

LAW REVIEW 15030¹

March 2015

You Have the Right to Time off from your Teaching Job for Military Service, under both State and Federal Law

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

- 1.1.1.7—USERRA applies to state and local governments
- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.3.1.3—Timely application for reemployment
- 1.3.2.7—Adequate rest before and after service
- 1.3.2.11—Vacations, holidays and days off
- 1.7—USERRA regulations
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant (O-3) in the Coast Guard Reserve and a member of the Reserve Officers Association (ROA). I live in western Pennsylvania, and I work as a teacher for a local school district. I perform inactive duty training (drills) for the Coast Guard Reserve at a Coast Guard station near Philadelphia. My drive from my home and work in western Pennsylvania to the Coast Guard station takes six to seven hours (sometimes longer), depending on traffic and weather conditions.

As a Coast Guard Reservist, I routinely perform my “weekend” drills on Friday and Saturday, rather than the traditional Saturday and Sunday. Several years ago, the Coast Guard abolished its traditional Reserve units. Reservists like me perform our inactive duty training at Coast Guard stations. We report directly to Regular Coast Guard officers, and we work directly with Regular Coast Guard officers and enlisted personnel. We perform our drills on Friday-Saturday, rather than Saturday-Sunday, so that the first day of our drill weekend most of the regulars are present to interact with us. I need to miss work on Thursday, in order to arrive at the drill location and have a reasonable night of sleep Thursday night, in order to be fit for duty early Friday morning.

I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Please review for me my rights under

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,300 “Law Review 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week..

² Captain Wright is the Director of ROA’s Service Members Law Center. He can be reached by telephone at (800) 809-9448, ext. 730. His e-mail is SWright@roa.org.

USERRA and under Pennsylvania law with respect to my drill weekends, including travel to and from these drill weekends. What is the relationship between federal law (USERRA) and state law in a case like this?

A: As I explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 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 law that led to the drafting of millions of young men (including my late father) for World War II. The reemployment statute is almost 75 years old and is part of the fabric of our society, but many civilian employers do not understand (or claim not to understand) this most important law.³

Like the VRRA, USERRA applies to almost all employers in this country, including the Federal Government, state and local governments,⁴ and private employers, regardless of size.⁵ Among employers in the United States, only religious institutions (on First Amendment grounds), Indian tribes (on residual sovereignty grounds), and foreign embassies and consulates and international organizations (on diplomatic immunity grounds) are exempt from USERRA enforcement.

As is explained in detail in Law Review 1281 and other articles, you have the right to *unpaid* but job-protected military leave from your civilian job—you have the right to reemployment after returning from military duty—if you meet five simple conditions:

- a. You left a civilian job (federal, state, local, or private sector) for the purpose of performing service in the uniformed services, as defined by USERRA.
- b. You gave 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, do not exceed five years.
- d. You have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, you have been timely in reporting back to work or applying for reemployment.

I shall discuss each of these conditions separately, as applied to your circumstances.

³ USERRA is important and relevant, now more than ever, because more than 906,000 Reserve Component (RC) personnel have been called to the colors since September 11, 2001 (the “date which will live in infamy” for our time), including more than 300,000 who have been called up more than once.

⁴ The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress amended the VRRA to make it apply to state and local governments as well. That was 41 years ago, but many school districts and other state and local government entities still have not gotten used to the idea that this law applies to them.

⁵ See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

Performance of service in the uniformed services

Section 4303 of USERRA defines 16 terms that are used in this law. The term “service in the uniformed services” 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 and includes active duty, active duty for training, initial active duty 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 32.⁶

Contrary to your employer’s apparent understanding, inactive duty training periods (drills) *are not limited to weekends*. In the “good old days” of the Strategic Reserve, RC service was generally limited to “one weekend per month and two weeks in the summer.” Those days are gone, and probably gone forever.⁷ Under USERRA, you have the right to time off from your civilian job (unpaid but job-protected) for inactive duty training or other forms of uniformed service during any day of the week.

