

**Number 76, May 2003:
Making Up Missed Contributions to Pension Plan**

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Q: I am an Army Reserve officer and ROA member, and I work for a major corporation. I am preparing for my retirement by means of a 401(k) plan at work. I contribute to this plan out of my paycheck, and my employer contributes as well. The plan documents provide that when an employee leaves the job for military service, or for any other reason, employer and employee contributions to the plan are suspended. The documents don't say anything about making up missed contributions after returning from military service.

I have been involuntarily called to active duty twice in recent years, from January through August 1998 and again from October 2001 to October 2002. After I returned from the more recent period of service, the company's personnel office advised me, upon re-employment, that I could take up to three years to make up the employee 401(k) plan contributions that I missed during the period of service. I have made arrangements to make up those contributions through extra payroll deductions between October 2002 and October 2005. I also asked for the opportunity to make up the contributions that I missed during my 1998 period of service, but the personnel office said that I am too late. What gives?

A: In Law Review 4 (July 1998), I described in detail the pension provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4333. All of the back Law Review articles are available on ROA's Web site: www.roa.org. Click on "Legislative Affairs" and then on "Law Review Archive" at the bottom of the drop-down menu.

In Law Review 4, I described the distinction between contributory and non-contributory pension plans, and also the distinction between defined benefit plans and defined contribution plans. Your 401(k) plan is an example of a contributory defined contribution plan.

In Law Review 4, I also explained that if employees as well as the employer contribute to the plan, the returning veteran must make up the missed employee contributions. [See 38 U.S.C. 4318(b)(2).] If you want to be treated as continuously employed, for purposes of what you get from your civilian job, you must also contribute that which you would have contributed. USERRA imposes a deadline for you to make up those contributions: "Any payment to the plan described in this paragraph shall be made during the period beginning with the date of re-employment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years." [38 U.S.C. 4318(b)(2)(final sentence).] Because your 1998 period of service was for eight months, the

deadline for you to make up the missed contributions expired 24 months later, in August 2000.

Q: That's not fair! The employer never told me, in 1998, that I had the right to make up the missed contributions, much less that there was a deadline for me to do so.

A: Unlike other federal laws, USERRA does not require an employer to notify employees of their legal rights. Of course, the employer can always do more than the law requires. [See 38 U.S.C. 4302(a).] The fact that the employer chose to notify you of your rights in 2002 does not mean that it was obligated to inform you in 1998, or that it will be required to inform you the next time that you are called to duty.

Perhaps USERRA should require employers to give employees such information, but that would require a statutory amendment. Louisiana has already enacted such a requirement at the state level. In the meantime, you need to inform yourself about your rights, and the Law Review columns can help. 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.