

LAW REVIEW 1229

March 2012

USERRA and the FMLA—Part II

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1.3.2.2—Continuous Accumulation of Seniority—Escalator Principle

1.8—Relationship between USERRA and other Laws/Policies

Q: I am a senior enlisted member of the United States Marine Corps Reserve (USMCR). I have read and utilized your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I read with great interest your [Law Review 1228](#), which you added to your website last week. Like the reservist in that article, I was called to active duty in late 2010, and I spent most of calendar year 2011 in Afghanistan, and I suffered combat wounds in Afghanistan.

In January 2012, I met the USERRA eligibility criteria for reemployment. I left my job in December 2010 for the purpose of performing service in the uniformed services, and I gave my civilian employer prior notice. I have not exceeded the cumulative five-year limit on the duration of my uniformed service periods, and since my most recent call-up was involuntary it does not count toward my limit in any case. I was released from active duty under honorable conditions, and I immediately applied for reemployment at a corporation, where I have worked since 1997. I returned to work on January 15, 2012.

About once a month, I need to go to the National Military Medical Center (NMMC) at Bethesda, Maryland, for medical appointments related to my recuperation from my Afghanistan wounds. I asked the NMMC for weekend appointments, to minimize the burden on my civilian employer; however, I have been told that weekend appointments are not available.

I have exhausted my limited sick leave entitlement at the corporation, and I asked the company to give me the opportunity to take unpaid leave under the Family Medical Leave Act (FMLA) for these military medical appointments.

The company's personnel director told me that I am not eligible to take FMLA leave in 2012 because I only worked 400 hours for the company in 2011. I was on active duty for almost the whole year. I have worked for this company for 15 years. Each year, I work 2000 or more hours for the company. The only years that I have fallen short of the 1250-hour threshold are 2003, 2007, and 2011, and I was on active duty for most of those years. The personnel director also told me that the corporation is exempt from the FMLA because it has only 45 employees. What gives?

A: For you to be eligible to take FMLA leave, both you and the employer must meet the FMLA eligibility criteria. You meet the criteria—it is clear that you would have worked more

than 1250 hours at the corporation last year if you had not been called to active duty. The problem is that the employer does not meet the FMLA criteria. For employees to have the right to FMLA leave there must be at least 50 employees of the employer who are employed within 75 miles. Since the corporation only has 45 employees, it is exempt from the FMLA.

Q: What about USERRA? Does that law give me the right to unpaid leave from XYZ to report to these military medical appointments?

A: USERRA gives you the job-protected right to be away from your civilian job to perform "service in the uniformed services." Section 4303(13) of USERRA defines that term as follows:

The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, *inactive duty training*, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section [12503](#) of title [10](#) or section [115](#) of title [32](#).

38 U.S.C. 4303(13) (emphasis supplied).

If the Marine Corps will give you inactive duty training (drills) orders for these medical appointments at the NMMC, you will have the job-protected right, under USERRA, to time off from your civilian job to make these appointments. In the absence of such orders, attending these appointments does not qualify as "service in the uniformed services" and you do not have the right to time off from your job, under USERRA, for this purpose.

On November 30, 2011, Representative Bruce Braley of Iowa introduced H.R. 3524, the proposed "Disabled Veterans Employment Protection Act. If enacted, this bill would amend USERRA to give the right to job-protected unpaid leave in circumstances like yours.