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Key Employee Program—Continued

By Fred Denson, Esq.*

Q: I was employed by a private employer, a defense contractor, who informed me that I was a "key employee" under Department of Defense (DoD) Instruction 1200.7. The employer obtained a letter from the DoD undersecretary, delaying my deployment, telling my company that I should have never been put in a key position to begin with, and telling my boss to proceed to realign our company assets to account for key positions.

My employer quotes the undersecretary in a June 3, 2004, letter as saying: "It appears the soldier, as a Ready Reservist, should not have been assigned to a 'key' position. Since Ready Reserve members may not occupy such civilian positions, [DoD directive 1200.7], I request you begin the process of reviewing your civilian positions so that Ready Reserve members occupying 'key' position can be realigned within your organization or removed from your Ready Reserve when we resume our normal screening process once we conclude these involuntary call ups."

My employer's attorney made the following statement: "The employee reported for active duty on or about September 9, 2004, *but was injured*, preventing his deployment to Iraq with his unit. He was released from active duty on October 5, 2004, and returned to work on November 8, 2004." In paragraph five of that same letter, he states: "The employee's premature return to work again raises the question of suitability for a 'key position' while on Ready Reserves." Since you were on orders for less than 90 days, you would have been entitled to the job you vacated, or the job you would have had had you never left, and not a job of equal pay and status. Their remedy then would continue to be removal from the Ready Reserve and not just placement to a warehouse job because the employer may have made an error in judgment in your placement in a key position.

My employer moved me into a warehouse job from a quality control position, and when I returned from active duty early due to an injury, I was put back into the warehouse position and terminated shortly thereafter.

Does the Key Federal Employee Regulation apply to private employers and do I have any rights under USERRA accordingly?

A: The fact that someone at DoD approved the delay in the deployment of a soldier while the employer searched for a method of moving that individual to a nonkey position in no way gives the employer a license to violate the Uniformed Services Employment and Reemployment Rights Act (USERRA) by moving the employee to a position of less than equal pay and status because of his/her military service. The employer violated USERRA a second time by refusing to re-employ you into a position which should have been equal in

pay and status to the previous key employee position, after your injury and discharge from the military.

Neither the key employee statute found at 10 U.S.C. 10149, nor the implementing regulation found at DoD regulation 1200.7, authorizes any employer, public or private, to violate USERRA provisions simply because someone in DoD delayed the mobilization period. It appears to me that the employer did anything but comply with 1200.7. The key employee provisions *for private employers* is found in the Regulation Annex at Section E.3.2.2, and this provision and regulation requires an employer to submit a letter of request in the format contained in the annex attachment, and it further requires the employer to submit that letter to the respective service command at the specific listings contained for each military branch in the appendix.

The purpose of this submission procedure is to give the employer an opportunity to indicate that the employee/solider performs an employment function that is more important to national security than the military function he/she performs while on orders. It's not for the purpose of allowing the employer to convince the DoD's under secretary of how important the employee is to the overall mission of the employer simply because your absence might reduce the company's ability to produce. This also allows the individual service (i.e., Army, Air Force) to submit its input covering the impact of having the soldier removed from the Ready Reserve, the only remedy provided by the regulation. There is no input here in this case on the part of the service, nor was the servicemember removed from the Ready Reserve.

In 2004, an arms contractor in the Washington, D.C., area submitted a request to the Tennessee adjutant general, consistent with 1200.7, which was subsequently forwarded to the National Guard Bureau (NGB) for input to DoD. The adjutant general indicated in his letter to NGB that the soldier provided an extremely important function to his military unit. The request was forwarded to DoD; however, the soldier was mobilized before a decision was made whether or not to remove the employee from the Ready Reserve. The employer subsequently withdrew his request, and the employee was restored to his civilian position after his military service.

To follow the logic of this company's actions, an employer need only to delay the servicemember's mobilization, move that employee somewhere in the company to an insignificant position, abolish that position while the solider is on active duty, and then claim afterward that the actions taken would have happened regardless of the mobilization. Because of the service-connected injury, there might be assumed disability associated with your military service, which affects your ability to return to your employment. The fact that you were unlawfully terminated to begin with does not negate your right to a reasonable accommodation or to a job of equal pay and status to the position you occupied, which was not referred to by the company as a key position before unlawfully being moved to a position of less pay and status just before mobilization.

The bottom line is that nothing in the Key Employee Statute nor USERRA allows the employer to escape from the requirements contained in USERRA with the exception of removal from the Ready Reserve by following the proper procedures set forth in 1200.7.

As to the employer's quote of the undersecretary in paragraph 2, the only place such a statement is found in 1200.7 is in Enclosure 3, Section E3.2.1.1.3, which states "*Federal Agency Heads*, or their designees, shall designate those positions that are of essential nature to, and within, the organization as 'key positions,' and shall require that they shall NOT be filled by Ready Reservists to preclude such positions from being vacated during a mobilization. Upon request from Federal Agencies, Secretaries of the Military Departments shall verify the essential nature of the positions being designated as 'key,' and shall transfer Ready Reservists occupying key positions to the Standby Reserve or the Retired Reserve or shall discharge them, as applicable, under 10 U.S.C. 10149 (reference (b)), except as specified in 4.2 of this Directive."[emphasis supplied] This particular section applies only to federal employers as a subsection to E3.2.1 and is not applicable to private employers.

The section applying to private employers is found at E3.2.2 and E3.2.3, which states: "Non-Federal employers of Ready Reservists, particularly in the fields of public health and safety and defense support industries, are encouraged to adopt personnel management procedures designed to preclude conflicts between the emergency manpower needs of civilian activities and the military during a mobilization. Employers also are encouraged to use the Federal key position guidelines contained in this enclosure for making their own key position designations and, when applicable, for recommending key employees for removal from the Ready Reserve."

E3.2.3 states: "All employers who determine that a Ready Reservist is a key employee, IAW the guidelines in this Directive, should promptly report that determination, using the letter format in section E3.4., below, to the applicable Reserve personnel center, requesting the employee be removed from the Ready Reserve."

Although this section encourages private employers to use Federal key position guidelines for making their own determinations and, when applicable, for recommending removal from the Ready Reserve, this section does not state that "Ready Reservists of private employers may not occupy such civilian positions," as stated in the employer's quote in paragraph two. Even in the case of a Ready Reservist with a federal employer, where the statement does apply, the express remedy provided in situations where Ready Reservists in fact do occupy key positions is to request that they be removed from the Ready Reserve, and there is no reference anywhere in this directive to an agency or private organization realigning itself.

In regard to the statement by the employer's attorney that the injury you sustained *before deployment*, and your premature return to employment raises the question of your suitability for a key position: this statement might also raise the question of accommodation requirements. Unless the lawyer was implying that you were unsuitable to occupy the key

position because of the speedy return of your extraordinary talents, there is some implication there that your accelerated return due to the service-connected injury made you a questionable candidate to refill the position, and that would be a clear violation of USERRA.

DoD Directive 1200.7 also refers to the process by which an agency may appeal DoD denial to move an individual to standby Reserve. That process is found in 44 CFR Part 333, which authorizes the director of the Federal Emergency Management Agency to adjudicate any differences between DoD and other federal agencies.

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The views expressed are Mr. Denson's, and not necessarily the view of DoD or the state of Tennessee.