

LAW REVIEW 1115

No Age Limit on USERRA Protection

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1.1.1.8—USERRA Coverage of Federal Government

1.3.1.2—Character and Duration of Service

1.3.2.3—Pension Credit for Service Time

Q: I graduated college, was certified as a Registered Nurse (RN), and was commissioned an Army Second Lieutenant in 1959.^[1] I remained on active duty for eight years, including a year in Vietnam, and I left active duty in 1967. I affiliated with the Army Reserve and remained active until I retired as a Lieutenant Colonel in 1987.

In 1983, I began my federal civil service career as a nurse for the Veterans Administration (VA), which in 1989 became the Department of Veterans Affairs. When I began my civil service career, I purchased federal civilian retirement credit for my eight years of active duty, from 1959 to 1967. The amount that I paid was based on a percentage of my Army earnings during 1959-67. I have always been a participant in the Civil Service Retirement System (CSRS), rather than the newer Federal Employee Retirement System (FERS).

In 2009, the Army put out the word that it was seeking nurses to come on active duty to treat the wounded warriors of Iraq and Afghanistan, and I volunteered. Although I was 71 years old at the time, I passed the Army physical and was selected to participate. I served on active duty at the Walter Reed Army Medical Center for exactly one year, from Sept. 1, 2009 to August 31, 2010. During that year, my salary as a Lieutenant Colonel was substantially less than my regular civilian salary as a very senior VA nurse.

I returned to work at the VA in Sept. 2010 with no problem, and now I am applying to retire from the federal civil service. Under CSRS, my monthly retirement benefit is computed based on a formula that includes the average compensation that I received during my high three years of federal compensation. The high three years are usually but not always the last three years before retirement. My last three years of federal civilian employment will be 2011, 2010, and 2009. Because of my year of active duty, I missed the last four months of 2009 and the first eight months of 2010.

How will my high three years of federal compensation be computed for purposes of the determination of my monthly retirement check? Will it be based on what I *would have earned* in federal civil service pay if I had been employed in my civilian job for all of 2009 and all of 2010? Or will it be determined based on my civil service salary plus my Army salary for those two years? Or do I need to look to 2008 and 2007 for my high three years of federal civilian compensation? The VA personnel office seems to be hopelessly confused in trying to answer this question.

A: If you met the eligibility criteria for reemployment in late 2010, after you were released from the year of active duty, you are entitled to be treated *as if you had been continuously employed* in the civilian job during the year that you were away from work for uniformed service. Thus, in computing your high three years of federal civil service compensation, you are entitled to credit for the civilian compensation that you would have received in 2009 and 2010 if you had worked for the VA all of those years.

As I explained in Law Review 0766^[2] and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that you did this in August 2009.

b. Must have given the employer prior oral or written notice. I shall assume that you gave the VA notice in July or August 2009.

c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. As is explained below, you are well within the five-year limit.

d. Must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. It is clear that you did so.

e. Must have made a timely application for reemployment, after release from the period of service. After a period of more than 180 days of service, the returning veteran has 90 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). It is clear that you applied for reemployment and returned to work well within this 90-day deadline.

"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—[There are eight statutory exemptions from the five-year limit.]." 38 U.S.C. 4312(c) (emphasis supplied).

Your 1959-67 active duty does not count toward your five-year limit because you performed that active duty prior to the beginning of your federal civil service career in 1983. Purchasing federal civilian retirement credit for the 1959-67 active duty does not make that time count toward your five-year limit with respect to the Federal Government as your civilian employer.

Your 2009-10 active duty was voluntary and counts toward your five-year limit. The Army Reserve training duty that you performed between 1983 (when you went to work for the VA) and 1987 (when you retired from the Army Reserve) is exempt from the computation of the five-year limit. Even if you did some voluntary active duty during that period (that counts toward your limit), you are still well within the five-year limit with respect to your employer relationship with the Federal Government.

Because you met the USERRA eligibility criteria when you returned to work for the VA in Sept. 2010, you have rights under section 4318 of USERRA, 38 U.S.C. 4318.

"A person reemployed under this chapter [USERRA] shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services." 38 U.S.C. 4318(a)(2)(A).

"Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer for the purpose of determining the nonforfeiture [vesting] of the person's accrued benefits and for the purpose of accrual of benefits under the plan." 38 U.S.C. 4318(a)(2)(B).

"For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—(A) *at the rate the employee would have received but for the period of service* described in subsection (a)(2)(B)." 38 U.S.C. 4318(b)(3) (emphasis supplied).

The language of section 4318 could not be any clearer. You are entitled to imputed compensation for your entire 2009 and 2010 salary (for the entire year in each case) in computing your high three years of federal civilian compensation.

Q: While I am working, I make a substantial payment to CSRS each pay period. While I was away from my civilian job for military service, from Sept. 2009 to Aug. 2010, I did not make these payments. Am I required to make up these missed employee payments to CSRS after I returned to my civilian job?

A: Yes, under section 4318(b)(2), which provides: "A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years." 38 U.S.C. 4318(b)(2).

Since you were reemployed in Sept. 2010, you have until Sept. 2013 (three times the period of service) to make up the missed employee contributions to CSRS. If you want to retire in 2011, you will need to expedite the repayment process.

Under Office of Personnel Management (OPM) policy, a person in your situation is offered the opportunity to make up the payments under an alternative computation method, based on the person's earnings from the military during the period of service. In your situation, the alternative computation method is more advantageous to you, because your salary as a very senior VA nurse greatly exceeds your salary as a Lieutenant Colonel on active duty, and you made the make-up payments under the alternative computation method. Nonetheless, you are entitled to computation of your "high three" based on what you *would have earned* from the VA if your VA employment had not been interrupted by the 2009-10 active duty.

[1] The facts in this article are hypothetical. These facts do not all pertain to a single individual.

[2] I invite your attention to www.roa.org/law_review. You will find more than 800 articles about USERRA, the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are particularly pertinent to those who serve our nation in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.