

LAW REVIEW 965

What Is Service in the Uniformed Services?

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

1.3.1.1—Left Job for Service and Gave Prior Notice

“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 reemployment rights and benefits and other employment benefits of this chapter if—[the person meets the USERRA eligibility criteria].” 38 U.S.C. 4312(a) (emphasis supplied).

In Law Reviews 0965 and 0966, I discuss the concept that the absence from the civilian position of employment is *by reason of service in the uniformed services*. This gives rise to two subsidiary questions:

1. What is “service in the uniformed services?”
2. What is the necessary relationship between the uniformed service and the absence from the civilian position of employment?

In this article, I will discuss the first question. In Law Review 0966, I will explain the necessary relationship between the uniformed service and the absence from the civilian position of employment.

What are the “uniformed services?”

Section 4303(16) of USERRA defines the term “uniformed services” as follows:

“The term ‘uniformed services’ means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.” 38 U.S.C. 4303(16).

The definitions section of title 10, United States Code, defines the term “Armed Forces” as follows: “The term ‘armed forces’ means the Army, Navy, Air Force, Marine Corps, and Coast Guard.” 10 U.S.C. 101(a)(4).

Service in the armed forces of another nation does not qualify for USERRA rights.

The context of title 10 clearly indicates that this reference is to the United States Army, etc. A person who leaves a job in the United States to serve in the armed forces of another nation does not, under any circumstances, have reemployment rights under USERRA. See Law Review 0630.

NOAA commissioned corps is not covered.

The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is a “uniformed service” as defined by 10 U.S.C. 101(a)(5), but it does not fall within USERRA’s definition of “uniformed services.” Accordingly, service in the NOAA Corps does not give rise to reemployment rights under USERRA. In Congress, the exclusion of the NOAA Corps from USERRA coverage was intentional. Please see Law Review 52.

PHS commissioned corps is covered.

On the other hand, the commissioned corps of the Public Health Service (PHS) is expressly included in USERRA's definition of "uniformed services." An individual who leaves a position of employment for the purpose of PHS service, and who meets the USERRA eligibility criteria, has reemployment rights. Please see Law Reviews 46 and 0963.

National Disaster Medical System service is covered.

The National Disaster Medical System (NDMS) is an organization within the United States Department of Health and Human Services (DHHS). It includes "intermittent disaster-response appointees" (IDRAs), who are physicians, nurses, morticians, and other professionals who have volunteered to make themselves available to treat the wounded, bury the dead, and deal with the public health consequences of a natural or man-made disaster. Many IDRAs served in the immediate aftermath of Hurricane Katrina in 2005. These folks also engage in periodic training to prepare themselves for this sort of contingency. Because their federal service as IDRAs is only occasional, they need full-time employment to support their families.

In 2002, Congress amended title 42 of the United States Code to accord USERRA rights to IDRAs who leave other employment (federal, state, local, or private sector) for IDRA emergency service or training. The pertinent subsection is as follows:

"Service as an intermittent disaster-response appointee when the Secretary [of DHHS] activates the National Disaster Medical System or when the individual participates in a training program authorized by the Assistant Secretary for Preparedness and Response or a comparable official of any Federal agency specified in subsection (a)(2)(B) of this section shall be deemed 'service in the uniformed services' for purposes of chapter 43 of title 38 pertaining to employment and reemployment rights of individuals who have performed service in the uniformed services (regardless of whether the individual receives compensation for such participation). All rights and obligations of such persons and procedures for assistance, enforcement, and investigation shall be as provided for in chapter 43 of title 38."

42 U.S.C. 300hh-11(e)(3)(A).

What is "service in the uniformed services?"

USERRA defines the term "service in the uniformed services" as follows:

"The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32." 38 U.S.C. 4303(13).

This definition is broad but not unlimited.

I am aware of National Guard and Reserve members who put in a substantial amount of uncompensated time on activities related to or in support of their National Guard or Reserve units. I commend them for their commitment and diligence, but I remind them that they do not have the right to time off from their civilian jobs (even time off without pay) for such activities, unless those activities fall within the definition of "service in the uniformed services." Please see Law Review 0920.

Absence from work for fitness examination is covered.

Please note that USERRA's definition of "service in the uniformed services" includes "a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to

perform any such duty.” This means that an individual has the right to time off from work for the purpose medical and other examinations to determine if the person will be permitted to enlist in the armed forces. Please see Law Reviews 50 and 0934.

The “examination to determine fitness” clause also applies to servicemembers on the Temporary Disability Retired List (TDRL). A member on the TDRL is off active duty, but he or she is required to report periodically to military medical treatment facilities for examinations to determine if he or she has recovered sufficiently to return to active duty, or whether he or she should be transferred to the Permanent Disability Retired List. The “examination” clause most certainly applies to TDRL examinations. Please see Law Review 0913.

Absence from work for medical treatment is not covered.

As currently written, USERRA gives an employee the right to time off (without pay) from his or her civilian job for a medical *examination* in some circumstances, but not for medical *treatment* for a wound, injury, or illness incurred or aggravated while on active duty. This can be a problem, because weekend appointments are not available at military and Department of Veterans Affairs (VA) medical treatment facilities.

In the 111th Congress, Representative Lloyd Doggett has introduced the Wounded Veteran Job Security Act, H.R. 466. If enacted, the bill would amend USERRA to give an individual the right to time off from a civilian job for military or VA medical treatment for a condition incurred or aggravated during military service. H.R. 466 has passed the House of Representatives and has been referred to the Senate Veterans Affairs Committee. We will keep the readers informed of progress on this important legislation.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers’ Law Center) at swright@roa.org or 800-809-9448, ext. 730.