

## LAW REVIEW 16077<sup>1</sup>

August 2016

### **USERRA Gives you the Right to Time off from your Federal Civilian Job for Inactive Duty Training on a Weekday**

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Update on Sam Wright

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**Q: I am a Major in the Air Force Reserve (USAFR) and a life member of the Reserve Officers Association (ROA). I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>3</sup>**

**I live in the DC metropolitan area, and I work as a GS-12 for a major federal agency, at its headquarters in DC. In the USAFR, I am assigned to a unit that drills at Nellis Air Force Base**

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<sup>1</sup> Please see [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 “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. I am the author of more than 1300 of the articles.

<sup>2</sup> BA 1973 Northwestern University, JD 1976 University of Houston Law School, LLM 1980 Georgetown University Law Center. 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 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. Although I am no longer employed by ROA, I have continued the work of the SMLC on a part-time voluntary basis. You can reach me through ROA at (800) 809-9448, extension 730, or. SWright@roa.org.

<sup>3</sup> As I explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA (Public Law 103-353, 108 Stat. 3168) and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (Public Law 76-783, 54 Stat. 885), the law that led to the drafting of more than ten million young men (including my late father) for World War II. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35).

**(AFB) in Nevada. Members of the unit perform 72 drills per year—in 12 monthly segments. Each segment lasts all day on Friday, all day on Saturday, and all day on Sunday.**

**It is not my choice to travel across the country for my drill weekend each month. The Air Force provides me with free lodging for the drill weekend, but I must pay out of pocket the cost of the commercial airfare from DC to Las Vegas and back. The cost of the airfare wipes out a substantial part of what I am paid by the Air Force for the drill weekend.**

**I would much prefer to drill at a nearby base, like Andrews AFB in Maryland or Dover AFB in Delaware, but in the units at nearby bases there is no current vacancy for an officer of my rank (Major) and military specialty. The fact that my unit drills all day Friday (as well as Saturday and Sunday) and the travel time to and from my drill weekend has exacerbated my difficult relationship with my supervisors at the federal agency in DC.**

**My federal supervisor insists that an employee is not entitled to miss civilian work on a weekday (Monday-Friday) and that inactive duty training periods must be limited to weekends. Is that correct?**

**A:** No. Inactive duty training periods have traditionally been held on weekends, but it has never been the case that the legal protection of the VRRA or USERRA was limited to drills on weekends. A drill period can be conducted on any day of the week, and you have the right to absent yourself from your civilian job (federal, state, local, or private sector) for a drill period or another form of service in the uniformed services on any day.

As I have explained in Law Review 15116 (December 2015), you have the right to reemployment after a period of uniformed service 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. You have not exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.<sup>4</sup>
- d. You were released from the period of service without having received a disqualifying bad discharge from the military.<sup>5</sup>

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<sup>4</sup> Inactive duty training (drill) periods do not count toward exhausting the individual's five-year limit. See 38 U.S.C. 4312(c)(3). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the individual's five-year limit.

e. After release from the period of service, you were timely in reporting back to work or applying for reemployment.<sup>6</sup>

These rules apply to short periods of service (like drill weekends) as well as longer periods. USERRA's definition of "service in the uniformed services" expressly includes "inactive duty training" as well as other forms of service.<sup>7</sup> If you meet these five conditions after a short or long period of service, you are entitled to prompt reinstatement<sup>8</sup> in the position that you would have attained if you had been continuously employed and you are entitled to be treated, for seniority and pension purposes, as if you had been continuously employed by the civilian employer during the period when you were away from work for service.<sup>9</sup>

**Q: As recommended by the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR),<sup>10</sup> I gave my employer (the federal agency) notice last September (2015) of all my drill weekends for Fiscal Year 2016 (October 2015 through September 2016), and I plan to do the same next month for Fiscal Year 2017, which begins on October 1, 2016. Each month, I give my supervisor a reminder (orally and by e-mail) of my drill weekend, two weeks in advance. Each time, my supervisor sends me an e-mail saying "You do not have my permission to miss work on any work day for this Air Force crap." My supervisor also harasses me almost every day, trying to get me to quit the USAFR. How should I respond to the supervisor?**

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<sup>5</sup> Under section 4304 of USERRA, 38 U.S.C. 4304, disqualifying bad discharges include dishonorable and bad conduct discharges and dismissals (awarded by court martial for serious criminal offenses) and "other than honorable" administrative discharges.

<sup>6</sup> After a period of service of fewer than 31 days (like a drill weekend or a traditional two-week annual training period, you are required to report back to the 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 the 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). After a period of service of 31-180 days, you must apply for reemployment within 14 days after the release from the period of service. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, you must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D).

<sup>7</sup> 38 U.S.C. 4303(13).

