

## Securing your Pension Rights when you Return to Federal Civilian Employment after Military Service

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**Q: I am a Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the**

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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 2300 “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 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.

<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 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>.

<sup>3</sup> At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing business as” name—the Reserve Organization of America. The point of the name change is to emphasize that the

Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have used those articles to help me understand my rights vis-à-vis my civilian job and absences from work necessitated by my Army Reserve obligations, and I have also shared your articles with many of my Army Reserve colleagues and subordinates.

I am a career Federal civilian employee, currently in grade GS-15. I left my job in September 2021 to serve on active duty for one year, from 10/1/2021 through 9/30/2022. This will likely be my final active duty period because I am approaching the point when I will need to retire from the Army Reserve. I am also just a few years away from the time when I expect to retire from my Federal civilian career.

My principal mode of retirement readiness, aside from my Army Reserve retirement, is the Federal Thrift Savings Plan (TSP). While I am working at my civilian job, money is taken out of my salary pre-tax and paid to the Thrift Savings Board (TSB), and my employer (the Federal agency where I work) matches those contributions. The TSB invests that money in safe, diversified securities, and the returns fund my retirement. Please review for me my USERRA rights with respect to the TSP and what I need to do to secure those rights.

**Answer, bottom line up front**

USERRA does not apply to the TSP. The pertinent USERRA subsection is as follows:

In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter [USERRA] shall be those rights provided in section 8432b of title 5 [of the United States Code]. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.<sup>4</sup>

Section 8432b of title 5 is similar to section 4318 of USERRA, and that section reads as follows:

**(a)** This section applies to any employee who—

**(1)** separates or enters leave-without-pay status in order to perform military service; and

**(2)** is subsequently restored to or reemployed in a position which is subject to this chapter [5 USCS §§ 8401 et seq.], pursuant to chapter 43 of title 38 [38 USCS §§ 4301 et seq.].

**(b)**

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organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

<sup>4</sup> 38 U.S.C. § 4318(a)(1)(B).

**(1)** Each employee to whom this section applies may contribute to the Thrift Savings Fund, in accordance with this subsection, an amount not to exceed the amount described in paragraph (2).

**(2)** The maximum amount which an employee may contribute under this subsection is equal to—

**(A)** the contributions under section 8432(a) [5 USCS § 8432(a)] which would have been made, over the period beginning on date of separation or commencement of leave-without-pay status (as applicable) and ending on the day before the date of restoration or reemployment (as applicable); reduced by

**(B)** any contributions under section 8432(a) or 8440e [5 USCS § 9432(a) or 8440e] actually made by such employee over the period described in subparagraph (A).

**(3)** Contributions under this subsection—

**(A)** shall be made at the same time and in the same manner as would any contributions under section 8432(a) [5 USCS § 8432(a)];

**(B)** shall be made over the period of time specified by the employee under paragraph (4)(B); and

**(C)** shall be in addition to any contributions then actually being made under section 8432(a) [5 USCS § 8432(a)].

**(4)** The Executive Director [of the Thrift Savings Board] shall prescribe the time, form, and manner in which an employee may specify—

**(A)** the total amount such employee wishes to contribute under this subsection with respect to any particular period referred to in paragraph (2)(B); and

**(B)** the period of time over which the employee wishes to make contributions under this subsection. The employing agency may place a maximum limit on the period of time referred to in subparagraph (B), which cannot be shorter than two times the period referred to in paragraph (2)(B) and not longer than four times such period.

**(c)**

**(1)** If an employee makes contributions under subsection (b), the employing agency shall make contributions to the Thrift Savings Fund on such employee's behalf—

**(A)** in the same manner as would be required under section 8432(c)(2) [5 USCS § 8432(c)(2)] if the employee contributions were being made under section 8432(a) [5 USCS § 8432(a)]; and

**(B)** disregarding any contributions then actually being made under section 8432(a) [5 USCS § 8432(a)] and any agency contributions relating thereto.

**(2)** An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to—

**(A)** the total contributions to which that individual would have been entitled under section 8432(c)(2) [5 USCS § 8432(c)(2)], based on the amounts contributed by such individual under section 8440e [5 USCS § 8440e] (other than under subsection (d)(2) thereof) with respect to the period

referred to in subsection (b)(2)(B), if those amounts had been contributed by such individual under section 8432(a) [5 USCS § 8432(a)]; reduced by

**(B)** any contributions actually made on such employee's behalf under section 8432(c)(2) [5 USCS § 8432(c)(2)] with respect to the period referred to in subsection (b)(2)(B).

**(d)** An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to—

**(1)** 1 percent of such employee's basic pay (as determined under subsection (e)) for the period referred to in subsection (b)(2)(B); reduced by

**(2)** any contributions actually made on such employee's behalf under section 8432(c)(1) [5 USCS § 8432(c)(1)] with respect to the period referred to in subsection (b)(2)(B).

