LAW REVIEW 748

(September 2007)
CATEGORY: USERRA MISCELLANEOUS
Federal Law and New York Law Governing Non-Federal Public Employees in New York and Military Service

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

Note: This is a speech CAPT Wright delivered on July 23, 2007, to attorneys and human relations managers for the state of New York and its political subdivisions (counties, cities, school districts, etc.). This article covers in detail the laws that New York has enacted for employees of the state and its political subdivisions relating to military service.

Since 1940 federal law has provided the right to reemployment after military service. The right to reemployment was originally enacted as part of the Selective Training and Service Act (STSA), our nation's first "peacetime" conscription statute. World War II had already begun in Europe in September 1939, but the United States was not unambiguously involved until Dec. 7, 1941, the original "date which shall live in infamy."

Tens of thousands of young men, including my late father, were drafted under the authority of the STSA, but that law had a one-year sunset clause. The authority for conscription was scheduled to expire in September 1941 unless extended by Congress. The legislation to extend the draft passed the House in late September 1941 by just one vote. If one Representative had voted the other way, our nation would have found itself even more woefully unprepared for the Pearl Harbor attack just nine weeks later.

In September 1941, with war clouds darkening, Congress enacted the Service Extension Act, extending indefinitely the authority to draft young men into military service. That 1941 act also amended the reemployment chapter to accord the right to reemployment to voluntary enlistees as well as draftees. Thus, almost from the very beginning, this law has applied to voluntary as well as involuntary service, but even today, almost seven decades later, a misconception persists that the right to reemployment is limited to those called to serve involuntarily.

The reemployment statute had many different names over the decades, but it came to be known colloquially as the Veterans' Reemployment Rights (VRR) law. The law was located in Title 50 of the U.S. Code as part of the Selective Service law until 1974, when Congress significantly amended the law and moved it to Chapter 43 of Title 38, where it remains to this day. The biggest substantive amendment made by the 1974 law (the Vietnam Era Veterans Readjustment Assistance Act) was to make the reemployment statute apply to state and local governments for the first time. The law has applied to the federal government and to private employers since 1940.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4334, a long-overdue rewrite of the VRR law. USERRA brought about some significant improvements in the reemployment statute, but it is not a new law. You should think of USERRA as 67 years old, not 13.
I worked as an attorney for the U.S. Department of Labor (DOL) for a decade. Together with one other DOL attorney, Susan M. Webman, I largely drafted the interagency task force work product that became USERRA when Congress enacted it, with only a few changes, in 1994. I have been speaking and writing about the reemployment statute in the context of readiness and retention in the National Guard and Reserve for a quarter century. In April 2007, I retired from the Navy Reserve as a captain in the Judge Advocate General's Corps—I had more than 37 years total Active and Reserve service.

In 1997 I initiated the "Law Review" column in The Officer, the monthly magazine of the Reserve Officers Association (ROA). You can find all the back issues (almost 300 so far) on ROA's website, www.roa.org/law_reviews.

Under Article VI, Clause 2 of the U.S. Constitution, commonly known as the "Supremacy Clause," a federal law like USERRA overrides a state law or local ordinance. The Supremacy Clause reads as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."
Early in our nation's history, the Supreme Court decided that the Supremacy Clause means exactly what it says and that federal law trumps conflicting state law. Gibbons v. Ogden, 22 U.S. 1 (1824). The dispute leading up to this seminal Supreme Court case arose just a few miles from where I am speaking to you today.

When steam power was in its infancy, the New York legislature granted Robert Livingston and Robert Fulton an exclusive 30-year license to operate boats powered by fire or steam in the waters of New York, and they assigned their rights to Aaron Ogden. In the meantime, Thomas Gibbons obtained a federal license to operate vessels in the "coastwise trade" under a federal statute enacted in 1793. Under authority of his federal license, Gibbons operated a steamboat service from Elizabethtown, N.J., to New York City.

