

## LAW REVIEW 16021<sup>1</sup>

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### **Does USERRA Give me the Right to Time Off from my Civilian Job for an Interview about Reassignment to a new Guard Unit?**

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Update on Sam Wright

1.1.1.8—USERRA applies to Federal Government

1.1.3.7—USERRA applies to examination to determine fitness

1.3.1.3—Timely application for reemployment

1.3.2.7—Adequate rest before and after service

2.0—Paid leave for government employees who are Reserve Component members

**Q: I am an enlisted member of the Army National Guard and a federal civilian employee. I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**My civilian job frequently requires that I work on weekends, so there are built-in conflicts between my civilian job and my National Guard assignment. These conflicts are exacerbated by the fact that my Guard unit drills at an armory that is more than 400 miles from my home and civilian job. The distant drill location means that I frequently must miss work on Friday**

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<sup>1</sup> I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://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. You will also find 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 those articles.

<sup>2</sup> 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. For six years (2009-15), I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have been dealing with USERRA and the predecessor reemployment statute (enacted in 1940) for more than 33 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed new reemployment statute that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353, USERRA, and that version was 85% the same as the Webman-Wright draft. I have also dealt with USERRA and the predecessor reemployment statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called “Employer Support of the Guard and Reserve,” as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an “Of Counsel” role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

(to travel to the drill location and sleep there overnight in order to be fit for duty on Saturday) and on Monday (to return home after my drill weekend and be fit for duty at my civilian job).<sup>3</sup>

There is a National Guard armory here in my home town, just ten miles from my home, and there is a National Guard unit that drills at that armory. I would really like to transfer to that Guard unit. Such a transfer would make it possible for me to avoid a lot of travel time and expense and a lot of hassle with my civilian supervisor, concerning time off from work on Friday and Monday. The problem is that the local unit has not had a vacancy for an enlisted member of my rank and military occupational specialty.

Recently, a suitable vacancy opened up in the local unit, and I have applied. I understand that there are several well qualified candidates, and it is by no means certain that I will be selected. The local unit drills on the first weekend of every month, while my current unit drills on the second weekend.

The commanding officer of the local unit told me, by telephone, that if I want to be considered for a transfer into her unit I need to show up at the local armory in person, in uniform, for several hours on Saturday, May 7, for interviews. This Saturday session will not count as part of my May drill weekend, which takes place a week later, and I will not be given any drill credit or paperwork for showing up for these interviews.

The problem is that I am scheduled to work at my civilian job on Saturday, May 7. I told my supervisor at the civilian federal job that I need to be absent from work on May 7 for an important meeting concerning my National Guard service, and she demanded to see "military orders" for that meeting. My supervisor told me that without such orders I have no right to be away from work on that day, even without pay, and that if I am not at work that day I will be considered Absent without Leave (AWOL) and will face discipline, maybe even termination.

Does USERRA give me the right to be absent from my civilian job on May 7 for this interview session? I understand that, as a federal civilian employee and National Guard member, I get 15 work days of paid military leave per fiscal year. Is it possible for me to use one of those paid military leave days for this interview session?

A: Unfortunately, the answer is no to both questions.

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<sup>3</sup> Please see Law Review 15030 (March 2015) concerning your right to time off from your civilian job for travel and rest time going to and returning from a drill weekend.

As I have explained in Law Review 15116 (December 2015) and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a position of employment (federal, state, local, or private sector) for the purpose of performing “service in the uniformed services” *as defined by USERRA*.
- b. You must have given the employer prior oral or written notice.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment.<sup>4</sup>
- d. You must 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 must have been timely in reporting back to work or applying for reemployment.<sup>5</sup>

It is necessary to meet all five of these conditions to have the right to reemployment under USERRA. If you fail to meet one or more of the five conditions, you do not have the right to time off from your civilian job, even time off without pay. If the activity planned for May 7 (the interview) does not qualify as “service in the uniformed services” *as defined by USERRA*, you do not have a job-protected right to miss work on that day and if you are absent from the civilian job on that day the employer permitted to treat you as AWOL on that day and discipline you for that absence.

