

## **AW REVIEW 1259**

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### **Meet the USERRA Eligibility Criteria in Order to Gain USERRA Pension Credit**

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**Q: I have read with interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I went to work for a county government in 1998. In the immediate aftermath of the terrorist attacks of September 11, 2001, I enlisted in the Army Reserve. I reported to boot camp and other Army training in January 2002. I completed the training and reported back to the county government in August 2002. I was involuntarily called to active duty in January 2003. At the end of the one year of involuntary service, I voluntarily remained on active duty, on successive voluntary extensions, until January 2012.**

**I informed the county government prior to my mobilization in January 2003, and I informed them of each extension of my active service. I served honorably and reaffiliated with the Army Reserve after I left active duty. I applied for reemployment with the county immediately after I left active duty. The county took me back, but as a “new hire” with no seniority and no pension credit for the three years that I worked for the county and the nine and a half years that I was on active duty, including the six months of training duty in 2002. I was 25 years old when I started work for the county in 1998. I think that it is unfair that I should have to start all over, at the age of 39, toward earning my civilian pension. To get a full pension, I need 30 years of county pension credit, and I don’t want to work until I am 69. Have my USERRA rights been violated?**

**A:** Probably not. Section 4318 of USERRA provides, in pertinent part, as follows:

Each period served by a person in the uniformed services shall, *upon reemployment under this chapter*, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability [vesting] of the person’s accrued benefits and for the purpose of determining the accrual of benefits under the plan.

38 U.S.C. 4318(a)(2)(B) (emphasis supplied).

You are not *reemployed under this chapter* unless you meet *all five* of the USERRA eligibility criteria.

As I explained in [Law Review 0766](#) and other articles,[\[1\]](#) you must meet five conditions to have the right to reemployment under USERRA:

1. Must have left a civilian job for the purpose of performing service in the uniformed services.
2. Must have given the employer prior oral or written notice.
3. Cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.
4. Must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. Must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

It seems clear that you met these conditions in January 2012, with the possible exception of the five-year limit. Your six months of military training in 2002 does not count toward your five-year limit with the county. See 38 U.S.C. 4312(c)(3). Your one year of involuntary service, from January 2003 to January 2004, is also exempt from the computation of your five-year limit. See 38 U.S.C. 4312(c)(4)(A). The problem is with the eight years of service between January 2004 and January 2012.

I invite your attention to [Law Review 201](#), for a definitive discussion of the five-year limit—what counts and what does not count. The short-hand is that *all* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit.

I suggest that you pull out all your orders for the period between January 2004 and January 2012. Some of the orders may contain the “magic words” to the effect that the Secretary of the Army has determined that the service under these orders is emergency service and is exempted from the five-year limit under USERRA. If you can show that at least three years of the eight-year period is exempt from the five-year limit, then you have not exceeded the limit. In that case, you would be entitled to civilian pension credit for your entire period of uniformed service, upon your reemployment in January 2012.

**Q: I checked all my orders, and none of the period between 2004 and 2012 appears to be exempt from the five-year limit, but it seems to me that this should not matter. The fact is that the county did take me back in January 2012, when I left active duty, so the county should be required to treat me as if I had been continuously employed during the entire time that I was away from work for service. What do you say about that?**

**A:** Section 4318 requires the employer and the pension plan to treat you as if you had been working in the civilian job during the time that you were away from work for service, but only *upon reemployment under this chapter*. You were not reemployed under USERRA, so the employer is not required to treat you as if you had been continuously employed. You were not entitled to reemployment in January 2012, and the employer did not *reemploy* you. Instead, the employer *rehired* you as a new rookie employee. If you don’t want to work for the county as a rookie, you can quit and seek employment elsewhere. If rehiring an individual who is not entitled to reemployment were construed to impose additional obligations on the employer, obligations that would not otherwise apply in these

circumstances, then the employer would have a powerful disincentive to offer a job to a person like you.

**Q: I understand that there is a five-year limit. That should mean that I get five years of civilian pension credit for the nine and a half years that I was away from work for military service, right?**

**A:** Wrong. You must meet the five USERRA eligibility criteria, including the five-year limit, to have the right to be treated as if you had been continuously employed for your civilian pension purposes. Because you are beyond the five-year limit, USERRA does not entitle you to *any* civilian pension credit for the time you were away from work for service.

