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Military Service during your Career as a Federal Civilian Employee—What Effect on your Civilian Retirement?

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.3.2.3—Pension credit for service time

1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Air National Guard (ANG) and a member of the Reserve Organization of America (ROA).³ On the civilian side, I am a federal law enforcement officer

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.

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 43 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.

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

for an agency in the United States Department of Homeland Security (DHS). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

As a federal law enforcement officer, I can retire from my civilian position when I have 20 years of federal civilian service and when I am at least 50 years old. I was born in January 1972. I began my federal law enforcement career in January 2002, when I was 30. Thus, I plan to retire in January 2022. I am frequently away from my federal civilian position for voluntary and involuntary training and service in the ANG. Please review for me the effect that these military periods will have on my federal civilian retirement. I am particularly concerned about periods that I am away from my civilian position during the final three years of my federal civil service career.

I understand that my monthly retirement annuity under “FERS Basic” is computed based on a formula, and my average rate of compensation during my “high-3” years of federal civilian compensation, and the high three years are normally (not always) the last three years as a federal civilian employee. If I proceed with my plan to retire from federal civilian employment in January 2022, my final three years of federal civilian employment will be calendar years 2019, 2020, and 2021.

I have been on active duty (this time) since 10/1/2018. I expect to leave active duty at the end of Fiscal Year 2019 (9/30/2019) and to return to my federal civilian position a few days later. This will likely be my final active duty period in the ANG.

Calendar Year 2019 will be the first year of my “high-3.” I have missed the first nine months of the calendar year, because I have been on active duty and away from my civilian job. Will the computation of my average rate of compensation for Calendar Year 2019 be based on my *actual earnings* from DHS during the year? Or will the computation be based on what I *would have earned* from DHS if I had been working at the civilian job, instead of on active duty, during the entire calendar year?

Answer, bottom line up front

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 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.

In computing your “high-3” average compensation, your compensation for Calendar Year 2019 will be what you *would have earned from DHS if you had worked your civilian job for the entire year*, not the much smaller amount that you actually earned in the last quarter of the calendar year after you were released from the period of service and returned to your civilian job. The pertinent subsection of USERRA is as follows: “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---at the rate the employee would have received but for the period of service described in subsection (a)(2)(B).”⁴

In this article, I will address first your rights with respect to FERS Basic and then your rights under the Thrift Savings Plan (TSP). For purposes of this article, I am assuming that you have met and can document that you have met the five USERRA conditions⁵ for each period when you have been away from your civilian job for uniformed service.

Explanation

The website of the United States Office of Personnel Management (OPM) includes the following explanation of the Federal Employees Retirement System (FERS):

Congress created the Federal Employees Retirement System (FERS) in 1986, and it became effective on January 1, 1987.⁶ 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

⁴ 38 U.S.C. 4318(b)(3)(A).

⁵ You must have left your federal civilian job to perform uniformed service, and you must have given the employer prior oral or written notice. You must not have exceeded the cumulative five-year limit on the duration of your period or periods of uniformed service, relating to you employer relationship with the Federal Government. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit. You must have been released from the period of service without having received a disqualifying bad discharge (like a punitive discharge awarded by court martial or an administrative discharge labeled “other than honorable”). After release, you must have made a timely application for reemployment. 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. Please see Law Review 15116 (December 2015) for a detailed discussion of the five conditions.

⁶ Because you began your federal civilian career after 1/1/1987, you were never included in the Civil Service Retirement System (CSRS), the older retirement system for federal civilian employees.

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 an 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 TSP is administered by the Federal Retirement Thrift Investment Board.⁷

The same website explains that a person who has retired under the special provision for federal firefighters, law enforcement officers, and nuclear material couriers receives an annuity based on the following formula: 2% of the years of service times the high-3 average salary.⁸

The OPM website explains the computation of the high-3 average salary as follows:

Your “high-3” average pay is the highest average basic pay you earned during any three *consecutive* years of service. These three years are usually your final three years of service, but can be an earlier period, if your basic pay was higher during that period. Your basic pay is the basic salary you earn for your position. It includes increases to your salary for which retirement deductions are withheld, such as shift rates. It does not include payments for overtime, bonuses, etc.⁹

Section 4318 of USERRA governs pension credit for military service time for employees who have left federal, state, local, or private sector jobs for voluntary or involuntary uniformed service and who have met the five USERRA conditions and have returned to their pre-service jobs after periods of uniformed service. Section 4318 provides:

Employee pension benefit plans

(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

⁷ See <https://www.opm.gov/retirement-services/fers-information/computation>.

⁸ Id.

⁹ Id.

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 nonforfeitality 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) 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.¹⁰*

Q: The personnel department of the agency where I work told me that I will need to "buy back" FERS Basic credit for the time when I have been away from work for service. Is that correct? What will I have to pay?

