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USERRA's Special Protection Period Against Discharge Upon Reemployment

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Q: I am the superintendent of a school district in a southern state. We have a teacher (let's call him Joe Smith) who is a member of the Army National Guard. He was called to active duty and deployed to Afghanistan, and he returned home recently.

Smith had only worked for us for about three months when he was called to active duty in late November 2010. His short-notice departure just before Christmas left us in the lurch, and I am still mad about that. It took me two months to find a replacement for Smith, but the replacement is a much better teacher. Smith applied for reemployment right after the first of the year. I don't want him back, because I don't want to displace the replacement. Moreover, Smith is still in the National Guard and may be called up again. I don't want to hire any more National Guard or Reserve members, because it is just too much hassle.

Under our state law, a new teacher is considered probationary for the first two years of employment. Every year, we fire one or two probationary teachers, and we never say why. We don't need to say, because of the fact that they are probationary. An ombudsman for Employer Support of the Guard and Reserve (ESGR) told me that federal law requires me to reemploy Smith. I will reemploy Smith and then fire him shortly thereafter. I don't need a reason to fire him, because he is probationary. What do you have to say about that?

A: As I explained in Law Review 0766 and other articles,[1] Joe Smith or an individual like him must meet five criteria to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The five criteria are as follows:

1. Joe Smith must have left a position of civilian employment (federal, state, local, or private sector) for the purpose of performing service in the uniformed services.
2. Joe Smith must have given the employer prior oral or written notice.

3. Joe Smith's cumulative period or periods of uniformed service, relating to his employee relationship with the school district, must not have exceeded five years. Since he had just been hired by the district, he obviously has not exceeded the limit, and since this was an involuntary call-up it does not count toward his limit.[2]
4. Joe Smith must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. Joe Smith must have made a timely application for reemployment with the district after release from the period of service.

It seems clear that Smith meets these five conditions. He gave you prior notice, albeit not a lot of advance notice. He could not give you more notice than the Army gave him. The Army National Guard and Army Reserve have made a great effort to provide months of advance notice to Guard and Reserve members being called to the colors, and to their civilian employers, but circumstances arise where the individual and the employer have very little notice. The Smith situation is one of those cases. For example, Smith's National Guard unit was not scheduled for mobilization in the fall of 2010. An individual in a unit scheduled for deployment may have flunked the physical examination and could not be deployed. At the last minute, Smith may have been transferred into that unit and mobilized.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. USERRA's 1994 legislative history addresses the issue of timely notice to the civilian employer of impending absence from work for military duty: "The Committee [House Committee on Veterans' Affairs] believes that the employee should make every effort, when possible, to give timely notice. The issue of timely notice should be considered on a case-by-case basis. In the event that an employee is notified by military authorities at the last minute of impending military duty, resulting short notice given to the employer should be considered timely." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2459.

Because Smith met the five conditions for reemployment under USERRA, he was entitled to prompt reemployment in the position of employment that he would have attained if he had been continuously employed, or in another position for which he is qualified that provides like seniority, status, and pay. *See* 38 U.S.C. 4313(a)(2)(A). Moreover, Smith is entitled, as a reemployed veteran, to a period of special protection against arbitrary discharge. I invite your attention to section 4316(c) of USERRA, which provides:

A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 180 days. 38 U.S.C. 4316(c).

The "special protection against discharge" provision has been in the reemployment statute since 1940. When Congress enacted USERRA in 1994, it tinkered with the duration of the period but did not change the basic concept. USERRA's legislative history explains the purpose and effect of this provision as follows:

> Section 4315(d) [later renumbered as 4316(c)] would relate the period of special protection against discharge without cause to the length, and not the type, of

> military service or training. … *Under this provision, the protection would begin only upon proper and complete reinstatement.*
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> *See O'Mara v. Peterson Sand & Gravel Co.,* 498 F.2d 896, 898 (7th Cir. 1974).
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> The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement. As expressed in *Carter v. United States,* 407 F.2d 1238, 1244 (D.C. Cir. 1968), 'cause' must meet two criteria (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice expressed or fairly implied that such conduct would be notice [cause] for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario,* 796 F. Supp. 166, 172 (E.D. Pa. 1992).
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> The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v. Louisville & Nashville Railroad Co.,* 338 U.S. 278, 284-85 (1949). *Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311.*
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> House Report No. 103-65, 1994 *USCCAN* at 2468 (emphasis supplied).

Under your state law, Smith is considered "probationary" and can be fired with or without cause. But under USERRA Smith can only be fired for cause, during the special protection period. Section 4302(b) of USERRA provides:

> This chapter [USERRA] supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.
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> 38 U.S.C. 4302(b).

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[3]

This provision is known as the Supremacy Clause, and it means that federal law trumps state law. A century and a half ago, a great war was fought about the supremacy of federal law over state law. Your state's team lost. If you try to fire Smith during his special protection period, you must prove that the discharge was for cause.

Q: We really do not want Smith back, because reinstating him would mean displacing a superior teacher who is not going to leave to "play soldier." We offered Smith one year of salary, in exchange for waiving his asserted right to reemployment and leaving the district, promising never to reapply. Under the

special protection provision, we are only required to reemploy Smith for a year, so his rejection of our offer of one year of salary is unreasonable.

A: You are misconstruing section 4316(c). Under the legislative history and the *O'Mara* case, the one year of special protection does not start running until you have *properly* reemployed Smith. It is clear from the circumstances that you have no intention of complying with federal law and reemploying him in the position that he would have attained, which is almost certainly the position that he left. Thus, an offer of one year of salary is grossly insufficient.

Moreover, even after Smith's special protection period has expired he still has rights under section 4311(a), which provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
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> 38 U.S.C. 4311(a).

It should also be noted that your stated intention to refrain from hiring National Guard and Reserve members in the future also violates section 4311(a). That subsection outlaws discrimination in *initial employment* as well as discrimination against those already employed.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 700 articles about USERRA and other laws that are especially pertinent to those who serve our nation in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] Please see Law Review 201 for a definitive discussion of what counts and what does not count in exhausting the five-year limit.

[3] Capitalization is included in the original, in the style of the late 18th Century.