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USERRA Overrides the Collective Bargaining Agreement

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Update on Sam Wright

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Q: I am a Specialist (E-4) in the Army National Guard (ARNG). I have read with great interest some of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3]

On the civilian side, I work construction in a major northern city. I am a member of one of the larger construction trade unions. My union has a collective bargaining agreement (CBA) with an association representing the major unionized construction companies in this city and its surrounding suburbs. My fellow union members and I work through a "hiring hall" operated jointly by the union and the association of employers. When I complete a project, I report to the hiring hall and make known my availability for the next project. I wait my turn, and then I am referred to the next project. The next project may be with the same company that employed me on the last project, but more likely it will be with a different company. There are 30 unionized construction companies that use this hiring hall to fill positions for our trade. Other construction trade unions, for other construction trades, operate similar hiring halls for their members and the same group of construction companies.

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[1] Please see www.servicemembers-lawcenter.org. You will find more than 1500 "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. I am the author of more than 1300 of the articles.

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[3] USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994, as a long-overdue replacement for the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940.

I know some other the older members (nearing retirement) who have built a whole career on a series of short-term assignments. An assignment will last anything from a few days to several months for a major construction project. Our pension rights and other benefits are provided for by the CBA between our union and the association of construction companies. There is a multi-employer pension plan managed by a board of directors. Half of the directors and appointed by my union, and the other half are appointed by the association of construction companies. The pension plan rewards work for any or all of the construction companies in the agreement.

As an ARNG member, I occasionally need to miss work for my inactive duty training (drills) and annual training for the Army. When that happens, I give notice orally and by e-mail to the construction company I am currently working for, the director of the hiring hall, and the business agent of my local union, as you have suggested in some of your "Law Review" articles.

First, how does USERRA apply, if at all, to this sort of situation, where I work through a hiring hall for a whole series of employers?

A: As I have explained in Law Review 174 (June 2005) and Law Review 183 (July-August 2005), USERRA most definitely applies to persons (like you) who work in a "hiring hall" situation. Section 4303 of USERRA[4] defines 16 terms, including the word "employer." The definition expressly includes "a person, institution, organization, or other entity to whom the employer [in the traditional sense] has delegated the performance of employment-related responsibilities."[5] The unionized construction industry employers in your state have delegated the job assignment responsibility to the union and the hiring hall. Thus, the hiring hall is your "employer" for important purposes under USERRA, and the hiring hall is bound by USERRA.

USERRA's legislative history expounds upon the congressional intent behind this language, as follows:

> Section 4303(4) would define "employer" and is to be broadly construed. It includes not only what may be considered a "traditional" single employer relationship, but also (1) those under which a servicemember works for several employers in industries such as construction, longshoring, etc., where the employees are referred to employment, and (2) those where more than one entity may exercise control over different aspects of the employment relationship. *See, e.g., Adams v. Mobile County Personnel Board*, 115 LRRM 2936 (S.D. Ala. 1982); *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 507-511 (E.D. Va. 1992).

[4] 38 U.S.C. 4303.
[5] 38 U.S.C. 4303(4)(A)(i).

This definition would also include potential employers in the case of a failure to hire an applicant as well as entities to which certain employment-related responsibilities have been delegated, such as pension funds. *See Imel v. Laborers' Pension Trust Fund*, 904 F.2d 1327 (9th Cir.), *cert. denied*, 111 S. Ct. 343 (1990); *Akers v. Arnett*, 597 F. Supp. 557 (S.D. Tex. 1983), *affirmed,* 748 F.2d 283 (5th Cir. 1984).[6]

Section 4331 of USERRA[7] gives the Department of Labor (DOL) rulemaking authority with respect to the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA regulations in the *Federal Register* in December 2005. The USERRA regulations are codified in the Code of Federal Regulations (C.F.R.) at Title 20, Part 1002. The pertinent section is as follows:

§ 1002.38 Can a hiring hall be an employer?

- Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns the employee to the jobs. In these industries, it may not be unusual for the employee to work his or her entire career in a series of short-term job assignments. The definition of "employer" includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered the employee's employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.[8]

The bottom line is that the union, its hiring hall, each and every one of the employers in the association, and the pension fund are subject to USERRA. You have USERRA rights, just like a person working for a single employer in a more traditional employment relationship.

