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Do I Have To Work on my Day Off? Part Two

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

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Q: I am a Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).³ For many years, I have read with great interest your “Law Review” articles

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 (VRRRA—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 VRRRA 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 VRRRA 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.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA

about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in the National Guard or Reserve. My current problem with my civilian employer is very similar to the situation that you addressed in Law Review 103 (December 2003).

I am a nurse and a “Title 38 employee” for the United States Department of Veterans Affairs (VA). I work an irregular 36-hour week, including many overnight and weekend shifts. My civilian work schedule often conflicts with my scheduled Army Reserve drill weekends. When that happens, I ask my VA supervisor for military leave on the days when I am scheduled to work for the VA and to drill for the Army Reserve.

Many times, my VA supervisor has told me that he will “permit” me to take military leave on a Saturday or Sunday only if I “agree” to work on a day in the following week when I would not otherwise be scheduled to work. Like the federal prison you addressed in Law Review 103, a VA hospital must be staffed 24 hours per day and seven days per week.

In Law Review 103, you wrote that the Marine Corps Reservist who was a federal corrections officer was entitled, under USERRA, to refuse to work extra days to “make up for” the civilian workdays that he missed because of his Marine Corps Reserve drills. Do you adhere to what you wrote 16 years ago in Law Review 103?

A: I adhere to and reiterate everything that I wrote in that article:

Section 4311(a) of USERRA provides: “A person who ... performs ... service in a uniformed service shall not be denied ... any benefit of employment by an employer.” 38 U.S.C. 4311(a). The term “benefit of employment” is broadly defined by USERRA, and the definition includes “the opportunity to select work hours or location of employment.” 38 U.S.C. 4303(2). Making you work on a day that would otherwise be a day off amounts to denying you the opportunity that you otherwise would have had to select that day as your day off.

the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

Also pertinent is 38 U.S.C. 4302(b), which provides that an employer cannot impose additional eligibility criteria upon the exercise of your USERRA rights. Making you work on a later day, when you would not otherwise have worked, amounts to imposing an additional eligibility criterion.

I think that this employer's policy also violates the spirit, if not the letter, of 38 U.S.C. 4316(d). As I have explained in Law Reviews 26 and 59, it is unlawful for the employer to make you use vacation or annual leave for your military obligations. Making you use a day off amounts to essentially the same thing, I would argue.⁴

Today, 16 years later, I would add one additional point. You do not need the employer's permission to absent yourself from work to perform uniformed service—you are only required to give the employer *notice*. The employer does not have a veto on your absentsing yourself from work to perform notice. Thus, the employer does not have the opportunity to impose a condition ("you must work on a later day that you would otherwise have off") on granting you permission to go to your military duty.

Section 4331(a) of USERRA⁵ gives the Secretary of Labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The pertinent provision of the Department of Labor (DOL) USERRA 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.⁶

Strictly speaking, the DOL regulations do not apply to your employer, the United States Department of Veterans Affairs (VA). The DOL USERRA regulations apply to state and local governments and private employers. Section 4331(b) of USERRA⁷ gives the Director of the Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to federal executive agencies as employers. The OPM USERRA regulations do not address this specific point.

⁴ Law Review 103 (December 2003).

⁵ 38 U.S.C. 4331(a).

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

⁷ 38 U.S.C. 4331(b).

Nonetheless, I argue that the principle behind section 1002.87 of the DOL USERRA regulation should apply to federal agencies as employers. The very first section of USERRA expresses the “sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.”⁸

Q: The lawyer at the VA medical treatment facility where I work insists that USERRA does not apply to me because I am a “title 38 employee.” What does that mean? Is the VA attorney correct?

A: Most federal civilian employees are “title 5 employees”—meaning that their status and their rights and responsibilities are governed by title 5 of the United States Code. Some federal agencies, including the VA, have statutory authority to employ persons outside the standard federal civil service system and outside title 5. Some but by no means all civilian employees of the VA (mostly physicians, nurses, and other medical professionals) are “title 38 employees”—meaning that their status, rights, and responsibilities are governed by provisions in title 38, which pertains to veterans’ affairs.

Section 4303 of USERRA⁹ defines 16 terms that are used in this law, including the word “employer.” The definition of “employer” includes “the Federal Government.”¹⁰ USERRA applies to all the Federal Government, not just the regular civil service that is governed by title 5. The jurisdiction of the Merit Systems Protection Board (MSPB) to adjudicate cases involving allegations that federal agencies have violated USERRA includes title 38 employees and other “special” employees of federal agencies.¹¹

Please join or support ROA

This article is one of 1900-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For

⁸ 38 U.S.C. 4301(b).

⁹ 38 U.S.C. 4303.

¹⁰ 38 U.S.C. 4303(4)(A)(ii).

¹¹ Please see Law Review 13097 (July 2013).

many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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