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Paid and Unpaid Military Leave for Reserve Component Members in Vermont

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The federal law

A federal statute called the Uniformed Services Employment and Reemployment Rights Act (USERRA)³ protects the civilian jobs of those who leave civilian employment for voluntary or involuntary service in the uniformed services. As I have explained in Law Review 15116 (December 2015), a person must meet five simple conditions to have the right to reemployment under USERRA:

¹ Please see <http://www.roa.org/lawcenter>. You will find more than 1500 “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. I am the author of more than 1300 of the articles.

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³ As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA (Public Law 103-353, 108 Stat. 3153) and President Bill Clinton signed it into law on 10-13-1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (Public Law 76-783, 54 Stat. 885), the law that led to the drafting of more than ten million young men (including my late father) for World War II. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35).

- a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service with respect to the employer relationship for which the person seeks reemployment.⁴
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.⁵
- e. Must have made a timely application for reemployment after release from the period of service.⁶

A person who meets these five conditions is entitled to prompt reemployment in the position that he or she would have attained if continuously employed or another position, for which he or she is qualified, that is of like seniority, status, and pay.⁷ Upon reemployment, the person is entitled to the seniority and pension credit that he or she would have received if continuously employed.⁸

USERRA does not require the civilian employer to pay the person for time not worked because of service, but the person has federal legal protection for these absences from work. It is unlawful for an employer to deny a person initial employment, retention in employment, promotion, or a benefit of employment on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.⁹ USERRA applies to almost all employers in this country.¹⁰

⁴ As is explained in Law Review 16043 (May 2016) and other articles, there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit with respect to that employer.

⁵ Under section 4304 of USERRA, 38 U.S.C. 4304, a disqualifying bad discharge includes a punitive discharge (bad conduct discharge, dishonorable discharge, or dismissal) awarded by court martial as part of the sentence for a serious criminal offense. Section 4304 also disqualifies those persons who received other-than-honorable administrative discharges and those who were "dropped from the rolls" of the service.

⁶ After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁷ 38 U.S.C. 4313(a)(2)(A).

⁸ 38 U.S.C. 4316(a), 4318.

⁹ 38 U.S.C. 4311(a).

¹⁰ Only religious institutions, Native American tribes, and foreign embassies and consulates and international organizations (United Nations, World Bank) are exempt from USERRA enforcement.

USERRA applies to persons who leave jobs for service in the Active Component (AC) of the armed forces,¹¹ as well as the Reserve Components (RC). In recent years, and especially since the terrorist attacks of September 11, 2001, USERRA has most commonly been applied to persons who serve in the RC of the armed forces.¹²

Our nation has seven Reserve Components. In order of size (smallest first) they are the Coast Guard Reserve (USCGR), the Marine Corps Reserve (USMCR), the Navy Reserve (USNR), the Air Force Reserve (USAFR), the Air National Guard (ANG), the Army Reserve (USAR), and the Army National Guard (ARNG). The ARNG and ANG are hybrid federal-state entities, while the other five components are purely federal.

The National Guard

Today's National Guard traces its origin to 1636, when the Massachusetts Bay Colony established the Massachusetts Militia to protect the colony from the Pequot Indians. Other colonies and later states established militia forces, and the state militias were called into federal service when needed for the American Revolution, the War of 1812, the Mexican-American War, the Civil War, and the Spanish-American War. These state militias were also available to the governors for state emergencies.

Early in the 20th Century, Congress established the ARNG as a hybrid federal-state entity. The Federal Government provides most of the funding for equipping, recruiting, training, and paying ARNG members, and they are subject to federal call-up as needed. They engage in periodic and special training (paid for by the Federal Government) to maintain their readiness for federal call-up. They are also available, in their traditional "state militia" role, to be called by the Governor for state active duty for hurricanes, tornadoes, floods, fires, blizzards, riots, and other state emergencies. In 1947, when the Air Force became a separate military service, Congress created the ANG as a similar hybrid federal-state organization.

Relationship between USERRA and state laws

USERRA protects the civilian jobs of ARNG and ANG members when they are away from those jobs for voluntary or involuntary training or service under title 10 or title 32 of the United States Code. USERRA does not apply to state active duty (called by the Governor, under state authority, paid with state funds, for state emergencies). If ARNG and ANG members are to have the right to reinstatement in their civilian jobs after state active duty, it must be by state law.

¹¹ Please see Law Review 0719 (May 2007).

¹² Almost one million RC members have been called to the colors since 9/11/2001.

