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Missouri's Reemployment Protections For National Guard Members

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GENERAL REEMPLOYMENT PROTECTION STATUTE FOR 'VETERANS'

Missouri's Revised Statutes Section 40.490, extends the reemployment protections of the Uniformed Services Employment and Reemployment Rights Act (USERRA)³ to members of the Missouri National Guard who have been called to active duty in service of the State of Missouri:

Members of the state military forces *of this state* who are ordered to active state duty by the governor shall, upon being relieved from such duty, be entitled to the same reemployment rights provided by Title 38 of the United States Code, the Revised Statutes of Missouri, and all amendments thereto. The attorney general shall enforce the reemployment rights contained in this section for members of the state military forces who are ordered to active state duty by the governor. [Emphasis supplied].

PUBLIC EMPLOYEES

Missouri's Revised Statutes Section 105.270 authorizes public employees who are also members of the Missouri National Guard to take a paid leave of absence for up to 120 hours in the event that they are called to state active duty. Section 105.270 also makes it a misdemeanor for public officers to discriminate against their employees who are National Guard members or interfere with their National Guard duties.

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³ Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38, United States Code, sections 4301-4335. Under USERRA, a 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) is entitled, upon release from the period of service, to reemployment in the position that the person would have attained if continuously employed. The person must have given the employer prior oral or written notice and must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to that particular employer. The person must have been released from service without having received a disqualifying bad discharge from the service and after release the person must have made a timely application for reemployment. In the case of National Guard members, USERRA's definition of "service in the uniformed services" includes training or duty under title 10 or title 32 of the United States Code, but USERRA does not apply to state active duty performed by National Guard members. The point of these state laws is to protect National Guard members who are absent from their civilian jobs for state active duty.

1. All officers and employees of this state, or of 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 the National Guard or of any reserve component of the Armed Forces of the United States, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave, impairment of efficiency rating, or of any other rights or benefits, to which otherwise entitled, for all periods of military services during which they are engaged in the performance of duty or training in the service of this state at the call of the governor and as ordered by the adjutant general without regard to length of time, and for all periods of military services during which they are engaged in the performance of duty in the service of the United States under competent orders *for a period not to exceed a total of one hundred twenty hours* in any federal fiscal year.
2. Before any payment of salary is made covering the period of the leave the officer or the employee shall file with the appointing authority or supervising agency an official order from the appropriate military authority as evidence of such duty for which military leave pay is granted which order shall contain the certification of the officer or employee's commanding officer of performance of duty in accordance with the terms of such order.
3. No member of the organized militia shall be discharged from employment by any of the aforementioned agencies because of being a member of the organized militia, nor shall he be hindered or prevented from performing any militia service he may be called upon to perform by proper authority nor otherwise be discriminated against or dissuaded from enlisting or continuing his service in the militia by threat or injury to him in respect to his employment. Any officer or agent of the aforementioned agencies violating any of the provisions of this section is guilty of a misdemeanor.
4. Notwithstanding the provisions of any other administrative rule or law to the contrary, any person entitled to military leave pursuant to the provisions of subsection 1 of this section shall only be charged military leave for any hours which that person would otherwise have been required to work had it not been for such military leave. The minimum charge for military leave shall be one hour and additional charges for military leave shall be in multiples of the minimum charge.

THE NATIONAL GUARD COVERAGE GAP

Like many other states, Missouri does not protect those of its citizens who serve in the National Guard in other states.

The Uniformed Services Employment and Reemployment Act (USERRA) provides reemployment protections for members of the reserve components, including the National Guard, who are called to federal active duty. For example, John Pershing, a Pulitzer Prize-winning author and military history professor, lives in Kansas City, on the Missouri side. Pershing teaches at the Wentworth Military Academy, also in Missouri. Pershing spends his weekends commanding a combined arms battalion in the Kansas National Guard. The Defense Department calls

Pershing's unit to active duty for a nine-month deployment to Afghanistan. Upon Pershing's return, he is entitled to reemployment under USERRA, which provides reemployment rights for all reserve component members who have been called to federal active duty or who volunteer for federal active duty.

One year later, the Governor of Kansas activates Pershing's battalion to assist in the recovery efforts after a series of tornadoes devastates several Kansas towns. The recovery operation takes four months to complete and causes Pershing to miss part of the school year at Wentworth. When he returns to Wentworth to take up his old post, he finds that his Teaching Assistant has been promoted to his old position and is now filling the only military history professor post that Wentworth offers. The school refuses to hire him. Pershing complains to the president of the college, Emilio Aguinaldo. Aguinaldo, a graduate of Oxford Law and an expert in labor law, has a long history of enmity with Pershing and will take any opportunity to get rid of him. When Pershing demands reinstatement, Aguinaldo replies that Pershing has no legal basis to do so. Aguinaldo correctly points out that state active duty is not covered by the protections of USERRA. Pershing counters by referencing Missouri Revised Statutes Section 40.490. Aguinaldo is triumphant. "The statute clearly states that it only applies to 'members of the military forces of *this state*.' You are a member of the military forces of *Kansas*. You may not avail yourself of this statute's protections." Pershing leaves the halls of Wentworth Academy, Aguinaldo's maniacal, villainous laughter ringing in his ears, and hoping that in some alternate universe he is able to take revenge.

ENFORCEMENT

Unfortunately for veterans, the Missouri legislature has not enacted any provisions giving veterans a civil cause of action against their employers. Because of the lack of such a provision, a member of the Missouri National Guard whose rights have been violated because of a state call-up can only appeal to the state attorney general. Public employers who violate their National Guard employees' rights are only guilty of a misdemeanor crime. We have previously stated our concern that reemployment protections for the National Guard that do not include a civil cause of action lack teeth, mainly because state attorneys general, prosecutors, and similar officials probably have their hands full with more pressing matters than the wrongful firing of a veteran⁴. We strongly advocate the enactment of legislation that would enable wronged members of the Missouri National Guard to take action against their employers in civil court.

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⁴ There is a notable exception for those individuals who meet the criteria of a "war on terror veteran" according to Missouri state law. Although these individuals still lack a civil cause of action against a discriminating employer, the penalty for discriminating against a war on terror veteran is financially steep enough to serve as a strong disincentive.

On 6/14/2017, the Governor of Missouri signed into law Senate Bill No. 108. That law added “any Missouri employee who is a member of the national guard of another state and who is called into state duty by the governor of that state” to the coverage of section 40.490.

For example, Josephine Smith lives in East Saint Louis, Illinois and is a Specialist (E-4) in the Illinois Army National Guard. For her civilian job, she commutes across the Mississippi River to Vidkun Quisling’s Norwegian Seafood Restaurant in Saint Louis, Missouri. After a major tornado strikes southern Illinois, the Governor of Illinois calls Smith to Illinois state active duty. Smith is away from her Missouri job for three weeks of state active duty. When she is released from state active duty, Mr. Quisling refuses to reinstate her to her job at the restaurant.

Prior to the 2017 amendment, a person in this situation had no legally enforceable right to reinstatement in the civilian job. After the amendment, section 40.490 accords the right to reinstatement to a person in this situation.

The 2017 amendment also added the following sentence to section 40.490: “The attorney general [of Missouri] shall enforce the reemployment rights contained in this section for members of the state military forces ordered to state duty by the governor.” Missouri now has an effective enforcement mechanism, and Missouri is now entitled to a “yes” on each of the four questions.