# Law Review 1146

**FMLA and USERRA**

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**1.1.3.2—USERRA Applies to Regular Military Service**
**1.8—Relationship Between USERRA and other Laws/Policies**

**Q: I went to work for the XYZ Corporation, a major company with more than 100,000 employees, in 2004. I enlisted in the Regular Army in late 2006 and reported to basic training in January 2007. I gave my immediate supervisor and the XYZ personnel office advance notice that I would be leaving my job in January 2007 to report to active duty. I left active duty in January 2011 and promptly applied for reemployment at XYZ, and I returned to work in February 2011. My husband and I are adopting a child, and I asked for unpaid leave from XYZ for just a few weeks, for the adoption. I am informed that I have the right to such time off from work under a federal law called the Family Medical Leave Act (FMLA). The XYZ personnel office informed me, in writing, that I do not have the right to FMLA leave for two reasons—that I have not worked for XYZ for at least a year and I have not worked at least 1,250 hours for XYZ during the 12 months preceding the start date of my proposed leave. Is the personnel office correct?**

**A:** No, the personnel office is wrong. It is clear that *but for* your 2007-11 active duty you would have met both the one-year threshold and the 1,250 work hours threshold. Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), you are entitled to be treated *as if you had been continuously employed* by XYZ during the four-year period that you were away from work for military service. Reading the FMLA together with USERRA, you are entitled to unpaid leave under the FMLA, for the adoption.

As I explained in Law Review 0766 (December 2007) and other articles, you must meet five eligibility criteria to have the right to reemployment under USERRA:

1. You must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that you did this in January 2007.
2. You must have given the employer prior oral or written notice. It is clear that you gave XYZ prior notice before you left your job to report to active duty in January 2007.
3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. It is clear that you have not exceeded the five-year limit.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. For purposes of this article, I shall assume that you served honorably.
5. You must have made a timely application for reemployment after release from the period of service. It is clear that you did so.

Because you met the five eligibility criteria, you were entitled to prompt reemployment by XYZ, and you were entitled to be treated as if you had remained continuously employed by XYZ during the 2007-11 active duty period. *See* 38 U.S.C. 4316(a). This is title 38, United States Code, section 4316(a).

The FMLA is a federal statute enacted in 1993. Under the FMLA, an eligible employee of a covered employer has the right to up to 12 weeks of leave (generally without pay) for the birth or adoption of a child or for the employee's own serious illness or the employee's need to take time off from work to care for an ill spouse, child, or parent. Since XYZ is a major corporation, I shall assume that it is a covered employer for FMLA purposes.

The Department of Labor (DOL) FMLA regulation provides as follows:

"(a) An 'eligible employee' is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite."

29 C.F.R. 825.110(a). This refers to title 29, Code of Federal Regulations, section 825.110(a).

I shall assume for purposes of this article that at least 49 other XYZ employees work within a 75-mile radius of the worksite where you work. The DOL FMLA regulation provides as follows concerning USERRA and the 1,250 hour requirement:

"Pursuant to USERRA, an employee *returning from fulfilling his or her National Guard or Reserve military obligation* [emphasis supplied] shall be credited with the hours of service that would have been performed *but for* [emphasis in original] the period of military service in determining whether the employee worked the 1,250 hours of service. Accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations."

29 C.F.R. 825.110(c)(2). *See also* 29 C.F.R. 825.110(b)(2)(i) with respect to the effect of military service on the one-year requirement.

It seems clear that you would have met the one-year requirement and the 1,250-hour requirement but for your 2007-11 active duty period. Accordingly, you are entitled to FMLA leave for this adoption.

**Q: The XYZ personnel office has pointed out that I was never in the National Guard or Reserve, but the Regular Army. The personnel office claims that the USERRA "carve out" only applies to "*an employee returning from fulfilling his or her National Guard or Reserve military obligation.*" Thus, the personnel office asserts that I am not entitled to FMLA leave. What do you think?**

**A:** In recent years, the big majority of USERRA cases relate to National Guard and Reserve members, but the reemployment statute has always applied to service in the Regular military services, as well as National Guard and Reserve service. Please see Law Review 0719 (May 2007). It does not matter that your 2007-11 uniformed service was in the Regular Army, not the Army National Guard or Army Reserve. I have asked several DOL officials to rewrite 29 C.F.R. 825.110(b)(2)(i) and 825.110(c)(2) to remove this confusing language about the National Guard and Reserve.