

Members of the National Guard and Reserves face not only the challenges associated with returning stateside from a war zone, but often have to contend with additional challenges concerning the civilian jobs they left behind when deployed. Connecticut Attorney David Slossberg recently settled an important lawsuit between a young marine reservist and a company that fired him for choosing to serve our country. In this article, Slossberg examines the legal rights of returning military personnel and their civilian employment.

USERRA: What you Need to Know

by Atty. David Slossberg



David Slossberg is a Connecticut-based attorney who recently settled a lawsuit involving a Marine reservist and the company that fired him for joining the reserves.

When we discuss our obligation to care for men and women in the military, we typically focus on serious health issues they face as a result of their service. An overlooked, and less understood issue, is how we protect their employment rights upon their return to civilian life.

With the wars in Iraq and Afghanistan, interruptions in civilian employment of our service men and women have never been more pronounced. As the armed services have relied more heavily on extended, multiple deployments of reservists and National Guard personnel, not only has there been a greater stress placed upon military families, but also on the businesses that employ them.

Military families and employers alike are grappling with the implications of these longer deployments, which are likely to continue under the realities of our modern military. Employers want to know whether they really have to hire, or reemploy, military personnel on extended tours of duty. Our men and women in uniform are seeking peace of mind that they will not lose their jobs because they are serving our Country.

In 1994, Congress enacted the Uniform Services Employment and Reemployment Act, referred to as

“USERRA,” which sought to strike a balance between the need to protect the employment rights of our service men and women, and the needs of employers to run their businesses with available, qualified workers.

Under USERRA, an employer must not deny initial employment, reemployment, promotion, or any benefit of employment to an individual on the basis of membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA covers all employers, both public and private, no matter their size, and all categories of military training and service in the uniformed services, in both times of peace and war. It includes service in the National Guard and reserve units, as well as all active components of the Armed Forces. The law does not cover state call-ups of National Guard units for riot and disaster relief.

To qualify for USERRA protections, the employee must show that he or she:

- gave the employer advance notice of military service
- has five years or less of cumulative service in the uniformed services

during his or her employment relationship with the employer

- timely returns to work or applies for reemployment; and
- has not been separated from service with a disqualifying discharge or under other than honorable circumstances.

The only way an employer is excused from the obligations is by demonstrating:

- employment circumstances have so changed as to make reemployment impossible or unreasonable
- assisting the employee in becoming qualified for reemployment would impose an undue hardship; or
- the employment position vacated by the employee was for a brief, non-recurrent period and there was no reasonable expectation that employment would continue indefinitely or for a significant period.

So what happens when a soldier returns from a tour of duty to learn that another person has been hired to his or her position?

In most instances, the employer must offer reemployment, even if reemployment might require termination of that replacement employee.

What must an employer do when the employee returns from service with an injury — a circumstance all too frequent in recent years? The law requires the employer to engage in efforts to reasonably accommodate disabilities acquired as a result of the employee's military service.

What commitment must be made to our service men and women upon their return? Notwithstanding that most employment relationships are at-will, the employer may not reemploy the service member for a period of less than 180 days if his or her most recent military service was more than 30 days or less than 181 days, or for less than one year if the employee's most recent military service was more than 180 days.

USERRA also protects a wide variety of reemployment rights, including preservation of health and seniority benefits of employment, all of which must be navigated with care.

As more and more military personnel return to civilian life, it is clear that all must be mindful of the law in order to marry the need to minimize disruption in the lives of our men and women in uniform, with the desire to promote a successful, healthy business environment. ●

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Fired For Serving?

Attorney David Slossberg has represented an 18 year-old serviceman who was fired from his job because he joined the Marine Reserves, but could not discuss any details regarding settlement of that action. He did, however, speak with AmeriForce about some of the misconceptions that surround USERRA laws and how service members can better understand the laws designed to protect their civilian employment when they are called upon to serve their country.

"The basic purpose of the act is to make sure service men and women do not have to make a choice between serving their country and having a job," says Slossberg. "And it doesn't matter when you join — you just have to give reasonable notice [of your absence]."

The USERRA laws cover Federal activations, but not state call-ups, clarified Slossberg. State activations of reserve forces are typically used for disaster or other local assistance, and are usually for shorter periods of time, so it is usually a non-issue for employers.

"This has really been the first time in recent memory that so many [reserve personnel] have been called to duty for extended periods of time overseas," he says. "Now with the wars winding down, more service people are coming home, and these provisions are becoming more important."

To be fair to businesses, Slossberg says, it would be very difficult to be a business owner and find out that your key employee has to leave for a year. "So, how are you supposed to manage your business?" he says. "There are certainly legitimate concerns for employers."

If an employer must hire someone to do the job of the deployed service member, says Slossberg, they also must be prepared to take back the service member at the same seniority once he or she returns. That may mean letting go the replacement worker, so it may be

a good idea to explain the situation to the new employee and let them know their position may be temporary.

"The bottom line is, most employees are employed at will — they can leave at any time and they also can be let go at any time for any reason...as long as it is not a discriminatory one," he says.

One common misconception of the USERRA laws is that smaller companies are not subject to the same provisions, but Slossberg says that is not the case. "Everybody's covered," he says, no matter how large or small the employer may be.

If you have an employment issue, where should you turn? Military installations offer legal services, but many reserve component members do not live near enough an installation to make good use of the services. Slossberg suggests finding an attorney who specializes in employment law.

There is also a Legal Assistance Program available to Army National Guard Soldiers nationwide. Air Guard members should contact their Wing Staff Judge Advocate for legal assistance support. Members of the reserves or any other branch or component can find their local Legal Assistance Office at <http://legalassistance.law.af.mil/content/locator.php>

So, should members of the Reserves and National Guard disclose their military service obligations when interviewing for a job? "I think it's good practice," says Slossberg. "The act covers not only post-hiring, but also covers initial hiring of employees," meaning an employer cannot pass over a service member for a position based on their military commitments.

"Frankly, I think most service people are very proud of their service," says Slossberg. "And most employers are very proud to hire service people." ●

—Jennifer G. Williams