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Don't Tell your Civilian Employer that you Are Considering Enlistment

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Q: I am a retired Coast Guard Reserve Captain and a life member of ROA. My son graduated from college a year ago and has a good job with a large company. For years, I have been trying to encourage my son to join the Coast Guard or some other service, but he has not seemed interested. I was surprised to learn from him that he recently visited a Coast Guard recruiter and he is seriously considering enlisting.

My son told me that he mentioned to his direct supervisor at work that he has visited the recruiter and that he is considering enlisting. She went to “general quarters” to try to discourage him from joining, and she told him that if he enlists he “has no future at this company.” When he mentioned that there is a federal law that protects individuals who seek to serve in the armed forces, she claimed that the company is exempt from the law. Is the supervisor correct?

A: No.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to almost all employers in the United States, including the Federal Government, the states, political subdivisions of states (counties, cities, school districts, etc.), and private employers, regardless of size. Only religious institutions (on First Amendment grounds), Indian tribes (on residual sovereignty grounds), and foreign embassies and consulates and international organizations (World Bank, United Nations, etc.—on diplomatic immunity grounds) are exempt from USERRA enforcement. The company that your son works for is certainly not exempt from USERRA.

As I explained in Law Review 1281¹ and other articles, your son will have the right to reemployment after he leaves active duty, provided he meets five conditions:

- a. He must have left his civilian job for the purpose of performing voluntary or involuntary service in the uniformed services—active duty, active duty for training, initial active duty training, inactive duty training, etc.
- b. He must have given the employer prior oral or written notice.

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 905 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012, and we have added another 83 new articles so far in 2013.

- c. He must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed services, relating to the employer relationship for which he seeks reemployment. Please see Law Review 201 for a definitive discussion of what counts and what does not count toward the limit.
- d. He must have been released from the period of service without having received a disqualifying bad discharge—a bad conduct discharge, dishonorable discharge, other-than-honorable discharge, etc.
- e. He must have made a timely application for reemployment after release from the period of service. After a period of service of 181 days or more, he has 90 days to apply for reemployment. Shorter deadlines apply after shorter periods of service.

If your son meets these five conditions, the company will have the legal obligation to reemploy him promptly² in the position of employment that he *would have attained if he had been continuously employed* or another position (for which he is qualified) that is of like seniority, status, and pay.³ Upon reemployment, your son will be entitled to the seniority and pension credit that he had at the time he left his job for service plus the additional seniority and pension credit that he *would have received if he had been continuously employed*.⁴

For example, let us assume that your son is accepted by the Coast Guard and reports to active duty (boot camp or officer candidate school) on December 1, 2013. He serves honorably for four years and is released from active duty (without a disqualifying bad discharge) on November 30, 2017. He then applies for reemployment on December 1, 2017. Under these circumstances, your son meets the five conditions and is entitled to reemployment under USERRA.

Q: During my 30 years in the Coast Guard and Coast Guard Reserve, I recall hearing several presentations about USERRA and the predecessor reemployment statute. I was under the impression that this law only applies to persons serving in a Reserve Component like the Coast Guard Reserve. Does it matter that my son is joining the Regular Coast Guard and not the Coast Guard Reserve?

A: No, that does not matter. USERRA and the predecessor reemployment statute have always applied to persons who serve in the Active Component as well as the Reserve Component. Please see Law Review 719 (May 2007).

Q: My son's immediate supervisor referred the issue to the company's General Counsel (GC), who has stated in writing that my son will not have reemployment rights after his Coast Guard service and that the company is denying him permission to enlist. My son visited an attorney, and that attorney wants \$500 to research the issue and to explain to the company's GC that she is wrong about USERRA. What do you think?

A: I think that it would serve no useful purpose for your son to get into an argument with the company about what his USERRA rights *may be* at some point four years in the future. Your son does not have a *ripe* dispute with the company. Your son's right to reemployment in December 2017 depends upon the occurrence of several events that may or may not occur.

First, your son may not in fact join the Coast Guard—he could flunk the physical at the Military Examination and Processing Station (MEPS), or he could change his mind and decide not to enlist. Your son could “fall in love” with the Coast Guard and remain on active duty for the next 30 years, and thus exceed the five-year limit under section 4312(c) of USERRA, 38 U.S.C. 4312(c). Alternatively, he could do something really stupid and get a bad discharge that disqualifies him under section 4304, 38 U.S.C. 4304. Your son could win the Publisher's Clearinghouse Sweepstakes and retire. In the fall of 2017, as he is preparing to leave active duty, he could get a great job offer elsewhere and decide that he does not want reemployment at his present employer. God forbid, your son could die, or the company could go the way of Studebaker and Montgomery Ward.

² According to the Department of Labor (DOL) USERRA Regulations, “Absent unusual circumstances, reemployment must occur within two weeks of the employee’s application for reemployment.” 20 C.F.R. 1002.181.

³ 38 U.S.C. 4313(a)(2)(A).

⁴ 38 U.S.C. 4316(a), 4318.

Q: Was my son obligated to inform his civilian supervisor that he was contemplating joining the Coast Guard? Was it a mistake for him to have done so?

A: Your son was under no obligation to inform his civilian employer that he was contemplating the possibility of enlisting. If he had asked me at the time, I would have advised him to keep his mouth shut. Your son's contemplation of the possibility of enlisting is frankly none of the employer's business.

