

## How Much Time Can Elapse between my Last Day at my Civilian Job and my Entry on Active Duty?

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[About Sam Wright](#)

- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.3—Timely application for reemployment
- 1.3.2.3—Continuous accumulation of seniority-escalator principle
- 1.3.2.3—Pension credit for service time

**Q: I am a Specialist (E-4) in the Army Reserve and a member of the Reserve Organization of America.<sup>3</sup> I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1900 “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 very 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 1700 of the articles.

<sup>2</sup> 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 43 years, I have worked 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 36 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](mailto:SWright@roa.org).

<sup>3</sup> At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA

**I am a traditional reservist, performing annual training and inactive duty training (drills). I applied for and was accepted into an Army program whereby I will report to active duty for three to five years (36 to 60 months). It is possible that I will remain on active duty long-term, to qualify for a regular retirement with 20 years of full-time active service, but it is more likely that I will leave active duty and revert to a part-time Army Reserve status after three to five years. I want to preserve my right to reemployment with my current civilian employer, a large company that we will call Coors Heineken & Schlitz Incorporated or CHSI.**

**My active duty report date is six months away, in August 2020. I want to leave my civilian job this month (February 2020) to put my personal affairs in order before I go on active duty. I am getting married, and I will adopt my new wife's two young children. I also want to spend some time with my parents, who are in poor health. If I leave my job six months before I go on active duty, will I have the right to reemployment at the end of my three to five-year active duty period?**

**Answer, bottom line up front:** You are not required to remain at your job until the day before you report to active duty, to have the right to reemployment upon release from active duty. You are entitled to take some time off to put your affairs in order, but I am concerned that six months may be stretching things too much. A month or two is certainly justified, especially since you have so many things to accomplish before you report to active duty.

### **Explanation**

As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five simple 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.
- b. You must have given the employer prior oral or written *notice*. You do not need the employer's permission, and the employer does not get a veto.

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the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

- c. You must not have exceeded the cumulative five-year limit on the duration of your period or periods of uniformed service, 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. Please see Law Review 16043 (May 2016).
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>4</sup> Disqualifying bad discharges include punitive discharges awarded by court martial and administrative discharges that are labeled “other than honorable.”
- e. After release from the period of service, you must make a timely application for reemployment.

You must meet all five conditions to have the right to reemployment. If you leave your job six months before you start the active duty period, it is likely that the employer will argue that you failed to meet the first condition—that you left your job for reasons unrelated to military service and only later chose to go on active duty, and it is possible that the court would agree with that argument. I urge you to wait until a month or two before the start of your active duty to leave your civilian job.

The Department of Labor (DOL) USERRA regulation provides as follows on this question:

If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.<sup>5</sup>

**Q: I began my employment at CHSI in January 2017. The company has a defined contribution pension plan. Employees like me are permitted to contribute up to 5% of our CHSI compensation, pre-tax,<sup>6</sup> to the employee’s pension account, and the company matches that contribution. If I leave my CHSI job to go on active duty, will I be permitted to keep making contributions to my pension account, and will the company be required to keep making matching contributions?**

**A:** The company is not required to accept contributions from you or to make matches *while you are away from work for service*. If you meet the five USERRA conditions and return to work for

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<sup>4</sup> When you complete your active duty period sometime between 2023 and 2025, you likely will not be discharged at all—you will simply be released from active duty and will revert to your part-time Army Reserve status.

<sup>5</sup> 20 C.F.R. 1002.74(b).

<sup>6</sup> Pre-tax means that the amount the employee contributes to his or her pension account is not included in the employee’s adjusted gross income for federal and state income tax purposes. For example, last year my CHSI compensation was \$50,000. I contributed 5% (\$2,500) to my pension account. I was taxed on an income of \$47,500, not \$50,000.

CHSI, at that point you will be able to resume making contributions to your pension account and you will also be entitled to make *make-up contributions* to the pension account and to receive employer matches on those contributions.<sup>7</sup>

**Q: How long will I have to make up the missed employee contributions?**

**A:** You must make up the missed employee contributions within the period that starts on the date you return to work and continues for three times your period of service, but not more than five years.<sup>8</sup> In your scenario, with you returning to work sometime between 2023 and 2025, you will have five years to make up the missed employee contributions.

**Q: How will my permissible employee contributions and the employer contributions be computed?**

**A:** These figures will be computed based on what you *would have earned at CHSI if you had remained continuously employed*.<sup>9</sup> It should be possible to come up with a reasonable estimate of what you would have earned, based on what you were earning before you left the job for military service and what your CHSI colleagues were earning while you were away from work for service. If the amount that you would have earned cannot be reasonably estimated, the computation will be made based on your CHSI earnings during the last year you were at work before the period of service.<sup>10</sup>

**Q: Am I entitled to make make-up contributions and get employer matches for the *entire period* that I am away from my CHSI job for military service?**

**A:** Yes, for the entire period. This includes the period (perhaps a month or two) between leaving the CHSI job and entering active duty. It also includes the period (up to 90 days)<sup>11</sup> between leaving active duty and returning to work at CHSI.<sup>12</sup>

As you can appreciate, this is a very valuable benefit. To secure this benefit, you must meet the five USERRA conditions and return to work for CHSI after your active duty period. It behooves you to dot the is and cross the ts.

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<sup>7</sup> 38 U.S.C. 4318(b)(2).

<sup>8</sup> Id.

<sup>9</sup> 38 U.S.C. 4318(b)(3)(A).

<sup>10</sup> 38 U.S.C. 4318(b)(3)(B).

<sup>11</sup> 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).

<sup>12</sup> Please see Law Review 19052 (June 2019).

## Please join or support ROA

This article is one of 1900-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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 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, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, 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 seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. 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](http://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 Officers Association  
1 Constitution Ave. NE  
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