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USERRA Protections for National Guard Personnel

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Q: I am a Captain in the Indiana Army National Guard and a member of ROA.¹ I command an Indiana Army National Guard company that drills at a National Guard armory in northwest Indiana. Most of the members of my company live and work in Indiana, but several of them have civilian jobs in Illinois, especially Chicago and its Illinois suburbs.

I have heard a lot of talk about “title 10 duty” and “title 32 duty” but I do not understand the difference. I have heard that National Guard personnel are not subject to or covered by the Uniform Code of Military Justice (UCMJ), the Servicemembers Civil Relief Act (SCRA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA) when we are on title 32 duty. Is that correct?

A: You are correct about the UCMJ and the SCRA but wrong about USERRA. USERRA applies to title 32 duty as well as title 10 duty.

¹ Yes. National Guard officers and NCOs are eligible for full membership in ROA.

There are 49 titles (broad subject areas) in the United States Code. Title 10 deals with the armed forces, while title 32 deals with the National Guard.

When you joined the Indiana Army National Guard, you took two enlistment oaths, and you joined two overlapping but legally distinct organizations. You joined the *Indiana Army National Guard*, which is the modern day equivalent of the Indiana State Militia. You also joined the Army National Guard *of the United States*, which is one of the seven Reserve Components of the United States armed forces.²

You can go on title 10 (federal) status either voluntarily or involuntarily, and you will likely do that several times if you stay in the Army National Guard for a 20-year career. You perform inactive duty training (drills), active duty for training (annual training), and full-time National Guard duty (like full-time duty at the headquarters of the National Guard of your state) while in a title 32 (state) status.

You are not subject to the UCMJ (the federal military justice system) while you are in a title 32 status. Many states have state equivalents of the UCMJ, to provide for state military justice for National Guard members who commit misconduct while in a title 32 status. Many of those state laws are decades old and probably unworkable or unconstitutional. Pennsylvania recently updated and recodified the Pennsylvania Code of Military Justice in order to provide a realistic option of courts martial and non-judicial punishment (NJP) for National Guard Soldiers and Airmen who commit misconduct while in a title 32 status.

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 federal-state status, while the other five Reserve Components are purely federal entities.

As I explained in detail in Law Review 13121 (September 2013),³ National Guard personnel on title 32 duty (including full-time National Guard duty) are not protected by the Servicemembers Civil Relief Act (SCRA)⁴ except in unusual circumstances. You are not subject to the UCMJ while you are on title 32 duty, and you are not protected by the SCRA, but the Uniformed Services Employment and Reemployment Rights Act (USERRA) gives you the right to reemployment in the civilian job that you leave for title 32 duty, as well as title 10 duty.

Section 4303 of USERRA⁵ defines 16 terms used in this law, including the term “uniformed services” and the term “service in the uniformed services.” Section 4303(16) defines the term “uniformed services” as follows: “The term ‘uniformed services’ means the Armed Forces, *the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty*, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.”⁶

Section 4303(13) defines the term “service in the uniformed services” as follows:

“(13) The term ‘service in the uniformed services’ means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty

³ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,062 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated the column in 1997, and we add new articles each week, including 169 new articles in 2013.

⁴ Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after the United States entered World War I. The SSCRA and now the SCRA provide important protections for active duty service members (including Reserve Component personnel on active duty) with respect to protection against default judgments, double taxation, and other important matters.

⁵ 38 U.S.C. 4303.

⁶ 38 U.S.C. 4303(16) (emphasis supplied).

for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.”⁷

It is clear beyond any question that you and other Army National Guard and Air National Guard personnel are protected by USERRA when performing title 32 duty.

Q: The Indiana Army National Guard company that I command, or parts of it, have been called to state active duty several times for state emergencies, including floods, tornadoes, riots, etc. Does USERRA give us the right to return to our civilian jobs after this state active duty?

A: No. State active duty does not fit within USERRA’s definition of “service in the uniformed services” and this federal law does not protect your civilian job when you are on state active duty. If you are to have the right to reinstatement in your civilian job after state active duty, it would have to be by state law.

