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Leave Active Duty and Apply for Reemployment before you Exceed the Five-Year Limit To Preserve your Pension

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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 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.

Q: I am a Major in the Army National Guard (ARNG) 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).

On 10/1/2009, I started a new job as a police officer in my hometown. Exactly five years later, on 10/1/2014, I was called to involuntary active duty under title 10 of the United States Code (U.S.C.). I gave both oral and written notice to my direct supervisor and to the police chief. I completed my two-year involuntary call-up on 9/30/2016 and immediately transitioned to voluntary Active Guard & Reserve (AGR) orders under title 32 of the U.S.C. I sent a certified letter to the police chief, informing him that I had voluntarily agreed to remain on full-time active duty at the end of my involuntary call-up. The police chief never responded to my letter.

My current orders expire at the end of Fiscal Year 2021 (9/30/2021). The Adjutant General (head of the National Guard of my State) has asked me to accept a new set of orders and stay on active duty past that date, but I have not yet decided to accept that offer. After having read some of your “Law Review” articles, I want to explore my USERRA rights first.

I contacted the personnel department of my hometown police department to explore my options, and they were not helpful. The personnel director told me that USERRA only applies to involuntary active duty under title 10, not to voluntary active duty under title 32, and that I gave up my reemployment rights when I remained on active duty voluntarily at the end of my involuntary call-up. She also said that USERRA has a five-year limit on the cumulative duration of the period or periods of active duty and that I am already well past that limit. Is the personnel director correct?

A: No, the personnel director is wrong. I suggest that you not rely on the employer’s personnel director for advice and information about USERRA. She probably knows little about the law, and much of what she thinks she knows is wrong.

Moreover, even if she understands USERRA perfectly she has no obligation to share that understanding with you. The employer’s only obligation to inform employees of their USERRA rights is to post the required notice.⁴ Even if you had access to that notice, it is necessarily terse and general and does not provide you the detailed information that you need to exercise and enforce your USERRA rights.

³ At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing business as” name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

⁴ 38 U.S.C. 4334.

The personnel director is wrong when she asserts that USERRA does not apply to voluntary service or to title 32 service. Under USERRA, a person who leaves a civilian job to perform “service in the uniformed services” is entitled to reemployment after release from the period of service if he or she meets the five USERRA conditions.⁵ USERRA defines the term “service in the uniformed services” as follows:

The term “service in the uniformed services” means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, *full-time National Guard duty*, State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.), State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 USCS § 5165f], and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 [10 USCS § 12503] or section 115 of title 32 [32 USCS § 115].⁶

USERRA defines the term “uniformed services” as follows:

The term “uniformed services” means the Armed Forces, *the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty*, the commissioned corps of the Public Health Service, the commissioned officer corps of the National Oceanic and Atmospheric Administration, System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford

⁵ The person must have given the employer prior oral or written notice. The person’s cumulative period or periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment, must not have exceeded five years. There are nine exemptions—kinds of service that do not count toward exhausting the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from the period of service, the person must have made a timely application for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of the five eligibility conditions.

⁶ 38 U.S.C. 4303(13).

Disaster Relief and Emergency Assistance Act [42 USCS § 5165f], and any other category of persons designated by the President in time of war or national emergency.⁷

Applying the italicized words in the two definitions above, USERRA applies to voluntary as well as involuntary service under title 32 as well as title 10.⁸ The personnel director is wrong when she contends otherwise.

The personnel director is correct when she says that there is a cumulative five-year limit, but there are also nine exemptions—kinds of service that do not count toward the five-year limit.⁹ Your two-year involuntary call-up does not count toward your five-year limit.¹⁰ The AGR duty that you have performed since 2016 is not exempt from the computation of your five-year limit. If you remain on active duty after 9/30/2021 you will not have the right to reemployment unless the period is exempt from the five-year limit under one of the exemptions stated in section 4312(c) of USERRA.

Q: The personnel director said that the city cannot reemploy me this fall because the city is having financial troubles and the City Council has ordered that there be no new hiring, and moreover there is no police department vacancy to fill. What do you say about that?

A: If you meet the five USERRA conditions after you leave active duty on 9/30/2021, the city has the legal obligation to reemploy you in the position that you would have attained if you had remained continuously employed, or another position for which you are qualified that is of like seniority, status, and pay,¹¹ *even if that means that the city must displace another employee to do so.* The pertinent section in the Department of Labor (DOL) USERRA regulation is as follows:

Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. *The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.*¹²

⁷ 38 U.S.C. 4303(17) (emphasis supplied).

⁸ USERRA also applies to voluntary or involuntary service under title 14, which applies to the Coast Guard.

⁹ 38 U.S.C. 4312(c). 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.

¹⁰ 38 U.S.C. 4312(c)(4)(A).

¹¹ 38 U.S.C. 4313(a)(2)(A), 4316(a).

¹² 20 C.F.R. 1002.139(a) (emphasis supplied).