Q: The CBA contains the following paragraph about military duty performed by National Guard and Reserve members who are union members working through the hiring hall:

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[6] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1. You can find this report of the House Committee on Veterans' Affairs reprinted in full in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 661 and 662 of the 2016 edition of the *Manual.*

[7] 38 U.S.C. 4331.

[8] 20 C.F.R. 1002.38 (bold question in original).

> **Employees covered by this agreement shall receive up to 15 days per calendar year of paid military leave for training and other duty as members of the National Guard or a reserve component of the armed forces. The construction company employing the individual at the time of the National Guard or Reserve duty shall pay this paid military leave. No employee covered by this agreement may miss more than 15 days of work per year, with or without pay, for National Guard or Reserve service.**

My National Guard unit frequently requires me to be away from my civilian employment for more than 15 days per year. Our drills sometimes start on Friday and go through Monday, and sometimes my civilian job requires me to work on Saturday or Sunday, like when we are trying to make up for lost time after a period of bad weather has put a construction project behind schedule. And of course, I am subject to being called to active duty for months at a time, and my ARNG unit has been informed that we will likely be called to active duty for up to a year sometime in 2017.

Does USERRA give me the right to be away from work for more than 15 days per year? What is the relationship between USERRA and the CBA?

A: USERRA gives you the right to *unpaid but job protected* military leave from your civilian employment relationship (federal, state, local, or private sector) in order to perform "service in the uniformed services" as defined by USERRA.[9] Section 4303 of USERRA defines 16 terms used in this law. The term "service in the uniformed services" is defined as follows:

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.[10]

Your right to unpaid military leave under USERRA is certainly not limited to 15 days per year. As I will explain further below, the right is only limited by USERRA's five-year cumulative limit on the duration of the period or periods of uniformed service that you can perform, with respect to a specific employer relationship, and the five-year limit has nine exemptions.[11]

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[9] 38 U.S.C. 4312(a).
[10] 38 U.S.C. 4303(13).
[11] 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a definitive summary of the five-year limit—what counts and what does not count.

As to the relationship between USERRA and the CBA, under section 4302 of USERRA[12] this law is *a floor and not a ceiling* on your rights as an employee who is a National Guard member. Section 4302 provides as follows:

- (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), *contract, agreement*, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b) This chapter supersedes any State law (including any local law or ordinance), *contract, agreement*, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[13]

The CBA can give you *greater or additional rights,* like the right to 15 days of *paid* military leave. The CBA cannot take away the rights and benefits that Congress gave you when in enacted USERRA.

USERRA does not require the employer or group of employers to give you *paid* military leave. The CBA gives you the right to 15 days of paid military leave, and it is certainly lawful for the CBA to limit the paid leave to 15 days. But the CBA cannot take away your right to take unpaid military leave, under USERRA, beyond the CBA's 15-day limit.

The DOL USERRA Regulation provides as follows concerning the relationship between USERRA and CBAs, other agreements or contracts, state laws, etc.:

§ 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?

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- (a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.
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- (b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by

[12] 38 U.S.C. 4302.
[13] 38 U.S.C. 4302 (emphasis supplied).

USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

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- (c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.
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  (d) If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, *even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave*.[14]

In the private sector, a CBA between a union and an employer or group of employers normally has a three-year duration. When the time comes for renewal, the negotiations usually focus on certain key clauses of the CBA, like the rate of pay. The other paragraphs of the CBA are often treated as boilerplate and are renewed every three years without much thought on either side. Your CBA's 15-day limit on absence from work for National Guard or Reserve duty is a relic of the "strategic reserve" days prior to August 1990.

Our nation has seven Reserve Components (RC). In order of size they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The Army National Guard and Air National Guard are hybrid federal-state organizations. They are subject to being called to federal active duty, or they can volunteer, for the defense of our nation. Also, in their traditional "state militia" role, they can be called to state active duty by the Governor for state emergencies, including hurricanes, tornadoes, fires, riots, etc.

