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### **Time off from Civilian Job for Travel and Rest in Connection with Drill Weekend**

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**Q: When doing an Internet search concerning my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), I stumbled upon your Law Review 1206<sup>1</sup> (January 2012), concerning the “ministerial exception” under USERRA and other employment laws. I am an ordained Protestant minister, and I am concerned that because of this “exception” I may not have enforceable USERRA rights.**

**I am a chaplain in the Air National Guard (ANG). As a civilian job, I am a chaplain for the Bureau of Prisons (BOP), which is part of the United States Department of Justice (DOJ). The warden of the prison continually gives me a hard time about my ANG service. Is the “ministerial exception” a problem in my case?**

**A:** No. Law Review 1206 is about *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. \_\_\_\_\_ (2012).<sup>2</sup> In that case, the Supreme Court made even clearer<sup>3</sup> that religious institutions (churches, synagogues, mosques, seminaries, etc.) are exempt from the application of employment laws, because of the religion clauses of the First Amendment to the United States Constitution. *The BOP is not a religious institution*, so the ministerial exception is not a problem in your case. You can enforce your USERRA rights against the BOP by bringing a case in the Merit Systems Protection Board (MSPB), just like any other federal employee with a USERRA case.<sup>4</sup>

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<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 880 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

<sup>2</sup> *Hosanna-Tabor* is a United States Supreme Court decision that was released on January 11, 2012. The decision will be published in Volume 565 of *United States Reports*, where decisions of the United States Supreme Court are officially published. The specific page number within Volume 565 is not yet available, until Volume 565 is published.

<sup>3</sup> I invite your attention to Law Review 185 (September 2005) and Law Review 859 (December 2008) for the ministerial exception at the Circuit Court level, before the Supreme Court first addressed this issue in *Hosanna-Tabor*.

<sup>4</sup> Please see Law Review 67 (March-April 2003) for a detailed discussion of the USERRA enforcement mechanism with respect to federal employees and federal agencies as employers.

**Q: Because part of my job involves putting on divine services for the inmates and staff on Sundays, I have an unusual civilian work schedule. I work from 11 am to 9 pm on Thursdays through Sundays—a 40-hour week. One weekend each month, my ANG drill is all day Friday, all day Saturday, and all day Sunday.**

The warden reluctantly gives me time off on Friday, Saturday, and Sunday for my drill weekend. We have had a continuing argument about Thursday. My ANG drill site is a seven-hour drive from the prison where I work. If I work until 10 pm Thursday evening at the prison and then drive to my drill site, I arrive there at about 5 am Friday morning. This gives me time for only a brief nap before I must be at work at the ANG base at 7:30 am on Friday. This means that I am ineffective (not to mention miserable) at my ANG assignment all day on Friday.

**I want to clock out and leave the prison at 2 pm on Thursday, so that I can drive to the ANG base and arrive by 9 pm and have a reasonable night of rest before I report to my ANG assignment at 7:30 am on Friday. Does USERRA give me the right to do this?**

**A: Yes.**

USERRA, and particularly the Department of Labor (DOL) USERRA regulations, strongly support your right to miss the Thursday shift or to leave early from that shift in order to travel to your drill weekend and be able to report for duty Friday morning “fit for duty.”

The DOL USERRA regulations address this issue head-on: **“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 services 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 work shift is necessitated so that the employee can report for uniformed service fit for duty.” 20 C.F.R. 1002.74 (bold question in original).

Section 4331 of USERRA (38 U.S.C. 4331) gives DOL the authority to promulgate USERRA regulations. DOL published proposed USERRA regulations in the *Federal Register* in September 2004, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002.

I am not sure that USERRA supports your right to clock out at 2 pm on Thursday, during your shift. If the warden were to insist that you work the full shift once you clock in, he is probably within his rights to so insist. It may be that you need to miss the entire shift on Thursday. It is probably a lot easier for the employer to find a replacement for an entire shift than for part of a shift.

**Q: If I ask the warden for all of Thursday off and he says no, what happens then?**

**A:** As I explained in Law Review 1281 and other articles, you have the right to reemployment under USERRA, after a period of voluntary or involuntary service in the uniformed services, if you meet five conditions:

- a. You must have left a position of employment for the purpose of performing service in the uniformed services. USERRA’s definition of “service in the uniformed services” expressly includes inactive duty training (drills). See 38 U.S.C. 4303(13).
- b. You must have given the employer prior oral or written *notice*. See 38 U.S.C. 4312(a)(1).

- c. You must not have exceeded the cumulative five-year limit on the duration of the period or period of uniformed service, relating to the employer relationship for which you seek reemployment. Inactive duty training does not count toward your five-year limit. See 38 U.S.C. 4312(c)(3).
- d. You must have been released from the period of service without having received a disqualifying bad discharge enumerated in 38 U.S.C. 4304.
- e. You must be timely in reporting back to work or in applying for reemployment, after release from the period of service.

After a period of service of less than 31 days (like these Thursday through Sunday inactive duty training periods), you are required to report back to work “not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of service to the person’s residence.” 38 U.S.C. 4312(e)(1)(A)(i).

After you complete your drill weekend late Sunday afternoon and then drive home, you must report back to work at the usual time Thursday morning at 11 am, because your normal work week is Thursday through Sunday.

When you meet these five conditions by reporting back to work at 11 am on Thursday morning, after your drill weekend, you are entitled to reemployment as a matter of federal law. If the BOP denies you reemployment or otherwise violates USERRA, you can enforce your rights by bringing an action against the BOP in the Merit Systems Protection Board (MSPB).

