

DOES USERRA APPLY TO EMPLOYEES OF RELIGIOUS INSTITUTIONS?

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is codified in title 38, United States Code, sections 4301-4333 (38 U.S.C. 4301-4333). USERRA was enacted in 1994, and it amounts to a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which was formerly codified at 38 U.S.C. 2021-2026. The VRR law can be traced back to 1940. For more than 63 years, persons leaving civilian jobs for voluntary or involuntary military service have had the right to reemployment in their civilian jobs, with accrued seniority and pension credit as if they had been continuously employed.

More than 350,000 National Guard and Reserve personnel, including several hundred chaplains, have been recalled to active duty since the atrocities of 11 September 2001. Most of these individuals have enforceable rights under USERRA, but there is a problem for most Reserve component chaplains and for some other Reserve component personnel who are employed by religious institutions.

The First Amendment to the U.S. Constitution provides, in pertinent part, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court has held that a labor-management statute shall be deemed to apply to a religious institution, as an employer, only if there is clear evidence that Congress actually thought about applying that statute to religious institutions and affirmatively decided that it should apply. *See Catholic Bishop of Chicago v. National Labor Relations Board*, 440 U.S. 490 (1979).

This is a rule of statutory construction intended to avoid the constitutional question of whether applying the statute to religious institutions is consistent with the First Amendment. If this first hurdle is crossed, a court must squarely face the constitutional question.

There is no evidence that Congress thought about religious institutions when it enacted either the VRR law or USERRA. Thus, if push comes to shove, employees of religious institutions do not have enforceable reemployment rights. This problem applies to most but not all chaplains, and to some other Reserve component members who are employed by religious institutions. The focus is on the religious or non-religious character of the employer as an institution, not on the nature of the particular employee's duties for that institution.