

LAW REVIEW¹ 21059

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Pension Rights upon Reemployment

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[About Sam Wright](#)

1.3.2.3—Pension credit for service time

1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Army National Guard (ARNG) and a life member of the Reserve Organization of America (ROA).³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁴

I am the same guy who asked the questions in Law Reviews 21057 and 21058, the two immediately preceding articles in this series. As I consider the matter further, the most important consideration as to my returning to work for the school district is my right to pension credit in the state teacher retirement system for my State. What does USERRA provide regarding my pension rights?

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,200 “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), 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 published so far, but we are always looking for “other than Sam” articles by other lawyers who are ROA members or willing to join ROA.

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 and retired as a Captain (O-6) in 2007. I am a life member of ROA and have served on the national staff as the Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC during its six years in operation as a funded ROA program. I have continued some of the work of the SMLC as a volunteer and ROA member since I left the national staff in 2015.

³ At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

⁴ 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. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

A: Section 4318 of USERRA governs your rights vis-à-vis your civilian employer's pension system, 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 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.⁵

Q: The teacher retirement system is administered under State law by a State agency located in our State capital. Is USERRA binding on that State agency as well as my local school district? What is the relationship between State law and USERRA?

A: Under section 4302 of USERRA,⁶ this Federal law is a floor and not a ceiling on the rights of service members and veterans. A State law or local ordinance can give you *greater or additional rights*, but State laws and local ordinances cannot take away your Federal statutory rights under USERRA or impose additional prerequisites upon your exercise of USERRA rights. Under the Supremacy Clause of the Constitution,⁷ a Federal statute like USERRA trumps a conflicting State law, local ordinance, or even a State Constitution. To enforce your USERRA pension rights, it may be necessary to sue the State teacher retirement agency as well as the local school district.

Q: The teacher retirement system in our State is a contributory defined benefit pension plan. Each teacher contributes to the pension fund as a deduction from each biweekly paycheck, and the employer (the local school district) matches that contribution. A teacher must have a minimum of 15 years of teaching in public schools in the State to qualify for a pension, and the amount of the teacher's monthly retirement check is determined by a formula that includes the retired teacher's number of years of teaching employment and his or her "high three" of teaching compensation.

⁵ 38 U.S.C. 4318 (emphasis supplied).

⁶ 38 U.S.C. 4302.

⁷ United States Constitution, Article VI, Clause 2.

I began my teaching career in the State in August 2006, at the start of the 2006-07 academic year. The way I figure it, I qualify for the retirement benefit as of September 2021, 15 years after I began my teaching career. I want to start drawing my teacher pension now, based on 15 years of teaching service, including constructive teacher retirement credit for the times that my teaching career has been interrupted by military service, including my current service since December 2019. If necessary, I will take a few days of leave to return home, sign the necessary papers at the school district office, and then continue my active duty period. Will this plan work?

A: No, that plan will not work. You are entitled to civilian pension credit under USERRA only *upon reemployment under USERRA*. That point is stated explicitly in five separate places in section 4318. In my quotation of that section, above, I have italicized each of those places.

To get teacher retirement credit for your current active duty period that began in December 2019, you must *meet the five USERRA conditions*.⁸ You did not have 15 years of teaching service by December 2019, when you left the teaching job for military service, and you are not yet entitled to teacher retirement credit for your military service since December 2019.

Q: After each of my earlier military service periods that interrupted my teaching career, I made up (after returning to work) the missed employee contributions to the teacher retirement system. When I return to work after my current active duty period, will I be required to make up the missed employee contributions during the military service period that began in December 2019?

A: Yes.⁹ You must make up the missed employee contributions within the period that starts on the date of reemployment and extends for three times the period of service, but not more than five years. Thus, if you are reemployed in January 2025, after you are released from active duty in December 2024, you must make up the missed contributions by January 2030.¹⁰

⁸ You already met the first two conditions in December 2019, when you left your civilian job to perform uniformed service and when you gave the employer prior oral or written notice. You must be *released* from the period of service without having exceeded the cumulative five-year limit and without having received a disqualifying bad discharge from the Army. After release from the period of service, you must make a timely application for reemployment. You have not met and cannot yet meet those last three conditions. Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

⁹ 38 U.S.C. 4318(b)(2).

¹⁰ This assumes that you return to work for the school district and remain employed. The DOL USERRA regulation provides: “Make-up contributions or elective deferrals may only be made during this period [the period that is three times the period of service but not more than five years] *and while the employee is employed with the post-service employer.*” 20 C.F.R. 1002.262(b) (emphasis supplied).

When you return to work, you must resume making the ongoing contributions and arrange for the make-up contributions. Both the ongoing contributions and the make-up contributions should be made by payroll deduction from pre-tax earnings.

Q: How will my required make-up contributions to the pension fund be computed?

A: Your required make-up contributions to the pension fund will be computed based on a percentage on *what you would have earned as a teacher if you had remained continuously employed instead of leaving for uniformed service.*¹¹

Please join or support ROA.

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. New articles are added each month.

ROA is almost a century old. It was established in October 1922 by a group of veterans of “The Great War” (as World War I was then known). Captain Harry S. Truman was one of those veterans. 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 defense. 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 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, military spouses, attorneys, judges, employers, and others about the legal rights of service members and 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 eight¹² uniformed services, you are eligible for full ROA membership, including the right to vote and run for office in the organization. Eligibility includes those who are serving or have served in the Active Component, the Reserve, or the National Guard, and enlisted members as well as officers are eligible.

¹¹ 38 U.S.C. 4318(b)(3).

¹² Congress recently established the United States Space Force as the eighth uniformed service.

If you are eligible, please join on-line at www.roa.org or call ROA at 800-809-9448. The cost is only \$20 per year or \$450 for a life membership. If you are not eligible, please support us financially to help us continue this work. You can mail us a check as follows:

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