

ANSWERING THE CIVILIAN CALL OF DUTY

TO UPHOLD THE EMPLOYMENT AND REEMPLOYMENT RIGHTS OF UNIFORMED SERVICE MEMBERS: A DISCUSSION OF OBLIGATIONS

By Olegario "Ollie" D. Cantos VII, Esq.

Special Counsel to the Acting Assistant Attorney General Civil Rights Division U.S. Department of Justice

Released Tuesday, March 4, 2008

Men and women of the United States Armed Forces are indeed deserving of the thanks of a grateful nation. These hard-working and dedicated individuals -regardless of sex, age, race, color, creed, religion, national origin, marital status, and economic background- give of their time, talents, energy, skill, and know-how in order to keep America free and to help advance the precious ideal of liberty throughout the world. A heartfelt debt of gratitude is owed by the American people to past, present, and future uniformed service members, whether enlisted or commissioned, no matter in what branch in which they serve, and whether they commit themselves to a career in the military, time as a reservist, or efforts in another auxiliary capacity.

The Federal Government, both as the largest single employer in the country and as a model for other employers to follow, has a significant and influential role to play in demonstrating its unwavering support for those serving in the military. Through its various components in the executive, legislative, and judicial branches, an ongoing opportunity exists proactively to put into place and then carry out the kinds of policies, practices, procedures, and activities that facilitate an environment of true respect for the countless sacrifices endured by so many.

In like manner, state government employers as well as employers from the private sector (including private non-profits, along with for-profit businesses) also share an obligation not to discriminate against individuals on the basis of military service.

For these reasons and more, human resource managers must learn how to do their part to employ returning veterans and to reemploy or allow the return to employment of civilian staff who are activated for military service and are called away for duty. Through undertaking a step-by-step approach, which may be institutionalized even as turnover in staff occurs over time, each professional in the human resources arena may personally contribute to long-term impact on the degree to which these agencies may give back to those in the military who have worked so hard to serve so many.

Part I: Recruiting and Employing Returning Veterans for Civilian Posts

STEP 1: CONSIDER WHY THOSE IN MILITARY SERVICE SHOULD BE SUPPORTED.

At the risk of stating the obvious, actions taken by human resource professionals must be based on sound principals. These include support for those who gave of themselves for the good of this nation through military service, an understanding that people serving at every rank may infuse and/or re-infuse the national workforce with a multitude of military skills that may be transferred to civilian life, and the realization that every person who has served honorably should be accorded the proper respect that he or she has so richly earned.

STEP 2: CREATE AND EXPAND A PIPELINE OF RETURNING MILITARY VETERANS WHO ARE EAGER TO WORK.

Hiring managers and others may make ready use of a network of at least 43 national organizations of American veterans, recognized by the U.S. Department of Defense (DoD). These are listed on a page of the official website of America Supports You (see http://www.americasupportsyou.mil/AmericaSupportsYou/vet_service_org.html).

In addition, hiring managers may identify returning veterans who are also job seekers. Paralleling with efforts to link veterans with career opportunities in the private sector (see <http://www.HireAmericasHeroes.org>) and as civilian support staff within the military itself (see <http://www.MilitaryJobs.com>), the U.S. Office of Personnel Management may also serve to match returning veterans with career opportunities available to them in the federal government (see <http://www.opm.gov/veterans>).

Most recently, last Friday, February 29, 2008, the U.S. Equal Employment Opportunity Commission released two documents supporting veterans with service-connected disabilities (see <http://www.eeoc.gov/press/2-29-08.html>). One guide is specifically tailored to employers (see <http://www.eeoc.gov/facts/veterans-disabilities-employers.html>), and the other to veterans (see <http://www.eeoc.gov/facts/veterans-disabilities.html>). Both address employment issues surrounding the Americans with Disabilities Act.

STEP 3: BECOME KNOWLEDGEABLE ABOUT SPECIFIC HIRING AUTHORITIES THAT MAY FACILITATE GREATER FEDERAL GOVERNMENT EMPLOYMENT OF RETURNING VETERANS, AND USE THESE AUTHORITIES TO SECURE EFFICIENT RESULTS.

It is important to be aware of existing appointing authorities that allow veterans either to receive additional consideration for a particular job or to be hired under what is called the "excepted service," meaning that qualified individuals may actually be brought into the federal workforce without the need for hiring officials to post job notices (see http://www.opm.gov/disability/appointment_disabilities.asp). Veterans may receive appointment through Veterans Recruitment Appointment, the 30% or More Disabled Veterans Program, and Veterans Employment Opportunity Act appointments (see <http://www.opm.gov/veterans/html/vetsinfo.asp#Special>). Veterans may also receive vocational rehabilitation assistance through the U.S. Department of Veterans Affairs (see <http://www.va.gov>) and a whole host of other programs including for job seekers (see <http://www.vetsuccess.gov>) and entrepreneurs (see <http://www.vetbiz.gov>).

