

Law Review 12104

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DOJ Expands Investigation of USERRA Violations by NYC

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1.1.1.7—USERRA applies to state and local governments

1.3.2.3—Pension credit for service time

1.4—USERRA Enforcement

The United States Attorney for the Southern District of New York (Honorable Preet Bharara)[\[1\]](#) has announced an expansion of the investigation of possible violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA) by New York City (NYC) as an employer.[\[2\]](#) In August 2012, the Department of Justice (DOJ), through United States Attorney Bharara, filed a class action USERRA lawsuit against NYC on behalf of all active and retired New York Police Department (NYPD) officers who have been affected or may be affected by an apparent USERRA violation. Mr. Bharara announced that the investigation is being expanded to include all NYC employees, not just police officers.[\[3\]](#)

Let us say that Josephine Smith was hired by the NYC Tax Department in 1997 and has worked for NYC ever since. Josephine is a member of the New York Army National Guard, and she was called to the colors in 2001, 2003, 2007, and 2011. Josephine can prove that she meets the USERRA eligibility criteria for each of these interruptions of her NYC career. She must prove that each time she left her civilian job for the purpose of performing voluntary or involuntary service in the uniformed services and that each time she gave prior oral or written notice to her civilian employer, NYC. She must prove that she has not exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to her employer relationship with NYC.[\[4\]](#) Each time, she was released from active duty without a disqualifying bad discharge[\[5\]](#), and each time she made a timely application for reemployment with NYC after release from active duty.[\[6\]](#)

Because Josephine met the USERRA eligibility criteria, she is entitled to be treated *as if she had been continuously employed in the civilian job* in determining when she qualifies for her NYC pension and also in determining the amount of her monthly retirement check. *See* 38 U.S.C. 4318.

When an NYC employee receives a pension, the amount of the monthly check is computed based on a formula. Part of the formula relates to the employee's *total compensation* from NYC (including overtime pay and night differential pay) during the relevant time period. Because overtime and night differential are included for employees generally, Josephine is entitled to credit for overtime and night differential in determining the *imputed pay* (what she would have earned from NYC if she had remained continuously employed) for each of the periods when she has been called away from her civilian job for military service.

The policy and practice of NYC has been to look to *base pay only* in computing these imputed earnings. This constitutes a clear violation of USERRA. For an individual like Josephine, who has been called to the colors repeatedly for months at a time, the cumulative effect on the pension can be substantial.

NYC employees and retirees who believe that they have been affected by this sort of violation, based on periods of military service performed after the terrorist attacks of September 11, 2001, are requested to contact the Civil Rights Unit of the Office of the United States Attorney for the Southern District of New York. The telephone number is 212-637-0840. Assistant United States Attorneys Tara M. LaMorte and Aratsu K. Chaudhury are in charge of this case, as appointed by United States Attorney Bharara.

Like many big city public employee pension plans, the NYC plans are overpromised and underfunded, but it is unconscionable for NYC to contemplate shortchanging the brave young men and women who have interrupted their city careers for military service as a way of addressing these fiscal problems. If there is not enough money available to pay all the promised benefits, it may be necessary to impose a “haircut” on *all* employees and retirees. *Before* any such proportional cuts in promised pension benefits are made, all employees who interrupted their careers for military service must first receive proper pension credit for their military service time, as mandated by USERRA. The prospect of “haircuts” in promised pension benefits makes it all the more important that veterans receive mandated credit.

We will keep the readers informed of developments in this important case.

[1] There are 93 United States Attorneys, one for each judicial district. Each state has at least one district, and New York has four—the Eastern, Northern, Southern, and Western Districts. The United States Attorney is appointed by the President with Senate confirmation.

[2] Please see Law Review 1283 (August 2012) for an article about this lawsuit. I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 804 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.

[3] Part of NYC is located in the Eastern District of New York, but this lawsuit and this investigation relate to all NYC employees in all five boroughs.

[4] Three of these four call-ups were involuntary mobilizations and do not count toward her five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count toward exhausting the five-year limit.

[5] Under section 4304 of USERRA, 38 U.S.C. 4304, a person who has received a punitive discharge (by court martial) or an other-than-honorable administrative discharge does not have the right to reemployment.

[6] After a period of more than 180 days of service, the returning veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.