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Federal Employee away from Work for Uniformed Service Is Entitled to Step Increase upon Reemployment, Not during Service

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This article is a comprehensive checklist of the rights of the federal employee who leaves a federal civilian job for voluntary or involuntary military service or training and who meets the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). This article covers the individual's rights during and after the period of uniformed service.

USERRA also applies to state and local governments and private employers, regardless of size. The rights of the service member or veteran returning to a non-federal job are different only in certain minor details.

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "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 1600 of the articles.

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Q: I am a Captain in the Army Reserve and a member of the Reserve Organization of America.[3] I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I am a GS-12 employee of a large federal department. The personnel department where I work seems to be woefully ignorant about USERRA.

I began my federal civilian career five years ago, in July 2014, when I was hired as a GS-12, Step 1. In the Federal Government, employees receive step increases within a GS level. Each step increase means a pay raise of 3-5%, and these step increases are essentially automatic with the passage of time. The first three step increases occur after increments of one year each, and the fourth and subsequent step increases require two years of employment. I was promoted to Step 2 in July 2015, to Step 3 in July 2016, and to Step 4 in July 2017. I expected to be promoted to Step 5 in July 2019.

[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending 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 number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

I am currently on a one-year voluntary recall to active duty. I entered active duty on 1/1/2019, and I expect to leave active duty on 12/31/2019. I am currently on "LWOP-US"[4] status at my civilian job. I fully expect to leave active duty at the end of this calendar year and to return to work at the federal agency just a few days later, in early January 2020.

I was part of a large group of newly hired GS-12, Step 1 employees in July 2014. Of that group, all but two were promoted to GS-12, Step 5 in July 19. One employee (let's call him Joe Smith) has continuously been in trouble for misconduct and unsatisfactory work, and no one was surprised when he did not get a step increase. I have heard that the agency has begun the process to fire him.

Of the group hired in July 2014, I am the only other employee who was not advanced to Step 5 in July 2019. I sent an e-mail to my direct supervisor and to the personnel director. The personnel director responded, saying that my advancement to the next Step is "frozen" while I am away from work for military service.

In several of your "Law Review" articles, I have read what you have written about USERRA's "escalator principle." You have written that I do not step back on the seniority escalator at work at the point I stepped off, but I step back on at the precise point that I would have occupied if I had remained continuously employed in the civilian job instead of leaving for military service.

Is what the personnel director told me about my advancements being "frozen" inconsistent with what you have written about USERRA's escalator principle?

Answer, bottom line up front:

Upon your reemployment, you are entitled to be treated, for seniority and pension purposes, as if you had been continuously employed, but the agency is not required to advance you to Step 5 now, while you are still on active duty. When you return to work in January 2020, assuming that you meet USERRA's five conditions at that time, you will immediately be entitled to be paid at the Step 5 rate, and the effective date of the advancement to Step 5 must be backdated to July 2019, meaning that you will be eligible for advancement to Step 6 in July 2021. There is no point in having an extended argument with the personnel department now, when you still have several months left in your period of uniformed service.

In this article, I will cover in detail your rights now, while you are away from work for service, and your more important rights upon your reemployment. I hope that this article will be useful

[4] Leave Without Pay-Uniformed Service.

to you and to others similarly situated in understanding and then insisting upon your USERRA entitlements.

There is no statute of limitations on your right to enforce your USERRA rights.[5] But the longer you wait, the harder it is to prove your case. I recommend that you not sleep on your rights. Early next year, in the weeks after you return to work, will be the time to insist upon your rights and, if necessary, to begin the process of enforcing your rights.

Explanation

Eligibility conditions for reemployment

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you will have the right to reemployment at the federal agency if you meet the five USERRA conditions.

a. You must have left your job to perform service in the uniformed services.[6]
b. You must have given the employer prior oral or written notice before leaving the job.[7]
c. Your cumulative period or periods of uniformed service, relating to your employment relationship with DWI, must not have exceeded five years.
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.[8]
e. You must have made a timely application for reemployment after release from the period of service.[9]

If you meet all five of these conditions, you will have the right to reemployment at the agency, and that includes being treated for seniority and pension purposes as if you had been continuously employed by the agency during the days, weeks, months, or years that you are away from the job for voluntary or involuntary military service or training. USERRA keeps your civilian job behind you as an unburned bridge. To preserve the option of returning to the agency after a period of service, you need to keep track of your own five-year limit and ensure that you do not inadvertently go over the limit.[10]

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[5] 38 U.S.C. 4327(b).
[6] 38 U.S.C. 4312(a).
[7] 38 U.S.C. 4312(a)(1). You are excused from the obligation to provide prior notice if giving such notice is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b).
[8] 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial as part of the sentence for a conviction of a serious crime) and other-than-honorable administrative discharges.
[9] 38 U.S.C. 4312(e). 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.
[10] Please see Law Review 16043 (May 2016).