Indiana law provides as follows concerning reemployment rights for members of the Indiana Army and Air National Guard who leave civilian jobs for state active duty:

Sec. 23. (a) As used in this section, “active duty” means:

(1) training or duty under federal law; or

(2) *state active duty under section 7 of this chapter; performed under an order of the governor.*

⁷ 38 U.S.C. 4303(13).

(b) The rights, benefits, and protections of the federal Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 501 et seq., as amended and in effect on January 1, 2003, apply to a member of the Indiana national guard ordered to active duty for at least thirty (30) consecutive days.

(c) The rights, benefits, and protections of the federal Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4301 et seq., as amended and in effect on January 1, 2003, apply to a member of the Indiana national guard ordered to active duty.

(d) Nothing in this section shall be construed as a restriction or limitation on any of the rights, benefits, and protections granted to a member of the Indiana national guard under federal law.

Indiana Code Annotated section 10-16-7-23 (West) (emphasis supplied).

Sec. 6. *A member of the Indiana national guard* is entitled to receive from the member's employer a leave of absence from the member's respective duties in addition to the member's regular vacation period for the total number of days that the member is on state active duty under section 7 of this chapter. The leave of absence may be with or without loss of time or pay at the discretion of the member's employer.

Indiana Code Annotated section 10-16-7-6 (West) (emphasis supplied).

Sec. 4. An employer who knowingly or intentionally refuses to allow *a member of the Indiana national guard* to attend any assembly at which the member has a duty to perform under this chapter commits a Class B misdemeanor.

Indiana Code Annotated section 10-16-7-4 (West).

It is clear that members of the Indiana Army or Air National Guard who are called to state active duty by the Governor of Indiana and who leave civilian jobs with private employers in Indiana have the right to reemployment in those jobs upon completion of their state active duty periods. It is unclear whether this right also applies to employees of the State of Indiana and its political subdivisions⁸ who are called to state active duty as members of the Indiana National Guard.

I would like the Indiana Legislature to enact legislation creating a private right of action—permitting an individual member of the Army National Guard or Air National Guard to sue a private employer or the state or a political subdivision if such employer refuses to reemploy the

⁸ Political subdivisions include counties, cities, school districts, etc.

individual when he or she is returning from a period of state active duty. I think that it is unrealistic to expect a state prosecutor to file a criminal case against an employer in this scenario.

Q: Most of the members of my company work for employers in Indiana, but several work for private employers in Illinois. For example, Specialist Joe Smith works for a restaurant in Chicago. If Smith is called to state active duty by the Governor of Indiana, is the Chicago restaurant required to reemploy him?

A: The Indiana Legislature in Indianapolis lacks the authority to regulate the activities of employers in Illinois or another state. If Smith is to have reemployment rights, it must be by Illinois law. The Illinois law provides as follows concerning reemployment rights after state active duty:

§ 30.15. National Guard; State Active Duty; reemployment rights.

(a) *Any member of the National Guard* (“a member”) employed by a private employer in the State of Illinois or by the State of Illinois or any political subdivision of the State whose absence from a position of employment is necessitated by reason of being called to State Active Duty, whether or not voluntary, shall be entitled to reemployment rights and benefits and other employment benefits under this Article if:

(1) the member (or an appropriate officer of the National Guard in which the service is performed) has given advance written or oral notice of the service, if reasonably possible;

(2) the member reports to, or submits an application for reemployment to, the employer in accordance with the provisions of subsection (e); and

(3) the character of the member's service on State Active Duty was honorable, under honorable conditions, or otherwise characterized as satisfactory.

(b) No notice is required under subsection (a) if precluded by military necessity, or if the giving of the notice is not reasonably possible, under all relevant circumstances. A written determination of military necessity for the purposes of this subsection shall be made by the Adjutant General of Illinois and shall not be subject to judicial review.

(c) An employer is not required to reemploy a member under this Section if:

(1) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable, or if reemployment would impose an undue hardship on the employer; or

(2) the employment from which the member leaves to serve in the National Guard on State Active Duty is for a brief, nonrecurrent period and there is no reasonable expectation that the employment will continue indefinitely or for a significant period.

