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Pension Rights in a Defined Contribution Plan

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Update on Sam Wright

1.3.2.2—Continuous accumulation of seniority—escalator principle
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Q: My daughter (let's call her Mary Jones) is a Captain in the Army Reserve. She was involuntarily called to active duty for one year in July 2015 and deployed to Afghanistan, where she is currently serving. Her current orders expire in July 2016, but she may volunteer to extend for another year. She gave me a power of attorney, and I am managing her financial affairs during her deployment.

In January 2014, Mary took a new job with a major corporation--let's call it Daddy Warbucks International (DWI). This employer maintains a defined contribution pension plan. Each individual employee is permitted to contribute up to 6% of his or her salary into an individual pension account in the employee's name, and the employer (DWI) matches these

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1500 "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 1300 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 was 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 been dealing with the federal reemployment statute (old and new) for 34 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 a proposed rewrite of the 1940 reemployment statute, and President George H.W. Bush presented our draft to Congress as his proposal in February 1991. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA). The version enacted in 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the reemployment statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) 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 (TR), and as SMLC Director. When ROA disestablished the SMLC last year, I returned to TR, this time in an "of counsel" role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

contributions. The employee uses pre-tax money to make these pension contributions. For example, if the employee earns $100,000 per year and contributes 2% ($2,000) into the pension account, the employee pays federal and state income tax on $98,000, not on $100,000. The pension system is administered by Carolina Mega Bank (CMB).

DWI permits the individual employee to start participating in this pension system after he or she has been on the payroll for one year. Accordingly, Mary started participating in January 2015, after she had worked for DWI for one year. Although she was permitted to contribute up to 6% of her salary, she was only contributing 2%. She did that for the first six months of 2015, before she was called to active duty in July 2015.

After Mary left her civilian job to go on active duty, I have tried (on her behalf) to make employee contributions to her DWI pension account and to get DWI to make matching contributions. CMB has adamantly refused to accept employee contributions and DWI has refused to make matching contributions. What does the Soldiers' and Sailors' Civil Relief Act (SSCRA) provide in this scenario?

A: First, let me point out that in 2003 Congress enacted and President George W. Bush signed into law the Servicemembers Civil Relief Act (SCRA), as a long-overdue rewrite of the SSCRA, which was originally enacted in 1917, shortly after our country entered World War I.[3] The SCRA has lots of great provisions that will be most useful to your daughter during her deployment, but her rights with respect to her civilian employer and its pension system are governed by the Uniformed Services Employment and Reemployment Rights Act (USERRA), not the SCRA.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994.[4] USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[5]

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[3] Please see Law Review 116 (March 2004), by Colonel Mark E. Sullivan, USA (Ret.). Like the SSCRA, the SCRA was codified in the "Appendix" of title 50 of the United States Code. In 2015, this confusing and cumbersome "Appendix" was eliminated, and the SCRA is now codified in title 50, at sections 3901 through 4043 (50 U.S.C. 3901-4043). Please see Law Review 15115 (December 2015). That article includes a most useful conversion table prepared by Colonel John S. Odom, Jr., USAF (Ret.). That table greatly facilitates finding the new section numbers for sections formerly codified in the Appendix.

[4] Public Law 103-353. USERRA is codified at 38 U.S.C. 4301-4335.

[5] 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. As originally enacted in 1940, the VRRA only applied to those who were drafted, but in 1941, as part of the Service Extension Act, Congress amended the VRRA to make it apply to voluntary enlistees as well as draftees. Almost from the very beginning, the reemployment statute has applied equally to voluntary as well as involuntary military service.

In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held:

> [The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.[6]

The VRRA did not specifically mention pension plans, but in 1977 the Supreme Court applied the escalator principle to defined benefit pension plans and held that the veteran (even decades after he completed his World War II military service) was entitled to be treated *as if he had been continuously employed in the civilian job* during his military service period, in determining his or her civilian pension benefit.[7]

That 1977 Supreme Court case dealt with a defined benefit plan (DBP). The Supreme Court made clear that it was leaving to another day the application of the escalator principle to defined contribution plans (DCPs). That "other day" never came, and it remains unclear how the escalator principle applies to DCPs under the VRRA. Section 4318 of USERRA (effective in 1994) applies to both DBPs and DCPs, although somewhat less generously in the case of DCPs.

In a DBP, a formula establishes the amount of the individual employee's monthly pension benefit. The formula typically considers the number of years of service with that employer and the employee's rate of compensation at the end of his or her career. The employer is required to set aside money to be invested, so that the proceeds of the investments can be used to pay the promised benefits. Sometimes, the money set aside proves to be insufficient, because the investments did not perform as well as expected or because the actuarial assumptions proved to be unsound. In that case, the employer must set aside more money to pay the promised benefits in a DBP. A DBP does not include individual accounts for individual employee participants.

The DWI system is an example of a DCP. Each individual participant, including Mary Jones, has an individual account in the system. Employee contributions and employer matching contributions are put into that account. The amount of money available for the participant's retirement depends upon the amount put into the account and the performance of the investments during the participant's working lifetime.

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[6] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). Please see Law Review 0803 (January 2008) for a detailed discussion of *Fishgold* and its implications. The escalator principle is codified in section 4316(a) of USERRA, 38 U.S.C. 4316(a).

