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I Think that my Employer Must Make both the Employer and the Employee Contributions to my Pension Plan

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Q: I work for a large city in Arizona. I am also a Captain in the Army Reserve and a life member of ROA. I am being called to involuntary active duty for a year under section 12302 of title 10 of the United States Code (10 U.S.C. 12302). My pension plan in my civilian job requires both me and the city to make contributions.

Section 38-858 of Arizona Revised Statutes (A.R.S. 38-858) governs credit for military service in the Arizona pension plan for public employees. A.R.S. 38-858(G) provides: "If a member performs military service *due to a presidential call-up,* not to exceed forty-eight months, the employer shall make *the employer and member contributions* computed pursuant to subsection E of this section on the member's return and in compliance with subsection B of this section." (Emphasis supplied.)

I think that this means that when I complete my year of active duty and return to work for the city in late 2014 the city will be required to make both the employer and employee contributions to the pension plan. The City Attorney insists that the right to insist that the employer make both the employer and employee contributions applies only to a "presidential call-up" under section 12304 or 12306 of title 10, and not to a call-up under section 12302, as in my case. Thus, the City Attorney insists that the city is not required to make and will not make the employee contributions to the pension plan when I return to work.

I have enjoyed reading your "Law Review" articles[1] in the ROA magazine and on the Service Members Law Center website, at www.servicemembers-lawcenter.org. What do you think of the City Attorney's attempt to distinguish section 12302 from sections 12304 and 12306?

A: I think that the City Attorney's distinction makes no sense. For purposes of comparison, I am attaching the three sections below:

"(a) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned [the Service Secretary] may, *without the consent of the persons concerned*, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty for not more than 24 consecutive months.
(b) To achieve fair treatment as between members in the Ready Reserve who are being considered for recall to duty without their consent, consideration shall be given to—
(1) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;
(2) family responsibilities; and
(3) employment necessary to maintain the national health, safety, or interest.

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 973 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 151 so far in 2013.

The Secretary of Defense shall prescribe such policies and procedures as he considers necessary to carry out this subsection.
(c) *Not more than 1,000,000 members of the Ready Reserve may be on active duty, without their consent, under this section at any one time."*

10 U.S.C. 12302 (emphasis supplied).

"(a) Authority.— Notwithstanding the provisions of section 12302(a) or any other provision of law, when the President determines that it is necessary to augment the active forces for any named operational mission or that it is necessary to provide assistance referred to in subsection (b), he may authorize the Secretary of Defense and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, *without the consent of the members concerned*, to order any unit, and any member not assigned to a unit organized to serve as a unit of the Selected Reserve (as defined in section 10143(a) of this title), or any member in the Individual Ready Reserve mobilization category and designated as essential under regulations prescribed by the Secretary concerned, under their respective jurisdictions, to active duty for not more than 365 consecutive days.
(b) Support for Responses to Certain Emergencies.— The authority under subsection (a) includes authority to order a unit or member to active duty to provide assistance in responding to an emergency involving—
(1) a use or threatened use of a weapon of mass destruction; or
(2) a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property.
(c) Limitations.—
(1) No unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 15 or section 12406 of this title or, except as provided in subsection (b), to provide assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.
(2) Not more than 200,000 members of the Selected Reserve and the Individual Ready Reserve may be on active duty under this section at any one time, of whom not more than 30,000 may be members of the Individual Ready Reserve.
(3) No unit or member of a reserve component may be ordered to active duty under this section to provide assistance referred to in subsection (b) unless the President determines that the requirements for responding to an emergency referred to in that subsection have exceeded, or will exceed, the response capabilities of local, State, and Federal civilian agencies.
(d) Exclusion From Strength Limitations.— Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or members in grade under this title or any other law.
(e) Policies and Procedures.— The Secretary of Defense and the Secretary of Homeland Security shall prescribe such policies and procedures for the armed forces under their respective jurisdictions as they consider necessary to carry out this section.
(f) Notification of Congress.— Whenever the President authorizes the Secretary of Defense or the Secretary of Homeland Security to order any unit or member of the Selected Reserve or Individual Ready Reserve to active duty, under the authority of subsection (a), he shall, within 24 hours after exercising such authority, submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of these units or members.
(g) Termination of Duty.— Whenever any unit of the Selected Reserve or any member of the Selected Reserve not assigned to a unit organized to serve as a unit, or any member of the Individual Ready Reserve, is ordered to active duty under authority of subsection (a), the service of all units or members so ordered to active duty may be terminated by—
(1) order of the President, or
(2) law.
(h) Relationship to War Powers Resolution.— Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution (50 U.S.C. 1541 et seq.).
(i) Considerations for Involuntary Order to Active Duty.—

(1) In determining which members of the Selected Reserve and Individual Ready Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to—
(A) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;
(B) the frequency of assignments during service career;
(C) family responsibilities; and
(D) employment necessary to maintain the national health, safety, or interest.
(2) The Secretary of Defense shall prescribe such policies and procedures as the Secretary considers necessary to carry out this subsection.
(j) Definitions.— In this section:
(1) The term "Individual Ready Reserve mobilization category" means, in the case of any reserve component, the category of the Individual Ready Reserve described in section 10144(b) of this title.
(2) The term "weapon of mass destruction" has the meaning given that term in section 1403 of the Defense Against Weapons of Mass Destruction Act of 1996 (50 U.S.C. 2302(1))."

