

Because Joe Smith Met the Five USERRA Conditions for his 2018-21 Active-Duty Period, You Must Give him Civilian Pension Credit for the Entire Period that he Was away from Work for Service.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.1.7—USERRA applies to State and local governments

1.3.1.2—Character and duration of service

1.3.2.3—Pension credit for service time

1.8—Relationship between USERRA and other laws/policies

Q: I am the Personnel Director for a city government. Our city has a police officer (let us call him “Joe Smith”) who is a Colonel in the Army Reserve and, he says, a life member of your organization. I am trying to understand Joe’s rights under the Uniformed Services

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 Spouses’ 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 46 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 (VRRRA—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 VRRRA 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 VRRRA 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.

Employment and Reemployment Rights Act (USERRA). Joe referred me to your “Law Review” articles and suggested that I contact you to help me understand this complex law.

Joe was born in this city in 1977. After he graduated from high school, he attended our state university from 1995 to 1999 and participated in the Army’s Reserve Officers Training Corps (ROTC). Upon graduation in 1999, he was commissioned a Second Lieutenant. He served on full-time regular active duty for six years, from June 1999 until June 2005, when he was released from active duty and affiliated with the Army Reserve. We hired him as a police officer shortly after he left active duty.

Since we hired him, Joe has been away from work for military duty for more than six years, not including his short-term military assignments like drill weekends and annual training. He was called to involuntary active duty and deployed to Iraq for 12 months in 2007-08 and for another 12 months in Afghanistan in 2010-11. In 2016-17, he was away for almost a year, to attend the Army War College in Carlisle, Pennsylvania. Joe volunteered to serve a three-year Active Guard and Reserve (AGR) tour, from 10/1/2018 until 9/30/2021.

Joe showed up in my office in early October 2021, with a copy of his DD-214 in hand, and asked for his job back. We rehired him because we badly need police officers, but we have not (so far) given him police officer pension credit for the time that he was away from work between 2018 and 2021, although we have given him credit for his earlier military service periods during his career as a police officer.

I understand that there is a five-year cumulative limit on the periods of uniformed service that an individual is permitted to serve, with respect to an employer relationship with a specific employer, and still have the right to reemployment under USERRA. I think that Joe’s 2018-21 voluntary AGR tour put him over the five-year limit.

I think that Joe was not entitled to reemployment when he showed up in my office in October 2021. We rehired him because we need police officers, not because Federal law required us to reemploy him. Thus, we are not required to give him pension credit for the 2018-21 period when he was away from work for voluntary military service. What do you think?

Answer, bottom line up front:

Joe met the five USERRA conditions for reemployment in October 2021, so the city is required to reemploy him and to treat him as if he had remained continuously employed in the civilian job, for seniority and pension purposes, during the entire time that he was away from work for service.

Explanation

The five USERRA conditions

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, any service member or veteran must meet five simple conditions to have the right to reemployment under USERRA:

- a. He or she 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.³
- b. He or she must have given the employer prior oral or written notice.⁴
- c. He or she must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which the person seeks reemployment.⁵
- d. He or she must have been released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. He or she must have made a timely application for reemployment after release from the period of service.⁷

Joe Smith met these five conditions

In August 2018, Joe Smith gave the city oral and written notice that he would be leaving his job to report for uniformed service, and he left on 9/22/2018 to report to active duty on 10/1/2018.⁸ Joe has not exceeded the five-year limit—discussed separately below. Joe did not receive a disqualifying bad discharge—indeed, he was not discharged at all. He simply left active duty. Joe applied for reemployment with the city within a few days after he was released from active duty on 9/30/2018. He was well within the 90-day deadline.

Joe Smith did not exceed the five-year limit.

Section 4312(c) of USERRA sets forth the five-year limit, and the exemptions from the limit, as follows:

³ 38 U.S.C. § 4312(a).

⁴ 38 U.S.C. § 4312(a)(1).

⁵ 38 U.S.C. § 4312(c).

⁶ 38 U.S.C. § 4304.

⁷ 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.

⁸ Joe was entitled to leave his civilian job a few days before the start of his active-duty period in order to get his affairs in order before beginning an extended period of service. 20 C.F.R. § 1002.74(b).

