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## **Manpower and military employments**

By Carole Moore

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Some departments find employing reservists has grown costlier in tough budget times

See that minefield? It's not your imagination. It's called USERRA and it's one tricky little patch of ground that can leave your agency with mud all over its face — and with lots of civil court time unless properly navigated.

To recap what you probably already know about it, USERRA stands for the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. 4301-4335) and it's a federal law passed to create employment equity for workers who are also members of the U.S. Armed Forces.

USERRA's official goals, according to the U.S. Office of Special Counsel, are to ensure members of the military don't suffer setbacks and reprisals in their civilian careers due to military service, move seamlessly back into their civilian jobs and face no on-the-job discrimination based on that service or training.

USERRA was designed to protect those who serve in the National Guard and as reservists, allowing the country to keep its military strength at a higher level without employing a strictly full-time military.

How, what and why

Back when U.S. lawmakers approached the idea of initiating a peacetime draft, they wanted to make sure military service didn't have the unintended effect of robbing those who served of their day jobs. These concerns led to passage of the Veterans' Reemployment Rights (or VRR). VRR grew into a behemoth that was difficult to interpret or understand, even by lawyers. At no point did this become more obvious than during the Gulf Wars: Operation Desert Shield and Desert Storm, which took place in the early 1990s.

USERRA is credited with clarifying and streamlining the complicated set of laws under VRR and helping ensure that the military has a constant pool of talent from which to draw when the numbers of regular members of the armed forces available for assignment dwindle. But it also has an unintended effect on employers who are required to have an open position for those returning from the military. Nowhere is this

more obvious than in its deployment of emergency personnel — in this case, law enforcement officers.

It's no secret that law enforcement likes military veterans and vets mirror that love. Those with prior military service seem to naturally acclimate to the discipline and demands of the job, are knowledgeable about firearms and tactical operations and have an innate understanding of the chain of command. However, with deployments growing longer and agency budgets shrinking at a never-before-seen pace, some agencies see vets with active ties to the military as liabilities they can barely afford.

Under current law, agencies stay on the hook for jobs filled by deployed vets, which can prove both expensive and inconvenient. But for veterans aspiring to dual careers as both cops and military reservists, USERRA is a huge step up from the days of yesteryear.

The bad old days

Pedro Gonzales, who retired from the San Antonio Police Department after serving as a sworn officer for 32 years, remembers what it was like before USERRA.

"It was very hard being caught between two masters," says Gonzales, who served with the Air National Guard. At the time he was both a guardsman and police officer, Gonzales was required to attend drill a weekend a month. Weekends were the police department's busiest in terms of calls for service. Gonzales says there were attempts in the early years to punish him for his dual service, but as time passed, the department became more accustomed to his schedule, and more accommodating in regard to his military obligations. Plus, more and more law enforcement officers kept their ties to the military, making the situation more common.

"When they passed the law, it really helped because as long as you had orders, the city couldn't prevent you [from doing your military duty]," he says. But even though there is strong legislation in place, that doesn't mean agencies aren't often hit with complaints about their handling of law enforcement officers with active military ties. It's a situation that spawns both frequent complaints and lawsuits.

A sampling of complaints

The Office of Special Counsel deals with hundreds of USERRA-based cases each year, many of them involving law enforcement agencies. In 2008, for example, an Immigration and Customs Enforcement agent alleged she was denied the chance to apply for a position that became available once she was activated. As a result of the complaint, ICE agreed to give the agent priority consideration for the slot.

In another case involving the Department of Homeland Security, one claimant alleged his employer "mischarged his leave and imposed a debt on him as a result of his service in the Air Force reserve." Eventually, the claimant's lost leave was restored.

In fact, one of the most frequent violations investigated by the USERRA unit of the OSC involves agency misconceptions about leave, pay and other benefits. This sometimes leads to suits like the one filed against the town of Billerica, Colorado, by one of its officers in September 2008. The officer, Timothy Connors, alleged in court documents that his efforts to obtain unpaid military leave in order to attend reserve training resulted in departmental retaliation.

