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Having a National Guard Member as an Employee Is a Pain, But you Can Handle it.

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Q: I am the owner-operator of a small diner in San Diego, and I have only ten employees. Josephine Smith, one of only two qualified cooks, is a sergeant in the Army National Guard. Her National Guard duties present a continuing problem for me as the owner-operator. My brother is an attorney, and he told me that as I have fewer than 15 employees I am exempt from federal employment laws.

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "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.

[2] Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

By doing an Internet search, I found your articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Because I have fewer than 15 employees, USERRA does not apply to me, right?

A: Wrong. It is true that other federal employment laws (including Title VII of the Civil Rights Act of 1964) only apply to employers with 15 or more employees, but the federal reemployment statute has never had such a threshold. You only need one employee to be an employer for purposes of USERRA.

As is explained in Law Review 15067 (August 2015), Congress originally enacted the reemployment statute more than 75 years ago, on September 15, 1940, as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my late father) for World War II. USERRA was signed into law on October 13, 1994, as a long-overdue rewrite of this 1940 law.

In 1992, the 5th Circuit[3] decided *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992).[4] Dr. Swint owned a "ranch"—his residence. He had one ranch hand, Cole. Cole joined the National Guard and left for several months of military training. Dr. Swint hired a replacement and was well pleased with his work. Cole completed his military training and made a timely application for reemployment. Dr. Swint only needed one ranch hand and was unwilling to displace the replacement employee. Cole sued and won. Dr. Swint argued that the reemployment statute did not apply to "casual employers" and that he was exempt. The 5th Circuit firmly rejected that argument. If Congress had intended that this law only apply to employers with more than a minimum number of employees, Congress would have included such a threshold in the text of the statute.

Cole is mentioned with approval in USERRA's 1994 legislative history: "This chapter [USERRA] would apply, as does current law, to all employers regardless of the size of the employer or the number of employees. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992)."[5]

Q: Josephine has her National Guard drill weekend coming up, and she asked me for Friday through Monday off. I told her that I could not let her off unless she can find another cook to fill in this weekend. My only other qualified cook, Barry Jones, is getting married this weekend and is not available. Josephine told me: "I don't need your permission, and you do not get a veto. I am only required to give you notice, and I just did. I will not be at work Friday through Monday. If you refuse to reinstate me when I return to work on Tuesday, I will make a formal complaint against you for violating USERRA." What do you say about that?

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[3] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

[4] The citation means that you can find the case in Volume 961 of *Federal Reporter Second Series,* starting on page 58.

[5] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2454.

A: Josephine is correct that she does not need your permission and that you do not get a veto. Section 4331 of USERRA (38 U.S.C. 4331) gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published draft USERRA regulations, for notice and comment, in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The regulations are published in Title 20 of the *Code of Federal Regulations* at Part 1002 (20 C.F.R. Part 1002). One section of the regulations is directly on point:

> **Is the employee required to get permission from his or her civilian employer before leaving to perform service in the uniformed services?**
> No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.[6]

As is explained in Law Review 1281 and other articles, Josephine (or any service member) must meet five conditions to have the right to reemployment after a short or long period of uniformed service:

a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Must have given the employer prior oral or written *notice.*
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which the person seeks reemployment. As is explained in Law Review 201, there are nine exemptions—kinds of service that do not count toward exhausting the person's five-year limit.
d. Must have served honorably, and must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from the period of service, must have been timely in reporting back to work or applying for reemployment.[7]

If Josephine meets these five conditions on Tuesday, after her drill weekend, she is legally entitled to reinstatement, under USERRA. You (the employer) have no right to add a sixth condition: "You must find your own replacement."

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[6] 20 C.F.R. 1002.87 (bold question in original).

[7] After a period of service of less than 31 days, the person is required to report for work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i). If the period of service was 31-180 days, the person has 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). If the period of service was 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

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 perquisites* to the exercise of any such right or the receipt of any such benefit."[8] The "find your own replacement" requirement is an additional prerequisite that you (the employer) have no right to impose.

Q: This weekend is our busiest weekend here in this town and at my diner. Our local university is having homecoming this weekend, and my diner is located a short walk from the stadium. My only other qualified cook is unavailable this weekend—he is out of town getting married. What am I to do?

A: I suggest that you contact the Commanding Officer (CO) of Josephine's National Guard unit. In view of these compelling circumstances, the CO may allow Josephine to have an "excused absence" from her drill obligation this weekend and to make it up on another weekend.

National Guard and Reserve units train together and go to war together. More than 910,000 Guard and Reserve members have been called to the colors since the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time. It is essential that these units train together as a team. Do not expect Josephine's CO to approve her missing drills and making them up on a regular basis, but it is probably not unreasonable for you to ask just this once.

Q: I asked Josephine for the name and telephone number of her CO, but she refused to provide me that information. What do I do now?

A: I suggest that you contact the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR), at 800-336-4590. ESGR can work with you, and Josephine, and the CO to try to find a solution that all can live with.

Q: I can probably figure out a way to accommodate for Josephine being away from work for one weekend per month, but her National Guard "drill weekend" starts Friday morning and continues until late Sunday afternoon. Am I required to accommodate Josephine for military training on Friday?

A: Yes. "Inactive duty training" (drills) has traditionally been limited to one weekend per month, but in the last 25 years the training requirements imposed on National Guard and Reserve personnel have greatly expanded. Inactive duty training and other forms of uniformed service can happen on any day of the week.

[8] 38 U.S.C. 4302(b) (emphasis supplied).

