



**STRATEGY
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**IMPACT OF REEMPLOYMENT RIGHT ACT OF 1994
ON INCREASED USE OF RESERVE COMPONENTS**

BY

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**IMPACT OF REEMPLOYMENT RIGHTS ACT OF 1994
ON INCREASED USE OF RESERVE COMPONENTS**

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ABSTRACT

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The end of the Cold War brought about a complex array of new national security challenges or operations other than war. Concurrently the downsizing of the Total Force brought about increased dependence on the Reserve Components. It is anticipated that increased use of Reserve Components will bring about stress and tension with civilian employers. This paper discusses the use of Reserve Components in future military operations, the background and development of Uniformed Services Employment and Reemployment Rights Act (USERRA), the major provisions of the USERRA, its impact on increased use of Reserve Components, and some additional leverage needed to ensure the accomplishment of our National Security Strategy.

INTRODUCTION

The Reserve Components, which include the Army National Guard, the Air National Guard, the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air Force Reserve and the Coast Guard Reserve, have experienced increased deployments since the end of the Cold War. Employment rights of service members returning to their civilian jobs was often confusing and misunderstood. This changed on October 13, 1994 when President William J. Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), P.L. 103-353:

I am pleased to sign into law H.R. 995, . . . Today there are members of the National Guard and Reserve, including Coast Guard Reservists, on active duty supporting operational missions. As their Commander in Chief, it is timely for me to sign a bill that will clarify and strengthen their right to return to the civilian positions they held before going on active duty without any loss of seniority, status, or pay. . . . My Administration is committed to enforcing the reemployment rights of service members. This Act is key to the achievement of that goal.¹

The development of the H.R. 995 into the USERRA, as will be discussed, was a smooth and uncontested transition from a bill into law. Although the law was completely rewritten, its basis was grounded in a long history of case law. Will this "new" law, however, stand the test of time? Will the USERRA be effective for the Reserve Components as the United States (U.S.) is propelled into the 21th century? Does more need to be done to enhance employer support of the increased use of Reserve Components in military operations?

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), P.L. 103-353, is sufficient to protect the employment rights and benefits of Reserve Component members during increased military operational deployments in the future. This paper will discuss the use of Reserve Components in future military operations, the background and development of USERRA, the major provisions of the USERRA, its impact on increased use of Reserve Components, and some additional leverage needed to ensure the accomplishment of our National Security Strategy.

USE OF RESERVE COMPONENTS

The military plays a vital role in U.S. National Security Strategy of engagement and enlargement by enhancing national security, promoting prosperity, and promoting democracy. President William J. Clinton stated in his preface to the National Security Strategy:

[The] military force remains an indispensable element of our nation's power. Even with the Cold War over, our nation must maintain military forces sufficient to deter diverse threats and, when necessary, to fight and win against our adversaries. While many factors ultimately contribute to our nation's safety and well-being, no single component is more important than the men and women who wear America's uniform and stand sentry over our security.²

Secretary of Defense William J. Perry recently reported:

As the United States shapes its forces to meet the challenge of a changing world within the constraints of available resources, it must use all of the Total Force in new ways. The R[eserve] C[omponent]s are integral partners in our nation's defense. The R[eserve] C[omponent]s are being counted upon more and more to respond quickly and decisively for peacetime and

wartime missions that draw on their strengths. . . . Under the Total Force concept it is virtually impossible for us to conduct an operation of any size without involving Reserve forces.³

Chairman of the Joint Chiefs of Staff, General John M. Shalikashvili said in the National Military Strategy: "Reserve component elements will take on increased responsibility for participating in and supporting peacekeeping missions."⁴ This increased responsibility of Reserve Components is due in part to the current downsizing trends.

Beginning in 1989 and continuing with the Bottom-up Review, the United States Armed Forces will have reduced its personnel end strength by almost 50 percent by the turn of the century. Total Active Component end strength will reduce from a 1989 strength of 2,130,000 to 1,445,000 members. Likewise the Selected Reserve will decrease from 1,170,000 in 1989 to 893,000 in 1999.⁵ This decrease provides strong evidence that the use of the Total Force, including Reserve Components, will be necessary to execute the military strategy. A strategy which is far different from that the Cold War period. .