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that your right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit¹³ has held:

Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that “the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee’s absence, even if reemployment might require the termination of that replacement employee.”¹⁴

The United States Court of Appeals for the Federal Circuit¹⁵ has held:

The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols’ [Nichols was the returning veteran and plaintiff] former position was “unavailable” because it was occupied by another and thus it was within the department’s discretion to place Nichols in an equivalent position. This is incorrect. Nichols’ former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ... Although occupied by Walsh, Nichols’ former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.¹⁶

Q: The personnel director referred my inquiry to the city attorney, and he said that displacing another employee to make room to reemploy me would violate State law and the collective bargaining agreement between the city and the police officers’ union. What do you say about that?

¹³ The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

¹⁴ *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013).

¹⁵ The Federal Circuit is the specialized federal appellate court that sits in our nation’s capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

¹⁶ *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer’s failure to reemploy the returning veteran, I invite the reader’s attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln-St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.*, 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981); *Jennings v. Illinois Office of Education*, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Musciante v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

A: USERRA is a floor and not a ceiling on the rights of service members and veterans. State laws and collective bargaining agreements can provide greater or additional rights *but cannot diminish or eliminate rights conferred by the federal reemployment statute*. The pertinent USERRA section is as follows:

- (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter].**
- (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.¹⁷**

The Supremacy Clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁸

Almost 200 years ago, the Supreme Court enunciated the basic principle that a federal statute trumps a conflicting State statute or State Constitution.¹⁹ As I have explained in footnote 2 and Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the VRRA, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress secured the veteran under the Act."²⁰

Q: The city has a defined benefit pension plan for police officers. The full benefit (the most generous) is for officers who have served for at least 25 years. The standard benefit, which most officers use, is for officers who have served at least 20 years but less than 25. The early retirement option is for officers who have served at least ten years. In the standard benefit

¹⁷ 38 U.S.C. 4302.

¹⁸ United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

¹⁹ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

²⁰ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (emphasis supplied).

option and the full benefit option, the retiree starts drawing the benefit immediately upon retirement. For the early retirement option, the retired officer starts drawing the monthly benefit upon reaching the age of 50. The amount of the benefit is based on a formula that includes the number of years of police officer service and the officer's "high three" compensation, meaning the average of the officer's highest three years of police officer compensation.²¹ Each year, the retiree receives a Cost-of Living Adjustment (COLA) to protect the retiree from the effects of inflation.

If I leave active duty as scheduled on 9/30/2021 and make a timely application for reemployment, and otherwise meet the five USERRA conditions, what are my USERRA rights with respect to the city's police officer pension plan?

A: 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

²¹ The high three are usually but not always the last three years before retirement.

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.²²

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]. If you meet the five USERRA conditions and return to work at the police department at least briefly, you are entitled to have the whole time that you have been away from work treated as police department service in determining when you qualify for the pension and the amount of the monthly pension benefit in retirement. If you fail to meet one or more of the five USERRA conditions, you are not entitled to pension credit for the uniformed service time, even if you later return to work for the police department.

Q: I would like to remain on full-time active duty or return quickly to full-time active duty, to continue my military career, but I want to lock in my entitlement to at least the early retirement benefit (at age 50) in the police department pension plan. Can I return to work briefly (perhaps for one pay period) and then retire from the police department, secure in the knowledge that I will start drawing the early retirement benefits, with the cost-of-living adjustment, when I turn 50?

A: Yes. If you meet the five USERRA conditions and return to work, you are entitled to be treated *as if you had been continuously employed by the police department for the entire time since you were hired on 10/1/2009*.²³ Thus, you will already be over the ten-year threshold, as of your first day back to work, and you can retire from the police department and start drawing your monthly retirement checks on your 50th birthday.

²² 38 U.S.C. 4318(c) (emphasis supplied).

²³ You are entitled to pension credit for the entire time that you have been on active duty and **Q:** for the time, before and after your active-duty period, when you were away from work because of your military service. But the time before and after the active-duty period does not count toward exhausting your five-year limit. Please see Law Review 19052 (June 2019).

Q: I have 60 days of leave in the bank, with the Army. I want to take leave to apply for reemployment and return to work for one pay period and then retire. Will this work?

A: No, that plan will not work. To have the right to reemployment after a period of uniformed service, you must make a timely application for reemployment “upon completion of a period of service in the uniformed services.”²⁴ When you are on leave from active duty, even terminal leave, you have not yet completed the period of service. You must *leave active duty* and then apply for reemployment at the police department.

Q: This information is helpful. Where can I go for further information?

A: I invite your attention to www.roa.org/lawcenter. You will find more than 2,200 “Law Review” articles about USERRA and other laws that are especially pertinent to those who serve our country in the National Guard or Reserve. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. If you cannot find the answer to your specific question, send me an e-mail at samwright50@yahoo.com.

Please join or support ROA

This article is one of 2200-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, including *amicus curiae* (“friend of the court”) briefs in the Supreme Court and other courts, we educate service members, their spouses, attorneys, judges, employers, and others about the legal rights of National Guard and Reserve 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 costs of providing this service and all the other great services that ROA provides.

²⁴ 38 U.S.C. 4312(e)(1).

If you are now serving or have ever served in any one of our nation's eight²⁵ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20, or \$450 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 keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

²⁵ Congress recently established the United States Space Force as the eighth uniformed service.