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Section 4318 of USERRA:

You Must Keep Track of your own 5-Year Limit.

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

1.3.1.2—Character and duration of service.

This article is a republication of Law Review 16043 (May 2016), with some added material. We are republishing this article now because a decade has passed since we published it and because I receive more questions about the five-year limit than about any other aspect of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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 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 (VRRRA—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 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.

Q: Why does the five-year limit matter?

A: When you have been away from your civilian job (federal, state, local, or private sector) for a short, intermediate, or long period of uniformed service, you (or any returning service member or veteran) will have the right to reemployment in your pre-service job only if you meet the five USERRA conditions:

- a. You must have left the job to perform service in the uniformed services, as defined by USERRA.³
- b. You must have given the employer prior oral or written notice of your impending absence to perform service.⁴
- c. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years.⁵
- d. You served honorably, and you were released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. You made a timely application for reemployment with the pre-service employer after release from the period of service.⁷

You must meet all five of these conditions to have the right to reemployment. If you are beyond the five-year limit, even after the

³ 38 U.S.C. § 4312(a).

⁴ 38 U.S.C. § 4312(a)(1). No specific amount of advance notice is required, but of course the practical advice is to give the employer as much notice as possible. “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.” 38 U.S.C. § 4312(b)(1).

⁵ 38 U.S.C. § 4312(c). There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit with respect to that employer relationship. The purpose of this article is to explain in detail what counts and what does not count in exhausting your five-year limit.

⁶ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious crimes, and other-than-honorable administrative discharges.

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

exempt periods are excluded from the computation, you do not have the right to reemployment even if you meet the other four conditions.

Q: Who needs to be concerned about the five-year limit?

A: If you are a member of the National Guard or Reserve and your periods of uniformed service that necessitate absence from your civilian job are limited to inactive duty training (drills), annual training, and involuntary calls to active duty, you need not be overly concerned about the five-year limit because these uniformed service periods are exempt from the computation of the five-year limit.⁸ If you have volunteered for additional periods of service, or if you expect to volunteer, you need to keep track of how much of the five-year limit you have exhausted and how much “headroom” you have left.

Do not expect your civilian employer, the Reserve Component of which you are a member, the Department of War (DOW) organization called Employer Support of the Guard and Reserve (ESGR), or anyone else to track the burn rate of your five-year limit. If you want to retain the option of returning to your pre-service job after you are released from active duty, you need to track your own five-year limit. Carefully reading this article will give you all the information that you need. If you need further information, after reading this article, you may contact me by email at SWright@roa.org.

Section 4312(c) of USERRA sets forth the five-year limit and the exemptions from the limit. I have placed the entire text of section 4312(c) at the end of this article.

⁸ As is explained more fully below, **state active duty** performed by National Guard soldiers or airmen counts toward the five-year limit even if involuntary.

The five-year limit is computed “with respect to the employer relationship for which a person seeks reemployment.”⁹ Alexander Adams (AA), enlisted in the Army in 2015 and served on active duty for ten years, until 2025, when he left active duty and affiliated with the Army Reserve (USAR). Shortly after he left active duty, he applied for a job with the ABC Corporation and was hired. AA thus started a new employer relationship with ABC Corporation. His ten year period of active duty, from 2015 to 2025, is irrelevant for purposes of the five-year limit because that period of active duty was not “with respect to the employer relationship” that AA has with ABC Corporation. AA has the entire five-year limit with ABC Corporation available to use.

Zelda Zumwalt (ZZ) is a Lieutenant Colonel in the USAR. She worked for the ABC Corporation for 15 years, from 2010 to 2025. During that 15-year period, she exhausted four years of her five-year limit with respect to her employer relationship with ABC Corporation. In 2025, ZZ resigned her job at ABC Corporation and was hired by XYZ Corporation, an unrelated corporation. ZZ has a fresh five-year limit with XYZ Corporation.

It is the individual’s “cumulative period of uniformed service, with respect to the employer relationship for which a person seeks reemployment” that is subject to the five-year limit.¹⁰ The period of absence from the civilian job will almost always be at least a few days longer than the period of service. The part of the period of absence that was before or after the period of service does not count toward exhausting the five-year limit.

