

State and Local Government Pension Funds Are in Sad Shape

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[\(Update on Sam Wright\)](#)

1.1.1.7—USERRA applies to state and local governments

1.3.2.3—Pension credit for military service time

1.8—Relationship between USERRA and other laws/policies

On 4/12/2018, the Pew Charitable Trusts released an important new report about the sad shape of many state and local government pension funds. Here is a [link to that report](#):

The report's Overview is as follows:

Many state retirement systems are on an unsustainable course, coming up short on their investment targets and having failed to set aside enough money to fund the pension promises made to public employees. Even as contributions from the taxpayers over the last decade doubled as a share of state revenue, the total still fell short of what is needed to improve the funding situation.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 1400 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 USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 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.

As I explained in detail in Law Review 17095 (October 2017) and many other articles, the returning veteran or service member who meets the five eligibility conditions³ for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) must be treated *as if he or she had remained employed in the civilian job* for purposes of pension credit in the civilian job, and USERRA applies to state and local governments as well as the Federal Government and private employers. Upon reemployment, the civilian employer must make contributions to the pension fund (including defined contribution plans as well as defined benefit plans) based on what the individual *would have earned* in the civilian job if he or she had remained continuously employed instead of leaving for military service.

I invite the reader's attention to Law Review 13146 (November 2013). The title of the article is "Detroit Bankruptcy and USERRA." In that article I wrote:

I think that it is inevitable that Detroit's public employee retirees will take a "haircut" (perhaps 50 percent or more) in their pension and health care benefits. This looming haircut make it all the more urgent that public employees and retirees who served in the Reserve Components, and whose careers were interrupted by military service receive pension credit for their military service time, as required by the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the predecessor reemployment statute, the Veterans' Reemployment Rights Act (VRRA).

Let us take a hypothetical but realistic example. Joe Smith retired from the Detroit Police Department in 2008, after a 25-year career, Joe also served in the Marine Corps Reserve, and his civilian career at the Police Department was interrupted by several periods of military service, including 1990-91 service for *Operation Desert Storm* and 2003-04 service for *Operation Iraqi Freedom*. Under the reemployment statute (old and new), Joe is entitled to be treated as if he had been continuously employed by the City of Detroit during each of the periods when he was away from work for military service.

Joe has not been so credited, and he is unaware that his federal rights have been violated. Now that Joe is facing a 50 percent cut in his pension benefits, getting proper credit for these military service times could be the difference between hamburger dinners and dog food dinners.

The recent Pew report shows that what happened in Detroit is likely to recur in other cities and even states. This makes what I wrote in 2013 more relevant and important. As you return from military service and seek reemployment in your pre-service civilian job, you should ensure that you

³ The individual must have left the civilian job to perform uniformed service and must have given the employer prior oral or written notice. The individual must 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. Please see Law Review 16043 (May 2016) concerning the computation of the five-year limit. The individual must have served honorably and must not have received a disqualifying bad discharge from the military. After release from the period of service, the individual must have made a timely application for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of these five criteria.

are properly credited in your civilian employer's pension plan for your military service time and that any required contributions to the pension plan have been made.