

## **If I Am away from my Civilian Job for Voluntary or Involuntary Service in the Uniformed Services, Do I Continue Accruing Annual Leave in My Civilian Job?**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

**1.3.2.2—Continuous Accumulation of Seniority—Escalator Principle**

**1.3.2.10—Furlough or Leave of Absence Clause**

**1.3.2.11—Vacations, holidays, and days off**

**1.8—Relationship between USERRA and other laws/policies**

**10.1—Supreme Court cases on the reemployment statute**

***Foster v. Dravo Corp.*, 420 U.S. 92 (1975).**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,000 "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 Spouses' 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 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, but we are always looking for "other than Sam" articles by other lawyers.

<sup>2</sup> 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 45 years, I have collaborated 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 38 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 <mailto:swright@roa.org>.

**Q: I am a Captain in the Navy Reserve and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I am the Commanding Officer of a major Navy Reserve unit. Over the years, I have utilized your “Law Review” articles to help me understand and exercise my rights in balancing my Navy Reserve career with my responsibilities to my civilian employer, a major multinational corporation—let us call it Daddy Warbucks Industries or DWI. I have also shared your articles with my colleagues and subordinates in the Navy Reserve.**

**At DWI, new employees (less than three years of company seniority) earn four hours of annual leave per two-week pay period. Employees with three to 15 years of company seniority earn six hours of annual leave per two-week pay period, and employees with more than 15 years of company seniority earn eight hours of annual leave per pay period. During 2022, I was away from my DWI job for three months of Navy Reserve duty. I have read and reread your Law Review 15116, about the five USERRA conditions for reemployment, and I am confident that I met those conditions.<sup>4</sup> During the three months that I was away from my DWI job for uniformed service, did I continue accruing annual leave as if I had been continuously employed?**

**Answer, bottom line up front:**

Probably not. The accrual of annual leave or vacation does not qualify as a “perquisite of seniority” for purposes of USERRA’s escalator principle. Conceivably, you could be entitled to the annual leave accrual under USERRA’s furlough or leave of absence clause.

### **Explanation**

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted the reemployment statute in 1940, as part of the Selective Training and Service Act (STSA).<sup>5</sup> As

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<sup>3</sup> In 2018, members of the Reserve Officers Association amended the organization’s constitution and made enlisted personnel eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name of “Reserve Organization of America” to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

<sup>4</sup> You must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA. 38 U.S.C. § 4312(a). You must have given the employer prior oral or written notice. 38 U.S.C. § 4312(a)(1). You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. 38 U.S.C. § 4312(c). You must have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. § 4304. After release from the period of service, you must have made a timely application for reemployment. 38 U.S.C. § 4312(e). *See generally* Law Review 15116 (December 2015) for a detailed discussion of the USERRA eligibility criteria.

<sup>5</sup> Selective Service and Training Act, Pub. L. No. 76-783, 54 Stat. 885.

originally enacted, the reemployment provision only applied to those young men who were drafted, including my late father, but one year later, as part of the Service Extension Act, Congress expanded the reemployment provision to include those men and women who voluntarily enlisted as well as those who were drafted.<sup>6</sup>

The reemployment statute got its greatest test in 1945-46, in the months following the end of World War II, when millions of young men and thousands of young women were released from military service and returned to their homes and civilian jobs. In its first case construing the reemployment statute, the Supreme Court enunciated the “escalator principle” when it held: “[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.”<sup>7</sup>

In subsequent cases, the Supreme Court refined the escalator principle. It does not apply to all that might have happened to the veteran if he or she had remained continuously employed in the civilian job. The escalator principle applies to “perquisites of seniority.” A two-pronged test determines whether a benefit qualifies as a perquisite of seniority. First, the benefit must be a reward for length of service, rather than a form of short-term compensation for services rendered. Second, it must be reasonably certain (not necessarily absolutely certain) that the veteran would have received the benefit if he or she had been continuously employed.

