

USERRA and Defined Contribution Pension Plans

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Update on Sam Wright

1.3.2.2—Continuous accumulation of seniority—escalator principle

1.3.2.3—Pension credit for military service time

Q: I am a Lieutenant Colonel in the Air Force Reserve and a life member of the Reserve Officers Association (ROA). I am the same guy who asked the questions in Law Review 16029, the immediately preceding article in this series.

I have been on active duty continuously since October 1, 2008. My current orders expire on September 30, 2016, and this time there will not be an extension. Although I have been on active duty for eight years, four of those years are exempt from the computation of my five-year limit under section 4312(c) of USERRA, 38 U.S.C. 4312(c). For purposes of this question, let us assume that I have met or will meet the five USERRA conditions for reemployment at Dinky Regional Airline (DRA), my employer before I went on active duty in 2008.

I can go back to work at DRA, but I also have an opportunity to go to work for Major Air Line (MAL), where the pay and benefits are much better. The downside of going to MAL is that I would be a brand new rookie with no seniority or pension credit. Please review for me what I would be losing at DRA if I choose to take a new job at MAL instead of exercising my reemployment rights at DRA.

I am particularly concerned about my pension rights at DRA. The airline had a defined contribution pension plan in effect when I worked there, and I believe that the plan is still in effect. Like other DRA pilots, I contributed 3% of my DRA pay to my individual pension plan account and DRA matched those contributions. I have not been contributing to the DRA plan for the last eight years, while I have been on active duty, and DRA has made no contributions

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1200 of the articles.

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to my account, but I did not withdraw the money from my account when I left to go on active duty in 2008. What are my USERRA rights with respect to the DRA pension plan? Do I lose those rights if I choose not to return to DRA and take a job at MAL instead?

A: Under section 4318 of USERRA³ you are entitled to substantial pension benefits *upon reemployment under USERRA*. This means that you must meet the five USERRA conditions and you must return to work for the pre-service employer, at least briefly.

If you are reemployed by DRA, you are entitled to make up the missed employee contributions to your pension account and to get the employer matches. You will have five years, starting on the date of your return to work, to make up the missed contributions.⁴ It would make sense for you to return to work for DRA at least long enough for you to make up the missed employee contributions and get the DRA matches paid into your pension account.

Q: How long will I need to work at DRA after reemployment in order to make these contributions and get these employer matches?

A: You need to pay the make-up contributions while employed by DRA, after your reemployment. Normally, it would make sense to spread out these make-up contributions, so that you can make the contributions with pre-tax earnings.⁵ In your case, it may make sense for you to complete the process of making up the missed contributions much more quickly, even if that means giving up the tax advantage of using pre-tax dollars to make these contributions, so that you can take advantage of the opportunity to get a pilot job at MAL. You likely need financial advice as well as legal advice in weighing these considerations.

Q: How will my make-up contributions and the employer matches be computed?

A: The company will need to compute how much you *would have earned* from DRA for each month between October 2008 and September 2016 (your active duty period), and then your make-up contribution will be 3% of that amount. You have a lot at stake here, so you need to check the company's math very carefully.

³ 38 U.S.C. 4318. The citation refers to section 4318 of title 38 of the United States Code. USERRA is codified in that title, at sections 4301 through 4335.

⁴ Under section 4318(b)(2), the maximum period for making up missed contributions after returning to work starts on the date of reemployment and extends for three times the period of service, but the repayment period may not extend beyond five years.

⁵ For example, let us say that your annual earnings at DRA after reemployment are \$100,000. You contribute \$3,000 (3% of the earnings) for your ongoing contributions to your DRA pension account plus another \$6,000 for make-up contributions, covering your active duty period from 2008 to 2016. In that scenario, you would pay federal and state income tax on \$91,000, not on \$100,000.

At a unionized airline like DRA or MAL, there is a pilot seniority roster based on date of hire. Let us say that Mary Smith is one spot above you on the roster and Bob Jones is one spot below you. Smith and Jones were among your classmates at the DRA rookie pilot class in 2007. They remained employed by DRA during the time that you were on active duty, from 2008 to 2016.

When you went on active duty in October 2008 you were on furlough status at DRA. When were Smith and Jones recalled from furlough? It is reasonable to conclude that you would have been recalled from furlough on that same date.

At a unionized airline, each pilot bids on a schedule each month, to cover the following month. The senior pilots normally get what they bid for, and the junior pilots (with little seniority) get what is left. Seniority also governs selection of aircraft type—pilots in larger aircraft get a greater hourly rate of pay than those flying smaller aircraft. And seniority often governs the timing for moving from the right seat (first officer) to the left seat (captain), with a substantial increase in pay.

For each month between October 2008 and September 2016, we can determine how many hours Smith and Jones flew and what their hourly rate of pay was. If you had remained at DRA instead of going on active duty, your hourly pay and number of hours worked would have been the same as that of Smith and Jones. Thus, we can come up with a very accurate estimate of how much you would have earned on a month-to-month basis during the entire eight years of your active duty period.

Q: What other benefits do I give up if I choose to take a new job at MAL instead of exercising my reemployment rights at DRA?

A: Under section 4316(a) of USERRA,⁶ you are entitled, upon reemployment under USERRA, to be treated *as if you had been continuously employed with the pre-service employer* during the time you were away from work for uniformed service, for seniority purposes after you return to the civilian job. If you return to work for DRA, you will have about nine years of seniority, and you will get the schedule you bid for at least some of the time. If you go to work for MAL, you will be a fresh rookie for seniority purposes, and you will not get what you bid for, by way of schedule, for several years.

⁶ 38 U.S.C. 4316(a).