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Time Off from Work before Mobilization

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Q: I am the commanding officer of an Army National Guard unit that has been mobilized and deployed to Kosovo. I am writing on behalf of an enlisted member of my unit.

We had seven months' advance notice of this deployment, and I encouraged unit members to notify their employers immediately after we learned of the likelihood of this call-up. This member, like most members, notified her civilian employer seven months in advance. She told them that she would be leaving work on 15 December 2003, and that is when she left. After leaving work, she drove her two small children to her parents' house, where the children are staying during her mobilization. She spent Christmas with her parents and her children. She is now here in Kosovo with the rest of the unit.

Our unit actually reported to active duty on 29 December 2003. This member's employer learned of the mobilization date recently and sent the member a nasty letter, saying that she will not have the right to re-employment because she left work two weeks early. Is the employer correct?

A: No, the employer is wrong. This member was not required to work at her civilian job until the last day before mobilization. Clearly, she left her job for the purpose of performing uniformed service, and she gave prior notice to the employer. That is all that she was required to do.

To explain the basis for my conclusion, let me offer some historic perspective. As I explained in Law Review 89, the Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted in 1994. It was a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. USERRA is codified at 38 U.S.C. 4301-4333. The VRR law was formerly codified at 38 U.S.C. 2021-2026.

The VRR law made confusing distinctions among categories of military training or service. Under the VRR law, a Reserve Component member was required to "request a leave of absence" for the time required to perform Active Duty for training or inactive duty training (drills). Under the VRR law, there was no prior-notice requirement for active duty, but it was necessary for the returning veteran to show, after returning from service, that he or she had left the job for the purpose of service.

Under USERRA, the individual who is leaving a civilian job for the purpose of performing uniformed service must give prior notice to the employer, regardless of the type of service to be performed, unless giving prior notice is precluded by

military necessity or otherwise impossible or unreasonable. [See 38 U.S.C. 4312(a)(1), 4312(b), and Law Review 5.] USERRA grafted on the prior-notice requirement, but the other provisions remain the same. Accordingly, I would argue that under USERRA, as under the VRR law, there is no limit on the duration of the interim period between the last day at work and the start of the period of uniformed service.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Department of Labor (DOL) rulemaking authority under USERRA. DOL will be promulgating USERRA regulations, and I expect the draft regulations to be published in the Federal Register, for notice and comment, in February 2004.

DOL did not have rulemaking authority under the VRR law, but DOL did publish the VRR Handbook. While employed as a DOL attorney (1982-92), I co-edited (along with one other DOL attorney, Billie Jane Spencer) the 1988 edition of that handbook. Several courts, including the Supreme Court, have accorded a "measure of weight" to the statutory interpretations expressed in the VRR Handbook. [See Monroe v. Standard Oil Co., 452 U.S. 549, 563 n. 14 (1981); Leonard v. United Airlines, 972 F.2d 155, 159-160 (7th Cir. 1992); Shadle v. Superwood Corp., 858 F.2d 437, 440 (8th Cir. 1988); Dyer v. Hinky Dinky, Inc., 710 F.2d 1348, 1352 (8th Cir. 1983); Smith v. Industrial Employers and Distributors Association, 546 F.2d 314, 319 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977); Helton v. Mercury Freight Lines, Inc., 444 F.2d 365, 368 n. 4 (5th Cir. 1971).]

The 1988 VRR Handbook provides as follows concerning the permissible interim between leaving the civilian job and entering active duty: "The statute [VRR law] does not specify any limit on the amount of time that may elapse between the time the employee leaves his position and the time his military service actually commences. It is a matter of intent and not of time. It is recognized that employees entering military service often need time to get their affairs in order, and that the amount of time needed for these preparations will vary from case to case. Sometimes the actual induction or enlistment may be delayed for weeks or even months for various reasons. Where there is an unusual delay, the causes of that delay and what they show about the employee's intent, rather than the length of time, determine whether he meets the statutory criteria." [1988 VRR Handbook, page 4-1.]

Applying these principles to your unit member's situation, it was certainly reasonable for her to leave work two weeks before the start of the active duty period, in order to make childcare and other arrangements. If she is released from active duty under honorable conditions and makes a timely application for re-employment, she will be entitled to re-employment, including being treated as if she had been continuously employed for seniority and pension purposes. The two-week delay between leaving the job and entering active duty certainly does not cause her to lose her re-employment rights.

It is most unfortunate that the employer sent the letter that caused your unit member to be concerned about her civilian job. The whole point of USERRA, as well as the Servicemembers' Civil Relief Act, is to remove civilian distractions from the

service member's mind. Your unit member should be able to devote her entire time and attention to her military duties. ROA

**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.