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Airline Employer Must Make Contributions to your Airline Pension Account when you Return from Military Service

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Update on Sam Wright

1.1.2.3—USERRA applies to laid off employees
1.3.1.1—Left job for service and gave prior notice
1.3.2.3—Pension credit for military service time
1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Air Force Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I graduated from college and was commissioned a Second Lieutenant in 1995, through my participation in the Reserve Officers Training Corps (ROTC). In 2005, I left active duty and affiliated with the Air Force Reserve. In January 2006, I signed on as a rookie pilot at a very large airline—let's call it Braniff Airline (BA).

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other 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. Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). The Reserve Officers Association (ROA) initiated the "Law Review" column in 1997. I am the author of more than 1200 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For six years (2009-15), I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have dealt with the VRRA and USERRA for more than 33 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed new reemployment statute that President George H.W. Bush presented to Congress (as his proposal) in February 1991. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

BA is a unionized airline. When furloughs (layoffs) are necessary because of a reduced demand for airline tickets, the furloughs are based strictly on seniority (longevity)—that is time in the employ of BA. Recalls from furlough are also based on seniority. The most junior pilots are the first to be furloughed and the last to be recalled from furlough. When the economy tanked in the fall of 2007, BA furloughed me on January 1, 2008.

Not knowing how long the furlough might last, and not being able to find other well-paid work at the time, I volunteered to return to active duty, for a two-year stint, in January 2009. Based on your suggestion in Law Review 0756 (October 2007), I gave notice to BA, by sending a certified letter to the Chief Pilot, return receipt requested. I have retained a copy of the letter I sent, along with the United States Postal Service (USPS) postcard showing that the Chief Pilot received my letter.

In January 2010, BA sent me a letter notifying me that I had been recalled from furlough and inviting me to return to work. I sent a new letter to the Chief Pilot, reminding him that I had informed him that I had returned to active duty in January 2009 and that I would likely remain on active duty until January 2011, in accordance with my Air Force orders. I have retained a copy of this letter and the USPS postcard showing that the Chief Pilot received my letter.

In January 2011, I left active duty at the end of my two-year recall to active duty, and I promptly applied for reemployment at BA and returned to work a few days later. I am uncertain as to whether BA has fully complied with USERRA with respect to my BA pension account.

BA has a defined contribution pension plan, and there is an individual account for each pilot. The airline contributes 16% of the pilot's BA earnings into the pilot's pension account. The individual pilot is not required or permitted to make contributions to the account. The amount of money for the pilot's retirement years depends upon the amount of money that BA has put in during the pilot's career and the performance of the investments.

What did USERRA require BA to do regarding my pension account when I returned to work in January 2011?

A: First, we must establish that you met the five USERRA conditions when you returned to work in January 2011. As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

a. You must have left a civilian *position of employment* (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA.
b. You must have given the employer prior oral or written notice.

c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment.
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. You must have made a timely application for reemployment, after release from the period of service.

It seems reasonably clear that you met these five conditions when you returned to work at BA in January 2011. As I have explained in Law Review 0756, you are considered to be holding a *position of employment* when you are in a furlough or layoff status, so long as there is some possibility that you will be recalled to work. Thus, you held a *position of employment* and left that position for the purpose of performing uniformed service in January 2009. You met the first condition.

It is most fortunate that you had the foresight to send the certified letter to the Chief Pilot before you returned to active duty in January 2009. Although you were in a furlough status at the time, you needed to give (and you did give) BA prior notice before you left your position of employment for the purpose of performing uniformed service. If you had not given such notice before you returned to active duty in January 2009, you would not have had the right to reemployment in January 2011.

It seems clear that you have not exceeded the five-year limit with respect to your employer relationship with BA. Your 1995-2005 decade of active duty is irrelevant for USERRA purposes because it occurred prior to your 2006 hire date at BA. Because your two-year recall (January 2009 to January 2011) was voluntary, it probably counts toward your five-year limit.[3] Even if the 2009-11 period counts, you are still well within the five-year limit.

