

Conflict Overseas, Conflict at Work

The motto "one weekend a month, two weeks a year" used to be a powerful marketing tool for the U.S. Army National Guard, but Sept. 11, 2001 changed all that.

As of January 2008, the total number of National Guard and Reservists who have been deployed to Iraq and Afghanistan is nearly 500,000, according to the Department of the Defense.

The Pentagon's office of the Employer Support of the Guard and Reserve estimates there are about 1.3 million total National Guard and Reservists, and about half have been called to active duty since 9/11.

One weekend a month, two weeks a year? Dave Patel, director of national operations for the ESGR, says that belongs to a "bygone era," like an eight-track tape.

Another remnant from a bygone era that is becoming increasingly relevant these days is the Uniformed Services Employment and Reemployment Right Act, as more service men and women return from active duty and try to pick up where they left off. USERRA, signed into law in 1994, provides for comparable employment, salary, benefits and status for service personnel who return to their employer.

But not everyone finds a warm welcome from their employer when they return.

As of July 11, according to ESGR, more than 9,200 contacts were made to the organization through e-mail, phone or its Web site form this year -- of which more than 2,000 were determined to be employer-violation cases that required mediation through an ombudsman affiliated with ESGR.

The trend has certainly picked up from 2007, when the number of total contacts for the entire year was more than 13,100, of which more than 2,300 were determined to be cases of violations.

While Patel projects that the number of USERRA inquiries and complaints will continue to rise in the near future, he says that, while the number of inquiries has been increasing during the past three years, the number of actual cases has gone down.

According to figures from the agency, the number of actual employer-violation cases from 2005 to 2007 has decreased from 4,682 to 3,152 and 2,374, respectively.

Patel says most ESGR cases are resolved swiftly, due in large part to an army of nearly 900 ombudsmen, who attempt to mediate cases within 14 days. All ombudsmen are required to be well-versed in USERRA legislation. Rather than contacting the ESGR with violations, some service personnel reach out to a private attorney; Patel says the ESGR doesn't track those complaints.

Samuel F. Wright, a partner with the Washington office of the Tully Rinckey law firm and a retired captain of the U.S. Navy, agrees USERRA violations will likely increase, as more

service personnel return to work from active duty in Afghanistan and Iraq.

"I only hear from people who have problems, but I think there are a lot of violations, and they will increase," he says. While some employers may be "clueless" about the USERRA, he says most employers are familiar with the law, but find the law burdensome, as in the case of Joe Cox, one of his clients.

Staff Sgt Joe Cox didn't contact the ESGR, but rather turned to Wright after returning from 14 months of active duty to find that his previous position as community manager with a housing corporation had been filled and, according to Cox, his supervisor was reticent to make way for him.

"She told me that if I wanted my old position back, she would have to fire somebody and demote another person, and that she didn't want to be known as the person who ruined company morale," says Cox, who has been stationed at Fort Drum, N.Y. for 12 years.

The company, Fort Drum Mountain Community Homes, declined to comment on the potential litigation, according to

Tracy Ellis Williams, an attorney with Murtha Cullina in Stamford, Conn., which represents the organization.

Cox says the company created a position for him as a utility manager for the housing community, but that the position was at a lower status, and that the rate of pay was not the same as he would have been making at his old job. Among

USERRA's regulations is what has become known as "the escalator principle" -- that the returning service man or woman must receive the seniority, status, pay level and benefits that they would have achieved had they not been called to active duty.

The final straw, says the 32-year-old Cox, was when his employer told him that if he took military leave for medical assistance, his job would be filled in his absence.

Ironically, Cox's former employer, which is a part of WinnCompanies and Actus Lend Lease, is under contract with the U.S. Army to provide housing complexes on U.S. military bases.

Cox is now employed on the midnight shift as a security guard at Fort Drum. He says it's difficult to see his wife and their three foster children, "but you've got to put bread on the table."

Wright says he intends to file his suit against Cox's former employer this week with the U.S. District Court in Albany, N.Y. He declined to speculate on whether the case will settle or go to trial.

"The guy doesn't want to go back to work there," he says. "But he's entitled to back pay, and I hope we can teach this employer a lesson. They don't have the discretion to deny a person's rights after he returns from active service."

Wright has a particular interest in USERRA issues, because he was among those who drafted the legislation when the Department of Labor and the Department of Defense sought to propose amendments to the 1940 Selective Training and Service Act, which was initially intended to guarantee employment to service men and women returning from active duty. USERRA was intended to improve and clarify the 1940 law, according to Wright.

Patel says he believes ignorance of USERRA is not as common as it was before September 2001.

"Before 2001, nobody even knew what the acronym meant," he says. He credits a U.S. Department of Labor requirement that employers display a USERRA compliance poster in the workplace. And, he cites the sheer numbers of employees who are being called to active

duty, and returning to the workplace, as educational tools for their employers.

Ombudsman John Lowrie, an attorney with the firm of Ford & Harrison in Denver, says employers should treat USERRA with the same compliance they afford any civil rights law, because that's what it is.

"USERRA is an extremely complicated employment statute," says Lowrie. "It is arguably the broadest civil rights statute in the United States code. It's so complicated that, many times, you need to take extra time in employment situations to ensure, as an employer, that you don't run afoul of the law."

Patel says that the mediation provided by ombudsmen such as Lowrie helps the returning service men and women as well as the employer, because it can avoid charges by the U.S. Department of Labor, to which the ESGR would hand unresolved cases, or civil action from a private attorney.

Although the ESGR has no statutory authority, it is responsible for educating both service members and employers about USERRA, as well as providing mediation between employers and returning service members who file a complaint through the ESGR.

Depending on the size of an organization, Patel says it isn't unusual for an otherwise supportive employer to nevertheless be in conflict with USERRA.

"There may be specific cases of USERRA issues in a large organization, for example. You may have a supervisor who's feeling the direct pain of an employee who's gone, and ... may not be aware of corporate policy. It's usually an information and education challenge within the organization."