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Returning to Work for a Different Federal Agency—Be Sure that you Get USERRA Pension Credit for your Period of Service

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[About Sam Wright](#)

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Q: I am a Sergeant First Class (SFC) in the Army National Guard and a member of the Reserve Organization of America (ROA).³ I am also a federal civilian employee. I began my federal

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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 44 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 38 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 Reserve, the Marine

civilian career in 2015, working for a component of the United States Department of Homeland Security (DHS). In 2018, I left that job to go on active duty under section 502(f) of title 32 of the United States Code (32 U.S.C. 502(f)). Before I left, I gave my DHS supervisor both oral and written notice that I was leaving to perform service in the uniformed services, in accordance with the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I was on active duty for 18 months and left active duty recently. While on active duty, I was assigned to work with another DHS component, in an assignment having to do with border security. That DHS component was impressed with my work and offered me a job, and I accepted the offer. When I left active duty in April 2020, I went to work almost immediately for the new DHS component instead of applying for reemployment with the DHS component that I worked for from 2015 until 2018.

Under these circumstances, am I entitled to federal civilian pension credit for the 18 months that I was away from my civilian DHS job for title 32 active duty? How does this work?

Answer, bottom line up front

Yes, you are entitled to federal civilian pension credit for the 18 months that you were away from your civilian job for military service. You just need to make sure that the personnel office of your new DHS employer is aware that you are not a new federal employee in April 2020. You have important pension rights at DHS, and do not assume that the personnel office will accord you those rights automatically. I suggest that you send a certified letter to the personnel office of the new DHS component, and enclose a copy of this article.

Explanation

As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services, as defined by USERRA.⁴

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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

³ Like the plaintiff (White), Crotty and Jarrard are reserve officers (of the Army National Guard and the Marine Corps Reserve, respectively) and are members of ROA.

⁴ 38 U.S.C. 4312(a).

- b. You must have given the employer prior oral or written notice.⁵
- c. Your cumulative period or periods of uniformed service, relating to your employer relationship with that employer, must not have exceeded five years.⁶
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁷
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.⁸

You clearly meet the first four conditions. You left your DHS job to go on active duty, and you gave the employer prior notice. You have not exceeded the five-year limit on the duration of your period or periods of service. You did not receive a disqualifying bad discharge from the Army.

The one remaining issue is whether you made a timely application for reemployment. I would argue that accepting a job offer with another federal agency and starting to work at that agency within 90 days after you left active duty was the functional equivalent of applying for reemployment with the agency that employed you before your active duty period.⁹

Q: Since I meet the five USERRA conditions, what am I entitled to with respect to my federal civilian pension?

A: Your pension rights are set forth in section 4318 of USERRA, 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 pension benefits of a person reemployed under this chapter shall be determined under this section.

⁵ 38 U.S.C. 4312(a)(1).

⁶ 38 U.S.C. 4312(c). As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit. Your recent 18-month active duty period probably counts toward your five-year limit, but because you did not start your federal civilian career until 2015 you clearly have not exceeded the five-year limit.

⁷ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges awarded by court martial and “OTH” (other-than-honorable) administrative discharges. You have not been discharged at all. You were released from active duty and returned to your former status as a traditional, part-time National Guard member.

⁸ 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.

⁹ In this case, the former agency and the new agency are in the same Cabinet-level department. I think that the result would be the same if your new agency were in a different department of the Federal Government.

(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 nonforfeitarility 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.¹⁰

Because you began your federal civilian career after 1988, you are covered by the Federal Employee Retirement System (FERS), not the older system called the Civil Service Retirement System (CSRS). FERS consists of FERS Basic and the Thrift Savings Plan (TSP).

FERS Basic is a contributory defined benefit plan. While employed, federal civilian employees contribute to FERS Basic each pay period. If you want to be treated as if you had been continuously employed, for the purpose of computing your FERS Basic entitlement, you will need to make up the missed FERS Basic contributions—the contributions that you would have made if you had remained continuously employed in the civilian job during the 18 months that you were away from work for military service.¹¹

You must make up the missed contributions during the period that started on the date that you returned to federal civilian employment in April 2020 and that runs for three times the period of

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

¹¹ 38 U.S.C. 4318(b)(2) (italicized above).

service, but not more than five years.¹² Because your period of service lasted 18 months, you will have 54 months (4.5 years) to make up the missed employee contributions.

Section 4318 does not apply to the TSP.¹³ Your rights in the TSP with respect to credit for your 18 months of active duty are governed by section 8432b of title 5 of the United States Code.¹⁴ That section reads 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 [5 USCS §§ 8401 et seq.], 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-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—

¹² *Id.*

¹³ 38 U.S.C. 4318(a)(1)(B) (italicized above).

¹⁴ *Id.*

(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) [5 USCS § 8432(c)(2)] if the employee contributions were being made under section 8432(a) [5 USCS § 8432(a)]; and

(B) disregarding any contributions then actually being made under section 8432(a) [5 USCS § 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) [5 USCS § 8432(c)(2)], based on the amounts contributed by such individual under section 8440e [5 USCS § 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) [5 USCS § 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) [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) [5 USCS § 8432(e)] with respect to sums required under section 8432(c) [5 USCS § 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 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) [5 USCS § 8433(d)], or paragraph (1) or (2) of section 8433(h) [5 USCS § 8433], 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

The references to the “Executive Director” refer to the Executive Director of the Thrift Savings Board (TSB). For more information, go to the TSB website.¹⁶

¹⁵ 5 U.S.C. 8432b (emphasis supplied).

¹⁶ <https://www.frtib.gov/>.

Please join or support ROA

This article is one of 2000-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. 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, 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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