LAW REVIEW[1] 19029
March 2019

Employer Must Make *Prompt* Payments to Employee's Retirement Account after Employee Returns from Military Service

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.3.2.3—Pension credit for service time
1.4—USERRA enforcement
1.7—USERRA regulations
1.8—Relationship between USERRA and other laws/policies

Q: I am a Major in the Air Force Reserve and a member of the Reserve Officers Association, doing business as the Reserve Organization of America or ROA. I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I am a first officer for a major airline—let's call it Super Big Air Line or SBAL.

I was recently away from my SBAL job for active duty for exactly two years, from 1/1/2017 until 12/31/2018. I have read and reread your Law Review 15116 (December 2015) about the five

---

[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.

USERRA conditions for reemployment, and it is clear beyond dispute that I meet the conditions. I left my SBAL job to go on active duty and gave the airline prior oral and written notice. I served honorably and did not receive a disqualifying bad discharge from the Air Force at the end of this active duty period. I was not discharged at all—I simply returned to the status of a traditional Air Force Reserve member. I think that this two-year period is exempt from the computation of my five-year limit with respect to SBAL, but even if the period is not exempt, I am well within the five-year limit. I applied for reemployment at SBAL on the first business day of 2019, well within the 90-day deadline to apply for reemployment.

I returned to work at the airline within a few days after I applied for reemployment. My concern is about getting SBAL to make timely and enough contributions to my individual account pension plan. At SBAL, the employer contributes 16% of each pilot's SBAL compensation into the pilot's account in the SBAL retirement system. Pilots are paid twice per month, and these contributions are made each pay period. If Joe Smith earned $4000 from SBAL in the first half of March, SBAL contributes $640 to Smith's pension account. In the SBAL system, only the employer contributes—there are no employee contributions.

As I understand what you have written in previous articles, SBAL is required to contribute 16% of what I *would have earned* in 2017 and 2018 if I had been working at the airline instead of on active duty during those years. If I had worked all of 2017 at the airline, I would have earned $71,400 from the airline. For 2018, I would have earned $74,600. I arrived at those figures by obtaining the compensation figures for the five first officers above me and the five first officers below me on the SBAL first officer seniority roster, and then I averaged those figures.

I contend that SBAL is required to deposit $11,424 ($71,400 times 0.16) into my account for 2017 and an additional $11,936 ($74,600 times 0.16) for 2018. Do you agree with my computation?

A: Yes. Among pilots at a unionized airline, this is the proper methodology for making these computations. Under the collective bargaining agreement (CBA) between your union and the airline, your seniority determines your hourly rate of pay. Under the bidding system, your seniority also controls the number of hours that you work for the airline. Thus, looking to the pilots immediately above you and immediately below you on the seniority roster results in a very accurate estimate of what you would have earned if you had been there.[3]

Q: When is the airline required to make these contributions?

A: SBAL is required to make those contributions within 90 days after your reemployment, that is by mid-April. Time is money in the investment for retirement business, and it is important that you insist that your employer make *timely* contributions to your retirement account.

[3] Please see Law Review 19025 (February 2019).

Section 4331 of USERRA[4] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published draft USERRA regulations in the *Federal Register,* for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The regulations have been published in title 20 of the Code of Federal Regulations (C.F.R.). The pertinent subsection is as follows:

> **When is the employer required to make the plan contribution that is attributable to the employee's period of uniformed service?**
>
> **(a)** The employer is not required to make its contribution until the employee is reemployed. For employer contributions to a plan in which the employee is not required or permitted to contribute, *the employer must make the contribution attributable to the employee's period of service no later than ninety days after the date of reemployment*, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable.[5]

Q: I am informed that SBAL routinely waits more than a year and sometimes as long as two years to make up contributions to the pension accounts of pilots returning from military service. If I sue SBAL, can I get the court to order the airline to make up the missed contributions within 90 days after a pilot returns to work?

A: No, not in an individual lawsuit. In civil litigation, there is an important concept of *standing.* You have standing to demand that the employer comply with USERRA with respect to your own account. You do not have standing to demand compliance with respect to other employees. If you want to seek compliance with respect to SBAL pilots generally, you will need to bring a *class action lawsuit.* You will need to show the court that this lawsuit meets the standards for class action treatment. First, you need to show *numerosity*—that there are so many potential plaintiffs that it makes sense to resolve the matter in one lawsuit instead of multiple lawsuits. Second, you will need to show *commonality*—that the pilots in the proposed class are all asserting essentially the same claim. Third, you will need to show *representativeness*—that your situation (as the named plaintiff) is representative of the situation of each member of the proposed class.

[4] 38 U.S.C. 4331.

[5] 20 C.F.R. 1002.262(a) (bold question in original, emphasis by italics supplied).