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Pension Credit for Military Service Time

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About Sam Wright

1.3.2.3—Pension credit for service time

Everything old is new again. Accordingly, we have decided to republish and update some of our earliest "Law Review" articles. This article was originally published as Law Review 4 (July 1998). I have added a lot of new material to this version.

Q: In your "Law Review" 2, you discussed civilian job pension credit for military service that *predates* the start of the relevant civilian job. How is it different if the period of military service *interrupts* my civilian job? If I leave my civilian job for a period of military service and later return to the civilian job, after release from service, am I entitled to be treated as if I had been continuously employed in the civilian job for purposes of my pension in the civilian job?

A: Yes, provided you meet the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3] Briefly stated,[4] those criteria are as follows:

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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, initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles.

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[3] When this article was originally published in 1998, USERRA was codified in sections 4301 through 4333 of title 38 of the United States Code, 38 U.S.C. 4301-33. Congress has since enacted two new sections at the end of USERRA, sections 4334 and 4335. USERRA is now codified at 38 U.S.C. 4301-35.

[4] Please see Law Review 15116 (December 2015) for a detailed discussion of the conditions for 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.[5]
b. You must have given the employer prior oral or written notice, or an "appropriate officer" of the uniformed service must have given the employer notice on your behalf.[6]
c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.[7]
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.[8]
e. After release from the period of service, you must have been timely in reporting back to work or applying for reemployment.[9]

If you meet these five conditions, you are entitled to *prompt*[10] reinstatement in the position of employment that you *would have attained if you had remained continuously employed* (possibly a better position than the one you left) or another position, for which you are qualified, that is of like seniority, status, and pay.[11] Upon reemployment, you are entitled to the seniority and benefits determined by seniority that you had when you left your job for service, plus the additional seniority and benefits determined by seniority that you would have attained if you had remained continuously employed in the civilian job.[12]

Congress enacted USERRA in 1994, to replace the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.[13] In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "The returning veteran does not step back on

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[5] 38 U.S.C. 4312(a). USERRA's definition of "service in the uniformed services" includes active duty, active duty for training, inactive duty training, initial active duty training, funeral honors duty, and time required to be away from civilian employment for an examination to determine fitness to perform any such duty. *See* 38 U.S.C. 4303(13).
[6] 38 U.S.C. 4312(a)(1). Prior notice to the employer is not required if it is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b).
[7] 38 U.S.C. 4312(c). Under section 4312(c), 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. 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.
[8] 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial as part of sentences for serious crimes) and "other than honorable" administrative discharges.
[9] After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.
[10] After a period of service lasting fewer than 31 days, like a drill weekend or a traditional two-week annual training period, you must *report for work,* and you are entitled to immediate reinstatement. After a period of service lasting 31 days or more, you must apply for reemployment. When you make a timely application for reemployment and meet the other four conditions, the employer must reinstate you within 14 days after you submit the reemployment application. *See* 20 C.F.R. 1002.181.
[11] 38 U.S.C. 4313(a)(2)(A).
[12] 38 U.S.C. 4316(a).
[13] Please see Law Review 15067 (August 2015) for a detailed discussion of the history of the federal reemployment statute.

the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[14]

The VRRA did not mention pension entitlements, but in 1977 the Supreme Court applied the escalator principle to pension benefits under a defined benefit plan.[15] In a defined benefit plan, the returning veteran who meets the eligibility criteria under the VRRA[16] is entitled to be treated as if he or she had been continuously employed in the civilian job, in determining when he or she qualifies for the pension and in determining the amount of the monthly pension check. In a footnote in *Alabama Power Company,* the Supreme Court made clear that it was not addressing how the escalator principle applied to defined contribution plans. That question has never been answered.

Q: What is the difference between a defined benefit plan and a defined contribution plan?

A: In a defined benefit plan, the employer is guaranteeing you a pension benefit upon retirement. Usually, there is a formula setting forth how the amount of the monthly pension check will be computed. For example: years of company service times 2% of the highest annual salary equals the monthly pension check.

In a defined contribution plan, the employer is defining what it will contribute to the employee's pension plan account, not the amount of the monthly pension check. The amount of money available for the employee's retirement depends upon the amount of money put in by the employer (and sometimes also by the employee) and the performance of the investments over the course of the employee's career. In a defined contribution plan, unlike a defined benefit plan, there is an account for each participating employee.

Q: Does USERRA apply to both defined benefit plans and defined contribution plans?

A: Yes. Section 4318 of USERRA[17] applies to both defined benefit plans and defined contribution plans, but not in the same way.

Q: I work for a big company—let us call it Daddy Warbucks Industries or DWI, and the company has a defined benefit plan. If I go away for military service and return to my DWI job, and meet the five USERRA conditions, what am I entitled to under section 4318 of USERRA?