Nearly one million National Guard and Reserve personnel have been called to the colors since the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time. More than 1200 of these recalled Guard and Reserve personnel have died fighting overseas. The entire United States military establishment, Active Component (AC) as well as Reserve Component (RC), amounts to only ¾ of one percent of our country's population. It is largely

[14] 20 C.F.R. 1002.7 (bold question in original, emphasis by italics supplied).

through the sacrifices of this tiny cohort that our country has been spared a repetition of the events of that terrible Tuesday morning 15 years ago.

It is not a cliché to say that "freedom is not free." The cost may include the ultimate sacrifice and is made by those men and women who volunteer to serve our country in uniform. Yes, USERRA is sometimes inconvenient to civilian employers and to the civilian co-workers of National Guard and Reserve personnel, but those costs do not compare to what our men and women in uniform volunteer to undertake to do.

The 0.75% of our country's population who serve in uniform are the intended beneficiaries of laws like USERRA. They are the ones who bear the lion's share of the cost of freedom. The other 99.25% pay none of the cost, beyond the payment of taxes.

Relying on RC personnel (who are only paid when they serve or train to serve) rather than AC personnel (who are paid a full-time salary) is a great deal economically.[15] At a time when the DOD budget is severely constrained and highly qualified and dedicated service members must be released from active duty simply because there is not enough money to pay them, keeping these personnel in the Guard or Reserve is increasingly necessary.

Under the Total Force Policy, adopted by DOD in 1973, when Congress abolished the draft and established the All-Volunteer Military (AVM), our country is more dependent than ever before upon the RC for critical national defense readiness. The number of RC personnel is almost equal to the number of AC personnel, so the RC constitutes almost half of our nation's total available military personnel base.

From July 1953 (the end of the Korean War) until August 1990 (when Iraq invaded Kuwait and President George H.W. Bush called up RC units as part of his response to this naked aggression), the National Guard and Reserve constituted a "strategic reserve" that would only be called up in case of World War III, which thankfully never happened. In August 1990, the transformation from the "strategic reserve" to the "operational reserve" began, and that transformation accelerated after the September 11 terrorist attacks. Unfortunately, all too many employers and union officials formed their views of RC service during the "strategic reserve" days (1953-90) when RC service was generally limited to "one weekend per month and two weeks in the summer."

[15] In compliance with a provision of the National Defense Authorization Act (NDAA) for Fiscal Year 2012, the Secretary of Defense (Chuck Hagel at the time) sent a letter dated December 20, 2013 to Senator Carl Levin (Chair of the Senate Armed Services Committee at the time) and identical letters to the chairs of the other appropriate committees of the Senate and House of Representatives. Together with these letters, the Secretary of Defense transmitted a copy of an official DOD report titled "Unit Cost and Readiness for the Active and Reserve Components of the Armed Forces." On page 3 of the report, as part of the Executive Summary, the following sentence appears: "Considering only cost of an individual, a drilling Reservist who serves 39 training days per year is about 15 percent the cost of an Active Component service member per year."

Under the VRRA, which preceded USERRA, there was a specific limit on active duty (four years) but no specific limit on active duty for training or inactive duty training. There was a 20-year argument in the courts as to whether there was an implied limit or "rule of reason" on the burden that an RC member could put on his or her civilian employer for military training and service.

The Supreme Court ended the debate about the rule of reason when it decided *King v. St. Vincent's Hospital*.[16] In a very clear and definitive 8-0 decision, the Court explicitly overruled the "rule of reason" cases. The Court held that the lack of an express limit under section 2024(d) of the VRRA [formerly codified at 38 U.S.C. 2024(d)] meant that there was no limit. It is not proper for the courts to create implied limitations upon explicit rights conferred by Congress.

Congress enacted USERRA just three years after King was decided. I invite your attention to section 4312(h) of USERRA:

> In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [USERRA's five-year limit, discussed in Law Review 6] and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.[17]

Section 4312(h) drove a stake through the heart of the already dead "rule of reason." USERRA's legislative history buttresses this conclusion:

> Section 4312(i) [later renumbered 4312(h)] is a codification and amplification of the Supreme Court's ruling in *King v. St. Vincent's Hospital,* 112 S. Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under former section 2024(d) of title 38. This new section makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements under section 4312(a) and (e).
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> The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of appropriate military authorities (*see Hilliard v. New Jersey Army National Guard,* 527 F. Supp. 405, 411-12 (D.N.J. 1981), and that

[16] 502 U.S. 215 (1991).
[17] 38 U.S.C. 4312(h).

> voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.[18]

The DOL USERRA Regulation also very clearly states that there is no "rule of reason" limiting the amount of time that military authorities may require or permit National Guard and Reserve personnel to be away from their civilian jobs for military training and service:

> **§ 1002.104 Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?**
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> No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.[19]

Your right to *paid* military leave is limited to 15 days per year. Your right to *unpaid but job-protected* military leave is essentially unlimited. The
CBA's 15-day limit on unpaid military leave is void and of no effect.

Q: I contacted the president of our local union and asked for his help in getting the CBA changed to expand the number of days of paid or unpaid military leave and in getting supervisors of the construction companies and some of my union member colleagues to stop harassing me about my National Guard duty and the absences from work necessitated by my duty. The local union president was very unsupportive. He basically told me to "pound sand." What gives?

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[18] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The two quoted paragraphs can be found on page 674 of the 2016 edition of the *Manual.*

[19] 20 C.F.R. 1002.104 (bold question in original).

A: Among the hundreds of skilled construction workers in your union, you may be the only one who is actively participating in the National Guard or Reserve at this time. The local union president has a three-year term. He is probably expecting to run for reelection, and it will be a secret-ballot direct election. To be reelected, he needs to concentrate on the needs of the many, not the needs of the few, or the one.[20] Your fellow union members are at best indifferent to your needs as a National Guard member to time off from your civilian employment for military training and service, and in some cases they are actively hostile to you.

In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[21] When you return to work after a lengthy period of military service and your seniority is restored, as if you had been continuously employed, you could move ahead of a dozen or more other union members on the seniority roster. The local union president probably figures that making you happy and 12 other members unhappy is no way for him to be reelected as president.

In that same 1946 case, the Supreme Court held: "No practice of employers, *or agreements between employers and unions,* can cut down the service adjustment benefits that Congress has secured the veteran under the Act."[22] The Court also wrote: "This law should be liberally construed for the benefit of he who laid aside his civilian pursuits to serve his country in its hour of great need."[23]

USERRA was not enacted for the great majority of our nation's population (99.25%) who remain at home, enjoying the protection of the ¾ of 1% who serve our country in uniform, in the active military or the National Guard or Reserve. Like the VRRA before it, USERRA was enacted to ensure that those who put their lives on the line by serving our country in uniform do not fall behind those who stay at home, enjoying the protection of the tiny band of brothers and sisters who serve, with respect to the escalator of promotions, seniority, and pay raises at the civilian job.

As I have explained in Law Review 15116 (December 2015) and other articles, you have the right to reemployment under USERRA if you meet five simple conditions:

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[20] In *The Wrath of Khan* (1982), Captain Spock said, "The needs of the many outweigh the needs of the few." Admiral Kirk responded, "Or the one."

[21] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The escalator principle is codified in sections 4313(a), 4316(a), and 4318 of USERRA, 38 U.S.C. 4313(a), 4316(a), and 4318.

[22] *Fishgold,* 328 U.S. at 285.

[23] *Id.*

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, as defined by USERRA.[24]
b. You gave the employer prior oral or written *notice.*[25]
c. You have not exceeded the five-year limit on the duration of your period or periods of uniformed service, relating to the employer relationship for which you seek reemployment.[26]
d. You served honorably and were released from the period of service without having received a disqualifying bad discharge from the military.[27]
e. After release from the period of service, you were timely in reporting back to work or applying for reemployment.[28]

If you meet these five conditions, the employer[29] is required to reemploy you promptly[30] in *the position that you would have attained if you had been continuously employed* (possibly a better position than the one you left) or another position (for which you are qualified) that is of like seniority, status, and pay.[31] Upon reemployment, you are entitled to seniority and pension credit as if you had been continuously employed.[32]

