

## **Time off from Civilian Job for VA Medical Appointments— Good News from Louisiana**

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**Q: I live in Louisiana and work for a restaurant in a small town in the Louisiana Delta. I graduated from high school in 2000. After the terrorist attacks of September 11, 2001, I was inspired to join the Army. I participated in the March 2003 invasion of Iraq, and I was wounded in action.**

**After four surgeries and extensive rehabilitation, I was medically retired from the Army in 2006, and I returned home to Louisiana. After years of unemployment, I recently found the job at the restaurant, as one of just two cooks. I have largely but by no means entirely recovered from the wounds I suffered in Iraq. I have several claims pending with the Department of Veterans Affairs, and several times per year I need to go to the VA regional center for medical appointments related to my claims.**

**My next appointment is scheduled for August 7, 2013, at the VA Regional Medical Center in Shreveport, Louisiana. This medical appointment will require that I miss an entire work day at the restaurant, including travel to Shreveport, waiting to see the VA physician, and returning home.**

**I gave the restaurant owner more than a month of advance notice of my need to be away from work on August 7. He told me, “I have had it up to here with this Army crap. If you miss your August 7 shift, you are fired.”**

**I am in a big dilemma. I need to go to Shreveport for this appointment, and I will probably need to go to several more appointments in the next year or so. The VA told me that evening**

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<sup>1</sup> Military title shown for purposes of identification only. The views expressed in this article are of the author alone and should not be attributed to the Department of the Army, the Department of Defense, or the United States Government. The author is a partner in the prominent employment law firm Jackson Lewis, and he has offices in Stamford, Connecticut and Denver, CO. He is a judge advocate in the Army Reserve and a member of ROA.

and weekend appointments are not available, so each appointment will require me to miss a day at work. I need to go to these medical appointments, but I also need the restaurant job, especially after a long period of unemployment after I left the Army.

**If I had never joined the Army, I would not need to go to these VA appointments. Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) give me the right to time off from my civilian job (even time off without pay) for these medical appointments?**

**A:** As Captain Samuel F. Wright explained in Law Review 168<sup>2</sup> (April 2005) and Law Review 1229 (March 2012), USERRA gives you a 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).

USERRA gives you the job-protected right to be away from your civilian job for a medical *examination to determine your fitness for military service*, but USERRA does not give you a job-protected right to be away from your job for medical *treatment* or for a medical examination *in connection with a VA claim that you may have filed*. This VA medical appointment does not qualify as “service in the uniformed services” under USERRA, and the federal law does not give you a job-protected right to miss civilian work for this purpose. There have been bills introduced in Congress to amend USERRA and to provide USERRA coverage for medical appointments of this nature, but those bills have not been enacted.

You do not have this right under federal law, but the good news is that now (as of August 1, 2013) you have this right under state law, thanks to the Louisiana Legislature and Governor Bobby Jindal, who recently signed Act No. 165 into law. This new law amended Louisiana Revised Statutes (LRS) 23:331.

Section 23:331(A) now reads as follows: “It shall be unlawful discrimination in employment to discharge, otherwise discipline, threaten to discharge, or threaten to discipline any veteran for

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<sup>2</sup> We invite your attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 914 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.

taking time away from work to attend medical appointments necessary to meet the requirements to receive his veterans benefits.” This section applies to all employers in the State of Louisiana, including the State, its political subdivisions, and private employers, regardless of size.<sup>3</sup>

**Q: What is the relationship between USERRA and state laws like LRS 23:331(A)?**

**A:** Under section 4302 of USERRA, this federal law is *a floor and not a ceiling* on the rights of those who serve or have served our country in uniform. That section provides as follows:

**“(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or *State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

**(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.”

38 U.S.C. 4302 (emphasis supplied).

Section 23:331 of Louisiana Revised Statutes, as amended by Act No. 165, provides Louisiana veterans *greater or additional rights* over and above USERRA and thus is not preempted or superseded by USERRA. But this new state provision is not part of USERRA, and the USERRA enforcement mechanism (suing the employer in federal district court) does not apply to this provision.

**Q: How do I enforce my rights under this new Louisiana provision?**

**A:** You may need to sue the employer in state court. As amended by Act No. 165, LRS 23:331(C) provides as follows: “If a veteran is discharged, disciplined, or has received a threat of discharge or discipline for attending medical appointments as provided in this Section, he may take legal action pursuant to LRS 29:38(D).”

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<sup>3</sup> This Louisiana law does not apply to federal agencies operating in Louisiana—applying a state law to the operations of a federal agency would be inconsistent with Article VI, Clause 2 of the United States Constitution, commonly called the Supremacy Clause. But federal employees who are veterans have the right to time off from their civilian jobs for medical treatment necessitated by their military service, under Executive Order 5396, signed by President Herbert Hoover 83 years ago, on July 17, 1930. Please see Law Review 13080 (June 2013).