⁹ 38 U.S.C. § 4312(c).

¹⁰ Id.

For example, Brenda Barnes (BB) was away from her civilian job at XYZ Corporation for exactly three years of Active Guard and Reserve (AGR) duty, from 10/1/2022 until 9/30/2025, when she left active duty and sought reemployment at XYZ Corporation. Voluntary AGR duty does not fit within one of the nine exemptions to the five-year limit. Accordingly, BB has exhausted exactly three years of her five-year limit with XYZ.

BB left her XYZ job on 9/20/2022, to get her affairs in order and prepare to report for a long period of active duty. That ten-day absence from her job, before she began the AGR duty on 10/1/2022, does not count toward exhausting her five-year limit. After BB was released from active duty on 9/30/2025, she waited 60 days to apply for reemployment at XYZ.¹¹ That 60-day period does not count toward exhausting her five-year limit with XYZ.

The five-year limit “shall not include any service ... that is required, beyond five years, to complete an initial period of obligated service.”¹² Connie Cox (CC) enlisted in the Navy in 2019 and chose the nuclear power option. Because she chose the nuclear power option, which involves very long and expensive training, CC was required to remain on active duty for six years, from 10/1/2019 through 9/30/2025.

CC was employed by the City of Mudville from January 2017 until September 2019, when she left her job to report to basic training in the Navy. She gave prior notice to the City that she was leaving to report for military service. She served honorably and did not receive a

¹¹ Because her period of service lasted longer than 180 days, BB had 90 days, starting on the date of release, to apply for reemployment. See 38 U.S.C. § 4312(e)(1)(D).

¹² 38 U.S.C. § 4312(c)(1).

disqualifying bad discharge from the Navy. CC made a timely application for reemployment with the City of Mudville in October 2025, well within the 90-day deadline for doing so. CC is entitled to reemployment because she meets the five USERRA conditions. Her additional year of active duty, from 2024 to 2025, was required to complete her initial period of obligated service, and that year does not count toward exhausting her five-year limit.

USERRA's legislative history explains the rationale for this exemption from the five-year limit as follows:

In order, however, to ensure that the Armed Forces have an adequate supply of trained personnel, certain exceptions to the five years basic limitation would be established by the Committee [House Committee on Veterans Affairs] bill. Section 4312(c)(1) would provide that the cumulative period of service may exceed five years if the additional time is necessary to complete an initial active service requirement. Because of the very high training costs for some military specialties, such as the Navy's nuclear power program, the services sometimes impose initial active service obligations exceeding five years upon persons serving in those specialties. The intent of this section is to ensure that a person leaving active duty upon completion of his or her initial active service obligation should have reemployment rights even if his or her period of continuous active service exceeds five years.¹³

¹³ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part I). The entire text of this committee report is reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 722 of the *Manual*.

If the individual is unable, through no fault of his or her own, to obtain orders from the military releasing the individual from active duty before the expiration of the five-year limit, that additional period does not count toward the five-year limit and does not cause the individual to lose the right to reemployment.

USERRA's five-year limit does not include a period of service "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."¹⁴

Title 10 of the United States Code, which governs the armed forces, includes the following section:

(a) The senior officer present afloat in foreign waters shall send to the United States by Government or other transportation as soon as possible each enlisted member of the naval service who is serving on a naval vessel, whose term of enlistment has expired, and who desires to return to the United States. However, when the senior officer present afloat considers it essential to the public interest, he may retain such a member on active duty until the vessel returns to the United States.

(b) Each member retained under this section-

(1) shall be discharged not later than 30 days after his arrival in the United States; and

(2) except in time of war is entitled to an increase in basic pay of 25 percent.

¹⁴ 38 U.S.C. § 4312(c)(2).