The end of the Cold War brought about a complex array of new security challenges or operations other than war. These operations mark a strict departure from the normal war fighting operations the military found themselves involved in the past. There is now the spread of weapons of mass destruction, including biological, chemical, and nuclear weapons, into third world countries. New peace processes throughout the world are threatened by violent extremists sometimes with ethnic,

religious, or territorial agendas. Much of the stability, which was held in check by the bipolar competition between the United States and the former Soviet Union, dissolved with the crumbling of the Berlin Wall causing increased American deployments to protect national interests. According to Chief of Staff of the Army, General Dennis J. Reimer: "There has been a 300 percent increase in our operational deployments overseas since the days of the Cold War -- and that places increasing demands on our soldiers."⁶

Joint Pub 3-07, recently published, identified sixteen types of Military Operations Other Than War (MOOTW). This number doubled that reported in Joint Pub 3-0 which was published in February 1995. The increase does not reflect the creation or discovery of eight new types, but merely a clearer delineation of operations in which the United States military, to include the Reserve Components, have already been involved. The increased number does, however, point out the diversity of MOOTW and indicates the increased importance being given to MOOTW as a vital part of the national military strategy.

According to Deborah R. Lee, Assistant Secretary of Defense for Reserve Affairs: "[T]oday's National Guard and Reserves are being counted upon more and more to respond quickly and decisively for wartime missions, peacetime missions and domestic emergency response missions."⁷ Since the last major military conflict, Operation Desert Storm, our Reserve Component forces have been involved in a plethora of MOOTW.

Air National Guard and Army Reserve have been involved in constructing and renovating schools, medical clinics, and roads in Latin America and the Caribbean. During Operation Uphold Democracy, all the Reserve Components were represented and providing, for example: linguists, equipment maintenance, special forces, civil affairs, psychological operations, and engineering support. Naval Reserve medical personnel and Air Force Reserve medical squadrons participated in Operation Sea Signal in Guantanamo Bay, Cuba providing relief to Cuban and Haitian refugees, while Marine Corps Reserves provided security. An all volunteer Army battalion consisting mostly of National Guard and Reserve soldiers were in the Gulf of Aqaba in the Sinai for six months verifying the compliance of the 1981 Camp David accords between Israel and Egypt. Army National Guard and Army Reserve mechanics have been used extensively in Europe for operation RETROEUR to prepare equipment for redistribution. Air Force Reserve have participated in Operation Restore Hope in Rwanda while Army Reservists supported war crimes investigations there. In an Albania exercise, Uji Crystal, National Guard and Marine Corps Reserves have been restoring a hospital. Currently in the Balkans the Reserve Components are providing expertise in the areas of civil affairs, psychological operations, logistics, medical support, postal service, public affairs, military police, port security, and harbor defense.⁸

According to General John M. Shalikashvili: "[O]ur Guard and Reserve have been fulfilling more and more of the tasks

associated with execution of our national security strategy. . . . [I]t is an entirely new phenomena to employ our Guard and Reserve so actively as a lead element in our strategy."⁹ With the increased dependence on the Reserve Components it is imperative that employers understand, not only the changing role for the part-time service members, but the employees rights and benefits as well.

DEVELOPMENT OF USERRA

USERRA saw its infancy, in a legal sense, in the introduction of H.R. 1578 by Representatives Timothy J. Penny (D, MN), et. al., on March 21, 1991. A similar bill, S. 1095, was introduced by Senators Alan Cranston (D, CA), et.al., on May 16, 1991.¹⁰ From this very beginning the bills had the interest of the Executive Branch. A task force was appointed by the President to work on the development and subsequent passage of the law. Members of the task force included representatives of the Department of Labor, Department of Defense, Department of Justice and the Office of Personnel Management.¹¹ Both Committees on Veterans' Affairs and the administration spent much time and effort on improving the law during the 102nd Congress. With one major exception no significant changes were made to either bill during the committee process.

