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You Are Entitled to Federal Civilian Pension Credit for your 1988-91 Active Duty Period, But Not under USERRA.

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[About Sam Wright](#)

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Q: I am a Navy veteran and a career Federal civil service employee. I recently joined the Reserve Organization of America (ROA)³ after I found one of your “Law Review” articles

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2300 “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 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

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 45 years, I have collaborated 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 <mailto:swright@roa.org>.

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

about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I joined your organization because I found your articles to be most helpful to me in understanding my rights as a veteran.

I graduated from college in 1986 and soon thereafter started an entry-level Federal civilian job. Two years later, in June 1988, I enlisted in the United States Navy and left my civilian job to report to Officer Candidate School (OCS). I served honorably and was released from active duty in June 1991. I promptly applied for reemployment and returned to the same Federal civilian job that I held until I left the job in June 1988 to join the Navy.

Just recently, I started researching my potential retirement benefits, and I learned that I was not credited, for Federal civilian pension purposes, for my three years of active duty. Doing an Internet search, I found your Law Review 21059 (September 2021), about how USERRA applies to civilian pension plans, and I am entitled to credit for my three active-duty years in computing my Federal civilian pension. I inquired of the personnel office at the Federal agency where I work. A lady in the office told me that USERRA does not apply to me because my active-duty period began and ended before USERRA was enacted in 1994 and that USERRA only applies to National Guard and Reserve service, not regular military service like the service I performed. Is the lady correct?

Answer, bottom line up front

The personnel office lady is correct that USERRA was enacted in 1994, but you have rights under the Veterans' Reemployment Rights Act (VRRA), the original Federal reemployment statute enacted in 1940 and replaced by USERRA in 1994. Moreover, the VRRA and USERRA both apply to regular military service as well as National Guard and Reserve service.

Explanation

History of the reemployment statute—1994 transition to new law

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue update and rewrite of the much-amended 1940 reemployment statute. Your rights are governed by the VRRA, not USERRA.⁴

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 See *Lucas v. District of Columbia*, 2019 WL 4860730 (D.D.C. 2019), rejecting employer's contention that veteran whose reemployment claim arose in 1978 could not seek relief under the VRRA law because that statute no longer existed).

The enactment of USERRA in 1994 did not destroy accrued rights under the VRRA, based on military service performed before the enactment of USERRA. Section 8 of USERRA (not codified in the United States Code) provides, in pertinent part, as follows:

- (1) Except as otherwise provided in this Act, the amendments made by this Act shall be effective with respect to reemployments initiated on or after the first day following the 60-day period [12/12/1994] beginning on the date of enactment of this Act [10/13/1994].
- (2) The provisions of chapter 432 of title 38 [the VRRA law], United States Code, in effect on the day before such date of enactment, shall continue to reemployments initiated before the end of such 60-day period.⁵

Eligibility criteria for reemployment under the VRRA law

The eligibility criteria for reemployment under the VRRA law are similar but not identical to the eligibility criteria under USERRA.⁶ The VRRA law's eligibility criteria were as follows:

- a. You must have left a civilian job (Federal, State, local, or private sector) to perform uniformed service.
- b. Your cumulative period of uniformed service, relating to your employment relationship with that employer, must not have exceeded four years.
- c. You must have served honorably.
- d. After release from active duty, you must have applied for reemployment within 90 days.

You will need to prove that you met these conditions, and that should not be difficult. The DD-214 form that you received in 1991 will show the date of your entry on active duty, the date you left active duty, and that your service was honorable.⁷ Your Federal civilian personnel record will show that you resumed your Federal civilian career well within the 90-day deadline after you left active duty.

Pension credit under the VRRA law

Unlike USERRA, the VRRA law did not specifically mention pension plans and the entitlement of the returning veteran to be treated as if continuously employed in the civilian job in

⁵ Section 8, Public Law 103-353, 108 Stat. 3149, 3715. These transition rules have not been codified into the United States Code, but they are part of the permanent Federal law. The transition rules are printed in a note that follows section 4301 of title 38, the first section of USERRA.

⁶ See Law Review 15116 (December 2015) for a detailed discussion of the USERRA eligibility criteria.

