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USERRA and Pension Rights of Airline Pilots

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Update on Sam Wright

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Q: I am a Captain in the Air Force Reserve and a member of the Reserve Organization of America.[3] On the civilian side, I am first officer (co-pilot) for a major airline, let's call it Very Big

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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.

[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard senior officers. Our nation

Air Line or VBAL. I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

At VBAL and other unionized airlines, seniority is controlling in determining a pilot's work schedule. Each month, each pilot submits a proposed work schedule for the next month. Those pilots who have many years of VBAL seniority get most of the trips for which they bid. Junior pilots like me get what is left. The trips for which I am assigned bear little resemblance to the trips for which I bid.

As a traditional Air Force Reservist, I am required to "drill" each month, usually on the first weekend. Most pilots prefer to work during the week and have weekends off. The more senior pilots bid for and get weekday schedules, and the junior pilots like me get stuck with flying on weekends. Frequently, my drill weekend conflicts with my VBAL flying schedule.

Seven or eight times per year, I find it necessary to drop scheduled VBAL trips in order to report to my scheduled drill weekend. What are my USERRA rights in this situation?

A: USERRA gives you the right to an *unpaid but job-protected leave of absence* from a civilian job (federal, state, local, or private sector) to perform voluntary[4] or involuntary "service in the uniformed services" as defined by USERRA. USERRA's definition of "service in the uniformed services" includes active duty, active duty for training, inactive duty training (including drills and Additional Flight Training Periods or AFTPs), and other forms of service.[5]

As I have explained in detail 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 voluntary or involuntary service in the uniformed services. That is exactly what you are doing each time that you must drop a scheduled VBAL trip to perform a drill weekend or some other kind of uniformed service.

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has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

[4] USERRA's definition of "service in the uniformed services" includes "the performance of duty *on a voluntary or involuntary basis*." 38 U.S.C. 4303(13). In a larger sense, all military service in our country is voluntary and has been for almost half a century. In 1973, Congress abolished the draft and established the All-Volunteer Military.

[5] 38 U.S.C. 4303(13).

b. You must have given the employer prior oral or written notice that you were leaving the job to perform service.
c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.[6]
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.[7]
e. After release from the period of service, you must have made a timely return to work or application for reemployment.[8]

These five conditions apply to short periods of service (like drill weekends and traditional two-week annual training tours) just like they apply to longer tours, like voluntary or involuntary recalls to active duty or even enlisting in the Active Component of the armed forces. It is important that you make and retain careful records showing that you meet these five conditions each time that you miss VBAL work to perform uniformed service.

Your USERRA right to the continued accumulation of seniority and pension credit at the civilian job for the time that you are away from work for service also applies equally to short periods of service. If it is only one time that you must miss a trip to perform a drill weekend, that is hardly worth arguing about, but over the course of a year or a career these lost opportunities really add up. You should not leave this money on the table.

Q: Whenever I give the chief pilot notice that I must drop a trip because of my USAFR obligations, he gives me a hard time about "playing soldier" and tells me that my request for military leave is denied. What do you say about that?

A: USERRA does not require you to ask for or obtain the employer's permission to absent yourself from work to perform uniformed service. The law only requires you to give *notice.* The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

> **Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?**
>
> No. The employee is not required to ask for or get his or her employer's permission to leave

[6] Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions to the limit—that is, there are nine kinds of service that do not count toward exhausting your limit.
[7] If you receive a punitive discharge by court martial or administrative discharge characterized as "other than honorable," you will not have the right to reemployment. *See* 38 U.S.C. 4304.
[8] After a period of service of 181 days or more, you have 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). After a period of service of 31-180 days, you have 14 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(C). After a continuous period of service of fewer than 31 days, you must report for work at the start of the first regularly-scheduled work period on the first day after your release from the period of service and the time reasonably required for safe transportation from the place of service to your residence plus eight hours (for rest) after your arrival at home. *See* 38 U.S.C. 4312(e)(1)(A). In determining the deadline for you to apply for reemployment, it is the *actual period of service,* not the expected period of service, that controls.

to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.

As a matter of courtesy to the chief pilot, and to avoid unnecessary peeing contests, I suggest that you phrase your notice as a request for permission, until the chief pilot tells you that your request is denied. Your USAFR unit probably has a written drill schedule for the fiscal year. It would make sense for you to send the chief pilot a certified letter with the fiscal year drill schedule, and then to remind him each time there is a conflict between your drill scheduled and scheduled VBAL work.

Q: I understand that USERRA does not require the airline to pay me for time that I do not work because of my military training or service, but the airline must determine how much I *would have earned* during the time that I was away from work for service and must consider those imputed earnings in computing the amount of money that VBAL must contribute to my individual account in the VBAL retirement plan. How does this work? At VBAL, the employer contributes 15% of each pilot's VBAL earnings into the pilot's retirement account.

A: Here is the text of section 4318 of USERRA:

Employee pension benefit plans

(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 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) 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.[9]

Let us assume that you earn $60,000 from VBAL in 2019 and the employer contributes $9,000 to your retirement account. If you had not had to drop trips because of your USAFR drill obligations, you would have earned an additional $10,000 from the airline. In that case, the employer must contribute an additional $1,500 to your account.[10]

Q: Instead of computing what I would have earned from the trips that I had to drop to perform my USAFR drills, VBAL uses a complicated formula that "looks back" 12 months from each dropped trip. I think that this formula shortchanges me, because my earnings during the 12-month period preceding a dropped trip were adversely affected by other trips that I had to drop because of my military obligations. What do you think?

A: I agree that VBAL's formula is insufficient and that the airline is violating USERRA. Under section 4318(b)(3),[11] using the 12-month look-back is permitted only "when the determination of such rate [that the employee would have earned but for the uniformed service] is uncertain."[12] When you drop a VBAL trip to perform a USAFR drill weekend, there is nothing "uncertain" about computing what you would have earned but for the service.

As a career airline pilot and a career Reserve Component service member, you have an enormous stake in ensuring that your USERRA rights are respected and that all required payments are made. As President Ronald Reagan said (referring to arms control treaties with the Soviet Union): "Trust but verify." Your union, the VBAL Pilots Association, will help you to exercise and protect your rights.

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

[10] Under section 4318(b)(3)(A), the employer must compute the employer contribution to the employee's account "at the rate the employee would have received but for the period of service." 38 U.S.C. 4318(b)(3)(A).

[11] 38 U.S.C. 4318(b)(3).

[12] 38 U.S.C. 4318(b)(3).