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## **Military Leave of Absence when Mobilized**

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Q: I am the commanding officer of a Marine Corps Reserve unit that has been mobilized and is in Iraq. I read with great interest Law Review 134, "Employers: Please Don't Bother Them in Iraq." A member of my unit works for a major corporation. He gave the employer plenty of advance notice of the mobilization, and the employer was initially very generous. The corporation paid him the difference between his corporate salary and his Marine Corps salary for the first six months of his active duty period. Then, the corporation sent a certified letter to his home, his wife had to go to the post office and stand in line to sign for and pick up the letter, which said that he had been "terminated" under the corporate leave of absence policy because he had been away from work for six months. This letter has the wife upset, and she has gotten the Marine upset. Although not as egregious as the employer conduct described in Law Review 134, this employer is not exactly a model of employer support of Reservists who have been called to active duty. Has this employer violated the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: Yes. USERRA provides "a person who is absent from a position of employment [for the purpose of performing service in the uniformed services] shall be deemed to be on furlough or leave of absence while performing such [uniformed] service" [38 U.S.C. 4316(b)(1)(A)].

I have found a very instructive paragraph in USERRA's legislative history: "Section 4315(b) [later renumbered to 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily mandated military leave of absence while away from work, regardless of an employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with a promise of re-employment, is of no effect. See *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders v. People Express Airlines, Inc.*, 595 F. Supp. 1512, 1518 (D.N.J. 1984), affirmed, 770 F.2d 1078 (3d Cir. 1985)." (House Rep. No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2466.)

The corporation is not required to pay differential pay at all, and it is certainly permitted to stop paying differential pay after six months. But the employer has no right to "terminate" the employee during his period of uniformed service. The employer is required to deem him to be on "military leave" even unpaid military leave.

\* Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at [samwright50@yahoo.com](mailto:samwright50@yahoo.com).