

## LAW REVIEW 16116<sup>1</sup>

November 2016

### New Federal Employee Should Make Deposit for Previous Active Duty

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- 1.1.1.8—USERRA applies to Federal Government
- 1.3.2.3—Pension credit for service time
- 1.8—Relationship between USERRA and other laws/policies
- 3.0—Reserve retirement and civilian employment

**Q: In 2007, I graduated from college and was commissioned a Second Lieutenant, via the Army Reserve Officers Training Corps (ROTC). I recently left active duty after having served full time for nine years, and I have landed a federal civilian job. The federal civilian personnel office has told me that I can make a deposit to cover my nine years of active duty, before I began my federal civilian job and that if I do that the nine years of active duty will count toward my federal civilian retirement eligibility. I have heard that making this deposit is probably in my best interests. What is the basis for this “deposit” requirement?**

**A:** I invite your attention to section 8411(c) of title 5 of the United States Code, which provides as follows:

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://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.

<sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA), as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates from 1940. I have been dealing with the VRRA and USERRA for 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

(c)(1) Except as provided in paragraphs (2), (3), and (5)<sup>3</sup>, and employee [of the Federal Government] or a Member [of Congress] shall be allowed credit for—  
(A) each period of military service performed before January 1, 1957; and  
(B) each period of military service performed after December 31, 1956, and before the separation on which title to annuity is based, *if a deposit (including interest, if any) is made with respect to such period in accordance with section 8422(e)*.  
(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 the line of duty during a period of war as defined by section 301 of title 38; or  
(B) *under section 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)*.<sup>4</sup>

Because you performed your military service after December 31, 1956, you must make the deposit to receive federal civilian retirement credit for this active duty period. If you make the deposit, you will receive the federal civilian retirement credit. If you fail to make the deposit, you will not receive the federal civilian retirement credit.

**Q: How much am I required to deposit? When must I make this deposit?**

**A:** I invite your attention to section 8422(e) of title 5, which provides as follows:

- (1) (A) Except as provided in subparagraph (B), and subject to paragraph (6), 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, or subchapter V of this chapter, 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 3 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

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<sup>3</sup> Section 8411(c)(5) deals with claims by former spouses to a share of retirement benefits. That subsection is not relevant to you since you have no former spouse—you are still married to your first wife.

<sup>4</sup> 5 U.S.C. 6411(c)(1) and (2) (emphasis supplied). The Reserve Officer Personnel Management Act moved the provisions of chapter 67 of title 10 to chapter 1223 of that title.

military service, such payment shall be based on 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 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) more than two years after the later of--

- **(A)** January 1, 1987; 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 section 8334(e).<sup>5</sup>

You must make the deposit *before you retire from federal civilian service*. If you wait more than two years after you begin your federal civilian service to make the deposit, you will be required to pay interest.

**Q: How does this deposit requirement relate to the Uniformed Services Employment and Reemployment Rights Act (USERRA)?**

**A:** As I have explained in Law Review 15116 (December 2015) and other articles, USERRA applies to a person who meets five simple conditions:

- a. *Left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing uniformed service.*
- b. Gave the employer prior oral or written notice, before leaving the civilian position of employment.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.<sup>6</sup>
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.

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<sup>5</sup> 5 U.S.C. 8422(e)(1) and (2) (emphasis supplied).

<sup>6</sup> There are nine exceptions—kinds of service that do not count toward exhausting the five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit and its exceptions.

- e. After release from the period of service, has made a timely application for reemployment with the pre-service employer.<sup>7</sup>

USERRA does not apply to your nine years of active duty, from 2007 to 2016, because you did not leave a federal civilian job in 2007 to report to active duty. Under these circumstances, USERRA does not require the Federal Government (as your civilian employer) to credit you for civilian retirement purposes for the active duty time.<sup>8</sup> You are entitled to get federal civilian retirement credit for the nine years of active duty, but not under USERRA. To get the retirement credit, you must make the deposit.

**Q: What is the meaning of section 8422(e)(1)(B)?**

**A:** To explain the meaning of that subparagraph, let me give an example that may apply to you in the near future. Let us say that you have affiliated with the Army Reserve since you left active duty recently, and next year you are recalled to active duty or you voluntarily return to active duty. You meet the five USERRA conditions (detailed above) in that you leave your federal civilian job to return to active duty and you give your employer prior oral or written notice. Your period of active duty, after leaving the federal civilian job, does not exceed USERRA's five-year limit. You serve honorably and you are released from the period of service without receiving a disqualifying bad discharge from the Army. After release, you make a timely application for reemployment with the federal agency.

Under these circumstances, you are entitled to reemployment with the federal agency. Let us assume that you do return promptly to the federal civilian job after you leave this new active duty period. Under section 4318 of USERRA, you are required to make up the *missed employee contributions* to the pension plan—the contributions that you would have made if you had been continuously employed.

Under section 4318 of title 38, the amount you must pay is based on what you *would have earned in the civilian job* if you had been continuously employed. Under section 8422(e) of title 5, the amount you must pay is based on what you *did earn from the military*. The meaning of section 8422(e)(1)(B) is that the amount that you must pay under these circumstances will be the *lesser of these two amounts*. In most but not all cases, the amount based on what you would have earned in the civilian job will be the smaller amount.

**Q: I have heard that the Federal Government has a rule against “double dipping”—that if I qualify for a military retirement based in part on the nine years of active duty that I have**

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<sup>7</sup> After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>8</sup> 38 U.S.C. 4318.

**already performed that I cannot also claim federal civilian retirement credit for that same period of service.**

**After I left active duty earlier this year, I affiliated with the Army Reserve. I already have nine of the 20 “good years” for Reserve Component retirement at age 60. I fully expect to accumulate at least 11 more good years and to qualify for Reserve Component retirement at age 60. If I qualify for RC retirement at age 60, will I lose the federal civilian retirement credit for the nine years of active duty that I performed from 2007 to 2016?**

**A:** No. I invite your attention to section 12736 of title 10:

No period of service included wholly or partly in determining a person's right to, or the amount of, *retired pay under this chapter may be excluded* in determining his eligibility for any annuity, pension, or old-age benefit *under any other law* on account of *civilian employment by the United States* or otherwise, or in determining the amount payable under that law, if that service is otherwise properly creditable under it.<sup>9</sup>

Section 12736 refers to “this chapter.” This is a reference to the chapter of title 10 that provides for Reserve Component retirement benefits at age 60 based on a combination of active service and Reserve or National Guard training. Clearly, you can count your 2007-16 active duty period for both federal civilian retirement and for Reserve Component retirement at age 60.

**Q: What if I qualify for a regular military retirement based on 20 years of active full-time military service?**

**A:** As I explained in Law Review 16092 (September 2016), it is conceivable but most unlikely that you could qualify for a regular military retirement and still be within your five-year USERRA limit. In that situation, you will be precluded from receiving both regular military retirement and federal civilian retirement for the 2007-16 active duty period, and the deposit that you made when you began your federal civilian career will be refunded to you with interest.

As I explained in Law Review 16104 (September 2016), you can qualify for a regular military retirement, start drawing it, and continue participating in the National Guard or Reserve. Then, when you reach the age of 60 you can transform your regular military retirement to a Reserve Component military retirement. Then, you could retire from federal civilian service and get credit for your active duty time in computing your federal civilian retirement.<sup>10</sup>

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<sup>9</sup> 10 U.S.C. 12736 (emphasis supplied).

<sup>10</sup> This is my theory. I have yet to see the theory implemented and tested, so I don't know for sure that it will work.