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USERRA Gives you the Right to Time off from your Civilian Job for Service in the Uniformed Services

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

Update on Sam Wright

1.3.1.1—Left job for service and gave prior notice

Q: I am a Captain in the Navy Reserve and a life member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I am the Commanding Officer (CO) of a major Navy Reserve unit. As CO, I have major responsibilities, far beyond what I can accomplish during a Saturday-Sunday drill weekend once per month. One very time consuming responsibility is to draft and sign performance evaluations for the junior officers and enlisted personnel in my unit. Many of these reports are overdue, and I would like to take three work days off from my civilian job (as a mid-level executive for a major corporation) to prepare these overdue performance evaluations. Does USERRA give me the right to three days off from my civilian job to prepare these performance reports?

A: No. Unless you have some documentation from the Navy as to the “competent authority” for this activity (preparing performance evaluations) on a specific day or days, this activity does not constitute “service in the uniformed services” and USERRA does not give you the right to time off from your civilian job (even without pay) for these days.

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1400 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1200 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA, and I served as the Director of ROA’s Service Members Law Center (SMLC) from 2009 to 2015. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, where I am “of counsel.” To arrange a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm’s Director of Client Relations) at (518) 640-3538. Please mention my name (Captain Wright) when you call.

USERRA gives you the right to time off from your civilian job (unpaid but job protected) to perform “service in the uniformed services.” That term is defined in section 4303(13) of USERRA, as follows:

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service *under competent authority* and includes active duty, active duty for training, initial active duty for training, inactive duty training [drills], 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 32.³

Perhaps you can get the Navy to write “retirement points only” inactive duty training orders for the three days in question. With such orders, you have the right to time off from your civilian job for the days in question. Without such orders or some evidence that the activity was performed “under competent authority,” you do not have the right to time off from your job, even time off without pay.

When you perform “service in the uniformed services” as defined by USERRA and thereby miss a day of work, it is unlawful for the employer to treat that missed work day as an unexcused absence, and that means that it is unlawful for the employer to fire you or otherwise discipline you for that absence. If you do not perform “service in the uniformed services” as defined by USERRA on the day in question, it is not unlawful for the employer to treat the missed work day as an unexcused absence.

I invite the reader’s attention to *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002).⁴ John C. Leisek was a member of the Oregon National Guard. He owned a hot air balloon with National Guard insignia. Throughout the spring and summer of 1996, he received special written orders to perform temporary active duty by attending and participating in ballooning events for the National Guard, but he received no military orders for a specific ballooning event in Montrose, Colorado. Accordingly, his absence from his civilian job on that particular occasion was not protected by USERRA. The 9th Circuit held:

Leisek attended the Colorado ballooning event without any Guard orders that he do so. His absence from employment while attending the Colorado event was thus not

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

⁴ This is a 2002 decision of the United States Court of Appeals for the 9th Circuit, the federal appellate court that sits in San Francisco and hears appeals from district courts in several western states. The citation means that you can find this decision in Volume 278 of *Federal Reporter Third Series*, and the decision starts on page 895. I discuss *Leisek* in detail in Law Review 1131 (March 2011) and Law Review 1260 (June 2012).

“necessitated by service in the uniformed services.” He is, therefore, not entitled to reemployment benefits provided by USERRA. Summary judgment was properly granted to Brightwood on Leisek’s reemployment claim.⁵

Applying *Leisek* to your situation, I think that it is clear that you do not have a job-protected right to absence from your civilian job to prepare performance reports for members of your Navy Reserve unit, in the absence of Navy orders referring to the days in question.

Q: At my civilian job, I earn 30 days of vacation per year, and I currently have 25 vacation days in the bank. Do I have the right, under USERRA, to use three of those 25 vacation days to prepare the overdue performance reports?

A: No, not without Navy orders for those days. I invite your attention to section 4316(d) of USERRA:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon 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.⁶

In the absence of Navy orders, the three-day period in question (to prepare the performance evaluations) does not constitute “a period of service in the uniformed services” and section 4316(d) does not apply.

Under general principles of contract law, you have the right to use the vacation days that you have earned, but you do not have the right to insist on using those vacation days at a time of your own choosing. You will need to request vacation days for the three days in question, and the employer has the right to deny your request to take vacation on those specific days if other employees have already scheduled vacation for that same time period.

Q: As the CO of a major Navy Reserve unit, I frequently receive calls from the CO of the Naval Operational Support Center (NOSC) that supports my unit and also from officers of our gaining command (the Regular Navy organization that my unit supports). I have asked these officers to call me at my home during evening hours, but they are not willing to do that. My supervisor at work is giving me a hard time about “all those damned Navy calls.” Does USERRA give me the right to spend time during my civilian work day answering Navy calls?

⁵ *Leisek*, 278 F.3d at 901.

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

A: No. In the first place, answering these calls does not amount to “service in the uniformed services” as defined by USERRA. Secondly, USERRA gives you the right to time off from your civilian job to perform uniformed service—USERRA does not give you the right to perform uniformed service while you are on the clock at the civilian job.

I invite your attention to *Escher v. BWXT Y-12, LLC*, 627 F.3d 1020 (6th Cir. 2010). In that case, a Navy Reserve Captain was fired for using the employer’s time, equipment, and supplies to do Navy Reserve work, and the 6th Circuit Court of Appeals upheld the lawfulness of the firing.

Military full-timers who deal with part-time reservists need to understand that *you must not call reservists at their civilian jobs during their work hours*. If you need to contact a reservist on a specific day, you need to put that reservist on orders for that day, or you need to contact the reservist at his or her home, outside civilian work hours.