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To Get Pension Credit for Military Service, You Must Return to your Pre-Service Civilian Employer

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1.3.2.3—Pension credit for service time

Q: I recently retired from the Air Force Reserve as a Lieutenant Colonel. In May 1987, I graduated from the United States Air Force Academy and was commissioned a Second Lieutenant. I served on active duty until May 1995, when I left active duty and affiliated with the Air Force Reserve, and also when I went to work for a major airline. Let's call it Big Deal Air Lines (BDAL). In October 2001, shortly after the September 11 terrorist attacks, I returned to active duty, and I informed BDAL. I served on active duty for exactly four years, until October 2005.

When I left active duty in October 2005, I notified BDAL, and the BDAL Chief Pilot offered me the opportunity to return to work just a few days later. But in the meantime I had found a better job as a pilot for an air cargo carrier, and I told the Chief Pilot "thanks, but no thanks." I still work for the air cargo carrier.

I recently became aware that BDAL offers a minimal pension, at age 60, to pilots who have at least ten years of BDAL service. I figure that I have more than ten years of BDAL service, including my four years of active duty from October 2001 to October 2005. I recently inquired of the BDAL personnel office, but I was told that my four active duty years do not count toward BDAL pension credit because I did not return to work at BDAL after I left active duty in October 2005. Is that right?

I found your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) by doing an Internet search. The way I read your articles, I was entitled to reemployment in the fall of 2005, after I left active duty, because I met the five USERRA conditions.³ That means that my four years of active duty from October 2001 to

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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³ As is explained in Law Review 1281 and other articles, a person has the right to reemployment if he or she left a civilian job (federal, state, local, or private sector) for uniformed service and gave the employer prior oral or

October 2005 counts toward my BDAL pension and I am entitled to the ten-year BDAL pension, right?

A: Wrong. Under section 4318 of USERRA⁴ you are entitled to civilian pension credit for your military service time *upon reemployment under USERRA*. In the fall of 2005, you met the five USERRA conditions, but you were not reemployed by BDAL, although the airline offered to reemploy you. You could have returned to work at BDAL, perhaps only briefly, and you could have claimed credit for the four active duty years and thereby have qualified for the BDAL ten-year pension. But it is far too late now.

Here is the entire text of section 4318:

“§ 4318. Employee pension benefit plans

(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* [USERRA] 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 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

written notice. The person must have been released from the period of service without having exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to that employer, and without having received a disqualifying bad discharge from the military. Finally, the person must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

⁴ 38 U.S.C. 4318.

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

As you can see from the language that I have italicized for emphasis, the right to be treated as if one had been continuously employed, for civilian pension purposes, only applies to a person

⁵ 38 U.S.C. 4318 (emphasis supplied).

who is *reemployed under USERRA*. In the fall of 2005, you met the five conditions for reemployment, and you were offered reemployment by BDAL, but you did not return to the employ of BDAL. Thus, you are not qualified for the BDAL ten-year pension.

Q: I wish that somebody had told me this in October 2005! As I was preparing to leave active duty in September 2005, I consulted with an Air Force legal assistance attorney, and right after I left active duty I consulted with a volunteer ombudsman for the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR). Nobody told me that by choosing not to return to work at BDAL I was giving up valuable pension benefits.

A: I hear this complaint all the time, and I find it to be most frustrating. I do not have the power to turn back the hands of time. I wish that you had contacted me in the fall of 2005.⁶

Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994. We recently celebrated the 20th anniversary of USERRA, but this law is really almost 75 years old. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II.

I have been dealing with the VRRRA and USERRA for more than 32 years, since September 1982. I developed the interest and expertise in this law during the decade (September 1982 to September 1992) 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 interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed in 1994 was about 85% the same as the Webman-Wright draft.

I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for ESGR, as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. In June 2009 I retired from private practice and joined the full-time staff of the Reserve Officers Association (ROA), as the first Director of the Service Members Law Center (SMLC). As SMLC Director, in 2014, I received and responded to 8,109 inquiries (675 per month on average) from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. More than half of the inquiries were about USERRA, and the other half were about everything you can think of that has something to do with military service and law.

As SMLC Director, I am here at my post, at ROA headquarters, answering e-mails and telephone calls during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to make it possible for Reserve and National

⁶ We did not establish the SMLC until June 2009, but I have been giving informal advice about the reemployment statute since the fall of 1982.

Guard personnel to call me or e-mail me from the privacy of their own homes, not from their civilian jobs. As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer. Moreover, if the employer is annoyed with you because you have been called to the colors five times since the terrorist attacks of September 11, 2001 and expect to be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

ROA is unique in providing this after-hours service. Neither ESGR, nor DOL, nor any other government agency or military association offers Reserve Component members the opportunity to speak to a live human after normal business hours.

Through our 1,300 published "Law Review" articles at www.servicemembers-lawcenter.org and through the opportunity to consult with me by e-mail or telephone, we are providing Reserve Component members detailed information about what they need to do to preserve and enforce their rights under USERRA and other laws. But you must read our articles and/or contact me before the fact rather than after the fact. I do not have the power to turn back the hands of time.