



VETS USERRA FACTSHEET #1: Frequently Asked Questions - Employers' Pension Obligations to Reemployed Service Members under USERRA

The following frequently asked questions provide general information concerning the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to employers that pay pension benefits as a percentage of total earnings of employees. This factsheet does not create new USERRA rights and obligations; the statute and regulations still govern USERRA rights and obligations.

1. Is the pension plan I maintain for my employees covered by USERRA?

- USERRA covers any plan, other than the federal government's Thrift Savings Plan, that provides retirement income to employees or that defers payment of income to employees until after employment has ended. 38 U.S.C. § 4318(a)(1)(A); 20 C.F.R. § 1002.260.
- The rights of reemployed service members with respect to the Thrift Savings Plan are governed by 5 U.S.C. § 8432b and 5 C.F.R. §§ 1620.40 to 1620.46.

2. My employee was absent from work due to military service and has now returned to work. What are my pension obligations to this employee under USERRA?

- USERRA requires employers to reemploy an eligible returning service member into the position and benefits the service member would have had, with reasonable certainty, if not for the military service. In other words, a returning service member is entitled to the seniority, rights, and benefits they would have attained had they remained continuously employed. 38 U.S.C. §§ 4312, 4316(a), 4318; 20 C.F.R. § 1002.191.
- Therefore, employers are required to determine a reemployed service member's eligibility for participation in a pension plan and the vesting and accrual of the service member's pension benefits as if the service member had not left for military service. 38 U.S.C. § 4318; 20 C.F.R. § 1002.191.

3. What period of an employee's military-related absence must I treat as continuous employment for purposes of determining pension benefits?

- The reemployed service member's entire "period of absence from employment due to or necessitated by" military service must be treated as continuous employment. 20 C.F.R. § 1002.259; see also 38 U.S.C. § 4318(a)(2).
- Additionally, (1) time spent in preparation for military service, and (2) post-service time "within which a person may apply for reemployment and/or recover from an illness or injury incurred or

aggravated by the military service" must be treated as continuous employment. 70 Fed. Reg. 75,246, 75,280 (Dec. 19, 2005); see also 20 C.F.R. § 1002.259.

4. My employee is currently absent from work for military service. Must I make contributions to the employee's pension while the employee is away?

- No. Employers are not required to make pension contributions until the service member-employee returns to work. 20 C.F.R. § 1002.262.

5. When must I make pension contributions attributable to the employee's military-related absence?

- For employer contributions to a plan in which employees are not required or permitted to contribute, the employer must make the contribution attributable to the reemployed service member's military-related absence no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the military service was performed, whichever is later. 20 C.F.R. § 1002.262(a).
- If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable. 20 C.F.R. § 1002.262(a).
- For employer contributions to a plan that provides for both employer and employee contributions, please see the next question.

6. I maintain a contributory pension plan for my employees. What are my obligations to make pension contributions for an employee who has missed contributions during military-related absence?

- If a pension plan is contributory, the employer is required to make contributions that are contingent on a reemployed service member's contributions or elective deferrals only to the extent that the service member makes up those payments to the plan. 20 C.F.R. § 1002.262(c).
- Any employer contributions that are contingent on or attributable to the service member's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions. 20 C.F.R. § 1002.262(c).

7. Are there any limitations on a service member's ability to make up payments to a pension plan that were missed during military-related absence?

- A reemployed service member may make up all or part of their missed contributions or elective deferrals. However, they are not required to do so. 20 C.F.R. § 1002.262(d).
- No makeup payment may exceed the amount the service member would have been permitted or required to contribute had they remained continuously employed. 38 U.S.C. § 4318(b)(2).
- A reemployed service member's makeup payments may be made starting on the date of reemployment for a period that is three times the duration of the service member's military service, but not to exceed five years. 38 U.S.C. § 4318(b)(2).

8. I maintain a pension plan in which employee compensation determines the amount of the employee's contribution or the retirement benefit to which the employee is entitled. How do I determine a reemployed service member's pension entitlement?

- A determination of a reemployed service member's pension entitlement requires an analysis of what pension benefits a service member would have received had the service member not left for military service. To make this calculation, the employer must determine the rate or rates of compensation the service member would have received but for the military-related absence. 38 U.S.C. § 4318(b)(3)(A). The methodology differs depending on whether the rate of pay the service member would have received if not for the military-related absence is reasonably certain.
- In order to determine the rate of compensation a service member would have received, an employer must analyze how many hours the service member likely would have worked and how much the service member would have earned based on the service member's work history leading up to the military-related absence. 38 U.S.C. § 4318(b)(3)(A).
- If the service member's rate of compensation cannot be determined with reasonable certainty because, for example, the service member consistently works variable hours or earns variable rates of pay under a commission scheme, the employer is required to look at the average rate of compensation the service member received during the preceding twelve months (referred to as the "12-month look-back"). If the service member was employed less than 12 months prior to leaving for military service, the employer is required to determine the average rate of compensation during the period of employment immediately preceding the military service. 38 U.S.C. § 4318(b)(3)(B).

9. I maintain a contributory pension plan. How do I determine the amount a reemployed service member is permitted or required to contribute?

- Follow the same procedures as outlined in response to question 8.

10. In the following fact-based scenarios there may be additional factors or circumstances, not addressed here, that an employer considers in determining the amount of compensation an employee would have earned if not for a military-related absence.

My employees are always scheduled to work 40 hours per week at a consistent rate of compensation. Therefore, for pension purposes, a reemployed service member's rate of compensation for a period of military-related absence should be based on 40 hours per week, right?

