LAW REVIEW 1101

Concessions on All Sides: Employers, as well as Reservists, must bear the brunt of the extended deployments and separation from work.

By Captain Samuel F. Wright, JAGC, USN (Ret.) and Captain Ted Daywalt, USN (Ret.)

1.3.1.2 Character & Duration of Service

As our service members continue to find themselves repeatedly deployed to fight a long war on terrorism, their employers at home also face the burden of covering their absence. To guarantee that service members still have a job when they return home, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, fully aware that the law would impose significant burdens on civilian employers and coworkers of uniformed service member employees. These burdens, however, are small compared to the burdens (and sometimes the ultimate sacrifice) assumed by those who serve.

Nevertheless, any law can become a dead letter in the face of massive resistance. Widespread resistance by civilian employers could interfere with the long-term sustainability of the Department of Defense (DoD) policy to utilize Guard and Reserve personnel in the long war to come. With the Cold War lasting 45 years (from 1945 to 1990), and with the Global War on Terrorism potentially lasting that long, the nation must develop and implement sustainable policies and practices for meeting armed forces' personnel needs over the long haul.

And with the nation's unemployment hovering around 10 percent—and underemployment at about 17 percent—that sustainability is more crucial than ever. According to the Bureau of Labor Statistics (BLS), the unemployment rate among veterans (across all age groups) has for many years been less than that of non-veterans by up to 2 percent (http://vetjobs.com/media/2010/07/10/2488/). However, unemployment trends for veterans are now higher than the rate for non-veterans, especially with respect to younger veterans who are subject to call-up as Guard and Reserve participants or members of the Individual Ready Reserve (IRR).

Workforce Management Magazine in 2007 surveyed employers, asking: "If you knew that a Reserve or Guard member could be called up and taken away from their job for an inordinate amount of time, would you still hire a citizen-soldier?" The results showed that 52 percent of respondents said they would *not* hire a citizen soldier; 30 percent said they would; and 18 percent did not know.

The Society for Human Resource Management and other organizations also published surveys showing similar results about employer resistance to employing Guard and Reserve personnel and reemploying them on their return from service.

In *Transforming the National Guard and Reserves,* dated January 2008, the Commission on the National Guard and Reserves final report to Congress and DoD stated: "What the [DoD] survey does not ask is whether current employers of Guard and Reserve members will continue to hire employees with such commitments at a time when the reserve components are being heavily utilized as an operational reserve. Although denial of employment because of military commitments is illegal, it does happen—and DoD must collect and analyze those data, because they illuminate questions not just of hiring but also of retention. DoD must pay attention to the type of anecdotal evidence cited in industry-credible surveys such as that by *Workforce Management Magazine*. ESGR's Dr. [L. Gordon] Sumner expressed concern that unless DoD properly addresses the impact on employers of reserve component deployment, at some point a reserve component member and an employer will have to make a choice between civilian job and service."

The BLS household survey reported that the unemployment rate for 18- to 24-year-old veterans has been rising over the last two years. A large majority of the veterans in that age group are Guard and Reserve members, at least

members of the IRR, because a person enlisting in the armed forces incurs an eight-year obligation. Especially in the Army and Marine Corps, an IRR member likely will be called to active duty at least once after leaving active duty and before completing the eight-year obligation. The elevated unemployment rate among recently separated veterans could be attributed to employer reluctance to hire an individual who is subject to being recalled to active duty.

The first quarter *2010 Current Population Survey* (CPS) unemployment data from BLS showed the following:

	1st Qtr Veteran	1st Qtr All
Total, 18 and Older	9.6%	10.2%
18 to 24 Years Old	25.0%	18.3%
25 to 34 Years Old	15.8%	10.9%
35 to 44 Years Old	8.4%	9.4%
45 to 54 Years Old	9.3%	8.5%
55 to 64 Years Old	8.0%	7.5%
65 and Older	8.3%	7.3%

According to the CPS, the unemployment rate for 18- to 24-year-old veterans exceeds the unemployment rate for the overall population in that age group by 6.7 percent. Both BLS surveys trend in the same direction. This quarter saw a rise in older veteran unemployment.

Calling up the Guard and Reserve

Title 10, United States Code (U.S.C.), section 12302(a) [10 U.S.C. 12302(a)] states: "In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized as a unit, in the Ready Reserve under the jurisdiction of that secretary to active duty for not more than 24 *consecutive* months." (Emphasis added.)

Under this statute, President George W. Bush declared a national emergency and authorized the involuntary call-up of National Guard and Reserve (NG&R) personnel after the Sept. 11, 2001, terrorist attacks. Since then, 790,642 NG&R personnel have been involuntarily mobilized or have volunteered to serve, according to the assistant secretary of defense for reserve affairs Nov. 16, 2010, weekly report. That national security declaration remains in effect today.

Although the law is clear that the 24-month limit only applies to the duration of a particular call to active duty, the initial Department of Defense (DoD) policy after September 2001 was that no NG&R member would be called up for more than 24 cumulative months for the national emergency that began in September 2001.

When the United States invaded Iraq in March 2003, the invasion went well, but the occupation and reconstruction process was much more difficult than anticipated. It was apparent that the continuing operations in Iraq, Afghanistan, and elsewhere could not be fulfilled solely by repeated deployments of Active Component (AC) personnel. As a result, DoD's "Total Force Policy," which was adopted in 1973, was tested as never before. And the transformation from a "strategic reserve," a force available only for World War III, to an "operational reserve," routinely called for operations such as Iraq and Afghanistan, was complete. These repeated and lengthy calls to serve put burdens not only on NG&R members and their families, but also on their civilian employers and their relationships with those employers.

