

**THE OPERATIONAL RESERVIST;
THEIR CIVILIAN EMPLOYERS
AND THE UNIFORMED
SERVICES EMPLOYMENT AND
REEMPLOYMENT RIGHTS ACT
(USERRA)**

BY

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Members of the Reserve Components (RC) have had to balance a military career along with a civilian career. Often times, this balance works to the advantage of both the military and the civilian employer. However, a persistent state of conflict and has altered the use of the reserve components from a strategic reserve to an operational reserve, the customary balance between a military and a civilian career is now being threatened by multiple deployments.

This paper will examine the effects of multiple mobilizations/deployments on RC and their employers; Uniformed Services Employment and Reemployment Rights Act (USERRA) protections; ease of processing complaints and explore possible improvements. This paper will also review the Employer Support Guard and Reserve (ESGR) awareness campaigns to RC and to civilian employers to mitigate complaints between the reservist and their employers, brought on by multiple calls to duty.

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THE OPERATIONAL RESERVIST; THEIR CIVILIAN EMPLOYERS AND THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

Evolution from Strategic Reserve to Operational Reserve Forces

The concept of Citizen-Soldiers has always been an integral component of our nation's defense policy. The drafters of our nation's Constitution ensured the recognition and legitimacy of the state militias by authorizing their existence.¹ Since the Militia Act of 1792, which defined the militia's relationship to the federal government,² citizen-soldiers have defended our borders.

The War of 1812 tested this unique defense arrangement as the regular army, backed by well-armed militias accomplished its defensive mission of protecting our Canadian border. This was one of the first opportunities to observe that regular army troops and militias could work well together and be effective as a team. It was not to be the last time that this arrangement would be employed. The militias', known today as the National Guard, were consolidated and became a member of the Reserve Components (RC) as a result of the various legislative acts dating back from the Militia Act of 1903.³ The National Guard and the Reserves were later to be used in many of our nation's great wars. Reserve Component personnel were not always well trained or well equipped. Nevertheless, they reported for duty and augmented the nation's active forces during periods of national crisis such as World Wars I and II, the Korean War, and the Vietnam War to a lesser extent.

Whenever the nation needed troops these servicemembers would take a leave of absence from their civilian employer, kiss their families goodbye and off they would go to fight the nation's wars. In previous wars, they deployed and returned home to their normal way of life once conflict ceased. However, since the end of the Vietnam War, these federal call-ups were virtually non-existent. A reservist, specifically National Guard members, knew that they were subject to federal activation, but as this rarely occurred, their tours of duty mostly amounted to state active duty in support of disasters or special events.

Desert Shield-Desert Storm in 1990 was the first major activation of reserve components units since the Korean War. Approximately 138,343 RC members were mobilized of which 73,431 were deployed to South West Asia (SWA).⁴ However, as a result of the terrorist attack on September 11, 2001, the United States entered a new era of persistent conflict to engage non-state actors, such as Al Qaida. To meet the emerging terrorist threat by these non-state actors, our nation has been deploying its military primarily to Afghanistan and Iraq. The reduced size of our active duty forces, coupled with how the nation's forces are arrayed, reveals that half of the Army's combat power and support services are in its reserve components. This has resulted in multiple rotations of reserve components forces to sustain the war effort. The multiple rotations of these forces are unprecedented as it has changed the use of the reserve component from a strategic reserve force to an operational reserve force. This new use of the reserve components now see its members deploying every three to five years as opposed to the previous deployment model of maybe once in a twenty-year career.

This new deployment model is where the challenges for the reserve components begin. The Uniformed Services Employment and Reemployment Act (USERRA), as written, may not meet the employment challenges for reservists, especially National Guard members, who deploy every three to five years, return home and are later mobilized for state duty. It also has the potential to create mal-content among civilian employers of servicemembers who repeatedly face the loss of their employees. As the nation strives to emerge from a near economic meltdown, employers who may want to rebalance their work force is faced with the dilemma of keeping an employee who may repeatedly be called to serve the nation. The changing attitude among employers was acknowledged during an interview with National Public Radio on January 11, 2007, Secretary of Defense, Robert Gates said, "When the war began (2001), many (employers) were eager to allow employees who belong to the military Reserves and National Guard to depart for active duty, and then return to their jobs. But as the war has become more open-ended, some of that enthusiasm has cooled."⁵

LOYALTY CHALLENGES: DOD vs. Civilian Employers

Employment: Who owns the Reserve Components Members?

This is an interesting question and one which will evoke differing answers depending on what status the individual is in at the time.

In an interview with BG Renwick Payne⁶, Special Assistant to the Director Army National Guard, he indicated that the question depends on what the servicemember is doing at the time. According to BG Payne if the personnel are in uniform they belong to the Armed Forces, however, when our nation is not at war, servicemembers belong to their respective employers. BG Payne acknowledged that, by and large, the servicemembers belong to their civilian employers and that multiple deployments do place a strain on the employers. He said that DoD and specifically, ARNG seek to create predictability in deployments with the stated goal of reserve servicemembers deploying one year and having five years dwell time at home. However, this goal has not been realized and instead reserve and National Guard members are being deployed somewhere between three and four years, depending on the type of unit that the servicemembers are assigned. BG Payne indicated that the military strategic communications did not do as good a job to communicate that the 1:5 deployment ratio is a goal, which the military is aspiring to instead of a rule set in stone. However, more work must be done to educate the general public. “The Public did not realize the long war would be as long and the active forces did not have the size in its force to sustain the fight without the use of the RC, BG Payne offered.

To businessman Theodore (Ted) Daywalt⁷, CEO and President of VETJOBS in Marietta, Ga, who is a staunch advocate of the reserve components, the answer is easy. He said the servicemembers first belongs to their civilian bosses. It’s through the civilian employer that the reserve component member primarily provides for his family. It is apparently a view that is shared by other business owners. In many cases, civilian employers view a reserve servicemember as their employee on loan to the nation to respond to war and other national emergencies. Once the emergency is over their employee should return home and resume their civilian life. After all, this is how the reserve was intended to be used.