The fact that you are still in the Air Force Reserve clearly shows that you did not receive a disqualifying bad discharge from the Air Force when you left active duty in January 2011. You received a DD-214 in January 2011, and that form clearly shows that your service was honorable.

After a period of service of 181 days or more, you have 90 days to apply for reemployment.[4] You were released from active duty, applied for reemployment, and returned to work, all within the month of January 2011. It is clear that your application for reemployment was timely.

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[3] If your orders contain "magic words," this two-year period will not count toward your five-year limit at BA. Please see Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

[4] 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

Because you met the five USERRA conditions and returned to work in January 2011, BA was required to make up the missed BA contributions to your pension account, promptly after you returned to work.[5] BA was not required to make contributions to your account while you were on active duty, because at that point you did not meet the five USERRA conditions.

Here is the pertinent subsection of section 4318:

> For purposes of computing 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—
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> (A) at the rate the employee *would have received* but for the period of service described in subsection (a)(2)(B), or
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> (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 [of service] (or, if shorter, the period of employment immediately preceding such period [of service]).[6]

Q: The BA personnel office insists that the determination of BA's obligation to make payments to my pension account, upon my reemployment, must be computed based on my BA compensation during calendar year 2008, because that was the 12-month period immediately preceding my return to active duty in January 2009. I received no BA compensation in calendar year 2008, because I was furloughed on January 1, 2008 and not recalled to work until January 1, 2010. Thus, BA asserts, there is no obligation for the company to make any payment to my pension plan account upon my reemployment in January 2011. What do you say about this BA assertion?

A: Under section 4318(b)(3) the *alternative* method of computation, based on the returning veteran's average rate of compensation during the 12-month period of employment immediately preceding the period of service is to be applied *only* "in the case that such rate [of compensation that the person would have received if he or she had been continuously employed] is not reasonably certain." In your situation, it is possible to determine with reasonable certainty what you would have earned from BA if you had remained continuously employed instead of going on active duty between January 2009 and January 2011.

You need to identify your "running mates" at BA. Let us assume that Mary Jones and Bob Adams were classmates of yours during the BA new hire class in January 2006. Like you, their seniority at BA dates from January 2006. On the BA pilot seniority roster, Mary Jones is one spot above you and Bob Adams is one spot below you. Like you, Jones and Adams were furloughed by BA on January 1, 2008 and recalled to work on January 2, 2010.

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[5] 38 U.S.C. 4318(b)(1).

[6] 38 U.S.C. 4318(b)(3) (emphasis supplied).

Jones and Adams did not work for BA and received no BA pay during calendar year 2009—they were furloughed in 2008 and not recalled to work until January 1, 2009. It is clear that you also would have received no pay from BA during calendar year 2009—you were on furlough for the entire calendar year.

Jones and Adams returned to work at BA in January 2010, when they were recalled from furlough. It is clear that you also would have returned to work at BA in January 2010 *but for* the fact that you were on active duty for another year, until January 2011. When you returned to work in January 2011 and were reemployed under USERRA, BA was required to compute what you *would have earned* from BA in calendar year 2010 and then to contribute 16% of that amount into your BA pension account.

Determining what you would have earned from BA in calendar year 2010 but for your military service during that year is a two-step process. First, we must determine the number of hours you would have worked in that year, but for your military service, and then we must determine what your hourly rate of compensation would have been. We can make both determinations based on the number of hours that Jones and Adams worked and the hourly rate of compensation that they received in 2010.

Q: When, if ever, is it appropriate to use the alternative method for computing the returning veteran's imputed earnings during the period of service?

A: Barry Bonds is an enlisted member of the California Army National Guard. On October 1, 2014, he went to work for Big Cadillac Dealer (BCD) in San Francisco, California. At BCD, Bonds is paid only by commission, on the Cadillacs that he sells.

