

# LAW REVIEW 15018<sup>1</sup>

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## Computing the Five-Year Limit under USERRA

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1.3.1.1—Left job for service and gave prior notice

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**Q: I am a Commander (O-5) in the Coast Guard Reserve and a life member of the Reserve Officers Association (ROA). For many years, I have read and utilized your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I am struggling with USERRA’s five-year limit. Why is it so complicated?**

**A:** USERRA’s five-year limit is complicated, but only if you are trying to push the envelope. Traditional Reserve Component (RC) duty periods, like drill weekends and annual training tours, are exempt from the five-year limit. If you are called to active duty *involuntarily*, under title 10 or title 14 of the United States Code, any such involuntary service period does not count toward exhausting your five-year limit.

Let us assume that you began your civilian career at Daddy Warbucks International (DWI) in September 1999. In that case, we must look back to September 1999 in determining how much of your five-year limit you have used and how much “head room” you have remaining. The five-year limit includes military duty periods that you have performed “with respect to the employer relationship for which a person seeks reemployment.”<sup>3</sup> Here is the entire text of section 4312(c):

(c) Subsection (a) 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

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<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,300 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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<sup>3</sup> 38 U.S.C. 4312(c). The citation means that you can find this language in subsection (c) of section 4312 of title 38 of the United States Code (U.S.C.). The Code has 52 titles (broad subject areas), and sections are numbered consecutively within each title. USERRA is codified at 38 U.S.C. 4301-4335.

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, 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).

**Q: I have been selected to attend the Naval War College (NWC). The course lasts for one full year. Will that year count toward my five-year limit under USERRA?**

**A:** Under section 4312(c)(3), routine RC training periods (like inactive duty training and annual training periods) are exempted from the five-year limit. Longer training tours are exempted if the “Secretary concerned”<sup>4</sup> has “determined and certified in writing” that the training duty is “necessary for professional development, or for skill training or retraining.” Your Coast Guard orders will no doubt include the “magic words” stating that the DHS Secretary has determined that your attending the NWC is necessary for your professional development. With those magic

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<sup>4</sup> The Secretary of the Department of Homeland Security (DHS) is the secretary concerned with respect to the Coast Guard. The DHS Secretary has delegated the authority to make these determinations to the Commandant of the Coast Guard.

words, your one year of NWC duty will be exempt from the computation of your five-year limit with respect to DWI.<sup>5</sup>

**Q: My NWC class starts on August 15. I plan to leave my civilian job on July 31, in order to get my affairs in order and then drive to Newport, Rhode Island for the course. Will the time between July 31 and August 15 count toward exhausting my five-year limit at DWI?**

**After my NWC class ends on August 14, 2016, I plan to wait 89 days before applying for reemployment at DWI. Will that 89-day period count toward exhausting my five-year limit?**

**A:** The answer is no to both questions.

Under USERRA, you are not required to work at the civilian job until the day before your military service period begins. You are entitled to take a few days or even a few weeks off (without pay) before the start of your military service period, in order to get your affairs in order and travel to the place of military duty. The interim period between July 31 (when you leave the civilian job) and August 15 (when you start your active duty period) does not count toward your five-year limit, without regard to whether the actual military duty period counts or does not count.

After a period of service on 181 days or more, you have 90 days to apply for reemployment.<sup>6</sup> If you wait 89 days (or some lesser period of time) after you are released from the period of service, before you apply for reemployment at the civilian job, your five-year clock is not running during that period.

**Q: Let us say that I am released from duty on August 14, 2016 and then wait 89 days to apply for reemployment at DWI. During that 89-day period, I perform 60 days of voluntary Active Duty for Operational Support (ADOS), duty that is not otherwise exempted from my five-year limit at DWI. I think that this 60-day period should not count toward my five-year limit at DWI, because I will be performing it during the 90-day period that I have to apply for reemployment. Do you agree with my analysis?**

**A:** No. The five-year clock and the 90-day clock should not be confused. In this scenario, your 60-day ADOS period (August to October of 2016) will count toward your five-year limit at DWI.

**Q: I did a year of voluntary active duty, from July 1, 2011 to June 30, 2012. I had 30 days of vacation stored up at DWI when I went on active duty, and I used that vacation for the month of July 2011. For that month, I received my DWI salary as well as my military salary. I figure that during the month of July 2011 I was still "at my job" at DWI because I was using up my**

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<sup>5</sup> You should ensure that these words really are in the orders. If they are not, ask the personnel office to include them, before you start the NWC training.

<sup>6</sup> 38 U.S.C. 4312(e)(1)(D).

**vacation. I figure that the month of July does not count toward my five-year limit. Do you agree with my analysis?**

**A:** No. Under section 4316(d) of USERRA<sup>7</sup> you had the right to use your vacation this way, in order to receive double pay (civilian pay plus military pay) for the month of July 2011. But using up your vacation in this way has no effect on the running of the five-year clock. Your five-year clock started running on July 1, 2011.

**Q: During that year of active duty (July 1, 2011 to June 30, 2012), I earned 30 days of leave from the Coast Guard. I took the 30 days of leave during the month of June 2012. I was home on “terminal leave” for the entire month of June. Was my five-year clock running during that month?**

**A:** Yes. If the period of service is not exempt under section 4312(c), your five-year clock continues running for the entire active duty period, including leave (and terminal leave) from military service. Even if you had returned to your civilian job on June 1, 2012, your five-year clock continued running until you left active duty on June 30.

**Q: I did another year of voluntary active duty (not exempt from USERRA’s five-year limit) from July 1, 2005 to June 30, 2006. During that active duty period, I remained at my Coast Guard duty station until the close of business on June 30 and then sold back 30 days of leave to the Coast Guard. Was my USERRA five-year clock running during that 30-day sell-back period?**

**A:** No. The sell-back period does not amount to “service in the uniformed services” as defined by USERRA. Your five-year clock was not running during that period.

**Q: What advice do you give to reservists in my situation?**

**A:** If you are going to push the envelope of the five-year limit, you need to know exactly what counts toward the five-year limit and what does not count. I invite your attention to Law Review 201 (August 2005) for a definitive discussion of what counts and what does not count toward exhausting your limit.

You need to keep track of your own five-year limit. Do not expect the Coast Guard, or the DWI personnel office, or Employer Support of the Guard and Reserve (ESGR), or the Department of Labor (DOL), or anyone else to keep track of this for you. If you are uncertain as to whether a particular period of service that you have performed, or that you are planning to perform, has counted or will count toward exhausting your five-year limit, read Law Review 201 very

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<sup>7</sup> “Any person whose employment with an employer is interrupted by a period of serve in the uniformed services shall be permitted, upon the request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.” 38 U.S.C. 4316(d).

carefully and then get in touch with me. I am here at my post at ROA during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. The evening availability is so that RC personnel will be able to call me or e-mail me from the privacy of their own homes, not from their civilian jobs.