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When I Return to Work after Military Service, How Much Will I Have To Pay To Reinstatement my FERS Retirement Account?

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Update on Sam Wright

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

Q: I am a Major in the Air Force Reserve (USAFR) and a life member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I left active duty in the Air Force in late 2013. On February 1, 2014, I started a new civilian job for the Department of the Air Force, and I affiliated with the USAFR after I left active duty. I returned to active duty on October 1, 2016. My orders are for one year and may be extended.

If I leave active duty as scheduled on 9/30/2017 and promptly return to my Air Force civilian job, will I be entitled to count this year of active duty toward my federal civilian retirement?

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1500 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, 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.

² 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. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) 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 proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) 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 (TR), and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

How much will I have to pay into the Federal Employees Retirement System (FERS) to make up for contributions that I missed during my year of active duty?

A: If you meet the five USERRA conditions for reemployment, you are entitled to be treated as if you had been continuously employed in determining when you qualify for retirement under FERS Basic³ and in determining the amount of your monthly retirement check.⁴

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

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services as defined by USERRA. You did this in September 2016.
- b. You must have given the employer prior oral or written notice. I shall assume, for purposes of this article, that you gave notice.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which you seek reemployment.⁵
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. After release from the period of service, you must have made a timely application for reemployment.⁷

³ As I shall explain below, a separate but very similar law governs your rights under the Thrift Savings Plan (TFP).

⁴ 38 U.S.C. 4318.

⁵ Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. The active duty that you performed prior to February 2014, when you began your federal civilian job, is irrelevant for purposes of the five-year limit. If your current active duty period is involuntary, it does not count toward your five-year limit with respect to the Federal Government as your civilian employer. If your current active duty period is voluntary, it counts toward the five-year limit unless your orders contain “magic words” excluding this active duty period from the computation of your five-year limit. Because you began your federal civilian career in February 2014, this year of active duty does not put you over the limit even if it counts. If you extend the active duty period voluntarily, or if you return to active duty voluntarily in the future during your federal civilian career, the five-year limit could become an issue at some point.

⁶ Under section 4304 of USERRA, 38 U.S.C. 4304, disqualifying bad discharges include punitive discharges awarded by court martial and other-than-honorable administrative discharges.

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.

Under section 4318 of USERRA, you are entitled to be treated as if you had been continuously employed in the civilian job during the entire time that you were away from work for service⁸ for purposes of determining your civilian pension rights, but you are only entitled to this benefit *upon reemployment under USERRA*. At this point, in November 2016, you are not entitled to reemployment under USERRA, and it is not certain that you will be entitled to reemployment. Several things might happen that would preclude you from having the right to reemployment in the civilian Air Force job.

You could remain on active duty voluntarily for several more years and exceed the cumulative five-year limit. You could do something stupid and receive a disqualifying bad discharge from the Air Force. You could get a great job offer outside the Federal Government and choose not to return to the civilian Air Force job. You could win the Publishers Clearinghouse Sweepstakes and retire. God forbid, you could die.

Let us assume that you leave active duty as scheduled on September 30, 2017 and apply for reemployment the next day (well within the 90-day deadline) and then you return to work on October 15, 2017. At that point, you are entitled to be treated as if you had been continuously employed in the civilian job for pension and seniority purposes.

How much will you have to pay to make up for payments that you did not make during the period that you were away from work for service? I will answer that question first with respect to FERS Basic and then with respect to the Thrift Savings Plan (TSP).

FERS Basic

Under section 4318(b)(2) of USERRA⁹ an employee reemployed under USERRA into a pension plan that requires the individual employee to contribute to the plan while working, the returning service member must make up the missed employee contributions during the period that starts on the date of reemployment and extends for three times the period of service, but not more than five years. This subsection provides: “No such payment [required of the returning veteran] 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.”

I also invite your attention to the relevant subsection of title 5 of the United States Code:

In any case where military service interrupts creditable civilian service under this subchapter [FERS] 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

⁸ The time that you are away from work for service includes the actual period of service (October 1, 2016 to September 30, 2017 in your situation) and it also includes the period of a few days or perhaps weeks after you left your civilian job to report to active duty and the actual start of the active duty and the period of up to 90 days after you left active duty and before you applied for reemployment. Please see Law Review 1210 (January 2012).