(c) The substance of this section shall be included in the enlistment contract of each person enlisting in the naval service.¹⁵

For example, David Davis (DD) enlisted in the United States Navy in 2021 and reported to active duty for basic training on 3/15/2021. His enlistment contract required him to remain on active duty for five years, until 3/14/2026. In the early part of 2026, DD was on active duty and assigned to the USS Gerald Ford aircraft carrier, and that vessel participated in military operations against Iran in February-March 2026. In accordance with section 5540 of title 10, the “senior officer present afloat” retained DD on active duty for a few days past 3/14/2026, when he expected to be released from active duty and to return home.

DD was employed by the Texas Department of Public Safety (DPS) from March 2018 until March 2021, when he left his job to report for active duty. DD gave prior notice to DPS that he was leaving his job to perform uniformed service. On 4/1/2026, DD was released from active duty with a Department of Defense Form 214 (DD-214) showing that he served honorably from 3/15/2021 until 4/1/2026. DD applied for reemployment at DPS a few days later, well within the 90-day deadline for doing so. DD is entitled to reemployment because he was unable (through no fault of his own) to obtain orders releasing him from active duty by 3/14/2026 and because he met the other four USERRA conditions for reemployment.

Required Reserve Component (RC) training does not count toward the five-year limit.

¹⁵ 10 U.S.C. § 5540.

USERRA provides that the five-year limit does not include uniformed service “performed as required under 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.”¹⁶

Edward Edwards (EE) is a petty officer in the Coast Guard Reserve. On the civilian side, he is employed by the City of Mudville. As such, he is required by section 10147 of title 10 to perform inactive duty training (drills, which usually but not always are conducted on weekends) and annual training to gain and maintain the skills required for him to serve effectively on active duty if it should become necessary to recall him to active duty. These periods of inactive duty training and annual training do not count toward exhausting EE’s five-year limit with regard to his employer relationship with the City of Mudville.

Frank Fox (FF) is a Sergeant Major (E-9) in the Army National Guard (ARNG). On the civilian side, he is an employee of the City of Mudville. Under sections 502(a) and 503 of title 32 of the United States Code, FF is required to perform inactive duty training and annual training as a member of the ARNG. These periods do not count toward exhausting FF’s five-year limit with regard to the City of Mudville.

Geraldine Goff (GG) is a Major in the Air Force Reserve (USAFR), and she is an employee of the State of California. She has been selected to attend the residential (full-time) Air War College (AWC) course, which lasts almost one year. The AWC course has been determined to be

¹⁶ 38 U.S.C. § 4312(c)(3).

necessary of the “professional development” of USAFR Majors and is ordinarily a prerequisite to promotion to the rank of Lieutenant Colonel.

Section 4312(c)(3) refers to the “Secretary concerned” making a written determination that a period of training duty is “necessary for professional development or for skill training or retraining.” The “Secretary concerned” is the Service Secretary—the Secretary of the Air Force in this case. In the Department of the Air Force (which also includes the Space Force), the authority to make determinations that result in certain periods of uniformed service being exempted from the computation of the five-year limit, has been delegated to the Assistant Secretary of the Air Force for Manpower & Reserve Affairs. Similarly, in the Department of the Navy (which includes the Marine Corps), the authority to make these determinations has been delegated to the Assistant Secretary of the Navy for Manpower & Reserve Affairs, and in the Department of the Army this authority has been delegated to the Assistant Secretary of the Army for Manpower & Reserve Affairs.¹⁷

The Assistant Secretary of the Air Force has determined, in writing, that it is necessary for the professional development of USAFR Majors that they attend the AWC course. “Magic words” to that effect have been included in GG’s orders for the AWC residential course.¹⁸ Because the Assistant Secretary has determined in writing that this training is necessary for GG’s professional development, this period of service does not count toward exhausting GG’s five-year limit with respect to her employer relationship with the State of California.

¹⁷ See Law Review 16075 (August 2016).

¹⁸ If it is too late to include those “magic words” in GG’s orders, these words can be included in the DD-214 that she released from this period of service.

No “magic words” are necessary in the case of periods of annual training or inactive duty that a Reserve Component service member performs. Those periods are exempt without there needing to be “magic words” in the orders.

Periods of service exempted from the five-year limit by section 4312(c)(4) of USERRA.