Prior notice to the civilian employer

Under section 4312(a) of USERRA,⁸ you are required to give your civilian employer prior oral or written *notice* prior to absenting yourself from your civilian job for uniformed service.⁹ You do not need the employer’s permission, and the employer does not get a veto.

Section 4331 of USERRA¹⁰ gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA Regulations in the *Federal Register* in September 2004, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in December 2005. The Regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), in Part 1002. The Regulations contain a section that clearly distinguishes between a *notice* requirement and a *permission* requirement, as follows:

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

⁶ 38 U.S.C. 4303(13) (emphasis supplied).

⁷ Please see Law Reviews 13062, 13072, and 13099.

⁸ 38 U.S.C. 4312(a).

⁹ You are excused from the requirement to give prior notice if giving such notice is precluded by military necessity or otherwise impossible or unreasonable. See 38 U.S.C. 4312(b).

¹⁰ 38 U.S.C. 4331.

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.¹¹

The cumulative five-year limit

Under section 4312(c) of USERRA,¹² there is a cumulative five-year limit on the duration of the period or periods of uniformed service that you can perform, with respect to the employer relationship for which you seek reemployment.¹³ As is explained in Law Review 201, there are nine exemptions from the five-year limit—kinds of service that do not count toward exhausting your five-year limit. Your periods of inactive duty training (drills) and active duty for training (annual training) do not count toward exhausting your five-year limit with the school district.¹⁴

Release from the period of service under honorable conditions

Under section 4304 of USERRA,¹⁵ you are disqualified from reemployment rights if, during the period of service, you received a Bad Conduct Discharge (BCD) or Dishonorable Discharge (DD) or if you have been dismissed from or dropped from the rolls of your uniformed service or if you have been administratively discharged "under conditions other than honorable." The fact that you are still serving in the Coast Guard Reserve clearly shows that you have not received one of these disqualifying bad discharges.

Timely reporting back to work

After a period of service of less than 31 days,¹⁶ like a drill weekend or a traditional annual training tour, you are required to report back to your civilian employer "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person's residence."¹⁷

Let us apply that language to your situation. Your drill weekend ends on Saturday afternoon, so it should not be a problem for you to be back at work at the school at the start of the school day on Monday. Some reservists have a problem with reporting back to work Monday morning. For example, Specialist Josephine Smith of the Army Reserve must drive for nine hours to get

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

¹² 38 U.S.C. 4312(c).

¹³ When you start a new job with a new employer, you get a fresh five-year limit with the new employer.

¹⁴ 38 U.S.C. 4312(c)(3).

¹⁵ 38 U.S.C. 4304.

¹⁶ 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 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

¹⁷ 38 U.S.C. 4312(e)(1)(A)(i).

back home, after her drill weekend ends sometime between 4 pm and 5 pm on Sunday. Because the time reasonably required for safe transportation home puts her into Monday, she is not required to report back to work at 8 am on Monday—she can report back to work at 8 am on Tuesday.

The deadline for reporting back to work is extended in some circumstances

At the end of Josephine's January drill weekend, there was a severe ice storm at the drill location, and the state police closed the highway, so Josephine checked into a motel. The ice storm continued on Monday and Tuesday. Finally, on Wednesday morning, the weather improved and the highway was reopened. Josephine checked out of the motel and drove home. She reported back to work at 8 am Thursday morning.

Under these circumstances, Josephine has reported back to work “as soon as possible after the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.”¹⁸ This is exactly the sort of situation that the drafters had in mind when they drafted this language.¹⁹

Travel and rest time on the front end—before the start of the training period

As I explain in detail in Law Review 14092, you have the right to time off from your civilian job so that you can travel safely to the place of military service and arrive in a “fit for duty” status. If you work a full day on Thursday and then drive all night to get to the drill location, you will not be fit for duty for the Friday morning drill. In your circumstances, USERRA explicitly gives you the right to time off from work on Thursday, so that you can drive to the drill location and have a reasonable night of rest and be fit for duty Friday morning. The DOL USERRA Regulation provides:

§ 1002.74 Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site *and arrive fit to perform the service*. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed

¹⁸ 38 U.S.C. 4312(e)(1)(A)(ii).

