

## **Purchasing Federal Civilian Retirement Credit for Active Military Service before You Began Your Federal Civilian Career**

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1.3.2.3—Pension credit for military service time

3.1—Federal employment

8.0—Veterans' preference

**Q: I am a retired Army Reserve Colonel and a life member of the Reserve Officers Association (ROA). I was born in 1956, and I graduated college in 1978. When I graduated, I was simultaneously commissioned a second lieutenant, through my service in the Army Reserve Officers Training Corps (ROTC). I served on active duty for exactly five years, from May 1978 until May 1983, when I was released from active duty and affiliated with the Army Reserve (USAR).**

**Through the remainder of the 1980s, my USAR participation was pretty much limited to the traditional USAR pattern of “one weekend per month and two weeks in the summer.” In 1990-91, I was recalled to active duty for almost a year, for Operation Desert Shield/Storm. In early 1991, I participated in the liberation of Kuwait and was awarded a medal. I continued**

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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 almost 1,400 “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.

<sup>2</sup> Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 “Law Review” articles available at [www.servicemembers-lawcenter.org](http://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 VRRRA 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.

my USAR participation and moved up the ranks to Colonel. I retired from the USAR in May 2008, when I reached my mandatory retirement date (30 years of commissioned service). I am currently a “gray area retiree” while awaiting my 60<sup>th</sup> birthday, which will arrive on May 9, 2016.

I began my federal civilian career in May 2005, when I was 49 years old. Because I started my federal civilian career late in life, I want to get as much credit as possible for the military service that I performed before I began my federal civilian career in 2005. I have been permitted to purchase federal civilian retirement credit for my five-year period of active duty (1978-83) and my 11-month period (1990-91), the periods for which I presented Army DD-214 forms as evidence. I also want to purchase credit for my USAR active duty for training (annual training) periods and my inactive duty training (drill weekend) periods that I performed between 1983 and 2005, but I have not been permitted to purchase credit for those periods.

I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does USERRA entitle me to purchase or otherwise obtain credit for the drill weekends and annual training tours that I performed between May 1983 and May 2005?

**A:** USERRA applies to periods of military service (including drill weekends and annual training periods) that *interrupt* the relevant civilian job. USERRA does not apply to periods of military service that you completed before you began your federal civilian job in May 2005. You have the right to purchase federal civilian retirement credit for periods of *active* military service before you began your federal civilian career under sections 8332(c), 8334(j), and 8331(13) of title 5 of the United States Code. For your convenience, I am attaching a copy of the entire text of those three subsections here:

(c) (1) Except as provided in paragraphs (2) and (4) of this subsection and subsection (d) of this section--

(A) the service of an individual who first becomes an employee or Member<sup>3</sup> before October 1, 1982, shall include credit for each period of military service performed before the date of the separation on which the entitlement to an annuity under this subchapter is based, subject to section 8332(j) of this title; and

(B) the service of an individual who first becomes an employee or Member on or after October 1, 1982, shall include credit for--

(i) each period of military service performed before January 1, 1957, and

(ii) each period of military service performed after December 31, 1956, and before the separation on which the entitlement to annuity under this subchapter is based, *only if a deposit (with interest, if any) is made with respect to that period, as provided in section 8334(j) of this title.*

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<sup>3</sup> As used here, the term “Member” means a Member of Congress (House or Senate).

(2) If an employee or Member is awarded retired pay based on any period of military service, the service of the employee or Member may not include credit for such period of military service unless the retired pay is awarded--

(A) based on a service-connected disability--

(i) incurred in combat with an enemy of the United States; or

(ii) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by section 301 of title 38; or

(B) *under chapter 1223 of title 10* (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act).

(3) (A) Notwithstanding paragraph (2) of this subsection, for purposes of computing a survivor annuity for a survivor of an employee or Member--

(i) who was awarded retired pay based on any period of military service, and

(ii) whose death occurs before separation from the service, creditable service of the deceased employee or Member shall include each period of military service includable under subparagraph (A) or (B) of paragraph (1) of this subsection, as applicable. In carrying out this subparagraph, any amount deposited under section 8334(h) of this title shall be taken into account.