(d) In any proceeding involving an issue of whether (i) any reemployment referred to in subsection (c) is impossible or unreasonable because of a change in an employer's circumstances; (ii) any accommodation, training, or effort referred to in subdivision (c)(1) would impose an undue hardship on the employer; or (iii) the employment referred to in subdivision (c)(2) is for a brief, nonrecurrent period and there is no reasonable expectation that

the employment will continue indefinitely or for a significant period, the employer has the burden of proving the impossibility or unreasonableness, the undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

(e) Subject to subsection (f), a member referred to in subsection (a) shall, upon completion of a period of State Active Duty, notify the employer referred to in subsection (a) of the member's intent to return to a position of employment with the employer as follows:

(1) In the case of a member whose period of State Active Duty was less than 31 days, by reporting to the employer:

(A) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following completion of the period of State Active Duty and the expiration of 8 hours after a period allowing for safe transportation of the member from the place of that duty to the member's residence; or

(B) as soon as possible after the expiration of the 8-hour period referred to in paragraph (A), if reporting within that period is impossible or unreasonable through no fault of the member.

(2) In the case of a member whose period of State Active Duty was more than 30 days but less than 180 days, by submitting an application for reemployment with the employer not less than 14 days after completion of the period of State Active Duty, or if submitting the application within that period is impossible or unreasonable through no fault of the member, the next full calendar day when submission of the application becomes possible.

(3) In the case of a member whose period of State Active Duty was 180 days or more, by submitting an application for reemployment with the employer not later than 90 days after completion of the period of service.

(f) A member who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of a period of State Active Duty shall, at the end of the period that is necessary for the member to recover from the illness or injury, report to the member's employer or submit an application for reemployment with the employer. The period of recovery shall not exceed 2 years, except that the 2-year period shall be extended by the minimum time required to accommodate the circumstances beyond the member's control which make reporting within the 2-year period impossible or unreasonable.

(g) A member who fails to report or apply for employment or reemployment within the appropriate period specified in this Section shall not automatically forfeit his or her rights and benefits under subsection (a), but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

(h) A member who submits an application for reemployment in accordance with this Article shall, upon the request of the employer, provide to the employer documentation to establish that:

(1) the member's application is timely; and

(2) the character of the member's service was honorable, under honorable conditions, or otherwise satisfactory.

The failure of a member to provide documentation as prescribed in this subsection may not be the basis for denying reemployment if the failure occurs because the documentation does not exist or is not readily available at the time of the employer's request. If, after reemployment, documentation becomes available that establishes that the member does not meet one or more of the requirements in paragraph (1) or (2), the employer may terminate the member's employment in accordance with the conduct rules, established policy, and general practices of the employer pertaining to explanation and discipline with respect to absence from scheduled work. An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not exist or is not then readily available.

(i) Except as otherwise provided by this subsection, a member entitled to reemployment under this Article, upon completion of a period of State Active Duty, shall be promptly reemployed in the position of employment which he or she left with the same increases in status, seniority, and

wages that were earned during his or her period of State Active Duty by employees in like positions who were on the job at the time the returning member entered State Active Duty, 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.

If at the time of requesting reemployment, the member is no longer physically, mentally, or otherwise qualified or able to perform the duties of the position of employment which he or she left due to disability acquired incident to his or her service in State Active Duty, but is qualified and able to perform the duties of any other position in the employ of the employer, then the member shall be restored to that other position, the duties of which he or she is qualified and able to perform and that will provide him or her with like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances of the case.

If a member enters State Active Duty and the position of employment which he or she left is filled by one or more employees who are also members of the National Guard and who later enter State Active Duty, the members shall, upon release from State Active Duty, be given preference in the matter of reemployment in the order in which they entered State Active Duty, and the employer shall not be required to retain more than one of them in his or her employ.

