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USERRA Obligations of the Administrator of a Multi-Employer Pension Plan

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Update on Sam Wright

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Q: I recently took over as the administrator of a multi-employer defined benefit pension plan, that is a traditional pension. Half of the trustees of the plan are appointed by the association of employers who participate in the plan, and the other half are appointed by the union that represents the employees of these employers. This pension plan has been in existence for many decades and the number of participating employers reached a high point of 35 many years ago. Several of those companies went bankrupt, and currently only 20 companies participate.

The trustees fired the previous pension plan administrator and brought me in to replace her because the pension plan is in serious financial difficulty, like many traditional pension plans. The poor financial position was brought about gradually, over the years, by a combination of bad luck, bad planning, and fraud that my predecessor and her staff failed to detect and prevent.

The bad luck is that many of the pension plan's investments have performed very poorly, and some of them were fraudulent. And as participating companies were in difficult financial

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[1] Please see www.servicemembers-lawcenter.org. You will find more than 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.

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straits they fell behind in their required contributions to the pension fund, and when those companies went bankrupt the overdue payments were never made up. The bad planning was that many of the plan's actuarial assumptions were faulty. Many of the participating employees and retirees quit smoking and thus have lived longer than expected. For most people, increased longevity is good news, but for pension plan administrators it can be a nightmare. As retirees live longer they draw their monthly pension checks longer, and that puts increased stress on an already struggling pension plan.

A lawyer friend of mine shared with me a copy of your Law Review 16097 (September 2016), about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[3] to multi-employer pension plans like the plan that I am now responsible for administering. Frankly, until I read your article I had not even thought about the possibility that there were employees in our plan who left their civilian jobs for military service and later returned to work for participating employers after release from their service. It never occurred to me that the participating employers and the plan itself had obligations to these men and women, to make them whole for pension benefits that they would have earned in our plan if their civilian careers had not been interrupted by military service.

The possibility that our plan now has additional obligations that have not been funded or planned for only adds to my nightmares as the pension plan administrator. Who is responsible for funding the cost of these obligations? How am I supposed to pay these benefits when we don't have enough money to pay all the benefits that we have planned for?

A: If there is not enough money to pay all the benefits that are required by law and by contract, it may be that all pension plan participants (current retirees as well as current employees) will have to take a proportionate "haircut." If that is the case, those employees who have rights under USERRA or the VRRA need to get pension credit for their military service time *before* the proportionate haircut is imposed.[4] It is utterly unconscionable to contemplate letting those who served our country in uniform take a disproportionate haircut.

USERRA is 22 years old (enacted in 1994), but the reemployment statute is 76 years old (originally enacted in 1940). This law is part of the fabric of our society. Your predecessor as pension plan administrator and the union and the employers who established, funded, and

[3] 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. USERRA was Public Law 103-353, 108 Stat. 3161. 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), Public Law 76-783, 54 Stat. 885. 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. I was one of two principal drafters of USERRA, along with Susan M. Webman, one of my colleagues as a Department of Labor (DOL) attorney in the 1980s and early 1990s. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

[4] Please see Law Review 13146 (November 2013).

benefited from the plan should have been aware of the reemployment statute and should have planned accordingly. Ignorance of the law is no excuse.

As I have explained in Law Review 15116 (December 2015) and other articles, a person who leaves a civilian job for military service is entitled to reemployment if he or she meets five simple conditions:

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, as defined by USERRA.
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 with respect to the employer relationship for which the person seeks reemployment.[5]
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.[6]
e. Must have made a timely application for reemployment after release from the period of service.[7]

A person who meets these five conditions and returns to work for the pre-service employer or the successor-in-interest of that employer is entitled to be treated *as if he or she had remained continuously employed* in the civilian job in determining his or her eligibility for the civilian pension and in determining the amount of the monthly pension check. Here is the entire text of section 4318 with the most pertinent words italicized for your convenience:

> **§ 4318. Employee pension benefit plans**
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> • (a) (1) (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

[5] As is explained in Law Review 16043 (May 2016) and other articles, there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit with respect to that employer.

[6] Under section 4304 of USERRA, 38 U.S.C. 4304, a disqualifying bad discharge includes a punitive discharge (bad conduct discharge, dishonorable discharge, or dismissal) awarded by court martial as part of the sentence for a serious criminal offense. Section 4304 also disqualifies those persons who received other-than-honorable administrative discharges and those who were "dropped from the rolls" of the service.

[7] After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

- (B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
  - (2)(A) *A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.*
- (B) *Each period 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 plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.*

- (b) (1) *An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--*
  - *(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or*
  - *(B) if the sponsor does not provide--*
    - *(i) to the last employer employing the person before the period served by the person in the uniformed services, or*
    - *(ii) if such last employer is no longer functional, to the plan.*
      - (2) A person reemployed under this chapter 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.

- (3) 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--
  - (A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
  - (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 (or, if shorter, the period of employment immediately preceding such period).

