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USERRA Coverage for Intermittent Disaster Response Appointees

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Intermittent Disaster Response Appointees (IDRAs, to create an acronym) are persons who have volunteered to serve on Disaster Medical Assistance Teams. After September 11 and the anthrax attacks, it is clear that these people and the functions that they perform are an essential part of national preparedness. Our nation is not prepared unless these people are prepared, and for that they must receive training. Under legislation recently enacted by Congress, these people are now protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA) when they engage in such training and also when (God forbid) they respond to real emergencies involving weapons of mass destruction or the like.

Title 42, United States Code, section 300hh-11(e) now provides: "Service as an intermittent disaster-response appointee when the Secretary [of Health and Human Services] activates the National Disaster Medical System or when the individual participates in a training program authorized by the Assistant Secretary for Public Health Emergency Preparedness or a comparable official of any Federal agency specified in subsection (b)(2)(B) shall be deemed 'service in the uniformed services' for purposes of chapter 43 of title 38, United States Code, pertaining to employment and reemployment rights of individuals who have performed service in the uniformed services (regardless of whether the individual receives compensation for such participation). All rights and obligations of such persons and procedures for assistance, enforcement, and investigation shall be as provided in chapter 43 of title 38, United States Code." 42 U.S.C. 300hh-11(e)(3)(A), added by Public Law 107-188, enacted June 2002.

As I discussed in Law Review 5 ("Notice to Your Civilian Employer," August 1998), a person leaving a civilian job to perform service in the uniformed services must give prior notice to the civilian employer, unless military authorities determine that "military necessity" precludes prior notice. Similarly, the Secretary of Health and Human Services can determine that "necessity" precludes prior notice, and such a determination is not subject to judicial review. If a terrorist sets off a "dirty bomb" in Times Square, there may not be time for the IDRA to give prior notice to his or her civilian employer before responding.

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.

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Section 300hh-11 of title 42 of the United States Code has been amended. What was section 300hh-11(e) is now section 300hh-11(e)(3) and reads as follows:

- **(3)** Employment and reemployment rights.
 - **(A)** In general. Service as an intermittent disaster-response appointee when the Secretary [of Health & Human Services] activates the National Disaster Medical System or when the individual participates in a training program authorized by the Assistant Secretary for Preparedness and Response or a comparable official of any Federal agency specified in subsection (a)(2)(B) shall be deemed "service in the uniformed services" for purposes of chapter 43 of title 38, United States Code, pertaining to employment and reemployment rights of individuals who have performed service in the uniformed services (regardless of whether the individual receives compensation for such participation). All rights and obligations of such persons and procedures for assistance, enforcement, and investigation shall be as provided for in chapter 43 of title 38, United States Code.
 - (B)** Notice of absence from position of employment. Preclusion of giving notice of service by necessity of Service as an intermittent disaster-response appointee when the Secretary activates the National Disaster Medical System shall be deemed preclusion by "military necessity" for purposes of section 4312(b) of title 38, United States Code, pertaining to giving notice of absence from a position of employment. A determination of such necessity shall be made by the Secretary, in consultation with the Secretary of Defense, and shall not be subject to judicial review.

42 U.S.C. 300hh-11(e)(3).

There has been no substantive change. Intermittent Disaster Response Appointees (IDRAs) of the National Disaster Medical System (NDMS) when the Secretary of Health and Human Services calls them to active service or when they engage in authorized training to prepare for that contingency.

In a situation where IDRAs need to be activated and deployed, it is likely that the nature of the emergency will preclude giving advance notice to the regular employers of these IDRAs. Subsection (3)(B) applies to this situation. The Secretary of Health and Human Services can determine that "military necessity" precludes providing such advance notice, and in that situation the regular employers of these individuals are forbidden to deny reemployment based on the lack of such notice.