LAW REVIEW 967

Prior Notice to Civilian Employer

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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 benefits of this chapter if—(1) the person (or an appropriate officer of the uniformed service in which the service is to be performed) has given *advance written or verbal notice* of such service to such person's employer." 38 U.S.C. 4312(a)(1) (emphasis supplied).

"No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review." 38 U.S.C. 4312(b).

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. The VRRA made confusing and cumbersome distinctions among categories of military service—active duty, active duty for training, initial active duty training, examination for fitness to perform service, etc. Different subsections of the VRRA applied to different categories of service, and the eligibility criteria and entitlements varied based on the category of service. USERRA consolidated all of these categories into "service in the uniformed services," which is broadly defined in 38 U.S.C. 4303(13).

Under the VRRA, a Reservist or National Guard member was required to "request a leave of absence" for active duty for training or inactive duty training (drills), but there was no prior notice requirement prior to active duty, initial active duty training, or an examination to determine fitness for service. Under USERRA, there is a prior notice requirement regardless of the category of service.

USERRA's legislative history explains in detail the purpose and intent of the prior notice requirement, as follows:

"Section 4312(a)(1) would generally require an individual who leaves a civilian job for service in the uniformed services to give written or verbal notice of the forthcoming military absence from employment to his or her civilian employer. Under current law, only a member of the Selected Reserve must notify his or her employer before leaving work for active duty for training or inactive duty training. *See* 38 U.S.C. 2024(d). There is no current requirement to notify the employer before leaving for active duty or initial active duty for training. *See Winders v. People Exp. Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D. N.J. 1984), *aff'd* 770 F.2d 1078 (3rd Cir. 1985). An individual who does not indicate in any way that he or she is leaving because of military duty would no longer be protected (unless the exception provided in section 4312(b) is applicable), but an individual who leaves for two or more reasons, one of which is for military duty, would continue to be protected. *See Adams v. Mobile County Personnel Board,* 115 LRRM 2936 (S.D. Ala. 1982). This new notice requirement is effective 60 days after enactment of the Committee [House Committee on Veterans' Affairs] bill and applies only to persons who leave their jobs for military service after that date. The notice requirement of current section 2024(d) of title 38 would continue in effect during that 60-day period.

Section 4312(b) would provide that the employee is excused from the requirement to give his or her employer advance notice of military leave if doing so is impossible or unreasonable because of military necessity or for other legitimate reasons. During the 1983 Grenada operation, for example, members of the National Guard and Reserve were called to active duty with little notice, and notifying their civilian employers was impossible for many individuals without jeopardizing military security. It is also made clear, in unambiguous language, that the determination as to whether military necessity precluded notification shall be made by the uniformed services and shall not be subject to judicial review.

The Committee believes that the employee should make every effort, when possible, to give timely notice. The issue of timely notice should be considered on a case-by-case basis. In the event that an employee is notified by military authorities at the last minute of impending military duty, resulting short notice to the employer should be considered timely. On the other hand, last-minute notice, which could have been given earlier by the employee but was unjustifiably not given, and which causes severe disruption of the employer's operation, should be viewed unfavorably. Lack of a timely notification which does not result in harm to the employer should not be a sufficient basis to deny reemployment rights.

The Committee does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves the job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an 'unburned bridge.' Not until the individual's discharge or release from service and/or transportation time back home, which triggers the application time, does the servicemember have to decide whether to recross that bridge. *See Fishgold, supra,* 328 U.S. at 284: 'He is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life.'"

House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2458-59.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The Secretary exercised that authority and published final USERRA Regulations in the *Federal Register* on Dec. 19, 2005. The Regulations are now published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. Four sections of the Regulations address the prior notice requirement in some detail, as follows:

§ 1002.85 Must the employee give advance notice to the employer of his or her service in the uniformed services?

(a) Yes. The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employer, the employee, or an appropriate office of the uniformed service in which his or her service is to be performed, must notify each employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.

(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an "appropriate officer" can give notice on the employee's behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

(c) The employee's notice to the employer may be either verbal or written. The notice may be informal and does not need to follow any particular format.

(d) Although USERRA does not specify how far in advance notice must be given to the employer, an employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense Department "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."

