When Reduction in Force (RIF) May Not Mean Rest in Piece: Protections Against RIF Actions under the Uniformed Services Employment and Reemployment Rights Act

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I. Introduction

The federal government is the largest employer of Reserve Component (RC) servicemembers in the United States.[1] Although the federal government employs less than 2% of the total U.S. workforce, it employs nearly 18% of all RC members who are employed full time.[2] This disproportionately high number of RC servicemember-employees inevitably leads to exposure to many issues regarding the special protections afforded by the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3] Unfortunately, but understandably, the top employer of RC servicemembers also receives the highest number of USERRA complaints in the nation.[4] In fiscal year 2011 alone, over 300 USERRA complaints were made against the federal government.[5]

One perennial issue for servicemembers returning to their positions following a period of active service is what protections, if any, they are afforded when their positions no longer exist.[6] For private employers, the USERRA creates no additional burdens over and above the fundamental protection that servicemembers cannot be placed in a worse position because of their military service.[7] For example, if a private employer would have eliminated an employee's position regardless of his active service, the employer would have no duty to rehire the servicemember.[8] However, for the federal government, the rule is completely different.[9] Servicemembers are provided additional rights that require the federal government to retain them if their positions were eliminated by a reduction in force (RIF) action during a period of military service.[10] For the federal government manager, labor counselor, and servicemember-employee, these little known protections are extremely important considering the personnel reductions contemplated for the federal government in the years to come.

II. RIF Overview

The 2011 Budget Control Act, also known as sequestration, led to massive cuts in defense spending and made the prospect of a separation or a downgrade a reality for thousands of U.S. Army civilian employees.[11] In July 2015, the Army announced plans to reduce the size of the regular Army from 490,000 to 450,000 Soldiers by the end of fiscal year 2018.[12] As reported by the Department of Defense, the Army's reduction of 40,000 Soldiers will be accompanied by a reduction of 17,000 Army civilian employees.[13] The Army predicts these "cuts will impact nearly every Army installation, both in the continental United States and overseas."[14]

When a federal agency reduces the size of its civilian workforce or conducts a RIF, it must follow the Office of Personnel Management's RIF procedures contained in title 5, Code of Federal Regulations, part 351.[15] In contrast to traditional adverse actions for employee misconduct, RIF procedures "are

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[1] Steve Vogel, *Returning Military Members Allege Job Discrimination – By Federal Government*, WASH. POST (Feb. 19, 2012), https://www.washingtonpost.com/world/national-security/returning-military-members-allege-job-discrimination--by-federal-government/2012/01/31/gIQAXvYvNR_story.html.

[2] RAND CORP.: SUPPORTING EMPLOYERS OF RESERVE COMPONENT MEMBERS (2013), http://www.rand.org/content/dam/rand/pubs/research_briefs/RB9700/RB9711/RAND_RB9711.pdf.

[3] *See* 38 U.S.C. §§ 4301-4034 (2015).

[4] *See* Vogel, *supra* note 1.

[5] *Id*.

[6] *See, e.g.*, 5 C.F.R. § 353.209(a) (2015).

[7] *See* 20 C.F.R. §1002.42 (2015).

[8] *Id*.

[9] *See* 5 C.F.R. § 353.209(a) (2015).

[10] *Id*.

[11] *See* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 241 (2011) (amending the Balanced Budget Emergency Control Act of 1985), codified at 31 U.S.C. § 3101A, 2 U.S.C. § 901a. The Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 125 Stat. 585, "modified the caps on defense and nondefense funding for fiscal year 2016 that were established by the Budget Control Act of 2011 (P.L. 112-25). The Bipartisan Budget Act reset those limits to total $1.07 trillion—$548.1 billion for defense programs and $518.5 billion for nondefense programs." CONGRESSIONAL BUDGET OFFICE, FINAL SEQUESTRATION REPORT FOR FISCAL YEAR 2016 1 (Dec. 2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51038-Sequestration.pdf.

[12] Am. Forces Press Serv., *Army Announces Force Structure and Stationing Decisions*, U.S. DEP'T OF DEF. (July 15, 2015), http://www.defense.gov/News/News-Releases/News-Release-View/Article/612774/army-announces-force-structure-and-stationing-decisions.

[13] *Id*.

[14] *Id*.

