

Thanks for your service—you're fired

Prosecutors are, by their nature, people drawn to a life of service. A great many of them serve beyond the courtroom in the armed forces.

Service in the federal or state military forces necessarily entails certain sacrifices—of time at least, and potentially even life and limb. For those who choose to serve, both the federal and state governments have instituted protections to ensure that these sacrifices do not include the loss of the service member's employment. This article is designed to give a rough primer to those who serve and to those considering serving on the protections the governments have put in place.

Federal law

Members of the federal armed forces include the active, reserve, and National Guard components and are protected by the Uniformed Services Employment and Reemployment Rights Act (commonly known as USERRA).¹ USERRA precludes any discrimination against members of the armed forces.² It further requires that an employee who is called up for service with the federal armed forces be allowed a leave of absence to perform that duty and be allowed to return to his prior employment without any penalty.³ USERRA also requires that an employer reinstate the employee with whatever seniority, pay rate, and vacation time that the employee would have accrued had he not left.⁴ The employee's right to take a leave of absence to perform military duty and also to return from that duty without penalty applies regardless of whether it was active duty or training,⁵ and his rights under USERRA apply regardless of whether the employee volunteered for the military duty or was ordered to perform it.

Generally, an employee who is taking military leave must give his employer notice before the leave begins.⁶ Likewise, the employee must give the employer notice of his intent to return to his prior employment when his service ends.⁷

USERRA's protections do have their dreaded exceptions, as we lawyers are familiar with in so many other contexts. Employers can refuse to reemploy an eligible employee where the em-



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ployer can demonstrate that doing so is impossible or that the employee was only temporary, the employee was not honorably discharged, or his reemployment would work an undue hardship on the employer.⁸

State law

One might first ask, "If federal law already provides protections for service members, why even worry about the state statute?" The reason is that the National Guard is a hybrid organization, a state military force subject to state control and state law that can be called into federal service and subject to federal law. When the National Guard is acting purely under state authority rather than federal, state law provides the remedy for violations of a Guardsman's employment rights. This likewise applies to members of the Texas State Guard because that organization is solely a state military force and does not receive USERRA protections under federal law.

The state statutes that govern employment rights of service members can be found in Chapter 437 of the Texas Government Code. These statutes apply to members of the Texas military forces,⁹ including the Texas National Guard (Army and Air) when operating under state authority and the Texas State Guard.¹⁰

The general Texas statute dealing with employment rights of service members is §437.204 of the Texas Government Code. This statute effectively mirrors USERRA. Under it, an employer may not terminate the employment of an employee who is a member of the state military forces because that person is ordered to authorized training or duty.¹¹ Like USERRA, the Texas

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statute requires that the employee may return to the same employment he held before leaving for military service and that the employer not only reemploy the service member, but also do so without any loss of seniority, vacation time, or any other benefit of employment.¹² Additionally, the employee must give notice of his intent to return to employment "as soon as practicable" following his release from duty.

The Texas Government Code also provides for 15 work days' worth of paid military leave specifically for employees who are employed by the state, a municipality, a county, or another political subdivision of the state (such as prosecutors and their staff members).¹³ The statute also reiterates that such employees may not be subjected to loss of time, efficiency rating, personal time, sick leave, or vacation time as a result of their leave to perform military duty.

Conclusion

To all those prosecutors and members of county and district attorneys' offices who serve, let me give you a heartfelt "thank you" for your service. Luckily, in my experience, the heads of such offices are overwhelmingly supportive of their service members, even when that service works a hardship on the office if that employee is deployed. It is nonetheless comforting for employees who serve and those considering service to know that the law provides them employment protections. ✱

Endnotes

¹ 38 U.S.C. §§4303-4326. Although it likely does not apply to most prosecutor offices, it should be noted that USERRA's employment protections apply only to service members who are employees of an organization, not independent contractors. 38 U.S.C. §4303(3).

² 38 U.S.C. §4311.

³ 38 U.S.C. §4312.

⁴ 38 U.S.C. §§4313, 4316.

⁵ 38 U.S.C. §4303(13) (defining service in the uniformed services as including voluntary or involuntary performance of duty including active duty, active duty for training, inactive duty training, full time National Guard duty, etc.).

⁶ 38 U.S.C. §4312(a)(1); but see 38 U.S.C. §4312(b) (notice need not be given where giving such notice is precluded by military necessity, or where it is impossible or unreasonable under the circumstances).

⁷ 38 U.S.C. §4312(e).

⁸ 38 U.S.C. §4312(d).

⁹ Tex. Gov't Code §437.204(a) (note that this statute also applies to persons who are members of the military forces of another state).

¹⁰ Tex. Gov't Code §437.001(14)(16).

¹¹ Tex. Gov't Code §437.204(a).

¹² *Id.*

¹³ Tex. Gov't Code §437.202(a).