# LAW REVIEW 13137
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# USERRA Pension Review

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**1.3.2.3—Pension credit for military service time**

**Q: This is a follow-up to Law Review 13136. This pension stuff is so confusing. What is a defined benefit plan (DBP)? How is a defined contribution plan (DCP) different from a DBP? Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), what are the rights of the returning veteran in a DBP? How is it different if the pension plan is a DCP?**

**Distinction between DBPs and DCPs**

**A:** In a DBP, there is a formula defining or guaranteeing what the individual employee's monthly pension benefit will be. Typically, the formula considers the employee's number of years of service with the employer and the employee's highest salary with that employer, or perhaps the average of the employee's top three years of compensation from that employer.

The Civil Service Retirement System (CSRS) is the older of the two principal federal employee pension plans. A formula determines the employee's pension benefit, based on years of federal service and high-three years of federal civilian compensation. CSRS is a DBP.

In a DBP, the employer (and perhaps the employees as well) contribute money periodically (usually, each pay period) to support the pension payments that the employees will receive during retirement. The contributed funds are to be invested in safe and diversified investments that will earn dividends and other income. The money set aside during the working lifetime of my generation should be sufficient to pay the promised benefits, even if the sponsoring employer goes bankrupt or otherwise is unable to come up with additional contributions to support the pension payments for me and my colleagues in my generational cohort during our retirement years.

The amount of money to be set aside should be based on reasonable assumptions about the rate of return on the invested funds, over the long haul, and on reasonable actuarial assumptions about how long the retirees will live and continue to receive promised pension payments. Sometimes, assumptions that seem reasonable when made can turn out to be badly wrong. For example, 30% of the employees in my age cohort stopped smoking and lived (on average) 15 years longer than had been projected. Alternatively, perhaps the reasonable

expectations for return on investment are dashed by poor investment choices and/or by the Great Recession that began in 2007.

In a DBP, the sponsoring employer is responsible for coming up with more money if (for whatever reason) the invested funds turn out to be insufficient to support the promised benefit. The problem is that coming up with additional funding decades later may be impossible. Just you try to get additional funding out of Eastern Airlines or the City of Detroit.

Let us take Detroit as the ultimate nightmare scenario. At its height, Detroit was a prosperous city of 2.4 million people. Today, Detroit is a poverty-stricken bankrupt city of 700,000 people. The principal source of revenue for a municipal government is the real property tax—assessed as an annual payment based on a percentage of the assessed value of residential and commercial buildings and land. Today, entire neighborhoods in Detroit consist largely of once-luxurious houses that have been abandoned and torched and that are essentially worthless. The luxurious house where Mit Romney spent his childhood no longer exists.

Even during Detroit's "glory days" the amount of money set aside to support DBPs for city police, firefighters, and other city employees was grossly insufficient. The money just is not there to pay the promised benefits. For decades, city officials and union leaders signed on to a "kick the can down the road" game, wherein promised benefits were increased and required payments were reduced or deferred. The jig is up, and it is time to pay the piper. The piper will of necessity be paid by making major cuts in promised benefits to retired municipal employees. The tragedy is that most of those retirees are now too old to return to work and there are not many private sector jobs available in the Detroit area in any case.

Don't look at Detroit and gloat. Many other public sector DBPs at the local level, and sometimes at the state level, are only marginally better off than Detroit.

In a DCP, on the other hand, money contributed by the employer (and sometimes money set aside by the employee as well) is put into an account in the individual employee's name and over which the individual exercises some degree of control. The individual employee has an incentive and an opportunity to protect his or her financial future by acting to ensure that the money being put into the account is sufficient and that the funds are being invested prudently.

In a DCP, the individual's retirement benefit depends upon how much money is built up in his or her account during his or her working lifetime. Employees traditionally think of DBPs as "safer" because the employer is required to come up with more money to pay promised benefits. Especially in the public sector, in recent decades, DCPs are much safer from the individual's point of view.

**Q: In my pension plan, I as an individual employee contribute to the pension plan out of each bi-weekly paycheck. That means that my plan is a DCP, right?**

**A:** Not necessarily. A plan is said to be "contributory" if the employees contribute and "non-contributory" if only the employer contributes. A DBP can be contributory or non-contributory, as can a DCP.

CSRS is an example of a contributory DBP. During the decade that I worked for the United States Department of Labor (DOL) as an attorney, I contributed to CSRS out of each paycheck, but there was no individual account in my name. Now that I am retired, my monthly check is computed based on a formula, not based on how much money the employer (DOL) and I contributed to CSRS or on how the investments have done in the intervening years.

**Q: How does USERRA treat a DBP? What about a DCP?**

**A:** Let us take two hypothetical but realistic employees—let us call them Bob Jones and Mary Williams. Bob works for ABC Corporation, which has a DBP. Mary works for XYZ Corporation, which has a DCP. Bob and Mary are both Marine Corps Reservists in the same unit. Both were away from their civilian jobs for all of Calendar Year 2012. Both were called to active duty on January 1 and released on December 31 in that year.

Both Bob and Mary met the USERRA reemployment eligibility criteria. Both gave prior notice to their civilian employers and made timely applications for reemployment, and returned to work, after they were released from active duty on December 31, 2012. Both Bob and Mary served honorably, and neither received a disqualifying bad discharge enumerated in section 4304 of USERRA, 38 U.S.C. 4304. Neither Bob nor Mary has exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment. This was an involuntary unit call-up, so it does not count to Bob's five-year limit with ABC Corporation or Mary's limit with XYZ Corporation.[1]

Let us assume that Bob's career at ABC began in January 2010 and ends in retirement in January 2045, 35 years later. When Bob's ABC retirement is computed in January 2045, Bob is entitled to 35 years (not 34) of ABC pension credit. Because Bob met the USERRA eligibility criteria, he is entitled to be treated *as if he had been continuously employed at ABC* during Calendar Year 2012, when he was away from work for military service, in determining *when* Bob qualifies for his ABC pension and also in determining *how much* each monthly check will be.