¹⁹ I know, because I had a hand in the drafting of USERRA when I was a DOL attorney (1982-92).

services:

- (a) *If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.*
- (b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.
- (c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.²⁰

Paid military leave

Q: Am I entitled to paid military leave under USERRA? What about under Pennsylvania law?

USERRA does not require the employer to pay you, or to make up the difference in pay, for an hour, day, week, month, or year that you are away from work for uniformed service or for travel to and from the place of uniformed service, but you have the right to 15 work days of *paid* military leave per year under state law. The pertinent section of Pennsylvania law is as follows:

§ 4102. Leaves of absence for certain government employees.

- (a) **Mandatory.--**
 - (1) The following shall apply to paid military leaves of absence:
 - (i) All officers and employees of the Commonwealth, *its political subdivisions* or their instrumentalities shall be entitled to paid military leaves of absence from their respective duties without loss of pay or efficiency rating, and without being required to use annual vacation time, as follows:
 - (A) On all days during which they shall, as members of the Pennsylvania National Guard, be engaged in active State duty under section 508 (relating to active duty for emergency).
 - (B) On all days *not exceeding 15 consecutive or nonconsecutive days* in any one year during which they shall, as members of the Pennsylvania National Guard *or as members of any reserve component of the armed forces of the United States, be engaged in training or other military duty under orders authorized by Federal or State law.*

²⁰ 20 C.F.R. 1002.74 (emphasis by italics supplied, bold question in original).

(ii) All officers and employees of the Commonwealth or its instrumentalities, except for officers and employees of political subdivisions and their instrumentalities, shall be entitled to up to 15 days of paid military leave in addition to the leave under subparagraph (i) in any one year if the officers and employees are ordered to active duty, other than active duty for training, and all of the following apply:

- (A) The duty is ordered for a period of at least 30 consecutive days.
- (B) The duty is involuntary or is performed in a zone of combat, in response to a domestic emergency or pursuant to a contingency operations service agreement.
- (C) The duty is performed while the member is deployed at least 50 miles away from both the member's home duty station and place of residence.
- (D) The duty is ordered under 10 U.S.C. § 12301 (relating to Reserve components generally), 12302 (relating to Ready Reserve) or 12304 (relating to Selected Reserve and certain Individual Ready Reserve members; order to active duty other than during war or national emergency) or 32 U.S.C. § 502(f) (relating to required drills and field exercises).

(2) All officers and employees of the Commonwealth, a political subdivision, or their instrumentalities shall, in addition to the leave provided under this subsection, be entitled to unpaid military leave of absence, up to the maximum cumulative period authorized by 38 U.S.C. Ch. 43 (relating to employment and reemployment rights of members of the uniformed services), from their respective duties without loss of seniority or efficiency rating and without being required to use annual vacation time on all days during which:

- (i) they are engaged in training or other military duty under orders authorized by Federal or State law; and
- (ii) they are not on paid military leave of absence.
- (b) Discretionary leave.--The Commonwealth, its instrumentalities and political subdivisions and their instrumentalities shall be authorized and permitted to provide paid military leave or other compensation and/or continue medical and other benefits to members of the Pennsylvania National Guard and other reserve components of the United States Armed Forces for days in excess of those provided in subsection (a) when the member shall be engaged in training or other military duty under orders authorized by Federal or State law.

