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USERRA and the 401(k) Account at your Pre-Service Employer

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Update on Sam Wright

- 1.3.1.2—Character and duration of service
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Q: I am a Lieutenant (O-3) in the Navy 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).

In 2013, I applied for a job at an intermediate-size computer services company (let’s call it Computers R Us or CRU) and was hired. CRU has a defined contribution pension plan called a 401(k) plan, referring to section 401(k) of the Internal Revenue Code. Each participating employee has an account in this plan. The employee is permitted but not required to contribute up to 6% of his or her CRU salary into his or her account, and these contributions are made with pre-tax money, before federal and state income tax are applied to that money.

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1700 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 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 the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). 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 (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, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

For example, if my CRU salary was \$10,000 and I contributed \$600 to my 401(k) account I am taxed on \$9400 in income, not \$10,000.

The employer (CRU) matches employee contributions up to 6% of CRU salary, but with a catch. The employee must remain with the company for at least five years to be “vested” in the employer matching funds. If the employer leaves the employ of the company short of the five-year point for any reason, the employer matching contributions to his or her 401(k) account are “forfeited” and are distributed pro-rata to the other participating employees who are vested. The employee contributions and employer matches are invested in a diversified portfolio of stocks and other investments, and my 401(k) account has done well as the stock market has gained in value since the 2016 election.

I went to work for CRU on October 1, 2013 and left exactly two years later, on September 30, 2015, to enter active duty in the Navy for a three-year tour, set to expire on September 30, 2018. The Navy gave me this opportunity to go on active duty because of my knowledge and skill regarding computers, the Internet, and cyber warfare. I gained that knowledge and skill from my civilian education—I have a Master’s Degree in Computer Engineering—and from my work at CRU and another company before I began to work for CRU.

I will probably leave active duty on September 30, 2018, at the end of my current orders, but if the Navy gives me an opportunity to extend on active duty I will likely take advantage of that opportunity. I find my Navy work most interesting and enjoyable and prefer that work to the work that I was doing at CRU.

I have tried to make contributions to my CRU pension account while I have been on active duty, to get the tax break and the employer matches, but CRU and the separate company that manages the pension plan have made it clear that no employee contributions will be accepted and no employer matches will be made while I am away from my CRU job for active duty. In the meantime, the CRU personnel office shows my status as “on military leave” while the separate company that manages the pension accounts shows me as “terminated.” Both companies have told me that I only have two years for vesting purposes and that my vesting stopped running on September 30, 2015, when I left my CRU job to go on active duty.

How does USERRA apply to my pension entitlements at CRU?

A: USERRA gives you valuable rights with respect to the pension plan, but only *upon your reemployment*. You must leave active duty and meet the five USERRA conditions (discussed below) and return to work at CRU. At that time, your active duty time (interrupting your CRU employment) will count toward your vesting in the CRU pension plan, and you will be entitled to resume making employee contributions and getting employer matches. You will also be

entitled to make make-up contributions, to make up for the period when you were away from work for uniformed service.

Section 4318 of USERRA provides as follows:

- **(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.
 - **(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 nonforfeitality 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.³

As I have explained in Law Review 15116 (December 2015) and many other articles, you (or any service member or veteran) must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services. It is clear beyond question that you did this in 2015.
- b. You must have given the employer prior oral or written notice. You gave such notice.

³ 38 U.S.C. 4318 (emphasis supplied).

- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which you seek reemployment.⁴
- d. You must have been released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA.⁵
- e. After release from the period of service, she must have made a timely application for reemployment.⁶

At this point, you meet the first two conditions but do not meet the other three. You cannot meet the other three conditions until you leave active duty and apply for reemployment. When you meet all five conditions and return to work, you will be entitled to valuable rights under section 4318 of USERRA. Until then, CRU and the company that runs the pension plan have no obligation to you, other than the fiduciary responsibility to manage your funds carefully.

It is by no means certain that you will meet all five conditions. The most likely development that would preclude you from having the right to reemployment is that the Navy could give you the opportunity to extend on active duty for another three years and you could avail yourself of that opportunity. In that case, you would not have the right to reemployment because you would be beyond the five-year limit, unless some of your six-year period of active duty were exempt from the limit.⁷

It is also possible (although most unlikely) that you could do something stupid and that you could receive a disqualifying bad discharge from the Navy. You could win the Publishers' Clearinghouse Sweepstakes and retire. You could get a great job offer elsewhere and choose not to return to CRU. God forbid, you could die, or CRU could go the way of Studebaker, Montgomery Ward, and Eastern Airlines. None of us can predict the future. As Yogi Berra said, "Making predictions is hard, especially about the future."

Let us assume that you serve honorably and leave active duty at the end of your current orders, on September 30, 2018. You apply for reemployment the next day and return to work on October 15, 2018. At that point, you will be fully vested in the CRU pension plan. If you had remained continuously employed by the company, you would have met the five-year threshold

⁴ Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting your limit. Your current three-year period of voluntary active duty most likely does count toward exhausting your limit.