The exception was with H.R. 1578. The Committee on Veterans's Affairs was task to clarify, simplify, and where necessary strengthen the existing veterans' employment and

reemployment rights provisions of Chapter 43, Title 38. They accomplished all three tasks in the one change. Protection under the new law would be based on time spent away from the place of employment and not on the designation of the service or type of training performed. Under the committee bill, all persons leaving their civilian jobs to enter military service would be required to provide notice, except when doing so would be impossible or unreasonable.

The most notable departure from the Administration's proposed bill related to section 2022(e) of the bill. This section would establish a rebuttable presumption of reasonableness regarding the timing, frequency, and duration of an individual's military service or training. The Committee believed employers and the courts should not be in the position of "second-guessing" Armed Forces officials regarding the military necessity of service. The Committee intended the determination of the military authorities to be final while efforts were made to provide flexibility in training schedules when appropriate. To keep the Secretary of Labor and the Director of the Office of Personnel Management from having too much latitude in prescribing regulations, the Committee authorized the Secretary and the Director to implement regulations, but policy was explicitly stated in the language of H.R. 1578.¹²

Although H.R. 1578 passed the House relatively quickly, S. 1095 did not pass the Senate until October 1, 1992. On October

6, 1992, the House agreed to the Senate amendments with amendments, but the differences between the House and Senate bills were not resolved before the adjournment of the 102nd Congress.¹³

During the 103d Congress H.R. 995 was introduced by Representatives G.V. (Sonny) Montgomery (R, MS), et.al., on February 18, 1993. Senators John D. Rockefeller IV (D, WV), et. al., introduced S. 843 on April 29, 1993. Both bills were similar to each other and were derived substantially from bills previously passed by both Houses during the 102nd Congress.¹⁴ Both bills were reported favorably by unanimous voice vote on April 28, 1993 and October 18, 1993 respectively.¹⁵

During all the committee and subcommittee hearings, there were over 30 major governmental agencies and interest groups represented. Only two groups provided statements in opposition; all other groups representing millions of members and associates provided statements of support for the corresponding bills.¹⁶ Final amendments to H.R. 995 were approved by the Senate on September 28, 1994 by voice vote. There was no need for a conference committee to iron out any differences between the House and the Senate, although discussions and minor compromises were made between the chambers.¹⁷

As demonstrated above, Public Law 103-353 developed relatively quickly and with much support. I think there were two primary reasons for the bipartisan, and almost unanimous passage of the bills; cost and timing. USERRA did not place any direct

financial burden on the American taxpayer. Therefore, there was no opposition from the constituents through the congressional districts of the United States. Timing was also important, in that it came on the heels of a very successful American Armed Forces campaign in Desert Shield, Desert Storm. The support, not only from the American people but from public and private employers, was high and remained relatively high throughout the development of the law. USERRA is two times the size of the former law and contains three times as many sections. The main reason for the increased text, however, is not new law, but the codification of over 50 years of case law and the clarification of previous rights, obligations, and definitions. There were, however some major provisions which have significant impact on Reserve Component members and employers.

MAJOR PROVISIONS OF USERRA

Some of the major changes bear discussion because of their impact on employment rights and benefits of Reserve Component employees:

1. Supply statutory definitions for terms used in the new chapter 43, title 38, USC.¹⁸

USERRA provides definitions for terms used to alleviate past confusion and/or misrepresentation. "Uniformed services" consist of the five armed services and their respective reserve components, the commissioned corps of Public Health Service, and any other category of persons the President would designate in

time of war or national emergency. "Service" in the uniformed services means any duty which is voluntary or involuntary. The previous law was misleading in that rights and obligations were based on categories of service instead of time served. Another example of clarifying terms is "temporary position." The previous law excluded persons holding temporary positions. There was much argument over what positions were temporary. The new law eliminated the term altogether.