Unfortunately, as a result of downsizing of the active forces, the reliance of reserve forces has increased. From September 11, 2001 through present, more than 500,000 of the 1.2 million Reserve component members were called to serve the nation on active duty.⁸ These servicemembers quickly responded to support operations centers, flight operations, and provide security at airports, seaports, active duty installations and at the Pentagon. Reserve servicemembers continue to preserve the peace in the Bosnia, Kosovo and Sinai. Reservists are, even now, guarding and managing America's enemies at Guantanamo bay, Cuba. At home, reservists, especially those belonging to the National Guard, support a wide range of domestic missions from fires in the western region of the nation, to responding to hurricanes in the Southern regions, to responding to floods in the Midwest and responding to ice-storms in the northeast region. RC members have also been called to provide special event support such as, NASCAR races, the Super Bowl, and inauguration of our presidents. The demand for the use of our nation's reserve is unprecedented and there is no sign that the reliance on the reserves will subside anytime soon.

The challenge with the increase call for reserve servicemembers to serve the nation is that to serve they must abandon their civilian employers. These are the same employers who keep our nation's commerce churning. Unfortunately, with current operations and other unforeseen missions, like Haiti, there is very little predictability in when these reservists will be called and for how long their service will be required.

Mr. Daywalt, speaking before Congress on January 31, 2007, said that corporate America will not support the new policy as outlined on January 11th by Secretary Gates and General Peter Pace, Chairman of The Joint Chiefs of Staff, that Reservist and National Guard personnel will be called up for longer periods of time and more frequently.⁹

Unfortunately, the answer to question of who owns the reserve component servicemember is a little more than, "it depends on what status the servicemember is in at the time," because their military membership has a long term bread and butter consequence. This impact is now being realized in the form of higher unemployment for returning reservists. According to Mr. Daywalt, a workforce management (www.workforce.com) poll asked: If you, as an employer, knew that reservist or a

National Guard member could be called up and taken away from their job for an indeterminate amount of time, would you still hire that Soldier? The results point to a passive rebellion in which members of the reserve components are caught in the middle.¹⁰

Yes: 30% of respondent

No: 52% of respondent

Don't know: 18% of respondent

Up until January 2007, Reserve Component members traditionally saw mobilization policies for as much as 15-24 months which included 12 months boots on the ground and the balance of the time in pre-deployment or post deployment training.¹¹ On January 19, 2007, Secretary Gates announced a new mobilization policy which mandated RC members mobilized time not to exceed a total of 12 months inclusive of its mobilization station validation and BOG time.¹² One basis of this policy was to provide a predictable deployment cycle that the RC members, their families and their civilian employers can use. This policy also sought to attain a mobilization rotational goal of 12 months deployed followed by 60 months at home station before deploying again.¹³

Mr. Daywalt cited the belief of some employers that they have been lied to since 2001. According to Mr. Daywalt, many of the challenges for civilian employers are the constant loss of their human capital, the RC soldiers. The changing deployment models one year away and maybe two, three, four or five years at home have taken its toll on employers and this toll may be contributing to the limited hiring of RC members.

Additionally, Mr. Daywalt sees the potential for the loss of senior officers from our forces if there is not a more predictable model for deployment. "No company wants their senior leaders to be deployed. The folks at Wal-mart, who works on the floor, are not as much as an issue to deploy, but companies are not going to give that senior position to RC members at the grade of Lieutenant Colonel or above. These companies will not tell their employees, leave the military if they want the upward mobility, but the writing is there," said Daywalt.

Daywalt adds that companies have a responsibility to their share holders, as well as their customers, to deliver on their contract. If companies' personnel are not always there, then it becomes understandable why there is a lull in the hiring of RC members.

Companies know it is illegal to discriminate against reserve component employees as a result of USERRA, but according to Daywalt, if a company executive has two applicants who are equally qualified for a job opening, and one is a member of a reserve component, there is a good probability that the non-military affiliated applicant would be offered the job.

Mr. Daywalt's opinion seems to have some merit. It appears that although businesses publicly state they support our military, which they do when it doesn't affect their bottomline, many have been slow to hire veterans in their work force. A poll conducted by the Society for Human Resource Management reveals that almost two-thirds (62 percent) of the polls' respondents told researchers that their organization had not hired any Iraq or Afghanistan veterans in the past 36 months. Most of those who took SHRM's October 2008 poll work for privately owned, for-profit organizations (53 percent).¹⁴

In February 2009, the unemployment for Veterans, between the ages of 18-24, was as much as ten points higher than non-veterans of the same age (26.7 vs. 16.8). Contrast the February 2009 figures with unemployment figures from 2007 where, a large majority (86.5 percent) of Gulf War-era II veterans participated in the labor force and their unemployment rate was 6.1 percent. For those ages 18 to 24, the unemployment rate was 12.0 percent, twice that of Gulf War-era II veterans ages 25 to 34 (6.0 percent). Among men ages 18 to 24, the unemployment rate of Gulf War-era II veterans (11.2 percent) was about the same as the rate of nonveterans (10.5 percent). In general, Gulf War-era II veterans had unemployment rates that were not statistically different from those of nonveterans of the same age and gender.¹⁵

Unfortunately the U.S. Department of Labor (DOL) Bureau of Labor Statistics (BLS) does not categorize veterans by armed forces or by types of components. Therefore, specific numbers could not be directly attributed to RC members, as opposed to active duty personnel who left military service. However, there is one key indicator that stands out; there are more unemployed veterans (20.7) than non-veteran (16.9). The following two tables compare the unemployment percentages for veterans and non-veterans ages 18-24

Employment status of persons by veteran status, age, race, Hispanic or Latino ethnicity, and sex, November 2009, not seasonally adjusted (Source: Current Population Survey) — Continued

(Numbers in thousands)

Age	Civilian noninstitutional population	Civilian labor force						Not in the labor force
		Total	Percent of population	Employed		Unemployed		
				Total	Percent of population	Total	Rate	
Both sexes, all races, Veterans								
Total, 18 years and over	22,037	11,847	53.8	10,840	49.2	1,008	8.5	10,190
18 to 24 years	288	216	74.9	171	59.4	45	20.7	72
18 to 19 years	5	1	18.6	1	18.6	—	—	4
20 to 24 years	283	215	75.9	170	60.1	45	20.8	68

Table 1: Unemployment percentage for Veterans ages 18-24

Employment status of persons by veteran status, age, race, Hispanic or Latino ethnicity, and sex, November 2009, not seasonally adjusted (Source: Current Population Survey) — Continued

(Numbers in thousands)

Age	Civilian noninstitutional population	Civilian labor force						Not in the labor force
		Total	Percent of population	Employed		Unemployed		
				Total	Percent of population	Total	Rate	
Both sexes, all races, Nonveterans								
Total, 18 years and over	205,716	139,779	67.9	126,943	61.7	12,836	9.2	65,937
18 to 24 years	28,342	18,259	64.4	15,169	53.5	3,091	16.9	10,083
18 to 19 years	7,993	3,853	48.2	2,883	36.1	971	25.2	4,140
20 to 24 years	20,349	14,406	70.8	12,286	60.4	2,120	14.7	5,943

Source: Department of Labor, Bureau of Statistics

Table 2: Unemployment percentages for non-veterans ages 18-24

Mr. Daywalt asserts that National Guard members may be more at risk by employers than Reserve members. He explains the reserve servicemembers go over to Iraq or Afghanistan, do their one year or eighteen months and return home and stay at work. Guard members, on the other hand, will deploy to Iraq or Afghanistan and return home work for three to five weeks and then may be called to support a domestic emergency such as floods, hurricanes or wild fires.

