LAW REVIEW 17067[1]
June 2017

Relationship between USERRA and State Law on Pension Entitlements for Public Employees Who Serve in the Reserve Components

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

Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments
1.1.3.1—USERRA applies to voluntary service
1.2—USERRA forbids discrimination
1.3.1.2—Character and duration of service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.3.2.3—Pension credit for service time
1.8—Relationship between USERRA and other laws/policies

In September 1940, a year after World War II broke out in Europe but before our country entered the hostilities, Congress enacted and President Franklin D. Roosevelt signed the Selective Training and Service Act (STSA).[3] During the congressional debates on the STSA,

---

[1] I invite the reader's attention to www.roa.org/lawcenter. 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, 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 the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 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 VRRA 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 VRRA 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, 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

[3] Public Law 76-783, 54 Stat. 885 (September 16, 1940). The citation means that the STSA was the 783rd new Public Law enacted during the 76th Congress (1939-40), and you can find this Public Law in Volume 54 of *Statutes at Large*

Senator Elbert Thomas of Utah conceived of the idea of requiring civilian employers to reemploy those who were called to the colors, and he offered an amendment to require such reemployment. He explained the rationale for his amendment as follows:

> It is not unreasonable to require the employers of such men [those who will be drafted under the law we are considering today] to rehire them upon the completion of their service, since the lives and property of employers, as well as the lives and property of everyone else in this country, are defended by such service.[4]

Senator Thomas' eloquent argument persuaded his colleagues in the Senate, and later in the House, and the original VRRA was included in the STSA as it was signed into law by President Franklin D. Roosevelt in 1940. As originally enacted, the VRRA only applied to draftees, but just one year later, as part of the Service Extension Act of 1941,[5] Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees.

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on October 13, 1994.[6] USERRA was a long-overdue update and rewrite of the VRRA.

The VRRA has applied to the Federal Government (Executive Branch) and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA),[7] Congress expanded the VRRA to make it apply also to state and local governments. Like the VRRA, USERRA applies to almost all employers in this country, including the Federal Government (Executive Branch and Legislative Branch), the states, the political subdivisions of states (counties, cities, school districts, etc.), and private employers, regardless of size.[8]

There have been 16 United States Supreme Court decisions on the VRRA and one (so far) on USERRA.[9] In its first VRRA case, 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

---

starting on page 885. The STSA is the law that authorized the drafting of more than ten million young men (including my late father) for World War II.

[4] 96 Cong. Rec. 10573. Senator Thomas' eloquent statement is quoted in *Leib v. Georgia Pacific Corp.,* 925 F.2d 240, 246 (8th Cir. 1991).

[5] Public Law 77-213, 55 Stat. 626, 627.

[6] Public Law 103-353, 108 Stat. 3162.

[7] Public Law 93-508, 88 Stat. 1593.

[8] Only religious institutions, Native American tribes, foreign embassies and consulates, international organizations (United Nations, World Bank), and the Judicial Branch of the Federal Government are exempt from USERRA enforcement within our country.

[9] Please see Category 10.1 in our Subject Index. You will find a detailed case note about each of these 17 decisions.

position continuously during the war."[10] The escalator principle is codified in section 4316(a) of USERRA.[11]

The VRRA does not mention pensions, but 40 years ago the Supreme Court held that under the escalator principle the veteran who has returned to work for the pre-service employer after military service, and who meets the VRRA eligibility criteria, must be treated as if he or she had been continuously employed for purposes of benefits under a defined benefit pension plan.[12] Section 4318 of USERRA applies to both defined contribution pension plans and defined benefit pension plans and accords valuable benefits to the person who leaves a civilian job for uniformed service, meets the USERRA conditions for reemployment, and returns to the pre-service employer after service. Section 4318 provides:

- (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 [38 USCS §§ 4301 et seq.].
        - (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 nonforfeitability 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

[10] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The citation means that you can find this decision in Volume 328 of *United States Reports,* and the case starts on page 275. The quoted sentences can be found at pages 284-85. I discuss the *Fishgold* case in detail in Law Review 0803 (January 2008).
[11] 38 U.S.C. 4316(a).
[12] *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). I discuss this case in detail in Law Review 0915 (April 2009).

