

## LAW REVIEW<sup>1</sup> 20056

June 2020

### You Must Stay within the Five-Year Limit To Get USERRA Pension Credit for your Military Service Time.

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[About Sam Wright](#)

1.3.1.2—Character and duration of service

1.3.2.3—Pension credit for service time

**Q: I am a retired Sergeant Major of the Army National Guard. I was born in 1967 and graduated from high school in 1985. I enlisted in the Army during my senior year and reported to basic training a few days after the graduation ceremony. I remained on active duty for a decade. I left active duty in 1995 and affiliated with the Army National Guard. I went to work for a large company (let us call it Daddy Warbucks Industries) shortly after I left active duty. A lawyer at the Adjutant General's office of my state told me that you are the "guru" about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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](mailto:SWright@roa.org).

**In the fall of 2001, shortly after the terrorist attacks of 9/11/2001, I was involuntarily called to active duty for two years. In the fall of 2003, I voluntarily agreed to remain on active duty for an additional year, and I was deployed to Southwest Asia most of that time. In the fall of 2004 I signed up for the Active Guard and Reserve (AGR) Program and remained on full-time National Guard duty, under title 32 of the United States Code, until the fall of 2015, when I retired with 21 years of active duty and returned to my job at DWI. When I was called to active duty in 2001, I informed my direct supervisor and the DWI personnel office that I was leaving my job to go on active duty, and I kept the company's personnel office informed of all my extensions of active duty. When I left active duty in 2015, the company welcomed me back and included a story about me and a photograph of me in uniform in the company newspaper.**

**Now that I have passed my 53<sup>rd</sup> birthday, I have started thinking about retiring from DWI. I have heard that under USERRA the company must give me civilian pension credit for my active duty time from 2001 until 2015, and I asked the company's personnel department for a print-out of my DWI pension status. The personnel department referred my inquiry to the legal department, and the company's general counsel sent me a letter saying that I am not entitled to DWI pension credit for my 2001-15 active duty period because I was beyond the five-year limit. What gives?**

#### **Answer bottom line up front**

As I have explained in Law Review 16043 (May 2016) and many other articles,<sup>3</sup> you must meet all five of the USERRA conditions for reemployment<sup>4</sup> to get civilian pension credit for the period of time when you were away from your job for service, *and this includes the five-year limit*. You were beyond the five-year limit with respect to your employer relationship with DWI, so the company was not and is not required to give you DWI pension credit for the service time.

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<sup>3</sup> Please see Law Reviews 20041 (April 2020), 20034 (April 2020), 20031 (March 2020), 20026 (March 2020), 19106 (December 2019), 19070 (August 2019), 19062 (July 2019), 19053 (June 2019), 19032 (March 2019), 19022 (February 2019), 18112 (December 2018), 18104 (October 2018), 18091 (September 2018), 18031 (April 2018), 18026 (March 2018), 17122 (December 2017), 17120 (December 2017), 17119 (December 2017), 17090 (September 2017), 17027 (March 2017), 16075 (August 2016), 16029 (April 2016), 15108 (November 2015), 15082 (September 2015), 15071 (August 2015), 15035 (April 2015), 14026 (February 2014), 13138 (October 2013), 13096 (July 2013), 13043 (March 2013), 13037 (March 2013), 12094 (September 2012), 12059 (June 2012), 12027 (March 2012), 12023 (March 2012), 12014 (February 2012), 11106 (December 2011), 11099 (November 2011), 11026 (April 2011), 10043 (June 2010), 09068 (November 2009), 09024 (June 2009), 08022 (May 2008), 06042 (November 2006), 201 (November 2005), 190 (June 2005), 42 (April 2002), and 6 (October 2001).

<sup>4</sup> You must have left a civilian job (federal, state, local, or private sector) to perform uniformed service. 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 the period or periods of uniformed service that you have performed, relating to the employer relationship for which you seek reemployment*. You must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, you must have been timely in reporting back to work or applying for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

## **USERRA's five-year limit**

Section 4312(c) of USERRA sets forth the five-year limit and its exemptions 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;

**(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 1 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.<sup>5</sup>

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<sup>5</sup> 38 U.S.C. 4312(c).

Your 1985-95 active duty period does not count toward your five-year limit with DWI because that period was before you began your employer relationship with DWI.<sup>6</sup> Your drills and annual training periods are exempt from counting toward your five-year limit.<sup>7</sup> Your involuntary active duty period, from 2001 to 2003, is likewise exempt.<sup>8</sup> Your 2003-04 period, although voluntary, was exempt.<sup>9</sup> But your 2004-15 voluntary AGR duty was not exempt. You are beyond the five-year limit by about six years.

Section 4318 of USERRA sets forth the civilian pension entitlements of the returning service member or veteran, 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.

(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

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<sup>6</sup> Id.

<sup>7</sup> 38 U.S.C. 4312(c)(3).

<sup>8</sup> 38 U.S.C. 4312(c)(4)(A).

<sup>9</sup> 38 U.S.C. 4312(c)(4)(B).