The Guard member may go to his boss and say he has to leave and will be back and the employer could respond, “No you’re not, you’re gone permanently.” Therefore, it would appear that as a result of their dual mission, Guard members may be more susceptible to being unemployed.

The USERRA provides some protection for reserve components personnel who are called to military duty. However, over the past three years a disturbing trend is being observed which may be related to the change in the Department of Defense Boots on the Ground (BOG) Policy. These trends have potentially manifested themselves as increase

in USERRA calls to both the Employer Support Guard and Reserve hot line and an increase in the unemployment rate of returning veterans, especially in the 18-24 age categories. An additional trend, which is related to the unemployment issue, is the apparent unwillingness of civilian employers to hire veterans.

Neither USERRA nor our nation's tax code provides employers with incentive to hold on to positions for mobilized employees, but instead create a hardship for employers, especially those with fifty or less employees. Mr. Daywalt suggested that one possible solution is cash awards to businesses that lose their human capital to support our nation's defense. This incentive would enable the employer to temporarily backfill the vacated position, until the deployed RC member returns. He thinks there is wide acceptance for this incentive amongst many employers since they can simultaneously train-up a new employee while the RC member is still on the job, thus reducing the challenges of a new hire which potentially creates a seamless transition between the new temporary hire and the deploying employee.

Mr. Daywalt's suggestion is not a new idea, as it is already being done in the National Guard. When an Active Guard Reserve (AGR) or Military Technician employee deploys, funds are sent to the state, using a formula, to backfill positions left vacant by deploying employees.

Daywalt believes that employers want to hire reservists, but are very aware of the requirements of USERRA once the employees are hired. Therefore, to avoid the potential for USERRA complaints, employers may be opting for hiring non-military affiliated personnel. The good news, however, is once employers hire military affiliated personnel; employers are going out of their way to maintain the employees' benefit as indicated by a survey conducted by the Society of Human Resource Management in June 2008. See Tables 3, 4, and 5 for results of the SHRM poll.¹⁶

What type of direct compensation (i.e., income) support, if any, is your organization offering those employees are on active duty?				
	2003 (n=372)	2004 (n=211)	2007 (n=157)	2008 (n=165)
Provide no direct compensation support	39%	39%	35%	42%
Providing pay differential (the difference between what the employee is paid by the military and what he/she would be making if he/she were working)	34%	28%	45%	40%
Provide pay equal to what the employee would make if not called to active duty	9%	10%	3%	13%
Provide full pay and benefits for a portion of the period of the active duty	-	-	10%	6%
Provide full pay and benefits for the entire period of the active duty	-	-	6%	1%
Other	17%	25%	7%	1%

Table 3: Types of direct compensation to employees on active duty CY03 -08

Other types of Benefits (Non-Compensation Support by Year)

	2003 (n=372)	2004 (n=211)	2007 (n=118)	2008 (n=164)
Provide re-employment into a position they would have attained but for their military service				55%
Provide an extension of health insurance for the employee's family	61%	53%	64%	49%
Provide an extension of health insurance for the employee	50%	39%	46%	49%
Provide continuing life insurance	49%	43%	52%	47%
Provide employee with only what is required by law				37%
Provide catch-up training/help transitioning back to work				37%
Recognition by management				36%
Other	17%	31%	20%	6%

Table 4: Types of non-compensation benefits for employees on active duty CY03 - 08

When asked by the same SHRM poll in June 2007, what challenges organizations have faced as a result of employees at your location serving on active duty? The Table 6 reflects the responses.

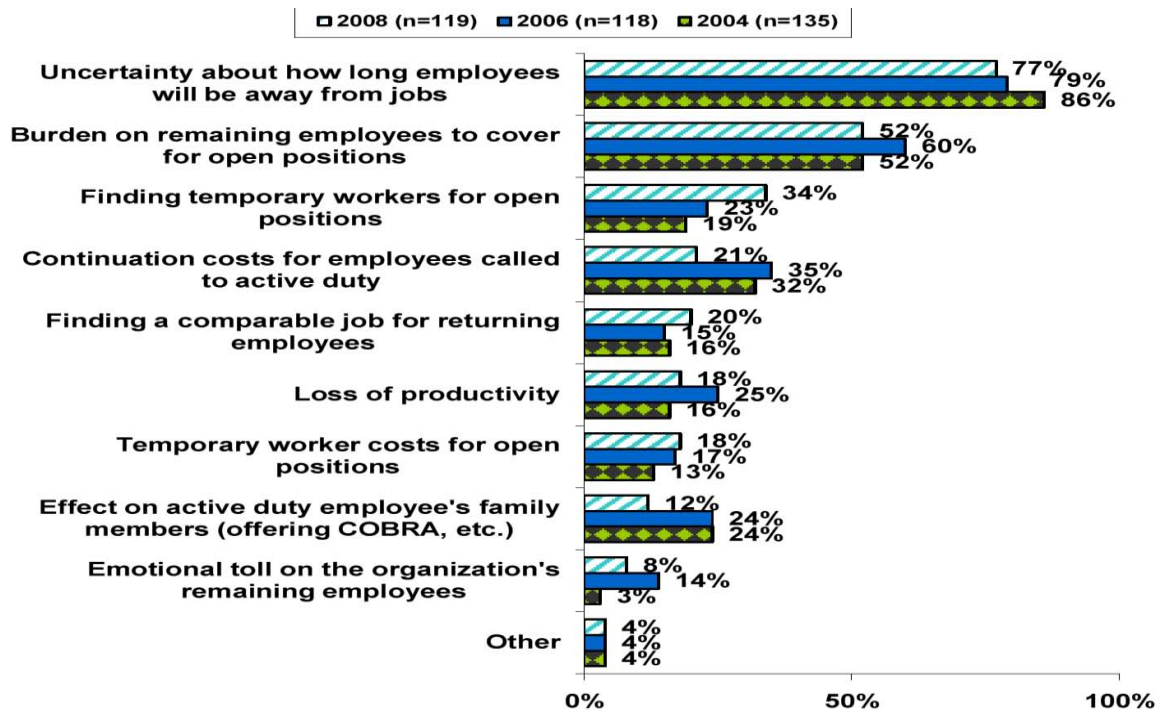


Table 5: Reflects employer concerns once employees are on active duty

The Uniformed Services Employment and Reemployment Act of 1994¹⁷

Before the USERRA was enacted, reserve servicemembers were deployed with uncertainty when called to military service. A call to active duty left the military member and their family with the unknown, of not knowing if their civilian job would be waiting for them once they completed their military duty.

