

You Must Stay within the Five-Year Limit To Obtain Civilian Pension Credit for Military Service Time

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

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Q: I am a retired Colonel in the Army Reserve and a life member of the Reserve Officers Association (ROA). I graduated from college in 1980 and was commissioned a Second Lieutenant in the Army, via the Reserve Officers Training Corps (ROTC). I served on active duty for the next five years and left active duty in 1985. I affiliated with the Army Reserve and became a traditional reservist. I was involuntarily recalled to active duty in 1990-91 for Operation Desert Shield/Storm.

I began my career with our state government on January 1, 1986. I figure that I am entitled to retire from state government service, with 30 years of pension credit, on January 1, 2016, but

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,350 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

² Captain Wright is the author or co-author of more than 1,200 of the almost 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

the state personnel office has told me that I do not have 30 years of state retirement credit because I am not entitled to state pension credit for my active military service from October 2002 through September 2010. I found your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) by doing an Internet search. Please help me understand my USERRA pension rights.

As an Army Reserve Lieutenant Colonel, I was involuntarily recalled to active duty for one year in October 2002. I participated in the preparation for and conduct of the invasion of Iraq in March 2003. At the end of that year of voluntary service, I volunteered for an additional year of service, through September 2004. I volunteered for six more one-year extensions. I was promoted to Colonel in 2006. I left active duty and retired from the Army Reserve in September 2010, when I reached my mandatory retirement date (30 years of commissioned service).

I kept my state agency employer informed of my various extensions of my active duty. When I finally left active duty I contacted the employer and was welcomed back to work within a few days after I left active duty. I had no inkling that I would not be credited with state pension credit for my 2002-10 active duty period until a few days ago, when I submitted my retirement application for January 1, 2016. Help!

A: As I have explained in Law Review 15081 (the immediately preceding article in this series) and other articles, you are entitled to civilian pension credit for a period of military service, but only *upon reemployment under USERRA*. You were not entitled to reemployment in September 2010 because you failed to meet one of the five USERRA conditions for reemployment—you were beyond the cumulative five-year limit. When the state took you back in the fall of 2010, it was effectively as a new hire, at least for pension purposes.

As I have explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. You gave the employer prior oral or written notice.
- c. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, does not exceed five years.³
- d. You served honorably and were released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, you have made a timely application for reemployment.⁴

³ Please see Law Review 201 for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

⁴ 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

It is clear that you met four of the five conditions for reemployment in the fall of 2010, but you must meet all five conditions to have the right to reemployment. You were beyond the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to your employer relationship with the state, when you left active duty in September 2010. The state had no obligation to reemploy you, so you do not have the right under federal law (USERRA) to state pension credit for your 2002-10 active duty period.

As I have explained in Law Review 201 and other articles, there are nine exemptions from the five-year limit—kinds of service that do not count toward exhausting your limit. At your request, I have reviewed all of your military orders going back to 1986, when you began your state job.⁵ Your 2002-03 involuntary active duty period is exempt from the five-year limit, but your voluntary periods after 2003 count toward the limit. You also had a one-year voluntary active duty period in 1997-98 that is not exempt from the limit. When you applied for reemployment in September 2010, you were more than a year past your five-year limit.

Under section 4318 of USERRA, you are entitled to be treated, for pension purposes, as if you had been continuously employed in the civilian job during the time that you were away from work for service, but only *upon reemployment under USERRA*. Here is the text of section 4318:

§ 4318. Employee pension benefit plans

(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.

⁵ The five-year limit is cumulative with respect to the employer relationship for which you seek reemployment, so we must look back to 1986 to compute your utilization of the five-year limit. As is explained in Law Review 201, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. The VRRRA had a four-year limit and also had exemptions. If a period of service counted, toward the VRRRA's four-year limit, and if the employer relationship began prior to 1994, the period of service counts toward USERRA's five-year limit, under USERRA's transition rules. Your 1990-91 involuntary call to active duty for Operation Desert Shield/Storm did not count toward your four-year limit under the VRRRA so it does not count toward your five-year limit under USERRA.

