

LAW REVIEW 720
(May 2007)

Long-term Deployment and Vacation Time

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

CATEGORY: USERRA Coverage

Q: I am in the California Army National Guard. I have just returned from 21 months of active duty. †Can my employer deny me the vacation days that I would have accrued had I not been on active duty?

A: The employer is not required to give you the vacation days you would have earned if you had been continuously employed. Those vacation days are a form of short-term compensation, not a perquisite of seniority that the returning veteran is entitled to claim under the reemployment statute. There is a U.S. Supreme Court case directly on point to this issue: *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). Please read Law Reviews 26, 59, and 188.

On the other hand, the time you were away from work for service in the uniformed services *does* count toward the rate at which you earn vacation. That clearly is a perquisite of seniority.

For example, let us say that at the XYZ Company, employees with up to five years of seniority earn two weeks of vacation per year, and employees with more than five years of seniority earn three weeks of vacation per year. †CPT Joe Smith has worked for the company for four years, and then he is called to active duty for 18 months. When he returns to work, assuming that he meets the eligibility criteria under USERRA (Uniformed Services Employment and Reemployment Rights Act), CPT Smith should start immediately earning vacation at the new, higher rate. †But CPT Smith is not entitled to the vacation days he would have earned during those 18 months.

I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (ESGR) at 1-800-336-4590. †Good luck.