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.[13]

Section 4318 applies to a person who has been "reemployed under this chapter" [USERRA]. That means that the person must have met all five of the USERRA eligibility conditions:

a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.[14]
b. Must have given the employer prior oral or written notice.[15]
c. Must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.[16]
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.[17]
e. After release from the period of service, must have made a timely application for reemployment with the pre-service employer.[18]

Under section 4302 of USERRA, this federal law is a floor and not a ceiling on the rights of those who are serving or have served our country in uniform. Section 4302 provides:

- (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

[13] 38 U.S.C. 4318 (emphasis supplied).
[14] 38 U.S.C. 4312(a).
[15] 38 U.S.C. 4312(a)(1).
[16] 38 U.S.C. 4312(c). Under that subsection, there are nine exemptions—that is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of USERRA's five-year limit.
[17] 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges awarded by court martial for serious criminal misconduct and other-than-honorable administrative discharges.
[18] After a period of service of 181 days or more, the deadline to apply for reemployment is 90 days after the date of release. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[19]

The meaning of section 4302 is clear, as applied to an employee of a state or a political subdivision of a state whose civilian career is interrupted by voluntary or involuntary uniformed service. A state law can give the person greater or additional rights, over and above USERRA, but a state law cannot deprive a person of rights to which he or she is entitled under USERRA. A state law that conflicts with USERRA is void under the Constitution's Supremacy Clause, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[20]

Many of the state laws that govern the pension rights of state employees are inconsistent with USERRA and void under the Supremacy Clause. For example, let us consider the relevant Maryland statute in the context of a hypothetical but realistic Army Reservist who is a Maryland state employee.

Section 38-103 of the Maryland State Personnel and Pensions Code provides:

§ 38-103. Rights to membership and service credit

- (a) Scope of section. -- This section applies only to a member of a State or local retirement or pension system who:
    - (1) does not withdraw any of the member's accumulated contributions, unless the member redeposits the sum withdrawn as provided under subsection (b) of this section;
    - (2) *within 1 year after the member leaves military service, is employed by the State or a political subdivision of the State;*
    - (3) does not take any employment other than the employment described in item (2) of this subsection, except for temporary employment after the member:
        - (i) applied for reemployment in the member's former classification or position in the State service; and
        - (ii) was refused immediate reemployment for causes beyond the member's control; and

[19] 38 U.S.C. 4302.

[20] United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

- (4) *applies for service credit with the State or local retirement or pension system in which the member held membership before the member's military service began.*

- (b) Redeposit of accumulated contributions. -- If a member of a State or local retirement or pension system who is absent from employment for military service withdraws any of the member's accumulated contributions and redeposits the sum withdrawn with regular interest into the State or local retirement or pension system, the member, if otherwise qualified, is entitled to the benefits of this section as if the withdrawal had not been made.

- (c) Retention of status and rights as a member. -- *Except as otherwise provided in this subtitle, a member of a State or local retirement or pension system who is actively reemployed under subsection (a)(2) of this section retains the status and rights as a member during a period of absence from employment for military service.*

- (d) Service credit. --
  - (1) Subject to paragraph (2)(i) of this subsection, a member of a State or local retirement or pension system shall receive service credit for a period of absence from employment while in military service if:
    - (i) the employment of the member under subsection (a)(2) of this section is active or the employee is reinstated as a regular employee on a leave of absence; and
    - (ii) membership in a State or local retirement or pension system is a requirement of employment.
  - (2)
    - (i) *For an absence for military service, service credit for the military service may not exceed 5 years.*
    - (ii)
      - 1. This subparagraph applies only to a member of a State system.
      - 2. *Subject to subparagraph (i) of this paragraph and in addition to any service credit received under paragraph (1) of this subsection, a member of the Maryland National Guard or of a reserve component of the armed forces of the United States who has been activated under Title 10 of the United States Code and who is on active or inactive duty for training that interrupts the member's service shall receive service credit at the rate of 4 months for each full year for military service, not to exceed a total of 36 months.*

- (e) Transfer of service credit. -- A member of a State or local retirement or pension system who receives service credit for military service under this section may transfer the credit to another State or local retirement or pension system.

- (f) Application of military service credit. -- The service credit for military service that a member of a State system receives under this section shall be applied to the individual's retirement allowance using the accrual rate at the time the individual retires from a State system.[21]

In some ways, section 38-103 provides benefits to the veteran or service member that are in addition to his or her rights under USERRA. In that case, the state law is not superseded because it provides greater or additional rights, and the veteran or service member has rights under the state law, not under USERRA.

In some ways, the individual's rights under the state law and under USERRA overlap perfectly. In that instance, there is no conflict between the state law and the federal law and the individual has rights under both laws equally.

In some ways, section 38-103 seems to limit an individual's rights under USERRA. In that case, the Maryland law fails under the Supremacy Clause. For example, let us consider the hypothetical but realistic Josephine Smith. She graduated from high school in Maryland in May 2009. Shortly thereafter, she enlisted in the Army. She served on active duty for exactly seven years, from 10/1/2009 through 9/30/2016, when she left active duty and affiliated with the Army Reserve.