Under section 4302 of USERRA,¹³ this federal law is a floor and not a ceiling on the rights of veterans and RC members, including members of the ARNG and ANG. Under section 4302(a), USERRA does not supersede or override a state law that provides *greater or additional rights*. Under section 4302(b), USERRA supersedes state laws that purport to limit USERRA rights or that impose additional prerequisites upon the exercise of USERRA rights.¹⁴

USERRA is a broad and strong law, but there is room for state laws in two ways:

- a. State laws can give RC members *greater or additional rights*. For example, more than 45 states grant limited periods of *paid* military leave to employees of the state and its political subdivisions.¹⁵
- b. State laws are needed to protect the civilian jobs of ARNG and ANG members on state active duty.

Vermont law

Vermont law provides as follows concerning the right of RC members in Vermont to paid or unpaid military leave from their civilian jobs:

Any duly qualified member of the Reserve Components of the U.S. Armed Forces, of the Ready Reserve, or an organized unit of the Vermont National Guard *or the National Guard of another state* shall upon request be entitled to leaves of absence *for a total of 15 days in any calendar year* for the purpose of engaging in military drill, training, or other temporary duty under military authority. *A leave of absence shall be with or without pay as determined by the employer.* Upon completion of the military drill, training, or other temporary duty under military authority, a *permanent* employee shall be reinstated in that position with the same status, pay, and seniority, including seniority that accrued during the period of service.¹⁶

In several important respects, this Vermont law is void under section 4302(b) of USERRA, in that it purports to limit the rights granted by USERRA. The right to time off (without pay but job-protected) under USERRA *is not limited to 15 days per calendar year*. The idea that National Guard or Reserve service is limited to “one weekend per month and two weeks in the summer” is a relic of the 37-year period between July 1953 (the end of the Korean War) and August 1990 (when Iraq invaded Kuwait and President George H.W. Bush called up RC units as part of his

¹³ 38 U.S.C. 4302.

¹⁴ Under Article VI, Clause 2 of the United States Constitution (called the “Supremacy Clause”), a federal statute like USERRA overrides conflicting state statutes and state constitutions.

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

¹⁶ Vermont Statutes Annotated, Title 21, Section 491(a) (emphasis supplied).

forceful response).¹⁷ In the last 26 years, and especially in the 15 years since the 9/11 terrorist attacks, the “strategic reserve” (available only for World War III, which thankfully never happened) has been transformed into the “operational reserve” (routinely called upon for intermediate military operations like Iraq and Afghanistan).

Because of the increasing reliance on RC members and units, “drill” periods are no longer limited to weekends and may be more than once per month, and annual training tours can be far longer than two weeks. All of this training is protected by USERRA.¹⁸ USERRA also protects the civilian jobs of RC members (including ARNG and ANG members) when they are called to federal active duty or when they volunteer for federal active duty.

Section 491(a) is also void because it purports to limit the right to reinstatement after military service to a *permanent* employee. To have the right to reemployment under USERRA, an employee need not be “permanent” or even “other than temporary.”¹⁹

More than 45 states give employees of the state and its political subdivisions the right to a limited period (typically 15 days) of *paid* military leave.²⁰ Such a state law is not superseded by USERRA because it grants the RC member *greater or additional rights*.

Vermont does not require state agencies and political subdivisions to grant *paid* military leave. Section 491(a) provides: “A leave of absence shall be with or without pay as determined by the employer.”

Section 491(a) is essentially irrelevant. RC members who have civilian jobs in Vermont do not need a state law to grant them the right to *unpaid* military leave—they have that right under USERRA. A Vermont employer does not need the permission of the state legislature to go above and beyond USERRA and grant paid military leave.²¹

Continued civilian health insurance coverage while on state active duty

¹⁷ Please see Law Review 13099 (July 2013). The title of that article is “This Is Not your Father’s National Guard.”

¹⁸ See 38 U.S.C. 4312(h).

¹⁹ There is an affirmative defense for which the employer bears the burden of proof. The employer is excused from the obligation to reemploy the individual if the employer proves that “the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant time.” 38 U.S.C. 4312(d)(1)(C).

²⁰ At our website (<http://www.roa.org/lawcenter>), at the “State Leave Laws” section, we have an article for each state about these laws, as well as an article about the state law that protects ARNG and ANG members on state active duty.

²¹ See 38 U.S.C. 4302(a).

The Vermont Legislature has made a generous provision for continued civilian health insurance coverage (through civilian employers) for National Guard members who are called to state active duty. In 2016, the Legislature amended this provision to include members of National Guard units of other states who have civilian jobs in Vermont. Here is the pertinent subsection of Vermont law:

(1) If any member of the Vermont National Guard with civilian employer-sponsored [health] insurance coverage is ordered to State active duty for up to 30 days, *or if any member of the National Guard of another state who is a Vermont employee with civilian employer-sponsored insurance is ordered to state active duty by the governor of that state* for up to 30 days, the service member may, at the member's option, continue his or her civilian health insurance under the same terms and conditions as were in effect for the month preceding the member's call to State active duty, including a continuation of the same levels of employer and employee contributions toward premiums and cost-sharing.

