

Law Review 1150

LAW REVIEW 1150

TSP and USERRA

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1.1.1.8—USERRA Applicable to Federal Government

1.3.2.3—Pension Credit for Service Time

Q: I am a Major in the Army Reserve and a life member of ROA. I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I have been on active duty since October 2007, and I expect to leave active duty on 30 September 2011. In October, I will resume my civilian Department of the Navy job, and I am concerned about my civilian pension entitlements. I began my career as a federal civil servant in 2000, after having served on active duty for ten years (1990-2000). In my civilian job, I am covered by the Federal Employee Retirement System (FERS), the newer of the two federal employee retirement systems. I began my federal career too late to be included in the Civil Service Retirement System (CSRS).

The principal part of my retirement plan is the Thrift Savings Plan (TSP). I have a TSP account. While working, I make contributions and the employer matches them. The money is invested, and it usually appreciates, but with the stock market crash there have been times when it has depreciated.

When I went on active duty in October 2007, I used up my paid military leave under section 6323 of title 5, and then I used up my accrued annual leave. When my leave was exhausted in December 2007, I went on “Leave Without Pay-Uniformed Service” (LWOP-US) status. I have made no TSP contributions since December 2007. When I return to work in October, I want to make up the missed TSP contributions and get the employer matches.

In anticipation of my expected return to my civilian job in October, I contacted the civilian personnel office at the Navy base where I work. I told the personnel officer that I want to return to work in early October and that I want to make make-up contributions to the Thrift Savings Plan (TSP) for the four years that I have been away. I told her that I am entitled to do this under USERRA, and she seemed not to know anything about USERRA. Help!

A: I am not surprised that the civilian personnel officer seemed clueless about USERRA. I have found that most civilian personnel officials (federal, state, local, and private sector) are clueless about military matters, and this is true even within the Department of Defense (DOD). In 2008, Congress amended USERRA by adding a new final section, section 4335. That section requires the head of each federal agency to provide to the agency’s human resources personnel training about USERRA, but most agencies have ignored this clear statutory requirement.

It is important that you understand your legal rights, not rely on another employee of your employer to explain them to you. Please note that the Supreme Court has held that the equitable doctrine of *estoppel* does not apply to the Federal Government, and you cannot rely on what federal employees tell you about the laws they are supposed to administer and enforce. *See Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

I discuss *Richmond* in some detail in Law Review 1104. You can find more than 750 articles at www.roa.org/law_review, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

Let us start with the eligibility criteria for reemployment under USERRA. You must meet *all five* of these conditions to have the right to reemployment:

1. You 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 so in October 2007.
2. You must have given the employer prior oral or written notice. For purposes of this article, I will assume that you gave such notice.
3. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service--more on this below.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. You will meet this condition on 30 September, unless you do something incredibly stupid in the next 60 days.
5. You must have made a timely application for reemployment, after release from the period of service—more on this below.

I invite your attention to Law Review 0766 for a detailed discussion of the eligibility criteria for reemployment and the entitlements of the person who meets those criteria.

The five-year limit is cumulative with respect to the employer relationship for which you seek reemployment. Thus, your 1990-2000 active duty period is irrelevant for USERRA purposes, because it was before you began your career as a federal civil servant.

If you performed any uniformed service between 2000 (when you started your federal career) and October 2007 (when you went on active duty), that period will apply to your five-year limit, unless it fits within one of the eight statutory exemptions under section 4312(c) of USERRA. Your annual training and drill weekends, and any involuntary periods, do not count toward the limit. Please see Law Review 201 for a definitive summary of the five-year limit. For purposes of this article, I shall assume that all of your 2000-07 duty was exempt from the five-year limit, and thus your 2007-11 duty does not exceed the five-year limit.

After a period of more than 180 days of service, you have 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). Thus, if you leave active duty on 30 September you have until 28 December to apply for reemployment, but you need not wait. Let us assume that you leave active duty on 30 September, apply for reemployment on 1 October, and return to work on 15 October, and that you meet the five eligibility criteria. Thus, USERRA requires the employer to treat you, for seniority and pension purposes, *as if you had been continuously employed* in the civilian job during the time that you were away from work for service. *See* 38 U.S.C. 4316(a), 4318.

Section 4318 governs the pension entitlements of the returning veteran who is entitled to reemployment under USERRA, but section 4318 does not apply to the TSP. “In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter [USERRA] shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.” 38 U.S.C. 4318(a)(1)(B).

Section 8432b of title 5 provides as follows:

- (a) This section applies to any employee who—
 - (1) separates or enters leave-without-pay status in order to perform military service; and
 - (2) is subsequently restored to or reemployed in a position which is subject to this chapter, pursuant to chapter [43](#) of title [38](#).
- (b)

(1) Each employee to whom this section applies may contribute to the Thrift Savings Fund, in accordance with this subsection, an amount not to exceed the amount described in paragraph (2).

(2) The maximum amount which an employee may contribute under this subsection is equal to—

(A) the contributions under section [8432 \(a\)](#) which would have been made, over the period beginning on date of separation or commencement of leave-without-pay status (as applicable) and ending on the day before the date of restoration or reemployment (as applicable); reduced by

(B) any contributions under section [8432 \(a\)](#) or [8440e](#) actually made by such employee over the period described in subparagraph (A).

