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Make-up Contributions to your Defined Contribution Pension Plan

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- 1.1.1.7—USERRA applies to state and local governments
- 1.3.1.2—Character and duration of service
- 1.3.2.3—Pension credit for service time
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a Master Sergeant (E-7) in the Air National Guard. I joined ROA recently after you amended your constitution to make NCOs eligible.

I am a police officer and have been since July 1997. I am eligible to retire from the police force when I have 20 years of service, and I have always planned to retire in July 2017, when I meet the 20-year requirement.

Our pension plan is a defined contribution plan. While working, I contribute 5% of the salary each pay period, before tax, and the employer matches this contribution with a like amount. These employer and employee contributions go into an account with my name on it—each employee has his or her own account. When I turn 60, I will start drawing down this account in monthly retirement checks.

In November 2007, I was involuntarily called to active duty for one year, until November 2008. Instead of leaving active duty and returning to work in late 2008, I accepted the Air Force's offer to remain on active duty, and I finally left active duty in November 2013, six years after I left my job for service in November 2007.

I returned to work in late November 2013, but now I am concerned about my retirement from the police force in July 2017. Does my six-year period of active duty (November 2007 to November 2013) count as employment time with the police department for pension eligibility purposes? Is the employer required to make up the missed employer contributions to my pension account? Am I required to make up the missed employee contributions?

A: The answer is yes to all three questions, *provided* that you meet the five conditions for reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). As I explained in Law Review 1281¹ (August 2012) and other articles, you must meet these five conditions:

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,013 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed

- a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. You must have given the employer prior oral or written notice.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. There are also nine exemptions—kinds of service that do not count toward the five-year limit.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the Air Force.
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.

It appears that you met these five conditions in November 2013. For purposes of this article, I shall assume that you gave prior notice to the police chief before you went on active duty in November 2007 and that you gave the chief notice of each extension of your active duty. Because you returned to the Air National Guard after you left active duty, it is clear that you did not receive a disqualifying bad discharge from the Air Force.

After a period of service of 181 days or more, you have 90 days to apply for reemployment.² Because you were back at work the same month that you left active duty, it is clear that you made a timely application for reemployment.

The five-year limit could conceivably be a problem. Because the limit is cumulative with respect to a specific employer relationship, we must look back to July 1997 in determining how much of the five-year limit you have used and how much “head room” you have remaining.

I invite your attention to Law Review 201 (August 2005) for a definitive summary of what counts and what does not count toward exhausting your five-year limit. Your drills and annual training periods do not count, and any involuntary service (as in a mobilization) does not count toward your limit. Some voluntary service is also exempted from the computation of the limit.

After having reviewed all your military orders from 1997 to the present, I see that you used none of the five-year limit between July 1997 (when you started your police department career) and November 2007 (when you began your recently concluded active duty period). Your year of involuntary active duty (November 2007 to November 2008) does not count toward your limit.³

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 169 new articles in 2013.

² 38 U.S.C. 4312(e)(1)(D).

³ 38 U.S.C. 4312(c)(4)(A).

I have determined that your five years of voluntary active duty, from November 2008 to November 2013, counts toward your limit. You have used every single day of your five-year limit, but you have not exceeded the limit. Going forward, you need to ensure that any additional periods for which you are absent from your police department job for military service are for exempt periods, because you have no head room on your five-year limit.

Because you met the five conditions in November 2013 and returned to work with the pre-service employer, the police department and its pension plan must treat you *as if you had remained continuously employed by the police department* during all the periods when you have been away from work for uniformed service, including the six-year period from November 2007 to November 2013. The pertinent USERRA section provides: "Each period [of uniformed service] 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 [pension] plan for the purpose of determining the nonforfeitality of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan."⁴

Because individual employees as well as the employer make contributions to this pension plan account, you will need to make up (after reemployment) the employee contributions that you missed during your active duty period (November 2007 to November 2013). The pertinent USERRA section is as follows:

"(2) A person reemployed under this chapter [USERRA] 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."⁵

Because you were reemployed in November 2013, you have until November 2018 (five years) to make up the missed employee contributions. Because you intend to retire from the police department in July 2017, you need to make up the missed employee contributions before you retire, because the make-up contributions must be made from post-reemployment earnings from that specific employer.

You will make these make-up contributions on top of the ongoing contributions that you make (just like all other employees) in the period between your reemployment (November 2013) and your retirement (July 2017). Like your ongoing contributions, these make-up contributions will

⁴ 38 U.S.C. 4318(a)(2)(B).

⁵ 38 U.S.C. 4318(b)(2).

be made with *pre-tax earnings*. That means that these payments will be taken off the top of your paychecks *before* federal and state income tax are charged on your salary.

It is important that you start making make-up contributions as soon as possible after your return to your civilian job and that you contribute as much as possible each pay period, because you have a limited time and a lot of missed contributions to make up.

Q: In December 2007, shortly after I was called to active duty, I contacted the personnel department of the police department and tried to make contributions to my pension plan account. The police department refused to accept contributions from me or to make contributions to my account while I was on active duty. Did that refusal violate USERRA?

A: No. You have rights under section 4318 of USERRA “*upon reemployment under this chapter.*”⁶ While you were away from work on active duty, the employer was not required to make contributions or to accept contributions from you.

Q: The City Attorney insists that make-up contributions cannot be made to my pension account because making such contributions violates state law. Is the City Attorney correct?

A: The City Attorney is wrong. USERRA explicitly overrules and supersedes state laws that purport to limit USERRA rights or that impose additional prerequisites on the exercise of USERRA rights. The pertinent USERRA section is as follows:

“(a) Nothing in this chapter [USERRA] 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 (emphasis supplied).

Article VI, Clause 2 of the United States Constitution (commonly called the “Supremacy Clause”) provides as follows:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall

⁶ 38 U.S.C. 4318(a)(2)(B) (emphasis supplied).

be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁷

As a nation, we are celebrating the sesquicentennial of a great war fought about the supremacy of federal authority over state authority. State and local government officials in your part of the country sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

⁷ Yes, it is capitalized just that way, in the style of the late 18th Century.