

LAW REVIEW 14053

April 2014

Progress for Service Members and Veterans in Indiana

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.2—USERRA forbids discrimination

1.8—Relationship between USERRA and other laws/policies

9.0--Miscellaneous

During the 2014 legislative session, the Indiana Legislature enacted and Governor Mike Pence signed into law nine new laws intended to benefit service members and veterans.

House Bill No. 1242 makes it unlawful for a private sector employer in Indiana to discriminate against a prospective employee based on his or her status as a veteran or his or her membership in the Indiana Army or Air National Guard or a Reserve Component of the armed forces.¹ This new law gives the Indiana Civil Rights Commission jurisdiction to enforce this new prohibition.

Does this new Indiana law duplicate the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

Yes. Section 4311 of USERRA provides:

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies

¹ The seven Reserve Components are the Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Marine Corps Reserve, the Navy Reserve, and the Coast Guard Reserve.

to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter [38 USCS §§ 4301 et seq.], (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter [38 USCS §§ 4301 et seq.], or (4) has exercised a right provided for in this chapter [38 USCS §§ 4301 et seq.]. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited--

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter [38 USCS §§ 4301 et seq.], (B) testimony or making of a statement in or in connection with any proceeding under this chapter [38 USCS §§ 4301 et seq.], (C) assistance or other participation in an investigation under this chapter [38 USCS §§ 4301 et seq.], or (D) exercise of a right provided for in this chapter [38 USCS §§ 4301 et seq.], is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title [38 USCS § 4312(d)(1)(C)].

38 U.S.C. 4311.

Section 4311 of USERRA makes it unlawful for any employer (federal, state, local or private sector) to discriminate in employment (including initial employment, retention in employment, promotions, and benefits of employment) on the basis of the employee's or applicant's membership in a uniformed service, application to join a uniformed service, performance of uniformed service (even service decades ago),

or application or obligation to perform service in the future. Thus, the federal law (USERRA) forbids everything that this new Indiana law forbids, plus a lot more.

Does USERRA supersede or override this new Indiana law?

No. Section 4302(a) of USERRA provides: “Nothing in this chapter shall supersede, nullify or diminish any Federal *or State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is *more beneficial to, or is in addition to,* a right or benefit provided for such person in this chapter.” 38 U.S.C. 4302(a) (emphasis supplied).

Of course, USERRA supersedes and overrides state laws that purport to limit USERRA rights or that impose additional prerequisites upon the exercise of federal USERRA rights. 38 U.S.C. 4302(b).

This new Indiana law does not purport to limit USERRA rights or to impose an additional prerequisite upon the exercise of USERRA rights. Thus, this new Indiana law is not preempted or superseded by USERRA.

Does this new Indiana law provide anything useful to service members and veterans in Indiana?

Not really. This new Indiana law might be marginally useful with respect to Indiana employers who are not aware of USERRA or who fail to understand that under the United States Constitution federal law trumps conflicting state law.

What is the relationship between a federal law like USERRA and a state law like this new Indiana statute?

Article VI, Clause 2 of the United States Constitution provides as follows: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²

Other new laws in Indiana

Senate Bill 58 authorizes counties, townships, cities, and towns to appropriate money to veterans’ organizations for Memorial Day activities.

Senate Bill 180 establishes the veterans disability clinic fund to provide funding for grants to qualified law schools in Indiana that maintain veterans’ disability clinics.

Senate Bill 331 establishes the “second service for veterans” program to attract veterans to study education and join the teaching profession in Indiana. This new law also requires Indiana state educational institutions to adopt policies awarding educational credit to veterans and National Guard members for certain military training that they received while on active duty or while actively participating in the National Guard.

Senate Bill 352 expands the duration (currently limited to three years) of state assistance to post-9/11 service members and dependents.

Senate Bill 354 establishes the “Hoosier women veterans program” to provide information and services to Indiana’s women veterans.

² Yes, it is capitalized just that way, in the style of the late 18th Century. This provision is called the “Supremacy Clause.”

Senate Bill 367 includes a provision that will allow a member of the armed forces to continue to claim the Indiana Homestead credit on his or her Indiana real property if he or she has received orders that require duty outside Indiana for his or her entire active duty time.

House Bill 1041 allows the Adjutant General of Indiana and certain of his or her subordinates to subscribe and administer oaths and take acknowledgments of all documents related to service in the Indiana National Guard. This new law would be substantially more useful if it applied to all seven Reserve Components, not just the Army National Guard and Air National Guard.

Finally, House Bill 1237 amends and codifies certain Bureau of Motor Vehicle (BMV) motor vehicle fees. Going forward, a single individual will be able to obtain both a Purple Heart license plate (if he or she was awarded a Purple Heart while in military service) and a disability placard or license plate (entitling the person to certain parking privileges as a disabled person).

The Purple Heart is awarded to a service member who was wounded in action. A Purple Heart recipient is not necessarily a disabled person for purposes of parking privileges.

ROA departments and chapters: We need your assistance in monitoring your state legislatures and in promoting the enactment of state laws that will benefit those who are serving, have served, or will serve our nation in uniform. Here at ROA headquarters, we have our hands full trying to monitor and effect what is going on here in Washington, with the Federal Government.

Thank you to Brigadier General James L. Bauerle, USA (Ret.) and the Department of Indiana for pushing for these new laws and for informing me of their enactment.