(B) A survivor annuity computed based on an amount which, under authority of subparagraph (A), takes into consideration any period of military service shall be reduced by the amount of any survivor's benefits--

(i) payable to a survivor (other than a child) under a retirement system for members of the uniformed services;

(ii) if, or to the extent that, such benefits are based on such period of military service.

(C) The Office of Personnel Management shall prescribe regulations to carry out this paragraph, including regulations under which--

(i) a survivor may elect not to be covered by this paragraph; and

(ii) this paragraph shall be carried out in any case which involves a former spouse.

(4) If, after January 1, 1997, an employee or Member waives retired pay that is subject to a court order for which there has been effective service on the Secretary concerned for purposes of section 1408 of title 10, the military service on which the retired pay is based may be credited as service for purposes of this subchapter only if the employee or Member authorizes the Director to deduct and withhold from the annuity payable to the employee or Member under this subchapter an amount equal to the amount that, if the annuity payment was instead a payment of the employee's or Member's retired pay, would have been deducted and withheld and paid to the former spouse covered by the court order under such section 1408. The amount deducted and withheld under this paragraph shall be paid to that former spouse. The period of civil service employment by the employee or Member shall not be taken into consideration in determining the amount of the deductions and withholding or the amount of the payment to the former spouse. The Director of the Office of Personnel Management shall prescribe regulations to carry out this paragraph.<sup>4</sup>

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<sup>4</sup> 5 U.S.C. 8332(c) (emphasis supplied).

(j) (1) (A) Except as provided in subparagraph (B), and subject to paragraph (5), each employee or Member *who has performed military service* before the date of the separation on which the entitlement to any annuity under this subchapter is based may pay, in accordance with such regulations as the Office shall issue to the agency by which the employee is employed or, in the case of a Member or a Congressional employee, to the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives, as appropriate, *an amount equal to 7 percent of the amount of the basic pay paid under section 204 of title 37 to the employee or Member for each period of military service after December 1956*. The amount of such payments shall be based on such evidence of basic pay for military service as the employee or Member may provide, or if the Office determines sufficient evidence has not been so provided to adequately determine basic pay for military service, such payment shall be based upon estimates of such basic pay provided to the Office under paragraph (4).

(B) In any case where military service interrupts creditable civilian service under this subchapter and reemployment pursuant to chapter 43 of title 38<sup>5</sup> occurs on or after August 1, 1990, the deposit payable under this paragraph may not exceed the amount that would have been deducted and withheld under subsection (a)(1) from basic pay during civilian service if the employee had not performed the period of military service.

(2) Any deposit made under paragraph (1) of this subsection more than two years after the later of--

(A) October 1, 1983; or

(B) the date on which the employee or Member making the deposit first becomes an employee or Member following the period of military service for which such deposit is due, shall include interest on such amount computed and compounded annually beginning on the date of the expiration of the two-year period. The interest rate that is applicable in computing interest in any year under this paragraph shall be equal to the interest rate that is applicable for such year under subsection (e) of this section.

(3) Any payment received by an agency, the Secretary of the Senate, or the Chief Administrative Officer of the House of Representatives under this subsection shall be immediately remitted to the Office for deposit in the Treasury of the United States to the credit of the Fund.

(4) The Secretary of Defense, the Secretary of Transportation, the Secretary of Commerce, or the Secretary of Health and Human Services, as appropriate, shall furnish such information to the Office as the Office may determine to be necessary for the administration of this subsection.

(5) Effective with respect to any period of military service after December 31, 1998, the percentage of basic pay under section 204 of title 37 payable under paragraph (1) shall be equal to the same percentage as would be applicable under subsection (c) of this section for that same period for service as an employee, subject to paragraph (1)(B).<sup>6</sup>

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<sup>5</sup> Chapter 43 is USERRA.

<sup>6</sup> 5 U.S.C. 8334(j) (emphasis supplied).