(j) Except as otherwise provided in this Section, each member in the employ of a private employer or of the State of Illinois or a political subdivision of the State who, for the purpose of entering State Active Duty, has left or leaves that employment but who has been rejected for State Active Duty for lack of proper qualifications, shall be restored by the employer (i) to the position of employment which the member left with the same seniority, status, and wage increases that an employee who was employed in that position at the time the member left to enter State Active Duty earned during the time the member was absent from employment because of his or her attempt to enter State Active Duty or (ii) to a position of like seniority, status, and pay, provided that at the time of the rejection for State Active Duty the member is qualified to perform the duties of the position of employment which he or she left and has made application for reemployment within the time period specified in subsection (e) after receiving official notice of the rejection for State Active Duty.

20 Illinois Consolidated Statutes section 1805/30.15 (emphasis supplied).

§ 30.20. Reemployment; benefits.

(a) *Any member of the National Guard* who is reemployed or seeks reemployment to a position of employment in accordance with the provisions of this Article, shall be considered as having been on furlough or leave of absence during his or her State Active Duty and shall be so reemployed without loss of seniority and shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time the member entered State Active Duty. The member shall not be discharged from the position without cause within one year after reemployment.

(b) If an employer provides health insurance, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a member entitled to participate in that insurance under this Section, or a health or physical condition of any other person who is covered by the insurance by reason of the coverage of that member, if: (i) the condition arose before or during that member's period of State Active Duty; (ii) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by that member in the insurance; and (iii) the condition of that member has not been determined to be service connected.

20 Illinois Consolidated Statutes section 1805/30.20 (emphasis supplied).

These protections explicitly apply to the State of Illinois and its political subdivisions (counties, cities, school districts, etc.), as well as private employers in Illinois. The language “any member of the National Guard” can be reasonably construed to apply to a member of the National Guard of another state (like Wisconsin or Indiana) who has a civilian job in Illinois.

Thus, Illinois law protects the Indiana National Guard member (like Smith) who has a civilian job in Illinois and who is called to state active duty by the Governor of Indiana. When the shoe is on the other foot (Illinois National Guard member works for private employer in Indiana and is called to state active duty by the Governor of Illinois), Indiana does not return the favor. The Indiana provision is clearly limited to members of the Indiana National Guard.

We want all the states to amend their laws to protect National Guard members *of this or any other state* who are called to state active duty. Especially in multi-state metropolitan areas (New York City, Philadelphia, Washington, Chicago, etc.), a significant number of National Guard members have civilian jobs in other states.

We are adding a new set of articles to our “state leave laws” section on our website, at www.servicemembers-lawcenter.org. We have completed and posted these articles for the first 14 states alphabetically (Alabama-Indiana). We hope to have all the articles posted by Independence Day.

Q: Two of the Soldiers in my company are federal employees. One works for a regional federal office in Indianapolis, and the other for a regional federal office in Chicago. Does the Indiana statute or the Illinois statute apply to the Federal Government as the employer of these two National Guard Soldiers?

A: A state lacks the constitutional power to tax or regulate the activities of a federal agency within its borders. *See M'culloch v. State of Maryland*, 17 U.S. 316 (1819).⁹

These two Soldiers have the right to *paid* military leave from their federal civilian jobs under section 6323 of title 5 of the United States Code, which reads as follows:

§ 6323. Military leave; Reserves and National Guardsmen

(a)

(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title [5 USCS § 2105] or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title [5 USCS § 3401(2)]), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.

(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title [5 USCS § 5519], an employee as defined by section 2105 of this title [5 USCS § 2105] or an individual employed by the government of the

⁹ The citation means that you can find this case in Volume 17 of *United States Reports*, starting on page 316.

District of Columbia, permanent or temporary indefinite, who--

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and

(2) (A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury--

(i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or

(ii) *full-time military service for his State*, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or

(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection *shall not exceed 22 workdays in a calendar year*. Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d) (1) A military reserve technician described in section 8401(30) is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.

(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.

5 U.S.C. 6323 (emphasis supplied).

Under 5 U.S.C. 6323(b)(2)(A), these two Soldiers are entitled to up to 22 workdays of paid military leave per calendar year for state active duty. They will need to keep their participation within that limit because neither USERRA nor state law gives them the job-protected right to any additional time off from their federal civilian jobs for state active duty.