

Illinois Law Protects Post-Secondary Students Called to the Colors

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

Update on Sam Wright

1.1.2.4—Students

1.8—Relationship between USERRA and other laws/policies

The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to the relationship between an employer (federal, state, local, or private sector) and employees or prospective employees. If a person leaves a civilian job for voluntary or involuntary service in the uniformed services, as defined by USERRA, and if the person meets the five USERRA eligibility criteria,³ the person is entitled to prompt reinstatement in the position that he or she would have attained if continuously employed, and the person must be treated, upon reemployment, as if he or she had been continuously employed, for seniority and pension purposes. USERRA also makes it unlawful for employers to discriminate in initial employment, retention of employment, promotions, and benefits of employment on the basis of membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.

USERRA does not apply to the relationship between a student and a college or university—the college or university is not the student’s employer. In 2008, Congress enacted a law that

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find almost 1500 “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. I am the author of more than 1300 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. From 2009 to 2015, I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an “of counsel” role. To arrange a consultation with me or any other Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

³ The person must have left the civilian job for the purpose of service and must have given the employer prior oral or written notice. The person’s cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. As is explained in Law Review 201 (August 2005), there are nine exemptions to the five-year limit—that is, kinds of service that do not count toward exhausting the individual’s limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment.

provides USERRA-like protections to post-secondary students whose educational programs are interrupted by voluntary or involuntary military service. That law is codified in title 20 of the United States Code at section 1091c.⁴ Please see Law Review 15038 for a detailed discussion of this important federal law.⁵

As I have explained in Law Review 15039,⁶ section 1091c offers important protections to the student who is called to the colors in the middle of a semester and must leave school. The student is entitled to a refund for the tuition paid for the interrupted semester. The student is protected from receiving a failing grade for the interrupted course or courses. The student has the legally enforceable right to return to the educational program after completion of the period of uniformed service. Upon reinstatement, the student is entitled to pay only the tuition that was in effect before the interruption—not the likely higher rate that is in effect at the time the student returns from service.

Section 1091c does not help the student who actively participates in the National Guard or Reserve and who has periods of inactive duty training (drills) and active duty for training (annual training) during a school semester. If each semester is interrupted by service, the student will never complete the educational program.

Section 1091c is a *floor and not a ceiling* on the rights of the post-secondary student who serves in the National Guard or Reserve. If a state law gives the student *greater or additional rights* over and above the rights provided by section 1091c, that state law is not superseded. Of course, the state law cannot take away rights conferred by federal law.

Many states have such laws. For example, here is the Illinois law:

Sec. 5.2. School attendance and tuition.

(a) Any person in military service with the State of Illinois or in federal active duty service pursuant to the orders of the President of the United States or the Governor has the right to receive a full monetary credit or refund for funds paid *to any Illinois public university, college or community college* if the person is placed into a period of military service pursuant to the orders of the President of the United States or the Governor and is unable to attend the university or college *for a period of 7 or more days*. Withdrawal from the course shall not impact upon the final grade point average of the person. If any person who has been enrolled in any Illinois public university, college, or community college is unable to process his or her

⁴ 20 U.S.C. 1091c. It should be noted that this is section 1091c, not section 1091(c)—section 1091(c) is subsection (c) of section 1091. Section 1091c is a separate section of the United States Code. I also invite the reader's attention to section 668.18 of title 5 of the Code of Federal Regulations (5 C.F.R. 668.18), the Department of Education regulations promulgated under section 1091c.

⁵ Law Review 15038 is by Commander Wayne L. Johnson, JAGC, USN (Ret.). The article was added to the website in May 2015.

⁶ May 2015.

enrollment for the upcoming term, he or she shall have any and all late penalties and or charges set aside, including any and all late processing fees for books, lab fees, and all items that were not in place because the person was engaged in military service and was unable to enroll in the courses at the appropriate time.

A service member enrolled in an institution of higher learning who is unable, because of his or her military service, to attend classes on a particular day or days has the right to be excused and to reschedule a course examination administered on such day or days. The faculty and administrative officials shall make available to the service member an equivalent opportunity to make up any examination he or she has missed because of his or her military service.

The rights set forth in this Section are in addition to any rights afforded to persons in military service with the State of Illinois or in federal active duty service pursuant to the orders of the President of the United States or the Governor under the policies of an Illinois public university, college, or community college.

(b) For the purposes of this Section:

"Institution of higher learning" has the same meaning as in Section 10 of the Higher Education Student Assistance Act.

"Military service" means any full-time training or duty, no matter how described under federal or State law, for which a service member is ordered to report by the President, Governor of a state, commonwealth, or territory of the United States, or other appropriate military authority.

"Service member" means a resident of Illinois who is a member of any component of the U.S. Armed Forces or the National Guard of any state, the District of Columbia, a commonwealth, or a territory of the United States.

(Source: P.A. 97-913, eff. 1-1-13.)⁷

The right to a tuition refund only applies to Illinois public colleges, universities, and community colleges. This limitation is essentially irrelevant, because the federal law (section 1091c) applies to all post-secondary educational institutions, private as well as public, that receive federal financial assistance.⁸ The right to excused absences from classes missed due to military training and the right to take a make-up examination if military service causes the student to miss an examination applies to private as well as public universities in Illinois.

⁷ 330 Illinois Consolidated Statutes section 60/5.2 (emphasis supplied).

⁸ This includes indirect federal financial assistance, such as students using Pell Grants and federally guaranteed student loans to pay tuition.