**(e)** For purposes of any computation under this section, an employee shall, with respect to the period referred to in subsection (b)(2)(B), be considered to have been paid at the rate which would have been payable over such period had such employee remained continuously employed in the position which such employee last held before separating or entering leave-without-pay status to perform military service.

**(f)**

**(1)** The employing agency may be required to pay lost earnings on contributions made pursuant to subsections (c) and (d). Such earnings, if required, shall be calculated retroactively to the date the contribution would have been made had the employee not separated or entered leave without pay status to perform military service.

**(2)** Procedures for calculating and crediting the earnings payable pursuant to paragraph (1) shall be prescribed by the Executive Director.

**(g)** Amounts paid under subsection (c), (d), or (f) shall be paid—

**(1)** by the agency to which the employee is restored or in which such employee is reemployed;

(2) from the same source as would be the case under section 8432(e) [5 USCS § 8432(e)] with respect to sums required under section 8432(c) [5 USCS § 8432(c)]; and

(3) within the time prescribed by the Executive Director.

(h)

(1) For purposes of section 8432(g) [5 USCS § 8432(g)], in the case of an employee to whom this section applies—

(A) a separation from civilian service in order to perform the military service on which the employee's restoration or reemployment rights are based shall be disregarded; and

(B) such employee shall be credited with a period of civilian service equal to the period referred to in subsection (b)(2)(B).

(2)

(A) An employee to whom this section applies may elect, for purposes of section 8433(d) [5 USCS § 8433(d)], or paragraph (1) or (2) of section 8433(h) [5 USCS § 8433], as the case may be, to have such employee's separation (described in subsection (a)(1)) treated as if it had never occurred.

(B) An election under this paragraph shall be made within such period of time after restoration or reemployment (as the case may be) and otherwise in such manner as the Executive Director prescribes.

(i) The Executive Director shall prescribe regulations to carry out this section.<sup>5</sup>

**Q: I expect to leave active duty on 9/30/2022, at the end of my current orders. What do I need to do after that date to ensure that I receive what I am entitled to with respect to the TSP?**

**A:** You must do four things:

- a. You must meet, and you must be prepared to document that you meet, the five USERRA conditions for reemployment.
- b. You must return to work for the Federal agency that employed you before you left for military service in September 2021, or for the successor-in-interest to that agency.
- c. You must resume making ongoing contributions to your TSP account.
- d. You must elect to make make-up contributions to your TSP account *within 60 days after you return to work*.

I will discuss each of these actions separately.

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<sup>5</sup> 5 U.S.C. § 8432b.

## **Meeting the five USERRA conditions for reemployment**

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 uniformed service.<sup>6</sup>
- b. You must have given the employer prior oral or written notice.<sup>7</sup>
- c. Your cumulative period of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.<sup>8</sup>
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>9</sup>
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.<sup>10</sup>

## **Apply for reemployment and return to the same Federal agency that employed you before you left your job for military service in September 2021**

It is important that you apply for reemployment and return to work for the same Federal agency that employed you before your military service.<sup>11</sup> If you want to look for a job with another agency, you should do so only after you have been reemployed by the pre-service agency.<sup>12</sup>

## **Q: What if the Federal agency that employed me in September 2021 no longer exists?**

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<sup>6</sup> 38 U.S.C. § 4312(a).

<sup>7</sup> 38 U.S.C. § 4312(a)(1).

<sup>8</sup> As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit with respect to the employer relationship for which you seek reemployment. You must be prepared to demonstrate that this year of active duty, from October 2021 to September 2022, does not put you over the five-year limit with respect to your employer relationship with the Federal Government. You can document that by showing that this year of service is exempt from the five-year limit under one of the subsections of section 4312(c) of USERRA, 38 U.S.C. § 4312(c). If this year of service is not exempt from the computation of the five-year limit, you must demonstrate that your previous active-duty periods, related to your employer relationship with the Federal Government, have not exceeded four years.

<sup>9</sup> 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial, and “other than honorable” administrative discharges.

<sup>10</sup> After a period of service that lasted 181 days or more, you have 90 days (starting on the date of release) to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>11</sup> See Law Review 22010 (February 2022).

<sup>12</sup> Id.