- Not necessarily. Pension benefits should be determined based on the rate the reemployed service member would have earned but for the period of military service, if that rate can be determined with reasonable certainty. If the service member consistently worked 40 hours per week prior to the military-related absence, it is reasonably certain that the service member would have worked 40 hours per week if not for the period of service.
- However, if the service member was scheduled to work 40 hours per week, but consistently worked 50 hours per week prior to the military-related absence, it is reasonably certain that the service

member would have worked 50 hours per week if not for the period of service. It is the number of hours worked, not the number of hours scheduled, that determines the rate of compensation the service member would have earned if not for the period of service.

- Additionally, if the service member was scheduled to work 40 hours per week, but the number of hours worked varied each week, then the rate of pay the service member would have received if not for the period of service is not reasonably certain. In this case, the rate of pay must be calculated based on the average rate of compensation the service member earned during the 12-month period preceding the military-related absence.
- See the examples below for further explanation.

Example A. The service member, who receives pension contributions based on a percentage of compensation earned, is scheduled to work 40 hours a week. However, for the nine weeks prior to her military-related absence, the service member worked 50 hours a week and earned overtime pay for the additional hours above 40 hours. The service member receives orders for a two-week deployment. How should pension contributions be calculated for the two-week absence?

- Had the service member been continuously employed, it appears reasonably certain that she would have continued to work the same number of hours during her two-week absence as she had done in the previous nine weeks.
- Therefore, after reemployment, the service member's pension contributions should be calculated based on the 50 hours of work per week (and applicable overtime pay) she would have worked if not for the two-week absence.

Example B. The service member, who receives pension contributions based on a percentage of compensation earned, is guaranteed to be paid for 75 hours per month. For the previous eight months, the service member has worked for 80 hours per month. The service member is absent from work for one month due to military service. How should pension contributions be calculated for the one-month absence?

- Had the service member been continuously employed, it appears reasonably certain that he would have worked 80 hours per month, as he has done the previous eight months.
- Therefore, after reemployment, the service member's pension contributions should be calculated based on working 80 hours per month.
- The service member's pension contributions should not be calculated based on the number of hours per month he is guaranteed to be paid, as this does not represent the actual number of hours he worked prior to his military-related absence.

Example C. The service member, who receives pension contributions based on a percentage of compensation earned, is guaranteed to be paid for 75 hours per month. For the previous eight months, the service member has worked 80 hours per month. The service member goes out on orders

for three years. The service member's reemployment escalator position is a promoted position earning a higher rate of pay than the service member previously received before deployment. How should pension contributions be calculated for the three-year absence?

- The service member's pension contributions should be calculated taking into account the point in time there's reasonable certainty that the promotion occurred. If the promotion would have occurred after the service member was deployed for one year, then there should be pension contributions at the pre-service rate for 80 hours a month for the first year and contributions at the promoted rate for 80 hours a month for years two and three.

Example D. The service member, who receives pension contributions based on a percentage of compensation earned, is scheduled to work 40 hours a week. After only six weeks at the place of employment, the service member is absent for one week as a result of military service. For the first six weeks of employment, the service member worked for 30 hours, 44 hours, 20 hours, 24 hours, 50 hours, and 40 hours, respectively. How should pension contributions be calculated for the one-week absence?

- The service member's hours during the six weeks of employment prior to military-related absence have been variable, therefore, her rate of pay has been variable. To determine her pension contributions, the amount of hours should be averaged, as the hours she would have worked, and thus the amount of compensation she would have earned if not for her military-related absence, are not reasonably certain.
- After reemployment, the pension contributions should be calculated based upon 34.7 hours—the average number of hours worked prior to the one-week absence.

Example E. The service member, who receives pension contributions based on a percentage of compensation earned, works 40 hours per week and earns base pay plus commission based on sales. Each week, the service member's commission is different. The service member has been working at the place of employment for two years. The service member goes out on orders for one month. How should pension contributions be calculated for the one-month absence?

- The service member consistently works 40 hours per week but earns commission based on sales. The commission earned each week varies, therefore, the service member's rate of compensation she would have earned if not for her military-related absence is not reasonably certain.
- After reemployment, pension contributions for the two-year absence should be calculated based on the average of the service member's compensation earned in the previous 12-month period.

Example F. The service member, who receives pension contributions based on a percentage of compensation earned, works 40 hours per week and earns commission based on sales. Each week, the service member's commission is different. The service member has been working at the place of employment for six years but returned from a one year deployment six months ago. The service member goes out on orders for two weeks. How should pension contributions be calculated for the two-week absence?

- The service member consistently works 40 hours per week but earns commission based on sales, and the commission earned each week varies. Therefore, the amount of compensation the service member would have received if not for his military-related absence is not reasonably certain.
- After reemployment, pension contributions should be calculated based on the average rate of compensation earned during the previous 12 months. Since the service member returned from a one-year deployment six months ago, the first six months of the previous 12-month period should not be considered, and the subsequent six months should be averaged to determine the average rate of compensation for the two-week absence.

Example G. The service member, who receives pension contributions based on a percentage of compensation earned, is always scheduled to work 40 hours a week. However, the number of hours the service member works each week is variable. The service member has been working at the place of employment for ten years. Three months ago, the service member returned from a one-week military-related absence. The service member goes out on orders for one month. How should pension contributions be calculated for the one-month absence?

- The number of hours the service member works each week is variable, therefore, the service member's rate of pay is variable, and the amount of compensation the service member would have received if not for her military-related absence is not reasonably certain.
- After reemployment, the service member's rate of compensation during the previous twelve months, excluding the one-week military-related absence, should be averaged to calculate the average rate of compensation for the one-month absence.

Where to Obtain Additional Information:

For additional information, visit our Veterans' Employment & Training Service USERRA Website: <http://www.dol.gov/vets/programs/userra> and/or call our toll-free information and helpline, available 8:00am to 8:00pm (Eastern Time), at 1-866-4-USA-DOL (1-866-487-2365).

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