After she left active duty, Josephine sought and obtained a civilian job. She was hired by the State of Maryland and began her new job on 1/1/2017. Under section 38-103(a)(2), Josephine is entitled to five years of state pension credit for her seven years of active duty, because she was employed by the State of Maryland within one year after she left active duty.[22]

After starting her state job on 1/1/2017, Josephine needs to be absent from her state job for periods of inactive duty training (drills), annual training, and voluntary or involuntary active duty as a member of the Army Reserve. Under USERRA, Josephine has the right to unpaid but job-protected leave from her civilian job for these military periods. Under Maryland State Personnel and Pensions Code section 9-1104(3), Josephine has the right to up to 15 days per year of *paid* military leave for this Army Reserve training. After she has exhausted her paid military leave under state law, she still has the right to unpaid leave under USERRA.

Josephine did not have the right to reemployment with the State of Maryland in the fall of 2016 because she did not work for the state before she began her active duty period in 2009. But under section 4311 of USERRA[23] it was unlawful for the State of Maryland to discriminate

[21] Maryland State Personnel and Pensions Code, section 38-103 (emphasis supplied).

[22] Maryland may try to argue that Josephine is not entitled to this credit because she was not a "member" of the state pension system when she entered active duty in 2009 or when she left active duty in 2016. The wording of section 38-103 is ambiguous as applied to Josephine's situation, but I hope that the Maryland Court of Appeals will construe the statutory language liberally for the benefit of those who have served our country in uniform, including Josephine. In any case, this is a state law question, not a federal law question.

[23] 38 U.S.C. 4311.

against her in initial employment because of her past uniformed service, her continuing membership in a uniformed service (the Army Reserve), or her continuing obligation to perform uniformed service. The state did not discriminate, and Josephine was hired effective 1/1/2017.

USERRA's five-year limit applies "with respect to the employer relationship for which a person seeks reemployment."[24] Josephine began a new employer relationship with the State of Maryland on 1/1/2017. Thus, she has a fresh five-year limit with this new employer as of that date. Her seven years of active duty from 2009 to 2016 are irrelevant for purposes of the five-year limit.

As an Army Reservist, Josephine performs periodic military training, including weekend drills (inactive duty training)[25] and annual training periods. All these training periods are exempt from Josephine's five-year limit with the State of Maryland.[26] In 2018, Josephine is selected to attend Officer Candidate School (OCS) as an Army Reservist, and she is away from her civilian job for seven months for that OCS class. That period is also exempt from Josephine's five-year limit.[27]

Josephine successfully completes OCS in 2018 and is commissioned a Second Lieutenant. In 2019, she is called to active duty involuntarily for an emergency in Korea. She is on active duty for exactly one year, from 10/1/2019 until 9/30/2020. That year of involuntary active duty does not count toward exhausting Josephine's five-year limit.[28]

In 2022, Josephine returns to active duty and to Korea, this time voluntarily. Her orders contain "magic words" to the effect that the Secretary of the Army has determined that her service, although voluntary, is for a declared national emergency. This period of service does not count toward Josephine's five-year limit.[29]

Josephine performs two two-year voluntary, non-exempt active duty periods, from October 2027 to September 2029 and from October 2031 until September 2033. These periods count toward her five-year limit, but she is still within the five-year limit because all her other periods are exempt.

Josephine retires from the Army Reserve as a Colonel in 2045, and shortly thereafter she retires from her civilian job with the State of Maryland. Under section 4318 of USERRA, she is entitled

[24] 38 U.S.C. 4312(c).
[25] Periods of inactive duty training are not limited to weekends. Especially after the terrorist attacks of 9/11/2001, Reserve and National Guard personnel are often expected to perform training that is far greater than the traditional pattern of one weekend per month and two weeks of annual training.
[26] 38 U.S.C. 4312(c)(3).
[27] 38 U.S.C. 4312(c)(3). Josephine's OCS orders will contain language stating that the Secretary of the Army has determined that it is necessary for Josephine's "professional development" that she attend OCS.
[28] 38 U.S.C. 4312(c)(4)(A).
[29] 38 U.S.C. 4312(c)(4)(B).

to civilian pension credit for each of her many military service periods, *as if she had been continuously employed in the civilian job during each military period.*[30]

Section 38-103(d)(2)(ii)(2) purports to limit a person like Josephine to four months of pension credit for each year of military service, and not to exceed 36 months of total credit. Those limitations are void under the Supremacy Clause of the Constitution because they are contrary to USERRA.

It is necessary to read a state law like section 38-103 together with USERRA, and this can get complicated.

[30] This assumes, of course, that Josephine meets the USERRA conditions for each military period, including prior notice to the civilian employer and timely return to work after service.