You already meet the first two conditions—you left your civilian job to serve and you gave prior oral or written notice. It is not 100% certain that you will meet the other three conditions. You could remain on active duty long term and go over the cumulative five-year limit with respect to your employer relationship with the agency. You could do something stupid and receive a disqualifying bad discharge, like a punitive discharge (awarded by court martial) or an administrative discharge characterized as "other than honorable." You could win the Publisher's Clearinghouse Sweepstakes and retire. God forbid, you could die.

Q: What is the "escalator principle?"

A: If you meet the five USERRA conditions and return to work early next year, you must be treated, for seniority and pension purposes, *as if you had remained in the civilian job for the entire time you were away from the job* to perform uniformed service.[11]

As I have explained in footnote 2 and in Law Review 15067 (August 2015), and many other articles, Congress enacted the Veterans' Reemployment Rights Act (VRRA) in 1940, as part of the Selective Training and Service Act. 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."[12]

Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the VRRA. The escalator principle is codified in sections 4313(a)[13] and 4316(a)[14] of USERRA.

The escalator principle does not apply to all the good things that *might* have happened to you if you had remained continuously employed. Rather, the escalator principle applies to *perquisites of seniority.* A two-pronged test determines whether a benefit qualifies as a perquisite of seniority. First, a perquisite of seniority is a *reward for length of service,* rather than a form of short-term compensation. Second, to be a perquisite of seniority it must be *reasonably certain* that you would have attained the benefit if you had remained continuously employed.[15]

Q: Can the escalator descend as well as ascend?

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[11] The time that you are away from the job to perform service includes the 365 days that you are on active duty and it also includes the period (perhaps two weeks) between your last day at the civilian job in December 2018 and your entry on active duty and the period (up to 90 days) between your release from active duty and your application for reemployment. Please see Law Review 19052 (June 2019).

[12] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). I discuss *Fishgold* in detail in Law Review 08003 (January 2008).

[13] 38 U.S.C. 4313(a).

[14] 38 U.S.C. 4316(a).

[15] It need not be absolutely certain, but it must be more than a possibility. Please see Law Reviews 18081 (September 2018), 18014 (January 2018), and 13127 (September 2013).

A: In the private sector and with respect to state and local governments, as employers, the escalator can descend as well as ascend. Federal employees who leave civilian jobs to perform uniformed service and who meet the five USERRA conditions are entitled to reemployment in jobs that are *at least as good as the jobs they left,* even if the evidence shows that their jobs would have been downgraded or would have gone away if the federal employee had remained continuously employed.

Section 4331(a) of USERRA[16] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. Section 4331(b)[17] gives the Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to federal executive agencies as employers.

The pertinent section of the DOL regulation is as follows:

> **Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**
>
> **Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.[18]

The pertinent subsection of the OPM regulation is as follows:

> *During uniformed service*. An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered "for cause" under this subpart.) He or she is not a "competing employee" under § 351.404 of this chapter. If the employee's position is

[16] 38 U.S.C. 4331(a).
[17] 38 U.S.C. 4331(b).
[18] 20 C.F.R. 1002.194 (bold question and bold “yes” in original).

> abolished during such absence, the agency must reassign the employee to another position of like status and pay.[19]

Vacation, annual leave, holidays, and days off

Q: While at work, I earn six hours of annual leave per two-week pay period. Do I continue earning this annual leave while I am away from work for military service?

A: No. The Supreme Court has held that vacation days are not perquisites of seniority because they fail the first prong of the two-pronged test.[20]

Q: New federal employees with no seniority earn four hours of annual leave per pay period. A federal employee with at least three years of seniority earns six hours of annual leave per pay period. A federal employee with at least 15 years of seniority earns eight hours of annual leave per pay period.

When I began my career as a federal civilian employee in July 2014, I earned four hours of annual leave per pay period. In July 2017, I started earning six hours of annual leave per pay period. If I remain employed by the Federal Government, I will reach the 15-year threshold in July 2029. Will the time I am away from work for military service (a little over a year) count in meeting my 15-year threshold in July 2029?