(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 10 [10 USCS §§ 331 et seq.] 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.⁹

Yes, there is a cumulative five-year limit on the period or periods of uniformed service that a person like Joe can perform, with respect to an employer relationship with a specific employer,

⁹ 38 U.S.C. § 4312(c) (emphasis supplied).

and still have the right to reemployment, but there are also nine exemptions under section 4312(c), copied above. That is, there are nine kinds of service that do not count toward exhausting Joe's five-year limit with respect to the city. Joe has not exceeded the limit. Under section 4312(c)(3),¹⁰ Joe's drill weekends and annual training tours do not count toward his five-year limit, and that subsection also excludes his year of training duty at the Army War College. Under section 4312(c)(4)(A),¹¹ Joe's involuntary duty periods in Iraq and Afghanistan are also exempt from his five-year limit.

Joe performed six years of active duty (1999-2005) before he began his employment with the city. That six-year period was not "with respect to the employer relationship for which a person seeks reemployment"¹² so that period does not count toward his five-year limit with respect to the city. Joe's 2018-21 AGR period counts toward his five-year limit, but all of his other uniformed service periods are exempt.

Joe's three-year AGR tour, from 2018 to 2021, did not put him over the five-year limit because he had used none of that limit prior to 2018. Joe met the five USERRA conditions, including the five-year limit, when he applied for reemployment with the city in October 2021. Thus, Joe was entitled to reemployment in October 2021 just as he was entitled to reemployment at the end of each of his earlier periods of uniformed service.

Joe Smith's rights under section 4318 of USERRA

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 [29 USCS § 1002(2), (33)]) 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 [38 USCS §§ 4301 et seq.] shall be those rights provided in section

¹⁰ 38 U.S.C. § 4312(c)(3).

¹¹ 38 U.S.C. § 4312(c)(4)(A).

¹² 38 U.S.C. § 4312(c).

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 [38 USCS §§ 4301 et seq.] 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 [29 USCS § 1145] 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 [29 USCS § 1002(37)], 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 [26 USCS § 402(g)(3)]) 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 [29 USCS § 1002(37)], 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.¹³

Joe Smith is a person who has been “reemployed under this chapter” (USERRA) because he met the five USERRA conditions and has returned to work for his pre-service employer, the city. Accordingly, the city is required to treat him *as if he had been continuously employed by the city* during this most recent (2018-21) period of uniformed service and during all of his previous periods that have interrupted his police officer career. It does not matter that the cumulative periods of service add up to more than five years.

Q: I talked to Assistant State Attorney General Bob Jones. Mr. Jones told me that our State law provides that under no circumstances is a State or local government employee entitled to more than five years of civilian pension credit for military service time. What do you say about that?

A: If your State law says that, that State law is void under the Supremacy Clause of the United States Constitution, which provides:

¹³ 38 U.S.C. § 4318.

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 in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.¹⁴

Almost two centuries ago, the Supreme Court established the basic principle that a Federal statute trumps a conflicting State statute or even a State constitution.¹⁵ A State law or local ordinance that conflicts with USERRA is void and unenforceable.

Q: What is the relationship between USERRA and State laws, local ordinances, and collective bargaining agreements between employers and unions?

A: USERRA is a floor and not a ceiling on the rights of service members and veterans. USERRA does not supersede or override a State statute, a local ordinance, or a collective bargaining agreement that provides *greater or additional rights, over and above USERRA*. USERRA trumps any of these things as far as they purport to limit USERRA rights or to impose additional prerequisites on the exercise of USERRA rights. Section 4302 of USERRA provides:

(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.¹⁶

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¹⁴ United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

¹⁵ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁶ 38 U.S.C. § 4302.

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 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 “friend of the court” briefs in the Supreme Court and other courts, we have educated service members, their spouses, attorneys, judges, employers, ESGR volunteers, DOL investigators, 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.

If you are now serving or have ever served in any one of our nation’s eight uniformed services,¹⁷ 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 20002¹⁸

¹⁷ Congress recently established the United States Space Force as the 8th uniformed service.

¹⁸ You can also donate on-line on our website, www.roa.org.