Q: Along with my colleagues in my construction trade union, I am covered by a multi-employer defined benefit pension plan. Whenever I work for any of the construction companies that use the hiring hall, the company makes a contribution to the pension plan—a percentage of my earnings. The amount of my monthly pension benefit upon retirement is determined by a formula that includes my years of participation in the industry and my high

[24] 38 U.S.C. 4312(a).
[25] 38 U.S.C. 4312(a)(1). You are exempted from the requirement to give prior notice if giving such notice is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b). You are only required to give notice. You do not need to seek or obtain the employer's permission to be away from work for service, and the employer does not get a veto. 20 C.F.R. 1002.87.
[26] 38 U.S.C. 4312(c). There are nine exemptions to the five-year limit—that is, there are nine kinds of service that do not count toward exhausting your five-year limit. Please see Law Review16043 (May 2016).
[27] 38 U.S.C. 4304.
[28] After a period of service lasting fewer than 31 days, like a drill weekend or a traditional two-week annual training tour, you are required to report back to the civilian job at your first regularly schedule work period after the completion of your period of service, the time reasonably required for safe transportation from the place of service to your residence, and eight hours for rest. 38 U.S.C. 4312(e)(1)(A). After release from a period of service lasting 31-180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After release from a period of service lasting 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).
[29] In your case, the employer is the hiring hall. You should report back to the hiring hall or apply for reemployment at the hiring hall.
[30] After a period of service lasting fewer than 31 days, you are entitled to immediate reinstatement upon reporting back to work. After a longer period of service, the employer must reinstate you within two weeks after you apply for reemployment. 20 C.F.R. 1002.181.
[31] 38 U.S.C. 4313(a)(2)(A).
[32] 38 U.S.C. 4316(a), 4318.

three years of compensation (usually the last three years before retirement). If my career in this industry is interrupted by a period of voluntary or involuntary military service, how is my period of absence from work, for military service, treated in the pension plan?

A: Under USERRA, you are entitled to be treated *as if you had been continuously employed* during the entire period or periods (short or long) that you were away from work for service, assuming of course that you meet the five USERRA conditions that I have outlined, in determining when you qualify for the civilian pension and also in determining the amount of your monthly pension check.[33] Section 4318 of USERRA most definitely applies to multi-employer as well as single-employer pension plans. The DOL USERRA Regulation provides:

§ 1002.266 What are the obligations of a multiemployer pension benefit plan under USERRA?

- A multiemployer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multiemployer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multiemployer plans, as follows:
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- (a) The last employer that employed the employee before the period of service is responsible for making the employer contribution to the multiemployer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the employee.
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- (b) An employer that contributes to a multiemployer plan and that reemploys the employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multiemployer plan pursuant to this subsection does not begin until the employer has knowledge that the employee was reemployed pursuant to USERRA.
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  (c) The employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multiemployer plan, provided that the pre-service employer and the post-service

[33] 38 U.S.C. 4318(b)(1).

employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.[34]

For example, let us assume that you are away from work for all of calendar year 2017 for military service, after you are called to the colors at the end of this year. Let us assume further that you meet the five USERRA conditions. In that case, you will qualify for your civilian pension on the same date that you would have qualified if you had worked continuously through calendar year 2017, and the amount of your monthly pension check should be exactly the same that it would have been if your civilian employment had continued uninterrupted.

Q: As a member of the Army National Guard, I am subject to being called up, or I can volunteer, for military service under title 10 of the United States Code. To maintain my readiness for such a call-up, I engage in periodic and special training under title 32 of the United States Code. I am also subject to being called up by the Governor of this state, for state active duty, to respond to tornadoes, floods, fires, riots, and other state emergencies. Does USERRA cover me for all of these kinds of National Guard duty?

A: USERRA protects your civilian job when you are away from that job for duty or training under title 10 or title 32 of the United States Code.[35] USERRA does not apply to state active duty.

Every state has a law that protects the civilian jobs of National Guard members on state active duty, but some of those laws are better than others. Please see the "State Leave Laws" section of our website, www.servicemembers-lawcenter.org. You will find an article for each state covering the rights of National Guard members on state active duty.

[34] 20 C.F.R. 1002.266 (bold question in original).
[35] 38 U.S.C. 4303(13) and (16).