(c) Calculation of leave.--

- (1) An employee who is on paid or unpaid military leave for a period encompassing one entire calendar day shall be charged with one day's military leave on each *workday* notwithstanding the number of hours encompassed in the employee's workday. *An employee on paid military leave shall be paid for the leave based on the compensation due for the leave period.*
- (2) An employee who is on paid or unpaid military leave of absence for a shift that extends into two consecutive calendar days shall be charged with only one day of military leave if the employee returns to work for the next regular shift.²¹

History: Dec. 17, 1990, Public Law 700, Number 174, effective immediately; Nov. 1, 2005, Public Law 327, Number 62, effective immediately; Nov. 9, 2006, Public Law 1383, Number 150, effective 60 days later; Nov. 1, 2013, Public Law 667, Number 80, effective immediately.

²¹ Pennsylvania Consolidated Laws, Title 51, section 4102 (emphasis supplied).

“Political subdivisions” include counties, cities, school districts, and other local units of government established by a state. The local school district that employs you is clearly a political subdivision of the Commonwealth of Pennsylvania. Section 4102 is binding on the school district. As a matter of Pennsylvania law, you have the right to 15 days of paid military leave per year.

Section 4102(a)(1)(B) gives the right to 15 days of paid military leave for “members of any reserve component of the armed forces of the United States.” The Coast Guard Reserve is such a reserve component.²²

Section 4102(a)(1)(B) gives you the right to “15 consecutive or nonconsecutive days” of paid military leave per year. You can use these 15 days for a single period of 15 or more days of active duty or active duty for training. Alternatively, you can use your paid military leave for nonconsecutive periods, like inactive duty training, or for some combination of consecutive and nonconsecutive periods of Coast Guard duty or training.

Section 4102(c)(1) makes it clear that only *work days* count in exhausting your entitlement to 15 days of paid military leave. When you perform inactive duty training or active duty for training or active duty on Saturday or Sunday, that day does not count toward exhausting your entitlement to 15 days of paid military leave.

Relationship between USERRA and state law

Q: What is the relationship between USERRA and Pennsylvania law?

A: Under section 4302 of USERRA, this federal law is *a floor and not a ceiling*. USERRA does not supersede or override a Pennsylvania law that gives you *greater or additional rights*. USERRA does supersede and override state laws that purport to limit USERRA rights or to impose additional prerequisites on the exercise of USERRA rights. Here is the text of section 4302:

§ 4302. Relation to other law and plans or agreements

(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),

²² There are seven reserve components: the Army National Guard, Army Reserve, Air National Guard, Air Force Reserve, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve. The Coast Guard is in the Department of Homeland Security, not the Department of Defense, but it clearly qualifies as an armed force. See 10 U.S.C. 101(a)(4).

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.²³

To the extent that the Pennsylvania law gives you the right to *paid* military leave (which USERRA does not require the employer to grant), that Pennsylvania law is not superseded by USERRA.

Relationship between state law and school district policy

There is a similar relationship between a state law enacted in Harrisburg and the policy of your school district. Section 4102(b) authorizes political subdivisions in Pennsylvania, including your local school district, to grant *greater or additional rights or benefits*, over and above your entitlements under section 4102, to Reserve Component members like you. The school district board does not have the authority to deprive you of rights that the state legislature has granted to you, any more than it can deprive you of your federal statutory rights under USERRA.

Time off with pay by using personal days or annual leave

Q: Under the collective bargaining agreement between my union and the school district, teachers like me are entitled to 11 “personal days” per academic year. When I take a personal day, within the 11-day limit, I receive my teacher salary for that day, without deduction for my absence. Am I entitled to use my personal days for my drills and travel time to and from drills in order to continue my civilian pay uninterrupted?

A: Yes, under section 4316(d) of USERRA. That section provides:

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.*²⁴

Your personal days clearly qualify as “similar leave with pay” as that phrase is used in section 4316(d). It is clear that, as a matter of federal law, you have the right to use these personal days for active duty, active duty for training, inactive duty training, or necessary travel time to and from this military duty or training.

Employer recouping money erroneously paid to you, the employer claims

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

²⁴ 38 U.S.C. 4316(d) (emphasis supplied).