- (c) *Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.*[8]

Those of us who drafted USERRA were very cognizant that some pension plans were in difficult financial circumstances, even 25 years ago, and that required or promised benefits need to be funded in advance. We were also aware that most pension plans (including multi-employer plans) made no provision for the possibility that a participating employee could leave his or her job for military service, serve for a period of time, and return to the civilian job after release from service and that there were pension obligations to such a person. Accordingly, section 4318(b)(1)(B)(i) provides that in this situation the last employer employing the individual before his or her uniformed service is responsible for funding the required pension credit.[9]

Q: That's great, but there are 20 individual companies that participate in this pension plan. If Josephine Smith leaves her job at the ABC Company for military service, completes her

[8] 38 U.S.C. 4318 (emphasis supplied).
[9] 38 U.S.C.

service, and is reemployed by ABC, I have no way of knowing that. How am I supposed to bill the company for the cost of according pension credit to Smith if I don't even know that she left for service and returned to work after service?

A: Those of us who drafted USERRA were aware of and made provision for that problem as well. I invite your attention to the final subsection of section 4318:

- *Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.*[10]

I suggest that you remind the participating employers (now and on an annual basis going forward) of the legal obligation to inform you whenever an employee returns from military service and is reemployed under USERRA and that you start billing the employers for this cost and suing them if they don't pay upon demand. You cannot turn back the hands of time and fix the failings of your predecessor over a period of many years, but you can at least establish proper procedures going forward.

Q: Is it correct to say that under no circumstances is an employee entitled to more than five years of civilian pension credit for military service time?

A: No, it is not correct to say that. A person is entitled to civilian pension credit for the time that he or she was away from work for service only if he or she meets the five USERRA conditions, discussed above. One of the conditions is that the person not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment.[11]

As I have explained in Law Review 16043 (May 2016) and other articles, there are nine exemptions to USERRA's five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's limit. If the application of the exemptions means that the person is within the five-year limit, and if the person otherwise meets the five conditions, that person is entitled to pension credit for the entire period of service, even if it is more than five years.

For example, let us say that Mary Jones works for the ABC Company, one of the companies that participates in your multi-employer pension plan. Mary enlists in the Navy and chooses the

[10] 38 U.S.C. 4318(c) (emphasis supplied).
[11] 38 U.S.C. 4312(c).

nuclear power program. Mary gives ABC prior oral or written notice that she is leaving for service, she serves honorably, and after release from service she makes a timely application for reemployment.

Because Mary chose the nuclear power program, her *initial active service obligation* is six years. Mary serves on active duty for exactly six years, from October 1, 2016 until September 30, 2022. Under section 4312(c)(1), the period of service that is required, beyond five years, to complete the individual's "initial period of obligated service" does not count toward the individual's five-year limit.[12] When Mary applies for reemployment in late 2022, she is entitled to reemployment, and she must be credited with pension credit for the entire period of her six years of active duty.

Moreover, Mary is entitled to civilian pension credit for the entire period that she was away from work for service, including the time between her departure from the job and her entry on active duty and the time after she leaves active duty and before she applies for reemployment.[13] Mary left her job at ABC on September 15, 2016, and she took 15 days to get her affairs in order before reporting to Navy basic training on October 1, 2016. She was entitled to do this under USERRA.[14]

Mary leaves active duty on September 30, 2022, and she then waits 60 days (until November 29) to apply for reemployment. After a period of service of 181 days or more, Mary has 90 days to apply for reemployment.[15] Mary's application for reemployment on day 60 was well within the 90-day deadline. The employer puts Mary back on the payroll 14 days after her application, on December 13, 2022. Under section 4318, Mary is entitled to civilian pension credit for the six years that she was on active duty plus the 15 days between her departure from the civilian job and the start of her active duty and the 74 days between her release from active duty and her return to the civilian job.

Q: I am aware of several employees of participating employers who left employment with participating employers for military service in the 1970s or 1980s and returned to work for participating employers well before 1994, when USERRA was enacted. Is it correct to say that I do not need to worry about those folks, as they retire in the coming months and years, because their military service and return to work was before the date of enactment of USERRA?

A: No, it is not correct to say that.

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[12] 38 U.S.C. 4312(c)(1).
[13] 20 C.F.R. 1002.259(a).
[14] 20 C.F.R. 1002.74(c).
[15] 38 U.S.C. 4312(e)(1)(D).

In its first case construing the VRRA (the predecessor reemployment statute), 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."[16] In 1977, the Supreme Court applied the escalator principle to pension benefits under a defined benefit plan.[17]

USERRA's transition rules preserve vested rights and obligations under the VRRA based on service before the enactment of USERRA. If Bob Williams left his job with a participating employer in 1982, if he left active duty in 1985 (within the VRRA's four-year limit on the duration of the period of service), if he served honorably and made a timely application for reemployment after release from service, he is entitled to civilian pension credit in your plan for his 1982-85 military service.

[16] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). I discuss *Fishgold* and its implications in detail in Law Review 0803 (January 2008).

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