

Law Review 1273

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Minnesota Teacher Called to Active Duty—Was He Required to Finance his own Substitute?

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Two sharp-eyed ROA members picked up on a story reprinted in our “SmartBrief” dated July 23, 2012, concerning Minnesota teacher Matt Reuter, an enlisted Air Force Reservist who was recalled to active duty and deployed to Afghanistan. The article stated that Mr. Reuter was required to finance, out of his own pocket, the cost the school district incurred to pay for a substitute during Mr. Reuter’s active duty service. These two ROA members asked me, “Doesn’t this school district practice violate the Uniformed Services Employment and Reemployment Rights Act (USERRA)?”

I have looked into this situation, and I can report that the article reprinted in SmartBrief was oversimplified and misleading. Mr. Reuter was not required to finance the cost for the substitute out of his own pocket. Rather, the cost for the substitute came out of the differential pay that the school district paid to him, in accordance with state law, over and above his USERRA rights. Let me explain what USERRA provides, and what USERRA does not provide, and the relationship between USERRA and state laws.

As I explained in Law Review 0766[\[1\]](#) and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

1. Must have left a position of employment for the purpose of performing voluntary or involuntary service in the uniformed services.[\[2\]](#)
2. Must have given the employer prior oral or written notice.
3. Must not have exceeded the cumulative five-year limit with respect to the employer relationship for which the individual seeks reemployment.[\[3\]](#)
4. Must have been released from the period of service without having received the sort of bad discharge that disqualifies the person under section 4304 of USERRA, 38 U.S.C. 4304.
5. Must have made a timely application for reemployment after release from the period of service.[\[4\]](#)

A person who meets these conditions is entitled to prompt reinstatement in the position of employment that he or she would have attained if continuously employed[\[5\]](#) or another position, for which the individual is qualified, that is of like seniority, status, and pay. The fact that the job has been filled is of no consequence—sometimes reemploying the returning veteran means displacing the replacement.[\[6\]](#)

Section 4311 makes it unlawful for an employer to deny an individual initial employment, retention in employment, promotion or any benefit of employment on the basis of the individual's membership in a uniformed service[7], application to join a uniformed service, performance of uniformed service, application or obligation to perform service, exercise of USERRA rights, or participation in a USERRA investigation or proceeding. This section is intended to protect the Reserve Component (RC) member from the employer who might be tempted to avoid the burdens of USERRA by firing RC members or by refusing to hire them in the first place.

USERRA applies to essentially all employers in this country, including the Federal Government, the states and their political subdivisions (including the school district that employed Mr. Reuter), and private employers, regardless of size.[8] Only religious institutions (on First Amendment grounds), Indian tribes (on residual sovereignty grounds), foreign embassies and consulates and international organizations (on diplomatic immunity grounds) are exempt from USERRA enforcement.

USERRA gives the individual the right to *reemployment* upon release from a period of uniformed service. USERRA does not require the civilian employer to pay the individual for an hour, day, week, month, or year that the individual is away from work for voluntary or involuntary service. USERRA does not require the employer to pay differential pay[9] when the individual receives less money on active duty than he or she had been receiving in the civilian job, but many employers pay differential pay voluntarily, as a matter of support above and beyond the requirements of USERRA.[10]

Section 4302 of USERRA (38 U.S.C. 4302) provides that USERRA is a floor and not a ceiling on the rights of the veteran or RC member. Section 4302(a) provides that USERRA does not supersede a state law or local ordinance that provides *greater or additional rights or benefits*. Section 4302(b) provides that USERRA overrides a state law that limits or eliminates USERRA rights or that imposes an additional prerequisite on the exercise of USERRA rights.[11]

Minnesota is one of many states that provide differential pay to state and local government employees who otherwise would lose money when called to active duty.[12] Until recently, Minnesota law provided that for a public school teacher the cost of paying the replacement employee would be deducted from these differential payments. Other state and local government employees in Minnesota were exempted from this deduction from the differential pay to finance the cost of the replacement.

When Mr. Reuter completed his active duty and returned to work for the school district, a bill for \$11,300 awaited him, representing the cost of paying a substitute teacher to cover his classes during his absence. It appears that the differential pay that he had received was more than \$11,300, but not by a lot. Of course, it would have been unlawful under USERRA to make him pay more for the cost of the substitute than he had received in differential pay.

Paying Mr. Reuter the differential pay (which would be taxable income for both federal and Minnesota purposes) and taking back most of it as "reimbursement" for the cost of the substitute creates an accounting nightmare. Mr. Reuter should only have to pay federal and state income tax on that part of the differential pay that was in excess of the cost of the substitute.[13]

The good news is that on May 1, 2012 Minnesota Governor Mark Dayton signed legislation that exempts teachers from the obligation to pay for the cost of the substitute, out of the differential pay. Under the amended law, teachers (like other public sector employees in Minnesota) receive the differential pay without an offset for the costs of the substitutes.

The 2012 amendment was not retroactive and did not apply to Mr. Reuter, because he completed his active duty and returned to work in 2011. Mr. Reuter's fellow teachers took up a collection and paid him \$11,300, to reimburse him for the amount that he had been required to pay for the cost of the substitute. The next question is whether the \$11,300 that he received from his colleagues amounts to 2012 taxable income for federal and Minnesota income tax purposes.

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 773 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

[2] Service in the uniformed services includes active duty, active duty for training, initial active duty training, inactive duty training (drills), full-time National Guard duty, funeral honors duty, and time required to be away from a civilian job for the purpose of an examination to determine fitness to perform any such duty. 38 U.S.C. 4303(13).

[3] All involuntary service and some voluntary service are exempted from the computation of the individual's five-year limit. See Law Review 201 for a definitive discussion of what counts and what does not count.

[4] After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[5] The position that the individual would have attained if continuously employed is not always the position that the person left when called to the colors. See Law Review 1272 (immediately preceding article).

[6] Please see Law Review 829 (June 2008).

[7] For USERRA purposes, the uniformed services are the Army, Navy, Marine Corps, Air Force, Coast Guard, and the commissioned corps of the Public Health Service. 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic and Atmospheric Administration is a uniformed service as defined by 10 U.S.C. 101(a)(5) but not for USERRA purposes. See Law Review 50.

[8] See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

[9] Of the 850,000 RC personnel called to the colors since the terrorist attacks of September 11, 2001, roughly 1/3 have suffered a significant loss in pay while mobilized. Typically, this would be the case for the junior enlisted RC member who has a relatively high-paying civilian job.

[10] It should be noted that differential pay only goes in one direction, from the civilian employer to the individual who is away from work for uniformed service. Some RC members on active duty receive more salary per month on active duty than they had been receiving in their civilian jobs, especially when they are deployed to a place like Afghanistan. Under no circumstances would it be lawful for an employer to require the individual to pay differential pay to the employer.

[11] Under Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause"), federal statutes trump conflicting state statutes and constitutions.

[12] I invite the reader's attention to the "state military leave laws" section at www.servicemembers-lawcenter.org.

[13] The accounting nightmare would be worsened if he received the differential pay in 2010 and paid federal and state income tax on it and then received the bill for the cost of the substitute in 2011, when he completed his active duty and returned to work for the school district.