The USERRA was enacted to offer protection to reserve component personnel as the reserve forces began the transitional process from a strategic reserve force to operational reserve as the reserve components, specifically the National Guard, began to perform other duties, such as Counterdrug activities under Title 32 section 502(f) or deployment for Gulf War I.

While there was some legal protection in the Vietnam Era Veteran's Readjustment Act of 1974, this protection was legitimized with the passage of the Uniformed Services Employment and Reemployment Rights Act of 1994. The USERRA was first put into law in 1994, and it was later updated, in 1996 and in 1998. The USERRA protects Reserve Component servicemembers who are called to active duty service, as well as protects their seniority with their civilian employer.¹⁸ The law offers

protection for both voluntary and involuntary service in the Reserves and military. The key to obtaining protection under the USERRA legislation is the requirement for servicemembers to meet specific criteria, such as timely notice of military duty. For discussion, I have lifted the following summary of the USERRA legislation, as highlighted by the Government Accounting Agency in one of its reports entitled “Military Personnel: Additional Actions Needed to Improve Oversight of Reserve Employment Issues”¹⁹.

“In 1994, Congress passed USERRA to “encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.” The act protects millions of individuals as they transition between their federal duties and their civilian employment. Prior to USERRA, reemployment rights were set forth in the Vietnam Era Veteran’s Readjustment Act of 1974.

Congress reviewed the effectiveness of the 1974 act after receiving a number of questions and complaints about reemployment rights from military servicemembers and employers following the 1991 Gulf War. USERRA covers not only those individuals who have served in the reserve components, but also large numbers of active duty servicemembers and veterans, including those who served prior to the passage of the act. Servicemembers retain reemployment rights under USERRA as long as they meet a few basic requirements.

Among the eligibility requirements are (1) the absence of the receipt of a dishonorable or other disqualifying discharge, (2) giving proper notice prior to departure, and (3) returning to work or applying for reemployment in a timely manner after conclusion of service. Provided servicemembers meet their USERRA requirements, they are entitled to

- prompt reinstatement to the position they would have held if they had never left their employment, or to positions of like seniority, status, and pay;*
- Health coverage for a designated period of time while absent from their employers and immediate reinstatement of health coverage upon return;*
- training, as needed, to re-qualify for their jobs;*
- periods of protection against discharge based on the length of service; and*

- *non-seniority benefits that are available to other employees with similar seniority, status, and pay who are on leaves of absence.*

USERRA also provides employment and reemployment protection to reservists who incur or aggravate a medical disability during their military service.

In these instances, generally a three-part reemployment scheme is required. First, the employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that he or she would have held if continuously employed. Second, if regardless of accommodation efforts a person is not qualified for his or her original position due to a disability, he or she must be offered employment in a position of equivalent seniority, status, and pay—so long as the employee is qualified to perform the duties of that position or could become qualified with reasonable efforts by the employer. Finally, if the employee cannot become qualified for his or her prior position or its equivalent, he or she must be offered employment in a position that most nearly approximates the prior position in terms of seniority, status, and pay consistent with the circumstances of the person's case.”²⁰

As highlighted above, USERRA, offered robust employment protection for the servicemember. To draw upon these protections, a reservist may choose several means to make inquiries into the system or file a formal USERRA rights violation through the Department of Labor (DOL).

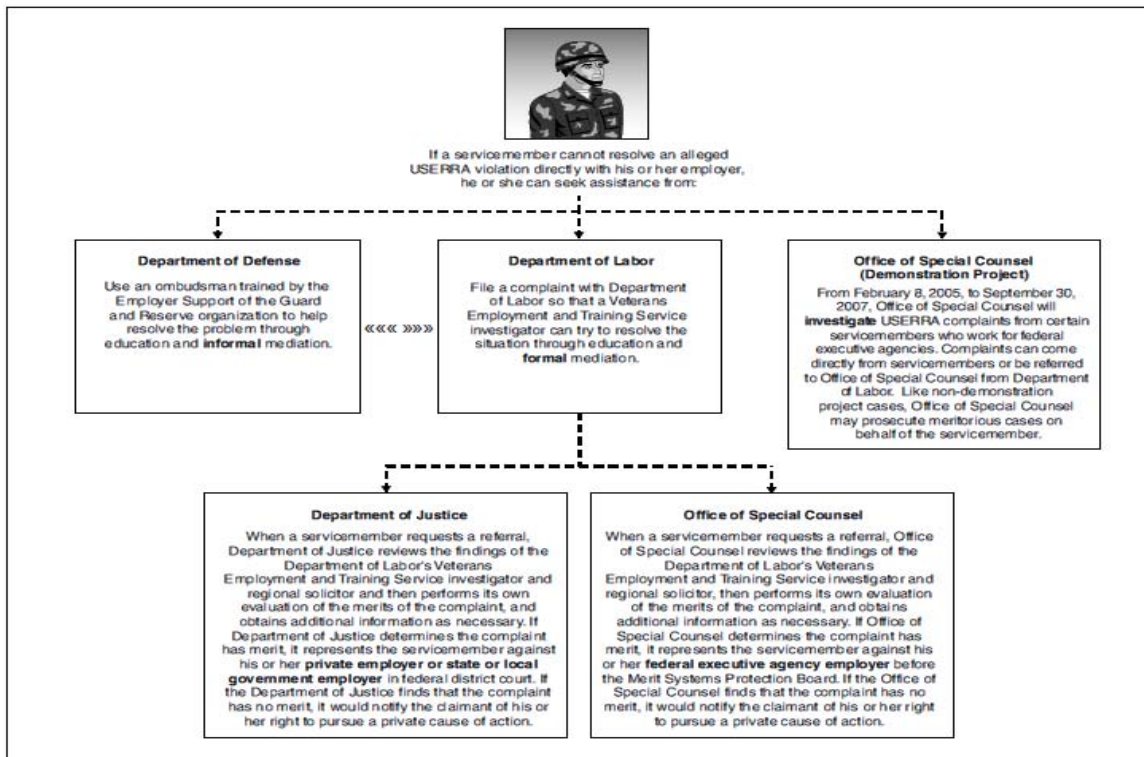


Figure 1: Federal agencies that veterans can seek assistance for USERRA complaints

