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Does USERRA Apply to the Federal Thrift Savings Plan? No, but Another Federal Law Provides Similar Protections.

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1.1.1.8—USERRA applies to the Federal Government.

1.3.2.3—Pension credit for service time

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

When I left active duty and began my civil service career as an attorney at the Department of Labor (DOL), in 1982, there was only one retirement plan for federal employees, and that was called the Civil

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>.

Service Retirement System (CSRS). I started drawing CSRS retirement benefits in 2013, when I turned 62.

In 1986, Congress enacted and President Reagan signed the Federal Employees' Retirement System Act of 1986.³ This law created the Federal Employees Retirement System (FERS) for federal employees hired after 12/31/1983.

On its website, the United States Office of Personnel Management (OPM) explains FERS as follows:

Congress created the Federal Employees Retirement System (FERS) in 1986, and it became effective on January 1, 1987. Since that time, new Federal civilian employees who have retirement coverage are covered by FERS.

FERS is a retirement plan that provides benefits from three different sources: a Basic Benefit Plan, Social Security and the Thrift Savings Plan (TSP). Two of the three parts of FERS (Social Security and the TSP) can go with you to your next job if you leave the Federal Government before retirement. The Basic Benefit and Social Security parts of FERS require you to pay your share each pay period. Your agency withholds the cost of the Basic Benefit and Social Security from your pay as payroll deductions. Your agency pays its part too. Then, after you retire, you receive annuity payments each month for the rest of your life.

The TSP part of FERS is an account that your agency automatically sets up for you. Each pay period your agency deposits into your account amount equal to 1% of the basic pay you earn for the pay period. You can also make your own contributions to your TSP

³ Public Law 99-335, 100 Stat. 514.

account and your agency will also make a matching contribution. These contributions are tax-deferred. The Thrift Savings Plan is administered by the Federal Retirement Thrift Investment Board.⁴

The Thrift Savings Plan (TSP) is the most important part, but not the only part, of FERS. TSP is administered by the Federal Retirement Thrift Investment Board (FRTIB), a federal agency headquartered in Alabama. On its website, the FRTIB explains the TSP as follows:

The Thrift Savings Plan (TSP) is a retirement savings and investment plan for federal government employees and uniformed services members, including the Ready Reserve. Established by Congress in the Federal Employees' Retirement System Act of 1986, the TSP offers the same types of savings and tax benefits that many private corporations offer their employees under 401(k) plans.

The TSP is a defined contribution plan, meaning that the retirement income you receive from your TSP account will depend on how much money you put into your account during your working years and the earnings accumulated over time (and, if you're eligible, [agency or service contributions](#) and their earnings). The TSP is administered by federal employees, who are also TSP participants, at the [Federal Retirement Thrift Investment Board](#) (FRTIB).⁵

A federal employee who leaves his or her civilian job for voluntary or involuntary service in the uniformed services, as defined by the Uniformed Services Employment and Reemployment Rights Act (USERRA), and who meets the USERRA criteria for reemployment, and

⁴ <https://www.opm.gov/retirement-center/fers-information/>.

⁵ <https://www.tsp.gov/about-the-thrift-savings-plan-tsp/>.

who returns to federal civilian employment after release from the period of service, is entitled to resume participating in TSP after returning to the civilian job and is entitled to make up missed employee contributions to his or her TSP account and to receive missed employer matches. This right is under section 8432b of title 5 of the United States Code, which 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.] [USERRA].

(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 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 subsection (d) or (f) of section 8433 [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.⁶

The Uniformed Services Employment and Reemployment Rights Act (USERRA)⁷ applies to almost all employers in this country, including the Federal Government, the States, the political subdivisions of States, and private sector employers, regardless of size. Section 4318 of USERRA⁸ provides pension rights for an individual who leaves a civilian job to perform service in the uniformed services and who meets the USERRA conditions for reemployment and who returns to the pre-service employer after release from the period of service.

⁶ 5 U.S.C. § 8432b.

⁷ 38 U.S.C. §§ 4301-4335.

⁸ 38 U.S.C. § 4318.

But section 4318 does not apply to TSP. The pertinent subsection of section 4318 is as follows:

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.⁹

This means that in enforcing your pension rights related to the interruption of your federal civilian career necessitated by your period of uniformed service you must rely on section 8432b of title 5, not section 4318 of title 38 (USERRA).

This means that the Veterans' Employment and Training Service of the Department of Labor (DOL-VETS), the United States Office of Special Counsel (OSC), and the United States Merit Systems Protection Board (MSPB) have no role in enforcing section 8432b or in adjudicating claims that the FRTIB has violated section 8432b. USERRA provides: "This subchapter [pertaining to USERRA enforcement] does not apply to any action relating to benefits to be provided under the Thrift Savings Plan under title 5."¹⁰

Q: How do I enforce my rights under section 8432b?

A: If you believe that the FRTIB has failed in its obligations to you under section 8432b, you will need to sue the FRTIB in the United States Court of Federal Claims.¹¹

⁹ 38 U.S.C. § 4318(a)(1)(B).

¹⁰ 38 U.S.C. § 4322(g).

¹¹ See 28 U.S.C. § 1491(a)(1).

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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 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 for 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.

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¹² Congress recently established the United States Space Force as the eighth uniformed service.

¹³ You can also contribute on-line at www.roa.org.