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Reserve Component Leadership Should Take on the Burden of Notifying the Civilian Employer when Military Duty Will Take the Reservist away from the Civilian Job

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1.3.1.1—Left job for service and gave prior notice

Q: I recently retired as the Director of Coast Guard Reserve and Military Personnel. I am a life member of ROA and a big fan of your "Law Review" articles and of the work of the Service Members Law Center (SMLC). I have served 42 of the 46 years of my Coast Guard career as a reservist, in between drilling and several recalled periods of active duty as Enlisted and Officer, culminating my last recall as Director of Reserve and Military Personnel. I am very familiar with the challenging balancing act that the individual guardsman or reservist must conduct, between their military, civilian, and family responsibilities.

As I turn over the Director of Coast Guard Reserve and Military Personnel, what can I brief my fellow flag about USERRA as well as guidance to provide to individual reservists in managing this challenging balancing act? RADM Steven E. Day, USCG.

A: Please tell reservists that they need to understand their legal rights and obligations under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal law that was enacted in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

Please direct reservists to www.servicemembers-lawcenter.org. You will find 1,001 articles about USERRA and other 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 169 new articles in 2013.

As the Director of the SMLC, I answer about 800 questions per month, and half of them are about USERRA. The other half are about everything you can think of that has something to do with military service and the law. I am here at my post answering calls and e-mails during regular business hours and until 2200 Eastern on Mondays and Thursdays. The point of the evening availability is to make it possible for the reservist to call me from the privacy of his or her own home, outside civilian work hours.

When you use the employer's telephone or computer on employer-paid time, you have no justifiable expectation of privacy. Moreover, if the employer is annoyed with you because you have been called to the colors several times, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

As I explained in Law Review 1281 (August 2012) and other articles, an individual must meet five simple conditions to have the right to reemployment after a voluntary or involuntary period of uniformed service:

a. Must have left the job for the purpose of performing uniformed service—active duty, active duty for training, inactive duty training, etc.
b. Must have given the employer prior oral or written *notice.*
c. Must not have exceeded the cumulative 5-year limit on the duration of the period or periods of uniformed service relating to the employer relationship for which the person seeks reemployment. All involuntary service and some voluntary service are exempted from the computation of the limit. See Law Review 201 (August 2005).
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. 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, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

Under section 4312(a)(1) of USERRA, the notice to the civilian employer may be given by the individual who is to perform service, or it may be given by "an appropriate officer of the uniformed service in which the service is to be performed." 38 U.S.C. 4312(a)(1). I respectfully suggest that the flag officer leading the Coast Guard Reserve is an appropriate officer to give such notice.

Whenever a Coast Guard Reservist is to enter active duty, voluntarily or involuntarily, the Coast Guard Reserve should send notice in writing, by certified mail, to the civilian employer. There should be a "heads-up" notice about six months in advance and a specific notice about one month in advance. The point is to ensure that advance notice is given and can be proved, if necessary, through the records of the Coast Guard. The individual reservist should be encouraged to give a follow-up notice, but even if he or she fails to do so the required notice has been given, protecting the individual's rights.

An even more important point is that the top leader of the Reserve Component should interpose himself or herself between the individual reservist and his or her civilian employer. The individual service member (especially a junior enlisted service member) should not have to deal with the wrath of the civilian employer for the inconvenience and expense of the call-up. The notice to the employer should include a note to the effect that "if you have problems with

this call-up, please communicate those problems to me, not to the individual reservist who is your employee."

This advice is addressed to each of the Reserve Components, not just the Coast Guard Reserve. Of course, I recognize that in larger components it will be necessary to delegate the employer-notification responsibility below the level of the component commander.