⁷ If you cannot find the DD-214 form that you received in 1991, it is possible to obtain a duplicate. See <https://www.aardvarkresearchgroup.com/>.

determining eligibility for and the amount of civilian pension payments. 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 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.”⁸

Three decades later, the Supreme Court applied the escalator principle to benefits under a defined benefit pension plan.⁹ Mr. Davis was employed by the Alabama Power Company from 1936 to 1971, but his career with the company was interrupted by 30 months of military service, from March 1943 until September 1945, when he was honorably discharged at the end of World War II. While he was away at war, the company established a traditional pension plan in 1943, and the plan rewarded work for the company both before and after the plan was established.

When Mr. Davis retired from the company in 1971, he received a pension based on continuous service from 1945 to 1971. The Supreme Court held that, under the VRRA law’s escalator principle, Mr. Davis was entitled to computation of his pension based on continuous service from 1936 to 1971—that his 30 months of military service did not interrupt his continuous accumulation of seniority for pension purposes. For Mr. Davis, crediting his military service time meant an additional \$18 per month in his pension check.¹⁰

The Federal Employee Retirement System (FERS)

The United States Office of Personnel Management (OPM) administers retirement programs for Federal civilian employees, including the Federal Employee Retirement System (FERS) and the older system, called the Civil Service Retirement System (CSRS). OPM has described FERS as follows:

⁸ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

⁹ *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977). A defined benefit plan is a traditional pension plan, like your plan at the telephone company. In a defined benefit plan, the employer is defining (guaranteeing) a specific retirement benefit, typically including the number of years of company service and the highest company position or earnings attained. A defined contribution plan is different. In a defined contribution plan, the employer is defining only the contributions that the employer will make, and those employer contributions may or may not be matched by employee contributions. In a defined contribution plan, but not a defined benefit plan, there is an account for each employee and retiree. In a defined contribution plan, the amount that the retiree will receive is determined by the amount of money deposited in his or her account during the working years and the performance of the investments during the working and retirement years. I discuss these matters in detail in Law Review 09015 (April 2009).

¹⁰ You have told me that in your case crediting your 24 months of military service will result in an additional \$180 per month for you, or exactly ten times the amount at issue for Mr. Davis. That is about right, because Mr. Davis retired from his career during your two-year military service, almost half a century ago.

Congress created the Federal Employees Retirement System (FERS) in 1986, and it became effective on January 1, 1987. Since that time, new Federal civilian employees who have retirement coverage are covered by FERS.

FERS is a retirement plan that provides benefits from three different sources: a Basic Benefit Plan, Social Security and the Thrift Savings Plan (TSP). Two of the three parts of FERS (Social Security and the TSP) can go with you to your next job if you leave the Federal Government before retirement. The Basic Benefit and Social Security parts of FERS require you to pay your share each pay period. Your agency withholds the cost of the Basic Benefit and Social Security from your pay as payroll deductions. Your agency pays its part too. Then, after you retire, you receive annuity payments each month for the rest of your life.

The TSP part of FERS is an account that your agency automatically sets up for you. Each pay period your agency deposits into your account amount equal to 1% of the basic pay you earn for the pay period. You can also make your own contributions to your TSP account and your agency will also make a matching contribution. These contributions are tax-deferred. The Thrift Savings Plan is administered by the Federal Retirement Thrift Investment Board.

For more information about TSP, [see their website \(external link\)](#). See the [SSA website \(external link\)](#) for more information about the Social Security portion of your retirement benefit. This website covers the Federal Employees Retirement System. Through the menu links on the left, you can find information about the following FERS retirement topics:

- [Eligibility](#)— The main eligibility requirements for the common types of retirements.
- [Computation](#)— How your retirement annuity is computed.
- [Creditable Service](#) – Rules showing the civilian and military service that can be used to compute your FERS retirement benefits.
- [Planning and Applying](#)— It's never too early to start planning for retirement in order to ensure it goes smoothly. Here you will find information to help ensure your retirement starts well.

