

LAW REVIEW 1020

Progress on Bill Adding an Additional Exemption from the 5-Year Limit

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1.1.3.3—USERRA Coverage of National Guard Service

1.3.1.2—Character and Duration of Service

Representative Michael Coffman (R-CO) has introduced H.R. 1879, called the "National Guard Employment Protection Act of 2010." On Mar. 24, 2010, the bill passed the House of Representatives by a vote of 416-1. Readers: Please contact your United States Senators in support of this bill.

If enacted, H.R. 1879 would make only one very specific change to the Uniformed Services Employment and Reemployment Rights Act (USERRA). The change would benefit some members of the Army National Guard and Air National Guard. Enactment of this bill would make no change, good or bad, in the USERRA protections for members of the Army Reserve, Air Force Reserve, Navy Reserve, Marine Corps Reserve, or Coast Guard Reserve.

The Servicemembers Law Center seeks to protect the employment rights and other rights of all Reserve Component members, including National Guard members.

Section 4312(c) of USERRA, 38 U.S.C. 4312(c), exempts eight specific kinds of service from the computation of the individual's five-year limit. I invite the reader's attention to Law Review 201 for a detailed discussion of the five-year limit—what counts and what does not count. The limit only includes service that an individual performs after starting the relevant civilian employer relationship. If the individual starts a new job with a new employer, he or she receives a fresh five-year limit with respect to the new employer.

The enactment of the National Guard Employment Protection Act of 2010 would add one more category of service to the categories that are already exempt from the five-year limit.

This bill would exempt service performed by an Army National Guard or Air National Guard member who was "ordered to full-time National Guard duty under the provisions of section 502(f) of title 32 when the period of duty is expressly designated in writing by the Secretary of Defense as covered by this subparagraph." If the Senate passes this bill in exactly the same form that the House has passed it, this amendment will be retroactive to Sept. 11, 2001.

To understand what this bill would accomplish, let us consider the hypothetical but realistic Sergeant Major (SGM) Joe Smith of the Colorado Army National Guard. He has worked for the XYZ Company of Denver since 1980. In 1983, he enlisted in the Army National Guard.

Over the last 27 years, Smith has performed many periods of uniformed service. Some of the periods were exempt from the five-year limit, and some were not exempt. After conducting a detailed audit of all his military duty periods since 1983, I have determined that Smith has used exactly four years and 11 months of his five-year limit. Any additional period of service (unless exempt) is likely to put Smith over the five-year limit and cause him to lose his right to reemployment at XYZ.

Let us assume that Smith now volunteers for a two-year tour of full-time duty under Title 32 U.S.C. 502(f). Under current law, performing this tour would put Smith over the five-year limit. If the National Guard Employment Protection Act were enacted, and if the Secretary of Defense were to certify in writing that Smith's new period of service is to be exempted from the five-year limit, Smith could perform the new period of service without losing his right to reemployment at XYZ.

Let us assume that the Senate passes the bill with the clause about retroactivity intact. Let us assume that Smith has performed full-time National Guard duty under Title 32 U.S.C. 502(f) since Sept. 11, 2001. In

that circumstance, the Secretary of Defense could retroactively exempt some of those periods from Smith's five-year limit at XYZ, possibly bringing him back under the limit if he has already exceeded it.

I would prefer broader bills that make several needed reforms in USERRA. But this bill has already passed the House, so this is a target of opportunity.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.