

USERRA and State Sovereign Immunity—Good News from Tennessee

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As I have explained in Law Review 14047 and other articles, the sovereign immunity claims of state and local governments, as employers, immensely interfere with effective enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA). A definitive analysis has shown that 10 percent of Reserve Component personnel (not presently on active duty) work for state governments and another 11 percent work for local governments. If we are to have strong and effective Reserve Components, we must have effective enforcement of USERRA with respect to all employers.

I am most pleased to report that on March 28, 2014, Tennessee Governor Bill Haslam signed into law House Bill No. 1918, enacting a new section of the Tennessee Code Annotated (TCA). The new section reads as follows: “Immunity from suit of any governmental entity, or any agency, authority, board, branch, commission, division, entity, subdivision, or department of state government, or any autonomous state agency, authority, board, commission, council, department, office, or institution of higher education, is removed for the purpose of claims against and relief from a governmental entity under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), 38 U.S.C. 4301-4334.” TCA 29-20-208.

This act takes effect on July 1, 2014, and this new provision waives sovereign immunity with respect to USERRA claims that accrue on or after that date. This new provision is not retroactive.

I am most pleased with both the breadth and clarity of this new provision. It applies to every conceivable state and local government entity in the State of Tennessee. The waiver of sovereign immunity is stated in unmistakably clear language—that “immunity from suit ... is removed.”

State courts in New Mexico, Delaware, and other states have relied on doctrines that “a waiver of sovereign immunity must be clear and unmistakable” and have held that state statutes purporting to make USERRA apply to state and local government entities, as employers, have not been sufficiently clear to waive sovereign immunity. I think that legislators in other states should use this new Tennessee law as a model of a legislative enactment that waives sovereign immunity in absolutely unmistakable language.