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USERRA and the FMLA—Two Different Laws, Enacted at Different Times, Applying to Different Situations

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About Sam Wright

1.1.1.2—USERRA applies to small employers
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 Organization of America.[3] I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I recently volunteered to return to active duty in the Air Force for one year. My active-duty period will begin on 10/1/2021 and is expected to end on 9/30/2022. As you have advised in Law Review 15116 (December 2015) and many other articles, I gave my employer both oral and written notice that I would be away from my civilian job for approximately one year starting in late September.

For several years, I have worked for a large company—let us call it Mommy Peacebucks Industries or MPI. The company has contracted with a "leave administration" company to administer the process of granting and denying employee requests for leaves of absence. Let us call the leave administration company Leave R Us or LRU.

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,200 "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), 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles published so far, but we are always looking for "other than Sam" articles by other lawyers who are ROA members or willing to join ROA.

[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 and retired as a Captain (O-6) in 2007. I am a life member of ROA and have served on the national staff as the Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC during its six years in operation as a funded ROA program. I have continued some of the work of the SMLC as a volunteer and ROA member since I left the national staff in 2015.

[3] At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new "doing business as" (DBA) name, the Reserve Organization of America, to emphasize that the organize represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

A few days after I requested military leave from my employer, LRU sent me a lengthy but incomprehensible form letter and demanded that I complete a long form requesting "FMLA leave" to cover my absence from my job at MPI. What is the FMLA? Why did LRU send me this letter and this form? How do you suggest that I respond?

A: The FMLA is the Family Medical Leave Act.[4] The Wage & Hour Division of the United States Department of Labor (DOL-WHD) is responsible for enforcing the FMLA. On its website, DOL-WHD explains the FMLA as follows:

> Eligible employees who work for a covered employer can take up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons: • The birth of a child or placement of a child for adoption or foster care; • To bond with a child (leave must be taken within one year of the child's birth or placement); • To care for the employee's spouse, child, or parent who has a qualifying serious health condition; • For the employee's own qualifying serious health condition that makes the employee unable to perform the employee's job; • For qualifying exigencies related to the foreign deployment of a military member who is the employee's spouse, child, or parent. An eligible employee who is a covered servicemember's spouse, child, parent, or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness. An employee does not need to use leave in one block. When it is medically necessary or otherwise permitted, employees may take leave intermittently or on a reduced schedule. Employees may choose, or an employer may require, use of accrued paid leave while taking FMLA leave. If an employee substitutes accrued paid leave for FMLA leave, the employee must comply with the employer's normal paid leave policies. While employees are on FMLA leave, employers must continue health insurance coverage as if the employees were not on leave. Upon return from FMLA leave, most employees must be restored to the same job or one nearly identical to it with equivalent pay, benefits, and other employment terms and conditions. An employer may not interfere with an individual's FMLA rights or retaliate against someone for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being involved in any proceeding under or related to the FMLA. An employee who works for a covered employer must meet three criteria in order to be eligible for FMLA leave. The employee must: • Have worked for the employer for at least 12 months; • Have at least 1,250 hours of service in the 12 months before taking leave;* and • *Work at a location where the employer has at least 50 employees within 75 miles of the employee's worksite.* *Special "hours of service" requirements apply to airline flight crew employees. Generally, employees must give 30-

[4] Congress enacted the FMLA in 1993. It is codified in title 29 of the United States Code, at sections 2601 through 2654 (29 U.S.C. 2601-54).

days' advance notice of the need for FMLA leave. If it is not possible to give 30-days' notice, an employee must notify the employer as soon as possible and, generally, follow the employer's usual procedures. Employees do not have to share a medical diagnosis, but must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection. Sufficient information could include informing an employer that the employee is or will be unable to perform his or her job functions, that a family member cannot perform daily activities, or that hospitalization or continuing medical treatment is necessary. Employees must inform the employer if the need for leave is for a reason for which FMLA leave was previously taken or certified. Employers can require a certification or periodic recertification supporting the need for leave. If the employer determines that the certification is incomplete, it must provide a written notice indicating what additional information is required. Once an employer becomes aware that an employee's need for leave is for a reason that may qualify under the FMLA, the employer must notify the employee if he or she is eligible for FMLA leave and, if eligible, must also provide a notice of rights and responsibilities under the FMLA. If the employee is not eligible, the employer must provide a reason for ineligibility. Employers must notify its employees if leave will be designated as FMLA leave, and if so, how much leave will be designated as FMLA leave. Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer. The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.[5]

Among MPI's 100,000 employees, only about 100 (1/10th of 1%) are active participants in the Reserve or National Guard. The LRU employees who process leave requests deal with military leave under USERRA only very infrequently, and most of them have never heard of USERRA. The LRU software system makes no provision for military leave under USERRA.

I suggest that you respond to the LRU form letter with a polite but terse letter, explaining that your situation is governed by USERRA, not the FMLA. You could enclose a copy of this article.

Q: The DOL-WHD website you quoted states that the FMLA only applies to an employee who works at a worksite where the employer has at least 50 employees working within 75 miles of that worksite. Does USERRA have any such threshold?

A: No. The Federal reemployment statute applies even to very small employers. You only need one employee to be an "employer" for purposes of the reemployment statute.[6]

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[5] *See* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fmlaen.pdf (emphasis supplied).
[6] *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).

Please join or support ROA.

This article is one of 2,200-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 October 1922 by a group of veterans of "The Great War" as World War I was then known. Captain Harry S. Truman was one of those veterans. 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 defense. For 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 military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs in the Supreme Court and other courts, we educate service members, attorneys, judges, employers, and others about the legal rights of service members and 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 cost 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 eight[7] uniformed services, you are eligible for full ROA membership, including the right to vote and run for office in the organization. Eligibility includes those who are serving or have served in the Active Component, the Reserve, or the National Guard, and enlisted members as well as officers are eligible.

If you are eligible, please join on-line at www.roa.org or call ROA at 800-809-9448. The cost is only $20 per year or $450 for a life membership. If you are not eligible, please support us financially to help us continue this work. You can mail us a check as follows:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

[7] Congress recently created the United States Space Force as the eighth uniformed service.