A: Yes. The *rate at which you earn annual leave* is a reward for length of service, not a form of short-term compensation. If you remain employed by the Federal Government (not necessarily the same agency or department), you will start earning eight hours of annual leave per pay period in July 2029.

USERRA rights during the period of service

Use of earned vacation time during service

Q: When I entered active duty on 1/1/2019, I had a positive balance of 32 hours (four days) of annual leave. Am I permitted to use and be paid for the 32 hours of annual leave during my active duty period?

A: Yes. USERRA provides:

> Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during

[19] 5 C.F.R. 353.209(a) (italics in original).

[20] *Foster v. Dravo Corp.,* 420 U.S. 92 (1975). I discuss *Foster* in detail in Law Review 09007 (February 2009). Vacation days or annual leave days are a form of short-term compensation, like salary or wages, so the returning veteran is not entitled to claim the vacation or annual leave days that he or she would have earned if continuously employed.

such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.[21]

The OPM USERRA regulation provides:

> **Use of paid time off during uniformed service.**
>
> An employee performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave under 5 U.S.C. 6304, military leave under 5 U.S.C. 6323, earned compensatory time off for travel under 5 U.S.C. 5550b, or sick leave under 5 U.S.C. 6307, if appropriate, during such service.[22]

As I have stated, you do not earn additional annual leave while you are away from work for uniformed service. You may want to preserve your 32 hours of annual leave, just in case you need to use some annual leave in early 2020, after you have returned to work but before you have built up a new positive balance of annual leave. It is your choice, not the employer's choice, to preserve or use your annual leave balance during your period of uniformed service.

Right to *paid* military leave

Q: As a federal employee and a reservist, I earn 15 workdays of *paid* military leave per fiscal year, under section 6323 of title 5 of the United States Code. I normally use the paid military leave for my Army Reserve annual training and perhaps sometimes for "drill" days that occur on a workday. Am I entitled to use this paid military leave during my year of active duty?

A: Yes. Section 6323 provides:

> **Military leave; Reserves and National Guardsmen**
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> **(a)**
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> **(1)** Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502–505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave

[21] 38 U.S.C. 4316(d).
[22] 5 C.F.R. 353.208 (bold heading in original).

under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.

(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who—

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and

(2)

(A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury—

(i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or

(ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or

(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year. Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the

District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d)

(1) A military reserve technician described in section 8401(30) [is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.

(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.[23]

If you had a positive balance of paid military leave on 1/1/2019, when you began your one-year active duty period, you should have been given the opportunity to use that paid military leave during the opening months of your active duty period. On 10/1/2019, the first day of Fiscal Year 2020, you earn 15 workdays of paid military leave for the new fiscal year, and you can use those days during the final three months of your active duty period.

Holidays that occur during your period of service

Q: During Calendar Year 2019, while I am on active duty, there will be or have been nine federal holidays (New Year's Day, Martin Luther King Day, President's Day, Memorial Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving, and Christmas). Am I entitled to be paid for a federal holiday that occurs during my year of active duty?

A: Yes, if you use a day of *paid* military leave or a day of annual leave on the day before the holiday.

Furlough or leave of absence clause

Q: What is my status in my civilian job during the months that I am away from work for military service?

[23] 5 U.S.C. 6323.

A: USERRA's "furlough or leave of absence" clause reads as follows:

> **(b)**
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> **(1)** Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
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> **(A)** deemed to be on furlough or leave of absence while performing such service; and
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> **(B)** entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.
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> **(2)**
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> **(A)** Subject to subparagraph (B), a person who—
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> **(i)** is absent from a position of employment by reason of service in the uniformed services, and
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> **(ii)** knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,is not entitled to rights and benefits under paragraph (1)(B).
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> **(B)** For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).
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> **(3)** A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.
>
> **(4)** Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.
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> **(5)** The entitlement of a person to coverage under a health plan is provided for under section 4317.
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> **(6)** The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.[24]

[24] 38 U.S.C. 4316(b). Please see Law Review 19026 (February 2019) for a detailed discussion of the "furlough or leave of absence" clause.

Right to differential pay during service

Q: There is a young woman on active duty with me, and like me she is a federal employee. Because she is a junior enlisted service member, her active duty pay is substantially less than her regular civilian pay. Is a federal employee in this situation entitled to differential pay from the employing federal agency?

A: Yes. Section 5538 of title 5 of the United States Code provides for differential pay. That section reads as follows:

- (a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty *under a provision of law referred to in section 101(a)(13)(B) of title 10* shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which--
    - (1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)
    - (2) the amount of pay and allowances which (as determined under subsection (d))--
        - (A) is payable to such employee for that service; and
        - (B) is allocable to such pay period.

