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Reemployment Rights Of National Guard Members In Texas

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Today's National Guard traces its origins to 1636, when the Massachusetts Bay Colony established the Massachusetts militia to defend the colony against attacks by the Pequot Indians. Other colonies and states later established similar state militias. Early in the 20th Century, Congress established the National Guard as a hybrid federal-state organization. National Guard members are subject to call by the President for national emergencies, and they train periodically for that contingency. National Guard members are also subject to state call-ups, by the Governor.

A federal statute called the Uniformed Services Employment and Reemployment Rights Act (USERRA)[3] accords the right to reemployment to 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) and who meets the USERRA eligibility criteria.[4] USERRA protects the civilian jobs of National Guard members (and also members of the Army Reserve, Air Force Reserve, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve) after military training or service under title 10 or title 32 of the United States Code, but USERRA does not apply to state active duty. If National Guard members are to have reemployment rights after state active duty, it must be by state law.

Like every other state legislature, the Texas Legislature has enacted provisions to protect members of the state's National Guard when they are on state active duty, called by the Governor for state emergencies like hurricanes, fires, floods, riots, etc. Vernon's Texas Codes Annotated (V.T.C.A.) section 437.204 provides:

> (a) An employer may not terminate the employment of an employee who is a

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[3] USERRA is codified in title 38, United States Code, sections 4301-4335.

[4] The person must have left the civilian job for the purpose of performing uniformed service and must have given the employer prior oral or written notice. The person's cumulative period or periods of uniformed service, relating to the employer relationship with that employer, must not have exceeded five years, but certain kinds of service are exempt from the computation of the person's five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military and after release the person must have made a timely application for reemployment.

> member of the state military forces of this state *or any other state* because the employee is ordered to authorized training or duty by a proper authority. The employee is entitled to return to the same employment held when ordered to training or duty and may not be subjected to loss of time, efficiency rating, vacation time, or any benefit of employment during or because of the absence. The employee, as soon as practicable after release from duty, must give written or actual notice of intent to return to employment.
> (b) A violation of this section is an unlawful employment practice. A person injured by a violation of this section may file a complaint with the Texas Workforce Commission civil rights division under Subchapter I.

Emphasis supplied.

"Employer" in this statute is defined as:

> (A) a person who is engaged in an industry affecting commerce and who *has 15 or more employees* for each working day in each of 20 or more calendar weeks in the current or preceding calendar year;
> (B) an agent of a person described by Paragraph (A);
> (C) an individual elected to public office in this state or a political subdivision of this state; or
> (D) a county, municipality, state agency, or state instrumentality, regardless of the number of individuals employed.[5]

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men for World War II. Unlike other federal employment statutes (Age Discrimination in Employment Act, Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, etc.), the federal reemployment statute has never had a threshold for applicability, based on the size of the enterprise or the number of employees. In a case decided two years before the enactment of USERRA, the United States Court of Appeals for the Fifth Circuit[6] held that the VRRA applied to an employer who had *only one employee* and that employee left his job for National Guard training and sought to return to his job after the training. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992). USERRA's legislative history makes clear the intent of Congress that USERRA would also apply without regard to the number of employees. *See* House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.

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[5] V.T.C.A. Government Code section 437.001 citing V.T.C.A. Labor Code section 21.002 (8). (Emphasis supplied.)

[6] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

Accordingly, it is clear that USERRA applies to private employers of *one or more employees*, but this Texas law (providing for reemployment rights after state active duty) only applies to private employers with 15 or more employees. For example, Freddie Prinze owns and operates Freddie's Fifth Ward Lunch Truck (a tiny business that sells food at construction sites) in Houston, Texas. Mr. Prinze has just one employee, Sam Houston, who is a Private First Class in the Texas Army National Guard.

When Houston joined the National Guard and went away for several months of "boot camp" and other elementary military training, USERRA gave him the right to reemployment with Mr. Prinze. USERRA also gives Houston a job-protected right to be absent from his job for weekend and annual training in the Army National Guard. If Houston is called up for or volunteers for federal active duty, USERRA gives him the right to reemployment. But if Houston is called up for state active duty, by the Governor of Texas, for state service during and after a hurricane or some other state emergency, Mr. Prinze has no legal obligation to reemploy him, because the Texas law, by its terms, only applies to private employers who have 15 or more employees.

For another example, Roy Bean owns and operates the West Texas Cantina in El Paso, Texas. Among his 50 employees, Bean employs two National Guard members. Jim Bowie lives in El Paso and is a Sergeant in the Texas Army National Guard. Roy Orbison lives a few miles west in New Mexico and is a Sergeant in the New Mexico Army National Guard. A major tornado devastates part of Texas and New Mexico, and both the Governor of Texas and the Governor of New Mexico call up some National Guard members (including Bowie and Orbison) for state active duty. Bean is annoyed by the short-notice call-up and fires both employees. When they return from their state active duty periods, Bean informs them that they have been fired and replaced and orders them off his property.

Fortunately, both Bowie and Orbison have enforceable reemployment rights at the West Texas Cantina because V.T.C.A. section 437.204(a) accords reemployment rights to members "of the state military forces of this state *or any other state*" who are ordered to state active duty by the Governor of Texas or any other Governor.