

New Mexico's Reemployment Protections For National Guard Members

By Nathan M. Richardson¹

General Eligibility

New Mexico's state laws protect the reemployment rights of members of the National Guard, but state law limits those rights to members of the *New Mexico* National Guard. Section 28-15-1 of the New Mexico Statutes provides, "Any person who, since July 1, 1940, has left or leaves a position he has held, other than a temporary position, in the employ of any employer to enter the ... national guard ... and who serves on active duty and is honorably discharged or released from active duty to complete his remaining service in a reserve component, or is entitled to a certificate of service, or who terminates his service without dishonor...and is still qualified to perform the duties of such position, and makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year shall be reemployed..." The statute then differentiates between private and public employees and state or local government employees (addressed below).

At first glance, New Mexico does not appear to limit its coverage to service in the *New Mexico* National Guard. Under such a reading, this statute technically could cover persons who pursue civilian careers within the borders of New Mexico while serving in the national guard of *other states*. However, this reading is most likely incorrect. Section 20-2-1 of the New Mexico Statutes provides a clear definition of the term 'national guard': "'National guard' means the *New Mexico army national guard and the New Mexico air national guard*." (Emphasis supplied.)

Chapter 28 does not define "national guard." When interpreting multiple conflicting or differing statutes, judges typically choose an interpretation that will harmonize the various provisions. Here, it is most likely that the definition of "national guard" in Chapter 20 applies to the use of the term in Chapter 28's reemployment provisions. Because of this, New Mexico's protections most likely do not apply to persons who hold civilian jobs in New Mexico but who are members of the National Guard of other states.

For example, Werner Heisenberg works as a chemist in Alamogordo, New Mexico, but is also a chemical officer in the Texas Army National Guard, holding the rank of colonel. His unit is activated as part of a Texas state counter-narcotics mission in El Paso. Although Colonel Heisenberg meets the eligibility requirements of New Mexico's reemployment statute, he is not deployed with the New Mexico National Guard overseas or in active service to New Mexico, as required by 20-2-1. When he returns from active state service for the State of Texas, if his

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employer refuses to reinstate him, Heisenberg is not eligible for protection under New Mexico's reemployment provision, because by definition the provision only applies to members of the New Mexico Air National Guard and New Mexico Army National Guard.

Private Employees

In the case of private employees, New Mexico law mandates that "the employer shall restore him to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." A key difference exists here between the state law and USERRA. Under USERRA, the person is entitled to reinstatement in the position that he or she *would have attained if continuously employed*, which might be superior to the position that the person left.

For example, Erwin Schrodinger works as a physicist for a private engineering firm in New Mexico, and is also an officer in the New Mexico Air National Guard. The firm offers regular promotions based on the number of years of employment with the company. Schrodinger was scheduled to earn one of these promotions, but the New Mexico Governor activates his unit to quell a riot in Albuquerque. When Schrodinger returns to his firm, satisfying all of New Mexico's reemployment eligibility requirements, state law only requires his firm to reinstate him in the same position he held before leaving his civilian job; it does not have to promote him. Conversely, USERRA would require Schrodinger's employer to return him to work along with the promotion he would have earned if he had never left his job. Unfortunately for Schrodinger, USERRA does not apply to *state* active duty.²

Public Employees

For public employees, defined as a person whose "position was in the employ of the *state of New Mexico or any political subdivision thereof*" the statute mandates that the employee "shall be deemed to meet all the requirements of the Personnel Act as well as all residency requirements or other provisions of law and shall be restored to such position or to a position of like seniority, status and pay." Public employees who are members of the National Guard face the same issue encountered by private employees—a possible conflict with USERRA. Under federal law, a public or private employee who has left his or her civilian job for uniformed service is entitled to return to the position that he or she would have attained if he or she had not taken military leave, potentially more substantial than the "position of like seniority, status and pay" required by New Mexico. However, just like the relevant provision for private employees, this does not apply to *state* active duty in the National Guard.

Reinstatement

Section 28-15-2 reiterates the requirements of 28-15-1, and further elaborates that reinstated personnel "shall be entitled to participate in insurance or other benefits offered by the

² USERRA's reemployment protections in Section 4303(13) apply to members of the National Guard who fall under USERRA's definition of 'service in the uniformed services,' which does not include state active duty. Please see Law Review 14071.

employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person entered the armed forces of the United States.” Most notably, the law prohibits employers from firing a reinstated employee “within one year after such restoration.”

Enforcement

Section 28-15-3 creates an enforcement mechanism for employees whose employers have violated the reemployment and reinstatement protections guaranteed by New Mexico state law.³ Employees may file “a motion, petition, or other appropriate pleading...to specifically require such employer or public officials to comply with such provisions, and, as an incident thereto, to compensate such persons for any loss of wages or benefits suffered by reasons of such employers or official’s unlawful action.” Additionally, the statute requires the court to expedite any such proceeding, requires the district attorney, “if reasonably satisfied that the [employee]...is entitled to [reemployment] benefits, shall appear and act as attorney for such person.” The statute explicitly prohibits the district attorney from charging the employee with any fees or court costs.

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New Mexico Governor Susana Martinez signed House Bill No. 83, and this new law goes into effect on July 1, 2017. This new law amends section 28-15-1 to make it apply to any member of “an organized reserve or the national guard of *this state or any other state or territory of the United States.*” (Emphasis supplied.)

³ Very recently, New Mexico’s intermediate appellate court held that this provision does not clearly and explicitly waive the sovereign immunity of state agencies as employers and that persons claiming USERRA rights with respect to state agencies as employers and that there is no remedy in state court for claims that state agencies have violated USERRA. See *Ramirez v. State of New Mexico*, No. 31,820 (New Mexico Court of Appeals March 3, 2014). The *Ramirez* case is discussed in detail in Law Review 14036 (March 2014).

⁴ BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for more than 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

For example, Samantha Houston lives in El Paso, Texas and is a Specialist in the Texas Army National Guard. Her civilian job is just across the state line in New Mexico. Houston is called to state active duty by the Governor of Texas and is away from her New Mexico job for state active duty in Texas for a time. After June 30, 2017, the civilian job of a person in this situation will be protected by New Mexico law.

House Bill No. 83 also makes the federal Servicemembers Civil Relief Act (SCRA) apply, as a matter of New Mexico law, to a National Guard member of New Mexico or any other state or territory who is on a continuous period of state active duty or Title 32 duty lasting at least 30 days.

In footnote 3 of the article, Nathan Richardson cites the decision of the New Mexico Court of Appeals (the state's intermediate appellate court) in *Ramirez*. The New Mexico Supreme Court reversed that Court of Appeals decision and held that the New Mexico Legislature has adequately waived sovereign immunity to permit a lawsuit against the State of New Mexico, under the Uniformed Services Employment and Reemployment Rights Act (USERRA), by a state employee or former state employee who claims that his or her USERRA rights were violated. *See Ramirez v. New Mexico Children, Youth & Families Department*, 372 P.3d 497 (New Mexico Supreme Court 2016). I discuss the New Mexico Supreme Court decision in detail in Law Review 16034 (April 2016).