

CHAPTER 5

CALLED TO DUTY: MILITARY ACTIVATION AND THE IMPACT ON LABOR RELATIONS

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Since the collapse of the Eastern Bloc and the end of the Cold War, the United States military has reduced the number of active-duty personnel by approximately a third of the force. The active-duty drawdown required the military to place increasing reliance on the Reserve components. The post-Cold War drawdown has forced Reserve components like the National Guard to transition from the role of strategic reserves to an operational reserve.

The increased operational role of the Reserve components has had an effect not only on the military, but also on society. Gone are the days when the mission of a state National Guard was largely confined to natural disasters, forest fires, and civil unrest. Gone too is the obligation of “one weekend a month, two weeks a year.” The current question is now a question of deployment—not an inquiry into *whether* you are going to deploy, but rather an inquiry into *when* you are going to deploy.

The National Guard and Reserves have made vital contributions to national security both at home and abroad, and reliance upon the citizen soldier has only increased since September 11, 2001. The activation of National Guard and Reserve forces has significant consequences in the communities from which they come. As the Chicago Daily Law Bulletin noted in the March 3, 2006, cover article entitled *For Some Vets, Return Leads to Conflict Over Employment*, conflicts over the labor and employment issues of activated and returning service members are on the rise. With increased deployments, employment-related conflicts have also increased—and the need for employers and labor unions to fully understand their obligations under federal law has also increased.

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The author has seen the effects of activations first-hand in Illinois, and those issues reflect issues seen in the rest of the country. The Illinois National Guard is deploying a Brigade Combat Team to Afghanistan and thousands of those soldiers began to leave at the end of September 2008. This is the largest Illinois National Guard deployment since World War II and the Brigade Combat Team will comprise a large portion of American forces in the North Atlantic Treaty Organization (NATO) mission in Afghanistan. With the activation has come issues for the employed, the employers, and the unions who represent the employees.

Employment and Re-employment Rights Under the Uniformed Services Employment and Reemployment Rights Act

Following the first Gulf War, Congress passed legislation designed to protect the employment rights of deployed National Guard and Reserve members. The Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted in 1994 to provide a comprehensive framework for the rights and obligations of the employer and the employed military member. The USERRA statute has the following main purposes:

- Encourage service in the Guard and Reserve by minimizing the disruption to the service member's civilian employment due to military service.
- Minimize disruption to the service member's employers, family, community, and co-workers by providing for prompt re-employment upon return.
- Prohibit discrimination in employment and re-employment against Guard and Reserve members because of their military service.

USERRA is applicable to all employers, without regard to the number of employees. USERRA has two concentrations—antidiscrimination and re-employment. The antidiscrimination portion of USERRA prohibits employment discrimination based upon military service. The re-employment portion protects the job that was left to perform military service. A protected employee is entitled to return to work in the position that he or she would have occupied—as if he or she never left.

For the re-employment protections of USERRA to apply, the service member must meet five eligibility criteria:

1. the employee must have left civilian employment;
2. the employee must have given notice that he or she was leaving to perform military service;
3. the cumulative period of service must not have exceeded five years—with certain exceptions;
4. the employee must have been released from military service under honorable or general conditions;
5. the employee must have reported back to work within the statutory time frame.

Although it is an extensive statutory framework, some of the key re-employment provisions of USERRA provide for the following:

- Prompt reinstatement to civilian employment upon return from military duty without loss of seniority, status, or pay rate;
- Up to five cumulative years of leave of absence from civilian employment for the period of voluntary or involuntary military service;
- Continuation of seniority during period of service—including pension credit;
- No termination for a defined period following return other than for just cause;
- Resolution of employment issues through enforcement by the U. S. Department of Labor.

USERRA is applicable to all employers, without regard to the number of employees. When the men and women of the Guard and Reserve return from deployment, it is obviously critical that they promptly return to their civilian employment. The goal of USERRA is to return protected employees to the positions they would have occupied, as if they had never left.

As a resource on USERRA issues, the Department of Defense funds the Employer Support of the Guard and Reserve (ESGR) program—a program staffed by volunteers and designed to both teach the requirements of USERRA and also engage in resolving employment disputes related to military service. ESGR supplies no-cost speakers, presentations, and materials to employers, labor unions, bar associations, civic and trade organizations, and other interested groups. ESGR also provides the free services of hundreds of trained volunteer mediators located in every state of the union. Main conflict areas include placement upon return

from service, promotion while deployed, benefit accrual, and pay rates.

Amendments to the Family and Medical Leave Act

The effects of the National Guard and Reserve mobilizations and return are seen in the families that remain at home. In response, the Family and Medical Leave Act (FMLA) was amended on January 28, 2008, with the National Defense Authorization Act. The amendments allow increased unpaid leave from 12 to 26 weeks for eligible employees. Eligible employees are a spouse, child, parent, or other nearest blood relative of a member of the Armed Forces who takes leave to care for a member of the Armed Forces. The leave may be taken to care for a relative who is a member of the Armed Forces undergoing medical treatment, recuperation, or therapy, or who is otherwise in outpatient status or on the temporary disability retired list, for a serious injury or illness suffered in the line of active duty.

