

LAW REVIEW 15081¹

September 2015

You Must Leave Active Duty and Apply for Reemployment to Obtain Civilian Pension Credit for your Military Service Time

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

1.1.1.7—USERRA applies to state and local governments

1.3.1.2—Character and duration of service

1.3.2.3—Pension credit for military service

1.7—USERRA regulations

Q: I am a Sergeant Major (E-9) in the Army National Guard (ARNG). I recently joined the Reserve Officers Association (ROA) after I became aware that noncommissioned officers (NCOs)³ and National Guard members⁴ are eligible to join. I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,350 "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.

² Captain Wright is the author or co-author of more than 1,200 of the almost 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

³ In 2013, ROA members amended the ROA Constitution and made NCOs eligible for full membership. The President of ROA's Department of Florida is an E-9 in the Air Force Reserve.

⁴ National Guard officers have always been eligible for ROA membership, and since 2013 NCOs have been eligible as well. Our nation has seven Reserve Components: the ARNG, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. ROA represents the interests of members of all seven Reserve Components.

I am a local police officer, and I began my police career in January 1996. In our state, normal retirement for police officers is after 20 years of police service. Several of my police academy classmates in the class that ran from January through May of 1996 are still on the police force, and all but one of them will be retiring in January 2016, exactly 20 years after we all began our police department careers.

My police department career has been interrupted several times by periods of uniformed service, some of them voluntary and some involuntary. I have read and reread your Law Review 201, about the five-year cumulative limit under USERRA. I am currently on a three-year voluntary Active Guard/Reserve (AGR) tour, from February 2013 through February 2016. I believe that my current AGR tour counts toward the five-year limit. At the end of my current tour, about five months from now, I will have only ten days of "head room" in my five-year limit with respect to my employment with the police department.

The way I figure it, I am entitled to retire from the police department on January 15, 2016, exactly 20 years after I began my police department career. But I will be on active duty under my current orders for another month after that date. The Army has offered me the opportunity to sign up for a new three-year AGR tour starting the next day after my current orders expire.

Is it possible for me to apply for my police department retirement and start drawing my retired pay while I am still on active duty?

A: No, that is not possible under USERRA as written. Under section 4318 of USERRA, you are entitled to be treated, for pension purposes, as if you had been continuously employed in the civilian job during the time that you were away from work for service, but only *upon reemployment under USERRA*. Here is the text of section 4318:

§ 4318. Employee pension benefit plans

(a) (1) (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of *a person reemployed under this chapter* shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter 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.

(2) (A) *A person reemployed under this chapter* 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.

(B) 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 nonforfeitality of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b) (1) An employer *reemploying a person under this chapter* shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
(B) if the sponsor does not provide--
 (i) to the last employer employing the person before the period served by the person in the uniformed services, or
 (ii) if such last employer is no longer functional, to the plan.

(2) 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.

(3) 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), or
 (B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who *reemploys a person under this chapter* and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.⁵

As is shown by each of the italicized places above, the right to pension credit under USERRA only applies to a person who has been *reemployed under USERRA*. As I have explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. You gave the employer prior oral or written notice.
- c. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, does not exceed five years.⁶
- d. You served honorably and were released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, you have made a timely application for reemployment.⁷

You will not be eligible to retire from your police department career on January 15, 2016, because you will still be on active duty on that date. Your current active duty period (February 2013 through February 2016) does not count toward your continuous service with the police department, for pension purposes, unless and until you *leave active duty and then make a timely application for reemployment*.

Because you will be within ten days of exceeding your five-year limit when you complete your current active duty, it is essential that you leave active duty and promptly apply for reemployment. You will need to return to work for the police department, at least briefly, and then you can retire from the police department. After you have retired from the police department, you no longer need to concern yourself with the five-year limit. At that point, you

⁵ 38 U.S.C. 4318 (emphasis supplied).

⁶ Please see Law Review 201 for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

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. You must be *off active duty* to apply for reemployment. If you apply for reemployment while still on active duty, your application for reemployment shall be deemed to be in effect as of the day after you leave active duty. *See Martin v. Roosevelt Hospital*, 426 F.2d 155, 159 (2d Cir. 1970). The citation means that you can find this case in Volume 426 of *Federal Reporter Second Series*, and the case starts on page 155. The specific language cited can be found on page 159. This is a 1970 decision of the United States Court of Appeals for the Second Circuit, the federal appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont.

will be retired, and you will not be seeking reemployment at the police department at the end of any new active duty period.

Q: I have a good friend—let's call him Joe Smith. Joe began his police department career exactly two years before I began mine—he began in January 1994. Joe is a member of the Air Force Reserve and has done several active duty periods since the terrorist attacks of September 2001. In January 2014, when he had 20 years of police department service, he retired from the police department, although he was on active duty at the time. Since the city allowed Joe to retire while on active duty, does that not create a precedent meaning that I am entitled to retire from the police department when I reach the 20-year point although I am on active duty at the time?

A: No. Under section 4302 of USERRA, this federal law is a floor and not a ceiling on your rights. Your employer can always do more than the law requires. USERRA does not supersede or override a state law that gives you *greater or additional rights*. But the fact that your employer has done more than the law requires for other employees does not mean that the employer is precluded from discontinuing this extra-statutory generosity.⁸

In your state, like many states, pension programs for local police departments are administered by a state agency in the state capital, not by your municipality. It may be that the personnel office of your local police department is quite willing to allow you to retire from the police department while you are on active duty, but I think that it is likely that the state pension agency will create a problem about that.