[7] *Alabama Power Co. v. Davis,* 431U.S. 581 (1977). I discuss this case and its implications in detail in Law Review 0915 (April 2009).

Under USERRA, Mary is entitled *after reemployment under USERRA* to make up the missed employee contributions—the contributions she would have made to her account if her DWI employment had not been interrupted by uniformed service. She must make the make-up contributions (on top of the resumed regular contributions) during the period that starts on the day she returns to work and extends for three times the period of service, but not more than five years.[8] For example, if Mary leaves active duty after one year, she will have three years to make up the missed employee contributions. If she remains on active duty for two years she will have five years to make up the missed contributions.

Although Mary was only contributing 2% of her salary to her pension account before she was called to the colors, she was permitted to contribute up to 6%. She is permitted to do the make-up contributions at the 6% rate, rather than the 2% rate, and that would be to her financial advantage. USERRA provides:

> No such [employee make-up] 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).[9]

It behooves Mary to do these make-up contributions as quickly as possible and in as great an amount as possible. When she does a make-up contribution, DWI is required to match it, as if she had remained continuously employed and had made the contribution at the originally scheduled time.[10]

Mary has these rights under section 4318 only *upon reemployment under USERRA.* This means that she must leave active duty, apply for reemployment, and return to work, and she must meet the five USERRA conditions. As I have explained in Law Review 15116 (December 2015) and other articles, Mary Jones or any service member must meet five conditions to have the right to reemployment under USERRA:

a. 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. Must have given the employer prior oral or written notice.
c. 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 the person seeks reemployment.[11]

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[8] 38 U.S.C. 4318(b)(2).
[9] 38 U.S.C. 4318(b)(2) (emphasis supplied).
[10] 38 U.S.C. 4318(b)(2).
[11] As is explained in Law Review 201 (August 2005), there are nine exemptions to the five-year limit—that is, there are nine kinds of service that do not count toward exhausting the person's five-year limit. Because Mary only began her DWI career in January 2014, the five-year limit is not an issue in her case,

d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.[12]
e. After release from the period of service, has made a timely application for reemployment with the pre-service employer.[13]

At this point, while Mary is on active duty, she meets the first two conditions but does not yet meet the other three. Thus, she is not entitled to make contributions to her account and DWI is not required to match any contributions.

Q: Mary has been contemplating quitting her job at DWI and opening her own business. How long will Mary need to remain employed at DWI, after she returns from military service, in order to get her DWI pension account matches?

A: Mary needs to make the make-up contributions *while working for DWI,* after she returns from military service. Ordinarily, it would make sense for her to string out these contributions over a period of years, in order to get the tax advantage of making the contributions with pre-tax money. If she is anxious to move on to being self-employed, it may make sense to forego the tax break and make the make-up contributions with a lump sum payment, using post-tax dollars.

Q: The DWI pension fund administrator at CMB said that Mary is not entitled to DWI pension credit and contributions for this period of military service because she is receiving military pension credit for this same period and that if she receives both military and civilian pension credit for the same period of time she is "double dipping." What do you say about that?

A: The pension administrator is wrong.

There are three kinds of military retirement, governed by three separate chapters of title 10 of the United States Code. There is the traditional military retirement, based on having performed 20 years or more of full-time active duty. There is military disability retirement, based on having suffered a serious disability in the course of military service. And there is the Reserve Component (RC) retirement system, governed by Chapter 1223 ("Retired pay for nonregular service") of title 10. The third form of military retirement is what I have been drawing since I

[12] Under section 4304 of USERRA, 38 U.S.C. 4304, a person who has received a dishonorable or bad conduct discharge or an other-than-honorable discharge or who has been dismissed or dropped from the rolls of a uniformed service is not entitled to reemployment.
[13] After a period of service of 181 days or more, the returning veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

turned 60 five years ago, and this is the form of military retirement for which Mary Jones is aiming. Chapter 1223[14] includes the following section:

> No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this chapter may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount of payable under that law, if that service is otherwise properly credited under it.[15]

In 1980, the 9th Circuit[16] held that section 12736 means exactly what it says and that it is unlawful to deny a person civilian pension credit based on the fact that he or she is receiving or may receive military pension credit under Chapter 1223 for the same period of time.[17]

Moreover, it is by no means certain that Mary will qualify for RC retirement benefits at age 60.[18] To qualify for this benefit, she must achieve at least 20 "good years" for RC retirement purposes, and a good year is a year during which she received at least 50 RC retirement points, based on active duty, active duty for training, inactive duty training, correspondence courses, etc. She may lose interest and disaffiliate before she attains 20 good years, or her downturn in her health could necessitate disaffiliation.

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[14] Congress enacted Chapter 1223 in 1948, as part of Public Law 80-810. At ROA headquarters, we have the pen that President Harry S. Truman used to sign that law. Truman was one of the founders of ROA, in 1922.

[15] 10 U.S.C. 12736.

[16] The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, and Washington.

[17] *See Cantwell v. County of San Mateo,* 631 F.2d 631 (9th Cir.), *cert. denied,* 450 U.S. 998 (1980). *See also Almeida v. Rhode Island Employees Retirement System,* 116 F. Supp. 2d 169 (D.R.I. 2000).

[18] Based on her performance of contingency service after January 28, 2008, Mary may qualify to start receiving her RC retired pay a few months prior to her 60th birthday. Please see Law Review 1007 (January 2010).