Mr. Ogden sued Mr. Gibbons in New York court and obtained an injunction against Mr. Gibbons' steamboat operation. The New York Court for the Trial of Impeachments and the Correction of Errors, then the state's highest court, upheld the injunction. Mr. Gibbons appealed to the U.S. Supreme Court and prevailed. Under the Supremacy Clause, the 1793 Federal statute trumped New York's exclusive license to Mr. Livingston and Mr. Fulton.

Just 37 years later, our nation came to blows over essentially the same argument, concerning the relationship between federal authority and state authority. New York was on the right side, and the prevailing side, of that bloody argument.

Section 4302 of USERRA explains the relationship between USERRA and state laws, local ordinances, collective bargaining agreements, employer policies, etc., as follows:

(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)

The point is that USERRA is a floor and not a ceiling on the rights of employees who leave work for voluntary or involuntary service in the uniformed services, including intermittent training and service in the National Guard or Reserve. State law enacted in Albany, an ordinance enacted by the local governing body, or a collective bargaining agreement with your employees' union can impose greater or additional obligations upon your governmental entity, with respect to persons who are serving or have served in our nation';s uniformed services. None of these things can take away rights that Congress conferred on servicemembers and veterans when it enacted USERRA or the predecessor law.

The seminal Supreme Court case under the reemployment statute is Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946). Writing for the Court, Justice William O. Douglas penned several memorable lines, including, "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the act." The Court also held that the statute should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." And the 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."

In preparation for my presentation here today, I have researched New York law governing the rights of employees of the state and its political subdivisions, relating to military service. Particularly pertinent is the "Military Law"

sections 241-243, McKinney's Consolidated Laws of New York, Annotated. I have found several instances in which complying with New York state law will cause you, as a public employer, to provide benefits that are "above and beyond" USERRA. In accordance with section 4302(a) of USERRA, these provisions conferring greater or additional rights are not superseded by USERRA. I have also found some ways in which New York state law purports to limit USERRA rights and is invalid under the Supremacy Clause of the U.S. Constitution. I will start with the good news.

New York Provisions That Go Above and Beyond USERRA and are not Preempted; Coverage of State As Well As Federal Military Service

First, New York law applies to "military" service to the State as well as the United States. I invite your attention to section 241(1)(b). USERRA, on the other hand, only applies to federal military training or service. I invite your attention to my Law Review 45 and Law Review 206 for an explanation of the distinction.

If you were to join the New York Army National Guard, you would take two enlistment oaths—you are simultaneously joining two overlapping but legally distinct organizations. One organization is the Army National Guard of the United States, one of the seven Reserve Components of the U.S. armed forces (along with the Air National Guard of the United States, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air Force Reserve, and the Coast Guard Reserve). The other organization is the New York Army National Guard, a state organization commanded by the governor and his appointed adjutant general. The "Dick Act" of 1903 provides for this dual status of the National Guard.

As I explain in Law Review 45, National Guard members have rights under USERRA when they perform federal training or service, including "Title 32" duty which is technically performed in a state status but paid for by the federal government. USERRA does not protect National Guard members performing state service for riots, floods, tornadoes, etc. Like almost all states, New York has enacted state laws to fill this gap. Members of the New York Army National Guard and Air National Guard who are employed in New York and who perform state active duty pursuant to a call by the governor are protected by state law, regardless of whether they work for the state of New York, its political subdivisions, or a private employer. Unfortunately, those who are employed by the federal government in New York are not protected—applying state law to federal civilian employees would be inconsistent with the Supremacy Clause.

New York law also protects members of New York military organizations that have no Federal status. I am thinking particularly of the New York Naval Militia (NYNM). I know several folks who have affiliated with the NYNM after retiring from the Navy Reserve. Unlike naval militias in other states that are largely honorary and vestigial, the NYNM is a real organization with real personnel and real missions. In the aftermath of at least two aircraft crashes in the last decade or so, members of the NYNM have performed the unenviable task of recovering human remains from the water.