- (b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)--
    - (1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and
    - (2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

- (c) Any amount payable under this section to an employee shall be paid--
    - (1) by such employee's employing agency;
    - (2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and
    - (3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

- (d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

- (e)
    - (1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.
    - (2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

- (f) For purposes of this section--
    - (1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;
    - (2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and
    - (3) the term "basic pay" includes any amount payable under section 5304.[25]

Section 5538(a) provides that a federal employee who is away from his or her federal civilian job "pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10"[26] shall be eligible for differential pay. Here is the text of section 101(a)(13):

> (13) The term "contingency operation" means a military operation that--
>
> - (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; *or*
>
> - (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, *section 712 of title 14*, *or any other provision of law during a war or during a national emergency declared by the President or Congress.*[27]

Differential pay for state and local government employees

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[25] 5 U.S.C. 5538 (emphasis supplied).

[26] Please see the italicized language above. The italics are mine.

[27] 10 U.S.C. 101(a)(13) (emphasis supplied). Please see Law Review 18102 (October 2018) for a detailed discussion of the provision for differential pay for federal employees who are called to the colors or volunteer to serve and who thereby lose money.

Q: Another junior enlisted service member on active duty with me has a great job for a state government agency? His active duty pay is substantially less than what he normally earns in his state job. Is he entitled to differential pay under section 5538?

A: No, not under section 5538. That section applies to federal employees. Several states have similar differential pay laws for state and local government employees. I invite the reader's attention to our "state laws" section at www.roa.org/lawcenter. You will find 54 articles[28] about the state laws that provide for differential pay and paid military leave for state, territorial, and local government employees.

Pension entitlements

Q: How does the escalator principle apply to pensions?

A: The VRRA (the 1940 reemployment statute that was replaced by USERRA in 1994) did not mention pensions, but 42 years ago the Supreme Court applied the escalator principle to pension plans.[29] It is important to note that the pension plan at issue in *Alabama Power* was a defined benefit plan. The Court set aside and did not answer the question of how the escalator principle might apply to defined contribution plans:

> Petitioner's plan is a defined benefit plan, under which the benefits to be received by the employee are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension plan is a defined contribution plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. … We intimate no views on whether defined contribution plans are to be treated differently under the [reemployment statute].[30]

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the VRRA. Section 4318 of USERRA applies to both defined benefit plans and defined contribution plans, as follows:

> **(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

[28] There are articles for each of the 50 states plus the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.
[29] *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). I discuss this case in detail in Law Review 09015 (April 2009).
[30] *Alabama Power,* 431 U.S. at 593, note 18.

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.

(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 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.[31]

Q: As a federal employee, I participate in the Federal Employee Retirement System (FERS). Is FERS a defined benefit plan or a defined contribution plan?

A: FERS is a hybrid plan. The FERS "basic plan" is a defined benefit plan. The Thrift Savings Plan (TSP) is a defined contribution plan. The United States Office of Personnel Management (OPM) has explained FERS as follows:

[31] 38 U.S.C. 4318 (emphasis supplied).

Congress created the Federal Employees Retirement System(FERS) in 1986, and it became effective on January 1, 1987. Since that time, new Federal civilian employees who have retirement coverage are covered by FERS.

FERS is a retirement plan that provides benefits from three different sources: a Basic Benefit Plan, Social Security and the Thrift Savings Plan (TSP). Two of the three parts of FERS (Social Security and the TSP) can go with you to your next job if you leave the Federal Government before retirement. The Basic Benefit and Social Security parts of FERS require you to pay your share each pay period. Your agency withholds the cost of the Basic Benefit and Social Security from your pay as payroll deductions. Your agency pays its part too. Then, after you retire, you receive annuity payments each month for the rest of your life.

The TSP part of FERS is an account that your agency automatically sets up for you. Each pay period your agency deposits into your account amount equal to 1% of the basic pay you earn for the pay period. You can also make your own contributions to your TSP account and your agency will also make a matching contribution. These contributions are tax-deferred. The Thrift Savings Plan is administered by the Federal Retirement Thrift Investment Board.[32]

FERS Basic

FERS Basic is a contributory defined benefit plan. While working at your federal civilian job, you make a modest contribution to FERS Basic every pay period. While you are away from the civilian job for full-time military service, you are not drawing your federal civilian paycheck, and thus no biweekly contribution to FERS Basic is made. When you return to work after a period of military service, you must make up the missed employee contributions. Then, you will be treated *as if you had been continuously employed in the civilian job* in determining when you qualify to retire from federal civilian service and in determining the amount of your monthly pension check from FERS Basic.