Bonds works for BCD for the last three months of 2014 and then is recalled to active duty by the Army on January 1, 2015. Bonds is away from his BCD job for all of calendar year 2015. Bonds is released from active duty on December 31, 2015. Bonds promptly applies for reemployment and returns to work at BCD in January 2016. Bonds meets the five USERRA conditions and is entitled to reemployment.

How many Cadillacs would Bonds have sold in 2015 if he had remained continuously employed in that year, instead of going on active duty? How much would he have earned in commissions? There is no way to estimate that figure with reasonable certainty. In this situation, Bonds' imputed earnings for calendar year 2015 will be based on his average rate of compensation during the three months that he worked for BCD, before he was called to the colors on January 1, 2015.

Q: At BA, each pilot is guaranteed payment for 70 hours per month, but like most pilots I routinely bid for and work 85-90 hours per month. If BA must pay make-up contributions to a pilot's pension account when a pilot is reemployed under USERRA, BA computes the pilot's imputed earnings (what he or she would have earned from the airline but for the period of military service) based on the 70 guaranteed hours per month. Is that sufficient under USERRA?

A: No. I invite your attention to Law Review 14070 (May 2014), by Nathan Richardson and myself. A class action lawsuit was brought against United Airlines (UAL), based on exactly this practice. UAL was required to make substantial additional contributions to the pension accounts of individual pilots. If you meet the USERRA reemployment conditions and return to work, the airline is required to make contributions to your pension account based on the *number of hours that you would have worked.* If you can show with reasonable certainty that you would have worked more hours than the minimum, you are entitled to an employer payment to your pension account based on the number of hours that you would have worked. Basing the computation on the minimum guaranteed number of hours is insufficient under USERRA.

Q: Was I required to make contributions to my pension plan account after I returned to work at BA in January 2011?

A: Under section 4318(b)(2) of USERRA,[7] the returning veteran who is reemployed under USERRA must make up the missed employee contributions that he or she would have made if continuously employed. These make-up contributions must be made during the period that starts on the date of return to work and extends for three times the period of service, but not more than five years.

At BA, only the employer makes contributions to the pension plan account of an individual pilot. You missed no employee contributions during your 2009-11 active duty period. Thus, there are no missed contributions for you to make up. Section 4318(b)(2) does not apply to your situation.

Q: Does USERRA apply to short periods of military service (like drill weekends) as well as longer periods of service?

A: Yes. Please see Law Review 0844 (October 2008). Whenever you miss a BA shift because of military service, even a drill weekend, the airline must compute what you *would have earned but for the period of service,* and then contribute 16% of that amount into your BA pension account.

The amount that you lose for a single drill weekend will be small and perhaps not seem worth the trouble of arguing about, but over the course of a career in a Reserve Component the

[7] 38 U.S.C. 4318(b)(2).

cumulative effect of missed airline shifts, because of drill weekends and other military obligations, will be substantial. In computing the effect, you must also consider "the miracle of compound interest." The money in your pension account earns interest, and then the interest earns further interest, etc. The cumulative effect will be much greater than you originally thought.

Q: The BA lawyer insists that BA is not required to make make-up contributions to the pension accounts of individual pilots returning from military service because the collective bargaining agreement (CBA) between BA and the pilots' union does not require and indeed forbids the making of such contributions. What do you say about this assertion?

A: As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[8] In its first case construing the VRRA, the Supreme Court held: "No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act."[9]

Under section 4302 of USERRA,[10] USERRA is *a floor and not a ceiling* on the rights of the returning veteran. The CBA can give you greater or additional rights, over and above USERRA. If the CBA purports to limit your USERRA rights or to impose an additional prerequisite upon your exercise of those rights, USERRA overrides the CBA. USERRA requires BA to make up the missed employer contributions to your pension account, as if you had been continuously employed. The CBA cannot override this USERRA obligation.

[8] The STSA is the law that led to the drafting of more than ten million young men, including my late father, for World War II.

[9] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946) (emphasis supplied). The citation means that you can find this case in Volume 328 of *United States Reports,* starting on page 275. The specific language quoted can be found on page 285.

[10] 38 U.S.C. 4302.