

LAW REVIEW¹ 21028

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You Have the Right to Depart your Civilian Job Early, before you Start Active Duty, to Get your Affairs in Order

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1.3.1.1—Left Job for Service and Gave Prior Notice

5.2—Military Service and Child Matters

Q: I am a Captain³ in the Army Reserve and a member of the Reserve Organization of America.⁴ I have read with great interest several of your “Law Review” articles about the

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 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.

³These facts are an amalgam of the facts of several Reserve Component members that I have heard from over the years. These facts should not be attributed to any one person.

⁴At 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 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

Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve in the National Guard and Reserve.

I am a single mom with sole custody of two school-age children, a fourth grader and a first grader. I had a bitter divorce and custody battle with my ex-husband. I was awarded sole custody of the two children, and he got only limited visitation rights, which he has not exercised. He has not seen the children for months, and he calls only occasionally to speak to the children. His record of paying child support is spotty.

I have been called to active duty with my Army Reserve unit, and I am to report on 1 June. I will deploy to a classified location in Asia for about a year. I plan to take the children to my parents' house in a distant state and register them for a nearby school. I need to leave my civilian job, as a deputy sheriff, on 1 May so that I can take the children to their grandparents and make the necessary arrangements for school, medical care, etc.

I have not told my ex-husband that I am being mobilized, and I do not plan to tell him. He will only make trouble for me, my children, and my parents.

I told the Sheriff that I need to leave my job on 1 May to get my affairs in order, followed by reporting to active duty on 1 June. I told him to expect me back in June 2022. He reacted very negatively to my request for a month off before the start of my one-year active duty. He said that he was reluctant to let me have a year off to "play soldier" and that he certainly would not let me have a month off to "play with the kids." His negative attitude and hurtful comments only magnify my difficulties at this difficult time.

The Sheriff said that if I am not at work every assigned day until the day before I am to report to active duty, he will fire me and that he will not reinstate me when I return from active duty in June 2022. Help!

A: The situation you described raises family law issues as well as USERRA issues. I will discuss the family law issues first.

You do not have the unilateral right to designate your parents as the substitute custodians of the children during your deployment. You must consult with the father. If he does not agree with your plan, you must go to court and let the court determine custody arrangements.

The situation you describe is remarkably like the situation that Colonel John S. Odom, Jr., USAF (Ret.) and I addressed in a 2009 article, Law Review 09051. In that article, we wrote:

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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

We think that you are going about this in the wrong way. You need to inform the boy's father as soon as the mobilization is reasonably certain. If the father does not agree to the plan of having the maternal grandparents take custody, you will need to go back to the court that granted you custody and get the court to order an appropriate custodial arrangement for the child during your deployment.

The court made a finding that giving you custody of the child was in the best interests of the child. The court retains jurisdiction to make redeterminations about the best interests of the child whenever there is a material change in circumstances. Your upcoming deployment to Afghanistan is most certainly a material change in circumstances.

Your ex-husband is the other parent of the child. His position is likely to be, "Hey, give me my kid. When my ex gets back from war, we can sort all this out, but for now I am the other parent and I want custody." The court is likely to go along with that pitch, in the absence of clear evidence of child abuse by your former husband.

The court gave you custody of the boy, but the court did not and cannot delegate to you the authority to determine an alternative custodial arrangement if for any reason you will not be able to exercise custody of the child for an extended period. You simply do not have the legal power or the right to turn over the child to your parents upon your deployment.

Q: But my ex-husband has shown little interest in these children recently. He has not seen them in months, he has not called them in weeks, and he is two months behind in paying child support.

A: The judge will consider those facts in determining the best interests of the child as to custody of the children during your deployment, but those facts do not give you the legal authority to determine the alternative custodial arrangements.

Your rights under USERRA

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

1. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.⁵
2. You must have given your employer prior oral or written notice.⁶

⁵38 U.S.C. § 4312(a).

⁶*Id.* § 4312(a)(1).

3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.⁷
4. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁸
5. You must have made a timely application for reemployment after release from the period of service.⁹

Under USERRA, you are entitled to an unpaid but job-protected military leave of absence for the entire period of absence from your civilian job that is “necessitated by reason of service in the uniformed services.”¹⁰ The protected period of absence includes the period of service as well as the period immediately before and the period immediately after the period of service, when you are away from the civilian job because of the service.

