

LAW REVIEW 1095

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 section 4304, any person whose absence from a position of civilian 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—(1) 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).

"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 the 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, to replace the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. USERRA's legislative history explains the requirement for the person leaving a civilian job for uniformed service to give advance notice to the civilian employer, 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 employer. Under current law [the VRRA], 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 requirement to notify the employer before leaving for active duty or initial active duty for training. See *Winders v. People Express Airlines, Inc.*, 595 F. Supp. 1512, 1518 (D.N.J. 1984), affirmed, 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 service 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 the enactment of the Committee bill [enacted October 13, 1994, so effective December 12, 1994] 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 [House Committee on Veterans' Affairs] 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 given to the employer should be considered timely. On the other hand, last-minute notice that could have been given earlier by the employee but unjustifiably not given, and which causes severe disruption to the employer's operation, should be viewed unfavorably. Lack of 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 a 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.' [*Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946).] 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 USERRA to state and local governments and private employers. The Secretary exercised that authority and published the final USERRA regulations in the *Federal Register* on December 19, 2005. The regulations are codified in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. Four sections of the regulations address the requirement to give notice to one's employer prior to absence from work necessitated by military service, 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 officer 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).

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, extension 730.