⁹ 38 U.S.C. 4318(b)(2).

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.¹⁰

Alternatively, you can make the “military deposit” of 3% of the military base pay that you received during the period of your active duty service.¹¹ In most but not all circumstances, the amount computed based on what you *would have paid if you had remained continuously employed in the civilian job* will be less than the amount that is 3% of your military base pay during the relevant active duty period. You will be required to pay *the lesser of these two amounts*.

Thrift Savings Plan (TSP)

Section 4318 of USERRA provides: “In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter [USERRA] shall be those rights provided in section 8432b of title 5.”¹² Section 8432b of title 5 provides:

§ 8432b. Contributions of persons who perform military service [Caution: See prospective amendment note below.]

- (a) This section applies to any employee who--
 - (1) separates or enters leave-without-pay status in order to perform military service; and
 - (2) is subsequently restored to or reemployed in a position which is subject to this chapter [[5 USCS §§ 8401](#) et seq.], pursuant to chapter 43 of title 38 [[38 USCS §§ 4301](#) et seq.].
- (b)
 - (1) Each employee to whom this section applies may contribute to the Thrift Savings Fund, in accordance with this subsection, an amount not to exceed the amount described in paragraph (2).
 - (2) The maximum amount which an employee may contribute under this subsection is equal to--
 - (A) the contributions under section 8432(a) [[5 USCS § 8432\(a\)](#)] which would have been made, over the period beginning on date of separation or commencement of leave-without-pay status (as applicable) and ending on the day before the date of restoration or reemployment (as applicable); reduced by
 - (B) any contributions under section 8432(a) or 8440e [[5 USCS § 9432\(a\)](#) or [8440e](#)] actually made by such employee over the period described in subparagraph (A).
 - (3) Contributions under this subsection--

¹⁰ 5 U.S.C. 8422(e)(1)(B).

¹¹ 5 U.S.C. 8411(c).

¹² 38 U.S.C. 4318(a)(1)(B).

- (A) shall be made at the same time and in the same manner as would any contributions under section 8432(a) [\[5 USCS § 8432\(a\)\]](#);
 - (B) shall be made over the period of time specified by the employee under paragraph (4)(B); and
 - (C) shall be in addition to any contributions then actually being made under section 8432(a) [\[5 USCS § 8432\(a\)\]](#).
- (4) The Executive Director shall prescribe the time, form, and manner in which an employee may specify--
 - (A) the total amount such employee wishes to contribute under this subsection with respect to any particular period referred to in paragraph (2)(B); and
 - (B) the period of time over which the employee wishes to make contributions under this subsection. The employing agency may place a maximum limit on the period of time referred to in subparagraph (B), which cannot be shorter than two times the period referred to in paragraph (2)(B) and not longer than four times such period.
- (c) (1) If an employee makes contributions under subsection (b), the employing agency shall make contributions to the Thrift Savings Fund on such employee's behalf--
 - (A) in the same manner as would be required under section 8432(c)(2) [\[5 USCS § 8432\(c\)\(2\)\]](#) if the employee contributions were being made under section 8432(a) [\[5 USCS § 8432\(a\)\]](#); and
 - (B) disregarding any contributions then actually being made under section 8432(a) [\[5 USCS § 8432\(a\)\]](#) and any agency contributions relating thereto.
 - (2) An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to--
 - (A) the total contributions to which that individual would have been entitled under section 8432(c)(2) [\[5 USCS § 8432\(c\)\(2\)\]](#), based on the amounts contributed by such individual under section 8440e [\[5 USCS § 8440e\]](#) (other than under subsection (d) (2) thereof) with respect to the period referred to in subsection (b)(2)(B), if those amounts had been contributed by such individual under section 8432(a) [\[5 USCS § 8432\(a\)\]](#); reduced by
 - (B) any contributions actually made on such employee's behalf under section 8432(c)(2) [\[5 USCS § 8432\(c\)\(2\)\]](#) (including pursuant to an agreement under section 211(d) of title 37) with respect to the period referred to in subsection (b)(2)(B).
- (d) An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to--
 - (1) 1 percent of such employee's basic pay (as determined under subsection (e)) for the period referred to in subsection (b)(2)(B); reduced by
 - (2) any contributions actually made on such employee's behalf under section 8432(c)(1) [\[5 USCS § 8432\(c\)\(1\)\]](#) with respect to the period referred to in subsection (b)(2)(B).
- (e) For purposes of any computation under this section, an employee shall, with respect to the period referred to in subsection (b)(2)(B), be considered to have been paid at the

rate which would have been payable over such period had such employee remained continuously employed in the position which such employee last held before separating or entering leave-without-pay status to perform military service.

