

LAW REVIEW 852

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Federal Government
USERRA Enforcement

Intelligence Not Superior: USERRA applies to Intelligence agencies.

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Q: I work for the National Geospatial-Intelligence Agency (NGA), a federal agency that is considered part of the Intelligence Community (IC). I got interested in military service and visited an Army recruiter. I have taken the oath of enlistment, and I have orders to report to boot camp in a few weeks. I informed my immediate supervisor and the NGA personnel office that I have enlisted, that I expect to be on active duty for about four years, and that I expect to return to the agency and to be reemployed after I complete my active duty service. My supervisor told me that NGA and other IC agencies are exempt from the Uniformed Services Employment and Reemployment Rights Act (USERRA). Is that correct?

A: No. It is not correct to state that IC agencies are exempt from the obligation to comply with USERRA, but IC agencies are exempt from USERRA enforcement through the Merit Systems Protection Board (MSPB). See 38 U.S.C. 4315, 4325.

The IC agencies are listed in 5 U.S.C. 2302(a)(2)(C)(ii), and NGA is on the list. The other agencies are the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, “as determined by the president, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities.”

“The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter [USERRA] apply to the employees of such agency.” 38 U.S.C. 4315(a).

“In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in a manner similar to the manner of reemployment described in section 4313.” 38 U.S.C. 4315(b).

If the head of an IC agency determines, for whatever reason, that it is “impossible or unreasonable” to reemploy an IC employee returning from uniformed service, the agency head shall notify the director of the Office of Personnel Management (OPM), and OPM is then responsible for finding that person an appropriate position elsewhere in the executive branch of the federal government, and for ensuring that the individual is reemployed in that position. See 38 U.S.C. 4315(c).

“The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans’ Affairs of the Senate and the Permanent Select Committee and the Committee on Veterans’ Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.” 38 U.S.C. 4315(c)(4). This reporting requirement is intended to discourage frivolous use of the authority of an IC agency to decline to reemploy returning veterans.

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