<sup>8</sup> After a period of service of fewer than 31 days, you are entitled to immediate reinstatement upon reporting back to work. See 20 C.F.R. 1002.181.

<sup>9</sup> 38 U.S.C. 4316(a), 4318.

<sup>10</sup> DOD created ESGR in 1972, just as Congress was abolishing the draft and creating the All-Volunteer Military and the Total Force Policy, under which the nation became even more dependent upon the National Guard and Reserve for essential national defense readiness. ESGR's mission is to gain and maintain the support of employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. ESGR asks employers to sign a "Statement of Support" in which they pledge to comply with USERRA. ESGR gives awards to employers who go above and beyond USERRA in supporting employees and potential employees who are National Guard or Reserve members. Working through a nationwide network of volunteer ombudsmen, ESGR works with employers and Guard/Reserve members to mediate disputes about time off from work for Guard/Reserve training and service. You can reach ESGR toll-free at (800) 336-4590. ESGR's website is [www.esgr.mil](http://www.esgr.mil).

**A:** You are required to give advance verbal or written notice to your employer for a short or long period when you will be absent from work for uniformed service<sup>11</sup> unless giving such notice is precluded by military necessity or otherwise impossible or unreasonable.<sup>12</sup> You do not need the employer's permission, and the employer does not get a veto on your right to be away from work for service. The Department of Labor (DOL) USERRA Regulation provides:

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.<sup>13</sup>

I strongly advise you to avoid getting into an argument with your supervisor about absence from work for service. Give the supervisor notice, orally and in writing, in a respectful and tactful way. If the supervisor refuses to "accept" the notice or to "permit" you to be away from work, contact ESGR at (800) 336-4590 and ask ESGR to have an ombudsman explain USERRA to the supervisor.

The DOL USERRA Regulation also provides:

**Is the employee required to accommodate his or her employer's needs as to the timing, frequency, or duration of service?**

No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency, or duration of the service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's service to the attention of appropriate military authority. Regulations issued by the Department of Defense at 32 C.F.R. 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.<sup>14</sup>

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<sup>11</sup> 38 U.S.C. 4312(a)(1).

<sup>12</sup> 38 U.S.C. 4312(b).

<sup>13</sup> 20 C.F.R. 1002.87. The citation is to section 1002.87 of title 20 of the Code of Federal Regulations.

<sup>14</sup> 20 C.F.R. 1002.104 (bold question in original).

Employers must remember the terrorist attacks of September 11, 2001, the “date which will live in infamy” for our time. Since that date, almost 1 million National Guard and Reserve members have been called to the colors for emergency service, and the National Guard and Reserve have been transformed from a “strategic reserve” (available only for World War III, which thankfully never happened) to an “operational reserve” (routinely called upon for intermediate military operations like Iraq and Afghanistan. To build and maintain their readiness for such call-ups, National Guard and Reserve personnel must engage in periodic training, and such training is no longer limited to “one weekend per month and two weeks in the summer.” If an employer has an objection to a specific period of military training, because of the urgent needs of the employer, military authorities will make an accommodation if it is possible to do so without detracting from the readiness of the individual and his or her unit. On the other hand, if the employer is objecting to military service in general, military authorities will show no sympathy.

**Q: Traveling from DC (where I live and work) to Las Vegas (where I perform my drills) takes several hours by commercial air. At my civilian job, the workday on Thursdays sometimes extends until 9 pm. If I work until 9 pm on Thursday, before my drill weekend, and then fly to Las Vegas late Thursday night, I frequently arrive so late that I can get little sleep in the hotel or Bachelor Officers Quarters before my drill starts early Friday morning. In my USAFR capacity, I sometimes pilot aircraft during my drill weekends. My USAFR commanding officer has expressed concern about the safety of my flying early Friday morning if I have not had at least seven hours of sleep Thursday night. Does USERRA give me the right to miss part or all of my Thursday work day at the civilian job in order to be able to travel to the place of duty, have a reasonable night of sleep, and be fit for duty the next morning?**

**A:** Yes. The DOL USERRA Regulation provides:

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. ... 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.<sup>15</sup>

**Q: Monday after my drill weekend is even more of a problem. My drill weekend is over at about 1700 (5 PM) Pacific Time on Sunday, and then I must get to the airport in Las Vegas, fly**

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<sup>15</sup> 20 C.F.R. 1002.74.

