

Leave Active Duty and Apply for Reemployment and Return to Work To Obtain Civilian Pension Credit for the Period of Service

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[About Sam Wright](#)

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¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 1700 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 (VRRRA—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 VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, 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 recently retired Sergeant Major (E-9) in the Army National Guard and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I was born in 1965 and graduated from high school in 1983. I enlisted in the Army and reported to basic training days after the graduation ceremony. I left active duty in 1987 and affiliated with the Army National Guard in my home state. In 1990, after Iraq invaded and occupied Kuwait, I was recalled to active duty involuntarily, along with my National Guard unit. I was also involuntarily recalled in 2001, 2005, 2009, and 2014. Of course, I also performed weekend drills and annual training, attended several Army schools, and performed state active duty when called by the Governor.

In 1992, shortly after I left active duty for my 1990-91 call-up, I joined the police department of my hometown. In January 2014, I left my police officer job to report to active duty when I was recalled to active duty involuntarily for the fifth time. I gave notice to the police chief, orally and in writing, before I reported to active duty. When that involuntary call-up ended in July 2015, I voluntarily remained on active duty in the Active Guard & Reserve (AGR) program. I sent a certified letter to the police chief, informing him that I had decided to remain on active duty. I left active duty in January 2020 and immediately applied for reemployment at the police department, but the police chief has refused to put me back to work, contending that I am beyond the five-year limit under USERRA. Help!

Under the state law of my state and the city ordinances of my city, a police officer is entitled to retire with full benefits after 25 years of police officer service. I always planned to retire from the police department in November 2017, 25 years after I joined the police department and reported to the police academy in November 1992. In November 2017, while I was on active duty, I applied to retire from the police department. The city attorney said that I was not eligible to retire with full benefits in November 2017, because I did not have 25 years of police department service as of January 2014, when I left my civilian job to report to active

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 dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

duty. After I left active duty in January 2020, I applied for reemployment, and I asked to return to work for one pay period and then retire. The city attorney said that I am not entitled to return to work because I am beyond the five-year limit. The city attorney said that I am only entitled to a reduced retirement benefit, based on police department service from November 1992 until January 2014.

What do you think of this issue?

Answer, bottom line up front:

You are entitled to be treated, for civilian pension purposes, as if you had been continuously employed in the civilian job during the entire time that you were away from that job for uniformed service⁴, but only *if and when you met the five USERRA conditions for reemployment*. You did not meet those five conditions in November 2017, because you had not been released from the period of service without having exceeded the five-year limit and without having received a disqualifying discharge from the Army. You met the five conditions in January 2020, except perhaps the five-year limit. If you did not exceed the five-year limit before you left active duty, the employer is required to treat you as if you had been continuously employed.

As I explained in detail in Law Review 15016 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment after a period when you have been away from the job for uniformed service:

- a. You left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.
- b. You gave the employer prior oral or written notice that he was leaving the job to perform service.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which he sought reemployment, 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.⁵

⁴ The entire time that you were away from the job for service includes the period of service, from the day that you entered active duty in January 2014 until the day that you left active duty in January 2020. It also includes the time (perhaps days or weeks) between your last day at the civilian job and the day that you reported to active duty, as well as the time (up to 90 days) between your release from active duty and your application for reemployment. If the employer did not reemploy you immediately after your application, the period of delay also counts toward your time away from work for service. Please see Law Review 19108 (December 2019).

⁵ If you receive a punitive discharge by court martial or administrative discharge characterized as “other than honorable,” you will not have the right to reemployment. See 38 U.S.C. 4304.

- e. After release from the period of service, you made a timely application for reemployment.⁶

You left your police officer job to perform uniformed service and you gave the police department prior notice. You left active duty without having received a disqualifying bad discharge from the Army, and you made a timely application for reemployment. The long pole in the tent is the five-year limit.

USERRA's five-year limit

Section 4312(c) of USERRA sets forth the five-year limit and the exemptions from the limit, as follows:

(c) 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;
- (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;

⁶ Scudder's application for reemployment was timely, and the wording was at least arguably adequate. Please see Law Review 20003 (January 2020). The 8th Circuit panel *did not find that Scudder had made a proper application for reemployment*. Rather, the appellate panel only found that Scudder had done "just enough" to preclude granting summary judgment to the employer on the issue.

