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ST39-1 Oregon USERRA (October 2008)

Oregon Finally Agrees to Comply with USERRA

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1.18-USERRA and Other Laws

2.0-Paid Military Leave

We have heard from an ROA member in Oregon who is a Coast Guard Reserve officer and an employee of an Oregon county government. The Coast Guard called him to active duty for 30 months. He was released from active duty under honorable conditions and made a timely application for reemployment. He met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

He returned to work, but the Public Employee Retirement System (PERS) of the state of Oregon told him that the 30 months of active duty would not count toward his state retirement. This meant a delay in his eligibility to retire and a reduction in the amount of his monthly retirement check. Failing to treat him as if he had been continuously employed in the civilian job, for purposes of his PERS retirement, violated section 4318 of USERRA, 38 U.S.C. 4318. I have discussed that section in great detail in Law Reviews 4, 9, 40, 74, 75, 76, 82, 107, 119, 138, 139, and 0607.

PERS told him that to be credited for state retirement for the 30 months of active duty, he would be required to pay both the employee share and the employer share of the contributions that would have been made to the state retirement fund if he had been continuously employed, and that he would have to pay that amount in full, with post-tax dollars, immediately upon returning to work. All of these statements are incorrect. Under section 4318, he is only required to make up the missed employee contributions, not the contributions that his employer (the county government) would have made during the 30 months that he was on active duty. Moreover, section 4318 gives him five years (starting on the date of his reemployment) to make up the missed contributions, with pre-tax dollars and without paying interest.

Section 4302(b) of USERRA [38 U.S.C. 4302(b)] provides that USERRA overrides a state law that purports to limit USERRA rights or that imposes an additional prerequisite upon the exercise of USERRA rights. Under Article VI, Clause 2 of the U.S. Constitution, commonly called the Supremacy Clause, federal law overrides conflicting state law. Early in our nation's history, the Supreme Court held that the Supremacy Clause means what it says and struck down a New York statute that conflicted with a federal statute. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

This ROA member contacted the National Committee for Employer Support of the Guard and Reserve and then the Veterans' Employment and Training Service, U.S. Department of Labor, all to no avail. Finally, he retained a private attorney, who convinced PERS of the error of its ways. The USERRA violation has now been fully corrected, at least for this individual ROA member. I hope that PERS will now make a blanket correction for all other state and local government employees who left their jobs when called to the colors.