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Flatlanders Need Not Apply: Legal Employment Protections For Service Members In The Colorado National Guard

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State Limitations

Colorado has codified several protections for members of the Colorado Army and Air National Guard when the Governor mobilizes them for state purposes. However, these laws apply only to members of the *Colorado* Air and Army National Guard. Colorado public or private employees who are members of the National Guard of *other states* are not covered by this legislation.

For example, William Palmer manages a fuel refinery in Pueblo, Colorado. He is also an officer in the New Mexico Army National Guard. When the Governor of New Mexico mobilizes Palmer's unit, he is not entitled to protection under Colorado's statutory provisions.⁴ When he returns from his duties in New Mexico, he cannot leverage Colorado's statutory provisions to force his employer to reinstate him or to provide him with the benefits he would have earned had he not left.

Colorado has enacted different provisions for private sector and public sector employees.

Private Employees

Private employees who are Colorado National Guard members have rights under Colorado Revised Statutes sections 28-3-609 through 28-3-610.5. Section 28-3-610.5 applies to absences due to active service for the state:

- (1) A private employee who is a duly qualified member of the Colorado National Guard who leaves or who is absent from his or her employment, regardless of

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⁴ Palmer is also not protected by New Mexico's law, because nothing enacted by the legislature in Santa Fe can bind an employer in Colorado.

the length of such absence, in order to engage in active service for state purposes pursuant to section 28-3-104:

- (a) Is entitled to the reemployment rights for members described in section 28-3-609, so long as such member otherwise meets the requirements of section 28-3-609; and
- (b) Retains his or her right to the employee benefits described in section 28-3-610.

Section 28-3-609 provides for the reemployment of Colorado National Guard members following training periods.⁵ Under this provision, any member of the Colorado National Guard who, following a mobilization to receive training *not exceeding fifteen days per calendar year*⁶, leaves a *non-temporary*⁷ job, subsequently provides evidence of “satisfactory completion of such training,” and who is “still qualified to perform the duties” required by the job, “is entitled to be restored to his or her previous or a similar position in the same status, pay, and seniority, and such period of absence for *military training* shall be construed as an absence with leave and without pay.”

Section 28-3-610 provides mobilized Colorado National Guard personnel with continued access to benefits following a mobilization for training purposes:

“Such absence for military training will in no way affect the employee's right to receive normal vacation, sick leave, bonus, advancement, and other advantages of his or her employment normally to be anticipated in his or her particular position.”

For example, Amanda Palmer (William Palmer's sister) is a member of the Colorado Army National Guard and a refinery manager in Pueblo, Colorado. The Governor mobilizes her unit to fight a forest fire in Manitou Springs, Colorado, for a period of 30

⁵ This section is largely redundant to federal law. The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the federal law that gives returning service members the right to reemployment in their pre-service civilian jobs (federal, state, local, and private sector) after “service in the uniformed services.” That term includes active duty for training (annual training) and inactive duty training (drills) performed by National Guard and Reserve members, but it does not include *state active duty* performed by National Guard members. The states need to enact laws that protect the civilian jobs of National Guard members on state active duty, because such duty is not protected by federal law.

⁶ Under USERRA, there is no 15-day limit, and in recent years National Guard members have frequently been tasked to perform more than 15 days of training duty per year. Under section 4302(b) of USERRA, 38 U.S.C. 4302(b), USERRA supersedes and overrides state laws that purport to limit USERRA rights or to impose additional prerequisites upon the exercise of USERRA rights. Colorado's 15-day limit on the annual duration of National Guard training duty is clearly superseded by federal law and therefore null and void.

⁷ Section 28-3-609 apparently predates the 1994 enactment of USERRA. As is explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, it was necessary for the returning service member to establish that he or she had left an “other than temporary” civilian job in order to perform military service or training. USERRA eliminated this requirement.

days. When Palmer returns, Colorado Revised Statute section 28-3-610.5 requires her employer to reinstate her. Because this mobilization was for active service, not training, the duration of Palmer's mobilization is immaterial to her right to reinstatement. As long as Palmer's employment was full-time, and as long as she is still qualified to perform her duties as a refinery manager, she must be "restored to his [her]... previous or similar position in the same status, pay, and seniority." Under section 28-3-610, Palmer is still entitled to her normal employment benefits, notwithstanding her absence from work.

Public Employees

Colorado Revised Statutes sections 28-3-601 through 28-3-607 provide similar protections to public employees, defined as "any officer or employee of the state or of any political subdivision, municipal corporation, or other public agency of the state" who are also members of the National Guard "or any other component of the military forces of the state organized or constituted under state or federal law" or members of the reserves. All such personnel are "entitled to a leave of absence from his or her public office or employment without loss of pay, seniority, status, efficiency rating, vacation, sick leave, or other benefits for all the time ... engaged ... in training or active service ... whether for state or federal purposes, but not exceeding fifteen days in the leave year established by the employer."

Unlike the laws applying to private employees, public employees continue to receive pay during the first 15 days of service, whether they are engaged in active service or training. If the public employee is required to serve for more than 15 days, section 28-3-102 entitles the employee to a leave of absence from public employment "*without* pay for all such additional service with right of reinstatement thereafter upon the same conditions as provided in section 28-3-604 for reinstatement after active service..."

Similarly, if the employee "engages in active military service in time of war or other emergency declared by proper authority of the state or the United States, for which leave is not otherwise allowed by law, is entitled to leave of absence ...*without* pay during such service with right of reinstatement as provided in section 28-3-604."⁸

Section 28-3-604 covers reinstatement following the completion of active service, requiring that a public "officer or employee shall be reinstated in the public position which he or she held at the time of entry into such service"⁹ or a public position of like seniority, status, and pay if such is available¹⁰ at the same salary which he or she would

⁸ Such a person would also be entitled to reemployment under USERRA, which supersedes and overrides conflicting state laws. USERRA is not limited to service during a war or national emergency.

