

Relationship between USERRA and Tennessee Law for Corrections Officers

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2.0—Paid leave for government employees who are Reserve Component members

Q: I am a First Lieutenant in the Tennessee Army National Guard (TNARNG), and I recently joined the Reserve Officers Association (ROA). For my civilian work, I am a corrections officer for the State of Tennessee at a state prison in western Tennessee. I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 15032 (April 2015), titled “State Law Protections for National Guard Members on State Active Duty” and Law Review 15030 (March 2015), titled “You Have the Right to Time off from your Teaching Job for Military Service, under both State and Federal Law.”

In Law Review 15030, you discussed in considerable detail the relationship between federal law (USERRA) and Pennsylvania law, in the context of a teacher in western Pennsylvania who must drive five hours or more to his Coast Guard Reserve drill weekends in eastern Pennsylvania. I would appreciate it if you could do a similar article about the relationship between USERRA and Tennessee law, in the context of my own employment situation, which is unusual but by no means unique. At the prison where I work, there are 700 corrections officers, and 35 of them (5 per cent) are active participants in Reserve Components of the armed forces.³

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" articles about 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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³ There are seven Reserve Components. In order of size (largest to smallest), they are the Army National Guard (ARNG), the Army Reserve (USAR), the Air National Guard (ANG), the Air Force Reserve (USAFR), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), and the Coast Guard Reserve (USCGR). As we explained in Law Review 15032, the ARNG and ANG are hybrid state-federal organizations, while the other five components are purely federal.

In my job at the prison, I work a schedule of six days on followed by three days off. Sometimes, the workday is 8.5 hours, and sometimes 9 hours. My TNARNG drill weekend is Saturday-Sunday, or sometimes Friday-Saturday-Sunday. My drill days often fall on days when I am scheduled to work at the prison, but sometimes these drills are on days when I am not scheduled to work at my civilian job.

I understand that USERRA does not require the employer to pay me for an hour, day, week, month, or year that I am away from work for military training or service, but I believe that Tennessee law gives me the right to 20 work days of *paid* military leave. The way that I figure it, when my TNARNG drill falls on a day that I am not scheduled to work at my civilian job, that day should not count as one of my 20 work days of paid military leave. Do you agree?

A: Yes. Here is the text of the pertinent section of Tennessee law:

“All officers and employees of this state, or any department or agency thereof, or of any county, municipality, school district, or other political subdivision, and all other public employees of this state who are, or may become, members of any reserve component of the armed forces of the United States, *including members of the Tennessee army and air national guard*, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave or vacation, impairment of efficiency rating, or any other rights or benefits to which otherwise entitled, for all periods of military service during which they are engaged in the performance of duty or training in the service of this state, or of the United States, under competent orders; provided, that an officer or employee while on such leave shall be paid salary or compensation for a period, or periods, *not exceeding twenty (20) working days in any one (1) calendar year, plus such additional days as may result from any call to active state duty pursuant to § 58-1-106*. The military leave herein provided shall be unaffected by date of employment or length of service and shall have no effect on other leaves provided by law, regulation, policy or practice. After the twenty (20) working days of full compensation, any public employer may provide partial compensation to its employees while under competent orders.

“After the twenty (20) working days of full compensation, members of any reserve component of the armed forces of the United States, including members of the Tennessee army and air national guard, *may use up to five (5) days of sick leave in lieu of annual leave for the purposes of not having to take leave without pay.*”

Tennessee Code, section 8-33-109 (emphasis supplied).

I have checked in LEXIS, a computerized legal research service, and there is no published case of the Tennessee Supreme Court or your state’s intermediate appellate court construing the meaning of this section. The reason that there is no such case is probably that the language of section 8-33-109 is clear and straightforward and no judicial interpretation of the meaning has been necessary.