(2) If a member of the Vermont National Guard is called to State active duty for more than 30 days, *or if a member of the National Guard of another state who is a Vermont employee is called to State active duty for more than 30 days*, the member may continue his or her civilian health insurance. For a member whose employer chooses not to continue regular contributions toward premiums and cost-sharing during the period of the member's State active duty in excess of 30 days, the State of Vermont shall be responsible for paying the employer's share of the premium and cost-sharing.²²

Providing civilian health insurance coverage for National Guard members on state active duty is important because those members are eligible to participate in the military medical system (TRICARE) for themselves and their families *only when they are on federal active duty*. This is the one significant area where Vermont law provides a benefit that is over and above USERRA. As amended in 2016, this provision applies to a member of the National Guard of another state who has a civilian job in Vermont.

Vermont's enforcement provision

In 2016, the Vermont Legislature significantly strengthened the Vermont provision for enforcement of these rights. The revised enforcement section is as follows:

If any employer fails to comply with the provisions of this subchapter, the employee may bring an action in the Civil Division of the Superior Court seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of

²² Vermont Statutes Annotated, Title 21, Section 492(c) (emphasis supplied).

wages or other benefits, reinstatement, costs, reasonable attorney's fees, and other appropriate relief.²³

Vermont now has a strong enforcement mechanism with respect to private employers in Vermont. It is unclear whether this enforcement mechanism applies to the State of Vermont and its political subdivisions.

To understand the interplay of USERRA and the Vermont law, let us discuss two hypothetical but realistic scenarios:

State active duty scenario

Len & Larry's Ice Cream Company is a major employer in eastern Vermont. Among its several hundred employees, there are two National Guard members. Ethan Allen is a Sergeant in the Vermont Army National Guard and Daniel Webster is a Sergeant in the New Hampshire Army National Guard. During the Memorial Day weekend in 2017, a careless camper inadvertently sets off a forest fire that soon becomes a major conflagration in eastern Vermont and spreads to western New Hampshire. Both the Governor of Vermont and the Governor of New Hampshire call up National Guard units to fight the fire, and the firefighting effort continues all summer, until the fire is finally brought under control just before Labor Day. Allen and Webster are both called to state active duty for three months.

Len & Larry's has a generous health insurance program for its employees and their families. The company pays 90% of the cost and the individual employee pays the other 10%. Under section 492(c), Ben & Larry's is required to continue the health insurance coverage for both Allen and Webster. For the first 30 days of their state active duty, the company must continue paying 90% of the premium cost. After the state active duty period extends beyond 30 days, the State of Vermont picks up this cost.

The fire is finally brought under control on August 31, 2017, and both Allen and Webster are released from state active duty. Is Len & Larry's required to reinstate them in their civilian jobs? The Vermont law is vague on this point. I suggest that the Legislature amend the law to make the reinstatement right explicit.

The federal active duty scenario

Melissa Morris is a Third Class Petty Officer (E-4) in the Coast Guard Reserve. She lives in Burlington, Vermont and works as a teacher for the local school district. In December 2016 there is a major new explosion and oil spill at an offshore oil platform in the Gulf of Mexico. The

²³ Vermont Statutes Annotated, Title 21, Section 493(a).

Coast Guard calls Morris to active duty for four months to help deal with the investigation and the environmental remediation.

Under USERRA, Morris is entitled to unpaid but job-protected military leave for this call-up period. At the end of the period of active duty, the school district is required to reemploy her promptly, for the remainder of the 2016-17 school year, and Morris is entitled to be treated, for seniority and pension purposes in the civilian job, as if she had been continuously employed by the school district during the active duty period. The 15-day limit imposed by section 491(a) is void as in conflict with the federal law (USERRA).

While on federal active duty, Morris is entitled to utilize the federal military health care system (TRICARE) for herself, her husband, and her two small children. The school district is not required to continue funding her health insurance coverage during her active duty, but when she completes the active duty and returns to work she is entitled to immediate reinstatement of the civilian health insurance coverage with no waiting period and no exclusion of pre-existing conditions.²⁴

The result would be the same if she had volunteered for this active duty period, or if she had been a member of the Army Reserve or another Reserve Component, instead of the Coast Guard Reserve. Moreover, the result would be the same if she were employed by a private employer rather than a political subdivision of the State of Vermont.

²⁴ 38 U.S.C. 4317.