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Pension Rights

Q: In "Law Review Numbers 1 and 2," you discussed civilian job-pension credit for military service that predates civilian employment. How is it different if my military service interrupts my civilian employment? If I leave my civilian job for a period of military service and later return to that job, am I entitled to be treated as continuously employed for purposes of my civilian job-pension rights?

A: Yes, provided you meet the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which can be found at Title 38, U.S. Code, Sections 4301-4333. Briefly stated, those eligibility criteria are as follows:
--You must leave your civilian job for the purpose of performing a period of service in the uniformed services, and you must give prior notice to your civilian employer that you are leaving for that purpose. 38 U.S.C. 4312(a)(1).
--Your period of service must not exceed five years. 38 U.S.C. 4312(c).
--You must be released from service under honorable conditions. 38 U.S.C. 4304.
--You must report back for work or submit your application for re-employment within the time limits required by USERRA.

In subsequent "Law Review" columns, I will address each of these eligibility criteria in considerable detail.

If you meet these eligibility criteria, you are entitled to re-employment, and the employer is required to treat you, for seniority purposes, as if you had been continuously employed. 38 U.S.C. 4316(a). This subsection expressly ratified the escalator principle, enunciated by the Supreme Court in 1946, in its first case under the Veterans' Reemployment Rights (VRR) law. (USERRA is a complete rewrite of the VRR law.) The Court held that [the returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]. Fishgold vs. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946).

USERRA expressly applies the escalator principle to pension entitlements. 38 U.S.C. 4318. Exactly what you are entitled to, upon re-employment, depends upon whether your employer's pension plan is a defined benefit plan (DBP) or a defined contribution plan (DCP).

In a DBP, the employer is guaranteeing you a particular pension benefit each month, upon your retirement. Usually, there is a formula that establishes your monthly benefit (e.g., years of service with that employer x 2 percent of highest monthly salary = monthly pension check).

In a DCP, the employer does not guarantee any particular monthly benefit, only the employer's contribution to the plan. In a DCP, unlike a DBP, there is an account in each employee's name. Employer and (usually) employee contributions are put in the account, which is invested. In a DCP, your monthly pension check depends upon how the investments fare during your career.

Q: I contribute to my pension plan each pay period, by means of payroll deductions. That means my pension plan is a DCP, right?

A: Not necessarily. You are confusing the distinction between a contributory plan and a non-contributory plan with the distinction between a DBP and a DCP. Contributory means that the employees, as well as the employer, contribute to the plan. In a non-contributory plan, only the employer contributes. A DBP can be contributory or non-contributory, as can a DCP. The Civil Service Retirement System-which is the older, federal employee pension plan-is an example of a contributory DBP.

Q: My employer's pension plan is a DBP. To what am I entitled upon return to work after military service?

A: If you meet USERRA's eligibility criteria, the employer and the pension plan must treat you as if you had been continuously employed, for purposes of determining when you qualify for your pension (e.g., years of service), and also in determining the amount of your monthly pension check. 38 U.S.C. 4318(a)(2).

Q: How is it different if my employer's pension plan is a DCP?

A: If your employer's pension plan is a DCP, the employer and the plan must treat you as if you had been continuously employed for purposes of determining when you qualify for your pension, but the amount of your monthly pension check will be slightly less than what it would have been if you had never left your job, in two respects: earnings on pension contributions and forfeiture distributions. 38 U.S.C. 4318(b)(1).

Let me offer a concrete example. Assume that you are on active duty from July 1995 to June 2000. You meet USERRA's eligibility criteria and are re-employed by your civilian employer in July 2000. Upon your re-employment, your employer is required to contribute to your pension account that which the employer would have contributed if you had been continuously employed, for each of the months between July 1995 and June 2000. 38 U.S.C. 4318(b)(1). However, the employer is not required to make you whole for the earnings that those contributions would have earned if you had been continuously employed.

Typically, in a DCP, when an employee leaves the employer, for whatever reason, short of vesting (typically, five years of employment), employer

contributions to that employee's account are forfeited and distributed pro rata to all the other employees. Assume that this occurred to one of your colleagues in October 1997, while you were on active duty. The employer is not required to make you whole for the distribution that you would have received in that month if you had been employed at the time.

Q: My pension plan is contributory. I contribute to the plan each pay period. When I return to my civilian job after military service, am I required to make up missed employee contributions?

A: Yes, but USERRA gives you an extended period of time to do that, without interest. That time is three times the period of service or five years, whichever is less. 38 U.S.C. 4318(b)(2).

Q: Does it matter that I volunteered for this period of military service?

A: No. Contrary to popular misconception, USERRA applies to voluntary as well as involuntary service, in peacetime as well as wartime. 38 U.S.C. 4303(13) [Definition of "service in the uniformed services" expressly includes both voluntary and involuntary service.] The same was true of the VRR law. See Foster vs. Dravo Corp., 420 U.S. 92, 96 n. 6 (1975); Boston & Maine Railroad vs. Hayes, 160 F.2d 325 (1st Cir. 1947); Mazak vs. Florida Department of Administration, 113 L.R.R.M. 3217 (N.D. Fla. 1983).

Q: Do these rules only apply to government employers?

A: No. USERRA applies to virtually all employers in this country, including the federal government, state and local governments, and private employers. 38 U.S.C. 4303(4)(definition of employer).

Q: Do these rules apply to active duty for training and in-active duty training (drills) as well as active duty?

A: Yes. The VRR law made confusing distinctions among categories of military training or service, but USERRA's definition of service in the uniformed services expressly includes all these categories. 38 U.S.C. 4303(13). Under USERRA, the rules depend upon the duration from which you are returning, not the category.

Q: When was USERRA enacted? What are the rules if I served in the military and returned to my civilian job before that date?

A: USERRA was signed into law by President Clinton on 13 October 1994. The pension provisions of USERRA went into effect two years later (October 1996). The Supreme Court reached essentially the same result, at least as to DBPs, under the VRR law's escalator principle. See Alabama Power Co. vs. Davis, 431 U.S. 581 (1977).

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