[15] 5 C.F.R. § 351.201(a)(2) (2016).

not aimed at removing particular individuals" but instead "are directed solely at [eliminating] positions."[16]

In accordance with RIF regulations, a RIF occurs when an agency furloughs (more than 30 days), separates, demotes, or reassigns (requiring displacement) employees for one of several permissible reasons.[17] Those reasons include a lack of work, a shortage of funds, an insufficient personnel ceiling, reorganization, an employee's exercise of reemployment rights or restoration rights, or a reclassification of an employee's position due to an erosion of duties.[18] While these are all reasons to initiate RIF procedures, not all employees in an organization undergoing a RIF are necessarily separated, and some who are subject to the RIF may have retention rights allowing them to remain in their positions or to be reassigned.[19]

The pool of employees who may be subject to a RIF action are referred to as "competing employees."[20] They are the employees who fall within the "competitive area" that an agency establishes for the RIF.[21] The competitive area is based upon the agency's organizational unit(s) and geographic location.[22] "Competitive levels" within the competitive area consist of positions within the competitive area which are in the same grade and classification series.[23] Positions in the same competitive levels must also be similar enough so that the agency can "reassign the incumbent of one position to any of the other positions in the level without undue interruption."[24] Accordingly, employees who satisfy an agency's criteria for its competitive area and for a specific competitive level are the competing employees who may compete for retention of a position during the RIF.

Once the agency has determined which employees are competing employees for purposes of the RIF, the agency must determine which employees have retention rights based upon the following four factors: tenure of employment, veterans' preference (or lack thereof), length of service, and performance.[25] An agency may not use RIF procedures for other purposes, e.g., to circumvent an employee's procedural rights in an adverse action for misconduct or unacceptable performance.[26] This is particularly significant when the employee is also a servicemember who is subject to the rights and protections afforded by USERRA.

III. Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 to § 4334, establishes certain rights and benefits for employees and certain duties for employers.[27] The act affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services.[28] It is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940.[29]

Under the USERRA, an employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of the employee's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.[30] In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, the employee will be eligible for reemployment under the USERRA by meeting the following criteria:

(1) The employer had advance notice of the employee's service;

(2) The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;

(3) The employee timely returns to work or applies for reemployment; and

(4) The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.[31]

During a period of service in the uniformed services, an employee is deemed to be on furlough or leave of absence

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[16] Grier v. Dep't of Health and Human Services, 750 F.2d 944, 945 (Fed. Cir. 1984).

[17] 5 C.F.R. § 351.201(a)(2) (2016).

[18] *Id*.

[19] See 5 C.F.R. § 351.203 (2016) (defining "competing employee"); 5 C.F.R. § 351.501 (2016) (order of retention for competitive service employees); 5 C.F.R. § 351.502 (2016) (order of retention for excepted service employees).

[20] *Id*.

[21] *See* 5 C.F.R. §§ 351.402 (2016), 351.403(a)(1) (2016).

[22] 5 C.F.R. § 351.402 (2016).

[23] 5 C.F.R. § 351.403(a)(1) (2016).

[24] *Id*.

[25] 5 C.F.R. § 351.501 (2016); 5 C.F.R. § 351.502 (2016).

[26] *See, e.g.*, Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); Carter v. Dep't of Army, 62 M.S.P.R. 393 (1994), *aff'd*, 45 F.3d 444 (Fed. Cir. 1995).

[27] 20 C.F.R. § 1002.1 (2016).

[28] *Id*.

[29] *See* 20 C.F.R. § 1002.2 (2016).

[30] 20 C.F.R. § 1002.18 (2016).

[31] 20 C.F.R. § 1002.32 (2016).

from a civilian employer.[32] In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or a leave of absence.[33] For example, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[34]

If a private sector employee is in a layoff status and begins service in the uniformed services or is laid off while performing military service, the employee may be entitled to reemployment upon return if the employer would have recalled the employee to employment during the period of service.[35] Similar principles apply if the employee is on strike or on a leave of absence from work when the employee begins a period of service in the uniformed services.[36] Therefore, if the employee is laid off before or during service in the uniformed services and the employer would not have recalled the employee during that period of service, then the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee for USERRA purposes.[37] Hence, reemployment rights under the USERRA cannot put the employee in a better position than if the employee had remained in the private sector employment position.[38] However, this is not the case with respect to federal employees whose positions are subject to a RIF action during military service.[39]