Under section 4312(a)(1) of USERRA, you are required to give *notice* to the civilian employer. You do not need the employer’s permission, and the employer does not get a veto. The DOL USERRA regulations provide:

**“1002.87 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.”  
20 C.F.R. 1002.87 (bold question in original).

**Q: The warden insists that whenever I will be away from work for a drill weekend it is my responsibility to obtain a replacement—another BOP chaplain—to fill in for me. Is that correct?**

**A:** No. I invite your attention to Law Review 1180 (October 2011).

If it is feasible for you to find and arrange for a replacement, by trading work days with another BOP chaplain, that may be to your advantage financially, and it will also help you to get along with the warden and minimize your friction with him concerning your ANG duty. Remember that USERRA does not require the employer to pay you for a shift that you do not work, because of your uniformed service. By trading shifts with other BOP chaplains to cover the shifts that you miss, because of your drill weekends, you can maximize your civilian earnings.

**Q: I understand that I am entitled to 15 days of paid military leave, as a federal employee. Is that correct? How does that relate to USERRA?**

**A:** Yes. Under section 6323 of title 5 of the United States Code, you receive such paid military leave. Here is the pertinent subsection:

“Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502–505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.” 5 U.S.C. 6323(a)(1).

You can use this paid military leave for inactive duty training, on Friday through Sunday, but you cannot use it for the Thursday travel time, to get to your ANG drill site. Under USERRA, you have the right to time off without pay for the Thursday travel time and also for the inactive duty training on Friday, Saturday, and Sunday. If you have a

drill weekend each month, you will quickly burn through the 15 days of paid military leave, even without regard to the Thursday travel time.

Under section 4302(a) of USERRA [38 U.S.C. 4302(a)], USERRA does not supersede or override another federal law that provides *greater or additional rights*, like the right to paid military leave. USERRA applies to all employers—federal, state, local, and private sector. Section 6323 only applies to federal agencies.

**Q: An ANG judge advocate told me that it is unlawful for a federal agency (like BOP) to charge me for paid military leave for Saturdays and Sundays. Is that correct?**

**A:** No, not in your unusual situation, where Saturdays and Sundays are part of your normal Thursday-Sunday work week.

The judge advocate was referring to *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003).<sup>5</sup> In that case, the Federal Circuit held that it is unlawful for a federal agency to charge a federal employee paid military leave for a day *when the employee would not have worked anyway*, like a weekend. But in your situation you do routinely work on weekends, so charging you paid military leave for those days is not unlawful.

**Q: I have a massive student loan debt and other pressing financial responsibilities. I am trying to maximize my earnings, in order to pay off these debts. How do I arrange my drill weekends and civilian work hours in order to maximize my income?**

**A:** After you have exhausted your paid military leave under 5 U.S.C. 6323, you have the right, under section 4316(d) of USERRA [38 U.S.C. 4316(d)] to use and be paid for any vacation, annual leave, or other similar leave with pay during your period of uniformed service, including inactive duty training and travel days for inactive duty training. Of course, you cannot have your cake and eat it too. If you exhaust all your annual leave for your drill weekends, you will not be able to take time off from work, with pay, for any other purpose.

If you choose not to use your annual leave in this way, or if you have exhausted your annual leave, you have the right, under USERRA, to time off without pay. USERRA does not give you the right to go in the hole on annual leave to cover your uniformed service.

**Q: In addition to annual leave, I also earn four hours of sick leave per pay period, from BOP. I am very healthy, and I have never missed a day of work because of illness. Am I entitled to use this sick leave for my drill weekends?**

**A:** No. See 20 C.F.R. 1002.153.

**Q: I have proposed to the warden that my work week be rearranged from Thursday through Sunday to Sunday through Wednesday. If this change were made, it would minimize my conflicts with the warden about my drill weekends and it would also enable me to maximize my earnings. Under this revised schedule, I would only miss the Sunday workday during the one weekend per month that I perform inactive duty training, instead of four days, including the Thursday travel day. Does USERRA require the warden to accommodate my request for this revised schedule?**

**A:** No. I invite your attention to *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).<sup>6</sup> The Supreme Court held that civilian employer is not required to rearrange an employee's work schedule in order to minimize the conflict between RC service and civilian employment and to enable the RC member to maximize his or her earnings. As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. VRRRA case law is still valid, except insofar as something in the text of USERRA overrules it. I believe that *Monroe* is still good law. There is no legal requirement that the warden accommodate your rescheduling request. Of course, this does not mean that the warden can veto an absence from work necessitated by your uniformed service.

Of course, the warden good grant your request if he chose to do so, and it may be that granting the request makes a lot of sense for you and prison management. I suggest that you contact Employer Support of the Guard and

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<sup>5</sup> This citation means that you can find the *Butterbaugh* case in Volume 336 of *Federal Reporter Third Series*, starting on page 1332. This is a decision of the United States Court of Appeals for the Federal Circuit. The Federal Circuit is a specialized federal appellate court here in our nation's capital. It has nationwide jurisdiction over certain kinds of appeals, including appeals from final MSPB decisions.

<sup>6</sup> I discuss this important Supreme Court decision in detail in Law Review 923 (June 2009).

Reserve (ESGR)<sup>7</sup> at 800-336-4590. It is possible that an ESGR volunteer can help you and the warden to set aside your squabbling and find a win-win solution. Good luck.

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<sup>7</sup> ESGR is a DOD organization that was founded in 1972. Its mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve.