

LAW REVIEW 1212

February 2012

USERRA and the Fair Labor Standards Act

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

1.8—Relationship between USERRA and other Laws/Policies

Q: I am a warrant officer in the Army National Guard and a member of ROA—I joined recently after utilizing your excellent “Law Review” articles. I work for a corporation, as a manager. I am paid a salary rather than an hourly wage. I routinely work more than 40 hours in a week, and sometimes far more, when the work requires it. When I work extra hours, I receive no extra pay, because I work on salary.

About the only time that I work less than 40 hours in a week is when I have my National Guard drill weekend. I am in a “MUTA-5” unit—we drill for four hours on Friday evening and then all day on Saturday and Sunday. The drill site is located 200 miles from my home and civilian job, so I need to leave at mid-day on Friday in order to arrive at my drill site in time for the Friday evening drill. As a result, my work hours for that week are generally in the 35-38 hour range.

In [Law Review 106](#) (December 2003), you wrote that the employer is not required by the Uniformed Services Employment and Reemployment Rights Act (USERRA) to pay the employee for a period of time (whether measured in hours, days, weeks, or months) that the employee is away from work for military training or service. You also wrote, “If you are exempt from the Fair Labor Standards Act (FLSA) overtime rules (because you are a manager, for example), the employer is not permitted to make a deduction for a part of a week missed because of temporary military leave. See 29 Code of Federal Regulations 541.118(a)(4). This is an FLSA requirement, not a USERRA requirement.”

My company’s written military leave policy includes the following: “Military leave is generally unpaid. However, the company will pay its exempt (salaried) employees their full salary for any work week in which they are in military leave and do any work for the company, *less any compensation the employee receives from the military.*” (Emphasis supplied.)

When I leave work 5 hours early on the Friday of my drill weekend, the company docks me for 1/8 of the normal weekly pay, because 5 is 1/8 of 40. The company insists that doing this is consistent with its written policy, with the FLSA, and with USERRA, so long as I am not losing *net* pay because of the deduction. Is it lawful for the employer to use my military pay as an offset against my civilian pay under these circumstances?

A: I think that your employer’s policy is lawful. I invite your attention to the pertinent FLSA regulation: “Deductions may not be made for absences of an employee [a salaried employee] caused by jury duty, attendance as a witness, or *temporary military leave.* The employer may, however, offset any amounts received by an employee as jury or witness

fees or military pay for a particular week against salary due for that particular week without loss of the exemption.” 29 C.F.R. 541.118(a)(4) (emphasis supplied).

Q: When I go on my annual training (usually two weeks) in the Army National Guard, I usually miss the whole week of work. Under those circumstances, is the employer required to pay me or to make up the difference in pay?

A: No. Section 541.118(a)(4) deals with the situation where the employee has worked part but not all of the work week. If you do not work at all during the work week, the employer is not required to pay you or to make up the difference in pay for that week. Docking you for that week is not unlawful under these circumstances.

Q: My employer’s principal cross-town competitor pays employees when they are away from work for Reserve or National Guard drills or annual training, and when they are mobilized the competitor makes up the difference between their civilian pay and their military pay. Is my employer required to emulate the competitor’s example?

A: Under section 4302 of USERRA (38 U.S.C. 4302), this federal law is a floor and not a ceiling. USERRA does not supersede or override an employer policy that provides *greater or additional rights*. The competitor has chosen to be generous, above and beyond the requirements of USERRA. But the competitor’s extra-statutory generosity does not mean that your employer is required to follow suit.