LAW REVIEW 1019

The Cost to Employers: Call-ups of Citizen Warriors have hit small businesses hard, but a larger economic impact is at stake.

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Calling National Guard and Reserve personnel to active duty and then requiring civilian employers to reemploy them upon their return imposes costs on employers, according to a report released in October by the Office of Advocacy of the Small Business Administration (SBA). The report, titled "An Analysis of the Effect of Reserve Activation on Small Business" and prepared for the SBA by SAG Corp. under contract number SBAHQ-07-F-0306, also states that small businesses suffer greater costs than large organizations.

"Smaller firms (fewer than 100 employees) were the primary employers of those Selected Reserve members working in the private sector," states the report. "According to DoD [Department of Defense], nearly 70 percent of the employers of Selected Reserve members fit this definition of small businesses. DoD data also indicate that 62 percent of private sector employers of reservists had fewer than 50 employees; 39 percent employed fewer than 10; and 28 percent had from one to four employees."

Certainly, small employers in particular are contending with costs involved in the mobilization of their Citizen Warrior employees. On the other hand, they would risk a greater economic impact if those Citizen Warriors were not defending the nation. The Institute for the Analysis of Global Security has estimated that the financial cost of the Sept. 11, 2001, terrorist attacks to the United States was $100 billion or more. (See http://www.iags.org/costof911.html.)

Freedom is not free. The greatest costs are borne by those who serve in the nation's armed forces, especially those in the reserve components who leave higher-paying jobs when called up. A small fraction of our country's population bears the lion's share of the cost of freedom. The entire U.S. military establishment, including the National Guard and reserve, amounts to less than three-quarters of 1 percent of the nation's population. It is those servicemembers who have stood between U.S. citizens and a repetition of the terrorist attacks of Sept. 11.

On Aug. 20, 1940, during the Battle of Britain, Prime Minister Winston Churchill said of the Royal Air Force: "Never in the field of human conflict was so much owed by so many to so few." Those eloquent words apply equally to those who serve in the U.S. military today.

So, the reemployment statute aims to guarantee that those who remain at home—enjoying the protection of those few who serve—do not pass those who serve on the ladder of success at work. While civilian employers and civilian coworkers of those who serve in the National Guard or Reserve do bear some costs, those costs are small in comparison to the costs—sometimes the ultimate cost—borne by those who volunteer to serve the nation in uniform.

Volunteer Status

"The costs of job absence also fall on the activated employee; absences may adversely affect career progression, for example," the SGA report states. "However, reserve participation is a voluntary decision on the part of the employee. Other things being equal, those who volunteer for reserve duty are in jobs where such absences are less likely to affect career progression and earnings. Firms have little latitude or choice regarding reserve participation by their employees. Indeed, employers are prohibited by federal law from discriminating against employees who participate in the reserves."

Why should reserve component service be less deserving of protection because it is voluntary? The military has a long tradition of volunteerism; the Air Force in particular relies heavily on volunteerism to fill its deployment needs, but keeps the option to mobilize. According to a weekly report prepared by the Office of

the Assistant Secretary of Defense for Reserve Affairs, 10,467 Air National Guard members were on active duty for contingency operations as of Feb. 2, and 7,878 of them (75 percent) were on active duty voluntarily. For the Air Force Reserve, the figure was 6,271 on active duty, 4,770 (76 percent) of them voluntary.

In a larger sense, all military service has been voluntary in this country since 1973 when Congress abolished the draft. It is a voluntary decision for any individual to enlist, but it is mandatory that the nation recruits and retains the necessary quantity and quality of personnel to defend itself. The fact that military service is voluntary, because there is no conscription, means that the nation must provide incentives and minimize the disincentives to those who voluntarily enlist and reenlist. The Uniformed Services Employment and Reemployment Rights Act (USERRA) is one of many laws Congress has enacted to provide incentives and minimize disincentives.

Some employers and employer associations assert that USERRA was written for the old days when service in the National Guard and Reserve was generally limited to one weekend per month and two weeks in the summer. These employers and associations assert that USERRA is being misused as the traditional strategic reserve has transformed into an operational reserve.

