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You Are Entitled to Civilian Pension Credit for your Military Service Time Only if you Meet the Five USERRA Conditions.

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

1.3.1.2—Character and duration of service.

1.3.2.2—Continuous accumulation of seniority-escalator principle.

1.3.2.3—Pension credit for service time.

Q: I am a Colonel in the Army Reserve, and I recently found one of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Several times over the years, I have heard briefings about USERRA during my drill weekends, and I thought that I understood this law, but now I am

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 (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 <mailto:swright@roa.org>.

coming to realize that this law is more complicated than I had understood. I wish that I had known about your articles many years ago.

I was born in 1976 and graduated from college in 1998. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC), and I was commissioned as a Second Lieutenant in the Army when I graduated. I then spent the next six years on active duty.

In May 2004, I was released from active duty as a Captain, and I immediately affiliated with the Army Reserve. That same month, I found a civilian job as a junior executive for a large company (let us call it Daddy Warbucks Industries of DWI). I have worked for that company continuously since May 2004 except for periods when I have been away from my civilian job for training and service in the Army Reserve.

I have been away from my DWI job many times for short periods of military training, like drill weekends and annual training tours. I was involuntarily recalled once for a year in Iraq and later for a year of active duty in Afghanistan. In 2018, I volunteered for a three-year Active Guard & Reserve (AGR) tour, from 10/1/2018 through 9/30/2021, When that tour was nearing its end, I volunteered to extend for a second AGR tour, from 10/1/2021 through 9/30/2024.

I was released from active duty on 9/30/2024, and I applied for reemployment at DWI the very next day. The company's personnel director told me that I was welcome back at the company because they needed a person with my skills and experience but that I was not entitled to reemployment at DWI and that I was not entitled to DWI pension credit for my 2018-24 active duty period because I did not meet the five USERRA conditions for reemployment.

I recall hearing, during USERRA briefings, that there is a five-year limit on the amount of civilian pension credit for military service time to which I am entitled. It seems to me that I should at least get five years of DWI pension credit for my 2018-24 active duty period. How does this work?

Answer, bottom line up front:

You are fundamentally misunderstanding section 4318 of USERRA.³ If you had met the five USERRA conditions for reemployment in October 2024, when you applied for reemployment, you would have been entitled to DWI pension credit for the entire time that you were away from your DWI job for military service and training. But you were not entitled to pension credit for the 2018-24 active duty period because you failed to meet at least one of the five USERRA conditions. The condition that you failed to meet is the five-year cumulative limit on the duration of the period or periods of uniform service that you have performed with respect to the employer relationship for which you sought reemployment.

Section 4318 of USERRA:

You are entitled to DWI pension credit for your military service time, but only if you demonstrate that you met all five USERRA conditions for each period when you have been away from your DWI job to perform service in the uniformed services. Section 4318 reads as follows:

³ 38 U.S.C. § 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) 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.⁴

You are entitled to civilian pension credit for your military service time only “upon reemployment under this chapter” (USERRA). In quoting section 4318 (above) I have italicized the five places where this limitation is made abundantly clear.

Q: What are the five conditions that I must meet to have the right to reemployment under USERRA?

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.⁵
- b. You must have given the employer prior oral or written notice.⁶
- 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.⁷
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁸

⁴ 38 U.S.C. § 4318 (emphasis supplied). The right to be treated as if one had been continuously employed by the civilian employer, for pension purposes, and the other rights set forth in section 4318, apply to a person who has been *reemployed under this chapter (USERRA)*. I have highlighted five places in section 4318 where this limitation is made clear.

⁵ 38 U.S.C. § 4312(a).

⁶ 38 U.S.C. § 4312(a)(1).

⁷ 38 U.S.C. § 4312(c).

⁸ 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.⁹

You probably meet four of the five conditions, but because you have exceeded the five-year limit you did not have the right to reemployment at DWI when you applied in October 2024.

Q: How does the five-year limit work?

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

⁹ 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.

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 [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.¹⁰

Your initial six-year active duty period, from 1998 until 2004, does not count toward your five-year limit because you performed that active duty before you began your DWI employment in 2004.¹¹ Your periods of inactive duty training (drills) and active duty for training that you performed during your DWI employment, between 2004 and 2018, do not count toward exhausting your five-year limit with DWI.¹² Similarly, your periods of involuntary active duty for service in Iraq and Afghanistan do not count toward your five-year limit.¹³

The voluntary AGR duty that you began on 10/1/2018 counts toward your five-year limit with DWI. Because you volunteered for a second three-year period of AGR duty, and because you remained on active duty past 9/30/2023, you have exceeded the five-year limit and you do not have the right to reemployment at DWI.

Q: It is not fair! Somebody should have told me that by agreeing to go on active duty in the AGR Program I would lose my right to DWI pension credit for my military service time. What gives?

A: As I have explained in Law Review 16043 (May 2016) and many other articles, you need to keep track of your own five-year limit to protect your reemployment rights. You cannot depend upon your employer, or the Army Reserve, or the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR) to track your

¹⁰ 38 U.S.C. § 4312(c) (emphasis supplied). See generally Law Review 16043 (May 2016) for a detailed discussion of what counts, and what does not count, in exhausting an individual’s five-year limit.

¹¹ Id.

¹² 38 U.S.C. § 4312(c)(3).

¹³ 38 U.S.C. § 4312(c)(4)(A).

burn rate of the five-year limit. Yes, the five-year limit is complicated, but this is not rocket science.

Q: Am I entitled to DWI pension credit for my 14 years of DWI employment between 2004 and 2018?

A: Yes, but not under USERRA. You are entitled to that credit under another federal statute, the Employee Retirement Income Security Act (ERISA).

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. We add new articles each month.

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).¹⁴

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

¹⁴ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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 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 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 eight¹⁵ uniformed services, you are eligible for membership in ROA,¹⁶ 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

¹⁵ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁶ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

at <https://www.roa.org/page/memberoptions> 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 20002¹⁷

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