(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.⁷

Your active duty period from 1983 to 1987 does not count toward your five-year limit because it was before you began your employer relationship with the police department.⁸ Your involuntary call-up in 1990-91, for Operation Desert Shield and Operation Desert Storm, was also before you began your career at the police department in 1992, and that period does not count toward your five-year limit under USERRA.

Your involuntary call-up periods that began in 2001, 2005, 2009, and 2014 are exempt from the five-year limit under section 4312(c)(4)(A).⁹ Your drill weekends and annual training periods are exempt under section 4312(c)(3),¹⁰ and that same subsection exempts the periods when you were away from work for Army training schools.

Like many National Guard members, you have been called to *state active duty* several times for state emergencies like hurricanes, floods, riots, etc. State active duty is not covered by USERRA, and the periods when you were away from your police department job for state active duty do not count toward your five-year limit under USERRA.¹¹

During your long and distinguished career in the Army National Guard, there have no doubt been days when you were away from work immediately before the start of a period of uniformed service, when you were away from your civilian job to get your affairs in order or to travel to a place of service (like a National Guard armory for a drill weekend). After periods of

⁷ 38 U.S.C. 4312(c) (emphasis supplied). 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 relating to a specific employer relationship.

⁸ Under section 4312(c), the five-year limit is computed “with respect to the employer relationship for which a person seeks reemployment.” 38 U.S.C. 4312(c).

⁹ 38 U.S.C. 4312(c)(4)(A).

¹⁰ 38 U.S.C. 4312(c)(3).

¹¹ Please see Law Review 20025 (March 2020) for a detailed discussion of state active duty. Please see our “state leave laws” section for an article for each state about the state laws that protect the civilian jobs of National Guard members on state active duty.

service, there have been days when you were away from work while traveling back to your home after a period of service or while you have waited a few days to apply for reemployment after release from a period of service. Those days do not count toward your five-year limit.¹²

Your voluntary active duty from July 2015 until January 2020 (54 months) probably counts toward your five-year limit with the police department, but 54 months is less than 60 months (five years). It appears that you are well within the five-year limit and that you have the right to reemployment.

Q: The city attorney has said that I must provide documentation showing that my cumulative periods of uniformed service since November 1992 (when I began my career as a police officer) do not exceed the five-year limit. Is that correct?

A: Yes, but you are only required to provide such documentation that already exists and is readily available. If the documentation is not yet readily available or does not exist, the employer is required to reemploy you promptly while awaiting the documentation. But the employer has the right to delay treating you as continuously employed for pension purposes until you provide documentation showing that you have not exceeded the five-year limit. The documentation requirement is set forth in section 4312(f) of USERRA, as follows:

(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that—

(A) the person's application is timely;

(B) *the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and*

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)

¹² Under section 4312(c), it is "such person's cumulative period of service in the uniformed services" not the cumulative period of absence from the civilian job that is subject to the five-year limit. 38 U.S.C. 4312(c). Please see Law Review 19108 (December 2019).

(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) *An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).*

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.¹³

You need to get started promptly in gathering documentation for each period since November 1992 when you have been away from your police department job for uniformed service. I think that you will be able to show that all your periods of service have been exempt from the computation of the five-year limit, except for the 54-month period from July 2015 until January 2020, and thus that you have not exceeded the five-year limit. I suggest that you contact the state personnel officer and the state judge advocate at the office of the Adjutant General (head of the National Guard) of your state, for assistance in compiling this documentation.

Q: Let us assume that I prove that I met the five USERRA conditions, including the five-year limit, when I left active duty and applied for reemployment in January 2020. What am I entitled to with respect to my police department pension?

A: Section 4318 of USERRA provides:

(a)

(1)

(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to

¹³ 38 U.S.C. 4312(f) (emphasis supplied). Please see Law Review 19113 (December 2019) for a detailed discussion of USERRA's documentation requirement.