Limited Period Of Paid Military Leave for New York Public Employees

Section 242(5) of New York's "Military Law" provides, "Every public officer or employee shall be paid his salary or other compensation as such public officer or employee for any and all periods of absence while engaged in the performance of ordered military duty and while going to and returning from such duty, not exceeding a total of 30 days or 22 working days, whichever is greater, in any one calendar year and not exceeding 30 days or 22 working days, whichever is greater, in any one continuous period of such absence."

This is an example of a greater or additional right that is conferred by state law and is not superseded by USERRA, which does not require an employer to pay an employee for time not worked because of military training or service. After the public employee has exhausted his or her right to paid military leave, under the state law, the employee then has the option but not the obligation to exhaust part or all of the remaining balance (if any) of vacation or annual leave, in order to continue the civilian pay for a time while away from work for military service or training. I invite your attention to section 4316(d) of USERRA, which provides, "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." 38 U.S.C. 4316(d) (emphasis supplied).

Let's take the hypothetical Mary Jones, a New York state police officer and a member of the Coast Guard Reserve. She leaves her civilian job for a year of voluntary or involuntary active duty in the Coast Guard—the law applies equally either way. She is on active duty from July 1, 2007, to June 30, 2008.

Let us assume that Mary has not used any of her paid military leave under section 242 during the current fiscal year. For the month of July 2007, Mary receives double pay, from the Coast Guard and from the state of New York, until she has exhausted her paid military leave under the state law. Let us further assume that Mary has 30 days of annual leave in the bank as of the time she enters active duty. Mary can, if she chooses, keep the double pay going for most or all of the month of August by utilizing her annual leave. Section 4316(d) of USERRA gives Mary the right to use her vacation, annual leave, or similar leave with pay during her period of service.
Of course, Mary cannot "have her cake and eat it too." If she chooses to exhaust her accrued annual leave during August 2007 while she is on active duty, she is likely to find that after she returns to work in July or August 2008 she will have to work for many months before she can take off any additional time with pay. It is likely that she will have a zero balance on annual leave when she returns to work, so she will need to build up some annual leave before she can utilize it.

Mary probably does not continue accruing annual leave (vacation) from the state of New York, her civilian employer, while she is away from work for military service. I mentioned the "escalator principle" above, in connection with Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946). Several later Supreme Court cases, and scores of lower court cases, have expanded upon the meaning and application of the escalator principle. Section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies this important principle.

The escalator principle applies to "perquisites of seniority." If a benefit qualifies as a perquisite of seniority, the returning veteran is entitled to claim that benefit upon reemployment, under the escalator principle. If the benefit does not so qualify, the returning veteran is not entitled to that benefit. A two-part test is applied in making this distinction. First, a perquisite of seniority is something that was intended to be a reward for length of service rather than a form a short-term compensation. Second, it must be reasonably certain (not necessarily absolutely certain) that the returning veteran would have attained the benefit if he or she had been continuously employed.
More than a generation ago, the Supreme Court held that vacation days do not qualify as a perquisite of seniority—they fail under the first part of the test. See Foster v. Dravo Corp., 420 U.S. 92 (1975). Accordingly, I say that Mary Jones probably does not continue accruing vacation days or hours of annual leave while she is away from her police officer job performing active duty in the Coast Guard. I invite your attention to Law Reviews 26, 59, 103, 140, 188, and 0720 for a detailed discussion of vacation benefits under USERRA.

I said probably because it is possible that Mary is entitled to continue accruing hours of annual leave while away from work for service, under USERRA's "furlough or leave of absence" clause, which provides as follows: "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." 38 U.S.C. 4316(b)(1).
If other New York state police officers who are on other forms of leaves of absence, paid or unpaid, continue accruing annual leave hours while away from work, then a person like Mary, who is away from work for military leave, is entitled to the same favorable treatment. If the employer has more than one kind of non-military leave, the comparison should be to the employer's most favorable form of leave. See Waltermeyer v. Aluminum Company of America, 804 F.2d 821 (3d Cir. 1986). Of course, the comparison must be to a non-military leave of comparable duration. It is not reasonable to compare a one-week jury leave to a one-year military leave. I discuss USERRA's furlough or leave of absence clause in detail in Law Reviews 41, 58, and 158.