⁹ Under USERRA, the person is entitled to reinstatement in the position that he or she *would have attained if continuously employed*, which could be better than the position that the person left. USERRA overrides conflicting state laws.

¹⁰ Under USERRA, there need not be a position that is "available" for the returning service member to have the right to reemployment, because in some circumstances the federal law requires the employer to

have received if he or she had not taken such leave,” as long as: (1) the position has not been abolished or its term has not elapsed, (2) that the public employee is still physically and mentally capable or performing the requisite duties¹¹, (3) the public employee “makes written application for reinstatement to the appointing authority within ninety days after discharge from ... medical treatment which immediately follows the termination of and results from such service, but such application shall be made within one year and ninety days after termination of such service, notwithstanding such hospitalization or medical treatment,”¹² and (4) the public employee can show that the military service was satisfactory.

Additionally, upon reinstatement, the public employee is entitled to “the same rights, with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if he or she had actually been employed during the time of such leave.” Once reinstated, the public officer or employee cannot be terminated within one year, except for cause or where there is less than a year remaining in a set term of service.

For example, Zeb Pike works as a prosecutor for the district attorney in Castle Rock, Colorado. Like Amanda Palmer, he is mobilized to fight the wildfire raging in Manitou Springs for a period of 30 days. As a public employee, Pike will receive pay for the first 15 days of his state mobilization. Additionally, Pike is covered by the reemployment provisions listed above.¹³ As long as Pike’s position has not been abolished before his return, and Pike is still physically and mentally capable of performing his duties, and he can show his service was satisfactory, and he applies, in writing, to his appointing authority for reinstatement within ninety days of discharge from medical care resulting from a service-connected injury, Pike is covered by the reemployment provisions of Colorado Law.

In another example, suppose Pike, while heroically battling the wildfire, suffers from severe vocal cord damage due to smoke inhalation, preventing him from audibly

displace another employee in order to make room for the returning service member. *See Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993).

¹¹ Under USERRA, the employer is required to make reasonable efforts to enable the returning disabled veteran who meets the USERRA eligibility criteria to perform the duties of the position that he or she would have attained if continuously employed. If the disability cannot be reasonably accommodated in that position, the employer must reemploy the veteran in some other position for which he or she is qualified, *or can become qualified with reasonable employer efforts*, and that provides like seniority, status, and pay, or the closest approximation thereof in view of the circumstances of the returning disabled veteran’s situation. Please see Law Review 0854.

¹² Under USERRA, a returning veteran who upon release from active duty was hospitalized or convalescing from an injury or illness incurred or aggravated during the military service is permitted to apply for reemployment within 90 days after the end of the period of hospitalization or convalescence *lasting up to two years*. *See* 38 U.S.C. 4312(e)(2). USERRA overrides a state law that limits USERRA rights.

¹³ Pike does not have the right to reemployment under USERRA in this scenario, because state active duty does not qualify as “service in the uniformed services” for USERRA purposes.

speaking. He is released from the hospital three months later, but does not apply to return to his position until one hundred days after his release. It seems clear that Pike is not covered by the legislation for several reasons. First, his inability to speak likely limits his physical capabilities as a prosecutor. Second, even if he is still capable of performing his duties, he has not applied in writing for reinstatement within 90 days after discharge from the hospital. The Castle Rock DA office will likely not be required to reemploy Pike.

Reinstatement for Public Officers with Definite Terms

A special provision applies to public officials who have been elected or appointed for a definite term. Section 28-3-605 requires that such a person, returning from military service, “shall file in the same office where his or her official oath is filed, within forty-five days after termination of such military service, a verified certificate that he or she has complied with the conditions for reinstatement prescribed in section 28-3-604, and he or she shall thereupon be deemed to have resumed his or her office.”

If Zeb Pike were the elected District Attorney for Castle Rock, this provision would apply. Pike has 45 days to file his certificate of compliance if he wants to ensure his reemployment.¹⁴

Substitutes for Public Officers

You may wonder what will become of the residents of Castle Rock, having lost their chief prosecutor for at least 30 days. Will Castle Rock become a haven for criminals and miscreants while Pike is away? Colorado Revised Statutes section 28-3-607 allows an absent public officer or employee to “appoint a substitute, to be known as acting incumbent, who shall qualify as required for the regular incumbent, shall receive the same compensation as fixed by law or otherwise such compensation as may be fixed by proper authority, and shall have all the power and perform all the duties of the position until the return of the regular incumbent; except that this shall not preclude the making of any other provision for the discharge of the duties of the position which may be otherwise authorized by law.”

Enforcement Mechanisms

Statute 28-3-611 provides both criminal and civil remedies against employers who violate the reemployment and benefit rights of mobilized Colorado National Guard Members:

¹⁴ It is unclear whether USERRA applies to elected officials, but an argument can be made that it does. See Law Review 1201 (January 2012). If Pike was called to state active duty, USERRA is not relevant to this discussion.

"Any employer violating any of the provisions [listed in this article] is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five thousand dollars. In addition, the employee may bring an action at law for damages and reasonable attorney fees for such noncompliance or apply to the district court for such equitable relief and reasonable attorney fees as are just and proper under the circumstances."

Obviously, the criminal enforcement mechanism may be unworkable and will provide no immediate benefit to the National Guard member. Guard personnel have a much better remedy in the civil portion of this statute, which allows them to recover damages, equitable relief, and attorney's fees from employers refusing to reinstate them or provide them with benefits in accordance with the state laws described in this article.