Section 4312(h) of USERRA provides:

> In any determination of a person's entitlement to protections under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services *shall not be a basis for denying protections of this chapter* if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.[9]

Q: We have a perfectly good National Guard armory right here in San Diego, but Josephine performs her drills at an armory north of San Francisco, many hundreds of miles from here. Josephine told me that she needs to have off from work all day Thursday so that she can travel to the armory in northern California and be "fit for duty" at 7 am on Friday, when her drill begins. Does USERRA support this claim?

A: Yes. I invite your attention to the pertinent section of the DOL USERRA regulations:

> § 1002.74 **Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?**
>
> No. At a minimum, an employee must have enough time after leaving the employment position to *travel safely to the uniformed service site and arrive fit to perform the service.* Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:
>
> (a) *If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.*
>
> (b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

[9] 38 U.S.C. 4312(h) (emphasis supplied).

> (c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.[10]

Under these circumstances, Josephine has the right to time off from her civilian job on Thursday so that she can travel to the place of service, have some sleep Thursday night, and be fit for duty on Friday morning.

Q: What about on the back end after she completes her drill Sunday afternoon?

A: Under section 4312(e)(1)(A)(i) [quoted above], Josephine is required to report for work *after* the time reasonably required for safe transportation from the place of service to her residence *plus eight hours for rest.* With such a long trip returning from her drill weekend, Josephine is probably entitled to Monday off.

Q: Why does Josephine have to travel all the way to northern California for her drill weekends?

A: Each National Guard or Reserve unit has a table of organization—the unit needs personnel of various grades and with various kinds of specialized military training. In assigning National Guard members to specific units, the Adjutant General of the state must consider many factors, and the travel convenience of the individual Guard member is just one of many factors to be considered.

Q: This past summer, we had terrible fires here in California. Josephine and many of her California Army National Guard colleagues were called to State Active Duty (SAD) by the Governor of California. Does USERRA protect the civilian job of the National Guard member called to SAD?

A: No. USERRA protects the civilian jobs of National Guard members when they are on duty or training under title 10 or title 32 of the United States Code. USERRA does not apply to SAD.

California and 49 other states have state laws that protect the civilian jobs of National Guard members on SAD. We (the Reserve Officers Association and the Service Members Law Center) have prepared 55 articles[11] about these state laws. Here is a link to our California article and our California update:
http://www.servicemembers-lawcenter.org/uploads/CA-2015-NG.pdf
http://www.servicemembers-lawcenter.org/uploads/CA-2015-NG-update.pdf

[10] 20 C.F.R. 1002.74 (bold question in original, emphasis by italics supplied).
[11] Fifty states, the District of Columbia, Guam, Puerto Rico, Virgin Islands, and a summary article.

Q: Why should I, as a small employer, have to put up with the inconvenience and expense of employing a National Guard member like Josephine?

A: Because, in enacting USERRA, Congress has very justifiably required this of you and of all employers.

Here at ROA headquarters in our nation's capital, we have the Minuteman Statue—donated to ROA by Brigadier General and Mrs. Roger L. Zeller as a memorial to Lieutenant Edwin F. Dietzel. The statue sits on a marble pedestal. On the pedestal, these words are inscribed: "Each citizen of a free government owes his services to defend it." Those words are attributed to General George Washington in 1783.

For most of our nation's history, we had a tiny standing Army of professional career soldiers, and a Navy that was only slightly larger. When conflict arose, the standing Army was quickly supplemented by calling up state militia forces, the citizen soldiers of that era. For a major military conflict, our nation established a draft and conscripted young men into service. This pattern held for the Civil War, World War I, World War II, the Korean War, the Vietnam War, and the first 28 years (1945-73) of the Cold War competition with the Soviet Union.

All of that changed in 1973, when Congress abolished the draft. Today, the United States military, Active Component and Reserve Component, is the best motivated, best trained, best led, best equipped, and most effective military in the world, and perhaps in the history of the world. Few in today's military would contemplate returning to the draft. The vast majority of our population is not asked to participate in the defense of the nation, beyond the payment of taxes. Today's military establishment, including the National Guard and Reserve, amounts to less than ¾ of 1% of the U.S. population.

In a speech to the House of Commons on August 20, 1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few.

Prime Minister Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to the United States military in the Global War on Terrorism. It is these few, these hardy few, who have prevented a recurrence of the horrors of September 11, by their prowess and their devotion.

According to the Department of Defense, more than 910,000 RC personnel have been called to the colors since September 11, 2001, our generation's "date which will live in infamy." Some have been called three or more times, and their civilian employers are tired of the "burden" and seek to shed the burden by flouting USERRA.

To our nation's employers—I say that your burdens, while not inconsiderable, pale in comparison to the burdens, and sometimes the ultimate sacrifice, made by those in uniform. Because our country abolished the draft 42 years ago, we are not calling you to involuntary military service, and we are not calling your children or grandchildren. That entire burden is borne by that tiny sliver of the population that volunteered to serve, in the Active Component or the Reserve Component. Employers—do not complain about the burden on you—honor and celebrate the much greater burden voluntarily undertaken by those who serve. When you find RC members in your work force or among job applicants, you must do all that USERRA requires and more and not complain about your "burdens."

The reemployment statute is not new—it is 75 years old. It was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men, including my late father, for World War II. A year later, as part of the Service Extension Act of 1941, Congress expanded the reemployment provision to make it apply to voluntary enlistees as well as draftees. Congress strengthened the law when it enacted USERRA in 1994, but you should think of this law as 75 years old, not 21. This law is an integral part of the fabric of our society.