USERRA gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers.¹¹ The pertinent section of the DOL USERRA regulation is as follows:

Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

No. 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. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) 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

⁷Only the period of uniformed service counts toward exhausting your five-year limit. The periods when you are away from work immediately before and immediately after the period of service do not count toward exhausting your five-year limit. Moreover, there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit. If you were involuntarily called to active duty, the upcoming period of service does not count toward your five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your limit.

⁸38 U.S.C. 4304. If you receive a punitive discharge (awarded by court martial for a serious offense) or an OTH (other than honorable) administrative discharge, you will not have the right to reemployment.

⁹After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

¹⁰38 U.S.C. § 4312(a).

¹¹*Id.* § 4331(a).

work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) *If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.*

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.¹²

DOL did not have rulemaking authority under the reemployment statute that was in effect before the 1994 enactment of USERRA, but DOL did publish the *Veterans' Reemployment Rights Handbook* in 1956, 1970, and 1988. Several courts, including the Supreme Court, accorded a "measure of weight" to DOL's interpretations as expressed in the *Handbook*.¹³ The 1988 edition of the *Handbook* states as follows concerning the permissible interim between leaving the civilian job and entering active duty:

The statute does not specify any limit on the amount of time that may elapse between the time the employee leaves his position and the time his military service actually commences. It is a matter of intent and not of time. *It is recognized that employees entering military service often need time to get their affairs in order, and that the amount of time needed for these preparations will vary from case to case.* Sometimes the actual induction or enlistment may be delayed for weeks or even months for various reasons. Where there is an unusual delay, the causes of that delay and what they show about the employee's intent, rather than the length of time, determine whether he meets the statutory criteria.¹⁴

You clearly have the right to leave your civilian job a month or even longer before you report to active duty.¹⁵ The interim between your departure from your job and the start of your active duty does not detract from your right to reemployment upon your release from active duty.¹⁶

¹²20 C.R.F. 1002.74 (bold question in original, emphasis by italics supplied).

¹³See *Monroe v. Standard Oil Co.*, 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines*, 972 F.2d 155, 159-60 (7th Cir. 1992); *Shadle v. Superwood Corp.*, 858 F.2d 437, 440 (8th Cir. 1988); *Dyer v. Hinky-Dinky, Inc.*, 710 F.2d. 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers & Distributors Association*, 546 F.2d 314, 319 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977); *Helton v. Mercury Freight Lines, Inc.*, 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

¹⁴*Veterans' Reemployment Rights Handbook, 1988 Edition*, page 4-1 (emphasis supplied).

¹⁵If you need to go to court to get the judge to approve your plan to take the children to your parents for the duration of your deployment, you may need more than a month to get your affairs in order.

¹⁶See Law Review 117 (March 2004).

Q: But the Sheriff has made it clear that he does not and will not approve my request for a leave of absence for a month before the start of my active duty period.

A: You do not need to ask for or receive the employer's permission to absent yourself from your job to perform uniformed service. The DOL USERRA regulation provides:

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.¹⁷

When DOL promulgated the DOL USERRA regulations in 2005, it also published a lengthy and scholarly preamble explaining the purpose and effect of each section. The preamble explained section 1002.87 as follows:

Proposed section 1002.87 makes explicit that the employee is not required to obtain the employer's permission before departing for uniformed service in order to protect his or her reemployment rights. Imposing a prior consent requirement would improperly grant the employer veto authority over the employee's ability to perform service in the uniformed services by forcing the employee to choose between service and potential loss of his or her employment position, if consent were withheld.¹⁸

To summarize, you do not need the Sheriff's permission to leave your job a month before the start of your active duty to get your affairs in order. If you meet the five USERRA conditions after you are released from the period of service, you will then be entitled to prompt reemployment in the position that you would have attained if you had been continuously employed. You will also be entitled to seniority and pension credit for the entire time you were away from work for uniformed service, including the time between departure from the civilian job and the start of the period of service, the period of service, and the time between release from the period of service and return to the civilian job.¹⁹

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This article is one of 2,300-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.

¹⁷20 C.R.F. 1002.87 (bold question in original).

¹⁸2005 *Federal Register*, page 75256, near the top of the left-hand column. *See also* Law Review 0811 (February 2008).

¹⁹See Law Review 19052 (June 2019); Law Review 08011 (February 2008).

ROA is almost a century old—it was established on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight²⁰ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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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²⁰Congress recently established the United States Space Force as the 8th uniformed service.