

LAW REVIEW 811

(February 2008)

CATEGORY: 1.13-Left Job with Timely Notice

Notice to Civilian Employer Not Requesting a Leave of Absence

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Q: Recently, I have had an extended argument with the personnel director of the company where I work. I say that under the Uniformed Services Employment and Reemployment Rights Act (USERRA) I am only required to give the employer notice when I will be away from work for military training or service. She says that I must “request a military leave of absence” and that she has the right to deny the request if my request comes at a bad time for the employer. Who is correct?

A: You are correct, but let me quickly add that I think that engaging your employer in an extended legal argument about an issue that may never arise is an exceedingly bad idea. If you have asked your employer for time off from work for military training or service, and if the employer has told you that your request for military leave has been denied, you should contact the National Committee for Employer Support of the Guard and Reserve (ESGR) at 1-800-336-4590. I also invite your attention to the ESGR website, www.esgr.mil.

The Department of Defense (DoD) established ESGR in 1972. Its mission is to assist National Guard and Reserve personnel with exactly this sort of problem. ESGR has almost 1,000 volunteer “ombudsmen” in the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and Europe. If you contact ESGR to request assistance, your case will be referred to an ombudsman near your home. Upon request, and when warranted, the ESGR ombudsman will contact your employer to explain USERRA and to appeal to the employer’s patriotism, as well as the employer’s self-interest. ESGR is successful in resolving more than 90 percent of the meritorious cases that are brought to its attention.

ESGR is not an enforcement organization. The idea is to resolve the matter quickly and with a minimum amount of disruption and hard feelings. If possible, we want to avoid “making a federal case” about the issue by having the Guard or Reserve member sue the employer in federal court or make a formal complaint against the employer with the U.S. Department of Labor (DOL).

As I explained in Law Review 0702, I recommend that you *not* use the employer’s telephone and time when you are on the clock at work to contact ESGR or anybody else to make a complaint against that employer. If the employer is annoyed with you for the time you spend away from work on military training or service, and if the employer is looking for an excuse to fire you, you should go out of your way to avoid giving the employer any such excuse. Accordingly, I urge you to contact ESGR from home, not from work.

I am pleased to announce that ESGR recently extended the hours of operation of its call center—the new hours are 8 a.m. to 8 p.m. Eastern Time Monday through Friday. ESGR extended its hours so that servicemembers in the Eastern and Central Time Zones can call ESGR from home, in the early evening. If you are west of the Central Time Zone, you can call ESGR early in the morning, before you go to work.

For similar reasons, I urge you *not* to use the employer’s computer and e-mail system to contact ESGR or anybody else requesting assistance with respect to that employer. When you log onto your employer’s computer, you probably click on an acknowledgment that the computer is for work purposes only and is subject to monitoring. If you cannot afford a computer and internet access at home, go to your local public library.

In dealing with your employer about your need for time off from work for military training and service, I urge you to go out of your way to avoid confrontations. Legally, you don’t need the employer’s permission to be away from work for military training or service—you are only required to give notice. Nonetheless, as a matter of courtesy to your employer, I advise you to phrase your notice as a request for permission.

If the employer denies your request for military leave, that is the time to contact ESGR for assistance. Don't try to "fly solo."

I have addressed the issue of notice to your civilian employer in Law Review 5 (August 1998) and Law Review 91 (September 2003). I am writing a new article now because I have received many inquiries on this subject. Moreover, the new DOL USERRA regulations (published in the *Federal Register* on Dec. 19, 2005), and the preamble to those regulations, address this notice-permission issue in considerable detail. I invite your attention to Law Review 0604 (February 2006), for a detailed discussion of the USERRA regulations.

Congress enacted USERRA (Public Law 103-353) in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. USERRA is codified at 38 U.S.C. 4301-4334. The VRRA was formerly codified at 38 U.S.C. 2021-2026. I invite your attention to Law Review 104 (December 2003) for a comprehensive discussion of the history of the reemployment statute.

