

In a Contributory Pension Plan, You Must Make Up the Missed Employee Contributions to the Pension Plan after you Return to Work.

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[About Sam Wright](#)

1.3.2.3—Pension credit for service time

1.8—Relationship between USERRA and other laws/policies

Q: I am a Sergeant Major (E-9) in the Army Reserve and a member of the Reserve Organization of America (ROA).³ On the civilian side, I am a police officer for a city. I have

¹ I invite the reader's attention to 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.

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 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.

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 Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army

read with great interest several of your “Law Review” articles about military-relevant laws, including the Uniformed Services Employment and Reemployment Rights Act (USERRA). I found those articles by doing an Internet search.

My city has a contributory defined benefit pension plan for public safety personnel like me. Each pay period, I contribute 1% of my pay to the pension plan, while I am working. That 1% comes out of my pay pre-tax, before Federal and State income taxes are withheld. I began my police officer career in 2000, after I left five years of regular active duty. In our city’s pension plan for public safety personnel, an individual can receive the full pension after 25 years of public safety service. I have always figured that I would retire from the police department in July 2025, 25 years after I started.

As an Army Reserve Sergeant, in 2005, I was involuntarily called to active duty with my unit and deployed to Iraq. Two members of the unit were killed in action in Iraq, and five more were seriously injured. The rest of us were released from active duty in July 2007, exactly two years after we were called to the colors.

While I was on active duty for two years, I did not make contributions to the city’s pension plan. I inquired about the pension plan when I notified the city that I was being called to active duty and offered to set up a direct deposit from my Army paycheck. A lady in the city’s personnel office told me that the city would not permit me to make contributions to the pension plan while I was away from work. She said nothing about making up missed contributions after I returned to work.

When I returned to work in July 2007, I contacted the city’s personnel department and resumed making contributions to the pension plan. The lady in the personnel department told me nothing about my need to make up the missed contributions for the two-year period when I was away from the police department for service in Iraq.

Recently, I contacted the city’s personnel department again to confirm that I will be eligible to retire with a full pension in July 2025, exactly 25 years after I began my police officer career. The lady that I spoke to in 2005 (when I was called to active duty) and in 2007 (when I returned to work) retired in 2012 and passed away in 2018. The man who replaced her told

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.

me that I must work until July 2027 to earn a full pension because I was not credited, for city pension purposes, for the two years that I was away from work for service in Iraq.

The man in the personnel department told me that I was required to make up the missed employee pension contributions within five years after I returned to work, or by July 2012. He said that because I did not make up the missed employee contributions by the deadline, I am not entitled to pension credit for the two active-duty years. Is that statement correct?

Answer, bottom line up front:

Unfortunately, that statement is correct. You were required to make up the missed contributions after reemployment, within the period that was three times your period of service or five years, whichever was less.⁴

Explanation

Section 4318 of USERRA⁵ governs the rights of the returning veteran or service member to pension credit for the period when he or she was away from work for uniformed service. The pertinent subsection is as follows:

A person reemployed under this chapter [USERRA] shall be entitled to accrued benefits [pension credit] under subsection (a) [of section 4318] 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.*⁶

You were required to make up the missed employee contributions by July 2012, but you did not do so. The city is not required to allow you to make up the contributions now. I regret that I do not have the power to turn back the hands of time. The city is not required to credit you for the two active-duty years in computing your pension.

⁴ 38 U.S.C. 4318(b)(2).

⁵ 38 U.S.C. 4318.

⁶ 38 U.S.C. 4318(b)(2) (emphasis supplied).

Q: It is not fair! Neither the city's personnel department nor anyone else ever told me that I was required to make up the missed employee contributions within five years. Was the city not required to inform me of my USERRA rights and of the conditions that I was required to meet to have those rights?

A: Unfortunately, the city had no such obligation. The city's only obligation to inform employees of USERRA is set forth in section 4334 of USERRA, as follows:

(a) Requirement to provide notice. Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. *The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.*

(b) Content of notice. The Secretary [of Labor] shall provide to employers the text of the notice to be provided under this section.⁷

If you look in the employee break room or other place where the police department normally posts notices, you will likely find a large plastic sheet with many employee notices required by Federal laws, including USERRA. Few employees ever read these notices. If you had read the USERRA notice in 2007, it would not have alerted you to the requirement to make up the missed employee contributions. The required notice is necessarily terse and general. It contains none of the details that you needed when you returned to work in 2007.

I think that the Army Reserve failed you and your colleagues by failing to provide you critical information about USERRA when you were called to the colors in 2005 and when you demobilized in 2007. For 25 years (1982 to 2007), I spoke to Reserve and National Guard units several times each month about USERRA and the predecessor reemployment statute (enacted in 1940). To the best of my knowledge, there is no Reserve Component judge advocate who is giving such speeches today.⁸

ROA established the "Law Review" column in 1997 to bring this critically needed information to Reserve Component service members. Our 2,200-plus articles are available for free to everyone—there is no paywall on the Law Review Library. But we hope that Reserve Component service members will join our organization to help us continue this vital service.

Q: My good friend Mary Jones was a member of the same Army Reserve unit as m, and she was also called to active duty and deployed to Iraq for two years in 2005-07. Mary is a career firefighter in a nearby city. When she was deployed, her city made all the employee and

⁷ 38 U.S.C. 4334 (emphasis supplied).

⁸ If any reader is aware of such a judge advocate, please let me know by e-mail.

employer contributions to her pension plan. If this nearby city made this accommodation for those employees who were called to active duty, why didn't my city do likewise?

A: Under section 4302 of USERRA, this law is a floor and not a ceiling on the rights of service members and veterans with respect to their civilian employers. That section provides:

(a) Nothing in this chapter 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.⁹

An employer can always do more than USERRA requires to support employees who are members of the Reserve or National Guard. Mary's city chose to pay the employee and employer share of pension contributions for employees who had been called to the colors. The fact that a nearby city chose to go above and beyond USERRA does not mean that your city was required to do likewise.

Similarly, your city could choose to allow you to make up the missed employee contributions now, although the deadline has passed. But the city is not required to make that accommodation.

Please join or support ROA

This article is one of 2200-plus "Law Review" articles available at 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.

⁹ 38 U.S.C. 4302.

Through these articles, and by other means, including “friend of the court” briefs filed in the Supreme Court and other courts, we have sought to educate service members, military spouses, and attorneys, judges, employers, and others about the legal rights of service members 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 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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