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State and Local Government Employees Need Effective USERRA Protections

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The need for USERRA

For almost a century, the Reserve Officers Association of the United States (ROA) has promoted national defense readiness through Reserve Components that are adequately resourced, trained, and motivated and that provide a cost-effective way to provide for the common defense, especially in times of budget stringency. The Reserve Components are a great deal for the taxpayer. Reserve Component (RC) personnel are paid only for the days when they serve or train to serve. The cost of an RC member (including compensation, retirement benefits, etc.) is only about 30% of the cost of a full-time member of the Active Component (AC). The cost of one AC member can support more than three RC members.

The seven Reserve Components are the Army Reserve, Army National Guard, Air Force Reserve, Air National Guard, Navy Reserve, Coast Guard Reserve, and Marine Corps Reserve. Together, these seven components account for almost half of our nation's military personnel pool. Since the terrorist attacks of September 11, 2001, 893,911 RC personnel have been called to the colors, as of March 18, 2014. This figure includes more than 350,000 individuals who have been called to active duty more than once.

Effective enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA) is essential if the services and especially their Reserve Components are to be able to recruit and retain the necessary quality and quantity of young people to protect our country. The end of the draft in 1973 did not mark the end of our nation's need for young men and women to enlist and reenlist in the armed forces. Quite the contrary, in the all-volunteer military it is necessary for Congress to establish, and Congress has established, laws that provide positive incentives and that minimize the disincentives to military service. Perhaps the most important law, especially for RC service members, is USERRA, which was enacted in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940 as part of the Selective Training and Service Act, our nation's first peacetime conscription law.

Under USERRA, a person who leaves a civilian job for voluntary or involuntary military service, in the AC or the RC, is entitled to reemployment in the pre-service job if he or she meets five simple conditions.[1] A person who meets these simple conditions is entitled to prompt reinstatement in the position that he or she would have attained if continuously employed, which is usually but not always the position the person left. Upon reemployment, the person must be treated as if he or she had been continuously employed in the civilian job, for seniority and pension purposes, and the health insurance coverage, for the employee and his or her family, must be immediately reinstated upon reemployment, with no waiting period and no exclusion of "pre-existing conditions." USERRA also makes it unlawful for an employer to deny a person initial employment, retention in employment, or a promotion or benefit of employment on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.

The need for effective enforcement of USERRA with respect to state and local governments, as employers

USERRA applies to almost all employers in the United States, including the Federal Government, the states and their political subdivisions, and private employers, regardless of size. You only need one employee to be an employer for purposes of USERRA, although other federal laws (including Title VII of the Civil Rights Act of 1964) only apply to employers with 15 or more employees.

Among employers in the United States, only religious institutions (on First Amendment grounds), Native American tribes (on residual sovereignty grounds), and international organizations (World Bank, United Nations) and foreign embassies and consulates (on diplomatic immunity grounds) are exempt from USERRA enforcement. USERRA also applies all over the world to the U.S. Government and to U.S. companies.

The federal reemployment statute has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress expanded the application of the law to include state and local governments. In 1974, the Senate Veterans' Affairs Committee explained the rationale for this expansion:

"The Department of Labor generally favors such an amendment to the law. It believes that school teachers, policemen, and other public employees returning from military service should not be denied reemployment rights provided for other veterans.

[1] Please see Law Review 1281 for a detailed discussion of those conditions. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,037 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with 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 169 new articles in 2013 and another 45 in the first quarter of 2014.

The Military Selective Service Act of 1967 declares it to be the sense of Congress that States and their subdivisions extend to veterans the same reemployment rights as do the Federal Government or private industry under present law. The provision now relating to State and local governments, however, is not binding under the law and, as a consequence, many returning veterans have found that their jobs in State or local government no longer exist. Furthermore, because these stated reemployment rights are not mandatory upon State and local governments, these veterans lose all benefits which would have accrued to them had they not entered military service.

This year [1974] it is expected that an estimated half million Vietnam veterans will be separated from military service. More than half of these young men were employed prior to their entering service. Under the Military Selective Service Act of 1967, those who held jobs with the Federal Government or private industry are assured that their job rights are protected. This is not the case with those veterans who previously held jobs as school teachers, policemen, firemen, and other State, county, and city employees.

Although a number of States have enacted legislation providing reemployment rights to veterans, the coverage, the rights provided, and the availability of enforcement machinery all vary considerably from state to state. Also, some State and local jurisdictions have demonstrated a reluctance, and even an unwillingness, to reemploy the veteran. Or if they do, they seem unwilling to grant them seniority or other benefits which would have accrued to them had they not served their country in uniform."

Senate Report No. 93-907, 93rd Congress, Second Session, pages 109-110 (June 10, 1974).

As in 1974, including employees of state and local governments among the beneficiaries of the reemployment statute is critically important. In the November-December 2013 edition of *The Officer,* our bimonthly ROA journal, we published an excellent scholarly article by Dr. Susan M. Gates, a senior economist and the Director of the Kauffman-RAND Institute for Entrepreneurship Public Policy in the RAND Institute for Civil Justice. The article is titled "Too Much To Ask? Supporting Employers in an Operational Reserve Era." Dr. Gates reported on RC members who were not currently on active duty and who held full-time civilian employment as of January 2011. Ten percent of them worked for state governments and another 11 percent for local governments, according to Dr. Gates. In recruiting and retaining service members for the seven Reserve Components, we as a nation cannot afford to write off 21 percent of potential recruits based on the character of their civilian employment.

All too often, state and local government officials hide behind hoary doctrines of sovereign immunity to avoid their obligations to state and local government employees who lay aside their civilian jobs to serve our nation in uniform. USERRA clearly applies to state and local governments, as employers, but if there is no effective enforcement mechanism with respect to such employers the legal right is of little value.

A compelling example of this problem is the case of Staff Sergeant Aldous Copeland, of the South Carolina Army National Guard. Please see Law Review 14044 (March 2014).

Conclusion

In a speech to the House of Commons on August 20, 1940, Prime Minister Winston Churchill said:

"The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide or world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few."

The Prime Minister's eloquent words about the Royal Air Force in the Battle of Britain apply equally to members of the United States armed forces in the 13 years since the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time. By their prowess and their devotion, they have prevented a recurrence of the nightmare events of September 11.

The entire U.S. military establishment, including the National Guard and Reserve, amounts to less than ¾ of 1 percent of the U.S. population. In our generation, these are the few to whom the many owe so much by way of gratitude.

And what do these few want? They ask for an effective way to enforce their legal rights, when those rights are flouted by federal, state, local, and private sector employers.