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My Professional License Has Expired-Help!

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Q: I have been a licensed real estate agent for several years. I work through only one real estate firm, but the firm considers me to be an “independent contractor” and not an “employee.” I receive no salary-only commissions on the sales that I arrange. The company does not withhold state and federal income tax from my commissions.

I am licensed by the state, and to keep my license current I must complete a substantial continuing professional education requirement. My five-year license expired in November 2004, while I was on active duty in Iraq. I was recalled to active duty in January 2003 and did not leave active duty until January 2005.

After I was released from active duty, I planned to return to work selling real estate. The real estate firm told me that I could not do that because my license has expired and both the firm and I would be in violation of state law if I sold real estate.

Now, I am in a real “Catch 22” situation. The real estate courses are expensive. Without income coming in, I cannot afford to take the courses necessary to renew my license. But without my license, I cannot earn income. All of these problems relate to my mobilization. If I had not been mobilized, I would easily have completed the professional education classes in time to renew my license in November 2004. All I am asking for is some time to be allowed to sell real estate while catching up on my professional education requirement. How does the Uniformed Services Employment and Reemployment Rights Act (USERRA) apply to my situation?

A: USERRA applies to the employer-employee relationship. If you are an employee, and if you meet the USERRA eligibility criteria (which you almost certainly do), the employer is required to re-employ you promptly, even if doing so violates state law. Under Article VI, Clause 2 of the United States Constitution, commonly called the “Supremacy Clause,” federal law prevails over conflicting state law. If the real estate firm cannot comply with federal law without violating state law, then the firm must violate state law.

But USERRA only applies if you are an employee. If you really are an independent contractor, USERRA does not apply. Calling you an independent contractor does not necessarily make you an independent contractor. This is a legal determination that a court might have to make.

Q: If not USERRA, what about the Soldiers' and Sailors' Act?

A: On December 19, 2003, President Bush signed into law the Servicemembers' Civil

Relief Act (SCRA), a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted during World War I and re-enacted on the eve of World War II. The SCRA includes all the protections included in the SSCRA, plus some important new protections. For a comprehensive review of the SCRA, please read Law Review 116, by Colonel Mark Sullivan. The SCRA has many great provisions; unfortunately, it has no provision concerning extensions of deadlines for renewing professional licenses that expire while you are on active duty.

Q: Where do I go from here?

A: I am informed that your problem was resolved through the good offices of Ms. Barbara Leonard, case manager at the National Committee for Employer Support of the Guard and Reserve (ESGR), a DoD organization. (Please see www.esgr.org.) She contacted your governor's office, and your governor agreed, "There ought to be a law." The legislature agreed, and a new law was passed, requiring state licensing authorities to be flexible in applying licensing deadlines to National Guard and Reserve personnel who have been called to active duty.

This is a problem all over the country. This sounds like a great project for ROA state departments, and particularly for the judge advocate of each ROA department. Your legislature needs to enact legislation on this issue. I also invite the reader's attention to Law Review 16 (September 2000), "Department Involvement in State Issues."

* Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government.

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