In 2007, two San Francisco police officers filed suit against their department claiming workplace discrimination, and asked for relief under USERRA. The two — one of whom served in the Army reserve and the other a member of the Army National Guard — say they repeatedly failed to win promotions as a result of their continued absences while serving in Iraq.

The law provides that departments maintain options for and refrain from discriminating against law enforcement officers called to active duty, but for most departments it's becoming more and more difficult to maintain enough bodies to keep the streets safe. And what happens when departments lose budgeted positions?

Based on the current economic downturn, it appears a lot of agencies will soon be in a position to answer that question.

#### Going out of business

The economic crisis has spawned both massive civilian layoffs and declining retail sales, which in turn have led to reduced revenues for many governments. That has translated into reductions in forces at levels heretofore unseen since the Great Depression. These economic situations can't help but impact law enforcement agencies.

David Schultz, a Hamline University professor in the School of Business and Department of Criminal Justice, says when laws like USERRA were passed, no one anticipated "deployments and obligations that amounted to years away from those jobs. For larger departments a lot of the brunt can be absorbed by the constant turnover. But smaller departments don't necessarily have that much turnover, and keeping jobs available can be fiscally difficult."

Schultz sees more challenges ahead, as well as possible confrontations between money-strapped departments and government mandates. As towns, cities and counties find it harder to get by with pending budget cuts, Schultz believes things will only grow more critical.

"As the war in Iraq winds down, more soldiers will return expecting jobs and ... as the economy tightens, layoffs and budget tightening may mean that the jobs do not exist when the soldiers return. Or if they do exist, they may force other workers out of a job, creating resentment," he says.

A misstep can be expensive

Mathew Tully understands better than most what a misstep under USERRA can cost both the individual and agency. The attorney began his career as a federal corrections officer in 1995 and was activated as a reservist for three years. His tours included a year in Korea.

Tully returned to his duties at a corrections center in New York City, where he worked until 2000. After filing a number of discrimination complaints based on his military service, Tully eventually settled for an undisclosed sum and retired in 2008.

One major component of his complaint was that his days off were adjusted to coincide with his military duty so the prison would not have to incur overtime expenses. Tully says he was also denied transfers to other prisons, as well as promotions. His performance evaluations reflected not his actual job performance, as they are designed to do, but absences due to his military service.

"Before 2001, the culture was that military service was voluntary," Tully says. "The warden said, 'Pick my career.' It was a blatant violation of the law."

But the former corrections officer eventually obtained satisfaction in a particularly ironic way: He used part of his settlement to put himself through law school. Tully's firm now represents individuals who believe they've been discriminated against in violation of the provisions of USERRA. But he also works with county and city attorneys to help departments stay in compliance with the USERRA statutes. And he admits there are some problems with the legislation.

"Since 9/11, the frequency of deployments has been unbelievable and employers are taking it on the chin," Tully admits.

The future and beyond

How can agencies budget for tomorrow and still get the job done today? It's not easy, but experts say there are solutions.

Chris DeLay, a criminal justice educator at the University of Louisiana at Lafayette, says the tendency to think that the solution to budgeting problems is to cut police services is shortsighted. "It's a case of shooting yourself in the foot," DeLay says. But when a small town decides to disband its department and go with coverage from a larger agency, such as a county sheriff, an officer who is deployed while serving with the defunct department is simply out of luck. DeLay believes most modern departments have little problem with officers serving in the military.

"I think most municipalities kind of like reserving slots for people going on active duty — it saves their budget and gives them a little more economic spending room with salaries they didn't have to pay, cars that don't have to run," DeLay says.

Schultz agrees with DeLay and says there are ways for agencies to integrate planning for absences into their usual allocation and distribution of manpower.

"They first need to do an inventory or survey of all the individuals and positions that were occupied by military personnel," Schultz says. "Second, they need to make sure that any union contracts or local hiring policies comply with [USERRA]. Third, they need to explain to policy makers that, even with budget cuts, they are still responsible for rehiring soldiers when they return," Schultz says. He explains that replacements also need to be advised that their positions are temporary.

For law enforcement agencies that are impacted by deployments, the best plan is to simply roll with the punches: It's both the legally and morally right thing to do.

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