**to DC, and get to my home from the DC airport. Traveling east, I lose three hours. It is usually at least 4 am Monday, Eastern Time, when I arrive home, and that gives me very little opportunity to get any sleep before I must travel to my civilian job for the 8 am start of the work day. After a drill weekend in a distant city, when am I required to report back to work at my civilian job?**

**A:** The DOL USERRA Regulation provides:

If the period of service in the uniformed services was less than 31 days, or the employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the employer not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of eight hours after a period allowing for safe transportation from the place of that service to the employee's residence. For example, if the employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the employer as soon as possible after the expiration of the eight-hour period.<sup>16</sup>

**Q: Sometimes, I am unable to leave Las Vegas by commercial air Sunday evening, or even on Monday, because of weather, mechanical, or computer problems of the airline. What does USERRA provide for this sort of situation?**

**A:** USERRA provides that a person reporting back to work after a period of service of fewer than 31 days is required to report "as soon as possible after the expiration of 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 such person."<sup>17</sup>

**Q: Is my employer required to pay me for a work day that miss (say a Thursday, Friday, or Monday) because of my Friday drill or because I am traveling to or returning from a drill weekend?**

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<sup>16</sup> 20 C.F.R. 1002.115(a).

<sup>17</sup> 38 U.S.C. 4312(e)(1)(A)(ii).

**A:** USERRA gives you the right to *unpaid but job-protected* military leave and for the travel and rest times before and after a period of military duty. USERRA does not require the employer to pay you for an hour, day, week, month, or year that you are away from work for service.

Federal civilian employees (like you) who are members of the National Guard or Reserve are entitled to 15 days (120 hours) of *paid* military leave, under another law that applies only to federal employees. Here is the pertinent subsection of that law:

Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating 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 member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.<sup>18</sup>

You should not be charged with a day of paid military leave for a Saturday or Sunday, unless you are normally scheduled to work at your federal civilian job on those days.<sup>19</sup> If you miss a day of work on a Friday because of your Friday-Sunday drill schedule, you are entitled to use one of your 15 paid military leave days for that day.

**Q: If I miss a day of work on a Thursday or a Monday, because of travel to or return from my drill weekend in Nevada, am I entitled to use a day of paid military leave for that day?**

**A:** No. Section 6323 specifically sets forth the purposes for which you can use paid military leave, and such travel is not included.

**Q: As a federal employee, I earn six hours of annual leave per pay period. I don't use a lot of leave, so I have a considerable balance of annual leave. Do I have the right to use annual leave for days that I will be absent from work because of military training or service?**

**A:** Yes. USERRA provides:

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<sup>18</sup> 5 U.S.C. 6323(a)(1) (emphasis supplied).

<sup>19</sup> See *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003).

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.<sup>20</sup>

As a federal employee, you earn annual leave, and you are entitled to use the annual leave that you have earned, but you do not have the right to insist upon using that leave on a specific day, *unless you are performing service in the uniformed services on that day*. Ordinarily, the supervisor has the right to veto an employee's request to use annual leave on a specific day. For example, a supervisor is permitted to deny an employee's request to use leave on Friday, August 12 if five other employees have already been granted permission to use annual leave on that day. But if you are to perform uniformed service on that day the supervisor has no discretion to deny your request to use annual leave on that day.

Under section 4316(d), it is *your option* to use annual leave for days that you are away from work for service. It is unlawful for the employer to make you use your leave in that way. If you choose not to use annual leave, or if you have exhausted your annual leave balance, you have the right to unpaid military leave under USERRA.

**Q: Do I have the right to use an annual leave day for a day (like Thursday or Monday) that I am away from work while traveling to or returning from a drill weekend in Nevada?**

**A:** Section 4316(d) gives you the right to use annual leave "during such period of [uniformed] service." A travel day is *necessitated by uniformed service*, but it is not *during* a period of service. Section 4316(d) does not apply to a travel day.

As I stated above, you have the right to annual leave and to use annual leave that you have earned. If you request to use annual leave for a travel day, and if your supervisor denies the request *because she is annoyed with you about your USAFR service*, such denial would violate section 4311(a) of USERRA,<sup>21</sup> which makes it unlawful for an employer to deny a person a benefit of employment on the basis of the person's performance of uniformed service.

**Q: My supervisor at the federal agency continuously harasses me about my USAFR service and is trying to pressure me to disaffiliate from the USAFR. Is there a remedy for this harassment?**

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<sup>20</sup> 38 U.S.C. 4316(d) (emphasis supplied).

<sup>21</sup> 38 U.S.C. 4311(a).

**A:** Yes. As I explained in detail in Law Review 16012 (March 2016), section 4324 of USERRA<sup>22</sup> provides the enforcement mechanism for USERRA cases against federal executive agencies as employers, and such cases are adjudicated by the Merit Systems Protection Board (MSPB). If you prove that you are being harassed by supervisors or co-workers on the basis of your uniformed service, the MSPB has the authority to order the agency to make the supervisors and co-workers stop harassing you.<sup>23</sup>

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<sup>22</sup> 38 U.S.C. 4324.

<sup>23</sup> See *Petersen v. Department of the Interior*, 71 MSPR 227 (Merit Systems Protection Board 1996).