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Under USERRA, you Have the Right To Take “Paid Time Off” for Military Duty

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Update on Sam Wright

1.3.2.11—Vacations, holidays, and days off

1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

Q: I am a Technical Sergeant in the Air Force Reserve and a member of the Reserve Officers Association (ROA).³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), including Law Review 14074, about using vacation days for military training or service.

On the civilian side, I work as an engineer for a major defense contractor—let’s call it Daddy Warbucks International or DWI. Until two years ago, the company had a traditional vacation system, whereby each employee accrued vacation by working and the amount of vacation that an employee earned was determined by his or her seniority. Two years ago, DWI established a new vacation system called “unlimited paid time off” (UPTO).

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1500 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, 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.

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. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 34 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 VRRA rewrite 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 USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC (TR), and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

³ In 2013, ROA members amended the ROA Constitution and made noncommissioned officers eligible for full membership.

Under the UPTO system, there supposedly is no limit on the amount of paid time off that an individual employee can take in a company fiscal year (July 1 through June 30), but of course no employee has ever been permitted to take off more than five weeks in a year. The individual employee must request paid time off, and the company can grant or deny the requested leave, depending upon how much notice the employee gives, how busy the company is at the time of the requested leave, how much leave the employee has already taken, and the employee's job performance. More senior employees do not get more leave than junior employees, and there is no carry-over of leave from one fiscal year to the next.

I have worked for DWI for five years, and each year I have used two weeks of my vacation or "unlimited paid time off" for my annual training in the Air Force Reserve. Having read some of your articles, I was under the impression that USERRA gave me the right to do this. Just recently, the DWI personnel office and legal office told me that I am not entitled to use paid time off under the company's new "unlimited PTO" policy for my military training, because under the new system the right to paid time off does not "accrue." What do you think?

A: I think that under section 4316(d) of USERRA you are entitled to use your "unlimited" paid time off for voluntary or involuntary training or service in a uniformed service and that denying you that right violates USERRA. Section 4316(d) provides:

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.⁴

As I have explained in Law Review 15607 (August 2015) and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates from 1940. USERRA's legislative history provides as follows concerning the provision that is now section 4316(d):

Section 4315(e) [later renumbered 4316(d)] would allow an employee leaving for military service to use, at his or her choice, accrued vacation leave during the military absence if such vacation leave could have otherwise been used during this period. While current law [the VRRA] prohibits an employer from forcing a reservist or National Guardsman to use paid vacation leave (*see Hilliard v. New Jersey Army National Guard*,

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

527 F. Supp. 405, 412 (D.N.J. 1981)), which would still be the case, it [the VRRA] does not explicitly allow such use if desired by the servicemember.⁵

Section 4331 of USERRA⁶ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The pertinent sentence in the regulations is as follows: “If employment is interrupted by a period of service, the employee *must be permitted* upon request to use any accrued vacation, annual, or *similar leave with pay* during the period of service, in order to continue his or her civilian pay.”⁷

When you are away from your civilian job for a short or long period of military training or service, you have the right (enforceable in federal court) to use vacation, annual leave, or *similar leave with pay* during the period of service. This right applies to DWI’s “unlimited” paid time off as well as more traditional vacation and annual leave entitlements.

In its first case construing the VRRA, the Supreme Court held: “No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act.”⁸ Section 4302(b) of USERRA⁹ makes clear that USERRA overrides and supersedes an employer policy, a collective bargaining agreement or other contract, or a state law that purports to limit USERRA rights or to impose an additional prerequisite on the exercise of USERRA rights.

In its tenth case construing the VRRA, the Supreme Court held:

The term “seniority” is nowhere defined in the act, but it derives its content from private employment practices and agreements. This does not mean, however, that employers and unions are empowered by the use of *transparent labels and definitions* to deprive a veteran of substantial rights guaranteed by the act.¹⁰

I am not persuaded by the company lawyer’s argument that under DWI’s “unlimited” paid time off policy the right to time off with pay does not “accrue” so section 4316(d) does not apply.

⁵ House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 681-2 of the 2016 edition of the *Manual*.

⁶ 38 U.S.C. 4331.

⁷ 20 C.F.R. 1002.153(a) (emphasis supplied).

⁸ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

⁹ 38 U.S.C. 4302(b).

¹⁰ *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225, 229 (1966) (emphasis supplied).

This argument by the company lawyer is an excellent example of an attempt to use “transparent labels and definitions” to deprive veterans and service members of their rights under the reemployment statute. This is exactly the kind of argument that the Supreme Court condemned in *Accardi*.

You “accrue” (earn) the right to paid time off, generally up to five weeks per company fiscal year. Whenever you are away from your DWI job for a short or long period of voluntary or involuntary training or service, you have the right to use your “unlimited” paid time off, up to five weeks per company fiscal year, during a period of service, in order to continue your civilian pay while you are performing the uniformed service. If the company refuses to accord you that right, the company is violating USERRA.