Section 4312(c)(4) exempts from the computation of the five-year limit the following kinds of service:

[Any period of uniformed service] 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.¹⁹

Under section 4312(c)(4), when military reservists or retirees or National Guard members are called to active duty **involuntarily**, these involuntary active-duty periods do not count toward the individual's five-year limit. No "magic words" signed by the Service Secretary or Assistant Secretary are necessary to make an involuntary period of active duty exempt from the five-year limit, but "magic words" may be included in the orders to remind the civilian employer that the period of involuntary active duty is exempt.

If the individual service member volunteered to return to active duty, the period of service counts toward exhausting the individual's five-year limit **unless the Service Secretary or Assistant Secretary has made the required written determination**. Sections 4312(c)(4)(B), 4312(c)(4)(C), 4312(c)(4)(D), and 4312(c)(4)(F) require written determinations by the Service Secretary or Assistant Secretary.

¹⁹ 38 U.S.C. § 4312(c)(4).

State active duty performed by ARNG soldiers and ANG airmen.

Sergeant Major Frank Fox (FF) served on active duty for six years, from 1999 to 2005. After he left active duty, he affiliated with the Army National Guard (ARNG) of his home State, Illinois. FF found a civilian job working for the City of Mudville, and he still works for that employer. FF joined two overlapping but legally distinct organizations. He joined the Illinois Army National Guard, which is the modern-day equivalent of the Illinois State Militia. He also joined the Army National Guard of the United States (ARNGUS), which is the largest of our nation's seven Reserve Components.²⁰

In his ARNGUS (federal) status, FF is subject to involuntary call to active duty for national emergencies, or he can volunteer to go on federal active duty. Of course, USERRA protects his civilian job when he is on title 10 (federal) duty.

In his State status, FF performs inactive duty training (drills) and annual training, to gain and maintain the skills that he will need to serve effectively on federal active duty. FF performs inactive duty training and annual training under title 32 of the United States Code, and the Federal Government pays for this training and service. USERRA protects FF's civilian job when he is away from that job for title 32 training and service, as well as title 10 service.

In his State status, FF is subject to being called to State active duty by the Governor of Illinois. When he is performing State active duty, FF is

²⁰ The other six, in descending order of size, are the Army Reserve (USAR), the Air National Guard of the United States (ANGUS), the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

serving under State authority and reporting to his State chain of command, and he is paid with State funds.

Until 1/5/2021, USERRA did not apply to State active duty under any circumstances. On that date, the President signed the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.²¹ This law amended USERRA's definition of "service in the uniformed services."²² On and after 1/5/2021, USERRA protects the civilian jobs of Army National Guard soldiers and Air National Guard airmen in three circumstances:

- a. If the period of State active duty is for 14 days or more, or
- b. If the State active duty is for a national emergency declared by the President under the National Emergencies Act, or
- c. If the State active duty is for a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.²³

State active duty that FF performed before 1/5/2021 does not count toward exhausting FF's five-year limit with respect to his employer relationship with the City of Mudville. State active duty that he has performed on or after 1/5/2021 counts toward exhausting his five-year limit if the State active duty was for 14 days or more or if it was for a national emergency or major disaster declared by the President. Even if the State active duty is involuntary, it counts toward exhausting an individual's five-year limit under these circumstances.

²¹ Public Law 116-315, 134 Stat. 5058.

²² 38 U.S.C. § 4303(13).

²³ The State active duty only needs to meet one of these three criteria. If the period of State active duty lasts for 14 days or more, USERRA applies even if the State active duty was not for a national emergency or major disaster declared by the President.

During his long career in the Army National Guard and his civilian career with the City of Mudville, FF has exhausted four years, 11 months, and 15 days of his five-year limit with the City of Mudville on non-exempt periods of uniformed service that he performed between 2005 and 2026. The Adjutant General of Illinois and his State Judge Advocate and personnel chief need to keep this issue in mind. We certainly do not want FF to lose his civilian job because he was involuntarily called to active duty.

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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.

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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:

(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, 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 10 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).