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Progress on Exempting Certain National Guard Service from USERRA's Limit

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1.1.3.3—National Guard service

1.3.1.2—Character and duration of service

On November 28, 2011, during the Senate debate on S. 1867 (the Senate version of the proposed National Defense Authorization Act for Fiscal Year 2012), Senator Roy Blunt of Missouri offered an amendment that would amend section 4312(c) of the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Senate adopted Senator Blunt's amendment and then passed S. 1867 on December 1, 2011. The amendment is included in section 1093 of the Senate-passed bill.

The next step is for a conference committee to resolve differences between S. 1867 and H.R. 1540, the NDAA version that passed the House of Representatives months ago. It is likely but not certain that section 1093 will find its way into the final NDAA version presented to the President for his signature. We will keep the readers informed of progress on this important issue.

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 job for the purpose of performing service in the uniformed services (active duty, active duty for training, inactive duty training, etc.).
- 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 person seeks reemployment, must not have exceeded five years.
- d. Must have been released from the period of service without having received a punitive 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.

As I explained in Law Review [201](#), Law Review [1199](#), and other articles, there are eight statutory exemptions to the five-year limit—kinds of service that do not count toward the limit. If enacted, section 1093 of S. 1867 would add a ninth exemption. Section 1093 would add a new subparagraph (F) to section 4312(c)(4) of USERRA. This new subparagraph would exempt from the five-year limit service performed by a member of the Army National Guard or Air National Guard who has been “ordered to full-time National Guard duty (other than for training) under section 502(f) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.”

As I explained in Law Review [1199](#) (November 2011), there is a Missouri Air National Guard unit at Whiteman Air Force Base that performs critical functions related to the B-2 bomber. The unit is made up largely of Air National Guard members on title 32 orders. Under current law, their critical service counts toward their five-year USERRA

limits, although similar service performed by members of the Air Force Reserve is exempted from the five-year limit. Many members of the unit may need to leave full-time service in the coming months, in order to avoid losing their civilian reemployment rights. Such a mass exodus would harm national defense readiness, because it would take years to train new personnel to this same standard. The enactment of this USERRA amendment would enable these personnel to remain on full-time duty, and thus keep our national defense always prepared.