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You Don't Need Prior Approval of your Federal Agency Employer To Join a Reserve Component of the Armed Forces

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- 1.1.1.8—USERRA applies to the Federal Government
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Q: I am a GS-11 employee of the United States Department of Homeland Security (DHS). I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, 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 1600 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. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 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, 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

I am seriously considering joining the Army Reserve. I have visited with a recruiter, but I have not yet signed an enlistment contract, nor have I been to the Military Examination and Processing Station (MEPS) for a physical examination.

I told my DHS supervisor that I am considering enlisting in the Army Reserve, and he reacted very negatively, telling me that I would likely be fired if I join the Army Reserve over his strenuous objections. He also told me that, under a DHS regulation, I must seek and obtain prior written approval of DHS before starting any “outside employment” and that the Army Reserve amounts to “outside employment.” He cited a DHS regulation that reads as follows:

A DHS employee, other than a Special Government Employee, shall obtain prior written approval before engaging in any outside employment or activity (as defined by section 4601.101 of this part), with or without compensation, unless the employee’s agency has exempted the outside employment or activity (or category or class of outside employment or activity) from this requirement by an instruction or manual issued pursuant to paragraph (c) of this section.³

Is my supervisor correct? Do I need the prior written approval of DHS before enlisting in the Army Reserve?

A: Your supervisor is wrong. I invite your attention to the definitions section of the DHS regulation on “outside employment.” The pertinent subsection is as follows: “Outside employment [for purposes of this regulation] does not include state or Federal military service protected by the Uniformed Services Employment and Reemployment Rights Act.”⁴

Almost a decade ago, I expressed the opinion that USERRA overrides federal agency “ethics” rules about “outside employment” and that a federal agency rule that purports to require the agency’s prior approval before an employee may enlist or attempt to enlist in a uniformed service is contrary to USERRA and invalid.⁵ I am pleased that DHS has recognized that its “outside employment” rule cannot lawfully be applied to an employee’s decision to enlist in the armed forces, including a Reserve Component of the armed forces.

If you want to “moonlight” at McDonald’s while working for DHS, you need the department’s prior written approval. But enlisting in the Army Reserve is fundamentally different from applying for a job at McDonald’s. As the department that includes the Coast Guard, one of our nation’s five armed forces,⁶ DHS should recognize this fundamental truth.

³ 5 C.F.R. 4601.103(a). The citation refers to subsection (a) of section 4601.103 of title 5 of the Code of Federal Regulations. This regulation is referred to as the “DHS Supplemental Regulation on Outside Employment.”

⁴ 5 C.F.R. 4601.101(d)(2)(iv).

⁵ Please see Law Review 1066 (2010).

⁶ See 10 U.S.C. 101(a)(4).

The Department of Labor (DOL) USERRA regulation makes clear that no civilian employer has the right to veto an employee's decision to enlist in a uniformed service or to leave a civilian job to report for uniformed service. The pertinent section of the regulation is as follows:

Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. 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.⁷

I regret that you did not ask me before you told your civilian supervisor that you are considering enlisting in the Army Reserve. If you had checked with me beforehand, I would have advised you to keep your consideration of enlisting a "close hold" secret until you have successfully enlisted and need to give the employer notice of an approaching period of military training or service. For example, in Law Review 13083 (June 2013) I wrote:

If you are considering enlisting (whether in the Active Component, the Reserve, or the National Guard), I strongly suggest that you keep your considerations to yourself, because you have no obligation to consult your employer about this matter. You have no obligation to say anything to your employer until the first time you will need to be away from work (for a short period or a long period) because of uniformed service. 38 U.S.C. 4312(a).

If you are in the process of enlisting in the armed forces, I suggest that you say nothing to the civilian employer until you have a *firm* [emphasis in original] report date that is only about a month away. If you give the employer more than a month of advance notice, that will only serve to give the employer the opportunity to make your life miserable as you prepare to serve our country in uniform.⁸

Q: The Army recruiter told me that I will need to take two or three days off work to report to the MEPS for a physical examination, to determine my eligibility to enlist in the Army Reserve. Does USERRA give me the right to time off from my civilian job for a military enlistment examination?

⁷ 20 C.F.R. 1002.87 (bold question in original).

⁸ See also Law Review 16073 (August 2016).

A: Yes. USERRA's definition of "service in the uniformed services" includes "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."⁹

Of course, to exercise your right to time off for the fitness examination you will need to inform the employer that you will be at the MEPS for the purpose of a military fitness examination. In your case, you already let that cat out of the bag when you told your DHS supervisor that you are seriously considering enlisting in the Army Reserve.

Q: Does USERRA give me the right to *paid* military leave for the days that I will be away from work for the examination at the MEPS?

A: No. USERRA does not require your employer to pay you for time that you are away from work for military service, including the fitness examination. USERRA gives you the right to an unpaid but job-protected military leave of absence.

Q: My good friend Mary Jones, another employee of DHS, is trying to enlist in the Marine Corps or Marine Corps Reserve. So far, she has said nothing about enlistment to her civilian supervisor or anyone at the job other than me. How do you suggest that Mary handle the need for time off from her civilian job for the examination at the MEPS?

A: I suggest that Mary build up some vacation days or make other arrangements to make it to the MEPS without telling her supervisor that she is trying to enlist. It is entirely possible that Mary will fail the physical at the MEPS. In that case, she will have annoyed her civilian supervisor and employer for attempting to enlist, but she will not in fact be enlisting. I suggest that Mary keep her enlistment effort a secret at least until she has passed the physical and has been found fit for military service.

⁹ 38 U.S.C. 4303(13).