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Yes, you Can Qualify for Regular Military Retirement and Reemployment under USERRA and Civilian Pension Credit for your Military Service Time

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¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 1500 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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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.

Q: I am a Lieutenant Colonel in the Army Reserve and a 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 was born in 1970 and graduated from high school in 1988. While in college, from 1988 until 1992, I participated in the Army Reserve Officers Training Corps (ROTC) program, and when I graduated in 1992 I was simultaneously commissioned a Second Lieutenant in the Army. I then served on full-time active duty for the next 12 years, until May 2004, when I left active duty and became a teacher in Texas, under the Troops to Teachers Program. I work for a school district, and I participate in the Texas Teachers Retirement System (TTRS).

After I left active duty in 2004, I affiliated with the Army Reserve and participated in annual training and inactive duty training (drill weekends) with my unit. I was called to involuntary active duty and deployed to Iraq for a year in 2007-08 and again for a year in 2011-12 and deployed to Afghanistan. My annual training and other short tours of full-time military training added up to an additional year during the 2004-14 period.

In 2014, I realized that I had 15 years of full-time active duty and that I could qualify for a regular (immediate) military retirement by returning to active duty for just five years. Accordingly, I returned to active duty in the Active Guard and Reserve (AGR) Program on 10/1/2014. I expect to leave active duty by retirement just 11 months from now, on 9/30/2019. At that time, I will be 49 years old, and I will qualify for a regular military retirement as a Lieutenant Colonel. I plan to return to work as a teacher for a decade or more and then retire from teaching and enjoy my TTRS retirement on top of my military retirement. I think that under USERRA I will qualify for TTRS pension credit for all my post-2004 active duty time, including the involuntary mobilizations in 2007-08 and 2011-12, the annual training tours, and the five years of voluntary active duty from 10/1/2014 through 9/30/2019.

Before I returned to active duty in 2014, I gave prior oral and written notice to the personnel department of the school district where I worked and to TTRS. I have also kept the school district and TTRS informed of my extension on active duty. I returned to active duty in 2014 with a three-year active duty commitment, and I extended for an additional two years in September 2017.

Now that I am within one year of my expected release from active duty, I sent formal letters by certified mail to the school district and to TTRS, informing them that I will leave active duty by retirement in September 2019 and immediately apply for reemployment at the school district, and that I intend return to work at the start of or early during the 2019-20 school year and that I will be entitled to TTRS pension credit for all my post-2004 military service.

Neither the school district nor TTRS responded to my letter. I spoke to a lawyer in Austin who claims to be an expert in TTRS and other Texas public sector pension programs. He told me that I am not entitled to TTRS pension credit for any of my post-2004 military service because I will be using that same military service time to qualify for a regular military retirement (as opposed to a Reserve Component retirement at age 60) and that, in any case, under no circumstances is an individual entitled to more than five years of military time credit for a TTRS retirement. He quoted the following paragraph from the *TTRS Benefits Handbook*:

If you receive USERRA credit under these provisions, you may not receive duplicate active duty military service credit for the same period of military service. Contact TRS for more information.

What do you think? Will I be entitled to reemployment with the school district when I leave active duty 11 months from now? Will I be entitled to TTRS pension credit for my eight years of active duty after I began my teaching career in 2004?

Answer, bottom line up front

The Austin lawyer is wrong. If you meet the five eligibility conditions under USERRA, and it seems clear that you will meet them next fall, you are entitled to prompt reinstatement in the civilian job that you would have attained if you had been continuously employed (perhaps a better job than the one you left), and you are entitled to be treated, upon reemployment, as if you had been continuously employed in the civilian job for the entire time that you were away from your civilian job for military service, with respect to your civilian seniority and pension credit.

Explanation

USERRA's conditions for reemployment

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you (or any returning service member or veteran) 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 uniformed service.³
- b. You must have given the employer prior oral or written notice.⁴

³ 38 U.S.C. 4312(a).

⁴ 38 U.S.C. 4312(a)(1).

- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.⁵ I will discuss this condition separately, below.
- 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 with the pre-service employer.⁷

It seems clear that you already meet conditions a and b—you left your job in 2014 to perform uniformed service and you gave prior notice. Unless you have done something stupid or do something stupid in the next 11 months, you will be released from active duty (by retirement) without a disqualifying bad discharge⁸ next fall. Making a timely application for reemployment is certainly within your power to do.⁹

Because you will be claiming USERRA pension credit for eight years of military service, I will discuss the five-year limit separately.

USERRA's five-year limit

As I have explained in detail in Law Review 16043 (May 2016) and other articles, there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit with respect to a specific employer relationship. Section 4312(c) of USERRA sets forth the five-year limit and its exemptions as follows:

- Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that *any such period of service shall not include any service--*
 - **(1)** that is required, beyond five years, to complete an initial period of obligated service;
 - **(2)** during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

⁵ 38 U.S.C. 4312(c).

⁶ 38 U.S.C. 4304.

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.

⁸ Disqualifying bad discharges include punitive discharges awarded by court martial and other-than-honorable administrative discharges. 38 U.S.C. 4304.

⁹ If you are released from active duty on 9/30/2019, you will have until 12/29/2019 (90 days after release) to apply for reemployment. You will not want to wait. You will want to apply for reemployment as soon as possible after you leave active duty, to return to work as early as possible during the 2019-20 school year.

