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Computation of Civilian Pension Upon Return to Work After Service

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1.3.1.2—Character and Duration of Service

1.3.2.3—Pension Credit for Service Time

Q: I am an Air Force Reserve officer and a member of ROA and I work as a pilot for a major airline. I recently returned to my civilian job after a four year absence while serving on active duty. I frequently read and utilize your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I returned to work promptly after I left active duty and applied for reemployment, but I am concerned that the airline is not treating me fairly and lawfully with respect to my civilian pension. The airline's personnel office claims that they are treating me "as if you never left" but their computation of the make-up employer contributions to my defined contribution pension plan is based on what I earned in the 12 months prior to my departure, not what I would have earned in the civilian job if I had remained continuously employed. In accordance with the collective bargaining agreement (CBA) between the airline and the union, my pilot colleagues received negotiated pay increases on January 1 of each year while I was away from work for service. Moreover, I would have received an additional pay raise each year based on longevity with the airline.

I think that these pay raises should be factored into the computation of the make-up employer contributions to my individual pension account. What do you think?

A: I think that you are entitled to have those pay raises factored into the computation, provided that you meet *all five* of the USERRA eligibility criteria. As I explained in [Law Review 0766](#) and other articles,^[1] you must meet five eligibility criteria to have the right to reemployment under USERRA:

1. You must have left a civilian position of employment for the purpose of performing service in the uniformed services. It is clear that you met this criterion.
2. You must have given the employer prior oral or written notice. For purposes of this article, I shall assume that you gave such notice.
3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. I shall assume that you met this criterion.
5. You must have made a timely application for reemployment, after release from the period of service. After a period of more than 180 days of service, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). It seems clear that you applied for reemployment well within this deadline.

It seems clear that you meet these five criteria, with the possible exception of the five-year limit. The limit is cumulative, with respect to your relationship with this employer. Thus, we must look back to your hire date at the airline to determine whether you have exceeded the five-year limit. I invite your attention to [Law Review 201](#) for a definitive discussion of what counts and what does not count. The shorthand version is that *all* involuntary service and *some* voluntary service are exempted from the computation of the limit.

Let us assume that you are within the five-year limit and that you otherwise meet the USERRA eligibility criteria. That means that you are entitled to prompt reemployment in the position of employment that you would have attained if you had been continuously employed. As part of that reemployment, you are entitled, under section 4318 of USERRA, to be treated *as if you had been continuously employed* in determining your pension entitlement:

For purposes of determining 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 that the employee would have received but for the period of service described in subsection (a)(2)(B)*, or (B) *in the case that the determination of such rate is not reasonably certain*, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such employment).

38 U.S.C. 4318(b)(3) (emphasis supplied).

This means that the airline needs to compute what you *would have earned* during that four-year period; coming up with a reasonable estimate is not terribly difficult. We can look to other pilots in your aircraft category—how many hours did they work in each of the four years you were gone? If you had been there during those years, it is reasonable to infer that your hours worked would be very close to the average hours worked by other pilots in your aircraft category. You determine the imputed hourly rate by adding the pay raises that you would have received, with reasonable certainty, to your pre-service hourly rate, if you had remained continuously employed. Multiply the imputed hours worked by the imputed hourly wage.

Your average rate of compensation during the 12 months immediately preceding your period of uniformed service is relevant only when the imputed earnings cannot be determined with reasonable certainty. An automobile salesman on commission would be an example of a person for whom the imputed earnings cannot be determined with reasonable certainty.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The Secretary promulgated such regulations and they were published in the *Federal Register* on December 19, 2005. The regulations are now published in title 20 of the Code of Federal Regulations, at Part 1002 (20 C.F.R. Part 1002). The Secretary's USERRA Regulations include a section right on point to this issue:

"How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?"

In many pension benefit plans, the employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using *the rate of pay that the employee would have received but for the period of uniformed service.*

(b)(1) Where the rate of pay the employee would have received is not reasonably certain, *such as where compensation is based on commissions earned*, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used."

20 C.F.R. 1002.267

(bold question in original, italicized emphasis supplied).

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 700 articles about USERRA and other military-relevant laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.