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[14] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The citation means that you can find this case in Volume 328 of *United States Reports,* starting at page 275. The specific language quoted can be found at the bottom of page 284 and the top of page 285. I discuss *Fishgold* in detail in Law Review 0803 (January 2008).
[15] *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). I discuss this case in detail in Law Review 09015 (April 2009).
[16] The VRRA criteria are similar but not identical to the USERRA criteria, discussed above.
[17] 38 U.S.C. 4318.

A: You are entitled to be treated as if you had been continuously employed by DWI for the entire time that you were away from work to perform uniformed service, in determining when you qualify for the pension and the amount of the monthly pension check.[18]

Q: My father worked for DWI for 40 years, from 1977 (when he was hired) until 2017 (when he retired). His DWI career was interrupted by three years of active duty in the Army, from 1980 until 1983. He met the VRRA eligibility criteria and was reemployed by DWI in 1983. Is my father entitled to be treated as if he had been continuously employed by DWI from 1977 until 2017?

A: Yes. Because your father completed his active-duty service and was reemployed by DWI before Congress enacted USERRA in 1994, his rights are governed by the VRRA, not USERRA. Under the *Alabama Power Company* precedent, your father is entitled to be treated, for pension purposes, as if he had worked for DWI for the entire 40-year period. If he has not been so treated, it is not too late for him to sue to get his rights.[19]

Q: My sister Mary works for another large company—let us call it Mommy Peacebucks Industries or MPI. Mary's employer has a defined contribution plan. Individual employees like Mary are required to contribute 1% of their MPI earnings to their individual pension accounts, and they are permitted to contribute up to 5%. The employer matches the employee's contributions, and all that money goes into the employee's individual account. The money is invested in an intelligent and diversified way.

Like me, Mary is an Army Reservist. She is currently on one year of active duty, from 10/1/2020 until 9/30/2021. Let us assume that Mary leaves active duty as scheduled on 9/30/2021 and makes a timely application for reemployment at MPI and that she meets the five USERRA conditions for reemployment. What is Mary entitled to under USERRA?

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[18] 38 U.S.C. 4318(a)(2). You are entitled to be treated as if you had been continuously employed by DWI for the entire time that you were away from the job for service. This includes the period of uniformed service. It also includes the time immediately before and after the period of service, when you were away from your civilian job for service. For example, let us assume that you were on active duty for exactly two years, from 10/1/2017 until 9/30/2019. You left your job on 9/16/2017, two weeks before your active duty report date, to get your affairs in order before the start of your uniformed service period. After you were released from active duty on 9/30/2019, you waited 60 days (within the 90-day deadline) to apply for reemployment on 12/1/2019. You returned to work two weeks later, on 12/15/2019. You are entitled to be treated, for pension purposes, as if you had been continuously employed during the entire time that you were away from work for service, from 9/16/2017 until 12/15/2019. Please see Law Review 19052 (June 2019).

[19] Please see Law Review 18034 (April 2018).

A: When Mary returns to work, she should immediately resume her ongoing contributions to the MPI pension account, and the employer should match her contributions. In addition, she should arrange for make-up contributions, to make up for the contributions that she would have made during the year that she was on active duty, and the employer must match those contributions when she makes them.[20]

Mary has three times the period of service, but not more than five years, to make up the missed contributions.[21] If she returns to work on 11/1/2021, she will have until 11/1/2024 to make up the missed contributions. Her make-up contributions, as well as her resumed regular contributions, should be made by payroll deduction, with pre-tax money.[22] Her contributions, and the employer matches, should be computed on what her MPI compensation *would have been if she had been continuously employed.*[23]

Q: Before she went away for military duty, Mary was contributing only the minimum amount (1%) to her pension account. Now that she is a year older, and a year closer to retirement, she wants to increase that to 5%. Can she contribute 5% in the make-up contributions and get the employer match for the maximum amount?

A: Yes. Her contribution is based on what she would have been "permitted or required" to contribute if she had been continuously employed.[24] Thus, she can contribute 5% during the make-up period and get employer matches.

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This article is one of 2,200-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. We add new articles 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.

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[20] 38 U.S.C. 4318(b)(2).
[21] 38 U.S.C. 4318(b)(2).
[22] For example, if her annual compensation from MPI is $100,000 and she contributes $10,000 to her pension account, she should pay federal and state income tax on $90,000.
[23] 38 U.S.C. 4318(b)(3).
[24] 38 U.S.C. 4318(b)(2).

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, and others about the legal rights of service members 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 cost 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 eight[25] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20.00, or $450.00 for a life membership. 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 continue and increase our support to those who serve. You can mail us a contribution to:

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[25] Congress recently created the United States Space Force as the eighth uniformed service.