(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.⁶

As is shown by each of the five italicized places above, the right to pension credit under USERRA only applies to a person who has been *reemployed under USERRA*. You were not reemployed under USERRA in September 2010 because you were beyond the five-year limit.

Q: That's not fair! If there is a five-year limit, I should at least get five years of state pension credit for my eight years of active duty, from October 2002 through September 2010. Right?

A: Wrong. To get civilian pension credit for a period that you were away from work for military service, you must meet all five of the USERRA conditions, including the five-year limit. Because you failed to meet one of the five conditions in September 2010, you get no state pension credit for the 2002-10 active duty period.

Q: But I kept my civilian supervisor and the personnel office of the state agency informed about my various active duty extensions. Nobody told me about the five-year limit!

A: Keeping your civilian employer informed was a good idea, but it is irrelevant to the five-year limit. Your employer had no obligation to keep track of your five-year limit and to advise you when you were approaching the limit. As I have explained in several previous articles, if you want to retain the option of returning to your pre-service civilian job, you must keep track of your own five-year limit. You cannot depend upon your civilian employer, or your service, or the Department of Labor, or Employer Support of the Guard and Reserve, or anybody else to track this for you.

Q: Is it possible that I am entitled to state pension credit for my 2002-10 active duty period under state law? What is the relationship between USERRA and state law?

A: Under section 4302 of USERRA, this federal law is *a floor and not a ceiling* on the rights of persons who leave civilian jobs for voluntary or involuntary military service. USERRA does not

⁶ 38 U.S.C. 4318 (emphasis supplied).

supersede or override a state law that gives you *greater or additional rights*. USERRA does supersede and override state laws that purport to limit USERRA rights or that impose additional prerequisites upon the exercise of USERRA rights. Here is the entire text of section 4302:

§ 4302. Relation to other law and plans or agreements

(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.⁷

It is possible (but not likely) that your state law will entitle you to state pension credit for the 2002-10 active duty period. The state law probably does entitle you to state pension credit for your state employment before October 2002 and after September 2010. Because you failed to meet the five USERRA conditions in September 2010, your case is governed by state law, not by USERRA.

Lesson to be learned:

The time to ask about the five-year limit is *before* you have gone over the limit, not after. I do not have the power to turn back the hands of time.

During the six years that I worked for ROA as the full-time Director of the Service Members Law Center (SMLC)⁸ I received and responded to more than 35,000 e-mail and telephone inquiries. About half of the inquiries were about USERRA, and the other half were about everything that you can think of that has something to do with military service and law. Among the USERRA inquiries, the most common subject was the five-year limit. Hundreds of times, for no charge, I have reviewed military orders to determine how much of the five-year limit an individual has exhausted and how much “head room” the individual has remaining.

For economic reasons, it is no longer possible for ROA to offer this free one-on-one advice service by e-mail and telephone, but we have more than 1,400 “Law Review” articles at www.servicemembers-lawcenter.org. We have a detailed Subject Index and a search function,

⁷ 38 U.S.C. 4302 (emphasis supplied).

⁸ I was the SMLC Director, as a full-time employee of ROA, from June 2009 through May 2015. For economic reasons, it was necessary for ROA to wind down the SMLC May 31, 2015.

to facilitate finding articles about very specific topics. I am the author or co-author of more than 1,200 of the 1,400 published articles. More than 900 of the articles are about USERRA. I had a hand in the drafting of USERRA when I worked for the United States Department of Labor as an attorney (1982-92).

Since my ROA employment ended on May 31, I have continued writing new "Law Review" articles, and I will continue to do so. I have also continued monitoring calls that come to the SMLC at 800-809-9448, extension 730, and e-mails that come to me at SWright@roa.org. Please understand that this has been an entirely voluntary effort, as a member of ROA. There must be a limit.

Since my ROA employment ended, I have returned to Tully Rinckey PLLC, the law firm where I worked before ROA established the SMLC in June 2009. If you need advice and assistance on USERRA and other military-legal matters, I am available for a reasonable fee through Tully Rinckey PLLC. Please see footnote 2 for my contact information.