Now that your son has let the cat out of the bag, by telling his direct supervisor that he is trying to join the Coast Guard, he will likely be subject to discrimination by the supervisor *even if he flunks the physical and does not in fact join the Coast Guard*. The supervisor will likely consider him "disloyal" to the company for even having considered military service.

Yes, many employers are just that short-sighted. It has been 40 years since Congress abolished the draft in 1973. With each year that passes since the establishment of the All Volunteer Military, a smaller and smaller percentage of folks who are in charge of things have ever served in the military. Your son's civilian supervisor likely has never served in the military, and nobody in her family and none of her close friends have ever served. She is focused on meeting her quota and getting good evaluations from her supervisor. The nation's need to defend itself by recruiting fine young men and women for the armed forces (including the Coast Guard) is not even on her mental radar screen.

Let us assume that your son passes the physical and receives Coast Guard orders to report to active duty on December 1, 2013. In the next five months, there will be training opportunities at the civilian job. The supervisor will not want to send your son, figuring that your son will be leaving soon anyway. Let us assume that there are promotion opportunities. Your son will not be considered—they will figure why promote him when he will be leaving soon anyway?

Let us assume that the company fires your son on August 31, three months before his expected Coast Guard report date.⁵ How is he to support himself in September, October, and November? How is he to find a new job when he knows that he will be leaving in three months anyway? I have seen issues just like these many times among the folks who contact me at the Service Members Law Center (SMLC).

These employer actions would constitute clear violations of section 4311(a) of USERRA, which provides: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. 4311(a).

Employers flout USERRA every day. They think that they can get away with it by being clever and subtle. All too often, employers get away with this stealth discrimination.

If you are considering enlisting (whether in the Active Component, the Reserve, or the National Guard), I strongly suggest that you keep your considerations to yourself, because you have no obligation to consult your employer about this matter. You have no obligation to say anything to your employer until the first time that you will need to be away from work (for a short period or a long period) because of uniformed service. 38 U.S.C. 4312(a).

If you are in the process of enlisting in the armed forces, I suggest that you say nothing to the civilian employer until you have a *firm* report date that is not likely to slip and until that report date is about a month away. If you give the employer more than a month of advance notice, that will only serve to give the employer the opportunity to make your life miserable as you prepare to serve our country in uniform.

⁵ The supervisor may seek to fire him to avoid the "hassle" of dealing with his USERRA rights.

Q: I understand that my son will need to travel to a MEPS to take mental and physical examinations. That will require that he miss at least two days of work at his civilian job. How does USERRA apply to this situation?

A: Section 4303 of USERRA defines 16 terms used in the statute, including the term “service in the uniformed services.” The definition of “service” includes “a period [of time] 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.” 38 U.S.C. 4303(13). Thus, your son has the right *under USERRA* to time off from his civilian job for the MEPS examination. Your son will need to give his employer advance notice of the days that he will miss because of the examination. At the end of the examination, *regardless of the outcome*, he is entitled to reemployment in his civilian job, just like returning from a drill weekend or other form of uniformed service.

Here is a link to an excellent summary of the MEPS process:

<http://usmilitary.about.com/od/joiningthemilitary/a/mepsglance.htm>. Even under the best of circumstances, and even without travel time, the process takes two days, sometimes longer. There are 65 MEPS locations. If your son lives outside a metropolitan area where there is a MEPS, he will need to spend the night in a motel (provided by the government) the night before the first day and the night before the second day. He will need to miss at least two days of work and maybe three or more.

Please remember that USERRA does not require the employer to pay your son for any period of time that he is away from work for uniformed service, and this includes the MEPS examination. If your son wants to be paid for the two MEPS days, he will need to use vacation days. He has the *right* to use his vacation days in that way under section 4316(d) of USERRA, 38 U.S.C. 4316(d).

Under normal circumstances I advise persons needing time off for MEPS examinations *not to use* USERRA for that purpose, because using USERRA requires you to tell the employer that you are trying to enlist. It is better to keep that information private until it is certain that you will be enlisting and until you have a firm report date for military service. Under most circumstances, it is better to ask for and obtain vacation days without telling the employer that the purpose is for military enlistment. In your son’s case, it makes little difference since he has already let the cat out of the bag by telling his supervisor that he is trying to enlist in the Coast Guard.

Here at the SMLC, I answer questions like this, by e-mail and by telephone, every day, sometimes including weekends. In May 2013, I received and responded to 1,009 inquiries, and almost half of them were about USERRA. If you have questions of this nature, e-mail me at SWright@roa.org or call me toll-free at 800-809-9448, ext. 730. I am here during regular business hours and until 10 pm Eastern Time on Mondays and Thursdays.

If you are complaining about your civilian employer or seeking advice and assistance regarding the employer, *do not use* the employer’s telephone, computer, e-mail system, or time to contact me, or Employer Support of the Guard and Reserve (ESGR), or the Department of Labor (DOL), or anybody else. Use your telephone and computer at home, on your own time. If you cannot afford a computer and Internet access at home, go to your local public library.

ROA is unique in providing this after-hours service, through the SMLC. Neither ESGR, nor DOL, nor anyone else is routinely available outside standard business hours.