20 C.F.R. 1002.85 (bold question in original).

§ 1002.86 When is the employee excused from giving advance notice of service in the uniformed services?

The employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.

(a) Only a designated authority can make a determination of "military necessity," and such a determination is not subject to judicial review. Guidelines for defining "military necessity" appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by "military necessity." See 42 U.S.C. 300hh–11(e)(3)(B).

(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the employee's employer or the employer's representative, or a requirement that the employee report for uniformed service in an extremely short period of time.

20 C.F.R. 1002.86 (bold question in original).

§ 1002.87 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 (bold question in original).

§ 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the

right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

20 C.F.R. 1002.88 (bold question in original).

As the Department of Labor (DOL) regulations make clear, an employee does not need the employer's permission to absent himself or herself from the civilian job for the purpose of performing uniformed service; the employee only needs to give the employer notice. Nonetheless, I strongly recommend that you phrase your notice as a "request for permission" as a matter of courtesy to your employer. If the employer tells you that permission is denied, notify your Reserve or National Guard unit commanding officer and contact the National Committee for Employer Support of the Guard and Reserve (ESGR) at 800-336-4590.

ESGR is a Department of Defense (DOD) organization founded in 1972. Its mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. If you call the ESGR headquarters, they will put you in touch with a volunteer ombudsman in your area. The ombudsman will, upon your request, contact your employer to explain the law and try to work out employer problems on an amicable basis.

I also invite your attention to www.esgr.mil. This is ESGR's website. You will find a great deal of practical information about serving in the National Guard or Reserve, getting cooperation and support from your civilian employer, and minimizing the burden on the employer, while maintaining your military participation and readiness. This includes the following practical advice:

"Drill Schedules.

Don't make your boss guess about your National Guard or Reserve duties. The more you share with the boss - and the earlier you share it the better - about drill schedules, annual training plans, reemployment rights and rules, and any extra time-off requirements, the easier things will go. Many units meet on the same weekend of each month, with exceptions for holidays or when scheduled annual training intervenes. If your unit follows this pattern, let your employer know. Remember, you must give your employer advance notice of any military service, including drills. Let your boss know as early as possible when you will be absent from work. When schedule changes occur, notify the employer as soon as you know about them.

Annual Training Schedules.

The same rules apply for Annual Training (AT). Most units schedule their AT months in advance - that is the time to provide notification to the employer. A change in orders can be more easily handled than an unplanned absence. If you are going to be on an advance party, or if your AT will exceed the traditional two weeks, make sure your employer knows about it well in advance.

Extra Training.

When you or your unit needs additional training, or you are scheduled to attend a service school, let the boss know about it. Giving employers the maximum lead-time enables them to make plans to accommodate your absence. To the extent that you have control over the scheduling of additional training, try to minimize any adverse impact your absence will cause from the civilian job. Show consideration for your boss and your co-workers when you volunteer for nonessential training.

Non-Training Active Duty.

Many Reserve component members perform tours of active duty that are not for training. This can range from short active duty tours, to support exercises or work on special projects, to years of active duty in the Active Guard Reserve (AGR) or similar programs. Again, under USERRA, prior notice of this type of duty must be given to your employer. Remember too, that most duty of this type is subject to a cumulative 5-year time limit after which you no longer have reemployment rights under USERRA with a given employer."

Section 4312(a)(1) provides that the advance notice to the employer can be "written or verbal." I strongly recommend that you give written notice and retain a copy for yourself. In some circumstances, it is prudent to spend about $4 to send the notice by certified mail, return receipt requested. You should retain a copy of the letter you sent and the postcard you receive from the United States Postal Service, showing that your letter was received. Remember that prior notice to the employer is one of the eligibility criteria for reemployment rights. It behooves you to document that you have met this criterion.

There is no particular form of words for the required notice. I recommend that you phrase your written notice as follows:

"I work in [department or section of employer]. I am a member of [identify the uniformed service of which you are a member, including your specific unit and contact information for your commanding officer]. I request your assent to my departure from work on [date and time] to perform military service. I expect to return to work on or about [expected date of return]. If my return is delayed for whatever reason, I will notify you by e-mail and/or letter.

