

**September 2013**

## **Notice to your Civilian Employer before AGR Duty**

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

- 1.1.1.8—USERRA applies to Federal Government
- 1.1.3.1—USERRA applies to voluntary service
- 1.3.1.1—Left job for service and gave prior notice
- 1.3.2.11—Vacations, holidays, and days off
- 1.7—USERRA regulations
- 1.8—Relationship between USERRA and other laws/policies
- 2.0—Paid leave for government employees who are Reserve Component members

**Q: I am a Major in the Army Reserve and a member of ROA. As a civilian, I am a GS-12 for the Department of the Air Force. I applied to the Army for an Active Guard/Reserve (AGR) tour, and I was accepted for a three-year tour. I have orders in hand, and I will report to active duty on October 1, 2013.**

**My supervisor, in my civilian job, is an Air Force Colonel. I gave him notice of my upcoming active duty and provided him a copy of my orders. He told me that I will not have reemployment rights at the end of this three-year tour because it is voluntary, and he has pressed me to sign a resignation letter that he drafted. It is likely that after this initial three-year AGR tour I will get an indefinite AGR tour and that I will never seek to return to my Air Force civilian job, but I would like to retain the option of returning—lots of things are changing in the Army and it may not be feasible for me to stay in the AGR program long-term.**

**Should I sign the resignation letter? How should I proceed?**

**A:** First, let me say that I think that it is unconscionable that the Air Force, as a civilian employer, is treating an Army Reservist in this way. The very first section of the Uniformed Services Employment and Reemployment Rights Act (USERRA) expresses the “sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.” Title 38, United States Code, section 4301(b) [38 U.S.C. 4301(b)]. If the Federal Government is to be a model employer, the Air Force and the other services should be triply the model employer. The services are the principal beneficiary of USERRA. Without a law like USERRA, the Air Force and the other services would be unable to recruit and retain qualified persons for the Active Component or the Reserve Component (RC).

How do we get the gas station owner in Shreveport to accommodate RC service by his employees if the United States Air Force treats reservists this way? The Department of Defense (DOD), through an organization called Employer Support of the Guard and Reserve (ESGR), is the principal proponent of employer support of National Guard and Reserve members. “Do as I say and not as I do” has always been a losing argument. “And why beholdest thou the mote

that is in thy brother's eye but considerest not the beam that is in thine own eye?" *Matthew 7:7 (King James Bible)*.

I would suggest that you not sign the resignation letter, but submitting a resignation would *not* defeat your right to reemployment so long as you make clear that you are resigning *for the purpose of performing uniformed service*. Please see Law Review 63 ("Effect of Resignation"), from January 2003.<sup>1</sup>

As I explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing *voluntary or involuntary* service in the uniformed services.
- b. You must have given your employer prior oral or written notice.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.
- d. You must have been released from the period of service without having received a disqualifying bad discharge.
- e. You must have made a timely application for reemployment with the pre-service employer after release from the period of service.

Section 4303 of USERRA defines 16 terms that are used in this law, including the term "service in the uniformed services." That term is defined 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."

Title 38, United States Code, section 4303(13), 38 U.S.C. 4303(13) (emphasis supplied).

Your AGR duty most certainly qualifies as "service in the uniformed services" for USERRA purposes. You are leaving your civilian position of employment for the purpose of performing uniformed service. If you meet the other four conditions, you will have the right to reemployment, as a matter of federal law, regardless of what your supervisor says.

---

<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 937 articles about laws that are especially pertinent to those who serve our country in uniform, along with 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 other 115 so far in 2013.

**Q: How does the five-year limit work?**

**A:** Section 4312(c) of USERRA sets for the five-year limit and its exceptions, as follows:

“Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person’s cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

- (1)** that is required, beyond five years, to complete an initial period of obligated service;
- (2)** during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
- (3)** performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
- (4)** performed by a member of a uniformed service who is—
  - (A)** ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;
  - (B)** ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
  - (C)** ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
  - (D)** ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
  - (E)** called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or
  - (F)** ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.”

38 U.S.C. 4312(c).

I invite your attention to Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count toward your five-year limit. Your upcoming period of AGR duty almost certainly will count toward your limit. You need to keep the five-year limit in mind.

