

LAW REVIEW 14030
March 2014

**One Week of Excused Absence for Federal Employee
Returning from Mobilization**

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

- 1.1.1.7—USERRA applies to state and local governments
- 1.1.1.8—USERRA applies to Federal Government
- 1.3.1.3—Timely application for reemployment
- 1.3.2.1—Prompt reinstatement in civilian job
- 1.3.2.7—Adequate rest before and after service
- 1.3.2.11—Vacations, holidays and days off
- 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 chaplain in the Army Reserve and a life member of ROA. When not on active duty, I am a civil service chaplain for the United States Bureau of Prisons, in the Department of Justice. Several years ago, I was called to active duty and deployed to Iraq for a year. When I returned to my civilian job, I was given one work week (five days) of time off, with pay, not charged to my annual leave balance. That week was very useful to me in readjusting to civilian life and making the preparations needed to return to my civilian job.

Last year, I was called to active duty a second time, and I have just returned from a year of active duty, most of it spent in Afghanistan. Upon my return to my civilian job, I asked for the week off with pay, like I received after my first mobilization. The personnel office told me that the week off with pay is a one-time entitlement and that I will not receive that benefit this time because I used it after my first mobilization. Is the personnel office correct?

A: No. The personnel office's information is out of date.

On November 14, 2003 President George W. Bush issued a Memorandum for Heads of Executive Departments and Agencies titled “Return of Activated Military Members to Federal Civilian Employment.” The Memorandum is available at <http://www.opm.gov/oca/compmemo/2003/2003-14b.asp>. This 2003 presidential memorandum did not address the question of whether the right to one week off with pay was limited to a single occasion or whether a federal employee who had been called to active duty more than once could benefit from this privilege more than once, but the Office of Personnel Management (OPM) guidance for implementation of the presidential memorandum indicated that this was a once-in-a-lifetime privilege.

On August 6, 2008, OPM issued a “Memorandum for the Heads of Executive Departments and Agencies” that expands upon the 2003 presidential order. The 2008 memorandum is available at

Under the 2008 memorandum, a federal employee who is called to active duty and returns to federal civilian employment is entitled to the one week off with pay each time that he or she is mobilized and returns.

Q: I understand that under the Uniformed Services Employment and Reemployment Rights Act (USERRA) I am entitled to 90 days off after my active duty period, before I return to work. How does the one week off with pay relate to USERRA?

A: It is not correct to say that USERRA gives you the right to 90 days off before you return to work. Under USERRA, you are required to *make a timely application for reemployment* as one of the five conditions that you must meet in order to have the right to reemployment. After a period of uniformed service of 181 days or more, you have 90 days to apply for reemployment.¹

Because your period of service lasted more than 180 days, you can apply for reemployment on the first day after your release from active duty or on the 90th day or on any day in between. If you need some additional time off before returning to work, you should delay making your application for reemployment until you are ready to return to work, but in any case you must apply before the 91st day following your release from active duty.² Of course, the civilian employer will not pay you for this interim period between your release from active duty and your return to your civilian job.

As I explained in Law Review 1281³ (August 2012) and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. You must have given the 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.⁴

¹ 38 U.S.C. 4312(e)(1)(D). After a period of service of 31-180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service of less than 31 days (like a weekend drill period or a traditional two-week annual training tour), you are required to report for work at the start of your next regularly scheduled work day, after the completion of your period of service, the time required for safe transportation from the place of service to your residence plus eight hours for rest. 38 U.S.C. 4312(e)(1)(A).

² If you are home on terminal leave, you are still on active duty, and the 90-day clock has not started to run.

³ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,021 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 169 new articles in 2013.

⁴ As is explained in Law Review 201 (August 2005) and other articles, there are nine exemptions to the five-year limit. These are kinds of service that do not count toward exhausting the individual’s five-year limit. The shorthand

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. You must have made a timely application for reemployment, under the rules explained above.

Making the timely application for reemployment, after you have been released from the period of service, is normally the last of the five conditions for you to meet. Once you make a timely application for reemployment, and after you have met the other four conditions, the employer is required to act on your application and put you back to work promptly.⁵

Under the 2003 presidential memorandum and the 2008 OPM guidance, you are considered to have been reemployed in the civilian job during the one week of time off without pay. You must take this week off immediately after you are reemployed, and before you actually return to work. If your agency improperly denied you the one week off upon your reemployment, you can take this time off at some later time that is mutually agreeable to you and the agency.

Q: My sister is a state employee. She is currently on active duty in Afghanistan and will be released from active duty in May. Is she entitled to one week off with pay?

A: No, not under the 2003 presidential memorandum and the 2008 OPM guidance, because these documents only apply to federal agencies as employers. She may be entitled to this benefit under a state statute or a gubernatorial executive order.

Under section 4302 of USERRA⁶ this federal law is a floor and not a ceiling on the rights of those who leave civilian jobs for military service. A state statute or executive order can give your sister *greater or additional rights* but cannot take away her USERRA rights or impose additional prerequisites on her exercise of her USERRA rights.

Of course, USERRA applies to your sister and her employment relationship with the state government. If she meets the five USERRA conditions after she is released from active duty in May, she will have the right (as a matter of federal law) to prompt reinstatement in the position of employment that she *would have attained if she had been continuously employed* or another position for which she is qualified that is of like seniority, status, and pay. Upon reemployment, she will be entitled to be treated *as if she had been continuously employed by the state* for seniority and pension purposes. But USERRA does not give your sister the right to extra days off, with pay, after she returns to her civilian job following her period of uniformed service. If your sister is entitled to those days off, it would only be by state law or a gubernatorial executive order.

version is that *all* involuntary service periods (like mobilizations) and *some* voluntary service periods are exempted from the computation of the limit.

⁵ Except in unusual circumstances, the employer is required to have you back on the payroll within two weeks after your application for reemployment. 20 C.F.R. 1002.181.

⁶ 38 U.S.C. 4302.