

## **Number 41, April 2002: USERRA Rights During Service**

By CAPT Samuel F. Wright, JAGC, USNR\*

Q: I have enjoyed your "Law Review" articles. In Number 40 (March 2002), you wrote: "Your rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) arise after you return from a period of service, not during the period (with two exceptions not pertinent here)." What are those two exceptions?

A: Under title 38, United States Code (U.S.C.), section 4317(a) [38 U.S.C. 4317(a)], you can elect continued health-plan coverage, for yourself and your family, while you are away from your civilian job for service in the uniformed services. This provision is discussed in detail in "Law Review Number 10" (June 1999).

The other exception is 38 U.S.C. 4316(b)(1), which reads as follows: "Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be: (A) deemed to be on furlough or leave of absence while performing such service; and (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service."

This provision is colloquially referred to as the "furlough or leave of absence" clause. Essentially the same language appeared in the Veterans' Reemployment Rights (VRR) law, USERRA's predecessor. The leading case on this provision is *Waltermeyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986). Although *Waltermeyer* was decided eight years before USERRA was enacted in 1994, it is still good law because it is mentioned with approval in USERRA's legislative history. [See House Report No. 103-65, 1994 United States Code Congressional and Administrative News, at page 2467.]

Assume that your employer accords holiday pay or some other non-seniority benefit to employees who have been furloughed (laid off) or to employees on some form of non-military leave (like educational leave). Under those circumstances, the employer must accord to you the same benefit, under the same conditions, while you are away from work for voluntary or involuntary uniformed service.

Assume that your employer has more than one form of non-military leave. Under *Waltermeyer*, the most favorable treatment accorded to any particular form of leave must also be accorded to the military leave, regardless of

whether the non-military leave is paid or unpaid.

Of course, the comparison should be to a non-military leave of absence of comparable length. It would not be reasonable to compare a five-year military leave to a five-day jury leave. ROA

1 Military title used for purposes of identification only. The views expressed herein are the personal views of the author and not necessarily those of the Department of Defense, the Department of the Navy, the Department of Labor, or the U.S. government. -- ROA

\*Military title used for purposes of identification only. The views expressed herein should not be attributed to the Department of the Navy or the U.S. government generally.

Captain Wright was employed as an attorney for DoL for ten years. He was largely responsible for drafting USERRA, along with one other DoL attorney. He also helped to write the successful appellate briefs for the veterans in both the Imel and the Akers cases. Most recently, he was on active duty for 71 days (May-July 2001), including 40 days in Bahrain. Please see his July 2001 "Law Review" article.

You may write to Captain Wright at ROA, or you can reach him by e-mail at samwright50@ yahoo.com.