- (3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
- (4) performed by a member of a uniformed service who is--
 - (A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;
 - (B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
 - (C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
 - (D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
 - (E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or
 - (F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.¹⁰

Your annual training periods in the 2004-14 timeframe do not count toward your five-year limit with respect to your employer relationship with the school district.¹¹ Your two involuntary call-ups (2007-08 and 2011-12) are also exempt from the five-year limit.¹² Your five years of voluntary AGR duty (from 10/1/2014 through 9/30/2019) are not exempt, but that period does not exceed the five-year limit.

Is there a rule against double-dipping?

The Austin lawyer who told you that because you will qualify for a regular (immediate) military retirement, rather than a Reserve Component retirement at age 60, was apparently thinking of section 12736 of title 10 of the United States Code. That section provides:

¹⁰ 38 U.S.C. 4312(c) (emphasis supplied).

¹¹ 38 U.S.C. 4312(c)(3).

¹² 38 U.S.C. 4312(c)(4)(A). See also Law Review 17122 (December 2017).

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 credited under it.¹³

The mention of “under this chapter” refers to the chapter of title 10 that provides for retirement benefits at age 60 for Reserve and National Guard members based on a combination of full-time and part-time service. It is true that section 12736 does not apply to your situation because you attained 20 years of full-time service and qualified for immediate retirement benefits. This section’s prohibition of “no double dipping” rules does not override the rule against double-dipping, but section 4318 of USERRA¹⁴ means that you are entitled to TTRS pension credit for your military service time if you meet the five USERRA conditions and return to your teaching job after you leave active duty next fall.

Under section 4318 of USERRA, you have the right to be treated for pension purposes as if you had been continuously employed in the civilian job, during the entire time that you were away from work for military service, if you meet six conditions:

- a. You left the civilian job to perform uniformed service.
- b. You gave the employer prior oral or written notice.
- c. You have not 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. There are nine exemptions—nine kinds of service that do not count in computing the exhaustion of your five-year limit.
- d. You were released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release, you made a timely application for reemployment.
- f. You returned to work for the pre-service employer.

TTRS seeks to add a seventh condition—that you are not using the same period of uniformed service to help you qualify for regular military service. When Congress created the prerequisites for reemployment and benefits under USERRA, Congress thereby precluded employers and state lawmakers from adding additional prerequisites.¹⁵

¹³ 10 U.S.C. 12736 (emphasis supplied).

¹⁴ 38 U.S.C. 4318.

¹⁵ 38 U.S.C. 4302(b). *See also Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008), *cert. denied*, 556 U.S. 1165 (2009). I discuss *Petty* in detail in Law Review 08064 (December 2008) and Law Review 12075 (August 2012).

In summary, if you meet the five USERRA conditions next fall and return to work for the school district next fall, you will be entitled to civilian pension credit for your military time, although you are also using the same time to qualify for military retirement.

Q: To qualify for military retirement, I need to remain on active duty until 9/30/2019, which will be five weeks into the 2019-20 school year. The school district's personnel director told me that I will not be reemployed for the 2019-20 academic year unless I am available to start on the first day of school. What do you say about that?

A: The school board's preference that the students have an uninterrupted relationship with their teacher for the entire academic year does not override your right to prompt reemployment in the position that you would have attained if you had been continuously employed. I invite your attention to *Fitz v. Board of Education of the Port Huron Area Schools*.¹⁶

Carol Fitz left a teaching job to enlist in the Army and was released from active duty in November 1983. After release, she made a timely application for reemployment, and she met the conditions for reemployment under the Veterans' Reemployment Rights Act (VRRA).¹⁷ Judge James Harvey of the United States District Court for the Eastern District of Michigan granted Fitz's motion for summary judgment, holding that neither Michigan state law nor the collective bargaining agreement between the school district and the teachers' union nor the preference to let students have an uninterrupted relationship with their teacher for the entire academic year made it "impossible or unreasonable" for the district to reemploy Fitz in November or otherwise excused the district's violation of the reemployment statute.

It is true that *Fitz* was decided nine years before Congress enacted USERRA in 1994, but USERRA's legislative history shows that the House Veterans' Affairs Committee cited the case with approval, showing the intent to adopt this principle into the new reemployment statute.¹⁸

Q: I understand that I have the right to reemployment several weeks into the 2019-20 academic year, but I would like to accommodate the interest of the students and the school board by returning to work on the first day of the academic year. I have been saving up the leave I have earned from the Army while on this AGR tour. I can go on terminal leave possibly as soon as 8/1/2019, but I need to remain on active duty until 9/30/2019 to qualify for my Army retirement. Do I have the right to apply for reemployment and return to work while on terminal leave?

¹⁶ 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *affirmed*, 802 F.2d 457 (6th Cir. 1986).

¹⁷ As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue update and rewrite of the VRRA, which was originally enacted in 1940.

¹⁸ See House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part I), reprinted in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The reference to the *Fitz* case can be found on page 710 of the 2018 edition of the *Manual*.

A: No, you do not have the right to insist that the employer put you back on the payroll while you are on terminal leave, because while you are on terminal leave you do not yet meet one of the five USERRA conditions—you have not been *released from the period of service*. But if you want to return to work while on terminal leave and the employer wants you back, there is no legal impediment to your returning to work while on terminal leave. Offering to go on terminal leave and return to work on terminal leave would be a good idea, to grease the skids for your return to work and build good will with the school district.