In your state, like many states, public employee pension plans are woefully overpromised and underfunded. The state pension agency will likely be unwilling to make an accommodation for you that is not clearly required by federal law (USERRA). You may need to sue the state agency even to get them to do what USERRA clearly requires. It is important that you dot your is and cross your ts in dealing with matters of this kind.

Q: Our police department pension plan is a hybrid of a defined contribution plan and a defined benefit plan. The traditional defined benefit plan is funded entirely by the employer, the city. The defined contribution plan is funded by employee contributions that are matched by the employer.

During the time that I have been on active duty, since February 2013, I have tried to make the employee contributions to my defined contribution plan account and to get the employer matches, but the city and the state pension agency have refused to accept my contributions or to make any payments into my account. How does this work?

⁸ See *Crews v. City of Mount Vernon*, 567 F.3d 860 (7th Cir. 2009). The citation means that you can find the *Crews* case in Volume 567 of *Federal Reporter Third Series*, starting on page 860. This is a 2009 decision of the United States Court of Appeals for the Seventh Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. I discuss *Crews* in Law Review 1004.

A: With respect to the defined benefit plan portion of your pension, you must be deemed to be reinstated in the plan, and fully vested for retirement, as of the day that you report back to work under USERRA. At that point, you must be treated as if you had been continuously employed in the civilian job during the three years plus that you were away from your job for uniformed service.⁹

The situation involving the defined contribution plan portion of your pension is more complicated. The employer is not required to make contributions or to accept contributions from you *unless and until* you are off active duty, without having exceeded the five-year limit and without having received a disqualifying bad discharge and then have made a timely application for reemployment and have returned to work. During the time that you have been on active duty (since February 2013), the city did not know and you did not know for certain that you would meet the five USERRA conditions. You could have remained on active duty past the five-year limit. You could have received a disqualifying bad discharge from the Army. God forbid, you could have died.

Section 4331 of USERRA gives the United States Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA rules, for notice and comment, in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in December 2005. The final USERRA Regulations are published in 20 C.F.R. Part 1002.¹⁰ The DOL USERRA Regulations provide as follows concerning the required amount and timing of the employer's contributions to the pension plan account and the returning employee's make-up contributions:

§ 1002.262 When is the employer required to make the plan contribution that is attributable to the employee's period of uniformed service?

(a) *The employer is not required to make its contribution until the employee is reemployed.* For employer contributions to a plan in which the employee is not required or permitted to contribute, the employer must make the contribution attributable to the employee's period of service no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable.

⁹ The period that you were away from work for service includes the three-year period that you were on active duty plus the period (perhaps a few days) between when you left your civilian job and when you reported to active duty plus the period (up to 90 days) between when you were released from active duty and when you applied for reemployment plus the period (perhaps up to 14 days) between when you applied for reemployment and when you reported back to work. See 20 C.F.R. 1002.259.

¹⁰ This refers to Part 1002 of title 20 of the Code of Federal Regulations.

(b) If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years. *Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer.*

(c) If the employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution because the employer is required to make contributions that are contingent on or attributable to the employee's contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals the employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.¹¹

§ 1002.263 Does the employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.¹²

¹¹ 20 C.F.R. 1002.262 (bold question in original, emphasis by italics supplied).

¹² 20 C.F.R. 1002.263 (bold question in original).

Q: In Law Review 0741 (July 2007), you wrote: "If you want to make up the missed elective deferrals [employee contributions] and get the employer matches, you will need to remain employed at XYZ for the entire five-year period, or at least long enough to make up the missed elective deferrals. Your [make-up] contributions to the XYZ pension plan must be made from XYZ earnings."

This requirement presents a big problem for me. I am eligible to retire from the police force and start drawing my police department retired pay in January 2015. I should not have to wait another five years to draw my civilian retirement, just because I performed military service near the end of my civilian career. Moreover, I need to retire from the police department so that I can perform another three-year AGR tour, and add to my military retirement, without having to worry about my five-year limit with the police department.

Do you adhere to the statement that you made in Law Review 0741?

A: Upon further reflection, I want to amend what I wrote in Law Review 0741. We will add a correction note to that article.

You will need to make up the missed employee contributions to the police department pension plan *while* you are employed by the police department (before you retire), but I no longer believe that you must make up the missed employee contributions from police department earnings after you have returned to work.

In most cases, you will want to make the make-up contributions as well as the resumed ongoing contributions by payroll deduction, so that you can pay this money with *pre-tax earnings*. In your case, it is clear that the tax break is less important than the importance of making up the missed contributions *as soon as possible* after you return to work, so that you can start drawing your police department pension and so that you can move on with your life. Soon after returning to work, you will want to write a check to make up all the missed employee contributions, even if you have to borrow money to write that check.

Conclusion:

Those who serve in our nation's Reserve Components need detailed information about USERRA and other laws, so that they can make sensible decisions and protect their legal and financial rights. Unfortunately, it is no longer possible for ROA to provide this one-on-one service by telephone or e-mail, through a full-time Service Members Law Center. But it is important to note that we have more than 1,400 "Law Review" articles at www.servicemembers-lawcenter.org. We also have a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, 12 years before I began my ROA employment in 2009, and I am continuing to write new articles after I left ROA employment in June 2015.