It is also possible that Mary is entitled to continued accrual of vacation or annual leave while away from work for service under New York state law. Of course, the state law is not preempted by USERRA if it grants greater or additional rights.

Section 242(4) of New York's Military Law provides, "Time during which a public officer or employee is absent [from the civilian job] pursuant to the provisions of subdivisions two, three and three-a of this section shall not constitute an interruption of continuous employment and notwithstanding the provisions of any general, special or local law or the provisions of any city charter, no such officer or employee shall be subjected, directly or indirectly, to any loss or diminution of time, service, increment, vacation or holiday privileges, or any right or privilege by reason of continuance in office or employment, reappointment to office, re-employment, reinstatement, transfer or promotion." (Emphasis supplied.)

The meaning of this subsection is ambiguous, as applied to vacation days accrued during a period of absence from work for military service, and McKinney's contains four conflicting annotations on this issue—two suggesting that the employee away from work for service continues accruing vacation, and two suggesting just the opposite.
"A fireman of the city of Oswego, a public employee, who has been called for 14 days of active duty with the New York national guard is entitled to receive his earned vacation time and to take his vacation time in the same manner as every other member of the fire department." 1971, Op. Atty. Gen. (Inf.), Dec. 20.

"A village policeman, who is in the United States military Reserve forces and who is ordered to military duty for two weeks should not suffer directly or indirectly any loss or diminution of his vacation privileges nor be prejudiced in any manner by reason of his two weeks' absence on military duty." 11 Op. State Compt. 649, 1955.

"The provision of former section 245 [now this section] against diminution of vacation or holiday privileges does not mean that a civil employee is considered as saving up and accumulating his vacation and holiday time, during all his military service, for the purpose of claiming it all after his return, for he will be considered as having had normal vacations and holidays by furlough while in military service, to take care of his current rights, but he is protected against diminution of holidays or vacations after his return because of time lost during his absence." Op. Atty. Gen., 1919, 18 St. Dept. Rep. 465.

"Paid city fireman recalled to active service with the U.S. Naval Reserve was not entitled after his return to any more vacation than amount he had earned before absence plus, as matter of administrative discretion, enough to give him what would be a normal vacation if he had worked steadily during the previous year." 10 Op. State Compt. 18, 1954.

Continued Contributions to the Employee$#8217;s Pension Plan While the Employee is Away From Work for Military Service

Under sections 242(6) and 243(4) of the New York Military Law, a public employee who is away from work for military service is permitted to continue making employee contributions, and to continue receiving employer matches, to the employee pension plan while away from work for military service. Under USERRA, the employee is permitted to make the contributions and to receive the matches only after meeting all five of the USERRA eligibility criteria—including having been released from the period of service without having received a punitive or other-than-honorable discharge and without having exceeded the five-year limit, and having made a timely application for reemployment. To the extent that the state law provides a greater or additional right, it is not preempted by USERRA.

Let us assume that Mary Jones was offered the opportunity to continue making employee contributions to her New York state police officer retirement account during the year that she was away from work for Coast Guard active duty. Mary declined the opportunity—maybe she was uncertain as to whether she would want to return to work, or maybe she could not afford to make those contributions on her reduced income while on active duty. USERRA gives her a window of opportunity to make up the missed employee contributions, after returning to work, as follows: "A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section

402(g)(3) of the Internal Revenue Code of 1986 [26 U.S.C. 402(g)(3)]), only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years." 38 U.S.C. 4318(b)(2)(emphasis supplied).

Let us assume that Mary Jones is released from active duty on June 30, 2008, and applies for reemployment on July 15, well within the 90 days permitted by law for her to apply for reemployment. She returns to the payroll of the state police on Aug. 1. She has until Aug. 1, 2011 (three times the period of service) to make up her missed employee contributions to the pension plan.

