

Reemployment Rights after Territorial Active Military Service by Public Sector and Private Sector Employees in the Virgin Islands

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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. Each state has enacted provisions to protect members of the Army National Guard and the Air National Guard when they are on state active duty, called by the Governor of the state for state emergencies like fires, floods, riots, etc. The Virgin Islands, Puerto Rico, and Guam also have territorial National Guard organizations and have laws that protect National Guard members when they are away from their civilian jobs for territorial National Guard service.

Under federal legislation enacted very early in the 20th Century, state militia forces have been given major federal assistance in pay, training, and equipment and have been given federal status as part of the Army National Guard of the United States, one of the seven Reserve Components of the United States Armed Forces.² After World War II, when the Air Force became a separate service rather than part of the Army, Congress created the Air National Guard of the United States as a similar hybrid state-federal military service.

Joe Smith is a Sergeant in the Army National Guard of the United States Virgin Islands. Like National Guard members in the 50 states, Joe is subject to call-up by the President (or he can volunteer) for federal active duty, and he engages in periodic training to prepare for such a contingency. A federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA) protects Joe from discrimination by civilian employers (federal, state, territorial, local, or private sector) with respect to initial employment, retention in employment, promotions, and benefits of employment based on his membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service. USERRA also gives Joe the right to reemployment in his civilian job if he leaves that job (for a period of hours, days, weeks, months, or years) for voluntary or involuntary service in the uniformed services.

USERRA gives Joe the right to reemployment in his civilian job after a period of voluntary or involuntary service under title 10 or title 32 of the United States Code. USERRA does not protect Joe's job when he is called to *territorial* military service by the Governor of the Virgin

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² The other six Reserve Components are the Army Reserve, the Air National Guard of the United States, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. The Army National Guard and Air National Guard have this hybrid state-federal status, while the other five Reserve Components are purely federal entities.

Islands, under territorial authority, paid with territorial funds, for a territorial emergency like a hurricane, fire, or riot. If Joe is to have the right to reinstatement in his civilian job after a period of territorial active duty, it must be by territorial law. The Virgin Islands Code has two sections (one for governmental employees and one for private sector employees) that are pertinent:

Leaves of absence to governmental employees

- (a) An officer or employee of the Government of the Virgin Islands, its agencies, authorities and public corporations, is entitled to leave without loss in pay, time or performance or efficiency rating for each day, not in excess of 30 days in a calendar year, in which he is on federal active duty, or training duty as a Reserve of the Armed Forces, or a member of the National Guard.
- (b) An officer or employee of the Government of the Virgin Islands, its agencies, authorities and public corporations, is entitled to leave without loss in pay, time or performance or efficiency rating for each day in which he is on *Territorial active military service*.
- (c) An officer or employee of the Government of the Virgin Islands, its agencies, authorities and public corporations who is on federal active duty, or training duty as a Reserve of the Armed Forces, or a member of the National Guard, in excess of 30 days in a calendar year, is entitled to the difference in salary between the pay received from the military and his salary as an officer or employee of the Government of the Virgin Islands, if the military salary is not greater than the Government of the Virgin Islands salary. Such an officer or employee incurs no loss of time, performance or efficiency rating for each day of active duty or training duty.

Virgin Islands Code Annotated, Title 23, section 1524 (emphasis supplied).

Leaves of absence to employees of private enterprise

A person in the employ of a private employer shall, upon request, be granted a leave of absence from his employer for the period required to perform *Territorial Military Service*. Upon his release from that service, or upon his discharge from hospitalization incident to that service, such employee shall be permitted to return to his position with such seniority, status, pay grade and vacation as he would have had if he had not been absent for such purposes. He shall report for work at the beginning of his next regularly scheduled work period after the calendar day following his release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If the employee is not qualified to perform the duties of his position by reason of disability sustained during *Territorial Active Military Service*, but is qualified to perform the duties of any other position in the employ of the employer or his successor in interest, he shall be restored by that employer or successor to such other position as will provide him like seniority, status, and pay grade, or the nearest approximation thereof consistent with the circumstances in his case.

Virgin Islands Code Annotated, Title 23, section 1525 (emphasis supplied).

These two quoted sections do not seem to provide an enforcement mechanism, if the employer fails or refuses to reinstate the returning National Guard member, as required.

These two sections only apply to members of the National Guard of the Virgin Islands, not members of the National Guard of another state or territory who happen to have civilian jobs in the Virgin Islands. For example, Josephine Weissmuller is a Captain in the Puerto Rico Army National Guard, but she works as the catering manager for a major hotel in the Virgin Islands. After a major hurricane devastates Puerto Rico, Weissmuller is called to Commonwealth of Puerto Rico active duty by the Governor of Puerto Rico. When she completes this Puerto Rico active duty period, no law gives her the right to reinstatement in her hotel job. The Puerto Rico law does not apply in the Virgin Islands. The Virgin Islands law, by its terms, is limited to members of the Virgin Islands National Guard. USERRA does not apply to state or territorial active duty. Josephine has fallen through the crack and is unemployed. We would like to see the Virgin Islands amend its law to protect National Guard members of other states and territories, in this scenario.