

# LAW REVIEW 1089

## USERRA Most Definitely Applies to National Guard Members Performing Border Protection Duty

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

### 1.1.3.3—USERRA Coverage for National Guard Service

**Q: I am an NCO in the Arizona Army National Guard. I am currently on duty within the State of Arizona, near the border with Mexico, participating in the border protection mission. My orders cite title 32, United States Code, section 502(f). I am concerned about the question of whether I have rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I left a good job at a store in Phoenix when I went on active duty, and I want to return to that job when I am released from this period of service.**

**I spoke to a fellow NCO—who works for the unit's judge advocate. My fellow NCO quoted the judge advocate as saying that I am not covered by USERRA because I am in a "title 32 status" rather than a "title 10 status" and because I am serving within the State of Arizona. Now, I am greatly concerned that I may not get my job back, and others within our unit have the same concern. Please tell me—am I covered by USERRA for this current set of orders?**

**A:** Please be assured that you are most definitely covered by USERRA for this period of service. I suspect that the judge advocate did not say that you are not covered. The NCO probably misunderstood what the judge advocate said. In any case, the judge advocate should be giving out advice directly, not through his NCO.

As I explained in detail in Law Review 0766 and other articles, you must meet five eligibility criteria to have the right to reemployment after a period of service:

- a. You must have left a position of civilian employment for the purpose of performing voluntary or involuntary *service in the uniformed services*.
- b. You must have given the employer prior oral or written notice.
- c. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 for a detailed discussion of what counts and what does not count.
- d. You must have been released from the period of service without having received a punitive 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.

The issue in your case comes down to: Does your current service under section 502(f) of title 32 of the United States Code qualify as "service in the uniformed services" for purposes of USERRA. The answer to that question is *clearly yes*.

USERRA is codified in Title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). Section 4303 of USERRA defines 16 terms used in this law, including the term "service in the uniformed services."

"(13) The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty training, inactive duty training, *full-time National Guard duty*, a period for which a

person is absent from a position of employment for the purpose of an examination to determine fitness of the person for any such duty, and a period for which a person is absent from a position of employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32." 38 U.S.C. 4303(13) (*emphasis supplied*).

USERRA does not define the term "full-time National Guard duty," but that term is defined in title 10 of the United States Code, as follows: "The term 'full-time National Guard duty' means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia, under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States." 10 U.S.C. 101(d)(5) (*emphasis supplied*).

Section 502 of Title 32 is one of the Title 32 sections specifically mentioned in the definition of "full-time National Guard duty." Section 502(f) is a part of section 502. Your orders cite section 502(f), so it is utterly clear that your current duty qualifies as "full-time National Guard duty" and thus as "service in the uniformed services." You will most definitely have reemployment rights at the Phoenix store after you complete this period of service, provided you meet the other USERRA conditions as to prior notice to your employer, the five-year limit, release from service under honorable conditions, and timely application for reemployment.

Please print this article and post it on bulletin boards and other appropriate places for the National Guard members on the Southwestern Border Protection Mission. We need to answer this ugly rumor that these National Guard members are not protected by USERRA.

If you need assistance in dealing with your civilian employer about your service in the National Guard or Reserve, call the National Committee for Employer Support of the Guard and Reserve (ESGR) at 800-336-4590.