

LAW REVIEW¹ 24011

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You Are Entitled to Civilian Pension Credit for your Military Service Time Only if you Meet All Five USERRA Conditions, Including the Five-year Limit.

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

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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 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 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>.

Q: I am an Army Reserve Colonel, and I recently joined the Reserve Organization of America (ROA) as a life member.³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I joined ROA as a life member because I want to support this great service that you provide to those of us who serve our country in uniform, especially in the National Guard or Reserve. I only regret that I did not know about your “Law Review” articles years ago.

I was born in 1972 and graduated from college in 1994. While in college, I participated in the Army’s Reserve Officers Training Corps (ROTC), and upon graduation I was commissioned a second lieutenant. I served on full-time active duty for exactly ten years, from May 1994 until May 2004, when I left active duty and began my career as a public school teacher.

My teaching career has been interrupted many times by periods of voluntary and involuntary military service and training, including 12 drill weekends per year and an annual training period of two to three weeks each year. I have been called to involuntary active duty, with my Army Reserve unit, twice, in 2007-08 and 2009-10. I was away from my teaching job for almost a year in 2012-13, to attend the Army War College in Carlisle, PA. In 2015, I volunteered for a three-year Active Guard & Reserve (AGR) tour, from 10/1/2015 until 9/30/2018.

In 2021, I was given the opportunity to return to active duty for three years (5/1/2021 through 4/30/2024) in a position of great

³ In 2018, ROA members amended the ROA Constitution and made enlisted service members eligible for full membership in our organization. ROA adopted the “doing business as” name of “Reserve Organization of America” to emphasize that we represent and seek to recruit as member all service members, from the most junior enlisted personnel to the most senior officers.

responsibility. I decided to utilize this opportunity because I thought that this would be a great opportunity to cap off my Army career before I reach mandatory retirement (30 years of commissioned service) in May 2024. I am currently on active duty. I expect to leave active duty and retire from the Army Reserve on 4/30/2024, at the end of my current orders.

I recently contacted the personnel department of my local school district and informed them that I will be leaving active duty and applying for reemployment in May 2024 and that I expect to return to work promptly and resume earning state teacher retirement credit with the school district. In our state, a teacher can retire with full retirement benefits when he or she has 30 years of teaching service. I expect to meet that threshold in August 2034, 30 years after I started my teaching career in August 2004.

The personnel director told me that the district will welcome me to return to work as a teacher because the district has a shortage of teachers, especially experienced teachers like me. But she also told me that I am not entitled to reemployment under USERRA, or teacher retirement credit for my 2021-24 military service, because I fail to meet one of the five USERRA conditions for reemployment. Specifically, she said that I am beyond the five-year limit on the duration of periods of service related to my employer relationship with the school district.

I thought that the five-year limit applied to the duration of the most recent period of service, not the cumulative period of service relating to that employer. The personnel director told me that the limit is cumulative. Is the personnel director wrong?

Answer, bottom line up front:

Unfortunately, the personnel director is correct. The limit is cumulative, relating to the employer relationship for which you seek reemployment. There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your limit, but you have two periods of *non-exempt* service that count toward the limit, and those two periods total six years. You are over the five-year limit by one year.

Q: What are USERRA's conditions for the right to reemployment?

A: As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.⁴
- b. You must have given the employer prior oral or written notice.⁵
- c. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years.⁶
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁷

⁴ 38 U.S.C. § 4312(a). There is no doubt that you left your teaching job to perform uniformed service.

⁵ 38 U.S.C. § 4312(a)(1). You have shown me a copy of the certified-mail letter that you sent to the school district, informing them of your impending departure for military service.

⁶ 38 U.S.C. § 4312(c). See generally Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

⁷ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offences) and OTH (“other than honorable”) administrative discharges.

- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.⁸

You have exceeded USERRA's five-year limit.

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

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

⁸ After a period of service that lasted more than 180 days, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

(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 [14 USCS § 2127, 2128, 2308, 2309, 2314, or 3713];
- (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 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

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

Your initial ten-year period of active duty, from 1994 until 2004, does not count toward your five-year limit because you performed that active duty before you began your teaching job in 2004.¹⁰ The drill weekends and annual training periods are exempt from the computation of the five-year limit.¹¹ Your year of Army War College training in 2015-16 is also exempt.¹² Your two periods of involuntary active duty are also exempt.¹³

Your voluntary AGR tour from 2015-18 and your current voluntary active duty period (2021-24) are not exempt. You are beyond the five-year limit by one year.

Q: Okay, I see that I am not entitled to reemployment under USERRA because I am beyond the five-year limit, but I will in fact be returning to work for the school district. It would seem to me that, under these circumstances, the school district and the state teacher retirement board are required to give me teacher retirement credit for my final active duty period, from 5/1/2021 until 4/30/2024. Do you agree?

A: No, I do not agree with that assertion. In this article, as in most of our “Law Review” articles, I am addressing *what the law is, not what I want it to be.*

Section 4318 of USERRA governs your right to civilian pension credit for military service time. You are entitled to civilian pension credit for a period of uniformed service *only if you are “reemployed under this chapter”* (USERRA). Because you do not meet all five USERRA

¹⁰ See 38 U.S.C. § 4312(c). The five-year limit applies “with respect to the employer relationship for which a person seeks reemployment.”

¹¹ 38 U.S.C. § 4312(c)(3).

¹² Id.

¹³ 38 U.S.C. § 4312(c)(4)(A).

conditions for the 2021-24 active duty period, you are not entitled to civilian pension credit for that period of service. Accordingly, you will need to continue your teaching career until 2037 to retire with the full 30 years of teacher retirement credit.

Here is the entire text of section 4318:

(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* 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 nonforfeitality 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 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.¹⁴

In seven places (italicized above), section 4318 makes clear that the right to be treated as continuously employed by the civilian employer, for civilian pension purposes, applies to a person who is “reemployed under this chapter.” You are not being “reemployed under this chapter” (USERRA) when you return to work for the school district in 2024 because you fail to meet one of the five USERRA conditions.

Please join or support ROA

This article is one of 2,100-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.

¹⁴ 38 U.S.C. § 4318 (emphasis supplied).

ROA is the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).¹⁵

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” 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 more than 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 advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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

¹⁵ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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 Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at <https://www.roa.org/page/memberoptions>.

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 20002¹⁷

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

¹⁷ You can also contribute on-line at www.roa.org.