LAW REVIEW 1199

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Bill Introduced to Expand Exemptions from USERRA's 5-Year Limit

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1.1.3.3—National Guard Service

1.3.1.2—Character and Duration of Service

Q: I am a member of the Missouri Air National Guard and a member of ROA. I am currently serving on "full-time National Guard duty" under section 502(f) of title 32, of the United States Code. Along with several other Missouri Air National Guard members, I serve in a unit that supports the Air Force in the operation of the B-2 bomber, for both strategic and tactical missions. When President Obama ordered B-2 bombers to bomb targets in Libya earlier this year, I and other members of the unit flew some of the missions.[1]

I am on military leave from the airline industry, and several other members of the unit are also on military leave from that industry. I am approaching the end of my five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and several other unit members are also approaching their limits. We will soon face a major dilemma. If we remain on duty, we will lose our right to return to our civilian jobs at airlines and cargo carriers. But if we leave, the critical mission will suffer.

If we were members of the Air Force Reserve, instead of the Air National Guard, our service in this sort of critical mission could be exempted from the five-year limit under one of the subparagraphs of section 4312(c) of USERRA, but it appears that this sort of exemption is not available to us, just because we are in the Air National Guard. It is not fair and, more importantly, it is contrary to the national defense interests of our country. If all of us leave full-time duty in the next few months, to return to our airline industry employers before our five-year limits expire, the mission will suffer greatly. It takes many months, and even years, to train pilots to the degree that we have been trained.

Senator Roy Blunt of Missouri, one of my two Senators, very recently introduced a bill to address this problem. Please comment on that bill.

A: On November 8, 2011, Senator Roy Blunt of Missouri and Senator Kirsten Gillibrand of New York introduced S. 1823, the proposed "National Guard Employment Protection Act of 2011." During the 111th Congress (2009-10), a very similar bill passed the House of Representatives but not the Senate. Please see my Law Review 1020.[2]

During the 111th Congress, Representative Michael Coffman of Colorado introduced H.R. 1879, the proposed National Guard Employment Protection Act of 2010. That bill passed the House of Representatives on March 24, 2010, by a vote of 416-1. The bill never came up for a vote in the Senate, and it died at the end of the 111th Congress.

In the new 112th Congress (2011-12), Representative Coffman introduced essentially the same bill, and the current number is H.R. 1811. He introduced the bill on May 10, 2011, and it was referred to the Subcommittee on Economic Opportunity of the House Veterans' Affairs Committee. No hearing has been conducted on this bill in the House in the current Congress.

In Law Review 1198 (the immediately preceding article), I explained the distinction between title 10 duty and title 32 duty. I also explained that full-time National Guard duty under title 32 most definitely qualifies as "service in the uniformed services" for USERRA purposes.

As I explained in Law Review 0766, and other articles, an individual must meet five eligibility criteria to have the right to reemployment under USERRA:

a. Must have left a civilian position of employment for the purpose of performing service in the uniformed services.

b. Must have given the employer prior oral or written notice.

c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, must not have exceeded five years.

d. Must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.

e. Must have made a timely application for reemployment, with the pre-service employer, after release from the period of service.

This issue comes down to the five-year limit under section 4312(c) of USERRA. The limit is cumulative, except that when you start a new job with a new employer you get a fresh five-year limit with the new employer. Section 4312(c) sets forth eight exemptions from the limit—these are kinds of service that do not count toward the individual's limit. In Law Review 201, I describe these eight exemptions in great detail.

If enacted, S. 1823 (like H.R. 1811) would add a ninth exemption to the five-year limit, by adding a new subparagraph (F) to 38 U.S.C. 4312(c)(4). That new subparagraph would exempt from the five-year limit service by a service member who has been "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." (Emphasis supplied.)

Under section 4312(c) as currently written, four of the eight exemptions from the five-year limit require the "Secretary concerned" (meaning the Service Secretary, like the Secretary of the Air Force)[3] to make a determination and written certification. *See* 38 U.S.C. 4312(c)(3), 4312(c)(4)(B), 4312(c)(4)(C), and 4312(c)(4)(D). But the proposed new subparagraph (F) would give this authority to the Secretary of Defense, not the Service Secretary. I suggest that it is enormously confusing and unnecessarily complicated to give the Secretary of Defense this authority with respect to subparagraph (F), while retaining the authority in the Service Secretary in the other subparagraphs. I suggest that subparagraph (F) be amended to refer to the Service Secretary. With this change, I support S. 1823 and H.R. 1811.

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[1] We do not deploy on operational missions in a title 32 capacity. We go on title 10 status for the time required for the operational mission. Since that is typically only a matter of hours or days, that does not significantly help us with regard to the five-year limit.

[2] I invite your attention to www.servicemembers-lawcenter.org. You will find more than 900 articles about USERRA and other military-relevant laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[3] A 1998 Department of Defense regulation provides that this authority may be delegated by the Service Secretary, but not below the Assistant Secretary level. These determinations and certifications are normally made by the Assistant Secretary of the Air Force for Manpower & Reserve Affairs, or by similar officials in the Department of the Army and the Department of the Navy.