Section 4303 of USERRA defines 16 terms 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 *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.<sup>6</sup>

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<sup>4</sup> Under section 4312(c) of USERRA, 38 U.S.C. 4312(c), nine kinds of service do not count toward exhausting your limit. Please see Law Review 201 (August 2005) for a detailed discussion of the five-year limit.

<sup>5</sup> If the period of service lasted fewer than 31 days, you are required to report to work “not later than the beginning of the first 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.” 38 U.S.C. 4312(e)(1)(A)(i). If the period of service lasted 31-180 days, you are required to apply for reemployment within 14 days after release from the period of service. 38 U.S.C. 4312(e)(1)(C). If the period of service lasted 181 days or more, you are required to apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D).

<sup>6</sup> 38 U.S.C. 4303(13) (emphasis supplied).

If the interview session is not part of your regularly scheduled inactive duty training (drill) period, and if you have no official paperwork concerning your participation in the session, this activity does not qualify as “service in the uniformed services” *as defined by USERRA* and you do not have a job-protected right to time off from your civilian job for that activity.<sup>7</sup>

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994, as a complete rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940.<sup>8</sup> The VRRA made confusing and cumbersome distinctions among different categories of military training or service, and different subsections of the VRRA applies to each category.

One subsection of the VRRA gave a person the job-protected right to be away from a civilian job for a “physical examination” to determine fitness for military service. In the years prior to 1973, when Congress abolished the draft and established the All-Volunteer Military, this VRRA subsection most commonly applied to young men who were required to report to the nearest AFEES<sup>9</sup> for an induction physical, but the provision also applied to young men and women reporting to an AFEES for an examination as part of voluntarily enlisting in the armed forces.

When the VRRA became USERRA in late 1994, one of the big changes was the elimination of the VRRA’s confusing and cumbersome distinctions among categories of military training and service. USERRA’s 1994 legislative history explained:

Section 4303(13) would define “service in the uniformed services” to include all types of military training or service, including active duty, active duty for training, initial active duty for training, and inactive duty training, etc. Under current law [the VRRA], entitlements and eligibility criteria for reemployment rights differ based upon categories of military training or duty. It is the Committee’s [House Committee on Veterans’ Affairs] view that those distinctions are no longer appropriate for reemployment rights purposes and only lead to confusion and anomalous results in some cases.<sup>10</sup>

When the separate subsections of the VRRA were consolidated into USERRA’s broad definition of “service in the uniformed services,” the term “physical examination” was changed to “examination.” The idea was that the examination given to a person trying to enlist in the

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<sup>7</sup> The fact that you are planning to wear your Army uniform for the interview does not mean that the interview qualifies as “service in the uniformed services” for USERRA purposes.

<sup>8</sup> Congress enacted the VRRA in 1940 as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my late father) for World War II.

<sup>9</sup> Armed Forces Examination and Entry Station. Today, such an installation is called a MEPS—Military Examination and Processing Station.

<sup>10</sup> House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2456.

armed forces is not limited to a physical examination. The process also includes the administration of the Armed Forces Qualifying Test and other tests to determine the individual's mental, educational, and moral, as well as physical fitness for military service.

Is the language of section 4303(13) broad enough to include your interview session? Perhaps, but there still needs to be some paperwork or other documentation to show that the interview was conducted *under competent authority*.

As a federal civilian employee who is a member of a Reserve Component<sup>11</sup> you are entitled to 15 work days (120 hours) of *paid* military leave.<sup>12</sup> You can use that paid military leave for:

...active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or a member of the National Guard.<sup>13</sup>

You are not entitled to paid military leave under section 6323 for the informal interview session scheduled for May 7.

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<sup>11</sup> There are seven Reserve Components: the Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

<sup>12</sup> 5 U.S.C. 6323.

<sup>13</sup> 5 U.S.C. 6323(a)(1).