**Q: I should at least get civilian pension credit for the three years that I worked for the county, before I was called to active duty in January 2003, right?**

**A:** Not under USERRA. Because you are beyond the five-year limit, USERRA simply does not require the county to do anything with respect to your civilian pension credit. A state law probably governs your right to a state pension based on employment by a political subdivision of the state (the county). It may be that the state law gives your pension credit for your county employment whether or not it is continuous, in which case your prior three years of county employment will count. This is a state law question, not a federal law question.

**Q: What is the relationship between USERRA and state laws?**

**A:** Under section 4302 of USERRA, this federal law is a *floor and not a ceiling*. Section 4302(a) provides that USERRA does not supersede or override a state law, a local ordinance, a collective bargaining agreement, an employer policy or practice, etc. that provides you *greater or additional rights*, beyond what USERRA requires. Section 4302(b) provides that USERRA overrides state laws, local ordinances, collective bargaining agreements, etc. to the extent that they purport to limit USERRA rights or to impose additional prerequisites on the exercise of USERRA rights.

In your case, you have no rights under USERRA, because you are beyond the five-year limit. Thus, any rights that you have under state law or under the collective bargaining agreement between the county and your union would be *greater or additional rights* and would not be preempted by USERRA.

In many states, it is possible for an employee of the state or a political subdivision of the state (like a county) to *purchase* state retirement credit for a period of military service, even service that is not covered by USERRA for whatever reason. You should explore your state law on this point. If you can purchase retirement credit for at least part of your active duty time, you won't have to wait until you are 69 to retire from the county with 30 years of county service credit.

**Q: I am still working for the county, albeit apparently as a new hire since I returned in January 2012. I am also still active in the Army Reserve. If I leave my county job for a new period of voluntary active duty, can I have the right to reemployment under USERRA?**

**A:** Yes. Section 4312(c) sets forth the five-year limit as follows:

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.

38 U.S.C. 4312(c) (emphasis supplied).

Because you were not entitled to reemployment in January 2012, and because the county treated you as a new hire, you started a *new employer relationship* with the county in January 2012, albeit a relationship with an employer with which you already had an employer relationship earlier in your lifetime. Thus, you have a *fresh five-year clock* in this new relationship.

For example, let us say that you go on voluntary active duty for four years, from January 2013 to January 2017. You must give the county prior oral or written notice, before you go on active duty next January. You must be released from the period of service without having received a punitive or other-than-honorable discharge, and you must make a timely application for reemployment with the county, after you leave active duty in January 2017. In this scenario, you meet the USERRA eligibility criteria, and you are entitled to reemployment in the employer relationship with the county that began in January 2012. A new period of service does not serve to resurrect rights in the 1998-2003 employment relationship with the county.

*USERRA is basically a simple law, but it can get quite complicated in the application. As the Director of the Service Members Law Center, I am here every business day, and sometimes on weekends, answering calls and e-mails about USERRA and other military-legal topics. On Thursdays, I am here until 10 pm Eastern Time. The point of the Thursday evening availability is to make it possible for Reserve Component members to call me from the privacy of their own homes, outside their civilian work hours.*

*If the employer is annoyed with Joe Smith because he has been called to the colors four times since 9/11/2001 and expects to be called again, and if the employer is looking for an excuse to fire Smith, the last thing that Smith should do is to give the employer the excuse that he or she is seeking. Thus, I strongly advise you not to use the employer's computer, e-mail system, telephone, or time to call me, or Employer Support of the Guard and Reserve (ESGR), or the Department of Labor (DOL), or your attorney to complain about your employer and to seek information about your rights with respect to your employer. When you use the employer's computer or telephone, you should expect that the employer is monitoring the e-mails and calls. You have no reasonable expectation of privacy when using the employer's equipment on the employer's time.*

*ESGR and DOL have not made arrangements for after-hours availability. Only ROA offers this service, through the Service Members Law Center. Last Thursday evening, I received six calls between 7 pm and 10 pm. If utilization continues to grow, we will add a second evening.*

*Through our Law Review Library, and through my availability by e-mail and telephone, we offer detailed information about USERRA and other laws—information that is not available anywhere else. In 2011, I received and responded to 5,405 inquiries (450 per month), and 63% of them were about USERRA. The pace has quickened further in 2012. In April I responded to 815 inquiries, a new record for one month.*

*I much prefer that you contact me before the fact rather than after the fact, when the situation is often irretrievable. For example, if you are beyond the five-year limit I cannot turn back the hands of time and bring you back under it, as in this article's example.*

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[1] Please see [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 760 articles about USERRA and other laws that are particularly 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. I initiated this column in 1997, and we add new articles each week.