2. Continue to prohibit discrimination or acts of reprisal against an employee or applicant for employment because of a past, current, or future military obligation, and add protection for persons who assist in investigation and testify in any proceeding.¹⁹

The ban against discrimination is broad and encompasses most areas of employment from hiring to reemployment to termination. USERRA expands the class of persons protected from discrimination. Previous law only protected National Guard and Reserve members. The burden of proof is on the employer in discrimination cases. Protection from retaliation has also been expanded. The old law only protected the individual filing a complaint.

3. Provide that reemployment rights protection shall apply to an individual if such person's period of service, with respect to the employment relationship for which a person seeks reemployment, does not, with certain exceptions, exceed five years.²⁰

The cumulative length of a person's absences for uniformed service was extended from four to five years. Unlike the old law which counted only active duty as part of the cumulative service, almost all types of service are now counted. The following eight

categories are exempt from this five year period: (1) For the purpose of completing an initial obligated service requirement when it goes beyond five years. Nuclear power program is an example. (2) If the service member, through no personal fault, is unable to obtain orders of release. An example would be sailors or Marines serving on a vessel at sea. Orders would be extended until the ship returns to port. (3) Statutorily mandated National Guard and Reserve training requirements such as monthly weekend drills and two weeks of annual training. (4) Active duty based on involuntary call-up in certain emergency or national security related circumstances. (5) Active service for volunteers or those involuntarily called during war or national emergency declared by the President or Congress. (6) Active duty in support of operational missions by members of the Selected Reserve under Presidential Selected Reserve Call-up (PSRC) authority for other than war or national emergency conditions. (7) Service by volunteers who are ordered to active duty in support of a critical mission or requirement in times other than war or national emergency and when no involuntary call up is in effect. (8) Presidential call up of members of the National Guard for Federal Service to suppress an insurrection, repel an invasion, or to execute the laws of the United States.²¹

4. Require an individual to return to work or apply for reemployment within certain time limits based on the length of time in the uniformed services.²²

Under the old law, time limits to return to work were based on type or category of service and ranged from the next regularly

schedule work day to 90 days. Under USERRA, the time limits, with the exception of fitness for service examinations, range from the next regularly scheduled workday for up to 30 days absence to 90 days for service of 181 days or more.

5. Reaffirm that the timing, frequency, and duration of a person's training or service, or the nature of such training or service in the uniformed services, shall not be basis for denying employment or reemployment protection so long as the training or service does not exceed certain limitations and, when possible, the service member shall provide notice to his or her employer that the absence from employment is because of military commitments.²³

Under the previous law the service member was not required to provide written documentation; under USERRA, the employer can ask for documentation when the period of absence is more than 31 days. The employer must still reemploy the service member promptly though there may be a delay in obtaining the documentation.

6. Reaffirm that a protected individual is generally entitled to reemployment in the same position which would have been attained if he or she had been continuously employed.²⁴

Unlike the old law which reinstated service members based on the person's category of service, USERRA provides reinstatement based on length of service; 1 to 90 days or over 90 days. There are priorities in each length of service. The top priority is to place the person in the job (s)he would have held had the person remained continuously employed, commonly referred as "escalator" position.

7. Require an employer to make reasonable efforts to qualify or requalify a protected returning individual for an appropriate position.²⁵

USERRA requires employers to train qualified returning service members for the appropriate "escalator" job. The old law only provided for training for the pre-service job.

8. Require an employer to make reasonable efforts to accommodate the service connected disability of a protected person.²⁶

USERRA provides a prioritized scheme to reemploy persons with service connected disabilities. The top priority is to make reasonable efforts to place the disabled person in the position (s)he would have held if continuously employed. This new law covers all employers regardless of size, where the old law was limited to employers of 15 or more employees.

9. Reaffirm that a person reemployed under chapter 43 is entitled to the seniority, and other rights and benefits determined by seniority, that would have been attained if he or she had remained continuously employed.²⁷

This relates again to the "escalator" principles, which requires that each returning service member actually be placed back in the seniority ladder at the point (s)he would have been if continuously employed, and all rights and benefits be reinstated. As with the prior law, absent service members must be treated as on a leave of absence and receive the same rights and benefits as other employees on a leave of absence. USERRA was expanded, however, to include rights and benefits which came in effect during the period of military absence.

