

**Number 75, May 2003:
Pension Rights Revisited**

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Q: I have read and utilized your articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in the articles about pension entitlements (Law Reviews 4 and 40).

I have worked for the same company since October 1975. I plan to retire as soon as I am eligible, which, under the company's defined benefit plan, will be in October 2005, when I have 30 years of company service and when I will celebrate my 55th birthday. The amount of my monthly pension check will be based on my "high five" years of company compensation. In most but not all cases, the last five years are also the highest five years.

I am a colonel in the Air Force Reserve, and I was recalled to active duty in October 2001. I was extended for a second year, and I anticipate leaving active duty in October 2003. Thus, I will be spending two of my last five years of company service on active duty and away from work.

I asked my pension plan administrator how this recall to active duty will affect my pension checks, assuming that I stick to my plan to retire in October 2005. The administrator told me that because I will have no company earnings between October 2001 and October 2003, my "high five" years will be the two years between October 2003 and October 2005, plus the three years between October 1998 and October 2001.

That means I am getting screwed! My earnings during the period between October 1998 and October 2000 were substantially less than what my earnings would have been between October 2001 and October 2003, if I had not been called to active duty. That means that my monthly pension check, for the rest of my life, will be substantially less than it would have been if I had not been called to duty. Is the pension plan administrator correct?

A: No, the administrator is wrong. In determining your "high five" years of company earnings, you are entitled to have included what you would have earned from the company during the October 2001 to October 2003 active duty period. [See 38 U.S.C. 4318(a)(2)(A), 4318(a)(2)(B), and 4318(b)(3)(A).]

Q: That's great, but in my case it is not possible to determine precisely what I would have earned from the company during that

two-year period. I am a salesman, and commissions make up more than half of my compensation. There is no way to determine precisely how many sales I would have made or just what I would have earned in commissions. How does the law address that problem?

A: In such a situation, what you would have earned during the period of your service will be determined "on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period [of service in the uniformed services] (or, if shorter, the period of employment immediately preceding such period)." [38 U.S.C. 4318(b)(3)(B).]

Of course, all of this assumes that you meet USERRA's eligibility criteria. Those criteria are explained in detail in Law Reviews 5–7. ROA

* Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.