When Congress or a state legislature uses a word or term and does not define it, courts look to general purpose dictionaries to determine the commonly understood meaning of the word or term in the English language, during the relevant time period, because the legislature must have intended the word to be understood in that way. The *Second College Edition of the American Heritage Dictionary*, published in 1982, defines the term "workday" as follows: "1. A day on which work is done. 2. The part of the day during which one works."

Applying this definition to the question of charging you military leave for a day when you were not otherwise scheduled to work at your civilian job, it is clear that when you perform inactive duty training (drills), active duty for training (annual training), or some other form of military training or service on a day when you would not otherwise have worked at your civilian job, that day does not count toward the exhaustion of your 20-day entitlement to paid military leave.

Q: I was scheduled to work nine hours at the prison tomorrow—Saturday, April 11, 2015. Many weeks ago, I notified the prison's personnel department that I will not be at work on April 11 because that day is part of my TNARNG drill weekend. On April 11, I will be using one of my 20 workdays of *paid* military leave, under section 8-33-109. The personnel department says that my compensation for that day will be limited to the hourly rate for an eight-hour day, not the nine-hour day that I was scheduled to work. What do you think of this assertion?

A: I see nothing in the text of section 8-33-109 to support this unusual interpretation. I think that it is clear that you are entitled to the full compensation that you would have received from the State of Tennessee if you had worked the entire nine-hour shift.

Q: In addition to my drill weekends and annual training that I perform in the TNARNG, I am also occasionally called to *state active duty* by the Governor of Tennessee for emergencies like fires, floods, tornadoes, riots, etc. If I am called to state active duty, am I entitled to *paid* military leave for that period? Do these state active duty periods count toward my 20-workday limit?

A: Under section 8-33-109, you are clearly entitled to paid military leave for your state active duty periods, and these periods do not count toward your 20-workday limit. I invite your attention to the following language in section 8-33-109: "plus such additional days as may result from any call to state active duty pursuant to section 58-1-106."

Q: Our TNARNG company is likely to be called to active duty for one year, for deployment somewhere in Asia or Africa, during late 2016 and early 2017. As we prepare for this likely deployment, it is likely that my military training duties, including drill weekends and at least two long annual training periods, will greatly exceed 20 workdays in 2015. What happens when I have exceeded my 20 workday limit?

A: Under section 4312(h) of USERRA,⁴ you are entitled to *unpaid* military leave *without limitation*. Moreover, section 8-33-109 does not conflict with USERRA. Under that section, your right to *paid* military leave is limited to 20 workdays per year, but your right to unpaid military leave is unlimited.

Q: In order to maximize my earnings, I want to utilize annual leave for military training days. Do I have the right to do this?

A: Yes, under section 4316(d) of USERRA, which provides: “Any person whose employment with an employer has been interrupted by a period of service in the uniformed services shall be *permitted, upon request of that person*, to use during such period of service any vacation, annual leave, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.”⁵

Q: In the nine years that I have worked for the Tennessee Department of Corrections, I have never missed a day of work because of illness. I have a large balance of sick leave in the bank, and I want to use some of those sick leave days for my military training. Do I have the right to use sick leave days in this way?

A: Section 4316(d) of USERRA does not entitle you to use sick leave days in this way. See 20 C.F.R. 1002.153(a). The final sentence of section 8-33-109 gives you the right to “use up to five (5) days of sick leave in lieu of annual leave for the purpose of not having to take leave without pay” for military duty.

Q: In my TNARNG company, we have 10 National Guard soldiers who are state employees and another 15 who work for counties, cities, or school districts. Do those 15 soldiers have the right to paid military leave under section 8-33-109?

A: Yes. Section 8-33-109 explicitly applies to all departments and agencies of the State of Tennessee and also to “any county, municipality, school district, or other political subdivision.”

Q: Other than the 25 soldiers who work for the State of Tennessee or its political subdivisions, the rest of the soldiers in our TNARNG company work for private employers, except for one federal employee,⁶ three full-time students, and four soldiers who are currently unemployed. Do these private-sector employees have the right to *paid* military leave? What about *unpaid* military leave?

