

LAW REVIEW 741

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CATEGORY: USERRA—Pension

Am I Permitted to Make Up Missed Employee Contributions to My Pension Plan Account after Leaving the Employ of My Pre-Service Employer?

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Q: I have enjoyed reading your Law Review articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have read all the articles about section 4318 of USERRA, as it applies to pension benefits through one's civilian job, and I do not find an answer to my specific question.

I had been employed by the XYZ Corp. for five years before I was called to active duty for two years. I was recently released from active duty under honorable conditions. I have not yet applied for reemployment at XYZ, but I still have plenty of time to do so within the 90 days (after the date of release from active duty) that the law allows me. I am trying to decide whether to apply for reemployment at XYZ, as I have an offer from ABC, in the same city, for a job that pays substantially better.

I would accept the ABC offer in a moment, but I am concerned about losing my built-up retirement benefits at XYZ. That company has a contributory-defined contribution pension plan. During the five years that I worked for the company, before I was recalled to active duty, I made employee contributions (actually called "elective deferrals" because they were made with pre-tax earnings). As I understand section 4318 of USERRA, I am entitled to make up the missed elective deferrals (employee contributions) within a period that starts on the date of my reemployment and extends for three times the duration of my most recent period of service in the uniformed services (but not more than five years), and then to receive the employer matches on those makeup contributions.

Let us say that I make a timely application for reemployment at XYZ and return to work there in June 2007, but resign in August 2007 to take the ABC job offer. Am I permitted to continue making makeup contributions to the XYZ pension plan, and continue receiving XYZ employer matches, through June 2012 (five years after my return to work)?

A: Probably not. The Department of Labor's final USERRA regulations, published in *Code of Federal Regulations* (CFR), at title 20, part 1002, have a subsection that specifically addresses your question: "If the employee is enrolled in a contributory [pension] plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years. *Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer*" 20 CFR 1002.262(b)) (emphasis supplied). It appears, based on the italicized language above, that your plan will not work. If you want to make up the missed elective deferrals and get the employer matches, you will need to remain employed at XYZ for the entire five-year period, or at least long enough to make up the missed elective deferrals. Your contributions to the XYZ pension plan must be made from XYZ earnings.

CORRECTION September 2015:

In this article, I wrote that it is necessary to make the returning employee make-up contributions by payroll deduction, out of post-reemployment earnings from the pre-service employer. Upon further reflection, I no longer believe that to be the case. You must make the make-up contributions WHILE you are employed by the pre-service employer, but it is not necessary that you make up the missed contributions out of post-reemployment earnings from that employer. Please see [Law Review 15081](#) (September 2015).