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War in Iraq generates employment issues back home

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Three years after the U.S. invasion of Iraq, the impact of being a nation at war is filtering down to daily life in corporate America.

Employment lawyers have seen an increase in inquiries about the rights of military personnel in the workplace. That may be due to the fact that there are more employees in military service that may have protected rights.

The [Uniformed Services Employment and Reemployment Rights Act of 1994 \(USERRA\)](#) governs the employment and reemployment rights of reservists, veterans and other uniformed service members; protects employees who seek a leave of absence; and provides reemployment rights to those who serve. It also protects their benefits while on leave for up to five years and prohibits any form of discrimination or retaliation.

"People don't realize what a severe law this is," said Theresa M. Gallion, managing partner of [Fisher & Phillips](#) in Tampa. "It is brutal. It applies to everybody, even people who work for the government. There are no exceptions."

The key, said Mark Levitt, a partner at Allen, Norton & Blue in Tampa, is that the employer be aware of its obligations.

"The law is very liberally construed in favor of our service men and women. The intent is clearly to get them back into the job they left so they are not penalized for serving their country," he said. "Any time that it is not complied with, it is more through lack of knowledge by the employer or an inadvertent mistake. With the patriotism we have in this country today, the employer wants to support them."

That may be true, but for the actual service people, there also remains a gap in their understanding of the law.

"I don't think a lot of reservists understand everything that USERRA can do for them," said [Tampa Air Force](#) reservist Nicole Blankenship. "We do occasional briefings at the base, and

USERRA is one of the subjects that is touched upon, but it would be helpful to have an in-depth presentation for all the airmen, especially the younger ones."

Time can change staffing priorities

The problem for employers usually comes when they have to manage specialized skills, said Levitt.

"The biggest problem is when operations change significantly, the position disappears or the scope of work has changed. That sort of creates the biggest dilemma: the employee comes back to a job that is no longer needed," he said.

Employers can be penalized for taking adverse actions against either an employee seeking to exercise a right under USERRA or anyone assisting that employee. If any adverse action occurs, the employee can bring a lawsuit against the company.

Employees must provide an advance notice of need for leave. Written orders may be requested, but are not required. Employees do not need to obtain permission, give a written notice or tell employers when or if they are returning to work.

Upon return, the employee must be given the position he/she would have attained had he/she remained continuously employed, a rule known in the legal world as the escalator principle.

"All the military person has to show is, 'I was in the military, I went on leave and when I came back this bad thing happened,'" said Gallion. "The employer has to have a really good reason to take an adverse action. People do not realize how burdensome the law may be."

Longer deployments may also be a cause for problems back home, she said.

"Military recruiters are having no success in recruiting new people, so they are taking people they already have and make them go two or three duties. They come back and are entitled to their job," she said.

The next six months to a year could see an increase in USERRA lawsuits.

"It's going to continue as Afghanistan and Iraq wind down and people come back," said William B. deMeza Jr., a partner at [Holland & Knight](#).

Employers should be prepared to deal with this issue, said David Miller, a shareholder and labor and employment attorney in the Miami office of [Akerman Senterfitt](#).

"It will become a more common inquiry," Miller said. He suggests that employers review the statute and how to comply with it. "There are complex notice requirements on the part of the employee and the employer, and when it intersects with other employment-related laws it can become a real headache."

"Every employer that has somebody going on leave or returning must study the facts to make sure they are handling it correctly," said Kevin Zwetsch, a shareholder at Fowler White Boggs Banker.

Final rules not right?

The [Department of Labor](#) issued final regulations for USERRA that became effective on Jan. 18, 2006.

"For the most part, they are pretty consistent with the way things were," said Levitt.

But although they generally confirm what the government had said for years, deMeza Jr. was a bit disappointed.

"They weren't as clear as we had hoped that they would be," he said. "They don't provide any more guidance as to how much notice an employee leaving for military service must give the employer. (They) don't provide any more guidance as to when an employee returning from military service must be given a promotion to a position better than when he/she left."

USERRA cases ebb and flow

The Department of Labor's Veterans Employment and Training Service (VETS) enforces USERRA provisions, investigates complaints and may refer a complainant to the Department of Justice.

As a percentage of total USERRA cases, DOJ enforcement actions are few but can be a good indicator of the overall trend.

Back in 1989, when USERRA was relatively new, the DOJ filed 1,400 enforcement actions. As the first Gulf War started and there was a big call-up of reservists, the number of actions climbed to 2,500.

Then it slowly declined until it reached a low of 895 cases in 2001.

After Sept. 11, 2001, with the wars in Afghanistan and Iraq, the numbers went up again and reached 1,195 in 2002, more than 1,300 in 2003, and 1,465 in 2004.

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