The Department of Labor, through the Veterans' Employment and Training Service (VETS), provides assistance to all persons having claims under USERRA. It is also the executive branch agency that has been charged to track and report USERRA issues to Congress. I will revisit DOL and its USERRA role later in this paper.

Reserve Components Servicemembers Advocates

Employer Support Guard and Reserve (ESGR)

The Department of Defense established ESGR as one of its agency in 1972. Its mission is to gain and maintain employer support for Guard and Reserve service by recognizing outstanding support, increasing awareness of the law, and resolving conflicts through mediation.²¹

To facilitate its mission ESGR uses a combination of Employer Recognition, Outreach and Mediation programs. Its employer recognition program has shown significant growth since 2001. According to MAJ Melissa Phillips, ESGR Public Affairs

Officer, “ESGR public recognition of employer support is a key retention tool, as it strengthens community relations.”

Under this program there are several tiers of recognition. In the basic tier an employee may nominate their employer for the Patriot Award. This award is given to employers directly by the servicemember. In 2008, 14,071 Patriots Awards were awarded to employers who were nominated by their employees/servicemember. In 2009, 14,571 Patriot Awards were issued, an increase of 500. While any increase in recognition for employers by servicemembers is good, the total number of awards begs the question, why aren’t more employers recognized annually?

I pose this question because the Patriot Award is the most basic of the awards and only requires the servicemember to nominate their employer on the ESGR web site.

Therefore, should we as leaders deduce that only 14,571 of more than 500,000 servicemembers have supportive supervisors or employers? Or should we postulate that our servicemembers do not see the strategic benefits of nominating their employers? I believe that real improvement can be made in this area if more attention is focused during weekend drills or annual musters. Once ESGR provides its regular briefing to the troops, it is up to leadership at the lowest level to determine ways to enhance and retain awareness of this basic award. Increased use of this simple tool can go a long way to improve and sustain a crucial relationship between the military and its servicemembers’ civilian employers.

MAJ Phillips said that ESGR plans to get more involved with social media such as Twitter and Facebook to get the word out to servicemembers. The goal is to establish another channel of communication to reach more servicemembers.

To facilitate a positive relationship and further mitigate friction between employers and servicemembers, ESGR seeks to increase awareness of the USERRA law through Employer, Military and Public Affairs Outreach programs. One such program is Bosslift. Bosslift enables employers to spend a day around the National Guard or the Reserves to observe and learn the mission of the armed forces, as well as get familiar with the experiences their employees gain from being members of the respective reserve components.²² This program is a keeper as it helps to facilitate direct interactions between the servicemembers and their employer outside of the traditional civilian

workplace environment. One of the key factors behind the success of this program is the opportunity for employers to interact with other employers as they gain an understanding of their employees' role in the nation's defense. Bosslift may be considered as a support group for employers.

The third mission of ESGR is conflict resolution through mediation. Through its various outreach programs, ESGR creates an information awareness foundation for employers or servicemembers to get answers to their questions. These questions may be directed to the ESGR National Customer Service Center. In Fiscal Year (FY) 2009, the National Customer Service Center received more than 15,000 USERRA inquiries of which 2,475 resulted in cases being assigned to its Ombudsman volunteers for follow up. These Ombudsmen are specially trained volunteers who may be lawyers, human resource specialist and other professionals who are trained in mediation or dispute resolution. These volunteers, who also must attend a special 3-day workshop, are trained to act as impartial ombudsman to informally mediate USERRA issues that arise between servicemembers and their employers. When the servicemember and their employers cannot resolve a complaint informally, the Ombudsman will advise the servicemember and or the employers of other options available to formally resolve their complaint. Usually the Ombudsman will advise the servicemember that they can choose to file a formal complaint with a private attorney or through the Department of Labor at no cost to the servicemember.

According to ESGR 2009 annual report, 1,982 cases were resolved. Those cases that were not resolved may have been turned over to DOL or left to the servicemember to decide whether to pursue. Table 6 outlines ESGR Success from 2007-2009.²³

ESGR by the Numbers				
Outreach Mission: Employer				
	Statements of Support	Employers Briefed	Employers Direct Mail	
FY 07	20,644	69,614	213,107	
FY 08	44,861	148,463	398,820	
FY 09	54,965	162,849	0*	
Outreach Mission: Service Members				
	Patriot Awards	Freedom Award Nominees	Service Members Briefed	Service Members Direct Mail
FY 07	15,128	1,192	232,808	N/A
FY 08	14,071	2,199	341,953	162,929
FY 09	14,571	3,202	443,833	0*
Ombudsmen Mission				
	USERRA Inquiries**	Cases Assigned	Cases Resolved/ % Resolved	Average Number of Days to Mediate (resolve)
FY 07	13,116	2,374	1742 / 73.4%	19.9
FY 08	13,090	2,664	1899 / 71.3%	14.2
FY 09	15,870	2,475	1982 / 80.1%	6.7***
Resources				
	Volunteer Hours	Media Impressions		
FY 07	155,038	78.9M		
FY 08	234,081	127.7M		
FY 09	232,882	477.0M		
* = No direct mail in FY 09 due to redesign of Employer & Service Member Brochures; mailing scheduled 1st quarter, FY 10				
** = USERRA Inquiry generated from phone call, email or voicemail request specifically related to USERRA				
*** = In FY 09, the number of days to mediate cases reported in business days (excludes weekends and holidays)				

Table 6: ESGR Outreach Programs FY07-09

Civilian Employer Information Database (CEI)

A critical tool that links ESGR and DoD with employers is the CEI. Although it has existed since 2001, it was only after a GAO report found that the database needed continuous updating that specific requirements were directed by the Defense Department. According to a GAO report 07-259 Military Personnel: Additional Actions Needed to Improve Oversight of Reserve Employment Issues:

“....In 2001, DoD established a database to collect voluntarily reported employer information from reserve component members, but few service members submitted the data. Following a recommendation in our 2002 report,

24 DoD took steps to make the submission of employer information mandatory. In March 2003, the Under Secretary of Defense for Personnel and Readiness signed a memorandum directing each military department to implement a civilian employment information program for the collection of employer information and cited the need to utilize the information in accomplishing employer outreach. Having complete civilian employer information is also important to DoD's ability to make informed decisions concerning which reservists should be called for active duty to minimize the impact that mobilizations might have on occupations such as law enforcement, and to determine how businesses may be affected by reserve activation. In August 2004, DoD implemented regulations that required each military department to implement employment-related information reporting requirements for each officer, warrant officer, and enlisted person assigned to the Ready Reserve. These Reservists are required to report employment data—including whether they are employed part-time or full-time, are a student, have specified voluntary service, or are not currently employed.

If the reservist is employed, the reporting instruction also asks for the employer's name and address, date of employment, occupation code, and whether the reservist is self-employed. According to DoD policy, this employment reporting is to be accomplished when a member affiliates with the reserves, either through DoD's Defense Manpower Data Center's Guard-Reserve Employer Web site or through their reserve component, which then forwards the employment information to DoD on a weekly basis. The Army National Guard, Air Force Reserve, Air National Guard, and Marine Corps Reserve members input their data in the Defense Manpower Data Center's Guard-Reserve Employer Web site. The Navy Reserve, Coast Guard Reserve, and Army Reserve members first enter their employment data into their personnel systems and then the components forward the information to the Defense Manpower Data Center.

The department has established a 95 percent reporting compliance goal for the Selected Reserve and a 75 percent compliance goal for the Individual Ready Reserve and Inactive National Guard. Prior to 2004, DoD had limited success in obtaining employer-related data from the reserve components. However, the percentage of Ready Reservists in compliance with employment-related reporting requirements has increased from about 60 percent in August 2005 to about 77 percent in August 2006. DoD statistics show an overall compliance rate of 91 percent for the Selected Reserve and 30 percent for the Individual Ready Reserve and Inactive National Guard with good addresses as of August 2006.”²⁴

The GAO report highlighted the need for improvement in the CEI database. Although, the numbers began trending upward it was and remains a struggle to get to the mandated compliance rate of 95 percent.

According to the CEI Database manager at the Army National Guard, Mr. Calvin Noble, initially compliance was low for all reserve components, except for possibly the Navy. However, as war persisted and employer issues began to dramatically rise, State Adjutant Generals and their Personnel office applied emphasis down to the troop levels to get the percentages up, thus all leaders knew that it was their responsibility to ensure their unit’s compliance.

Noble continued that the individual National Guard states’ began to use their Recruit Sustainment Program (RSP) within their respective Recruiting Battalions to update the CEI of new soldiers, as well as, prior service individuals who returned to the National Guard. This new emphasis began to see compliance rates in the 90th percentile. “The reserve components all had good reporting numbers in the past. However, in June 2009, the National Guard and other reserve components CEI compliance ratings tumbled due to a change in the reporting requirement which took effect in April 2009, said Noble.

In July 2008, a memorandum from the Office Assistant Secretary of Defense Office for Reserve Affairs, Subject: Annual Certification of Civilian Employer Information for Members of the Ready Reserve, reiterated DoD instruction 7730.54, and amended the reporting procedures for CEI. The new policy required, at a minimum, an annual certification of the CEI of Ready Reserve members using the reporting format

specified in Reserve Components Common Personnel Data System (RCCPDS). This annual certification took effect April 2009 and tracked the annual certification date and First Responder data indicator to identify those ready Reservists who were first responders in their communities.

Essentially, this new policy enhanced the initial CEI policy, as decisions could now be made by mobilization planners “to assess the effects of mobilization decisions on members employed in positions related to maintaining the public health and safety, and those supporting vital national interests. In addition, the Department is required by law to ensure members with critical skills are not retained in the Ready Reserve in numbers beyond what the Department needs for those skills.”²⁵

The following table illustrates the employment reporting compliance rates and strength numbers for Selected Reserve members as well as the Individual Ready Reserves and the Inactive National Guard in each of the seven reserve components and DoD.

CEI Compliance Report for the week of January 11, 2010 Baseline population based on the November 2009 RCCPDS File
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Reserve Component (Last submission date)	Category	Baseline Population	Records Passed all CEI Edits			Reported		
			Personnel Reporting		Difference*	Personnel Reporting		Difference*
			#	%	#	#	%	#
Army National Guard (January 11, 2010)	Drilling Reserves	286836	155368	54.17	6314	276057	96.24	581
	IMA	0	0	0	0	0	0	0
	Total SelRes	286836	155368	54.17	6314	276057	96.24	581
	Total ING	0	0	0	0	0	0	0
	Total Ready Reserve	286836	155368	54.17	6314	276057	96.24	581
Army Reserve (January 11, 2010)	Drilling Reserves	164688	49283	29.93	646	150080	91.13	220
	IMA	3517	554	15.75	7	3426	97.41	0
	Total SelRes	168205	49837	29.63	653	153506	91.26	220
	Total IRR	48295	4433	9.18	76	22085	45.73	47
	Total Ready Reserve	216500	54270	25.07	729	175591	81.1	267
Navy Reserve (January 11, 2010)	Drilling Reserves	53424	49483	92.62	203	52937	99.09	69
	IMA	229	204	89.08	1	228	99.56	0
	Total SelRes	53653	49687	92.61	204	53165	99.09	69
	Total IRR	37515	15891	42.36	45	22979	61.25	97
	Total Ready Reserve	91168	65578	71.93	249	76144	83.52	166
Marine Corps Reserve (January 11, 2010)	Drilling Reserves	29528	4138	14.01	193	14638	49.57	116
	IMA	3130	644	20.58	7	2526	80.7	4
	Total SelRes	32658	4782	14.64	200	17164	52.56	120
	Total IRR	52175	3183	6.1	57	12320	23.61	54
	Total Ready Reserve	84833	7965	9.39	257	29484	34.76	174
Air National Guard (January 11, 2010)	Drilling Reserves	90315	60870	67.4	4665	79163	87.65	1693
	IMA	0	0	0	0	0	0	0
	Total SelRes	90315	60870	67.4	4665	79163	87.65	1693
	Total IRR N/A for Air Guard	0	0	0	0	0	0	0
	Total Ready Reserve	90315	60870	67.4	4665	79163	87.65	1693
Air Force Reserve (January 11, 2010)	Drilling Reserves	54094	39851	73.67	1829	50135	92.68	524
	IMA	8095	4921	60.79	21	7160	88.45	8
	Total SelRes	62189	44772	71.99	1850	57295	92.13	532
	Total IRR	36399	2699	7.42	51	11104	30.51	32
	Total Ready Reserve	98588	47471	48.15	1901	68399	69.38	564
Coast Guard Reserve (January 11, 2010)	Drilling Reserves	7623	6389	83.81	26	7409	97.19	8
	IMA	0	0	0	0	0	0	0
	Total SelRes	7623	6389	83.81	26	7409	97.19	8
	Total IRR	1168	323	27.65	0	475	40.67	2
	Total Ready Reserve	8791	6712	76.35	26	7884	89.68	10
TOTAL ALL SERVICES	TOTAL SelRes	701,479	371,705	52.99	13,912	643,759	91.77	3,223
	TOTAL IRR/ING	175,552	26,529	15.11	229	68,963	39.28	232
	TOTAL Ready Reserve	877,031	398,234	45.41	14,141	712,722	81.27	3,455