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.¹⁴

If you met the five USERRA conditions after you returned from your 2014-20 active duty period, you are entitled to be treated *as if you had been continuously employed in the civilian job* during the entire time that you were away from your civilian job for uniformed service, for the purposes of determining when you qualify to start drawing your civilian pension and for determining the amount of your monthly pension check. You are also entitled to be treated as if you had been continuously employed in the civilian job during all the earlier uniformed services periods (including drill weekends and annual training periods) when you were away from your job for service.

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

For example, let us assume that you return to work for the police department in March 2020 and work until November 2020 (28 years after your start of your police department career) and then retire. Under those circumstances, you are entitled to be treated as if you had been continuously employed at the police department for the entire 28-year period. If you do not establish that you met the five USERRA conditions, you are not entitled to be treated as if you had been continuously employed in the civilian job during the time that you were away from the job for uniformed service. As you can appreciate, establishing that you met the USERRA conditions makes a huge difference in your retirement income. It is worthwhile to assert your USERRA rights.

Q: My police officer colleagues and I make contributions to the pension plan every two weeks, out of our paychecks. I have been away from my police officer job for the last six years, from January 2014 until January 2020, for military service. Am I required to make up these missed employee contributions? If so, how long do I have to make up these missed contributions?

A: Under section 4318(b)(2) of USERRA,¹⁵ you must make up the missed employee contributions during the period that starts on the date of reemployment and extends for three times the period of service, but not more than five years. Thus, if you return to work in March 2020 you have until March 2025 to make up the missed contributions.

Q: As I have stated, I want to retire from the police department as soon as possible. I do not want to wait until March 2025 to retire, to be able to make up all the missed employee contributions. Is it possible for me to retire from the police department and continue making make-up contributions as a retiree?

A: Probably not. The Department of Labor (DOL) USERRA Regulation provides that: “Make-up contributions or elective deferrals may only be made during this period [three times the period of service or five years, whichever is lesser] *and while the employee is employed by the post-service employer.*”¹⁶ Thus, it appears that you must make up all the missed employee contributions before you retire from the police department. It is worthwhile for you to do this even if you must borrow money to make up the missed contributions with a lump-sum payment.

Q: When a police officer (like me) contributes to the pension plan by payroll deduction, it is with pre-tax money. For example, let us say that Officer Smith’s police department

¹⁵ 38 U.S.C. 4318(b)(2). This subsection is italicized, above.

¹⁶ 20 C.F.R. 1002.262(b) (emphasis supplied).

compensation for the year is \$70,000, and she pays \$2000 in contributions to the pension plan. Her federal and state income tax is computed on \$68,000 in income, not \$70,000.

If I remain with the police department to make the make-up contributions, on top of the resumed regular contributions, will the make-up contributions be made with pre-tax money?

A: Yes. Please see Law Review 82 (July-August 2003).¹⁷ If you write a check to make up the missed contributions in a lump sum, that will be with post-tax money. But getting the pension credit for your 2014-20 active duty period is worthwhile even if it means that you must give up the tax break.

Q: The city attorney has asserted that the city cannot be sued in state court because of the state's "sovereign immunity" doctrine and that the city cannot be sued in federal court because of the 11th Amendment of the United States Constitution. Is the city attorney correct?

A: No, the city attorney is wrong. Cities, counties, school districts, and other units of local government are considered *political subdivisions of the state*. Political subdivisions of the state do not share the state's immunity under the 11th Amendment. You can sue a political subdivision in federal court, in your own name and with your own lawyer, just like suing a private employer.¹⁸

I hope that this detailed discussion has been useful to you and to other Reserve and National Guard personnel in understanding your rights under USERRA, and in understanding how to exercise and enforce those rights.

Please join or support ROA

This article is one of 1900-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

¹⁷ That article was written by Lieutenant Marc J. Soss, SC, USNR, a tax lawyer in Florida.

¹⁸ 38 U.S.C. 4323(i). Please see Law Review 19091 (October 2019) for a detailed discussion of suing political subdivisions for violating USERRA.

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.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

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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