

October 2011

It Is Not Your Responsibility to Find a Replacement

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

1.1.1.8—USERRA Applies to Federal Government

1.2—USERRA Forbids Discrimination

1.3.1.1—Left Job for Service and Gave Prior Notice

1.4—USERRA Enforcement

Q: I am a Lieutenant Commander in the Navy Reserve and a member of ROA. As a civilian employee, I work as a special agent for a Department of Defense (DOD) law enforcement agency, and my civilian employer gives me a very hard time about my Navy Reserve service.

My Navy Reserve unit drills the first weekend of every month, except when a federal holiday on Monday follows that first weekend. In that situation, my drill weekend is a week later.

In September, the unit Commanding Officer (CO) distributed our drill schedule for all of Fiscal Year 2012, which began on 1 October 2011. At your suggestion, I provided this written schedule to the Special Agent in Charge and to the supervisor who is responsible for setting the schedule, along with a letter explicitly asking for time off from my civilian job for all of these weekends. Each month, I provide them a written reminder of my scheduled drill weekend.

The supervisor who is in charge of scheduling has refused to rearrange my civilian work schedule around my drill weekends, and the Special Agent in Charge has refused to intervene in this matter. The supervisor claims that it is my responsibility to find a replacement special agent whenever I am scheduled to work on Saturday and that happens to be my Navy Reserve drill weekend.

My next scheduled drill weekend is 5-6 November, and I am scheduled to work in my civilian job on Saturday, 5 November. There are only three fellow special agents who could fill in for me, and all three have refused, even when I offered to fill in for them on Christmas Day. I protested that I am unable to be at the job on 5 November. I also asked my Reserve CO for permission to reschedule my November drill weekend, and she denied me that permission. My civilian supervisor has told me that if I miss work on 5 November I will be marked down as absent without authorization and will be suspended without pay for two weeks. I have been warned that if this happens again I will be fired.

Have my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) been violated?

A: Yes.

As I explained in [Law Review 0766](#) and other articles, you have the right to reemployment under USERRA if you meet five simple eligibility criteria:

- a. You must have left a position of service in the uniformed services for the purpose of performing voluntary or involuntary service in the uniformed services.

- b. You must have given the civilian employer prior oral or written notice.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.[\[1\]](#)
- d. You must have been released from the period of service without having received a punitive or other-than-honorable discharge that disqualifies you under 38 U.S.C. 4304.
- e. You must be timely in reporting back to work or applying for reemployment.[\[2\]](#)

As to the notice requirement, you are only required to provide notice—you do not need the employer's permission, and the employer does not get a veto. It is clearly unlawful for the employer to put the “find a replacement” burden on you, as a condition precedent to “permitting” you to absent yourself from your civilian job on 5 November.

Section 4331 of USERRA gives the Secretary of Labor rulemaking authority under this law, and the Department of Labor USERRA Regulations are codified in title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). The pertinent section is as follows:

§ 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).

Q: The Special Agent in Charge insists that USERRA does not apply to DOD as a civilian employer. Is there any legal basis for that assertion?

A: No. USERRA applies to DOD, just as it applies to any other federal agency, a state or local government, or a private employer. Indeed, USERRA *especially* applies to DOD.

USERRA's very first section expresses the “sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.” 38 U.S.C. 4301(b). Because DOD is the principal beneficiary of USERRA, DOD must strive to be a model among models. Without a law like USERRA, the services would not be able to recruit and retain Regular[\[3\]](#) Reserve, and National Guard personnel. Through Employer Support of the Guard and Reserve (ESGR) (a DOD organization founded in 1972), DOD urges public and private sector employers to comply with USERRA and to go beyond USERRA in supporting employees or potential employees who are members of the National Guard or Reserve.

By this “find your own replacement” policy, DOD has created the appearance that it considers itself above USERRA, with respect to its relationship with its own civilian employees, like you. This appearance must necessarily undermine the DOD's moral standing to advocate for service members, with respect to their civilian employers. “Do as I say and not as I do” has always been a losing argument.

“Any why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye.” *Matthew 7:7 (King James Bible)*.

Q: Where do I go from here? My scheduled November drill weekend is only a few days away, and I am in a fix. My Navy Reserve CO has ordered me to be at my drill on 5 November, and my civilian employer has ordered me to be at my civilian job, and has threatened me with termination if I am not. I cannot be at both places at the same time. What do I do now?

A: I suggest that you call ESGR at 800-336-4590. I hope that an ESGR ombudsman can talk some sense into your direct supervisor and the Special Agent in Charge. But if the issue is not resolved by 5 November, you should report to your drill. After the drill weekend you should report back to work promptly on Monday morning. Be sure to document that you meet the USERRA eligibility criteria, and dot all the i's and cross all the t's.

If the agency takes any unfavorable action against you for missing work on 5 November, you should promptly file a formal written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). Alternatively, you can bypass DOL-VETS and file your claim directly with the Merit Systems Protection Board (MSPB), in accordance with section 4324 of USERRA, 38 U.S.C. 4324. The MSPB will order your agency to comply with USERRA and to compensate you for any pay or benefits that you have lost because of the violation, and to pay the attorney fees that you reasonably incur in enforcing your rights. *See* 38 U.S.C. 4324(c).

[1] Your inactive duty training periods and other Reserve or National Guard training do not count toward your five-year limit. See [Law Review 201](#) for a detailed summary of what counts and what does not count.

[2] After a period of service of less than 31 days (like a drill weekend), you must report for work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i).

[3] USERRA most definitely applies to Regular military service, as well as National Guard and Reserve service. Please see [Law Review 0719](#).