10. Provide that a protected person would, at the person's request, continue to be covered by employer provided insurance for up to 31 days at the employer's expense and up to 18 months at the person's expense, unless the employer chooses to fund the entire cost.²⁸

Unlike the old law, USERRA provides for health insurance coverage from employers regardless of size. Employers with fewer than 20 employees were not required to continue health insurance under the old law. Dependents of Reserve Component members are entitled to participate in the military health care system, including CHAMPUS, if the member serves more than 31 days.

11. Provide that, in the case of employer sponsored health benefits, no exclusion from coverage or waiting period can be imposed for a non-service-connected physical condition of covered persons which developed before or during military service.²⁹

The Veterans Administration will make the determination as to service connected disabilities.

12. Require an individual, except when it is impossible or unreasonable, to give verbal or written advance notice to an employer regarding and anticipated absence due to military service.³⁰

Unlike the old law, USERRA requires all employees to provide their employers with advance notice of military service. However no notice is required if military necessity prevents the giving of notice; or the giving of notice is otherwise impossible or unreasonable. The Secretary of Defense will define "military necessity."

13. Require the Secretary of Labor, through the Veterans' Employment and Training Service, to provide assistance in obtaining employment or reemployment to any person entitled to rights or benefits under chapter 43.³¹

Unlike the old, law the Secretary of Labor is empowered to provide regulations implementing the statute. USERRA provides the Veterans's Employment and Training Service the right of

access employer and employee documents for investigation purposes.

14. Require that federal employees be provided representation by the Office of Special Counsel before the Merit Systems Protection Board when necessary to enforce reemployment rights with the Federal Government.³²

The previous law did not provide for representation before the Merit Systems Protection Board.

15. Provide for the discretionary assessment of liquidated damages against any employer who willfully violates the Act's requirements.³³

16. Authorize the Secretary of Labor to subpoena documents and witnesses in relation to the investigation of cases under chapter 43.³⁴

17. Require the Secretary of Labor to transmit to the Congress and annual report concerning cases related to chapter 43.³⁵

Items 15, 16, and 17 were not provided for under the old law but are major provisions in USERRA.

As is readily apparent from the above discussion, the USERRA of 1994 is a comprehensive clarifying law which will, if needed, adequately protect the employment rights and benefits of Reserve Component members for any deployment situation which might arise in the foreseeable future. Although the USERRA seems to be extensive enough, the ideal situation would be to not use the law. It is more positive if employers and Reserve Component employees are mutually supportive when it comes to pursuing America's National Security Strategy. That is one of the major objectives of the Department of Defense's National Committee for Employer Support of the Guard and Reserve (NCESGR).

ADDITIONAL NEEDS

The National Committee for Employer Support of the Guard and Reserve (NCESGR) recently conducted a major employer evaluation questionnaire. There were eight major findings:

1. Employers are supportive of the National Guard and Reserve.
2. Employer attitudes could shift from being positive about the Reserve Components to a more negative outlook due to increasing military training requirements. This change may already be taking place.
3. Employers are not receiving enough advance notice from employees in the Reserve Components regarding military training requirements.
4. Employers with previous military experience are inclined to hire those with current or previous military experience.
5. Being a member of the Reserve Components may be a positive factor associated with employment.
6. Tax incentives would encourage employers to hire those in the Reserve Components.
7. Those in the Reserve Components are perceived as bringing value added qualities to the organization.
8. Employer work requirements and Reserve Component training requirements are creating conflicts in scheduling.³⁶

