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USERRA And The DC National Guard

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Like each of the 50 states, the District of Columbia (DC) has an Army National Guard and Air National Guard,² but DC's National Guard is fundamentally different from the National Guard of Virginia, Maryland, or any other state, since DC is not a state.³ As is explained in Law Review 14071⁴ and other articles, the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵ accords the right to reemployment to any person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services (as defined by USERRA) and who meets the USERRA eligibility conditions.⁶

In Virginia, Maryland, or any state, the National Guard has a hybrid state-federal status, as the modern-day equivalent of the state militia and as a Reserve Component of the United States armed forces. In their state status, National Guard members perform *state active duty* when called by the Governor for state emergencies like hurricanes, fires, riots, etc. National Guard members also perform federally funded training and duty under title 10 and title 32 of the United States Code.

USERRA protects the civilian jobs of National Guard members when they perform training or duty under title 10 or title 32, but not when they perform state active duty. If they are to have job protections for state active duty, it must be by state law. Each of the 50 states has such a law, but DC does not. DC does not need such a law, at least for DC National Guard members, because DC National Guard members do not perform state active duty. The Mayor of DC has no

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² The DC Air National Guard is actually located at Andrews Air Force Base in Maryland, since there is no suitable airport in DC.

³ Article I, Section 8, Clause 17 of the United States Constitution gives the Congress the authority "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." Yes, it is capitalized just that way, in the style of the late 18th Century.

⁴ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,100 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. I initiated this column in 1997, and we add new articles each week, including 169 new articles added in 2013.

⁵ 38 U.S.C. 4301-4335.

⁶ The person must have left the civilian job for the purpose of service and must have given the employer prior oral or written notice, unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable. The person must have been released from the period of service without having exceeded the cumulative five-year limit on the duration of the period or periods of service and without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment.

authority to call up DC National Guard members. If the Mayor needs these Soldiers and Airmen for a local emergency, the Mayor would need to ask the President to call them up. In that scenario, they would be on federal duty and would be protected by USERRA.

Let us consider a hypothetical but realistic scenario. Abraham Lincoln, Jefferson Davis, and Francis Scott Key are young attorneys employed by Dewey, Cheatham & Howe (DCH), a major DC law firm. Lincoln is a Captain in the DC Army National Guard. Davis is a Captain in the Virginia Army National Guard. Key is a Captain in the Maryland Army National Guard.

In September 2015, a major hurricane causes severe damage throughout the Mid-Atlantic States, including DC, Virginia, and Maryland. The Governor of Virginia calls Davis to active duty for 60 days to assist in the clean-up, and the Governor of Maryland similarly calls Key to state active duty for 60 days. The Mayor of DC asks the President to call up Lincoln and his unit, and the President acts upon that request.

Lincoln, Davis, and Key each serve honorably for 60 days and then seek reemployment at DCH. Lincoln has a legally enforceable right to reemployment, under USERRA, because his military duty was federal. Davis and Key are out of luck if DCH does not want them back, since USERRA does not apply to state active duty and DC has no law that protects individuals in this situation. Laws enacted in Richmond and Annapolis do not apply to DCH, a DC employer.