10 U.S.C. 12304 (emphasis supplied).

"(a) Units and members in the Standby Reserve may be ordered to active duty only as provided in section 12301 of this title, but subject to the limitations in subsection (b).
(b) In time of emergency—
(1) no unit in the Standby Reserve organized to serve as a unit or any member thereof may be ordered to active duty under section 12301(a) of this title, unless the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, determines that there are not enough of the required kinds of units in the Ready Reserve that are readily available; and
(2) notwithstanding section 12301(a) of this title, no other member in the Standby Reserve may be ordered to active duty as an individual under such section without his consent, unless the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, determines that there are not enough qualified members in the Ready Reserve in the required category who are readily available."

10 U.S.C. 12306.

Section 12306 deals with the Standby Reserve and is not relevant to this conversation. I see no logical basis for making a distinction between section 12302 and section 12304. Both sections provide for the *involuntary* call-up of Reserve and National Guard personnel in times of national emergency, as determined by the President. The apparent purpose of A.R.S. 38-858(G) is to give an *extra benefit* (over and above USERRA) to those who are *involuntarily* called to the colors.

I think that A.R.S. 38-858(G) applies equally to call-ups under section 12302 and section 12304. When you complete your call to active duty and return to work, I think that you are entitled to insist that the city make up both the employer and employee contributions, in accordance with section 38-858(G). This is a question of interpretation of the state law. If the city persists in its refusal, you may need to sue the city in state court.

Q: What is the relationship between state law and the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: Section 4302 explains the relationship between USERRA and state laws and other matters:

"(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."

38 U.S.C. 4302.

Under this section, USERRA is *a floor and not a ceiling* on the rights of people like Joe. USERRA does not require the city to make the employee contributions to the pension plan, only the employer contributions. State law gives you that right. This is an example of a state law that gives you *greater or additional rights* and is not preempted by USERRA, in accordance with section 4302(a).

Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* September 20, 2004. After considering comments received and making a few adjustments, the Department of Labor (DOL) published in the December 29, 2005, *Federal Register* the final USERRA regulations. They took effect January 18, 2006. The regulations are published in Title 20, Code of Federal Regulations (CFR), Part 1002 (20 C.F.R. Part 1002). One section of the DOL regulations explains the relationship between USERRA and other laws, contracts, agreements, policies, and other matters:

How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) *If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA.* For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave."

20 C.F.R. 1002.7 (emphasis by italics supplied, bold question in original).

I see one subsection of A.R.S. 38-858 that provides a lesser benefit than USERRA requires and that is preempted by USERRA: "An active member of the [retirement] system who volunteers or is ordered to perform military service may receive credited service *for not more than sixty months of military service* as provided by the uniformed

services employment and reemployment rights act (38 United States Code part III, chapter 43)." A.R.S. 38-858(B) (emphasis supplied).

As I explained in Law Review 13138 and Law Review 13142, USERRA *does not limit the required pension credit to five years.* Under section 4318 of USERRA, the returning service member is entitled to civilian pension credit *upon reemployment under USERRA.* As I explained in Law Review 1281 and other articles, the returning service member must meet five conditions to have the right to reemployment under USERRA. One condition is that the person's cumulative period or periods of uniformed service not have exceeded five years with respect to the employer relationship for which the member seeks reemployment, *but there are nine exemptions from the five-year limit.*

Please see Law Review 201 (October 2005) for a definitive discussion of what counts and what does not count toward exhausting an individual's five-year limit. The shorthand is that *all* involuntary service and *some* voluntary service are exempt from the computation of the five-year limit.

Let us consider a hypothetical but realistic example. Joe Smith has had a long career as an employee of a city government in Arizona and an equally long career in the Army Reserve. During Joe's long career, he has been away from his civilian job for four years of *voluntary* active duty (duty that counts toward his five-year limit) and another three years of *involuntary* active duty (duty that is exempt from the five-year limit). Joe meets the USERRA eligibility criteria with respect to each period of uniformed service, both the voluntary and the involuntary periods.

Notwithstanding A.R.S. 38-858(B), Joe is entitled to Arizona public employee pension credit for all seven years (84 months) of military service time. Under Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause"), a federal statute like USERRA trumps a state statute or even a state constitution.

As a nation, we are commemorating the 150th anniversary of a great war fought about the supremacy of federal law over state law, and the federal side won. Arizona did not join the union until 47 years after the end of that war, but your state is bound by the outcome.