States Code (U.S.C.), Chapter 43, and supersedes Reference (b) USERRA provides protection to uniformed service members absent from civilian employment when specific conditions are met. Under the authority delegated by the Secretary of the Air Force, I determine the following periods of service exempt from the five-year limit: a. Periods of service

performed by a member ordered to or retained on active duty under 10 U.S.C. §12301(d) on or after 14 September 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency, declared by Presidential Proclamation 7463, dated 14 September 2001, and successive continuations. The basis for the order must be linked to the war or national emergency.¹

b. Periods of service performed by a member ordered to or retained on active duty under 10 U.S.C. §12301(d), for the purpose of providing direct or indirect support of missions and operations associated with Operation ATLANTIC RESOLVE, declared by Executive Order 14102, dated 13 July 2023.

c. Periods of service performed by a member ordered to or retained on full-time National Guard duty (other than for training) under section 502(f)(2)(A) of Title 32 or Air Force Reserve members under 10 U.S.C. §12301(d) for the purpose of providing direct or indirect support of ¹Linkage to the National Emergency may be shown by one or more various indicia, including citation to Presidential Proclamation 7463; or, to Executive Order 13223; or to a named operational mission associated with the National Emergency. In most cases, members ordered to duty under 10 U.S.C. §12301(d), but serving under 10 U.S.C. §12310 (AGR duty); 10 U.S.C. §10211, or 10 U.S.C. §12402 will not fit these criteria. missions and operations supporting a response to the crisis at the southern border of the United States declared by Proclamation 10886 of January 20, 2025, Declaring a National Emergency at the Southern Border of the United States.

d. Periods of service for aircrew, maintenance, and base operating support personnel ordered to or retained on active duty under 10 U.S.C. §12301(d) for the purpose of providing direct support to enduring Alert missions² tasked to the member's respective gaining MAJCOM, regardless of primary OPLAN. This exemption applies to support of critical missions other than missions and operations

associated with the National Emergency, declared by Presidential Proclamation 7463, dated 14 September 2001, and successive continuations. e. **Periods of service performed through in-residence Developmental Education (DE) and any mandatory follow-on assignments. This exemption is based on the authority of 38 U.S.C. §4312 (c)(3), which exempts the service of a member who performs duty necessary for professional development and certifies the approved DE in accordance with Reference (a).** f. Periods of service related to training required by the member's Air Force Specialty or Space Force Specialty Code. SAF/MR may approve additional individual exemption requests for periods of service when service members are ordered to active duty in support of a critical mission or critical requirement, as defined in DoDI 1205.12, section G.2. These individual exemptions will be used sparingly based on military necessity and must not be used: 1) as a means to avoid the USERRA's 5-year cumulative Service limit; 2) to routinely extend reemployment rights; or 3) to extend individuals in repeated active duty tours (to include "statutory" or Active Guard Reserve³ (AGR) tours). Individual exemptions will not be granted if the member has sufficient cumulative five-year service limit time remaining to complete the term of duty. Individuals may apply for an exemption by contacting their assigned Force Support Squadron (FSS) or Military Personnel Management Office (MPMO). Commanders must remain vigilant to potential hardships to employers when approving short notice military orders. I ask each commander to consider the impact on employers when determining whether training must be accomplished during peak work cycles within various industries and employment sectors. Also, please consider a member's career force development plan to balance judicious use of exemptions. Finally, I ask Department of the Air Force leaders at all levels to continue maintaining balance between mission, civilian employment, and family

to better sustain a healthy operational reserve. GWENDOLYN R. DEFILIPPI, SES, DAF Acting Assistant Secretary of the Air Force for Manpower and Reserve Affairs 2Defined as missions that posture for immediate response to any threat posed to the homeland and/or national security. 3Because there is no clear statutory authority nor federal case law to support the exemption of Title 32 AGR duty, requests for Title 32 AGR exemptions will not be considered.

Emphasis supplied.