A: You don't need to "buy back" anything, but you will need to *make up the missed employee contributions to FERS Basic*, after you return to work in the fall of 2019. The pertinent language of section 4318 is as follows:

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) of the Internal Revenue

¹⁰ 38 U.S.C. 4318 (emphasis supplied).

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.¹¹

When you are working at your federal civilian job, you get paid every two weeks. A modest payment to FERS Basic is deducted from your paycheck every two weeks. While you have been away from work for military service from 10/1/2018 through 9/30/2019, you have not received federal civilian paychecks, so no such payroll deductions have been made for your FERS Basic contributions.

When you return to work after your period of uniformed service, you will resume making the ongoing contributions to FERS Basic. On top of those ongoing contributions, you will be required to do *make-up contributions*, to cover for the contributions that you did not make during the year that you were away from your civilian job for uniformed service. Like the ongoing contributions, the make-up contributions should be deducted from your federal salary *before federal and state income tax are applied to your compensation*.

You are not required to make up the missed employee contributions to FERS Basic all at once. You must make up the missed contributions during the period that starts on the date you return to work and extends for three times the period of service, but not more than five years.¹²

Q: If have read about “defined benefit plans” and “defined contribution plans” but I don’t understand the distinction. Please explain it to me. Is FERS Basic a defined benefit plan or a defined contribution plan?

A: In a defined benefit plan, the employer defines the benefit that the employee will receive in retirement, and the employer may find it necessary to increase its contribution to support the benefit that employees have been promised. FERS Basic is a defined benefit plan. A formula determines the amount of your monthly pension benefit under FERS Basic.

As I shall explain further below, the TSP is a defined contribution plan. The amount of money in your TSP account when you retire will determine the amount of your monthly payment. The amount of money in your account will be determined by the amount of money you put in the

¹¹ 38 U.S.C. 4318(b)(2).

¹² Id. Thus, if you return to work on 10/15/2019, you will have until 10/15/2022 to make up the missed employee contributions. Because you plan to retire from federal civilian employment in January 2022, you will want to schedule your make-up contributions to FERS Basic so that you will have made up all the missed contributions before your expected retirement date.

account, the amount that your employer (the Federal Government) puts in as matching contributions, and the performance of the investments during your working years. TSP offers a variety of investment plans. You can choose a high-risk-high-yield plan or a low-risk-low-yield plan.

Q: You said that I must contribute to FERS Basic. Doesn't that mean that FERS Basic is a defined contribution plan?

A: No. You should not conflate the distinction between a defined benefit plan and a defined contribution plan with the distinction between a contributory plan and a noncontributory plan. In a contributory plan, employees as well as the employer contribute. In a noncontributory plan, only the employer contributes. A defined benefit plan can be contributory or noncontributory, as can a defined contribution plan. FERS Basic is a contributory defined benefit plan.

Q: How does USERRA apply to the Thrift Savings Plan (TSP)?

A: USERRA does not apply to the TSP. Section 4318 of USERRA provides:

In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter 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.¹³

Section 8432b¹⁴ is very similar to USERRA. That section provides as follows:

(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) [5 USCS § 8432(a)] which would have been made, over the period beginning on date of separation or commencement of leave-

¹³ 38 U.S.C. 4318(a)(1)(B).

¹⁴ Section 8432b should not be confused with section 8432(b). Section 8432(b) is subsection (b) of section 8432. Section 8432b is a separate section that comes after section 8432 and before section 8433.

without-pay status (as applicable) and ending on the day before the date of restoration or reemployment (as applicable); reduced by

(B) any contributions under section 8432(a) or 8440e [5 USCS § 9432(a) or 8440e] actually made by such employee over the period described in subparagraph (A).

(3) Contributions under this subsection—

(A) shall be made at the same time and in the same manner as would any contributions under section 8432(a) [5 USCS § 8432(a)];

(B) shall be made over the period of time specified by the employee under paragraph (4)(B); and

(C) shall be in addition to any contributions then actually being made under section 8432(a) [5 USCS § 8432(a)].

(4) The Executive Director shall prescribe the time, form, and manner in which an employee may specify—

(A) the total amount such employee wishes to contribute under this subsection with respect to any particular period referred to in paragraph (2)(B); and

(B) the period of time over which the employee wishes to make contributions under this subsection. The employing agency may place a maximum limit on the period of time referred to in subparagraph (B), which cannot be shorter than two times the period referred to in paragraph (2)(B) and not longer than four times such period.

(c)

(1) If an employee makes contributions under subsection (b), the employing agency shall make contributions to the Thrift Savings Fund on such employee's behalf—

(A) in the same manner as would be required under section 8432(c)(2) 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) [5 USCS § 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) 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) [5 USCS § 8432(g)], in the case of an employee to whom this section applies—

(A) a separation from civilian service in order to perform the military service on which the employee's restoration or reemployment rights are based shall be disregarded; and

(B) such employee shall be credited with a period of civilianservice 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 shall prescribe regulations to carry out this section.¹⁵

¹⁵ 5 U.S.C. 8432b.