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It Is Better for a Reserve Component to Rely Primarily upon Involuntary Mobilization

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1.1.3.1—USERRA applies to voluntary service

Each week, the Office of the Assistant Secretary of Defense for Reserve Affairs puts out a release showing the number of National Guard and Reserve personnel currently serving on active duty and the total number mobilized since the terrorist attacks of September 11, 2001. The report dated May 21, 2013 shows 55,242 Reserve Component (RC) personnel currently serving on active duty and a total of 875,829 since September 2001.

The weekly report also shows the number involuntarily activated for each of the seven Reserve Components, and the number for each component who volunteered. The May 21 report shows that 25,707 Army National Guard members are currently on active duty, and 23,635 (92%) are involuntary. For the Army Reserve, the number is 10,691 of 13,507 (79.2%). For the Navy Reserve, the number is 4,214 of 4,413 (95.5%). For the Marine Corps Reserve, the number is 1,335 of 2,420 (55.2%). For the Air National Guard, the number is 1,860 of 5,663 (32.8%). For the Air Force Reserve, the number is 1,250 of 3,005 (41.6%). For the Coast Guard Reserve, the number is 179 of 527 (34%).

The Uniformed Services Employment and Reemployment Rights Act (USERRA) accords the right to reemployment (with accrued seniority and pension credit as if the individual had been continuously employed in the civilian job) to those who leave civilian jobs (federal, state, local, or private sector) for *voluntary or involuntary* military service. USERRA makes no distinction between voluntary and involuntary service, except that *all* involuntary service and *some* voluntary service are exempted from the computation of the individual's five-year limit on the duration of the period or periods of uniformed service with respect to the employer relationship for which the individual seeks reemployment.¹

I suggest that the policy of each Reserve Component should be to rely primarily on involuntary call-ups. The repeated call-up of Reserve Component members puts a major burden on civilian employers, and employers are increasingly complaining about the burden. Employers are willing to put up with a lot, if military leaders will patiently explain that the burden is necessary for national defense, and if employers are convinced that the burden is being spread around fairly. When a Component chooses to rely primarily upon volunteers, it is likely that a handful of members will volunteer repeatedly and most members will not volunteer. This inevitably means that an inordinate share of the burden will be borne by the employers of the serial volunteers. It is better to make the burden predictable and fairly distributed, by recalling members involuntarily and on an announced schedule.

Having said that, please do not attack the serial volunteers in the Reserve Components. The "send me in coach" attitude is something that we should encourage, not discourage. But that does not mean that the service leadership needs to accommodate these serial volunteers every time. Maybe the answer should be, "Thank you for volunteering, but I see that you have already served five special active duty tours, and I think that we should find somebody else this time."

¹ Please see Law Review 201 for a definitive discussion of what counts and what does not count toward exhausting an individual's five-year limit. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 901 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 79 so far in 2013.

Of course, in a larger sense all military service is voluntary. It has now been more than 40 years since Congress abolished the draft and established the All Volunteer Military.