Table 7: CEI Compliance report for all reserve components

Although the new reporting requirement has significantly reduced the compliance rate across all reporting reserve components, it does demonstrate that DoD is responsive to the GAO's recommendation, that the Secretary of Defense direct the Office of the Assistant Secretary for Reserve Affairs to instruct all military departments to establish a formal review mechanism that would require all reservists to review and update at least annually their reported employment-related information.²⁶

Noble indicates that units are working hard and the compliance rate will significantly increase before the end of FY2010.

Department of Labor

When ESGR, through its Ombudsman, cannot informally resolve USERRA complaints, The U.S. Department of Labor can pursue the formal complaint aspect of a USERRA. It is the federal agency that Congress appointed as the advocate of USERRA. DOL has the responsibility to provide an annual report to Congress on all matters pertaining to USERRA. According to its Congressional mandate, DOL is responsible to report on ten (10) particular areas. They are:²⁷

1. The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.
2. The number of cases reviewed by the Secretary of Defense under the National Committee for Employer Support of the Guard and Reserve of the Department of Defense during the fiscal year for which the report is made.
3. The number of cases referred to the Attorney General or the Special Counsel pursuant to Section 4323 or 4324, respectively, during such fiscal year and the number of actions initiated by the Office of Special Counsel before the Merit Systems Protection Board pursuant to Section 4324 during such fiscal year.
4. The number of complaints filed by the Attorney General pursuant to Section 4323 during such fiscal year.
5. The number of cases reviewed by the Secretary of Labor and the Secretary of Defense through the National Committee for Employer Support of the Guard and Reserve of the Department of Defense that involve the same person.
6. With respect to the cases reported on pursuant to paragraphs 1, 2, 3, 4, and 5 –
 - A. the number of such cases that involve a disability-related issue; and
 - B. the number of such cases that involve a person who has a service-connected disability.
7. The nature and status of each case reported pursuant to paragraph 1, 2, 3, 4, or 5.
8. With respect to the cases reported on pursuant to paragraphs 1, 2, 3, 4, and 5 the number of such cases that involve persons with different occupations or persons

seeking different occupations, as designated by the Standard Occupational Classification System.

9. An indication of whether there are any apparent patterns of violation of the provisions of this chapter together with an explanation thereof.
10. Recommendations for administrative or legislative action that the Secretary of Labor, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

In its FY 2008 report to Congress, DOL reported that it reviewed 1,426 cases. This amount is slightly up from a year ago in which DOL reported that it reviewed 1,365 new cases in FY 2007.²⁸ Table 7 provides an overview of the type of complaints:²⁹

Cases Opened by VETS in FY 2008: USERRA ISSUE	VETS CASES ALL E G I N G ISSUE *	
Military obligations discrimination	495	35.6%
Reinstatement	347	25.0%
Other non-seniority benefits	55	4.0%
Promotion	92	6.6%
Vacation	36	2.6%
Status	62	4.5%
Pay rate	53	3.8%
Reasonable accommodation/	5	0.4%
Discrimination as retaliation for	129	9.3%
Seniority	41	3.0%
Pension	46	3.3%
Initial hiring discrimination	58	4.2%
Layoff	64	4.6%
Special protected period discharge	18	1.3%
Health benefits	24	1.7%
Reasonable	36	2.6%
Other	98	7.1%

Table 8: Formal USERRA cases opened by VETS in FY2008

In reviewing the latest data from ESGR annual report and from DOL annual report to Congress, I discovered that Congress may have un-intentionally created a blind-spot in the quality of the information it receives from the Department of Labor. To clarify, the latest DOL annual report to Congress is published in October 2009 and reflects information dated from 1 October 2007 – 30 September 2008. Therefore, the report Congress receives is more than twelve months old. In its annual report, DOL has the responsibility to report to Congress the number of cases reviewed by the Secretary of Defense under the National Committee for the Employer Support of the Guard and Reserve of the Department of Defense during the Fiscal year.³⁰ The fiscal year that DOL references in its report is FY2008 and reports 13,090 inquiries. In contrast, the latest ESGR annual report was published December 2009 and the reporting period reflects

information from 1 October 2008 to 30 September 2009. In its report, ESGR references its FY2009 data that reflects more than 15,870 USERRA inquiries. Unless, Congress reads the ESGR 2009 Annual report, it may not have enough current information to continue effective oversight of reserve employment matters. As a result, Congress will not see the increase of more than 2,000 USERRA inquiries between FY2008 and FY2009 until DOL reports later in calendar year 2010. Consequently, Congress will not have the most current information to determine whether any revisions to USERRA are warranted based on the nature of inquiries, as well as formal and informal complaints.

In this case, the marked increase in ESGR inquiries may be another indication that employers are dissatisfied with the unpredictable nature of its human capital being deployed or maybe not. It is likely that Congress will have to wait until October 2010 for DOL to update information that is currently available, but by then the information will be dated.

