

## **Number 103, December 2003: Do I Have To Work on My Day Off?**

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Q: I am a Marine Corps Reservist and also a guard for the Federal Bureau of Prisons (U.S. Department of Justice). Frequently, I am scheduled to work at the prison on the same weekend as my Marine Corps Reserve drill. The warden grudgingly lets me have time off from work to go to my drill, but he requires me to come in and work on two days when I am not otherwise scheduled to work, to make up for the Saturday and Sunday that I have missed. I object to having to come to work on days that I would otherwise have off, just because I have exercised my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Have my USERRA rights been violated?

A: I believe that an excellent argument can be made that your rights have been violated. Section 4311(a) of USERRA provides: "A person who ... performs ... service in a uniformed service shall not be denied ... any benefit of employment by an employer." 38 U.S.C. 4311(a). The term "benefit of employment" is broadly defined by USERRA, and the definition includes "the opportunity to select work hours or location of employment." 38 U.S.C. 4303(2). Making you work on a day that would otherwise be a day off amounts to denying you an opportunity that you otherwise would have had to select that day as a day off.

Also pertinent is 38 U.S.C. 4302(b), which provides that an employer cannot impose additional eligibility criteria upon the exercise of your USERRA rights. Making you work on a later day, when you would not otherwise have worked, amounts to imposing an additional eligibility criterion.

I think that this employer's policy also violates the spirit, and perhaps the letter, of 38 U.S.C. 4316(d). As I have explained in Law Reviews 26 and 59, it is unlawful for the employer to make you use vacation or annual leave for your military obligations. Making you use a day off amounts essentially to the same thing, I would argue.

Of course, some reservists would welcome or even try to insist upon the kind of arrangement to which you object. It may be that the warden misunderstands what you want. I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (ESGR), at 1-800-336-4590. An ESGR volunteer ombudsman can work with you and the employer to try to find a "win-win" solution.

\*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.