

LAW REVIEW 1207

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Can I Sell Back My Holiday Time?

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1.3.1.3—Timely Application for Reemployment

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Q: I am a member of the Army National Guard. I am currently in Afghanistan, nearing the end of an 18-month call-up. I left a civilian job with a large corporation for this service, and I expect to return to work for that corporation soon, when I leave active duty next month.

When I was called to the colors, I had 30 days (240 hours) of paid vacation time in the bank. I asked the company to pay me for those hours—240 times \$20 per hour equals \$4800. The company refused, and I contacted Employer Support of the Guard and Reserve (ESGR). An ESGR ombudsman contacted the company, and the company deposited \$4800 in my account.

During the 18 months that I have been on active duty, there have been 14 company holidays, for an additional 112 hours. At \$20 per hour (my standard rate of pay) that comes to an additional \$2240. I asked the company to pay me that, but the company refused, asserting that holiday pay is different from vacation pay. What do you think?

A: I think that holiday pay is different from selling back your vacation hours, but you may be entitled to the holiday pay under a different provision of the Uniformed Services Employment and Reemployment Rights Act (USERRA). First, let's discuss selling back vacation hours when you leave a job for service in the uniformed services.

Section 4316(d) of USERRA provides:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.

Title 38, United States Code, section 4316(d) [38 U.S.C. 4316(d)].

Since you had earned and banked 30 days of vacation before you began this current period of service in the uniformed service, you were entitled but not required to sell that leave

back to the employer. It appears that the employer has done what the law required, after some initial confusion that the ESGR ombudsman helped to resolve.

The holidays that have occurred during the last 18 months are in a different category. All employees at work have received these holidays. The right to these holidays is not something that you accrued during your employment with the corporation, before you left for service. Thus, section 4316(d) does not entitle you to be paid for those 14 holidays.

It should be noted that you have almost certainly not earned additional vacation days during the time that you have been away from work for uniformed service. The Supreme Court has held that vacation days are not a "perquisite of seniority" that the returning veteran is entitled to upon reemployment. *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).^[1]

Since you chose to sell back all your vacation days, and since you have not earned any additional vacation days while you have been on active duty, you will return to work with a vacation balance of zero. This means that you will need to work for several months, and rebuild a positive vacation balance, before you can take another vacation day.

Because you have been on active duty for more than 180 days, you can wait up to 90 days to apply for reemployment with the corporation. See 38 U.S.C. 4312(e)(1)(D). That 90-day deadline starts running on the day that you are released from active duty. If you return home on terminal leave, the 90-day period is not running during the terminal leave period.

Since you have been in combat in Afghanistan, it is likely that you will need some "down time" to readjust to civilian life, before you return to your civilian job. That is what the 90-day period is for. I suggest that you not apply for reemployment until you are ready to return to work. Please see Law Review 11101 (November 2011), titled "Don't Apply for Reemployment Until You Are Ready to Return to Work." When you return home, you should send a polite note to your supervisor, advising him or her that you are home safe but not yet ready to apply for reemployment. See Law Review 11101 for a sample letter.

Now let's turn to the question of your possible entitlement to be paid for the 14 holidays that have occurred at your civilian job during the 18 months that you have been away from work for service. You may be entitled to that benefit under USERRA's "furlough or leave of absence" clause, which reads as follows:

(b)

(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2)

(A) Subject to subparagraph (B), a person who—

(i) is absent from a position of employment by reason of service in the uniformed services, and

(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,

is not entitled to rights and benefits under paragraph (1)(B).

(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section [4317](#).

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section [4318](#).

38 U.S.C. 4316(b).

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which goes back to 1940. The furlough or leave of absence clause has been in the reemployment statute since 1940 and was carried over into USERRA without significant change.

In a case arising under the VRRRA, the 3rd Circuit [\[2\]](#) held that under the furlough or leave of absence clause employees who are away from work for military training or service are entitled to be paid for holidays that occur during such service, if and to the extent that other employees who are away from work for non-military leaves of absence are paid for holidays that occur during such leave periods. See *Waltermeyer v. Aluminum Company of America*, 804 F.2d 821 (3rd Cir. 1986). It should be noted that USERRA's legislative history cites *Waltermeyer* with approval. See House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2466. Thus, you are entitled to be paid for those 14 holidays if you can show that other employees of the corporation who are away from work for non-military leaves of absence of *comparable duration* are routinely paid for holidays that occur during their leaves of absence. [\[3\]](#)

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 promulgated those regulations in 2005, and you can find them in Title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). For the regulations on the furlough or leave of absence clause, I invite your attention to 20 C.F.R. 1002.149-152.

[1] I discuss the implications of *Foster* in detail in Law Review 0907 (February 2009). I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 700 articles about USERRA and other military-relevant laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] The 3rd Circuit is the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, and Pennsylvania.

[3] You cannot compare a jury leave of 18 days with a military leave of 18 months, for example.