The FMLA amendments also permit a 12-week period of leave for “any qualifying exigency” arising from the fact that the employee’s spouse, child, or parent is on active duty or has been notified of impending active duty in the Armed Forces. The definition of “qualifying exigency” has yet to be determined. The Secretary of Labor must issue a final regulation defining a “qualifying exigency” before the provision will be effective. The Department of Labor has stated that the regulation will be “expeditiously prepared.” Like any other employee seeking FMLA leave, employees seeking leave under the new military-related amendments must meet the same eligibility requirements.

State Laws

The National Guard traces its roots back to colonial militias and has been a Reserve component of the United States Army since the beginning of the 20th century. The Air National Guard has been a Reserve force since the end of World War II. The structure of the National Guard and Air National Guard is unique because it is a dual state–federal force. Because of this unique dual control, every state has legislation addressing certain aspects of military reserve service. Some common areas of legislation are pay and pension continuation for public sector employees, leaves of absence for military service, benefit continuation for family mem-

bers, veterans' preference points, antidiscrimination provisions, and others.

Needless to say, analysis of a military activation issue must include research into local law. The practitioner should also be aware that many states offer greater protection under state law than that afforded under federal law. For example, Illinois has made military service a protected class under the state human rights laws.

Labor Relations and Military Activation

The effects of increased mobilization of Guard and Reserve units are being seen by employers and labor unions. These issues were examined at a panel presentation at the National Academy of Arbitrators 2008 Annual Meeting in Ottawa, Canada, entitled: *War Impacts—Returning Veterans, Workplace Rights and Arbitration*.

The presentation was moderated by Brian Clauss, an arbitrator from Park Ridge, Illinois, and included a management perspective from Chicago attorney Carl Tominberg of Laner Muchin Dombrow Becker Levin and Tominberg, Ltd, and a union perspective from Springfield, Illinois attorney Sean Smoot, Chief Legal Counsel for the Policemen's Benevolent & Protective Association of Illinois. Michelle Camden, an arbitrator from Willowbrook, Illinois, provided a perspective on Canadian military reserve activation.

The panel agreed that antidiscrimination issues under USERRA have not been widely encountered. However, they also agreed that re-employment issues under USERRA, as well under the related state statutes, are increasingly being seen. The panelists further agreed that a unionized workplace is an advantage because seniority and pay are part of the collective bargaining agreement and easily determined. However, the panel noted that there are a myriad other issues including, but certainly not limited to, return to a comparable position, promotion while deployed, pay differentials, bid shifting and posting, temporary assignments, and disability accommodation.

The panelists commented on how this area of the law is largely untested and quickly evolving. Mr. Smoot discussed the sheer number of his organization's members who are affected and the effects of the mobilizations on police and fire departments. He suggested that collective bargaining agreements specifically incorporate USERRA by reference. Mr. Tominberg discussed how the activations are affecting employers who must temporarily fill

vacated positions and attendant issues such as minimum staffing, overtime, accommodation, and workers displaced by a service member's return to the workplace. He suggested that, similar to the Americans with Disabilities Act (ADA) and Title VII, USERRA should not be specifically incorporated into contracts. Mr. Claus commented on the USERRA and state law issues common to many of the labor relations conflicts involving military activation and the issues that he has seen in arbitration.

The panelists identified some future issues as effects of the mobilizations and the area of the law develops, including: the post-Cold War transition of the National Guard and Air National Guard from a strategic reserve force to an operational reserve; the increasing amount of training time required for complex weapons systems; the reality of a large percentage of women in combat and the physiological effects of combat stresses upon them; the return of disabled employees to the workplace and the accommodation provisions of USERRA that offer many more protections to the returning service member than the ADA; the psychological effects of nontraditional warfare; and long-term health issues.

The panel concluded by discussing issues being seen in labor relations in Illinois as the Illinois National Guard prepares a Combat Brigade Team for a fall 2008 deployment to Afghanistan. Illinois is using a new pre-deployment training program as part of their largest deployment since World War II. Under the previous program, the units would activate and then spend from 90 to 150 days at a stateside training facility. The units would then deploy to a combat zone. Under the new program, the Guard member spends approximately one month training on active duty prior to deployment. The reduced time on active duty pre-deployment training must still be done prior to going overseas. Rather than spending months at a base in preparation for going overseas, that training is instead done during weekend drills, special trainings, and increased annual training prior to deployment. Under this new deployment model, employees will be gone for a shorter total period, but will require more time off for pre-deployment training.

Like past wars, the effects of the current conflicts will be felt by generations of Americans. We are now starting to see the impacts of the National Guard and Reserve mobilizations in labor relations.