By late 2006, the Army Reserve, Army National Guard, and Marine Corps Reserve were running out of personnel to mobilize, so long as the 24-month limit was considered cumulative. Accordingly, DoD modified the policy in January 2007 to assure NG&R personnel, their families, and their civilian employers that the duration of a particular active duty call-up would not ordinarily exceed 12 months, and individual members could expect no more than one mobilization in a five-year period. However, the 24-month cumulative limit was removed.

USERRA Considerations

USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act of 1940, and provided that an individual who leaves a civilian job for voluntary or involuntary military service has the right to reemployment in the civilian job if he or she gives the employer prior oral or written notice. The individual's cumulative period or periods of service must not exceed five years. The individual must have been released from service without a punitive or other-than-honorable discharge; and he or she must have made a timely application for reemployment after release from the service. USERRA also made it unlawful for an employer to deny an individual initial employment, retention, promotion, or employment benefit on the basis of the individual's membership in, or application to join, a uniformed service. Employers also may not deny employment, retention, promotion or benefits to a service member based on performance of service or application or obligation to serve.

Under 38 U.S.C. 4312(c), the five-year limit is cumulative, but only with respect to the employer relationship for which the individual seeks reemployment. If the individual starts a new job with a new employer, he or she gets a fresh five-year limit with the new employer. Moreover, section 4312(c) also sets forth eight exemptions from the limit. The shorthand version is that all involuntary service, and some voluntary service, is exempted from the computation of the limit. (Law Review 201, available at www.roa.org/site/PageServer?pagename=law_review_201, provides a comprehensive discussion of what counts and does not count toward exhausting the five-year limit.)

Time for Solutions

If we are going to make our system work for the expected long war, we must make military service and USERRA compliance palatable to civilian employers. Otherwise, employers will not support the system. And without employer support, the NG&R system will not work. Unfortunately, there is no easy way to address these employer concerns. A few alternatives, however, could possibly address these pressing issues:

Provide tax breaks and other financial benefits to employers of NG&R personnel. During his 2005-2009 service as ROA's Executive Director, LtGen Dennis McCarthy, USMC (Ret.) (now the Assistant Secretary of Defense for Reserve Affairs) said, on more than one occasion, that we need "carrots as well as sticks" in securing the cooperation and support of civilian employers of NG&R personnel. For almost 25 years, ROA has pushed for tax breaks and other financial benefits for employers of NG&R personnel, with only limited and temporary success. *(See Law Review 845 at www.roa.org/site/PageServer?pagename=law_review_0845)*

The Reserve Components should rely primarily on involuntary call-ups on a predictable schedule, rather than soliciting volunteers. The seven Reserve Components vary considerably in their policies regarding the use of involuntary call-up authorities or soliciting individual volunteers. We recommend that each Reserve Component establish a policy whereby NG&R personnel are called to active duty involuntarily, as units, on a predictable schedule, such as one year on active duty followed by four or five years not on active duty. We must give employers ample advance notice (a year or more) of when to expect an employee to be called up. Each Reserve Component also should maintain a current list of unemployed or self-employed members. Those members should be encouraged to volunteer for active duty as frequently as they wish, while other members should be limited, under most circumstances, to involuntary call-ups with their units.

Minimize the burden on your employer whenever possible. To the extent that you can control your military and/or civilian schedule, you should schedule your military obligations around your civilian work days and/or schedule your civilian work days around the days that you are scheduled to perform military duty. The idea is to maintain your military readiness while imposing on your civilian employer as little as possible.

Whenever military obligations require you to miss work—whether for a day or a year—give your employer as much advance notice as possible, so he or she can make other arrangements to get the work done. Weeks or months of advance notice relieves the employer's burden. Waiting until the last possible moment, on the other hand, magnifies the employer's burden. The law does not give veto power to employers on who can leave to perform military duty, but they are entitled to consideration and advance notice.

For Reserve Component leadership, as well as individual NG&R members: If at least 30 days notice isn't possible before leaving for military training or duty, the duty should be canceled or postponed. Remember, NG&R members are not full-time active duty members. They have civilian jobs, which they depend upon for their livelihood. They and their employers must be given consideration and advance notice.

N*G&R leaders should communicate with civilian employers*. Section 4312(a)(1) of USERRA provides that the required notice to the employer can be given by the individual employee who will be absent from work for service, or it can be given by "an appropriate officer of the uniformed service in which the service is to be performed." NG&R unit commanding officers are certainly appropriate officers to give notice to civilian employers of unit drill schedules, mobilizations, and other military activities that will require unit members to be absent from their civilian jobs. Take the burden off the individual NG&R member, especially the junior enlisted member. Unit commanding officers should notify civilian employers of military activities. If a civilian employer is angry about an individual employee's time away from work, let the employer vent on the commanding officer, not the individual employee. Unit commanding officers should also keep open communications with civilian employers. Accommodate the needs of employers, insofar as you can do so without detracting from the readiness of your unit.

While at work, concentrate on work. Last, and most important: When you are at work at your civilian job, concentrate on doing that job as effectively and efficiently as possible. We realize that a great deal of mental discipline is required to lay aside military concerns when returning to work, but you do not have to return immediately. If your period of service was more than 180 days, by law (See 38 U.S.C. 4312(e)) you have 90 days (starting on the date of release from service) to apply for reemployment. If you need time to readjust, take that time before you apply for reemployment and return to work. Once you return to work, you must perform well for the employer who is paying you salary or wages, even though your work may seem mundane and boring compared to the way you spent your last year, in Afghanistan.

Captain Daywalt is a life member of ROA and is the president of VetJobs, the leading military job board on the Internet.