

LAW REVIEW¹ 22070

November 2022

USERRA Requires the Employer To Fund the Returning Veteran's Pension Account upon Reemployment.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.3.2.3—Pension credit for service time

1.8—Relationship between USERRA and other laws/policies

Q: I am the Personnel Director for a large company—let us call it Daddy Warbucks Industries or DWI. Under the collective bargaining agreement between DWI and the DWI Employees Union, the company has established a noncontributory defined contribution pension plan. For each employee, the company contributes 5% of the employee's DWI compensation into an account set up for that specific employee, and the money builds up during the employee's working lifetime, including dividends and growth of the stocks included in the employee's account.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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 Spouses' 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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 <mailto:swright@roa.org>.

Under the CBA, the individual employee is not required or permitted to add money to his or her account, and the only source of funding for an individual employee's account is the money that the company contributes—5% of the employee's DWI earnings. If an employee missed work for a period of time, for whatever reason, no contribution is made to the employee's account during the period of absence. From the company's point of view, the primary purpose of the employee pension program is to encourage good attendance and long-term service to the company.

We have an employee (let us call her Mary Smith) who is a Major in the Army Reserve and who is away from work for one year of military service, from 1/1/2022 until 12/31/2022. She has told us that she will complete her period of service at the end of December and report back to work in early January.

Mary has asserted that the company is required to make pension contributions to her account while she is away from work for military service. Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) require the company to do that?

Answer, bottom line up front

The company is not required to make contributions to Mary's account while she is away from work. If Mary meets the five USERRA conditions³ after she is released from this period of service, she will then be entitled to prompt reinstatement in her DWI job, and at that point DWI will be required to make up the missed employer contributions to her pension plan account within 90 days after her reemployment.⁴

Explanation

Section 4318 of USERRA governs pension entitlements of returning service members and veterans who meet the five USERRA conditions for reemployment. Here is the entire text of that section:

³ Like any returning service member or veteran, Mary must have left her job to perform voluntary or involuntary service. See 38 U.S.C. § 4312(a). She must have given the employer prior oral or written notice, or an appropriate officer of her service must have given notice for her. 38 U.S.C. § 4312(a)(1). She must not have exceeded the cumulative five-year limit on the duration of her periods of uniformed service related to her employer relationship with DWI. See 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 an individual's five-year limit. See Law Review 16043 (May 2016). She must have been released from the period of service without having received a disqualifying bad discharge from the military. See 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious crimes) and OTH (other than honorable) administrative discharges. After release from the period of service, May must make a timely application for reemployment with DWI. After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply to for reemployment. See 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁴ See 20 C.F.R. § 1002.262(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 (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

Under section 4318(b)(1) of USERRA,⁶ DWO will be required to pay into Mary's pension account the amount of money that it would have paid into the account during the period of her most recent active-duty period if she had remained continuously employed by DWI during that

⁵ 38 U.S.C. § 4318. *See generally* Law Review 21059 (September 2021) and Law Review 20056 (June 2020) for a detailed discussion of section 4318;

⁶ 38 U.S.C. § 4318(b)(1).

period. Under the Department of Labor (DOL) USERRA Regulation, DWI is required to make that payment “no later than 90 days after reemployment.”⁷

Q: What is the relationship between USERRA and the collective bargaining agreement (CBA) between DWI and the union that represents DWU employees?

A: Under section 4302 of USERRA, this federal law is a floor and not a ceiling on the employment rights of service members and veterans. Section 4302 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.⁸

The CBA between DWI and the union is certainly relevant in determining what Mary *would have received from DWI if she had remained continuously employed*, but the CBA cannot take away her federal statutory rights under USERRA, nor can the CBA establish additional prerequisites to the exercise of those rights.

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the 1940 reemployment statute, the Supreme Court established an important principle: “No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act.”⁹

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⁷ 20 C.F.R. § 1002.262(a).

⁸ 38 U.S.C. § 4302.

⁹ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (emphasis supplied).

ROA is more than a century old—it was established on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

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¹⁰ Congress recently established the United States Space Force as the 8th uniformed service.

¹¹ You can also contribute on-line.