Right to Preference in Another Position if Your Position is Abolished While You are On Active Duty

Let us assume that while Mary Jones is on active duty her position with the state police is abolished—this is a change that would have happened even if Mary had not been on active duty at the time. Under USERRA, the "escalator" can descend as well as ascend. USERRA does not protect Mary from an adverse change that clearly would have happened anyway. Upon returning from military service in August 2008, Mary is entitled to be placed in the position that she would have been in if she had been continuously employed. This may be a job in another part of the state government or perhaps severance pay, depending upon what would have happened to Mary if she had been there, instead of in Iraq, when the position was abolished.

Under section 243(11) of New York's Military Law, Mary is entitled to preference in hiring in another position if her position is abolished during her military service. To the extent that this provision provides greater or additional rights, it is not superseded by USERRA.

New York Law Provisions that Purport to Limit USERRA Rights and are Preempted by Federal Law; Purporting to Limit the Right to "Military Leave" to Absences for Which the Employer has Granted Permission

Section 243(2)(a) purports to limit the right to "military leave" to periods of absence from work for which the public employer has granted its permission, at least for certain police officers. To the extent that the state of New York is granting a benefit that goes above and beyond USERRA, the state is permitted to put conditions on that right that are different from the USERRA conditions. For example, the state of New York could require employer permission as a condition precedent to the receipt of paid military leave under state law.

Neither the state of New York nor any employer has the authority to put additional conditions (beyond the statutory conditions) upon the right to unpaid leave under USERRA. An employee who expects to be away from work to perform uniformed service, whether for five hours or five years, must give prior oral or written notice to the employer, unless giving such notice is precluded by military necessity or otherwise impossible or unreasonable. See 38 U.S.C. 4312(a)(1), 4312(b). This is a notice requirement and not a permission requirement. Under USERRA, the employee does not need the employer's permission to be absent from work for uniformed service, and the employer has no authority to deny such permission. I invite your attention to Cronin v. Police Department of the City of New York, 675 F. Supp. 847 (S.D.N.Y. 1987).

Purporting to Make it Within the Employer's Discretion to Reemploy or not Reemploy an Employee Who Resigned in Order to Perform Uniformed Service

Section 243(2)(b) of New York's Military Law appears to make it within the public employer's discretion whether to reemploy or not reemploy a person who "resigned" in order to perform uniformed service. Under section 4312(a) of USERRA, the person leaving work for voluntary or involuntary uniformed service is required to give prior notice to the employer—there is no permission requirement, and there is no particular form of words that the notice must contain. "I resign because I am joining the Army" is not the recommended terminology, but it is a sufficient notice

under USERRA. I invite your attention to my Law Review 63.

Purporting to Limit the Rights of Returning Disabled Veterans

I describe the USERRA rights of returning disabled veterans in detail in Law Reviews 121, 136, and 199, and LTC Matthew Gilligan, USAR, describes them even more fully in Law Review 0640. These are valuable rights, and they override conflicting state law.

Let us assume that Mary Jones loses her left arm and left leg when an improvised explosive device explodes in Iraq, where she is serving on Active Duty. She is released from Active Duty under honorable conditions and makes a timely application for reemployment with the New York state police, her civilian employer.

The civilian employer is required to make reasonable efforts to make it possible for Mary to return to her police officer job. If no reasonable accommodation can be made for a person with one arm and one leg to do her former job, the employer is required to reemploy Mary in an alternative position for which she is qualified, or can become qualified with reasonable employer efforts, and that provides like seniority, status, pay, or the closest approximation thereof consistent with the circumstances of Mary's case. Mary's employer is the state of New York, not just the State Police Department.

Section 243(15) of the New York Military Law seems to limit Mary (or any disabled veteran in this circumstance) to another state position that happens to be vacant at that time. Wrong! If the closest approximation position is filled, the state of New York must displace the incumbent in that position in order to accord Mary her rights as a returning disabled veteran.

Moreover, section 243(15) requires the approval of the New York Civil Service Commission to put Mary in an alternative position if she cannot return to her pre-service position because of the service-connected disability. Of course, no state official has the constitutional authority to limit rights conferred by a federal statute.
I hope that this discussion has been useful to you in understanding your obligations as an employer under USERRA and the state law and in understanding the relationship between the New York state law and USERRA.