⁵ 38 U.S.C. 4304. The enumerated disqualifying discharges include a dishonorable discharge, a bad conduct discharge, a dismissal, an administrative discharge characterized as "other than honorable," or being "dropped from the rolls" of a uniformed service.

⁶ After release from a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁷ Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit.

on October 1, 2018. Because you meet the USERRA conditions, you are vested as of your return to work.⁸

Upon returning to work, you should resume making ongoing contributions to the CRU pension plan, to get the employer matches and the tax advantage of using pre-tax money to make those contributions. You will also want to *make up the employee contributions that you missed during the three years that you were away from work for active duty*, and USERRA gives you the right to do that, under these circumstances. You will have three times the period of service, but not more than five years, to make up the missed employee contributions.⁹ The make-up period begins on the day that you return to work and are reemployed under USERRA. Thus, you need to do the make-up contributions by October 14, 2023 (five years after you return to work).

You will probably want to make these make-up contributions, in addition to the resumed ongoing contributions, by payroll deduction from your CRU salary, to get the tax advantage of making the contributions with pre-tax money. You must do the make-up contributions *while employed by CRU*. If you are thinking of returning to active duty yet again, or if you will likely be leaving the employ of CRU for some other reason, it may be to your advantage to forego the tax advantage and do the make-up contributions in cash, with after-tax money, to get the CRU matches. This is a financial planning issue as well as a legal issue.

Q: If I had remained continuously employed at CRU during the 2015-18 period, and if I had made employee contributions and had received employer matches, I would have earned a lot of interest and appreciation on that money in the stock market run-up after the 2016 election. Is CRU required to make me whole for these missed earnings?

A: No. “For the purpose of determining the amount of such [employer] liability and any obligation of the plan, earnings and forfeitures shall not be included.”¹⁰

Q: Let us assume that during the three years that I was away from my CRU job for active duty nine other CRU employees left the employ of the company short of the five-year vesting point. When those employees left CRU employment, they took their contributions with them, including the earnings on those contributions, but the CRU matches and the earnings on those matches were forfeited and were distributed pro rata to the other CRU employees. If I had been there during that period, I would have benefited from those forfeiture distributions. Am I entitled to those forfeiture distributions upon my reemployment?

A: No. These are the “forfeitures” that are referred to in the sentence quoted above.

Q: Let us assume that instead of applying for reemployment the day after I leave active duty on September 30, 2018 I wait 89 days and then apply just barely within the 90-day deadline.

⁸ 38 U.S.C. 4318(a)(2)(B).

⁹ 38 U.S.C. 4318(b)(2).

¹⁰ 38 U.S.C. 4318(b)(1).

Under those circumstances, am I entitled to do make-up contributions for the period between September 30 (when I left active duty) and December 29 (when I returned to work)?

A: Your rights under section 4318 of USERRA and section 4316(a) (the escalator principle for seniority purposes) apply to the *entire period of your military absence from the civilian job*. This includes the active duty period. It also includes the lapse (if any) between your last day at the civilian job and your first day on active duty.¹¹ This also includes the period of up to 90 days when you are waiting to apply for reemployment and the lapse (if any) between your application for reemployment and your first day back at the civilian job.¹²

Q: Let us assume that at the end of my current orders (September 30, 2018) the Navy gives me the opportunity to extend for another three years and I decide to avail myself of that opportunity? What happens to my CRU pension account under those circumstances?

A: Under those circumstances, you will likely want to remove your funds from the CRU pension account and roll over those funds into another appropriate retirement account, like an Individual Retirement Account (IRA).

Q: Is CRU required to give me detailed advice about my USERRA rights and to assist me in exercising those rights?

A: No. As I explained in Law Review 17025 (March 2017), the employer's only obligation to inform employees of USERRA is the requirement under section 4334¹³ to post a notice in the form prescribed by the Department of Labor (DOL). You can probably find the USERRA notice in the CRU employee break room or some other place where required notices are posted. The USERRA notice will be one of about 25 required employee notices under the Fair Labor Standards Act, the Occupational Safety and Health Act, and many other notices required by various federal statutes, along with some notices required by state law. The USERRA notice prescribed by DOL is necessarily cursory, and it contains none of these details about pension entitlements under section 4318.

To exercise and enforce your USERRA rights, you first need to understand those rights. Informing you about USERRA and other pertinent laws is the primary purpose of our Law Review Library at the Reserve Officers Association.

Don't be "penny wise and pound foolish." You have a great deal at stake here, and you should be prepared to expend a few hundred dollars for expert legal advice to help you navigate this maze. Unfortunately, there are only a few dozen lawyers nationwide who understand USERRA in this level of detail.

¹¹ You were not required to work until September 30, 2015 when you entered active duty on October 1. You could have taken some days or even weeks off to get your affairs in order. See 20 C.F.R. 1002.74.

¹² Please see Law Review 60 (December 2002).

¹³ 38 U.S.C. 4334.