- (f)
 - (1) The employing agency may be required to pay lost earnings on contributions made pursuant to subsections (c) and (d). Such earnings, if required, shall be calculated retroactively to the date the contribution would have been made had the employee not separated or entered leave without pay status to perform military service.
 - (2) Procedures for calculating and crediting the earnings payable pursuant to paragraph (1) shall be prescribed by the Executive Director.
- (g) Amounts paid under subsection (c), (d), or (f) shall be paid--
 - (1) by the agency to which the employee is restored or in which such employee is reemployed;
 - (2) from the same source as would be the case under section 8432(e) [[5 USCS § 8432\(e\)](#)] with respect to sums required under section 8432(c) [[5 USCS § 8432\(c\)](#)]; and
 - (3) within the time prescribed by the Executive Director.
- (h) (1) For purposes of section 8432(g) [[5 USCS § 8432\(g\)](#)], in the case of an employee to whom this section applies--
 - (A) a separation from civilian service in order to perform the military service on which the employee's restoration or reemployment rights are based shall be disregarded; and
 - (B) such employee shall be credited with a period of civilian service equal to the period referred to in subsection (b)(2)(B).
 - (2) (A) An employee to whom this section applies may elect, for purposes of section 8433(d) [[5 USCS § 8433\(d\)](#)], or paragraph (1) or (2) of section 8433(h) [[5 USCS § 8433](#)], as the case may be, to have such employee's separation (described in subsection (a)(1)) treated as if it had never occurred.
 - (B) An election under this paragraph shall be made within such period of time after restoration or reemployment (as the case may be) and otherwise in such manner as the Executive Director prescribes.
- (i) The Executive Director shall prescribe regulations to carry out this section.

History

(Added Oct. 13, 1994, [P.L. 103-353](#), § 4(a)(1), [108 Stat. 3170](#); Oct. 5, 1999, [P.L. 106-65](#), Div A, Title VI, Subtitle F, § 661(a)(3)(A), (C), [113 Stat. 671](#).)

(As amended Nov. 25, 2015, [P.L. 114-92](#), Div A, Title VI, Subtitle D, Part I, § 632(e)(2), [129 Stat. 847](#).)

Annotations

Notes

References in text:

"Section 8433(h)", referred to in subsec. (h)(2)(A), was redesignated [5 USCS § 8433\(f\)](#) by Act March 30, 1994, [P.L. 103-226](#), § 9(b)(2), [108 Stat. 119](#).

Prospective amendment:

Amendment of subsec. (c)(2)(B), effective Jan. 1, 2018. Act Nov. 25, 2015, [P.L. 114-92](#), Div A, Title VI, Subtitle D, Part I, § 632(e)(2), [129 Stat. 847](#) (effective 1/1/2018, as provided by § 635 of such Act, which appears as [5 USCS § 8432](#) note), provides that subsec. (c)(2)(B) of this section is amended by striking "(including pursuant to an agreement under section 211(d) of title 37)".

Under section 8432b, you will have the opportunity to make up, after returning to work in the civilian federal job, the TSP contributions that you could have made if you had remained continuously employed in the civilian job. You must make up the missed contributions during a period that starts on the date of your reemployment and extends for two to four times the period of service, as determined by the TSP Executive Director.

Even if you were not participating in TSP before you left your federal civilian job for military service, you will be permitted to make up the maximum amount that you *would have been permitted to contribute* if you had remained continuously in the civilian job. You will likely want to contribute the maximum amount you can to obtain the employer matches and provide for your retirement.

While you are on active duty, you can make TSP contributions out of your military salary and get U.S. Government matches on your contributions. To the extent that you make such TSP contributions while on active duty, from your military salary, the amount that you will be permitted to make from your federal civilian salary, as make-up contributions, will be reduced thereby.