The five-year limit pertains to the *employer relationship* for which you seek reemployment. As a federal civilian employee, you have an employer relationship with the Federal Government, not with a specific agency or department, like the Department of the Air Force. For example, let us assume that you began your federal civilian career in 2001, at the Department of

Commerce. In 2005, you applied for and were accepted into a civilian position at the Department of the Air Force, and you took your federal civilian seniority and pension credit with you when you went to your new job. In that scenario, we must look back to 2001 (not just 2005) in determining how much of the five-year limit you have used and how much “head room” you have remaining.

I have reviewed your Army career, and I have determined that you have used none of the five-year limit. Your five years of active duty from 1995 to 2000 do not count, because that period of service was before you began your federal civilian career in 2001. Your 12 months of active duty in Iraq in 2007-08 does not count, because you were called up involuntarily. Your drill weekends and annual training tours also do not count toward the limit. Your upcoming period of voluntary AGR duty does count. If you remain on active duty (voluntarily) past October 2018 you will not have the right to reemployment in your federal civilian job.

**Q: When I give notice to the Department of the Air Force that I am leaving my civilian job to go on active duty in the Army, am I required to assure the Air Force that I will be returning to the civilian job in the fall of 2016?**

**A:** No.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA. The Secretary utilized that authority and published the final USERRA Regulations in the *Federal Register* on Dec. 19, 2005. The Regulations are now published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002 (20 C.F.R. Part 1002). The pertinent section is as follows:

**“Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?”**

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.”

20 C.F.R. 1002.88 (bold question in original).

The purpose of USERRA is to keep your civilian job behind you as an “unburned bridge.” You are smart to give notice to your civilian employer in order to preserve the right of return, even if you think that it is most unlikely that you will ever exercise that right.

**Q: My civilian supervisor (an active duty Air Force Colonel) insists that I need his permission to leave my job for Army service, whether it is for two weeks of annual training or three years of active duty, and he insists that he has the right to withhold and is withholding permission. How should I respond?**

**A:** I suggest that you invite the Colonel's attention to the pertinent section of the USERRA Regulations:

**"Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?"**

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service."

20 C.F.R. 1002.87 (bold question in original).

But please do not get into an extended legal argument with the Colonel about what your rights may be in October 2016, when you return from this three-year AGR tour. It is entirely possible and indeed very likely that you will never seek reemployment in your Air Force job or that you will not have the right to reemployment. The most likely scenario is that you will remain on voluntary AGR duty past October 2018 and that you will not have the right to reemployment because you will be beyond the five-year duration of service limit. Another possibility is that you will do something utterly stupid ("let's wake up the prisoners and play the naked pyramid game again") and be disqualified by virtue of having a punitive (by court martial) or other-than-honorable discharge. You could win the Publisher's Clearinghouse Sweepstakes and retire. God forbid, you could die.

Unless and until you meet all five USERRA eligibility criteria, including having been released from the period of service and having applied for reemployment in the civilian Air Force job, you do not have a ripe USERRA claim. There is absolutely no point in having an argument about USERRA now.

**Q: But every day, Colonel Smith (my Air Force supervisor) calls me into his office and demands that I sign the resignation letter that he has drafted for me. How should I respond?**

**A:** I suggest that you send Colonel Smith a concise, polite letter by certified mail, something like the following:

Colonel Joe Smith, USAF  
Barksdale AFB  
Shreveport, LA

Dear Colonel Smith:

In accordance with section 4312(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4312(a), I am hereby giving you notice that I have been selected for a three-year Active Guard and Reserve (AGR) tour in the Army Reserve. I am enclosing a copy of my Army orders, for your convenience.

I am directed to report to Fort Polk, Louisiana, on Tuesday, October 1, 2013, and I will be reporting as ordered. I plan to work at my civilian Air Force job through the close of business on Friday, September 20, since I need a few days to get my affairs in order and to move my family and household goods to Fort Polk.

If you have questions about USERRA, please call the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), at 800-336-4590.

Very respectfully,

You

If the Colonel keeps harassing you, contact ESGR yourself.

