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Is it Lawful for the Employer to Make me Use Vacation Days for my Military Training and Service?

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

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Q: First, I would like to thank you for your work with the Service Members Law Center (SMLC). You seem to be making things better for all of us.

I am a life member of ROA, and I recently retired as a Captain in the Navy Reserve. I work for the State of North Dakota. For many years, I have read your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) with great interest, and I have used the articles in dealing with my state agency employer concerning my right to absent myself occasionally from my civilian job, for Navy Reserve training and duty.

I am now retired from the Navy Reserve, but several of my colleagues at this state agency are still active in the Army Reserve, the Army National Guard, and the Air National Guard. These colleagues frequently come to me with questions about their rights, as Reserve or National Guard members, with respect to the state agency as their civilian employer, and I refer them to your articles.

I have a colleague (let’s call him Joe Smith) who is a noncommissioned officer (NCO) in the North Dakota Army National Guard.³ His state job frequently requires him to work on weekends, and several times each year there is a conflict between his National Guard drill

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1,300 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

² Captain Wright is the Director of ROA’s Service Members Law Center (SMLC). He can be reached at (800) 809-9448, ext. 730. His e-mail is SWright@roa.org.

³ In August 2013, ROA members amended the ROA Constitution and made NCOs eligible for full membership in ROA, and yes National Guard officers and NCOs are eligible for ROA membership.

weekend and his civilian job. Joe’s supervisor has told him that when he misses work at his state job on a Saturday and/or a Sunday, because of his National Guard training, the absence will be charged against his annual leave balance. This is a problem for Joe, because he really wants to take his children on vacation each summer, and it is likely that his National Guard drill weekends and annual training will use up all of his annual leave balance. Is it lawful for the civilian employer to charge his annual leave balance for his National Guard service days?

A: No. It is unlawful for any civilian employer to require an employee to use vacation or annual leave for days when the employee will be away from work for military training or service. But it should be noted that USERRA does not require the civilian employer to pay the individual for an hour, day, week, month, or year that the individual is away from work for military duty or training. If Joe wants to keep his civilian pay coming while he is away from work for National Guard duty, he may need to utilize his annual leave.

USERRA provides as follows concerning the use of annual leave or vacation during a period of uniformed service: “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 leave, 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.” 38 U.S.C. 4316(d) (emphasis supplied).⁴

It is clear that Joe has the right to use his annual leave (assuming of course that he has a positive balance of annual leave) to cover a drill weekend, an annual training period, or another period of uniformed service. It would be unlawful for the employer to make Joe use his annual leave in this way. Under USERRA, Joe has the right to time off from his civilian job (without pay) for uniformed service, including drill weekends, annual training periods, funeral honors duty, and voluntary or involuntary active duty periods.

As I have explained in detail in Law Review 1281 and other articles, Joe (or any service member) has the right to reemployment under USERRA if he meets five simple conditions:

- a. Left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.⁵
- b. Gave the employer prior oral or written *notice*.⁶ Joe does not need the employer’s permission, and the employer does not get a veto.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment.⁷ As is explained in Law Review 201 and other articles, there are

⁴ The citation means that you can find this language in subsection (d) of section 4316 of title 38 of the United States Code. USERRA is codified at sections 4301-4335 of title 38.

⁵ 38 U.S.C. 4312(a).

⁶ 38 U.S.C. 4312(a)(1).

⁷ 38 U.S.C. 4312(c).

nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit. Joe's weekend drills and annual training periods do not count toward exhausting his five-year limit.⁸

- d. Has been released from the period of service without having received a disqualifying bad discharge from the military.⁹
- e. Has been timely in reporting back to work or applying for reemployment, after release from the period of service.¹⁰

If Joe meets these five conditions, the employer (State of North Dakota) has the legal obligation (under USERRA) to reinstate him promptly¹¹ in the position of employment that he *would have attained* if he had been continuously employed in the civilian job¹² or another position (for which Joe is qualified) that is of like seniority, status, and pay.¹³ Upon reemployment, Joe is entitled to be treated, for seniority and pension purposes, *as if he had been continuously employed* in the civilian job for the entire time that he was away from the job for uniformed service.¹⁴

Q: Is it true that state law gives Joe the right to 20 days of *paid* military leave per year?

A: Yes. Like 44 other states, North Dakota gives employees of the state and its political subdivisions¹⁵ a limited period of *paid* military leave.¹⁶ North Dakota law provides as follows concerning paid military leave for employees of the state and its political subdivisions:

"All officers and employees of this state or of a political subdivision thereof who:

"1. Are members of the national guard;

"2. Are members of the armed forces reserve of the United States of America;

⁸ 38 U.S.C. 4312(c)(3).

⁹ 38 U.S.C. 4304.

¹⁰ After a period of service of less than 31 days (like a drill weekend or a traditional annual training tour), Joe must report back to his civilian job at his first regularly scheduled work period on the first day following release from the period of service, the time reasonably required for safe transportation from the place of service to Joe's residence, and eight hours (for rest). After a period of 31-180 days, Joe has 14 days to apply for reemployment. After a period of service of 181 days or more, Joe has 90 days to apply for reemployment. 38 U.S.C. 4312(e).