Section 2024(d) of the VRRA required the Reservist or National Guard member to "request a leave of absence" from his or her civilian employer for the time required to perform active duty for training or inactive duty training (drills). The VRRA did not require any advance notice to the employer in the case of a person leaving civilian employment to perform voluntary or involuntary active duty.

USERRA eliminated the VRRA's sometimes confusing distinctions among categories of military training or service—active duty, active duty for training, inactive duty training, initial active duty training, etc. All of these categories of service fall within USERRA's broad definition of "service in the uniformed services." 38 U.S.C. 4303(13).

Under USERRA, unlike the VRRA, the employee leaving work for uniformed service (anything from a five-hour drill period to five years of voluntary active duty) is required to give the civilian employer advance notice of absence from work for uniformed service, regardless of the category of the service. (No advance notice is required in cases where giving such notice is precluded by military necessity or otherwise impossible or unreasonable.) USERRA also makes clear that the employee is only required to give the employer *notice*—*this is not a request for permission, and the employer has no right to deny the employee permission to be absent from work for uniformed service*.

The pertinent statutory language is as follows: "Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer." 38 U.S.C. 4312(a)(1).

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the secretary of labor the authority to prescribe regulations with regard to the application of USERRA to states, local governments, and private employers. DOL published final regulations (along with a lengthy and well-written preamble) on Dec. 19, 2005. I invite your attention to the 2005 edition of the *Federal Register*, pages 75246 through 75313. The regulations and preamble are also available on the DOL website, www.dol.gov/vets.

The USERRA regulations address this notice-permission issue head on: "*Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?*" No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service." 20 C.F.R. 1002.87.

The DOL preamble to the USERRA Regulations addresses the comments that DOL received after publishing the proposed regulations and makes clear the intent and meaning of the regulations. The preamble expounds upon the notice-permission issue as follows: "Proposed section 1002.87 makes explicit that the employee is not required to obtain the employer's permission before departing for uniformed service in order to protect his or her reemployment rights. Imposing a prior consent requirement would improperly grant the employer veto authority over the employee's ability to perform service in the uniformed services by forcing the employee to choose between service and potential loss of his or her employment position, if consent were withheld." You can find this paragraph on page

75256 of the 2005 *Federal Register*, near the top of the left-hand column.

Q: My employer's personnel director insists that I must provide a copy of my military orders when I ask for time off from work for military training or service. This is a big problem. I do not ordinarily receive written orders for inactive duty training (drill weekends). Am I required to append a copy of my military orders when I inform the employer of an upcoming drill weekend?

A: Your employer is incorrect. No such documentation-in-advance requirement exists. Nonetheless, I urge you to provide your employer a copy of whatever paperwork you have. At the start of the fiscal year, you should give your employer a copy of your drill schedule for the entire fiscal year.

The DOL preamble to the USERRA regulations reports as follows: "Five commenters requested the final rule require the employee to provide, either before or shortly after commencement of the uniformed service, some form of documentation, either a written notice or a copy of military orders or similar documentation of the service." You can find this sentence on page 75256 of the 2005 *Federal Register*, at the bottom of the left-hand column and the top of the middle column.

The secretary of labor rejected the commenters' suggestion that the USERRA regulations should require the employee to provide a copy of military orders or other documentation when giving the employer notice of pending uniformed service. Such a requirement is not supported by the text or legislative history of USERRA, and in many cases it is difficult or impossible for the individual National Guard or Reserve member to obtain such documentation and provide it to the civilian employer before leaving work to get to the place where he or she is to perform the uniformed service.

In Law Review 91, I wrote, "You are not required to provide any documentation when you give notice to your employer of an upcoming period of service, but I strongly recommend that you share with the employer whatever paperwork you have. Your AT [annual training] orders are not a military secret, and you should not be reluctant to provide a copy to your employer. It is true that some civilian employers have an inflated idea of the kind of paperwork that Reservists typically receive from the military. You can probably get your unit's commanding officer (CO) to provide you the unit drill schedule on unit stationery. That will probably satisfy the employer. If not, you could request that your CO contact your employer, or invite the employer to contact your CO. Your employer probably just wants reassurance that you really are performing service during the times you are away from work."