Q: During the 2014-15 academic year, I have missed school days on Fridays, for my Coast Guard drills, in September, October, November, January and February—five days total. I also missed five school days for travel to my drills, on Thursdays, in those same months. The school district paid me for those ten days, without deduction for my absence or for the pay that I received from the Coast Guard for these inactive duty training periods. Just recently, the school district personnel director has changed her mind. Now, she says that I have been illegally “double dipping” and that I must repay the school district for all the money that the Coast Guard has paid me during the 2014-15 academic year. Please evaluate the personnel director’s claim.

A: The personnel director is clearly wrong on several levels. First, section 4102 clearly entitles you to “double dip.” Section 4102(c)(1) includes the following sentence: “An employee on paid military leave shall be paid for the leave based on the compensation due for the leave period.” This language could hardly be clearer. The only reasonable interpretation of this sentence is that when you are on paid military leave under section 4102 you are entitled to your full civilian pay from the school district for the days that you were on paid military leave, without regard to whether your civilian pay is more than, less than, or equal to the pay that you received from the Coast Guard for those days. There is absolutely no legal basis for the personnel director’s claim that you must repay the school district for the money that you have been paid by the Coast Guard. Your Coast Guard pay has no relevance whatsoever to this discussion.

The way that I see it, you are entitled to five days of *paid* military leave for the Fridays that you missed work for Coast Guard drills in September, October, November, January, and February. Of your entitlement to 15 work days of paid military leave, you have used five days and you have ten days remaining.

Section 4102 does not entitle you to paid leave for your travel days—the five Thursdays in September, October, November, January, and February. But under section 4316(d) of USERRA you are entitled to use your personal days for these travel days. The way that I see it, you have used five of your 11 personal days in this school year. You still have six days to use, assuming that you have not used any personal days for some other purpose this school year.

The days that you have missed this school year for Coast Guard training and travel necessitated by that training are still well within what you are entitled to under state and federal law. At this point, you do not owe any money to the school district.

Upcoming annual training period

Q: I will be on 12 days of annual Coast Guard Reserve training duty, attending a Coast Guard school at the Coast Guard headquarters in Washington, in April. My duty starts on Monday, April 6, and ends of Friday, April 17. Am I entitled to *paid* military leave for that period?

A: Yes, under section 4102. The way that I see it, you have used five days of your 15-day entitlement to paid military leave. You still have ten days left to use, and that will cover your upcoming period of annual training.

Under section 4102(c)(1), you should only be charged for *work days* that you miss because of military duty or training. You will be on Coast Guard annual training duty on Saturday, April 11, and Sunday, April 12, but those days do not count toward exhausting your entitlement to 15 days of paid military leave.

Additional Coast Guard days after April 17

Q: At this point, I do not anticipate any more Coast Guard days between April 17 and June 12, which is the end of the 2014-15 school year. Of course, that could change. What happens if I have additional Coast Guard days between April 17 and June 12?

A: After you have exhausted your right to 15 days of paid military leave under Pennsylvania law, you still have the right, under USERRA, to unpaid but job-protected leave for any additional days when you will be away from your civilian job for Coast Guard duty or training. Moreover, the way that I see it, you still have a balance of six days in your 11-day “personal day” account for this school year. Under section 4316(d) of USERRA, you have the right to use these remaining personal days for military duty.

Calendar year versus academic year

Q: Section 4102 gives me the right to 15 days of paid military leave “in any one year.” But the school district thinks of things in terms of the academic year, which starts in late August and runs until mid-June. Does that make a difference?

A: Perhaps. When the legislature enacted section 4102, it was thinking of state and local public employees in general, not just teachers. When the legislation refers to “in any one year” this must mean a calendar year, like 2014 or 2015. It may be necessary for you and the school district to go back and compute your use of paid and unpaid military leave and personal days in calendar year 2014 and so far in calendar year 2015.