¹¹ After a short period of service, like a drill weekend or a two-week annual training period, Joe must be reinstated immediately upon his reporting back to work. After a longer period of service, Joe must be reinstated within two weeks after his application for reemployment. See 20 C.F.R. 1002.181.

¹² The position that Joe would have attained will usually be the position that he left, but it could be a better position, a worse position, or no position at all, depending upon what would have happened. In determining what would have happened, we need to look to what happened to Joe's colleagues with similar seniority and in the same kinds of positions.

¹³ 38 U.S.C. 4313(a).

¹⁴ 38 U.S.C. 4316(a), 4318.

¹⁵ Political subdivisions are counties, cities, school districts, and other units of local government.

¹⁶ Please see the "State Leave Laws" section at www.servicemembers-lawcenter.org. You will find an article about each of the 50 states plus the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

"3. Shall be subject to call in the federal service by the president of the United States; or

"4. Shall volunteer for such service,

"when ordered by proper authority to active noncivilian employment, are entitled to a leave of absence from such civil service for the period of such active service without loss of status or efficiency rating. If such persons have been in the continuous employ of the state or political subdivision for ninety days immediately preceding the leave of absence, they shall receive twenty workdays each calendar year without loss of pay. In addition, any leave of absence necessitated by a full or partial mobilization of the reserve and national guard forces of the United States of America, or emergency state active duty, must be without loss of pay for the first thirty days thereof less any other paid leave of absence which may have been granted during the calendar year pursuant to this section. However, if leave is required for weekend, daily, or hourly periods of drill for military training on a day in which a public officer or employee is scheduled to perform the work of the state or of a political subdivision, the officer or employee must be given the option of time off with a concurrent loss of pay for the period missed or must be given an opportunity to reschedule the work period so that the reserve or national guard weekend, daily, or hourly drill or period of training occurs during time off from work without loss of status or efficiency rating."

North Dakota Century Code, section 37-01-25.

Q: What is the relationship between USERRA and state law?

A: Under section 4302 of USERRA, this federal law is a floor and not a ceiling on the rights of the person who leaves a civilian job for uniformed service. Under section 4302(a), USERRA does not supersede or override a state law that provides *greater or additional rights*. Under Section 4302(b), USERRA overrides a state law that purports to limit USERRA rights or that imposes an additional prerequisite upon the exercise of USERRA rights. Here is the text of section 4302:

§ 4302. Relation to other law and plans or agreements

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. 4302.

USERRA does not require the employer to pay the employee for time not worked because of military service. Thus, USERRA does not supersede section 37-01-25. After Joe exhausts his 20 work days of paid military leave under the state law, he has an essentially unlimited right to unpaid military leave under USERRA.

Q: Joe was called to active duty for a year (June 2010 to June 2011), and he spent most of that year in Afghanistan. Did Joe continue accruing North Dakota annual leave during this year of active duty?

A: No. USERRA does not require the employer to permit Joe to continue accruing vacation while he was away from work performing uniformed service.

Congress enacted USERRA in 1994, as a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. In its first case construing the VRR law, 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." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). Section 4316(a) of USERRA, 38 U.S.C. 4316(a), codifies the escalator principle.

In the half century plus since the Supreme Court enunciated the escalator principle, there have been hundreds of published court decisions about what it means, including at least six Supreme Court decisions. The escalator principle applies to "perquisites of seniority." A two-part test determines what is, and what is not, a perquisite of seniority that the returning veteran can claim under this principle. First, a perquisite of seniority must be something that was intended to be a reward for length of service, rather than a form of short-term compensation for services. Second, a perquisite of seniority is something that with reasonable certainty the service member would have received if he or she had remained continuously employed. It need not be an absolute certainty, but it must be more than a mere possibility.

The Supreme Court has held that vacation days fail under part one of this test. See *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). The employer is simply not required to give Joe the vacation days that he would have earned if he had been continuously employed. Those vacation days are not a perquisite of seniority.

Q: What about the rate at which Joe earns vacation? In North Dakota state employment, an employee with more than three years of state seniority earns six hours of annual leave per pay period, rather than four hours. Joe would have gone over the three-year seniority threshold in January 2011, if he had not been on active duty at the time. Was Joe entitled to start earning annual leave at the higher rate immediately upon his reemployment?

A: Yes. The rate at which Joe earns annual leave is clearly a reward for length of service and a

perquisite of seniority. When he returned to work in July 2011, he should have started immediately earning annual leave at the new, higher rate.

Q: In addition to his weekend drills, annual training, and voluntary or involuntary federal active duty, Joe and his North Dakota Army National Guard colleagues are also occasionally called to state active duty by the Governor of North Dakota, for state emergencies like fires, floods, tornadoes, etc. Does USERRA protect Joe's right to reinstatement in his civilian job after a period of state active duty?

A: No. USERRA does not cover state active duty, but North Dakota and every other state has a state law that protects National Guard members on state active duty. I invite the reader's attention to the "National Guard" articles in the "State Leave Laws" section at www.servicemembers-lawcenter.org.