

LAW REVIEW 836

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CATEGORY: 1.1 USERRA Coverage

USERRA Coverage for National Guard Technicians

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Q: I am an Army National Guard technician. As a condition of employment, I must maintain my membership in one of the Army National Guard units that I support. I perform inactive duty training (weekend drills) and active duty for training (annual training) in my military capacity with my unit. If the unit is mobilized, I will likely be mobilized and deployed with the unit, in my military capacity. Between drill weekends, I work for the National Guard as a civilian employee, although I wear my Army uniform and observe military courtesies (saluting, etc.) while at work.

I want to volunteer to go on active duty and deploy to Iraq, independently of my National Guard unit and my technician job. My supervisor at work told me that I must ask his permission to volunteer to go on active duty, and that he will deny the permission, and that if I volunteer anyway I will be fired from my civilian technician job. I called the Department of Defense organization called the National Committee for Employer Support of the Guard and Reserve (ESGR), and ESGR put me in touch with an ombudsman in my state. That ombudsman told me that National Guard technicians are not covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA) and that nothing can be done for me.

The ESGR ombudsman works at the state headquarters of the National Guard in our state and is apparently paid by and works for the National Guard. I think that this is a conflict of interest, or at least an apparent conflict of interest. Was the ombudsman correct when he told me that National Guard technicians have no rights under USERRA?

A: No, the ombudsman's statement is incorrect. USERRA applies to all employers in the United States except for religious institutions, Indian tribes, foreign embassies, and international organizations (United Nations, World Bank, etc.). A National Guard technician job is a civilian position of employment. If you leave that position to perform voluntary or involuntary service in the uniformed services, you will have the right to reemployment, assuming of course that you meet the USERRA eligibility criteria. As I explained in Law Review 77, you will have the right to reemployment if you meet these five conditions:

- a.** You must have left your position of civilian employment for the purpose of performing voluntary or involuntary service in the uniformed services. This can be anything from a drill weekend to five years of full-time voluntary active duty.
- b.** You must have given the employer prior oral or written notice.
- c.** Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment under USERRA, must not have exceeded five years. *All* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit. See Law Review 201.
- d.** You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
- e.** You must have made a timely application for reemployment with the pre-service employer, after release from the period of service. After a period of service of more than 180 days, you have 90 days to apply for reemployment. Shorter deadlines apply after shorter periods of service.

If you meet these five conditions, the employer has a legal obligation to reemploy you. In this respect, the National Guard, as your civilian employer, is treated exactly like any other civilian employer.

For USERRA purposes, the adjutant general of the state is considered to be the employer of a National Guard

technician employed under 32 U.S.C. 709. See 38 U.S.C. 4303(4)(B). If the adjutant general determines that it is “impossible or unreasonable” to reemploy you in your technician job, the director of the U.S. Office of Personnel Management is required to ensure that you are offered an equivalent position in a federal executive agency. See 38 U.S.C. 4314(d). I invite your attention to Law Reviews 155 and 0763 for a detailed description of how this alternative placement requirement is supposed to work.

When you give your employer (any employer) notice that you will be leaving work for uniformed service, it is entirely possible that your employer will contact the uniformed service of which you are a member and request that your orders to perform uniformed service be canceled. It is not unlawful for the employer to make such a request, but in most cases the uniformed service is unlikely to honor such an employer request. In your case, however, your civilian employer and your military unit are essentially the same. If the adjutant general of your state contacts the Army and requests that your application to perform uniformed service be denied, or that your pending orders be canceled, it is likely that the Army will honor that request.

Section 4311(a) of USERRA is also relevant to this situation: “A person who is a member of, applies to be a member of, performs, has performed, *applies to perform*, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment*, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.” 38 U.S.C. 4311(a) (emphasis supplied).

If your supervisor carries through with his threat to fire you or discipline you for having *applied* to perform a tour of voluntary active duty, that action would constitute a clear violation of section 4311(a). Your application may be denied by the Army, but that denial in no way authorizes your civilian employer to fire you or discipline you for having made the application.