(3) Contributions under this subsection—

(A) shall be made at the same time and in the same manner as would any contributions under section [8432 \(a\)](#);

(B) shall be made over the period of time specified by the employee under paragraph (4)(B); and

(C) shall be in addition to any contributions then actually being made under section [8432 \(a\)](#).

(4) The Executive Director shall prescribe the time, form, and manner in which an employee may specify—

(A) the total amount such employee wishes to contribute under this subsection with respect to any particular period referred to in paragraph (2)(B); and

(B) the period of time over which the employee wishes to make contributions under this subsection.

The employing agency may place a maximum limit on the period of time referred to in subparagraph (B), which cannot be shorter than two times the period referred to in paragraph (2)(B) and not longer than four times such period.

(c)

(1) If an employee makes contributions under subsection (b), the employing agency shall make contributions to the Thrift Savings Fund on such employee's behalf—

(A) in the same manner as would be required under section [8432 \(c\)\(2\)](#) if the employee contributions were being made under section [8432 \(a\)](#); and

(B) disregarding any contributions then actually being made under section [8432 \(a\)](#) and any agency contributions relating thereto.

(2) An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to—

(A) the total contributions to which that individual would have been entitled under section [8432 \(c\)\(2\)](#), based on the amounts contributed by such individual under section [8440e](#) (other than under subsection (d)(2) thereof) with respect to the period referred to in subsection (b)(2)(B), if those amounts had been contributed by such individual under section [8432 \(a\)](#); reduced by

(B) any contributions actually made on such employee's behalf under section [8432 \(c\)\(2\)](#) (including pursuant to an agreement under section [211 \(d\)](#) of title [37](#)) with respect to the period referred to in subsection (b)(2)(B).

(d) An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to—

(1) 1 percent of such employee's basic pay (as determined under subsection (e)) for the period referred to in subsection (b)(2)(B); reduced by

(2) any contributions actually made on such employee's behalf under section [8432 \(c\)\(1\)](#) with respect to the period referred to in subsection (b)(2)(B).

(e) For purposes of any computation under this section, an employee shall, with respect to the period referred to in subsection (b)(2)(B), be considered to have been paid at the rate which would have been payable over such period had such employee remained continuously employed in the position which such employee last held before separating or entering leave-without-pay status to perform military service.

(f)

(1) The employing agency may be required to pay lost earnings on contributions made pursuant to subsections (c) and (d). Such earnings, if required, shall be calculated retroactively to the date the contribution would have been made had the employee not separated or entered leave without pay status to perform military service.

(2) Procedures for calculating and crediting the earnings payable pursuant to paragraph (1) shall be prescribed by the Executive Director.

(g) Amounts paid under subsection (c), (d), or (f) shall be paid—

(1) by the agency to which the employee is restored or in which such employee is reemployed;

(2) from the same source as would be the case under section [8432 \(e\)](#) with respect to sums required under section [8432 \(c\)](#); and

(3) within the time prescribed by the Executive Director.

(h)

(1) For purposes of section [8432 \(g\)](#), in the case of an employee to whom this section applies—

(A) a separation from civilian service in order to perform the military service on which the employee's restoration or reemployment rights are based shall be disregarded; and

(B) such employee shall be credited with a period of civilian service equal to the period referred to in subsection (b)(2)(B).

(2)

(A) An employee to whom this section applies may elect, for purposes of section [8433 \(d\)](#), or paragraph (1) or (2) of section [8433 \(h\)](#), as the case may be, to have such employee's separation (described in subsection (a)(1)) treated as if it had never occurred.

(B) An election under this paragraph shall be made within such period of time after restoration or reemployment (as the case may be) and otherwise in such manner as the Executive Director prescribes.

(i) The Executive Director shall prescribe regulations to carry out this section.

5 U.S.C. 8432b.

The final subsection of section 8432b refers to regulations prescribed by the Executive Director of the TSP. Those regulations can be found in Subpart E of title 5 of the Code of Federal Regulations (C.F.R.). “Upon reemployment or return to pay status, an employee has 60 days to elect to make up missed contributions. An employee’s right to make retroactive TSP contributions will expire in an election is not made within 60 days of the participant’s reemployment or return to pay status.” 5 C.F.R. 1620.42(b).

When you return to work in October 2011, you will need to resume making ongoing TSP contributions, and you will also need to make make-up contributions, to cover the 2007-11 period when you were away from your civilian job for uniformed service. Both the ongoing contributions and the make-up contributions should be made from *pre-tax earnings*.

As soon as you are back at work in your civilian federal job, you should send a *certified letter* to your agency’s chief personnel officer, requesting reinstatement of your ongoing TSP contributions and also make-up contributions. Send essentially the same certified letter to:

Executive Director
Thrift Savings Plan
P.O. Box 385021
Birmingham, AL 35238

It is most important that you *document* that you have made this request within 60 days after returning to work in your civilian job. It will cost you about \$10 to send two certified letters. That is money well spent.