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.<sup>10</sup>

As Congress has made clear in five separate places in section 4318 (all italicized above), the right to be treated *as though one had been continuously employed in the civilian job* applies to a person who is *reemployed under this chapter* [USERRA]. *You were not reemployed under USERRA in 2015—you were rehired—because you failed to meet at least one of the five USERRA conditions.* DWI is not required to treat you as if you had been continuously employed during your 2001-15 active duty period.

**Q: If I was beyond the five-year limit, why did DWI take me back in 2015?**

**A:** It is possible that the company was not aware of the five-year limit and thought that it had a legal obligation to reemploy you. It is also possible that the company was aware that it had no legal obligation to reemploy you but chose to do so anyway, wishing to honor those who have served our country in uniform in the years following 9/11/2001. It is also possible that the company rehired you simply because you were qualified, and the company had a vacancy that it needed to fill. In any case, rehiring you although you did not meet the five USERRA conditions did not mean and does not mean that the employer is required to treat you as continuously employed for pension purposes.

**Q: It is not fair. I kept the DWI personnel office informed of all my active duty extensions. The company never told me that I was approaching the five-year limit. The company should not be permitted to rely on that limit.**

**A:** You were well-advised to keep the company informed about your military status, but the personnel department's acknowledgment of receipt of your notices did not amount to an agreement by the company that any of your periods of service were exempt from the five-year limit. As I have explained in Law Review 16043 (May 2016) and many other articles, *you must keep track of your own five-year limit* if you want to maintain your civilian job behind you as an unburned bridge. The personnel office employee you dealt with probably did not understand the five-year limit, but even if he or she did understand it he or she was under no obligation to share that information with you.

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<sup>10</sup> 38 U.S.C. 4318(c) (emphasis supplied).

**Q: Isn't the employer required to notify the service member of his or her rights under USERRA?**

**A:** The employer's only obligation to inform employees of their USERRA rights is set forth in section 4334, as follows:

**(a) Requirement to provide notice.** Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. *The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.*

**(b) Content of notice.** The Secretary [of Labor] shall provide to employers the text of the notice to be provided under this section.<sup>11</sup>

The italicized sentence above makes clear that the employer's only obligation is to post the notice. More than 20 federal statutes require employers to post notices for employees. At an office supply store, an employer can purchase a large plastic sheet that includes all these notices.

If you check out any employee break room at DWI, you will almost certainly find that large plastic sheet, including the USERRA notice. Few employees read these notices. Even if you had read the USERRA notice, it would not have helped you, because the notice is necessarily terse and general.

You really needed to know about USERRA's five-year limit while you were away from your DWI job on active duty, and before you went over the five-year limit sometime in 2009. At that time, you were away from your civilian job and you probably had no access to DWI employee break rooms.

**Q: During all my years in the Army National Guard, I can recall several "employer support" presentations by ESGR<sup>12</sup> volunteers. Those presentations were about honoring supportive employers by nominating them for ESGR awards and by arranging for them to go on "boss lifts" so they could see their employees in action in the National Guard and Reserve. I never heard a single presentation about USERRA's five-year limit or about how USERRA treats civilian pension entitlements. What gives?**

**A:** Most of the ESGR volunteers who give those presentations are not lawyers, and they are aware only vaguely (if at all) of the details of section 4312(c) and section 4318 of USERRA.

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<sup>11</sup> 38 U.S.C. 4334 (emphasis supplied).

<sup>12</sup> ESGR is the abbreviation for Employer Support of the Guard and Reserve. This is a Department of Defense organization that was founded in 1972. Its mission is to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve.

Moreover, the limited time set aside for these ESGR presentations does not permit the volunteer to go into any detail about USERRA.

During a 25-year period<sup>13</sup> I gave more than 500 speeches to Reserve and National Guard units and other audiences. Some of those speeches lasted three hours or more, and I was able to go into considerable detail. I am not aware that any Reserve Component judge advocate is making this effort today.<sup>14</sup>

**Q: What can I do about this problem?**

**A:** Unfortunately, there is nothing that you or I can do about it now. Neither you nor I have the power to “turn back the hands of time.”<sup>15</sup> I am writing this article, as I have written more than 1800 published articles, to educate those who serve in the National Guard and Reserve today, so that they will not repeat your mistake.

I have devoted my legal career and my military career, indeed my entire adult lifetime, to educating service members about their legal rights (voting rights, reemployment rights, etc.) and helping them to exercise and enforce those rights. It is frustrating to me when I hear from a service member saying: “Why didn’t somebody tell me about this 15 years ago?”

**Please join or support ROA**

This article is one of 2000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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

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<sup>13</sup> The period began in 1982, when I went to work for the United States Department of Labor (DOL) as an attorney and became aware of the reemployment statute, and ended in 2007, when I retired from the Navy Reserve (mandatory retirement with 30 years of commissioned service).

<sup>14</sup> If a reader knows of such a judge advocate, please let me know by sending me an e-mail at SWright@roa.org.

<sup>15</sup> Tyrone Davis released the hit single “Turn Back the Hands of Time” in 1970, when I was 19.

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](http://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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