(13) "military service" means honorable *active* service--

(A) in the armed forces;

(B) in the Regular or Reserve Corps of the Public Health Service after June 30, 1960; or

(C) as a commissioned officer of the Environmental Science Services Administration<sup>7</sup> after June 30, 1961;

and includes service as a cadet at the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy, or as a midshipman at the United States Naval Academy, but does not include service in the National Guard except when ordered to active duty in the service of the United States or full-time National Guard duty (as such term is defined in section 101(d) of title 10) if such service interrupts creditable civilian service under this subchapter and is followed by reemployment in accordance with chapter 43 of title 38 that occurs on or after August 1, 1990.<sup>8</sup>

You are entitled to purchase credit for *active* military service that you performed before May 2005, when you began your federal civilian career. Clearly, you are not entitled to purchase credit for *inactive* duty training periods (drill weekends) that you performed between May 1983 and May 2005. Are you entitled to purchase credit for *active duty for training* (annual training) periods that you performed in that time period? That is a much closer question.

The United States Office of Personnel Management (OPM) administers the federal civilian retirement system, including these provisions. For decades, OPM's interpretation has been that the federal employee is only entitled to purchase credit for *active duty* and not active duty for training. OPM also requires that you provide a DD-214 form for any period of military service for which you purchase civilian retirement credit, and of course you did not receive DD-214s for annual training tours.

You could challenge OPM's interpretation, but frankly the cost of hiring a lawyer to challenge the interpretation would greatly exceed the additional federal civilian retirement benefit that you might receive, and there is no guarantee that you would win.

**Q: Between May 2005 (when I began my federal civilian career) and May 2008 (when I became a gray area retiree in the USAR), I performed 36 weekend drills (12 per year) and three two-week annual training tours. Am I entitled to federal civilian retirement credit for these short periods of military service?**

**A:** USERRA applies to these periods of uniformed service, and under section 4318 of USERRA<sup>9</sup> you are entitled to be treated as if you had been continuously employed in the civilian job

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<sup>7</sup> Many years ago, the name "Environmental Science Services Administration" was changed to the "National Oceanic and Atmospheric Administration."

<sup>8</sup> 5 U.S.C. 8331(13) (emphasis supplied).

<sup>9</sup> 38 U.S.C. 4318.

during each of the periods of “service in the uniformed services” that interrupted the civilian job, provided you met the USERRA eligibility criteria for each of these periods.<sup>10</sup>

USERRA’s definition of “service in the uniformed services” includes active duty for training and inactive duty training, as well as active duty. The definition also includes full-time National Guard duty, funeral honors duty, and time required to be away from a civilian job for the purpose of an examination to determine fitness to perform any such duty.<sup>11</sup>

You should check to ensure that you have received federal civilian pension credit for each of these short periods of service, but you are likely to find that these periods have already been credited to you. You are not entitled to have them credited twice.

**Q: I earned a five-point veteran’s preference in 1991, based on my service in *Operation Desert Storm*. I used that preference to help me get the federal civilian job in May 2005. The personnel office told me that I lost the five-point preference when I retired from the military in a grade above O-3. Is that true?**

**A:** It is true that military retirees in the grade of O-4 or above are not entitled to the five-point preference.<sup>12</sup> A gray-area retiree like you does not lose the five-point preference until he or she actually starts drawing the retired pay, usually at age 60.

When you turn 60 and start drawing your reserve retired pay, you will not be fired from your federal civilian job. But after that point you will not be entitled to the five-point preference in landing a new federal job or in protecting you from a Reduction in Force (RIF).

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<sup>10</sup> You must show that you left the civilian job for the purpose of performing voluntary or involuntary service in the uniformed services and that you gave the employer prior oral or written notice. You must show that you did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. Each of these short tours of military training is exempt from the computation of your five-year limit. Please see Law Review 201. You must show that you were released from the period of service without having received a disqualifying bad discharge from the military and that you reported back to work in a timely manner after release from the period of service. You need to show that you meet these five conditions for each period of service, but this probably will not be difficult.

<sup>11</sup> 38 U.S.C. 4303(13).

<sup>12</sup> A person who has a service-connected disability rated at 30% or more is entitled to a ten-point veteran’s preference. A person who is entitled to the ten-point preference does not lose the preference based on the retirement grade.