LAW REVIEW 732

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CATEGORY: USERRA-Pensions
USERRA Applies to Deferred Compensation Plans

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Q: I am a volunteer ombudsman for the National Committee for Employer Support of the Guard and Reserve (ESGR). I have a case involving a Reservist who was called to active duty and deployed to Iraq. He left his job with a village here in Wisconsin. He returned safely and made a timely application for reemployment. He is back at work, but the village has refused to make contributions to his pension plan for the time he was away from work serving our country.

I pointed out to the village attorney the Uniformed Services Employment and Reemployment Rights Act (USERRA), and specifically section 4318 of that act. The village attorney insists that section 4318 only applies to "pension plans" and that the village does not have a "pension plan." He refers to the village's plan as a "deferred compensation plan." It seems to me that USERRA would be largely worthless if its requirements could be defeated by simple wordsmithing of this nature. What do you think?

A: I think that the village attorney's assertion that USERRA does not apply to the village's "deferred compensation plan" borders on being frivolous. Congress has made clear the broad application of section 4318 of USERRA. "Except as provided in subparagraph (B) [pertaining to the Federal Thrift Savings Plan, and not pertinent to this discussion], in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974 [ERISA] [29 U.S.C. 1002(2), (33)] *or a right provided under any federal or state law governing pension benefits for governmental employees,* the right to pension benefits of a person reemployed under this chapter shall be determined under this section" (38 U.S.C. 4318(a)(1)(A)) (emphasis supplied).

ERISA is the statute enacted by Congress 33 years ago to ensure the financial soundness of pension plans established by employers and labor organizations. "Except as provided in subparagraph (B) [pertaining to regulations to be prescribed by the Secretary of Labor, under ERISA, and not pertinent to this discussion], the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of the surrounding circumstances such plan, fund, or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan, or the method of distributing benefits from the plan" (29 U.S.C. 1002(2)(A)).

This ERISA definition of "pension plan" is broad. It was written that way intentionally to preclude exactly the sort of "this does not apply to us" argument the village attorney is giving you. ERISA does not apply to pension plans established by governmental employers (federal, state, or local). Accordingly, the phrase "or right provided under any federal or state law governing pension benefits for governmental employees" was included in section 4318 to make it clear that, in this respect, USERRA's application is broader than ERISA's. USERRA most definitely applies to the states and their political subdivisions (counties, cities, villages, school districts), as well as to private employers and to the federal government.

Q: The village attorney also asserts that no contribution to the pension plan is owed because the individual in question received no salary or wages from the village during the time he was away from work to serve on active duty. What do you think of that argument?

A: Section 4318 of USERRA provides, "For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service

described in subsection (a)(2)(B) shall be computed-(A) at the rate the employee *would have received* but for the period of service" (38 U.S.C. 4318(b)(3)) (emphasis supplied).

The rights of the individual in question, with respect to the village's pension plan, are based on what he *would have earned* from the village if he had not been called to the colors, not based on what he did in fact earn from the village (nothing, in this case) during his period of military service. Section 4318 of USERRA follows directly upon the "escalator principle" first enunciated by the Supreme Court in 1946: "[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 the war" (*Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946)).

Q: The village attorney next asserts that the village is not permitted to make contributions based on what the individual would have earned from the village, but for the mobilization, because state law in Wisconsin, applicable to the village, expressly forbids making contributions based on imputed earnings. What do you say to that argument?

A: Section 4302(b) of USERRA [38 U.S.C. 4302(b)] expressly provides that USERRA overrides any state law or local ordinance that purports to limit rights provided by USERRA or that imposes an additional prerequisite on the exercise of such rights. I also invite your attention to Article VI, Clause 2 of the U.S. Constitution (commonly called the Supremacy Clause). Early in our nation's history, the Supreme Court decided that the Supremacy Clause means exactly what it says-that when federal and state law are in conflict, the federal law is supreme and controlling. See *Gibbons v. Ogden,* 22 U.S. 1 (1824).