

## Returning Troops Still Face USERRA Violations

As a federal correctional officer for the DOJ in Washington, D.C., Mathew Tully took pride in protecting the public from convicted felons. But in October 1995—only two months into his job—Tully, a member of the National Guard, was called to duty. Deployed first to Korea, then to Iraq, Tully was on active duty for three years and looked forward to returning home and getting back to work. Unfortunately, it wasn't a warm homecoming.

"The DOJ hired me back," Tully explains. "But it didn't promote me, it didn't provide me health insurance while I was gone, it didn't provide me adequate compensation and time off because of my military service."

Tully sued, claiming the agency violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The case ultimately settled for an undisclosed sum, which Tully used to put himself through law school and open his own firm specializing in USERRA cases.

Tully's experience underscores the fact that USERRA reaches far beyond simply rehiring an employee who has been serving his or her country. According to the Status of Forces Survey of Reserve Component Members released by the Department of

Defense late last year, although the number of USERRA complaints filed has gone down, there is a growing discontent among military personnel with the way the government handles complaints. Some experts believe military personnel are filing fewer complaints because they are too frustrated with the system.

"These returning employees are still unhappy with employers," says Jason Branciforte, a shareholder at Littler Mendelson in Washington, D.C. "They just aren't bothering to file complaints because they feel the complaints are going nowhere. But now more than ever employers need to be stepping up and doing their part." In a time when increasing numbers of military personnel will be returning from the Middle East, the study's findings indicate that employers should begin making USERRA a priority to stave off costly legal ramifications.

Understanding USERRA USERRA is a federal statute that provides rights to individuals who leave their civilian jobs voluntarily or involuntarily to serve in the military. Although various laws protecting military personnel had been in place for years before USERRA's enactment in 1994, the Act specifically extends protection to voluntary service personnel, including members of the National Guard and Army reservists and doctors and nurses.

"Congress made the decision that we are a nation of citizen soldiers," says Conrad Kee, lieutenant colonel in the U.S. Army Reserve and a Denver-based partner at Jackson Lewis. "And it said those soldiers need certain protection."

Protection under USERRA includes nondiscrimination based on military status; reinstatement under the "escalator principle"; continuation of medical benefits; all seniority upon return to work as if the employee had remained continuously employed; and protection from discharge upon return to work—unless there is cause—for a period of time depending on the length of

service.

Tully, who founded Tully, Rinckey & Associates in Albany, N.Y., believes this law is a critical element of the country's security. "One of the reasons so many people enlist in the National Guard is because they know their jobs will be there when they return," he says.

Common Confusion Despite Congress' clarification to USERRA in January 2006, many companies continue to struggle to get their arms around the law. "The issues are usually technical rather than intentional," Kee says. "Employers generally want to do the right thing."

Still, employers continue to make several common mistakes, which resulted in 2,500 cases being filed in 2007, down from 3,000 in 2006. First, they often don't realize that they are required to rehire an employee who has been serving in the military for an accumulated five years or fewer. "It doesn't matter if the employer has already filled the position, it is required by law to give that employee's job back," says Hal Coxson, partner at Ogletree Deakins in Washington, D.C.

Many employers also don't understand their requirements with regard to employee benefits. For example, employers should allow National Guard members and Army reservists to continue to vest in their retirement plan while on leave. "If someone goes out for a year, he gets a year's worth of vesting," Branciforte explains. "It's as simple as that."

Finally, many employers do not appreciate the extent of the nondiscrimination protection USERRA offers. "Companies sometimes fail to recognize that this law prohibits discrimination with respect to hiring, actual employment and promotion," Coxson says. "Oftentimes an employer believes a qualified candidate for a position or an active employee may be leaving for military service and, without intending, the employer may discriminate by not hiring or promoting that person because he is going away. That is a violation."

Preventive Measures To ensure they are acting in conformity with the regulations, employers should not only examine their USERRA policies, but also take proactive steps to make sure all parties handle the situation appropriately.

First, make information about the rights of military personnel readily available to all employees. "Put together a one-page information sheet explaining the employees' rights," Branciforte says. "The more informed everyone is, the fewer problems the employer is likely to have."

Second, be sure HR officials and all company managers are adequately versed on how to avoid USERRA violations. "They should have the knowledge they need to sufficiently respond to the many inquiries reservists will have prior to deployment," Tully says.

Finally, have a one-on-one with the employee before deployment. "Sit down and go through USERRA so the employee knows what rights and obligations he or she has and what rights and obligations the employer has," Coxson says.

Tully emphasizes that encouraging people to serve in the Reserves and National Guard is a matter of national security.

"It only works if you guarantee re-employment rights," he says. "It's also important to honor these men and women for their service and make sure that having a job when they come home is one less thing they and their families have to worry about."