

Keep your Civilian Job Separate from your Reserve Component Assignment and Vice Versa

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

Update on Sam Wright

1.0—USERRA generally

I want to reiterate some advice that I first offered in Law Review 106.³ I have heard from several Reserve Component (RC) members who have tried to work part-time at their civilian jobs while on active duty. This practice is particularly common in the Army National Guard, because many Guard members serve on active duty in the same metropolitan areas where they normally live and work. For several reasons, I think that "moonlighting" in your pre-service job, or in any civilian job, is a bad idea, and I urge you not to try this.

The basic idea behind the Uniformed Services Employment and Reemployment Rights Act (USERRA) is that you leave a job for voluntary or involuntary service, and then you return to that job after you complete that period of service. You only confuse matters when you work part-time at the civilian job during the period of service.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,400 "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.

² Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Ms. JoAnne Perniciaro of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

³ Law Review 106 was published in December 2003. The title of the article is "Don't Try To Work at your Civilian Job while on Active Duty."

If your active duty assignment is within a reasonable commuting distance of your civilian job, it may be geographically feasible to get to your civilian worksite for a few hours each week, but you must have the permission of your military commander to moonlight in this way. Your commander may give you that permission, but with the clear understanding that your military duties come first. You will not be allowed to say, "I cannot stay late tonight here at the military base, because I need to get to my civilian job."

If you are to work part-time at your civilian job, your civilian employer will probably schedule you for work at certain times. The first time that you are unable to get to work at one of those times, because of conflicting military duties, your civilian employer may try to discipline you or fire you for missing scheduled work. Will USERRA protect you under those circumstances? That is unclear.⁴ Better to avoid the issue by not trying to work at your civilian job while on active duty.

If you are on full-time active duty, voluntarily or involuntarily, you should be devoting your full time and attention to your military duties. The whole point of USERRA, as well as the Servicemembers Civil Relief Act, is to remove civilian legal distractions in order to enable you to do your military duties. Especially if you are called to active duty for a national emergency, you should not be trying to serve your civilian employer simultaneously. "War is a 24-hour job. There will be no novel-writing on the USS Caine." Lieutenant Commander Queeg (Humphrey Bogart) to Lieutenant Keefer (Fred McMurray), in *The Caine Mutiny* (my favorite movie).

It is just as important that you avoid doing military work while on the clock at your civilian job. Perhaps your employer is annoyed with you because you have been called to the colors five times since the terrorist attacks of September 11, 2001, and may be called up again. Perhaps the employer is looking for an excuse to fire you. If that is the case, the last thing that you should do is to give the employer such an excuse. USERRA gives you the right to time off (without pay) from your civilian job to do your military duties. USERRA does not give you the right to do your military duties while you are on the clock for your civilian employer, and it certainly does not give you the right to use the employer's telephone, computer, or other equipment to perform military functions.

⁴ See *Drake v. Tuscan Inc.*, 2010 U.S. Dist. LEXIS 2288 (D. Arizona Jan. 12, 2010). Drake was an active duty Airman in the Air Force, assigned to duty in Arizona. The Air Force deployed Drake to Southwest Asia for several weeks, after which he returned to the Air Force base in Arizona. While on active duty in Arizona, Drake had a "moonlighting" job as a bouncer at a strip club. He left that job when he deployed and sought to return to the job after he returned from deployment. The strip club refused to reinstate him and he sued. He lost. The court held that USERRA does not apply to a situation like this. I discuss *Drake* in detail in Law Review 13004 (January 2013).

I invite your attention to *Escher v. BWXT 7-12 LLC*, 627 F.3d 1020 (6th Cir. 2010). Rudolph N. Escher, Jr., a Navy Reserve Captain, was fired by his civilian employer for gross misuse of employer equipment and time for Navy Reserve purposes. The United States District Court for the Eastern District of Tennessee and the United States Court of Appeals for the 6th Circuit upheld the lawfulness of the firing.⁵

Captain Escher's abuse of employer equipment and time was egregious, but even a much more moderate misuse of equipment and time could be grounds for discipline. While you are on the clock with your employer, you should be doing the employer's business exclusively. Yes, I realize that there must be exceptions. If your child gets sick at school, the school must call you at work. All employees have such emergencies from time to time. There should not be additional "emergencies" because you are a member of the National Guard or Reserve.

The military full-timers who deal routinely with RC personnel need to understand that the RC member not on active duty should not be called at his or her civilian job except in a rare dire emergency. Civilian employers are putting up with a great deal since the terrorist attacks of September 11, 2001. Let's say employee Joe Smith has been called up five times in the past 15 years and is expecting a sixth call-up this year. When he is not on active duty, do not tax the employer's patience still further by routinely calling him at work about military matters, and do not expect or permit Joe to do military work while at his civilian job.

I am aware of a recent situation involving an RC officer who is a federal civilian law enforcement officer. In his Reserve capacity, he is assigned to a major joint command. While at his civilian job, he requested and obtained information from his civilian federal agency that was useful to his military command, and while on active duty for a few days he used that information to prepare a report for the command. His civilian supervisors had a "change of heart" about giving him permission to use the information after they perceived that his military report portrayed his civilian employer in an unflattering way.

Even within the Federal Government, different agencies have different perspectives and interests. If you are aware of material at your civilian federal job that may be useful to your military command, you should suggest that the military command request the material from the civilian agency through proper channels. Beyond that, you should not involve yourself in the sharing of information between your federal civilian employer and your military command. In the Federal Government, both military and civilian, some folks are very sensitive about "proper channels" and the "chain of command."

⁵ I discuss the *Escher* case in detail in Law Review 1054.

One of the strengths of the Reserve Components is that many RC members have skills, knowledge, and experience gained through civilian education and employment that can be put to good use when they are on active duty or even inactive duty training.⁶ I certainly appreciate and support this strength. When you are on active duty, you should utilize everything that you know and all the skills that you possess to perform your military duties well. But you must be alert to avoid conflicts of interest and situations that may appear to present conflicts of interest. One excellent way to avoid such conflicts is to keep your military activities chronologically separate from your civilian job, and keep your civilian job chronologically separate from your military duties. When you are on active duty, you should focus exclusively on your military duties. When you are at your civilian job, you should focus exclusively on the civilian job.

⁶ For example, I gained a detailed knowledge of the federal reemployment statute during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney, and I put that knowledge to good use in the Navy Reserve Judge Advocate General's Corps.