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Section 4318 of USERRA:
State Pension Credit for your Military Service.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.3.2.3—Pension credit for military service.
1.8—Relationship between USERRA and other laws/policies.

Q: I am a Colonel in the Army Reserve (USAR) and a life member of the Reserve Organization of America (ROA). For many years, I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have shared your articles with my colleagues and subordinates in the USAR. Your articles have been immensely helpful

[1] I invite the reader's attention to Law Center | ROA. You will find more than 2,300 "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), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 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 SWright@roa.org.

to me in understanding my legal rights relating to my civilian employer, the State government, and my USAR participation.

I was born in May 1975. After I graduated high school, I attended our State university and participated in the Army's Reserve Officers Training Corps (ROTC). When I graduated from college in May 1997, I was simultaneously commissioned as a Second Lieutenant in the Army. I spent exactly four years on active duty. In May 2001, I left active duty and affiliated with the USAR.

That same month, I started a new civilian job, working for the State government in my home State. In accordance with our State law, I purchased State retirement credit for my four years of active duty from May 1997 to May 2001. In October 2001, just five months after I started my State job and just one month after the terrorist attacks of 9/11/2001, I was involuntarily recalled to active duty for the emergency. In October 2002, I was released from active duty and returned to my State job. In accordance with section 4318 of USERRA, I immediately resumed making contributions to the State employee pension plan and I also made up the employee contributions that I missed during the year that I was away from my job for involuntary active duty.

In 2021, I volunteered to return to active duty for three years of Active Guard and Reserve (AGR) duty. I was on AGR duty from 10/1/2021 until 9/30/2024. I returned to my civilian job in October 2024. I resumed making contributions to the State employee pension fund every pay period, and I will pay make-up contributions over a five-year period, from October 2024 through September 2029. It is

important to me to make up all the missed employee contributions to the State pension plan. Our State employee pension plan provides for a full pension after 25 years of State service and monthly payments start at age 60. I will turn 60 in May 2035. I want to start receiving my full State pension starting on my 60th birthday.

I recently applied for and was selected for a Federal civilian job that pays $30,000 more per year than my current State salary. My new Federal job is scheduled to start on 8/1/2026. I want to leave my State job in July 2026 so that I can start my new Federal job as scheduled. I also want to continue making make-up contributions to the State pension fund through September 2029 so that I can receive my full State pension starting on my 60th birthday.

I inquired about this matter with the State personnel office, and a lawyer in that office told me that I must pay the make-up pension contributions *while I am still working for the State*. In support of that statement, he cited and quoted section 1002.262(b) of the Department of Labor (DOL) USERRA Regulations. That subsection states:

> If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made

> during this period *and while the employee is employed with the post-service employer.*[3]

I think that I should be permitted to continue making make-up contributions to the State employee pension plan after I leave my State job and start my new Federal job. What do you think?

A: I agree with you that you should be permitted to continue making up the missed employee contributions through September 2029 even after you have left your State job and started your new Federal job. Section 4318(b)(2) of USERRA sets forth the obligation to make up missed employee pension plan contributions as follows:

> 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.*[4]

[3] 20 C.F.R. § 1002.262(b) (emphasis supplied).

[4] 38 U.S.C. § 4318(b)(2) (emphasis supplied). I have put the entire text of section 4318 at the end of this article.

Section 4318(b)(2) of USERRA provides that you have three times the period of service, but not more than five years, to make up the missed employee pension plan contributions. USERRA does not say that you must remain continuously employed by that employer during the entire repayment period. The DOL USERRA Regulations cannot lawfully impose additional prerequisites upon your exercise of USERRA rights, beyond the prerequisites set forth in the statute itself.

Over a period of many centuries, the courts in Great Britain, the United States, and other common-law countries have developed rules for the interpretation of constitutions, statutes, regulations, contracts, wills, and other legal documents. The definitive recent treatise on these rules is *Reading Law: The Interpretation of Legal Texts*, by Justice Antonin Scalia and Professor Bryan A. Garner.[5] In their treatise, they express the pertinent interpretation rule as follows:

> *Expressio unius*, also known as *inclusio unius*, is a Latin name for the communicative device known as negative implication. In English, it is known as the negative implication canon. We encounter the device—and recognize it—frequently in our daily lives. When a car dealer promises a low financing rate to "purchasers with good credit," it is entirely clear that the rate is *not* available to purchasers with spotty credit.[6]

Under section 4318 of USERRA,[7] the returning service member or veteran is entitled to pension credit for the period when he or she was

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[5] Thomson/West Publishing Co, 2012.
[6] Id., at page 107.
[7] 38 U.S.C. § 4318.

away from the civilian job for uniformed service if he or she meets the enumerated conditions:

a. Must have left the job to perform uniformed service.
b. Must have given the employer prior notice.
c. Must have been released from the period of service without having exceeded the five-year limit and without having received a disqualifying bad discharge from the military.
d. Must have made a timely application for reemployment.
e. Must have made up the missed employee contributions to the pension plan within a period that is three times the period of service but not more than five years.

The Department of Labor (DOL) USERRA regulation establishes an additional condition—that the person remain employed by the post-service employer during the entire repayment period of up to five years. Imposing this additional condition violates the negative implication canon.

Q: In interpreting USERRA, are the courts required to give deference to the interpretations expressed in the DOL USERRA regulations?

A: When the DOL USERRA regulations were promulgated in 2005, the pertinent Supreme Court precedent required the courts to give great deference to regulations promulgated by the federal agency charged with implementing or enforcing the statute in question and to accept that interpretation as long as it was *one of the permissible interpretations* of the ambiguous words of the statute.[8] Two years ago,

[8] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

the Supreme Court definitively overruled the *Chevron* precedent.[9] Under this new precedent, the courts are to apply the rules of interpretation when determining the meaning of federal statutes but should give some deference to the interpretation adopted by the relevant federal agency.

The DOL interpretation that the returning service member or veteran must make up the missed employee contributions to the pension plan *while still employed by the post-service employer* should not stand because it runs contrary to the negative implication canon.

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

Here is a link to the Maher Legal Services website:

https://www.lawyersdefendingwarriors.com/about.

[9] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

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Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Here is the entire text of section 4318 of USERRA:

(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) 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 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, 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.

38 U.S.C. § 4318. *See generally* Law Review 21059 (September 2021) for a detailed discussion of section 4318.