

USERRA's Pension Rules Apply to Short-Term Military Periods

By CAPT Samuel F. Wright, JAGC, USNR (Ret.)

CATEGORY: USERRA—Pension

The Uniformed Services Employment and Reemployment Rights Act (USERRA) gives you the right to time off from your civilian job for *voluntary or involuntary* service in the uniformed services. If you meet the USERRA eligibility criteria (summarized in Law Review 77), you are entitled, upon your return from service and timely application for reemployment, to be promptly reemployed (generally, within two weeks after your application, and immediately after a short-term tour of duty like a drill weekend). Upon your reemployment, you are entitled to be treated, for seniority and pension purposes, *as if you had been continuously employed* during the period that you were away from work for service.

The term “service in the uniformed services” is defined in section 4303(13) of USERRA, 38 U.S.C. 4303(13). The definition is broad—it includes active duty, active duty for training, inactive duty training (drills), and initial active duty training. A period of service in the uniformed services, protected by USERRA, can be anything from five hours to five years.

Most employers have come to understand the obligation to make up missed employer pension contributions, and to give the returning employee the opportunity to make up missed employee contributions, after a lengthy period of military service—like an 18-month callup to active duty. Many employers have resisted making these arrangements for short tours of military duty, like drill weekends and two-week annual training tours. Employer personnel offices complain about the administrative burden of accommodating several short tours of military duty in the same year; but “too hard” is not a defense under USERRA.

I invite the reader’s attention to my Law Review 107, entitled “Pension Entitlements Apply To Training Duty.” I have long taken the position that section 4318 of USERRA applies equally to short tours and longer tours of military duty or training, and now the Department of Labor (DOL) USERRA Regulations strongly support my position. I invite the reader’s attention to 20 CFR (Code of Federal Regulations) 1002.259. Making you whole, with respect to your civilian pension, for a single drill weekend may seem to be much ado about not very much, but if you spend a career in a Reserve component, and spend the same time employed by a civilian employer, the cumulative effect of multiple short military-related absences from work could become quite significant.

I have good news to report. An ROA member who is employed by the Federal Express Corporation (FedEx) as a pilot has sent me a copy of a FedEx notice dated October 2006 and entitled “Important Information about the Federal Express Corporation Pilots’ Money Purchase Pension Plan: Contribution to the Plan Due to Short Term Military Leave.” The notice provides as follows:

"The primary federal statute governing employment-related issues for servicemen who are required to miss civilian work in order to perform military service is the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (USERRA). Among many other things, this statute governs the provision of retirement benefits, including the Federal Express Corporation Pilots' Money Purchase Pension Plan (PMPPP), for pilots who return to work following periods of qualifying military leave. The Company understands USERRA to require PMPPP contributions to be made for pilots who return to work following periods of qualifying military leave. The Company understands USERRA to require that PMPPP contributions be made for pilots who return to work following periods of qualifying military leave even though they are not paid while taking that leave.

For short-term military leaves, trips in conflict with military leave are removed without pay and the credit hours removed go into the pilot's make-up bank and are available to be flown in make-up status at a later date. Since trips dropped due to military leave could be made up following the pilot's return to work, it was once thought that PMPPP contributions could be made at the time the pilot flew the make-up trip. However, the USERRA regulations suggest that those contributions should be made within 90 days of the date on which the pilot returns to work from a qualifying military leave, regardless of whether the pilot flies any make-up that can be traced to trips dropped due to military leave.

With this clarification in interpretation of USERRA requirements, FedEx is making a corrective contribution to your PMPPP account for the period(s) of time you were on a short-term military leave beginning June 1, 1999 through August 31, 2006. The contribution is based on lost pay as a result of your dropped trip(s) while you were on short-term military leave. ... On a prospective basis, beginning with leaves that were completed in September 2006 or afterward, PMPPP contributions will be processed within 90 days of the date on which the pilot returns from a qualifying short-term military leave."

FedEx has now corrected its USERRA violation, at least on this issue. Now is the time for other employers, large and small, to make similar corrections.

Military title shown for purposes of identification only. 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.