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal statute enacted in 1994, I have the right to absent myself from work for military service and to return to work after completion of my service. I invite your attention to www.esgr.mil. This is the website of the National Committee for Employer Support of the Guard and Reserve (ESGR), a Department of Defense organization. You can also call ESGR at 800-336-4590."

As I explained in Law Review 0965, being "furloughed" or "laid off" by your civilian employer can be considered a "position of employment" for USERRA purposes, so long as there is some possibility that you will be recalled to work as business conditions improve. If you perform service in the uniformed service while in a layoff or furlough status, you should give your civilian employer prior notice, even though you are not actually working during that period. Failing to do so will likely deprive you of the right to reemployment upon your return from service. Please see Law Reviews 31, 39, and 0756 at www.roa.org/law_review.

USERRA entitles you, upon your return to work after service, to promotions and seniority benefits that you would have attained, with reasonable certainty, if you had been continuously employed. You are entitled to be considered, during your military-related absence from work, to be considered for promotion and transfer opportunities and other benefits. In your notice to your civilian employer, you should designate a trusted colleague at work as your point of contact for dealings with the employer.

If you are to be deployed to the theater of operations, it is likely that you will be out of contact for weeks at a time. A prime purpose of USERRA is to enable you, while you are serving our country in uniform, to devote your full time and attention to your military duties. This is a safety issue—your safety and the safety of your military colleagues. If I am in the foxhole next to yours, I should not have to worry that you are not paying full attention to your sector of the perimeter because you cannot put out of your mind your concern about your civilian job back home.

I also invite your attention to Law Review 134 (Sept. 2004), titled "Employers: Please Don't Bother Them in Iraq!" I invite your attention to www.roa.org/law_review. You will also find more than 600 articles about USERRA and other laws, along with a detailed Subject Index, to facilitate finding articles about very specific topics.

You should also give a limited power of attorney to that trusted colleague at work, authorizing him or her to access your personnel record and to make applications on your behalf. A military legal assistance attorney can assist you in drafting the limited power of attorney.

If you work for a small employer, you should send this notice to the owner or general manager. If you work for an intermediate or large employer, you should send this notice to the company's personnel department, with a copy to your direct supervisor.

If you are being called to active duty, you should include in your notice the expected end date of the call-up. If your active duty is extended, voluntarily or involuntarily, you should notify the employer by e-mail and follow up with a certified letter.

E-mail is great for instant communication across thousands of miles, but it may be difficult, months later, to prove that your e-mail was sent, or that it was received. That is why I recommend certified mail. At a minimum, you should print out and preserve all pertinent e-mails.

Most often, problems arise between employees and employers when there is a lack of communication. Open communication is the key to balancing civilian and military duties and goes a long way towards gaining and maintaining the support of an employer for both endeavors. Rather than being fearful of the employer's reaction, the best approach is to communicate your military activities to your employer as far in advance as possible. This may also require engagement with your military commander to come up with the best "win-win" situation for both the military and civilian workplaces. In communicating the situation, you have the opportunity to assure your employer that you remain a dedicated employee and plan to work hard in that organization upon your return. Once you return to your civilian job, follow through on that plan – strive to be the best worker in the workplace as actions speak much louder than words.

Section 4312(a)(1) provides that an "appropriate officer" of the uniformed service may give notice to the civilian employer, in addition to or in lieu of the notice given by the individual employee. I want to encourage National Guard and Reserve unit commanding officers to communicate with the civilian employers of unit members, by telephone and in writing, about drill schedules, annual training requirements, and voluntary and involuntary calls to active duty. We should not leave it to the individual member (especially a junior enlisted member) to deal with the employer's annoyance about inconvenience and costs imposed upon employers by military-related absences from work.

The Cold War lasted for 45 years (1945-90). The Global War on Terrorism may last just as long or longer. If we are going to continue to rely upon the National Guard and Reserve for major contributions, we need to formulate and implement policies and practices that are sustainable over the long haul. That includes keeping open the lines of communication with civilian employers of National Guard and Reserve personnel, and giving them as much advance notice as possible whenever military training or service will require that an employee be absent from his or her civilian job.

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.