In fact, Congress enacted the reemployment statute for World War II, and the burden placed on employers today pales in comparison to the burden placed on civilian employers during and immediately after that war. When Japan surrendered on Sept. 2, 1945, the United States had 12 million men and women on active duty in the armed forces. Within a few weeks, that number was reduced to three million. Even if only half of the nine million returning veterans had civilian jobs to return to, that still amounts to 4.5 million men and women demanding (with the force of federal law behind them) that their pre-service employers reemploy them, even if that meant displacing other employees.

In 1973, when Congress abolished the draft, DoD adopted the Total Force. Both the executive branch and the legislative branch recognized that in the all-volunteer military it would be necessary to rely increasingly on the Reserve Components for support in contingencies well short of a third World War. The seven reserve components began encouraging their members to participate in military training and service well beyond the minimum requirements, and a long debate ensued as to whether an implied "rule of reason" limited the frequency and duration of military service periods for National Guard and reserve members.

In 1981, the Department of Labor (DOL) bowed to pressure from employer interests and announced a "90-day rule": that the individual reserve component member had the right to reemployment after military training or service only if such periods of service did not exceed 90 days in a three-year period. A few months later, DOL bowed to pressure from DoD and Congress and rescinded this 90-day rule.

Through the 1970s and 1980s, courts handed down conflicting decisions as to whether National Guard and reserve service that exceeded the minimum requirements was protected by the reemployment statute. The Supreme Court finally put an end to that argument by holding clearly and unanimously that the right to time off from one's civilian job for military training or service was not subject to any implied limit or "rule of reason." *See King v. St. Vincent's Hospital,*502 U.S. 215 (1991).

Three years later, Congress enacted USERRA as a comprehensive rewrite of the 1940 reemployment statute. In section 4312(h) of USERRA, Congress codified the Supreme Court's holding in *King*: "In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) and the notification requirements [timely application for reemployment] are met." 38 U.S.C. 4312(h).

The language of section 4312(h) could hardly be clearer, but the clarity is further buttressed by the legislative history: "Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital*. This new section makes clear the committee's intent that no 'reasonableness' test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the servicemember has complied with requirements under sections 4312(a) and (e)." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* (USCCAN) 2449, 2463.

Sharing the Burden

In August 1990, Iraq invaded Kuwait, and President George H.W. Bush began that month calling National Guard and Reserve personnel to active duty, the first significant call-up of the reserve components since the Korean War. The rapid victory achieved by American and allied forces limited the burden on civilian employers during 1990–1991.

The Global War on Terrorism has increased the burden on employers, but this increased burden is certainly not unanticipated or unprecedented. Congress has decided that small employers as well as large employers should be required to bear this burden. The reemployment statute is unique among federal labor-management laws in that it has no threshold based on the size of the employer or the number of employees. It has been held that an individual only needs to have one employee to be an "employer" subject to
the requirements of this statute.

In the case *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992), Dr. Swint owned a ranch and employed one ranch-hand, Mr. Cole. Mr. Cole joined the National Guard and took time off from work for his initial active duty training. Dr. Swint filled the position with another ranch-hand and refused to reemploy Mr. Cole upon his return from military training. Dr. Swint argued that since he had only one employee he was a "casual employer" and not subject to the requirements of the reemployment statute. The U.S. Court of Appeals for the Fifth Circuit forcefully rejected this assertion. If Congress had intended to exempt small employers, it could have written such a provision into the statute, as it has done with other statutes, the court said. The lack of an express exclusion for small employers means that they are subject to the law.

When Congress enacted USERRA in 1994, it reiterated its intent that the reemployment statute should apply to even the smallest of employers. "This chapter [USERRA] would apply, as does current law, to all employers regardless of the size of the employer or the number of employees. *See Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992)." House Rep. No. 103-65, 1994 USCCAN at 2454.

Many National Guard and Reserve members work for small employers, so exempting such employers from USERRA would deprive the nation of some of the servicemembers most needed for its defense. Carrots as well as sticks are needed to gain and maintain the support of civilian employers for reserve component service.

For more than 20 years, ROA has advocated tax breaks and other benefits for employers of reserve component members, an effort which continues today. Among the items on ROA's legislative agenda for 2010 are the following:

- Continue to enact tax credits for health care and differential pay expenses for deployed reserve component employees.
- Provide tax credits to offset costs for temporary replacements of deployed reserve component employees.
- Support tax credits to employers who hire servicemembers who served in the Global War on Terrorism.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.