It is apparent from the above findings that generally employers want to support Reserve Component personnel but their might be an underpinning of concern about increased deployments. The Reserve Officers Association has conducted surveys of *Fortune* 500 companies. Of the 155 who responded, only 21 provided no salary benefits to employees absent for uniformed service and 23 had no standing policies.³⁷ This is a very positive finding but most Reserve Component members do not work for *Fortune* 500 companies. The survey conducted by NCESGR indicated that of the 671 companies responding to their survey, 52 percent employed less than 100, and 72 percent employed 500 or less. One of the

positive legislative activities being worked by the Assistant Secretary of Defense for Reserve Affairs is tax credits. The proposal being drafted is to provide tax credits for employers of Reserve Component members who are ordered to active duty. This legislation would primarily assist the small business owners and self-employed Reservists, where the preponderance of Reserve members are employed.³⁸ Tax credits or similar legislation would provide a positive incentive to employers of Reserve Component members and foster good will between the employer and the Reservist.

Additionally diplomatic efforts need to be made in the area where U.S. Reserve Component members are employed in foreign countries by foreign companies. For example the 7th U.S. Army Reserve Command in Schwetzingen, Germany has combat support and combat service support units whose members live in Germany and work for foreign companies. The USERRA, of course, does not cover those members.

CONCLUSION

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), P.L. 103-353, is more than adequate to protect the employment rights and benefits of Reserve Component service members today who are under U.S. jurisdiction. USERRA appears to also be able to satisfactory protect the employment rights and benefits with the anticipated increased use of Reserve Components within the foreseeable future. Employer tension and

stress brought about by the increased number and length of deployments must be addressed in a proactive manner so that USERRA will not have to be used. Commanders at all levels must ensure that employers are notified, where practical, of upcoming activations and deployments. The service member has a responsibility to the employer as well. Future legislation should not be geared toward making USERRA stronger, but should be pointed to providing incentives for employers, such as tax credits, to hire and retain Reserve Component members.

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²President, A National Security Strategy of Engagement and Enlargement, (Washington DC: U.S. Government Printing Office, February 1995) p 9.

³William J. Perry, "Reserve Meet Needs," The Officer, (February 1996): 24.

⁴Department of Defense, Chairman of the Joint Chiefs of Staff, National Military Strategy of the United States of America 1995, (Washington DC: Government Printing Office, 1995), p 9.

⁵Ibid., p 17.

⁶General Dennis J. Reimer, "Reserve Does Superb Job of Adjusting," ROA National Security Report, (March 1996): 20.

⁷Deborah R. Lee, "25 Years of Total Force," The Officer (February 1996): 39.

⁸Ibid., p 41.

⁹General John M. Shalikashvili, "Hidden Secret of Military Successes," The Officer (February 1996): 34.

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¹¹Congress, House, Representative Montgomery of Mississippi speaking for H.R. 995 and recognizing the members of the executive branch task force, 103rd Cong., 1st sess., Congressional Record (4 May 1993), vol. 139, no. 60, H2209.

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¹³Congress, Senate, Senator Rockefeller of West Virginia speaking for S. 843 and explaining history of legislation, 103rd Cong., 1st sess., Congressional Record (29 April 1993), vol. 139, no. 57, S5181.

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¹⁸Congress, House, Veterans' Affairs Committee, U.S. Code Congressional and Administrative News - 1994, vol 5, 103rd Cong., 2nd sess. (St. Paul Minnesota: West Publishing Co., 1995), 2450.

¹⁹Ibid.

²⁰Ibid.

²¹Ibid., p. 2460-2461.

²²Ibid., p. 2450.

²³Ibid.

²⁴Ibid.

²⁵Ibid.

²⁶Ibid.

²⁷Ibid.

²⁸Ibid.

²⁹Ibid.

³⁰Ibid.

³¹Ibid., p. 2451.

³²Ibid.

³³Ibid.

³⁴Ibid.

³⁵Ibid.

³⁶Cheryl P. Bowen and Major Michael R. West, "National Committee for Employer Support of the Guard and Reserve (NCESGR), Employer Evaluation Results, January - August 1995", (Washington, D.C. 1995), pp 2-45.

³⁷Carol A. Kelly, "Employer Support Call-Ups," The Officer (February 1996): 89.

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