**"(2)**

[1] Please see Law Review 201 (August 2005) for a definitive discussion of what counts and what does not count toward the five-year limit. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 959 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 137 so far in 2013.

**(A)** A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
**(B)** Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan."

38 U.S.C. 4318(a)(2).

Mary's situation with XYZ Corporation is more complicated. Let us assume that the XYZ DCP provides for each employee to contribute 5% of his or her earnings, each pay period, to the individual's DCP account.[2] Each pay period, the employer matches Mary's contribution, and the employer and employee contributions are invested in safe and diversified investments.

During Calendar Year 2012, Mary was not at work at XYZ because she was on active duty for the entire year. XYZ did not make and was not required to make contributions to Mary's account *while she was away from work.* Mary has rights under section 4318 *upon reemployment under this chapter.* During 2012, Mary was not entitled to reemployment under USERRA because she did not yet meet the USERRA eligibility criteria. She left her XYZ job for military service and gave XYZ prior notice, but she had not yet been *released* from the period of service, without a disqualifying bad discharge and without having exceeded the cumulative five-year limit, and she had not yet made a timely application for reemployment with XYZ. She cannot apply for reemployment until after she has been released from the period of active duty.

Let us assume that Mary applied for reemployment at XYZ on January 2, 2013, the first business day of the new year. At that point, and only at that point, Mary was entitled to reemployment at XYZ. She was released from active duty (on December 31) without having received a disqualifying bad discharge and without having exceeded her five-year limit at XYZ.

Because Mary's period of active duty exceeded 180 days (it was 366 days), she had 90 days, starting on the day of release from active duty, to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Mary applied for reemployment on the second day after her release from active duty. Her application for reemployment was most certainly timely.

Let us assume that Mary returned to work at XYZ on Monday, January 7, 2013. Upon returning to work, she will resume making the employee elective deferral payments to her DCP account, at 5% of each bi-weekly paycheck. In addition to these ongoing contributions, she will also need to make make-up contributions, to cover the contributions that she *would have made* in Calendar Year 2012 if she had been at work (instead of on active duty) for the entire year. She

[2] This contribution is called an "elective deferral" under the Internal Revenue Code (IRC). This money is taken off the top of Mary's salary, before federal and state income taxes are applied. Making this required contribution from pre-tax money gives Mary a significant tax break.

can make these make-up contributions, along with the ongoing contributions, out of pre-tax earnings. She has until January 2016 (three times the period of service) to complete the make-up contributions. Each time she makes a make-up contribution, XYZ must make a matching payment, just as if Mary had been at work and had made the contribution during Calendar Year 2012.

**"(2)** A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment 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."

Is Mary being treated exactly *as if she had been continuously employed at XYZ during 2012* for pension purposes? No. "For purposes of determining the amount of such [employer] liability and any obligation of the [pension—DCP] plan, earnings and forfeitures shall not be included." 38 U.S.C. 4318(b)(1).

To explain the meaning of these two exclusions (earnings and forfeitures), let me offer a tangible example. If Mary had not gone on active duty in Calendar Year 2012, she would have made contributions to her XYZ DCP account during that year, and XYZ would have matched those contributions. There would have been *earnings* (dividends and stock value appreciation) during the time Mary was on active duty and afterwards based on those employee contributions and employer matches. Calendar Year 2012 was a pretty good year for the stock market, a year of recovery from the Great Recession that began in 2007.

Is XYZ required to compensate Mary for these lost earning caused by her active duty in 2012? No. These are *earnings* that are subject to the exclusion under 38 U.S.C. 4318(b)(1).

What are *forfeitures?* Let us say that at XYZ the vesting period for the DCP plan is five years. In July 2012, while Mary was on active duty, Alex Adams was fired for misconduct after 4.5 years at XYZ. In accordance with standard practice, Alex takes with him his *employee* contributions to his XYZ DCP account, but the *employer matches* are forfeited—this is the cost of leaving XYZ employment short of vesting.

In July 2012, when Alex left XYZ employment, the employer matches in his XYZ DCP account were forfeited and were distributed *pro rata* to the other XYZ employees (into their DCP accounts) on the payroll in July 2012. Mary did not receive this distribution because she was not on the XYZ payroll in July 2012—she was on active duty in Afghanistan.

Is XYZ required to compensate Mary for the forfeiture distribution that she missed while she was on active duty? No. 38 U.S.C. 4318(b)(1).

**Need for timely reinstatement of pension contributions**

I answer about 800 questions per month from RC service members, military family members, attorneys, employers, etc., and about half of the questions are about USERRA. Every week, I hear of circumstances where it has taken weeks or months for the employer to reinstate an employee like Mary in the DCP pension account. The personnel office says, "we have never heard of that" and the payroll office says "we don't have a way of doing that in our software system." USERRA is almost 20 years old, and these delays are intolerable.

Mary needs to start as soon as possible making the make-up contributions to her DCP pension account, on top of the resumed regular contributions now that she is back at work. Mary needs the employer matches and the earnings that go with them. Mary should not have to wait a year or even a month for the employer to "get with the program" under a law that is hardly new. According to the Department of Defense, almost 900,000 RC personnel have been called to the colors since the terrorist attacks of September 11, 2001, our generation's "date which will live in infamy." Educating employers and pension plan administrators about USERRA is necessary and urgent, now more than ever.