- [Early Retirement](#)—Explanation of the minimum retirement age and early retirement if your agency undergoes a “reduction in force” or you are involuntarily separated other than for cause.
- [Types of Retirement](#)—Learn about the age, service requirements and considerations affecting the various types of retirement.
- [Deferred](#)—If you are a former Federal employee who was covered by the Federal Employees Retirement System (FERS), you may be eligible for a deferred annuity at age 62 or the Minimum Retirement Age (MRA).
- [Survivors](#)—When a Federal employee dies, monthly or lump sum benefits may be payable to survivors. Learn about these Survivor benefits here.
- [Military Retired Pay](#)—Adding military service to your civilian service
- [Service Credit](#)—Payment to increase your annuity for civilian service when no CSRS retirement deductions were withheld or were refunded or for military service after 1956.
- [Former Employees](#)—Options if you leave your Government job before becoming eligible for retirement.¹¹

Applying the VRR law to FERS Basic

FERS is a hybrid pension plan—partly a defined benefit plan and partly a defined contribution plan. FERS Basic is a defined benefit plan, albeit a modest one. The VRR law, as interpreted by *Alabama Power Co. v. Davis*, applies to defined benefit plans, and that includes FERS Basic. In determining your benefits in the FERS Basic plan, you should be credited for your three years of active duty, from 1988 to 1991.

Applying the VRR law to the Thrift Savings Plan

The Thrift Savings Plan (TSP) is a defined contribution plan. Employer and employee contributions are invested in diversified portfolios and the returns on the investments determine the employee’s benefits upon retirement. USERRA applies to both defined benefit plans and defined contribution plans,¹² but the VRR law only applies to defined benefit plans.

Moreover, the TSP regulations provide:

¹¹ See <https://www.opm.gov/retirement-services/fers-information/>.

¹² 38 U.S.C. § 4318.

Make-up contribution election. Upon reemployment or return to pay status [after military service], an employee has 60 days to elect to make up missed contributions. An employee's right to make retroactive TSP contributions will expire if an election is not made within 60 days of the participant's reemployment or return to pay status.¹³

Your Federal agency employer should have informed you of the need to make the election,¹⁴ but that probably never happened. In any case, it is probably too late today, more than three decades after you returned from military service, to make the election today.

The regulation further provides:

(c) Missed agency contributions. This paragraph (c) applies only to an employee who would have been eligible to receive agency contributions had he or she remained in civilian service or pay status. A FERS employee who separates or enters nonpay status to perform military service is eligible to receive agency makeup contributions when he or she is reemployed or restored to pay status in the civilian service, as follows:

(1) *The employee is entitled to receive the Agency Automatic (1%) Contributions that he or she would have received had he or she remained in civilian service or pay status. Within 60 days of the employee's reemployment or restoration to pay status, the employing agency must calculate the Agency Automatic (1%) makeup contributions and report those contributions to the record keeper, subject to any reduction in Automatic (1%) Contributions required by paragraph (c)(5) of this section.*

(2) An employee who contributed to a uniformed services TSP account during the period of military service is also immediately entitled to receive agency matching makeup contributions to his or her civilian account for the employee contributions to the uniformed services account that were deducted from his or her basic pay, subject to any reduction in matching contributions required by paragraph (c)(4) of this section. However, an employee is not entitled to receive agency matching makeup contributions on contributions that were deducted from his or her incentive pay or special pay, including bonus pay, while performing military service.

(3) An employee who makes up missed contributions is entitled to receive attributable agency matching makeup contributions (unless the employee has already received the maximum amount of matching contributions, as described in paragraphs (c)(2) and (c)(4) of this section).

¹³ 5 C.F.R. § 1620.42(b).

¹⁴ 5 C.F.R. § 1620.46(a).

(4) If the employee received uniformed services matching contributions, the agency matching makeup contributions will be reduced by the amount of the uniformed services matching contributions.

(5) If the employee received uniformed services Automatic (1%) Contributions, the Agency Automatic (1%) Contributions will be reduced by the amount of the uniformed services Automatic (1%) Contributions.¹⁵

At a minimum, your employing agency is required to pay the 1% automatic contribution that should have been paid promptly upon your reemployment in 1991, and you are entitled to interest on that payment, as if it had been made, as it should have been made, in 1991.

Please join or support ROA

This article is one of 2,300-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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

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, DOL investigators, ESGR volunteers, congressional and state legislative staffers, 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 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 eight¹⁶ 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

¹⁵ 5 C.F.R. § 1605.31(c) (emphasis supplied).

¹⁶ Congress recently established the United States Space Force as the 8th uniformed service.

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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