

## LAW REVIEW<sup>1</sup> 21012

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### USERRA Applies to Defined Contribution Pension Plans as well as Defined Benefit Plans

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[About Sam Wright](#)

#### 1.3.2.3—Pension credit for service time

**Q: I am a Captain<sup>3</sup> in the Army Reserve (USAR) and a life member of the Reserve Organization of America (ROA).<sup>4</sup> I have read with great interest several of your “Law Review” articles about**

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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 2000 “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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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 44 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 38 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](mailto:SWright@roa.org).

<sup>3</sup> The factual set-up for this article is hypothetical but realistic.

<sup>4</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 Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army

the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am particularly interested in Law Review 21011, the immediately preceding article in the “Law Review” series.

I am currently away from my civilian job at a large company (let us call it Daddy Warbucks Industries or DWI) for a two-year voluntary active duty period, from 10/1/2019 until 9/30/2021. I expect to leave active duty at the end of September 2021 and to return promptly to DWI. My questions relate to how USERRA applies to my pension entitlements with my civilian employer.

I was hired by DWI in October 2016 and worked there for three years, until I left to go on active duty in September 2019. I gave the company prior oral and written notice that I was departing to report for active duty. I have served honorably and expect to be released from active duty without a disqualifying bad discharge from the Army. Indeed, I will not be discharged at all—I will simply be released from active duty to revert to the part-time USAR status. I plan to return home and apply for reemployment immediately, well within the 90-day deadline.

DWI has a defined contribution pension plan. Each employee is required to contribute 1% and permitted to contribute up to 5% of his or her DWI compensation to his or her individual pension account, and the company matches these employee contributions. The money is invested in an intelligent and diversified way, and the money in my account has grown. While on active duty, I have tried to make employee contributions to my account, but the company has refused to accept my contributions or to match them.

**How does USERRA apply to this kind of pension plan? What should I do to exercise my rights under USERRA?**

**Answer, bottom line up front**

Section 4318 of USERRA applies to defined contribution plans as well as defined benefit plans, but there are differences in how the two kinds of plans are treated. I will explain in detail how USERRA applies to your DWI pension account and what should happen after you return to work this fall.

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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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

## Explanation

Under section 4318 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), you are entitled to be treated, for civilian pension purposes, *as if you had been continuously employed in the civilian job* during the time that you were away from work for service.<sup>5</sup> Section 4318 reads 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

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<sup>5</sup> You are entitled to be treated as if you had been continuously employed during the *entire time* that you were away from work for service. This includes the time (perhaps a few days or weeks) between your departure from the job and your entry on active duty and the time (up to 90 days, in most cases) between your release from active duty and your application for reemployment with your pre-service employer. Please see Law Review 17121 (December 2017).

(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.<sup>6</sup>

*When you meet the five USERRA conditions,<sup>7</sup> the employer is required to reinstate you promptly to your civilian job and to comply with section 4318. While you are on active duty, the company is not required to accept pension contributions from you or to match those contributions.*

When you return to work, you should immediately resume making the ongoing pension plan contributions, and you should also arrange for make-up contributions, for the period when you have been away from work for military service. Both the ongoing contributions and the make-up contributions should be by payroll deduction, with pre-tax dollars.<sup>8</sup>

**Q: How long do I have to make up the contributions that I missed during my two-year active duty period?**

**A:** You must make up the missed employee contributions within the period that starts on the date of your reemployment and extends for three times the period of service, but not more than five years.<sup>9</sup> If you return to work on 11/1/2021, you will have until 10/31/2026 to make up the missed contributions.

**Q: When is DWI required to match my make-up contributions?**

**A:** The company is required to match your contributions when you make them. It would be prudent for you to make up the missed contributions as quickly as you can.

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<sup>6</sup> 38 U.S.C. 4318 (emphasis supplied).

<sup>7</sup>You already meet the first two conditions and will soon meet the other three. You left your job to perform uniformed service, and you gave your employer prior notice. It is unclear whether this two-year active duty period is exempt from USERRA's five-year limit, but even if the period is not exempt you are well within the five-year limit. You expect to be released from active duty without a disqualifying bad discharge, and you plan to apply for reemployment well within the 90-day deadline. After 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).

<sup>8</sup> Making the contributions with pre-tax dollars is important. For example, let us say that your annual salary is \$100,000 and you make \$10,000 in qualified pension plan contributions. In this situation, you pay federal and state income tax on \$90,000, not \$100,000.