### **The important Supreme Court precedent—*Foster v. Dravo Corp.***

Earl R. Foster was employed by the Dravo Corporation until 3/6/1967, when he was drafted into the Army. He was honorably discharged 18 months later, and he returned to work on 10/2/1968. He claimed that, under the escalator principle, he was entitled to all of the vacation days that he would have earned from the employer if he had not been drafted and if he would have remained continuously employed at the Dravo Corporation for all of 1967 and 1968. The Supreme Court rejected his principal argument, holding that vacation days are a form of short-term compensation for services, not a perquisite of seniority.<sup>8</sup>

The Supreme Court remanded the case to the United States District Court for the Western District of Pennsylvania. On remand, the district court held that Foster was entitled to a pro rata share of the vacation days he would have earned in 1967 and 1968 because he worked the first 64 days of 1967 and the last 90 days of 1968. The court awarded him \$166.28 for those vacation days.<sup>9</sup>

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<sup>6</sup> Service Extension Act, Pub. L. No. 77-213, 55 Stat. 626, 627.

<sup>7</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

<sup>8</sup> *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). See generally Law Review 09007 (February 2009) for a detailed discussion of this important precedent.

<sup>9</sup> *Foster v. Dravo Corp.*, 395 F. Supp. 536 (W.D. Pa. 1975).

**Q: I was hired by DWI on 10/1/2007 and have worked for the company continuously since that date, except for the periods when my DWI employment has been interrupted by military service and training. I was away from my DWI job last year for military service for three months, from 9/1/2022 to 11/30/2022. If I had not been away from work for service, I would have celebrated my 15<sup>th</sup> anniversary on the job on 10/1/2022, and at that point I would have started earning annual leave at the rate of eight hours per pay period rather than six hours per pay period. The company made me wait until 3/1/2023 to start earning annual leave at the faster rate. Has the company violated my USERRA rights?**

**A:** Yes. The rate that you earn annual leave after you return to work is clearly a reward for length of service and thus a perquisite of seniority. When you returned to work, having met the five USERRA conditions, you were entitled to start immediately earning annual leave at the rate of eight hours per pay period.

**Q: You mentioned USERRA’s “furlough or leave of absence” clause. What is that provision?**

**A:** That provision reads as follows:

(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.<sup>10</sup>

If and to the extent that an employer grants paid leave for comparable periods for non-military reasons, like jury duty or the birth or adoption of a child, the employer is required to grant paid military leave for those comparable periods of military duty.<sup>11</sup>

**Q: During the three months that I was away from my DWI job for military duty last year (9/1/2022 through 11/30/2022), there were four DWI holidays—Labor Day, Columbus Day, Veterans Day, and Thanksgiving. Was DWI required to pay me for those holidays?**

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<sup>10</sup> 38 U.S.C. § 4316(b)(1). This provision, essentially unchanged, has been part of the reemployment statute since 1940. When Congress enacted USERRA in 1994, this provision was carried over without significant change.

<sup>11</sup> See *Travers v. FedEx Corp.*, No. 20-2703 (3<sup>rd</sup> Cir. 2021); *White v. United Air Lines, Inc.*, 987 F.3<sup>rd</sup> 616 (7<sup>th</sup> Cir. 2021). See generally Law Review 21067 (October 2021).

**A:** If DWI gives paid holidays to employees who have been furloughed (laid off) or employees who are on non-military leaves of absence (for jury duty, the birth or adoption of a child, etc.), DWI was also required to pay you for those holidays.

**Q:** Joe Smith, a junior officer in the Navy Reserve unit that I command, also works for DWI. Like me, and like most of the members of the unit, Joe was on military duty for three months last year, from 9/1/2022 until 11/30/2022. Joe is the kind of guy who almost never takes a day off from work. Each year, at the end of the calendar year, Joe loses leave under DWI's "use it or lose it" rule.

**When we were called to duty last year, I suggested to Joe that he send a letter to the DWI personnel office, formally requesting to use his balance of 30 days of annual leave during our three-month military duty, and Joe followed my advice. The company refused to let Joe use his annual leave balance in this way. Were Joe's USERRA rights violated?**

**A:** Yes. The pertinent USERRA provision is as follows:

(d) 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.<sup>12</sup>

Joe had the right, but not the obligation, to use his annual leave balance in this way.

### **Please join or support ROA**

This article is one of 2,000-plus "Law Review" articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing. 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.

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<sup>12</sup> 38 U.S.C. § 4316(d).

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 advocate for the rights and interests of service members and 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 eight<sup>13</sup> 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](http://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:

Reserve Organization of America  
1 Constitution Ave. NE  
Washington, DC 20002<sup>14</sup>

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<sup>13</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>14</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).