

USERRA Coverage for National Guard Members Assisting in Border Control Efforts

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Q: President Bush proposes to call about 6,000 National Guard members to active duty to support the efforts of the Border Patrol on our nation's southern border. Will those National Guard members have reemployment rights, in their civilian jobs, under the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: Yes. Please see my Law Review 45. USERRA accords the right to reemployment to anyone who leaves a civilian job to perform voluntary or involuntary "service in the uniformed services." Section 4303(13) of USERRA, 38 U.S.C. 4303(13), defines uniformed services to include "full-time National Guard duty." Title 10, section 101(d)(5) [10 U.S.C. 101(d)(5)] states any duty performed under 32 U.S.C. 316, 502, 504, or 505 qualifies as "full-time National Guard duty." Although such duty is performed "in the member's status as a member of the National Guard of a State or territory" (State status), such duty does give rise to the right to reemployment under USERRA.

It is also possible that these National Guard members will be called under Title 10 (Federal status). In that case, their USERRA coverage would be even clearer.

Q: I know a young man, a member of the National Guard of our State, who has been called to active duty twice since September 11, 2001. On the second call-up, he deployed to Iraq for a year. He also has been away from work for his periodic National Guard training, plus several brief (but no-notice) state call-ups, for an ice storm, a tornado, a flood, etc. His civilian employer is getting "sick and tired" of all this "Army stuff" and has threatened to fire this young man, and never to hire a Reserve Component member ever again. Where do we go from here?

A: As I point out in Law Reviews 30, 203, and 205, USERRA specifically disclaims any "balancing test" or "rule of reason." If this young man meets the USERRA eligibility criteria as to prior notice,

release from service under honorable conditions, and timely application for reemployment, he has the legal right to reemployment, enforceable in federal court, despite the perhaps severe burden that this may impose upon the civilian employer.

Of course, I also share your concern about the burden that we as a nation are placing on the employer-employee relationships of our citizen warriors, and on employers generally. President Bush emphasized the limited scope and duration of his "National Guard on the border" initiative. The program will last about two years, during which time our nation will recruit, hire, and train about 6,000 new professional Border Patrol officers.

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