<sup>9</sup> 38 U.S.C. 4318(b)(3) (italicized above). If the stock market is still rising after you return to work, you may want to expedite the make-up of missed employee contributions to benefit from the rise.

**Q: During my first three years with the company, before I went on active duty in 2019, I was only contributing the minimum required—1% of my DWI compensation. Now that I am older, I have started thinking more about preparing for retirement. I want to do make-up contributions based on the 5% figure rather than the 1% figure. Am I entitled to do that?**

**A:** Yes. You are entitled to make up, and to get employer matches on, the amount that you would have been “permitted or required” to contribute if you had been continuously employed.<sup>10</sup> Thus, you are entitled to make up the missed contributions at the 5% rate and get employer matches on those contributions.

**Q: Am I entitled to increase my contributions during the 2016-19 period, before I went on active duty, retroactively?**

**A:** No.

**Q: How do we compute the amount of my make-up contributions and the amount of the DWI matches?**

**A:** This computation is based upon what you *would have earned from DWI if you had been continuously employed*.<sup>11</sup>

**Q: While I worked for DWI from 2015 until 2018, I occasionally worked overtime. Does my overtime compensation count in computing the amount of my make-up contributions and employer matches?**

**A:** Yes. If other DWI employees were permitted to make employee contributions and to get employer matches based on overtime compensation, as well as straight-time compensation, you are entitled to the same privilege. It should be possible to come up with a reasonable estimate of the number of overtime hours that you would have worked and your rate of compensation for those overtime hours.

**Q: At DWI, the vesting period for the pension plan is five years. Does my two-year active duty period, from 2019 to 2021, count toward meeting the vesting threshold?**

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<sup>10</sup> 38 U.S.C. 4318(b)(2).

<sup>11</sup> 38 U.S.C. 4318(b)(3)(A). If the amount that you would have earned from the company cannot be reasonably calculated, the computation will be based on your DWI earnings during your last 12 months of company employment before you left the job for uniformed service. 38 U.S.C. 4318(b)(3)(B). Except in the most unusual circumstances, it is possible to determine with reasonable certainty what you would have earned—an estimate is sufficient.

**A: Yes.<sup>12</sup> You should be vested upon your reemployment or soon thereafter.**

**Q: At DWI, when an employee leaves the company short of the five-year vesting point, he or she receives a refund of the employee contributions to the pension account. The employer matches to the departed employee's account are distributed to the accounts of the other employees.**

**In October 2020, while I was away from my DWI job for military service, employee Joe Smith left the company on the fourth anniversary of his hire date, one year short of vesting. The DWI matches to his account were distributed to the other employee accounts. I missed out on that forfeiture distribution because I was away from work for military service at the time. Is DWI required to make me whole for that missed forfeiture distribution?**

**A: No.<sup>13</sup>**

**Q: Will my employer's personnel department or the pension plan administrator inform me of the need to make up missed contributions and offer me the opportunity to make up the missed contributions by payroll deduction?**

**A: Probably not. The personnel department is likely ill-informed about USERRA, and even if they understand they are not required to share that understanding with you. You need to understand and insist upon your rights.**

The employer's only obligation to inform employees of their USERRA rights is to post a notice, prescribed by the Secretary of Labor, in the place (usually the employee break room) where employer notices are customarily placed.<sup>14</sup> If you look carefully, you can find the USERRA notice on a large plastic sheet with many other notices required by federal laws. The USERRA notice is necessarily terse and general. It contains none of the details that you need to understand to ensure that your USERRA pension rights are respected.

Because National Guard and Reserve members need detailed information about USERRA and other laws, the Reserve Officers Association (now doing business as the Reserve Organization of America) established this "Law Review" column in 1997. We now have more than 2,000 articles. Please see [www.roa.org/lawcenter](http://www.roa.org/lawcenter) for the articles and a detailed Subject Index.

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<sup>12</sup> 38 U.S.C. 4318(a)(2)(B) (italicized above).

<sup>13</sup> 38 U.S.C. 4318(b)(1) (italicized above). That subsection also provides that the employer is not required to make you whole for what your employee contributions and the employer matches *would have earned* during the time that you were away from work for service. Unfortunately, you will not benefit from the run-up in the stock market from March 2020 through November 2020, from 18,000 on the Dow Jones Industrial Average to 30,000.

<sup>14</sup> 38 U.S.C. 4334.

## **Please join or support ROA**

This article is one of 2000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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