

# LAW REVIEW 15022<sup>1</sup>

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## Bill in Texas Legislature Would Provide Additional Benefits for State Employees Returning to State Employment after Military Service

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1.8—Relationship between USERRA and other laws/policies

2.0—Paid military leave for government employees

State Representative Joe Farias of San Antonio has introduced H.B. 339 in the Texas House of Representatives. The entire text of this short bill is shown below:

84R2919 AAF-D

By: Farias

H.B. No. 339

### A BILL TO BE ENTITLED AN ACT

relating to leave for certain veterans returning to state employment.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter Z, Chapter 661, Government Code, is amended by adding Section 661.923 to read as follows:

Sec. 661.923. LEAVE FOR REEMPLOYED VETERANS. (a) Except as provided by Subsection (b), a state employee who is reemployed by a state agency after military service as provided by Section 437.204 or Chapter 613 may be granted leave to tend to matters relating to the employee's military service or reintegration into civilian life, including obtaining medical or mental health care and receiving employee assistance counseling. Leave granted under this section may not exceed 15 days each fiscal year without a deduction in salary or loss of vacation time, sick leave, earned overtime credit, or state compensatory time.

(b) The administrative head of a state agency may annually grant additional days of leave described by Subsection (a) as the administrative head determines appropriate for the employee.

SECTION 2. This Act takes effect September 1, 2015.

To understand what this bill will provide if enacted, let us consider the hypothetical but realistic case of Josephine Smith, an employee of the State of Texas in Austin and a Sergeant in the

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,300 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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Texas Army National Guard.<sup>3</sup> In 2016, after HB 339 has been enacted and has gone into effect, Smith is called to federal active duty and deployed to Afghanistan for a year. She gives prior notice to her state government employer, and she is away from her civilian job from January 2016 until January 2017. She serves honorably and is released from active duty without a disqualifying bad discharge from the Army. In late January 2017, she returns home to Texas, leaves active duty, and returns to her status as a traditional National Guard member. On February 15, 2017, she makes a timely application for reemployment at the state agency that employs her.<sup>4</sup> Smith returns to work at her state job on March 1, 2017.

While on active duty in Afghanistan, Smith served in combat and was wounded, receiving a Purple Heart. She also suffered from Post Traumatic Stress (PTS). For several months after her release from active duty, she needs medical treatment for the physical injuries and the PTS, and she has several appointments at the Brooke Army Medical Center (BAMC) in San Antonio. The BAMC does not have evening or weekend appointments available, so these appointments require that she have time off from her state job to drive to San Antonio, receive the medical care, and return to Austin.

Under HB 339, assuming that it has been enacted, Smith is entitled to up to 15 days of *paid* leave from her state job “to tend to matters relating to the employee’s military service or reintegration into civilian life, including obtaining medical or mental health care and receiving employee assistance counseling.” This special paid leave will be in addition to her right to paid sick leave and annual leave as a state employee, and it will also be in addition to her right to paid military leave under section 431.005(a) of the Texas Government Code.<sup>5</sup>

This new entitlement under HB 339 is *not* superseded by the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA (the federal statute) is a floor and not a ceiling on the rights and benefits of a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary uniformed service. Section 4302 of USERRA provides:

§ 4302. Relation to other law and plans or agreements

(a) 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.

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<sup>3</sup> This bill will apply to anyone who leaves a civilian job for the State of Texas for voluntary or involuntary service in the uniformed services and who meets the eligibility criteria under a federal statute known as the Uniformed Services Employment and Reemployment Rights Act (USERRA), and who returns to a State of Texas job after release from the period of service.

<sup>4</sup> Because her period of service was more than 180 days, Smith has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

<sup>5</sup> Please go to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org) and then to “State Leave Laws.” You will find an article about each state, in alphabetical order, and its laws granting paid military leave to employees of the state and its political subdivisions.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. 4302 (emphasis supplied).

USERRA does not give an individual the right to *paid* military leave, so a state law that provides such right is not superseded by USERRA.

USERRA gives an individual the right to *unpaid* but job-protected leave from a civilian job (federal, state, local, or private sector) for “service in the uniformed services” as defined by USERRA. USERRA’s definition of “service in the uniformed services” includes “a period [of time] 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 service.”<sup>6</sup> USERRA does not give an individual the right to be away from his or her civilian job, even without pay, for medical *treatment*, even if the treatment was necessitated by a medical condition incurred during a recent period of uniformed service.

During the 111<sup>th</sup> Congress (2009-10), Representative Lloyd Doggett of Texas introduced H.R. 466, the Wounded Veteran Job Security Act. If it had been enacted, it would have expanded USERRA’s definition of “service in the uniformed services” to include time needed to be away from a civilian job for purposes of medical treatment for a wound, injury, or illness incurred during a period of uniformed service. Representative Doggett’s bill passed the House but not the Senate during the 111<sup>th</sup> Congress. No such bill was passed during the 112<sup>th</sup> Congress or the 113<sup>th</sup> Congress. The effort continues.

As is explained in Law Review 15012 (January 2015), Representative Stephen F. Lynch of Massachusetts has introduced H.R. 313 in the United States House of Representatives. If enacted, that bill will provide new and reemployed federal employees up to 104 hours of special sick leave during the individual’s first year of federal civilian employment, to cover situations of this kind.

H.B. 339 would apparently only apply to employees of the State of Texas, not to employees of political subdivisions, like counties, cities, and school districts. This bill is also limited to the *reemployed* veteran, not a person who starts a new state job after release from military service.

For example, Alexander Adams served on active duty in the Marine Corps for eight years and was medically retired in 2015 because of disabilities resulting from combat wounds. Adams did not work for the State of Texas before he enlisted in the Marine Corps in 2007, but he takes a

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<sup>6</sup> 38 U.S.C. 4303(13) (emphasis supplied).

new civilian job for the State in January 2016. Under H.B. 339 as currently written, Adams does not have the right to paid leave for medical treatment.

I want to thank Captain Morgan Little, USNR (Ret.), ROA's National Councilman for Texas, for bringing H.B. 339 to my attention. We need ROA's state departments and local chapters to work with state and local governments on issues that affect those who serve our country in uniform, especially in the Reserve Components. Here at ROA headquarters, we have our hands full with what is going on in the Federal Government. We do not have time to monitor (much less to affect) what is going on in 50 state capitals.