IV. RIF Protections

Under 38 U.S.C. § 4313, upon completion of a period of service in the uniformed services, a federal government employee shall be promptly reemployed in the same position of employment or in a position of like seniority, status, and pay.[40] Most importantly, a federal government employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause, and a "*reduction in force [action] is not considered for cause.*"[41] Consequently, if the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status and pay.[42] Therefore, unlike private sector employees subject to layoffs during military service, federal government employees are shielded from a RIF reduction or separation when such action occurs during a period of military service.[43]

In *Depascale v. Department of the Air Force*, an enlisted Airman was not returned to his vehicle foremen position at the Newark Air Force Base following his service in Desert Shield/Desert Storm.[44] The Airman's position had gone through a RIF action while he was deployed, and he was offered a "freight rate specialist" position by the Air Force upon his return.[45] The Airman contested the agency's action arguing that the position offered to him upon his return to the agency was improper due to its lower status.[46]

In deciding the case, the Merit System Protection Board (MSPB) noted that as a returning veteran, the Airman was entitled to be placed back in his former civilian position at the precise point he would have occupied had he remained on the job.[47] The board further noted that even though the agency would have abolished the appellant's position if he had been present via the RIF action, the agency was still required to place him in an equivalent position upon his return.[48]

Similarly, in *Crawford v. Department of the Army*, a returning Soldier contested the position offered to him following his military service.[49] The Soldier argued his former civilian position of information technology specialist, which had been abolished by the agency, had a higher status than that of a program support specialist.[50] Although not at issue, the court commented that USERRA's implementing regulations to the USERRA mandate that when an employee's position is abolished during uniformed service, the agency must reassign the employee to another position of like status and pay.[51] Therefore, the USERRA provides returning servicemembers with the peace of mind of knowing that their federal government employment will not be

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[32] 20 C.F.R. § 1002.149 (2015).

[33] *Id.*

[34] 20 C.F.R. § 1002.150(c) (2015).

[35] 20 C.F.R. § 1002.42 (2015).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See* 5 C.F.R. § 353.209(a) (2015).

[40] *See* 38 U.S.C. § 4313 (2012). If the period of service is ninety days or less, the employee is entitled to the same position. *Id.* If the period of service is for more than ninety days, the employee is entitled to a position of like seniority, status, and pay. *Id.*

[41] 5 C.F.R. § 353.209(a) (2015) (emphasis added).

[42] *Id.*

[43] *Id.*

[44] *See* Depascale v. Dep't. of Air Force, 59 M.S.P.B. 186 (1993).

[45] *Id.* at 187-88.

[46] *Id.* at 188.

[47] *Id.* at 191.

[48] *Id.*

[49] *See* Crawford v. Dep't. of Army, 718 F.3d 1361 (Fed. Cir. 2013).

[50] *Id.* at 1363.

[51] *Id.* at 1365.

terminated prior to their return regardless of any agency restructuring or potential RIF actions.[52]

V. Conclusion.

As the principal employer of RC servicemembers, the federal government is in a unique position to impact this important population.[53] Recognizing this fact, Congress placed additional burdens on the federal government as an employer.[54] The federal government is required to offer servicemembers positions of employment upon their timely return from military service regardless of the fact that their previous positions may have been abolished through a RIF action.[55] This protection recognizes the capacity of the federal government to rehire servicemember-employees to positions of like seniority, status, and pay even if their exact positions have been removed.[56] It also recognizes that private employers, especially small businesses, may not have the capacity to rehire an employee whose position was cut for business reasons during a period of military service.[57] This flexibility in the law focuses its burdens on the largest RC employer while allowing smaller employers the ability to effect needed personnel changes.[58] Knowledge of these rules will allow the federal government manager, labor counselor, and servicemember-employee to make informed choices in the years to come as personnel reductions are implemented across the federal government.

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[52] *See* 5 C.F.R. § 353.209(a) (2015).

[53] *See* Vogel, *supra* note 1.

[54] *See* 5 C.F.R. § 353.209(a) (2015).

[55] *Id.*

[56] *Id.*

[57] *See* 20 C.F.R. § 1002.42 (2015).

[58] *Id.*; *see also* 5 C.F.R. § 353.209(a) (2015).