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United Airlines Class Action Settlement Sets New USERRA Record

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1.3.2.3—Pension Credit for Military Service Time
1.4—USERRA Enforcement

The United States District Court for the District of Colorado has approved an unprecedented settlement in a class action lawsuit filed against United Airlines (UAL) by those of its pilots who have been away from their UAL jobs for military service in recent years. On May 19, 2014, the court issued its final approval order, permitting United to disburse a $6.15 million dollar settlement among the pension accounts of approximately 1,160 pilots.

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA),[3] a person who leaves a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services (Army, Navy, Marine Corps, Air Force, Coast Guard, or Public Health Service, including but not limited

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[3] Congress enacted USERRA (Public Law 103-353) on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

to the Reserve and National Guard components of these services) is entitled to reemployment after release from the period of service.

The person must have given the civilian employer prior oral or written notice[4], unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable.[5] The person's cumulative period or period of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. All involuntary service periods (like involuntary mobilizations) and some voluntary service periods (including Reserve and National Guard training periods) are exempted from the computation of the individual's five-year limit.[6]

The person must have been released from the period of service without having received a disqualifying bad discharge from the military.[7] After release from a period of service of 181 days or more, the person must have applied for reemployment with the civilian employer within 90 days.[8]

A person who meets these five simple conditions is entitled to prompt reemployment[9] in the position of employment that he or she *would have attained if continuously employed*[10] or another position (for which the

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[4] 38 U.S.C. 4312(a).
[5] 38 U.S.C. 4312(b).
[6] Please see Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count toward exhausting the five-year limit. We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,061 articles about USERRA and other 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. ROA initiated this column in 1997 and adds new articles each week, including 169 new articles in 2013.
[7] 38 U.S.C. 4304.
[8] 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.
[9] Generally, the person must be back on the payroll of the civilian job within two weeks after his or her application for reemployment. 20 C.F.R. 1002.181.

[10] The position that the person would have attained if continuously employed is usually but not always the position the person left when called to the colors. The returning service

person is qualified) that is of like seniority, status, and pay.[11] Upon reemployment, the person must be treated *as if he or she had been continuously employed* for seniority and pension purposes.[12]

In a defined contribution plan (like the UAL pension plan at issue in this case), the employer must make contributions to the returning service member's pension plan account after the member has been reemployed under USERRA. In these cases, the employer's contribution to the individual employee's pension account is usually determined as a percentage of the employee's earnings from the employer. In the case of a returning service member, there were no earnings from the employer—the person was away from work for uniformed service during the period at issue. Therefore, the employer's contribution must be computed based on *imputed earnings*—what the individual would have earned from the employer if he or she had remained continuously employed.[13]

At UAL, like many airlines, the individual pilot is guaranteed a minimum number of hours per month—meaning that if the pilot works fewer hours than the minimum he or she is nonetheless paid for the minimum.[14] If the pilot works more than the minimum, he or she is paid for the hours worked—perhaps as many as 90 hours in a month. During the 2000-10 period, UAL made retroactive payments to the pension accounts of individual pilots returning from military service, but the

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member may be entitled to a better position, or worse position, or no position at all, depending upon what would have happened if he or she had never left the civilian job. We must review what happened to other employees to determine what would have happened to the service member.

[11] 38 U.S.C. 4313(a)(2)(A).

[12] 38 U.S.C. 4316(a), 4318.

[13] The employer's contribution must be computed "at the rate the employee would have received but for the period of service." 38 U.S.C. 4318(b)(3)(A). If the compensation rate is not reasonably determinable, the computation must be made "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)." 38 U.S.C. 4318(b)(3)(B).

[14] Between 2000 and 2003, the guaranteed minimum was 75 hours per month. Starting in May 2003, the minimum was 70 hours per month.

payments were computed based on the minimum guaranteed hours, not the hours that the individual *would have worked* if continuously employed. In this respect, UAL failed to comply fully with USERRA, and this settlement now remedies the violation.

James Daniel Tuten is a Lieutenant Colonel in the Air National Guard and a UAL pilot. During the 2000-10 period, he was away from his UAL job three times for military service periods of varying duration. He filed suit against UAL in June 2012, in the United States District Court for the District of Colorado. He was designated as the class representative for all UAL pilots who were away from their UAL jobs for military service during the 2000-10 period (approximately 1,160 pilots). The parties submitted a settlement agreement for the court's approval in August 2013.

On May 19, 2014, the court issued the final approval order for a $6,015,000 settlement. This is the single largest publicly disclosed settlement or award amount under USERRA by a margin of more than 5 million dollars. As part of the settlement, United also agreed to provide several forms of nonmonetary relief, including the adoption of a written policy ensuring that pension contributions for pilots on military leave will conform to USERRA's computation requirements in the future.

Mr. Tuten's law firm, Cohen Milstein Sellers & Toll, PLLC, is currently pursuing a similar case with American Airlines.[15] For further information, see Law Review 14016.

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[15] Additional information on the ongoing American Airlines case may be found on the firm's website: http://www.cohenmilstein.com/cases/323/american-airlines-pilots-userra-erisa-pension-contribution-litigation