

NUMBER 5, AUGUST 1998 (updated March 2003):
Notice to Your Civilian Employer

Q: In Law Review Number 4 (July 1998, The Officer), you said that if I leave my civilian job for service in the uniformed services and later return to the same civilian employer, I am entitled to be treated as if I had been continuously employed for purposes of computing my civilian pension entitlements, provided that I meet the eligibility criteria set forth in the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The first criterion you mentioned was that I must leave my civilian job for the purpose of service and give prior notice to my civilian employer that I am leaving for that purpose. Who can give this notice, and how must the notice be given

A: The notice can be given either by the individual who is to perform service in the uniformed services or by an "appropriate officer of the uniformed service in which such service is performed." 38 U.S.C. 4312(a)(1). If you are the commanding officer of a Reserve unit, you can give the notice on behalf of unit members. For example, you could send a letter to the employer of each unit member, setting forth your unit's drill schedule for the upcoming fiscal year. Such letters are recommended.

If you are a unit member, I suggest that you give your own notice. Remember that it is your job on the line. Do not assume that your commanding officer will give notice for you. There is no harm in the employer receiving both notices.

The notice can be "written or verbal." 38 U.S.C. 4312(a)(1). Because prior notice is one of the eligibility criteria that you must establish to have reemployment rights, I strongly recommend that you give written notice and retain a copy for your records.

Q: I read somewhere that Reserve component members are required to "request a leave of absence" for active duty for training or inactive-duty training, but that there is no prior notice requirement for active duty. Is that not the rule?

A: Not any longer. That was the rule under the Veterans' Reemployment Rights (VRR) law, which USERRA replaced. USERRA eliminated the VRR law's confusing distinctions among categories of military training or service. Under USERRA, you must give prior notice to your employer, for any category of service.

Q: Do I need my employer's permission to be away from work for military training or service?

A: No. USERRA requires only that you give prior notice, not that you obtain the employer's permission. As a matter of courtesy to your employer, I suggest that you phrase your notice in terms of a request for permission. Do not be unnecessarily confrontational about asserting your USERRA rights. If your employer tries to deny you permission, that may be the time to get help in explaining the law to the employer.

Q: Are there any exceptions to the prior notice requirement?

A: Yes. No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. 38 U.S.C. 4312(b). I envision that these exceptions will be quite rare, even in a mobilization. Do not depend upon these exceptions; depend upon the general rule. Give advance notice to your employer if at all possible.

Q: When might advance notice to a civilian employer be precluded by military necessity?

A: In the most unusual circumstances, even in a mobilization, military authorities might determine that it is necessary to keep secret not only a unit's mission and destination, but even the fact of recall to active duty. For example, a Reserve unit might have such a unique capability that Saddam Hussein might infer what our military is planning, if he were to hear on CNN that the unit had been recalled to active duty.

I envision that the Department of Defense will use very sparingly the authority to determine that military necessity precludes prior notice to civilian employers. Do not try to argue that military necessity precludes you from notifying your civilian employer of your unit's drill schedule. "That old dog will not hunt," as my late father used to say.

Q: If military authorities determine that military necessity precludes me from giving prior notice to my employer, can my employer later come back with expert testimony showing that military necessity really did not preclude prior notice?

A: No. The decision by military authorities that military necessity precludes prior notice shall not be subject to judicial review. 38 U.S.C. 4312(b).

Q: My Reserve unit drills on the first weekend of every month. Is it sufficient to tell my employer that?

A: Probably not, because what your Reserve unit means by the "first weekend" is not always literally the first weekend. A weekend preceding a Monday federal holiday, like Labor Day, normally "does not count," but your employer may not know this. I recommend that you provide the actual dates. See also Sawyer vs. Swift & Co., 836 F.2d 1257, 1260-61 (10th Cir. 1988). (VRR case upholding the firing of a Naval Reservist who told his employer that he would need time off "the first non-holiday weekend in January.")

Q: How much notice am I required to give to my civilian employer?

A: USERRA does not specify any minimum period of advance notice. Certainly, my practical advice is that you give your employer as much advance notice as possible. This is the number-one preventable problem in this area. Again and again, I hear of

cases of Reservists waiting until 1700 on Friday afternoon to tell the boss. Your company does not stop doing business while you are away for military training or service. Your supervisor will be required to make other arrangements to cover your work in your absence. If you give the employer advance notice, making those alternative arrangements is much easier.

USERRA's legislative history, showing the intent of Congress, shows that you will not be penalized if you have little advance notice from the military, but if you have advance notice and intentionally withhold it from your employer, this will be "viewed unfavorably," especially if the lateness of the notice causes a severe disruption of the employer's operations. See H.R. Rep. 103-65, 103d Cong., 1st Sess., page 26 (28 April 1993). See also Burkart vs. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988). (VRR case upholding the firing of a National Guardmember who withheld notice until the last moment).

Q: Am I permitted to give one notice for multiple periods of service?

A: Yes, and that is recommended. For example, in September 1998 you could give your employer written notice of your FY99 drill schedule. Oral reminders to your direct supervisor would probably be a good idea, and you must give your employer prior notice if there are any changes to your drill schedule.

Q: My civilian job is normally limited to Monday-Friday, and my drill periods are always held on weekends. Is there any point in notifying my employer of my drill schedule?

A: Yes, for two reasons. In the first place, your civilian employer may occasionally call you in on weekends for "mandatory overtime." By notifying your employer of your drill schedule, you can make it clear that you are not available for overtime on your drill weekends. Second, as will be discussed in detail in a subsequent column, you are ordinarily required to report back to work on the day following a short (less than 31 days) period of service, but that deadline can be extended if reporting back so soon is "impossible or unreasonable" due to factors beyond your control, like an automobile accident on the return trip. See 38 U.S. Code 4312(e) (1)(A)(ii). If you failed to notify your employer of your drill weekend, your employer may argue that this provision, extending the deadline for your return in case of an accident or the like, does not apply.

Law Review is periodically featured in The Officer. ROA members can send legal questions to: Capt. Samuel F. Wright, USNR, 437 New Jersey Ave. SE, Washington DC 20003; or you can e-mail him at samwright50@yahoo.com. If your question appears to affect or be of interest to many members, Captain Wright will include it in this column