

LAW REVIEW 0607

How Does USERRA Apply To the Relationship Among Employers and Pension Plan Administrators?

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Q: I am an administrator of a multi-employer defined benefit pension plan. The participating employers are 30 different construction companies. The plan was established in 1955, and seven of the companies have been with the plan from the start. I have read with interest your articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), especially the articles pertaining to the obligations of the employer concerning pension benefits.

I was present to hear your speech to the Associated General Contractors Legal Conference on April 29, 2005, in Washington. [See Law Review 183 for the text of the speech.] We are located in the 9th Circuit, and I have advised the pension plan trustees and the participating employers that we are bound by *Imel v. Laborers Pension Trust of Northern California*, 904 F.2d 1327 (9th Cir.), cert. denied, 498 U.S. 939 (1980), as described in your speech and your articles.

I am sure that at least several dozen employees in the plan are Reservists who have been mobilized since September 2001. Am I responsible for ensuring that these folks receive pension credit in our plan for the time they are away from work for military service? I do not consider myself to be the employer of these people, so I am off the hook, right?

A: Wrong. USERRA defines 16 terms used in the law, including the term “employer.” That broad definition includes “a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities” 38 U.S.C. 4303(4)(A)(i). Because the employers have delegated to you the function of administering pension benefits for employees, you are an employer for purposes of USERRA. If you fail to comply with USERRA responsibilities, you are subject to being sued, just like any other employer.

Q: The employers participating in our pension plan are located all across our large state. In most cases, I will not even know that an employee has been called to military service, returned, and reemployed by an employer participating in our plan or by the hiring hall operated by the union on behalf of all the employers. How am I to comply with USERRA if I am not even aware that an employee has been reemployed?

A: “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 reasons 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” 38 U.S.C. 4318(c). I suggest you remind all the participating employers of their obligation to notify you upon reemploying an employee returning from military service.

Q: Our pension plan is not exactly flush with excess cash. Our plan is funded by employer contributions for each pay period an individual works. If we must pay benefits for periods of time when an employee was not working and when the employer was not making payments to our plan, that will no doubt adversely affect the actuarial soundness of our plan. Is this an unfunded obligation of the pension plan?

A: No, it should be a funded obligation. “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 benefits described in subsection (a)(2)” 38 U.S.C. 4318(b)(1).

You should develop a system for reminding participating employers to notify you of reemployment of returning servicemembers. When you receive such a notice, you should bill the employer for the costs involved. All of this needs to happen within two or three months after the employee returns to work. I suggest that you should not let this issue fester until the affected employee retires—by that time, perhaps several decades later, it will be most difficult to collect from employers (to say nothing of the lost interest).

Please note that any dispute between you and participating employers concerning funding of pension benefits mandated by USERRA should not in any way affect the rights of the employee-veteran. As I have explained, you are an “employer” for USERRA purposes. You are required to accord pension credit, as mandated by USERRA, whether or not the employer has made the required contributions.

Q: As you described in Law Review 183, the employers that participate in our pension plan utilize a hiring hall operated by the union to obtain employees as needed for construction projects. The pension plan rewards service with all the employers, not just one employer. An employee works for that particular company for the duration of the project and then returns to the hiring hall for a new assignment, probably to a different company. The typical employee participating in our plan works for all the employers in our plan over the course of a year, or at least over the course of a career. Let us say that Joe Smith was working for the XYZ Company when he was called to serve. When he returned from service, he went back to the hiring hall, and the first employer to which he was assigned was the ABC Company. In this scenario, which company is responsible for funding the cost of treating Smith as if he had been continuously employed during the time he was away from work for service?

A: Unless your plan or the collective bargaining agreement provides otherwise, the obligation to fund the cost falls upon “the last employer employing the person before the period served by the person in the uniformed services” 38 U.S.C. 4318(b)(1)(B)(i). In this scenario, that would be the XYZ Company.

Q: What if the XYZ Company declared bankruptcy and went out of business during the time that Smith was on active duty?

A: In that case, the cost falls on the plan itself. *See* 38 U.S.C. 4318(b)(1)(B)(ii).

Q: I have also heard from a participating employee who claims he was called to active duty for the first Persian Gulf War in 1990. I don’t have to worry about that one, but that was before Congress enacted USERRA, right?

A: Wrong. This person is entitled to pension credit for the time she was on active duty in 1990-91, based on the Veterans’ Reemployment Rights (VRR) law, precursor of USERRA. USERRA’s transition rules make it clear that rights accrued under the law prior to the 1994 effective date of USERRA are not forfeited by the enactment of USERRA, superseding the VRR law. I invite your attention to *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977) and *Imel v. Laborers’ Pension Trust of Northern California*, 904 F.2d 1327 (9th Cir.), *cert. denied*, 498 U.S. 939 (1980). I also invite your attention to my Law Review 139.

Of course, the provisions about notification and funding were not in effect at the time—Congress added those provisions in 1994, as part of USERRA. But the lack of those provisions in no way detracts from your obligation to provide this individual the pension benefits to which she is entitled.

Q: The person served on active duty and returned to work more than 15 years ago. Certainly, the statute of limitations must preclude her from making a claim at this time.

A: Wrong. The VRR law contains no statute of limitations, and the same is true of USERRA, and both laws contain identical provisions precluding the application of State statutes of limitations. Moreover, her claim has not even accrued yet, because she has not yet retired and started drawing retirement benefits.

In summary, Congress has provided you, the pension plan administrator, the tools you need to avoid unanticipated costs that have not been funded, but any dispute between you and the participating employers should be permitted to delay or defeat the pension rights of returning servicemembers under USERRA.

The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government. samwright50@yahoo.com.