**Q: As a federal civilian employee, I receive 15 days of paid military leave per fiscal year, and I use that leave for my annual training tours and other Army Reserve duty. I currently have a balance of five days of this paid military leave, and I expect to receive another 15 days on October 1, the start of Fiscal Year 2014. Am I eligible to use this paid military leave for this AGR tour?**

**A:** Yes. You are referring to section 6323(a)(1) of title 5 of the United States Code, which provides as follows:

- (1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for *active duty*, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502–505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

5 U.S.C. 6323(a)(1) (emphasis supplied).

You should request to use your 20 days of paid military leave (including the 15 days that you receive on October 1), starting on October 1, your first day on this AGR duty. As you draw down the 20 days of paid military leave, you should only be charged for work days—you should not be charged for weekends and federal holidays. See *Butterbaugh v. Department of Justice*,

336 F.3d 1332 (Fed. Cir. 2003). Thus, your 20 days of paid military leave will take you through October 29, 2013. For almost the entire month of October, you will receive your civilian Air Force GS-12 salary, on top of your Army Major salary.

At the start of each new federal fiscal year, you will receive and you can utilize this entitlement to 15 days of paid military leave. For example, in October of 2014 you can utilize your 15 days of paid military leave for Fiscal Year 2015. That will entitle you to your federal civilian salary for the period of October 1 through October 22, 2014.

**Q: If I remain on AGR duty indefinitely, past October 2016, for how long can I continue drawing this paid military leave?**

**A:** Section 6323 does not contain a time limit, but there needs to be a limit, so the USERRA five-year limit applies. If you remain on AGR duty past October 2018 (five years), at that point you will lose the right to paid military leave under section 6323.

**Q: In my civilian job, I earn annual leave at the rate of six hours per two-week pay period, and I currently have 45 days of annual leave in the bank. Is it possible for me to use this annual leave during my AGR tour?**

**A:** Yes. Section 4316(d) gives you the right to use your annual leave in this way. That subsection reads as follows: “Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be *permitted, upon the 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.” 38 U.S.C. 4316(d) (emphasis supplied).

It is your choice. You can use all or any part of the 45 days of accrued annual leave during this period of service, and in this way you can extend the period when you are receiving both your Air Force civilian pay and your Army active duty pay. Since you think that it is unlikely that you will be returning to your civilian job, it makes sense for you to burn up your annual leave in this way.

**Q: Do I continue accruing annual leave from my civilian employer while I am away from work for service in the uniformed services?**

**A:** No. See *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

As a federal employee, you accrue annual leave while working and while on a paid status, including annual leave and paid military leave under 5 U.S.C. 6323. If you exhaust all your annual leave during your active duty period and then return to work, you will need to work at the civilian job for some months, and build up a positive leave balance, before you can take any more paid time off.

If you need some decompression time after you complete your military assignment, you should wait a few weeks before you submit your application for reemployment with your pre-service civilian employer. After a period of service of 181 days or more, you have 90 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D).

**Q: As a federal civilian employee, I earn four hours of sick leave per pay period. I am seldom sick, and I have a positive balance of more than 100 days of sick leave in the bank. Am I permitted to use this sick leave during my active duty period?**

**A:** No. See 20 C.F.R. 1002.153(a).

**Q: I have heard that federal employees who are called to active duty as RC members receive differential pay, to the extent that their military pay is less than their federal civilian pay. Will I be entitled to differential pay during my three-year AGR tour?**

**A:** Probably not.

You are referring to section 5538 of title 5, which reads as follows:

**(a)** An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

**(1)** the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

**(2)** the amount of pay and allowances which (as determined under subsection (d))—

**(A)** is payable to such employee for that service; and

**(B)** is allocable to such pay period.

**(b)** Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

**(1)** during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

**(2)** for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

**(c)** Any amount payable under this section to an employee shall be paid—

**(1)** by such employee's employing agency;

**(2)** from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

**(3)** to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

**(d)** The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

**(e)**

**(1)** The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

**(2)** The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

**(f)** For purposes of this section—

**(1)** the terms “employee”, “Federal Government”, and “uniformed services” have the same respective meanings as given those terms in section 4303 of title 38;

**(2)** the term “employing agency”, as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

**(3)** the term “basic pay” includes any amount payable under section 5304.

5 U.S.C. 5538.

Section 5538(a) refers to 10 U.S.C. 101(a)(13)(B), which reads as follows:

“(13) The term “contingency operation” means a military operation that-- ...

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this [title 10], chapter 15 of this title, section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.”

Your voluntary AGR orders do not cite one of the enumerated title 10 sections. Accordingly, you are not eligible for differential pay during this three-year AGR tour.