

## More on the USERRA Pension Rights of the Airline Pilot

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[Update on Sam Wright](#)

1.3.2.3—Pension credit for service time

1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

**Q: I am a Lieutenant Commander (O-4) in the Navy Reserve and a member of the Reserve Organization of America.<sup>3</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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 (VRRRA—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 VRRRA 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 VRRRA 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](mailto:SWright@roa.org).

<sup>3</sup> 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

I am particularly interested in Law Review 19024, the immediately preceding article in the “Law Review” series. Like the Air Force Reserve Captain who asked the questions in that article, I am a pilot (first officer) for the major airline that you call Very Big Air Line or VBAL. I was hired by VBAL as a rookie pilot on 1/1/2015. Exactly two years later, on 1/1/2017, I left my VBAL job to return to active duty voluntarily, for two years (from 1/1/2017 until 12/31/2018). I have read and reread your Law Review 15116 (December 2015), and I think that it is abundantly clear that I met the five USERRA conditions for reemployment.

I left my VBAL job to return to active duty. I gave the company three months of advance notice, orally and in writing. It is unclear whether my recent two-year active duty period counts toward my five-year limit,<sup>4</sup> but even if the period counts, I am well within the five-year limit. I served honorably and did not receive a disqualifying bad discharge from the Navy. I was released from active duty 12/31/2018 and applied for reemployment just three days later, on 1/3/2019. I was well within the 90-day deadline to apply for reemployment.

I returned to work in mid-January, and the company has made make-up contributions to my VBAL retirement account, as required by section 4318 of USERRA. My complaint is that the company has based the payment on my *actual earnings in 2016* (my last 12 months of VBAL employment before I returned to active duty), rather than what I *would have earned at VBAL* in 2017 and 2018 if I had remained continuously employed instead of returning to active duty.<sup>5</sup> If I had remained in my civilian job, I would have earned more in 2017 than in 2016 and still more in 2018, based on my having another year of VBAL seniority and on the general cost-of-living pay raise that all VBAL pilots receive each year. Also, my 2016 pay figure was adversely affected by the drill weekends, annual training, Additional Flight Training Periods (AFTPS), and other military duty that I performed in 2016. What do you think?

A: I agree that VBAL has shortchanged you. The computation of the company’s make-up payment to your retirement account should be based on what you *would have earned* from

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senior officers. Our nation 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 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.

<sup>4</sup> As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit.

<sup>5</sup> Under the collective bargaining agreement between the airline and the pilots’ union, the airline contributes 15% of each pilot’s VBAL earnings into the individual’s retirement account. Using the amount that I earned from the company in 2016, rather than the amount that I would have earned from the company in 2017 and 2018 means that the company’s contribution to my account is substantially smaller.

VBAL in 2017 and 2018 if you had remained continuously employed, instead of away on active duty, during those years. Using your earnings during the 12-month period before you left for service is authorized *only* “in the case that the determination of such rate [what you would have earned but for the period of service] is not reasonably certain.”<sup>6</sup> In your case, it is relatively easy to determine what you would have earned in 2017 and 2018, but for your service, and to come up with a reasonably certain estimate.

Computing what you would have earned is based on determining the approximate number of hours that you would have worked and multiplying that by the hourly rate of compensation. Your hourly rate of compensation is a fixed figure, determined by your position and years of seniority, based on the collective bargaining agreement (CBA) between the company and your union, the VBAL Pilots Association (VBALPA). I suggest that the best way to determine the number of hours that you would have worked in 2017 and 2018 is to look to the five pilots right above you and the five pilots right below you on the FBAL first officer seniority roster—pilots who are not National Guard or Reserve members. How many hours or trips did those pilots work in 2017 and 2018? That computation will result in a very reliable estimate of the number of hours that you would have worked.

Section 4331 of USERRA<sup>7</sup> gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. On behalf of the Secretary, the Department of Labor (DOL) published draft USERRA regulations in the *Federal Register* in September 2004, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005, and those regulations went into effect in January 2006. The regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The pertinent section is as follows:

**How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?**

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In many pension benefit plans, the employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

**(a)** Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

**(b)**

**(1)** *Where the rate of pay the employee would have received is not reasonably certain, such as where compensation is based on commissions earned, the average rate of*

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<sup>6</sup> 38 U.S.C. 4318(b)(3).

<sup>7</sup> 38 U.S.C. 4331.

compensation during the 12-month period prior to the period of uniformed service must be used.

**(2)** Where the rate of pay the employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.<sup>8</sup>

**Q: How much, if anything, am I required to pay, upon or after reemployment, into my retirement plan account?**

**A:** Nothing. I am informed that under the current CBA between VBAL and the VBALPA the individual pilot makes no contribution to the retirement account—only the employer contributes. Since there are no employee contributions that you would have made to the account in 2017 and 2018, there are no missed employee contributions for you to make up.

In a defined contribution pension plan where employees contribute and the employer matches those contributions, the employee returning to work after a period of uniformed service must make up the missed employee contributions during a period that starts on the date of return to work and extends for three times the period of service, but not more than five years.<sup>9</sup>

**Q: What is the relationship between USERRA and the CBA between VBAL and the VBALPA?**

**A:** USERRA is a floor and not a ceiling on the rights of those who leave civilian jobs (federal, state, local, or private sector) to serve our country in uniform. The CBA can give you greater or additional rights, but it cannot take away the rights that Congress gave you by enacting USERRA. The pertinent USERRA section is as follows:

**(a)** Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

**(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.<sup>10</sup>

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<sup>8</sup> 20 C.F.R. 1002.267 (bold question in original, emphasis by italics supplied).

<sup>9</sup> 38 U.S.C. 4318(b)(2).

<sup>10</sup> 38 U.S.C. 4302.