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Public Sector Pension Funds Are in Sad Shape—Make Sure that you Have Been Credited for your Military Service Time, as Required by USERRA

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[About Sam Wright](#)

1.3.2.3—Pension credit for service time

As *USA Today* reported recently (see attached link on last page), many state and local government pension funds are in sad shape, and the COVID-19 crisis has only made that situation worse. It may be inevitable that state and local government employees and retirees in some jurisdictions will be required to “get a haircut” in their pension payouts.

If there is not enough money in the government and its pension plan, there will necessarily be proportional reductions (perhaps 50% or more) of the individual’s entitlement. The prospect of

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.

a “haircut” in your pension makes more important that you receive credit for all the short³ or long military service periods that have interrupted your civilian career. If you are unlawfully deprived of civilian pension credit for your military service, and you then receive a haircut of the reduced amount, you will really be hurting in your retirement years. The time to check this is *now*, not ten years from now when you are already retired from a Reserve Component and from your government job.

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.⁴ 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*

³ USERRA, and specifically section 4318, applies to short periods of military training or service, like drill weekends and traditional two-week annual training tours, as well as longer periods of voluntary or involuntary military service. Please see Law Review 107 (January 2004).

⁴ 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).

maintaining the plan for the purpose of determining the nonforfeitability 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 (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.⁵

If you meet the five USERRA conditions for reemployment, your time away from work for military service counts toward determining when you qualify for your civilian job pension and also in determining the amount of your monthly pension payment in retirement.

Q: What conditions must I meet to be entitled to reemployment under USERRA and pension credit for my military service time?

A: As I explained in detail in Law Review 15116 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment after a period when you have been away from the job for uniformed service:

- a. You left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.
- b. You gave the employer prior oral or written notice that you were leaving the job to perform service.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.⁶

⁵ 38 U.S.C. 4318 (emphasis supplied).

⁶ Under section 4312(c) of USERRA, 38 U.S.C. 4312(c), there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit. Under some circumstances, you can be entitled to reemployment although your cumulative period of service exceeds five years, and you can be entitled to more than five years of civilian pension credit for military time. See Law Review 16043 (May 2016) for a detailed discussion of the five-year limit.

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁷
- e. After release from the period of service, you must have made a timely application for reemployment.⁸

Q: In my pension plan, I (as an employee) contribute a few dollars to the plan out of each two-week paycheck. If I am away from work and miss employee contributions to the pension plan, am I required to make up those missed contributions after I return to work?

A: Yes. When you return to work, you should immediately resume making the required contributions, and you should also arrange to make up the missed contributions. You must make up the missed contributions within the period that starts on the date you return to work and extends for three times the period of service, but not more than five years.⁹

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 employee notices are customarily placed.¹⁰ 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 and a detailed Subject Index at www.roa.org/lawcenter.

⁷ If you receive a punitive discharge by court martial or administrative discharge characterized as "other than honorable," you will not have the right to reemployment. See 38 U.S.C. 4304.

⁸ After a period of service lasting 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁹ 38 U.S.C. 4318(b)(2) (italicized above).

¹⁰ 38 U.S.C. 4334.

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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 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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