⁴ 38 U.S.C. 4312(h).

⁵ 38 U.S.C. 4316(d) (emphasis supplied).

⁶ Federal civilian employees who are Reserve Component members are entitled to 15 workdays of paid military leave, under 5 U.S.C. 6323.

A: USERRA applies to almost all employers in the United States, including the Federal Government, the states, political subdivisions of states, and private employers. Under USERRA, these TNARNG soldiers are entitled to unpaid military leave for their inactive duty training (drills), active duty for training (annual training), and voluntary or involuntary active duty. Neither USERRA nor Tennessee law requires private sector employers to grant paid military leave.

Q: There is a noncommissioned officer (NCO) in our company who works for a very small diner—there are only nine employees, including this NCO. The old man who owns and operates the diner insists that USERRA and other federal laws do not apply to employers with fewer than 15 employees? Is the owner correct?

A: The owner is correct about other federal laws but not about USERRA. The federal reemployment statute has never had a threshold based on the size of the enterprise or the number of employees. You only need one employee to be an employer for purposes of the reemployment statute. *See Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992).

Q: What about state active duty? If the private sector soldiers in our TNARNG company are called to state active duty by the Governor of Tennessee, are their civilian jobs protected by USERRA? What about by Tennessee law?

A: USERRA does not apply to state active duty, but Tennessee law specifically protects the civilian jobs of Tennessee National Guard soldiers and airmen who are called to state active duty by the Governor of Tennessee. Here is the pertinent section:

“In addition to the leave of absence provided in section 8-33-109, all officers and employees of this state, or any department or agency thereof, or of any county, municipality, school district, or other political subdivision, all other public employees of this state *and all private sector employees who are members of the Tennessee army and air national guard on active state duty* or the Tennessee state guard and civil air patrol shall be entitled to an unpaid leave of absence from their respective duties, without loss of time, pay not specifically related to leave of absence time, regular leave or vacation or impairment of efficiency rating for all periods of service during which under competent orders they are engaged in the performance of duty or training in the service of this state, including the performance of duties in an emergency.”

Tennessee Code section 8-33-110 (emphasis supplied).

Q: We have an NCO in our company (let’s call him Sergeant Joe Smith) who lives in Memphis, Tennessee and is a member of the TNARNG, but for his civilian job he commutes west across the Mississippi River to a private sector job in West Memphis, Arkansas. If he is called to state active duty by the Governor of Tennessee, does section 8-33-110 protect his civilian job in Arkansas?

A: No. Tennessee law does not apply across the state line in Arkansas. Fortunately, Arkansas law protects his civilian job in this circumstance. Here is the pertinent section of Arkansas law:

- (a) A person who is called to active state duty as a member of the armed forces of this state *or any other state*, including without limitation the National Guard, a reserve component of the armed forces, or the militia, is afforded such employment and reemployment rights, privileges, benefits, and protections in employment as though that person had been called to active duty in the service of the United States and shall not be denied hiring, retention in employment, promotion, or other incidents or advantages of employment because of any obligation as a member of the armed forces.
- (b) In any civil action to enforce the provisions of this section, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

Arkansas Code section 2-62-413 (emphasis supplied).

Q: I know a young woman (let's call her Mary Adams) who lives in West Memphis, Arkansas and is a sergeant in the Arkansas ARNG. For her civilian job, she commutes east across the Mississippi River to a large law firm in Memphis, Tennessee, where she works as a paralegal. If she is called to state active duty by the governor of Arkansas, does she have a legally enforceable right to reemployment at the Tennessee law firm?

A: Unfortunately, no. While the Arkansas law explicitly applies to a National Guard member of "this state or any other state," the Tennessee law is clearly limited to *Tennessee* National Guard members. We need the Tennessee Legislature to amend to amend the Tennessee law, along the lines of section 2-62-413 of the Arkansas Code.