Thrift Savings Plan

USERRA does not apply to the TSP, because section 4318 of USERRA specifically excludes the TSP from USERRA coverage: "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."[33] Section 8432b of title 5 provides:

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[32] *See* https://www.opm.gov/retirement-services/fers-information/.
[33] 38 U.S.C. 4318(a)(1)(B).

(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, pursuant to chapter 43 of title 38 [USERRA].

(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) [of title 5] 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 actually made by such employee over the period described in subparagraph (A).

(3) Contributions under this subsection—

(A) shall be made at the same time and in the same manner as would any contributions under section 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) if the employee contributions were being made under section 8432(a); and

(B) disregarding any contributions then actually being made under section 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), based on the amounts contributed by such individual under section 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); reduced by

(B) any contributions actually made on such employee's behalf under section 8432(c)(2) 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) with respect to sums required under section 8432(c); and

(3) within the time prescribed by the Executive Director.

(h)

(1) For purposes of section 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), or paragraph (1) or (2) of section 8433(h), 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 [of the Thrift Savings Board] shall prescribe regulations to carry out this section.[34]

Section 8432b of title 5 is almost identical to section 4318 of title 38. The only difference I see relates to the timing for making up missed employee contributions to the pension account. Under USERRA, the employee returning from military service must make up the missed employee contributions within the period that starts on the date of reemployment and extends for three times to period of uniformed service, but not more than five years. Under section 8432b, the employee must make up the missed contributions within the period that is not less than two times the period of service and not more than four times the period of service.

The Thrift Savings Board (TSB) and its Executive Director are responsible for managing the Thrift Savings Plan. On its website, the TSB has the following advice for the federal employee who is leaving his or her civilian job for voluntary or involuntary military service:

[34] 5 U.S.C. 8432b. Please note that section 8432b is not the same thing as section 8432(b), which refers to subsection b of section 8432. Section 8432b is a separate section that comes after section 8432 and before section 8433.

Before You Go on Active Duty

Resources

Publications:

- *Loans*
- Effect of Nonpay Status on Your TSP Account
- TSP Benefits That Apply to Members of the Military Who Return to Federal Civilian Service

Forms:

U = Uniformed Services

- TSP-41, Notification to TSP of Nonpay Status
- TSP-3, Designation of Beneficiary
- TSP-U-1, Election Form

Related Topics:

- Beneficiaries
- TSP Loans
- Nonpay Status
- Powers of Attorney

Multiple TSP Accounts

If you have both civilian and uniformed services accounts, you may create a Web password and user ID that may be used for both of your accounts.

You have a lot to think about as you prepare to go on active duty. Whether you are a Federal or non-Federal civilian employee, if you take the actions described here, you can minimize problems that may arise regarding your TSP account(s).

- Federal Civilian Employees
- Non-Federal Employees
- All Employees (Federal and Non-Federal)

Federal Civilian Employees

Be sure to immediately inform your Federal civilian agency that you have been called to perform active military service.

Payroll Contributions

Be aware that your payroll contributions to your civilian TSP account (and Agency Contributions, if you are FERS) will stop once you go into a nonpay status.

However, you can still contribute to your uniformed services account. It is a good idea to contribute a percentage of your basic pay, which entitles you to contribute a percentage of any incentive pay, special pay, or bonus pay.

TSP Uniformed Services Account

If you do not yet have a uniformed services account, you may want to establish one by submitting Form TSP-U-1, Election Form, to your service, or by using your service's electronic version of the form.

Read the Fact Sheet TSP Benefits That Apply to Members of the Military Who Return to Federal Civilian Service.

TSP Loans

Be aware that, if you have a TSP loan from your civilian TSP account, your loan payments will stop, because they come from payroll deductions. Also, you cannot make payments on that loan from your uniformed services pay. However, you can continue to make loan payments by sending a personal check or money order to the TSP along with a TSP Loan Payment Coupon. Ask your Federal civilian agency to submit Form TSP-41, Notification to TSP of Nonpay Status. Submission of this form will suspend your loan payments until you return to your Federal civilian job. However, there are other acceptable forms of documentation to notify the TSP.[35]

Please join or support ROA

This article is one of 1800-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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[35] *See* https://www.tsp.gov/LifeEvents/military/index.html.

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If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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