

**Number 40, March 2002:
Pension Rights Continued**

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Q: I am an Air Force Reserve officer and a member of the Reserve Officers Association (ROA). I have been involuntarily recalled to active duty for the present emergency. I gave written notice to my civilian employer, where I have worked since 1995. I asked the employer to continue making contributions to my pension account during my absence, because I fully intend to return to that employer as soon as I am released from active duty. My employer states that I am not eligible to have the employer make contributions to my account because I am no longer working there. Is my employer correct?

A: For the time being at least, yes. Your rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) arise after you return from a period of service, not during the period (with two exceptions not pertinent here). USERRA is codified in Title 38, United States Code, Sections 4301-4333 (38 U.S.C. 4301-4333). Your pension rights are set forth in 38 U.S.C. 4318.

To have re-employment rights under USERRA (including pension rights), you must meet these five eligibility criteria:

You must have left your civilian job for the purpose of service in the uniformed services.

You must have given your employer prior oral or written notice that you are leaving for that purpose.

Your cumulative period of service, with respect to that employer, must not exceed five years. Involuntary service and some voluntary service are exempted from the five-year limit.

You must not be released from active duty under punitive or other than honorable conditions.

You must make a timely application for re-employment.

I am sure that you already meet the first two criteria, but you do not yet meet (and cannot yet meet) the other three criteria. I am sure that you fully intend to return to that civilian employer, but many things could happen that would prevent you from having re-employment rights. You could voluntarily remain on active duty after the end of your involuntary recall, and you could go over the five-year limit. You could receive a punitive or other than honorable discharge. You could wait too long to apply for re-employment after your release from service. You could choose to go to work for a

different employer. Until you meet all five eligibility criteria, your rights under USERRA are not considered "ripe."

Q: I have heard that it makes a difference as to whether my pension plan at work is a defined benefit plan (DBP) or a defined contribution plan (DCP). I am not sure which category my plan falls into. Please explain the distinction.

A: USERRA applies to both kinds of plans, but in different ways. A formula determines the amount of your monthly pension check in a DBP. The formula usually includes the number of years of service with the company and the highest salary that you attain before retirement. In a DCP, on the other hand, the employer is not guaranteeing you a particular monthly benefit. In a DCP, the amount of money available for your retirement depends on how well the investments do as well as how much money you and the employer put into your account. In a DCP (unlike a DBP), there is an account in the name of each participating employee.

Q: At my job, I contribute to my pension plan each pay period. That means that my plan is a DCP, right?

A: Not necessarily. You are confusing the distinction between a DBP and a DCP with the distinction between a "contributory" plan and a "non-contributory" plan. In a contributory plan, the employees (as well as the employer) contribute to the plan. In a non-contributory plan, only the employer contributes. A DCP can be contributory or non-contributory, as can a DBP.

If your plan is contributory, and if you want to be treated as continuously employed for pension purposes, you must make up (after your return to work) the employee contributions that you would have made if you had been continuously employed. USERRA gives you an extended time to make up those contributions. That period (after your return to work) is three times the period of service, but not to exceed five years. [See 38 U.S.C. 4318(b)(2).]

Q: Now that you have explained the difference, I think that my plan is a DBP. What am I entitled to upon re-employment?

A: If you meet USERRA's eligibility criteria and return to work at that employer, your period of service must not be considered a "break in service" in determining when you qualify for your pension or in determining the amount of your monthly check. [See 38 U.S.C. 4318(a)(2).] For example, assume that you work for this company from November 1995 until November 2025 (30 years of service). Your period of active duty, from November 2001 until November 2003, does not interrupt your continuous accumulation of pension service credit. Your monthly pension check, starting in December 2025, must be exactly what it would have been if you had not been away from work between November 2001 and November 2003.

Q: My good friend, in the same Air Force Reserve unit, works for a different civilian employer. His pension plan is a DCP. How are his USERRA rights

different?

A: Let's assume that he also serves on active duty from November 2001 until November 2003, and his civilian employer re-employs him in that latter month. Upon re-employment, the employer is required to make to his account the employer contributions that the employer would have made during the period of his military-related absence. [See 38 U.S.C. 4318(b)(1).] The employer is not required to make him whole for what the employer and employee contributions would have earned (interest, dividends, appreciation, etc.) during his absence. *Id.* The employer is also not required to make him whole for forfeiture distributions that occurred during his military-related absence from work. *Id.*

Q: If I have difficulty obtaining my rights after I return from service, where should I go for assistance?

A: The Veterans' Employment and Training Service (VETS) in the U.S. Department of Labor is responsible for assisting veterans and Reservists in enforcing their USERRA rights, including their pension rights. [See 38 U.S.C. 4321.] VETS has offices in every state. For a list, see the VETS Web site, www.dol.gov/dol/vets.

1 Military title used for purposes of identification only. The views expressed herein are the personal views of the author and not necessarily those of the Department of Defense, the Department of the Navy, the Department of Labor, or the U.S. government. -- ROA

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Captain Wright was employed as an attorney for DoL for ten years. He was largely responsible for drafting USERRA, along with one other DoL attorney. He also helped to write the successful appellate briefs for the veterans in both the Imel and the Akers cases. Most recently, he was on active duty for 71 days (May–July 2001), including 40 days in Bahrain. Please see his July 2001 "Law Review" article.

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