**A:** If the functions of the agency that employed you when you left for military service have been transferred to another Federal agency, you have the right to reemployment at that agency, and that is where you should apply and should return to work.<sup>13</sup> If the Director of the Office of Personnel Management (OPM) determines that your pre-service agency no longer exists and that the functions have not been transferred to another agency, the OPM Director is responsible for ensuring that you are reemployed by another Federal agency.<sup>14</sup>

**After returning to work, act promptly to resume making ongoing TSP contributions and to make up missed contributions.**

After you return to work, you must act promptly to resume making TSP contributions each pay period and to arrange for making make-up contributions to cover for the contributions you missed during your year of active duty. The pertinent section of the regulations is as follows:

Upon reemployment or return to pay status, an employee has 60 days to elect to make up missed contributions. An employee's right to make retroactive TSP contributions will expire if an election is not made within 60 days of the participant's reemployment or return to pay status.<sup>15</sup>

**Q: Does that mean that I must come up with all the make-up contributions within just 60 days?**

**A:** No, it does not mean that. You must *elect* to do make-up contributions within 60 days after you return to work, but the contributions themselves will be spread out over a period of time that is between two times and four times your period of uniformed service.<sup>16</sup> Your make-up contributions, like your resumed ongoing contributions, will be made by payroll deduction from pre-tax money.

**Q: What about the agency's obligations?**

**A:** The regulation further provides:

(c) Missed agency contributions. This paragraph (c) applies only to an employee who would have been eligible to receive agency contributions had he or she remained in civilian service or pay status. A FERS employee who separates or enters nonpay status to

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<sup>13</sup> 38 U.S.C. § 4314(b)(2)(A).

<sup>14</sup> Id.

<sup>15</sup> 5 C.F.R. § 1620.42(b).

<sup>16</sup> 5 U.S.C. § 8432b(b)(4)(B).

perform military service is eligible to receive agency makeup contributions when he or she is reemployed or restored to pay status in the civilian service, as follows:

*(1) The employee is entitled to receive the Agency Automatic (1%) Contributions that he or she would have received had he or she remained in civilian service or pay status. Within 60 days of the employee's reemployment or restoration to pay status, the employing agency must calculate the Agency Automatic (1%) makeup contributions and report those contributions to the record keeper, subject to any reduction in Automatic (1%) Contributions required by paragraph (c)(5) of this section.*

(2) An employee who contributed to a uniformed services TSP account during the period of military service is also immediately entitled to receive agency matching makeup contributions to his or her civilian account for the employee contributions to the uniformed services account that were deducted from his or her basic pay, subject to any reduction in matching contributions required by paragraph (c)(4) of this section. However, an employee is not entitled to receive agency matching makeup contributions on contributions that were deducted from his or her incentive pay or special pay, including bonus pay, while performing military service.

(3) An employee who makes up missed contributions is entitled to receive attributable agency matching makeup contributions (unless the employee has already received the maximum amount of matching contributions, as described in paragraphs (c)(2) and (c)(4) of this section).

(4) If the employee received uniformed services matching contributions, the agency matching makeup contributions will be reduced by the amount of the uniformed services matching contributions.

(5) If the employee received uniformed services Automatic (1%) Contributions, the Agency Automatic (1%) Contributions will be reduced by the amount of the uniformed services Automatic (1%) Contributions.<sup>17</sup>

**Q: Is my Federal agency employer required to notify me of my rights and obligations with respect to returning to Federal employment and to the TSP Program?**

**A:** Yes. The pertinent section of the regulations is as follows:

Each employing agency must establish procedures for implementing these regulations. These procedures must at a minimum require agency personnel to identify eligible employees and notify them of their options under these regulations and the time period within which these options must be exercised.<sup>18</sup>

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<sup>17</sup> 5 C.F.R. § 1605.31(c) (emphasis supplied).

<sup>18</sup> 5 C.F.R. § 1620.46(a).



I suggest that you need to understand your rights and to act to protect your rights. I suggest that you not depend on your agency's personnel office to give you timely and correct information and advice. You are probably among just a handful of employees of the agency who have recently been away from work for military service, and the people in the personnel office may be unfamiliar with USERRA and with section 8432b. Unfortunately, the Supreme Court has held that the Federal Government is not bound by incorrect information or bad advice given out by Federal employees.<sup>19</sup>

**Q: What about FERS Basic?**

**A:** FERS Basic is a contributory defined benefit pension plan. Section 4318 of USERRA applies to FERS Basic but not to the TSP.<sup>20</sup> To be considered as having been continuously employed by the agency for purposes of FERS Basic, you will need to make up the missed employee contributions to FERS Basic within a period of time that starts on the date of your reemployment and extends for three times the period of uniformed service, but not more than five years.<sup>21</sup>

**Please join or support ROA**

This article is one of 2,300-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 on 10/1/1922 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 almost 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 educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative 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

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<sup>19</sup> See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). I discuss the implications of those two decisions in Law Review 11004 (published in 2011).

<sup>20</sup> 38 U.S.C. § 4318(a)(1)(B).

<sup>21</sup> 38 U.S.C. § 4318(b)(2).

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 eight<sup>22</sup> 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 [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:

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1 Constitution Ave. NE  
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<sup>22</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.