On a positive note from the author's perspective, DOL identified an issue with the current version of USERRA as it provides for the optional continuation of coverage under employer health plan. DOL validated a concern that USERRA section 4317 gives an employee the right to continue coverage under a health plan during a period of military service, but does not expressly preclude an employer from requiring continuation of such coverage (and charging the employee for their share of the premiums, which can be as high as 102% of the cost) during a period of service.³¹

I share the same opinion with DOL that Congress should consider clarifying that USERRA provide servicemembers with the option of electing to continue an employer-provided health plan. According to DOL, this could be accomplished if Congress amends section 4317 to expressly provide that an employer may not require an employee to continue health plan coverage during a period of military service that exceeds 30 days.

Summary and Recommendations

In summary, this paper recommends the following initiatives to address shortfalls which were highlighted previously.

1. Revisit DoD strategic communications to ensure it conveys DoD's current posture as opposed to future goals. It appears that the rotational goal to

mobilize reserve component units one year for every five years at home may have been misunderstood by the general public and employers.

Unfortunately, due to the shortage of some units, such as Special Operation Forces or Civil Affairs, the rotational ratio for some units is shorter than the announced goal.

2. Increase awareness among servicemembers of ESGR employer recognition programs such as the Patriot Awards so more servicemembers may nominate their civilian employers and thus reduce opportunities for employment friction. Employers need to know that they are still appreciated.
3. Clarify USERRA health coverage option to close the loophole which can be used by civilian employers to compel service members to retain their civilian employer's health care coverage.
4. Offer tax credits or cash incentives to civilian employers to offset the loss of their human capital when they are deployed for active service to support national emergencies. If tax credits are used, Congress should consider making the procedures user friendly.
5. Consider removing the five year limit from USERRA, as the increased use of the Reserve and National Guard personnel may eclipse five years during a twenty-year career.
6. Consider changing the reporting period for the Department of Labor Annual Report to Congress on USERRA issues so Congress can have the most up-to-date information when making decisions/legislations.

As our nation continues to prosecute its war against non-state actors who would seek to do us harm, the reserve component servicemember will continue to do their part to protect America. We must continue to build strong relationships between the Armed Forces and its RC servicemembers civilian employers. DoD's communication model must acknowledge that there are very few legacy RC servicemembers in the system today. Many of the legacy, pre-September 2001, RC servicemembers have done their tours and left the service. Since 2001, they have been replaced by more than 200,000 new servicemembers who expect to continue being members of the operational reserve. The future challenge for DoD is to preserve this new operational model or risk losing

faith with its Reserve Component. On the other hand, civilian employers also have to acknowledge that freedom is not free and seek ways to work with their employees when they are needed by the country and their individual state.

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ENDNOTES

¹ . U.S. Constitution authorizing State Militias

² Militia Act Of 1792 provided the authority of the president to call out the Militia and providing federal standards for the organization of the Militia.

³ Militia Act of 1903 established the creation of the National Guard of the United States as the primary reserve force for the U.S. armed forces.

⁴ Mobilization of the Reserve Component for Operations Desert Shield and Desert Storm, Center for Lesson Learn (CALL), Report 92-2, Historical Overview.

⁵ National Public Radio, Karen Grigsby Bates interview with Secretary of Defense Robert Gates: “Employers and Military Deployment,” January 11, 2007

⁶ BG Renwick Payne, Special Assistant to the Director Army National Guard, exclusive interview by author, December 16, 2007

⁷ Theodore L. Daywalt, “Daywalt Talks: Challenges for employers whose employees serve in the reserve component: An Exclusive Interview with the CEO and President of VETJOBS,” December 17, 2009.

⁸ Department of Defense, Office of the Assistant Secretary of Defense, Legislative Affairs, January 2008.

⁹ Theodore L. Daywalt, CEO and President VetJobs, on Assessing Federal Small Business Assistance, Programs for Veterans and Reservists to The Senate Committee on Small Business and Entrepreneurship Wednesday, January 31, 2007, Russell Senate Office Building, Washington, D.C.

¹⁰ Theodore L. Daywalt, CEO and President VetJobs Inc, on Exploring the challenges facing self-employed reserve component members and the employers (small, medium and large businesses) of reserve component members to the Commission on the National Guard, May 17, 2007

¹¹ Guard to Get Shorter, More Predictable Deployments, Feb 28, 2007,by Fred W. Baker III, American Forces Press Service

¹² Top Official Describes Reserve-Component Mobilization Policy By Jim Garamone, American Forces Press Service April 13, 2007.

¹³ Top Official Describes Reserve-Component Mobilization Policy By Jim Garamone American Forces Press Service April 13, 2007.

¹⁴ Returning U.S. Veterans Face Long Job Searches, SHRM, 11/18/2008, By Kathy Gurchiek

¹⁵ “Employment situation of Veterans,” Department of Labor, Bureau of Statistic, News Release, April 10, 2008

¹⁶ While there appears to be a slight decrease in support in 2008, this decline may be more indicative of the looming economic challenges American business face.

¹⁷ USERRA from the Dept of Labor military.com

¹⁸ *ibid*

¹⁹ GAO Report to Congressional Committees- MILITARY PERSONNEL: Additional Actions Needed to Improve Oversight of Reserve Employment Issues, Report number 07-259

²⁰ GAO Report to Congressional Committees- MILITARY PERSONNEL: Additional Actions Needed to Improve Oversight of Reserve Employment Issues, Report number 07-259, USERRA Coverage and Protections page 14

²¹ ESGR Annual report 2009 Mission statement

²² ESGR Annual Reports 2008 and 2009

²³ ESGR 2009 Annual report

²⁴ GAO Report to Congressional Committees- MILITARY PERSONNEL: Additional Actions Needed to Improve Oversight of Reserve Employment Issues, Report number 07-259, DOD Has Made Progress Capturing Employer Information, but Most Components Have Not Met Reporting Goals, pg 15

²⁵ Assistant Secretary Memorandum, Subject: Annual Certification of Civilian Employment Information for Members of the Ready Reserve, dated Jul 22, 2008.

²⁶ GAO Report to Congressional Committees- MILITARY PERSONNEL: Additional Actions Needed to Improve Oversight of Reserve Employment Issues, Report number 07-259, USERRA – Recommendation for executive action pg 37. Dated February 2007

²⁷ Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Fiscal Year 2008, Annual Report to Congress, October 2009,

²⁸ *Ibid*. Note: DOL report is based upon fiscal years, while ESGR is based upon the calendar year. Therefore, DOL data will be not always be in synch with ESGR and Congress will not always get the most current information.

²⁹ *Ibid*

³⁰ *Ibid*

³¹ Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Fiscal Year 2008, Annual Report to Congress, October 2009, pg 16