Notably, prospective employees with disabilities, including returning veterans, may be brought into the federal workforce via a mechanism called Schedule A hiring authority (see 5 C.F.R. Part 213.3102(u): <http://www.opm.gov/fedregis/2006/71-072606-42246-a.htm>), promulgated by the U.S. Office of Personnel Management to support the hiring of people with physical disabilities, psychiatric disabilities, and "mental retardation" in cases where physicians/medical professionals, federal government agencies issuing or providing disability benefits, state vocational rehabilitation agency counselors (see <http://www.jan.wvu.edu/SBSES/VOCREHAB.htm> for a national directory of state vocational rehabilitation agencies), or private vocational rehabilitation or other counselors issuing private disability benefits may certify disability and job readiness. (The term "mental retardation" is used here instead of "cognitive disability," "developmental disability," or "intellectual disability," because it is the official terminology used in the authorized Executive Order 12215, dated March 15, 1979.)

Use of hiring authorities is ideal for personnel decision-makers because of the opportunity to minimize the time a job is vacant, meet human resource needs more quickly, and maximize hiring efficiency that will enable personnel to dedicate their time toward other matters.

STEP 4: LEARN HOW RETURNING VETERANS MAY BE REASONABLY ACCOMMODATED ON THE JOB IN CASES WHERE THERE IS AT LEAST ONE SELF-IDENTIFIED DISABILITY.

Perhaps surprising to some, most job-related accommodations are not expensive (with 71% costing less than \$500); and, job accommodations may reduce workers' compensation and other insurance costs, increase the pool of qualified employees, be as simple as rearranging equipment, and increase opportunities for people with functional limitations (see <http://www.jan.wvu.edu/media/Stats/BenCosts0799.html>). An effective strategy for helping to remove attitudinal barriers to employment would be to utilize valuable informational resources available at the Job Accommodation Network (see <http://www.jan.wvu.edu>).

In addition, for people with disabilities working for the federal government, they may receive work-related adaptive technology through the Computer/Electronic Accommodations Program (CAP) (see <http://www.vetsuccess.gov>), spearheaded by the U.S. Department of Defense which has cooperative agreements with more than 60 federal agencies. Certain agencies are not CAP partners due to their own self-contained programs and CAP not wanting to duplicate the electronic accommodations these agencies already provide to their employees. Such entities include the U.S. Department of Education and the U.S. Department of Housing and Urban Development as well as the Internal Revenue Service of the U.S. Department of the Treasury and the Social Security Administration.

Part II: Upholding the Rights of Uniformed Service Members to Return to Federal Government Employment

Gratitude for dedicated service to the American People by those in the uniformed services is something that is individually and collectively shared by members of the community at large. This spirit of service inextricably links the rights, benefits, and obligations of human resource managers with those of civilian personnel who are activated for military duty as part of the Uniformed Services and whose deployment gives rise to a leave of absence from work for a specified period of time. On October 13, 1994, the Uniformed Services Employment and Reemployment Rights Act, commonly referred to as USERRA (Title 38, U.S.Code, Chapter 43, Sections 4301-4334; Public Law 103-353, as amended, hereafter, just cited by section) became the law of the land, consequently ushering in a whole new era of expanded rights of employees who serve in the Armed Forces and who seek a return to their place of work after completion of military duty. As human resource managers seek to understand how best to support these courageous, patriotic, and stalwart men and women (most notably, those returning from the conflicts in Iraq and Afghanistan, they may gain general guidance from what now follows, which is compiled significantly from the Veterans' Employment and Training Service (VETS) of the U.S. Department of Labor (see <http://www.dol.gov/vets>).

STEP 1: DETERMINE TO WHOM USERRA APPLIES.

USERRA applies to persons who perform duty, voluntarily or involuntarily, in the "uniformed services," which include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services. Federal training or service in the Army National Guard and Air National Guard also gives rise to rights under USERRA. In addition, under the Public Health Security and Bioterrorism Response Act of 2002, certain disaster response work (and authorized training for such work) is considered "service in the uniformed services."

Under USERRA, uniformed service includes active duty, active duty for training, inactive duty training (such as drills), initial active duty training, and funeral honors duty performed by National Guard and reserve members, as well as the period for which a person is absent from a position of employment for the purpose of an examination to determine fitness to perform any such duty (§§4303(13&16)). USERRA covers nearly all employees, including part-time and probationary employees. USERRA applies to virtually all U.S. employers, regardless of size. Government employers at the local, state, and federal levels are subject to USERRA.

However, employers are exempt from reemployment obligations if the employee's pre-service position of employment "is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period (§§4312(d)(1)(C))."

STEP 2: UNDERSTAND THE BASIC PROVISIONS OF USERRA.

Under USERRA, the pre-service employer must reemploy service members returning from a period of service in the uniformed services if those service members meet five criteria:

(1) The person must have held a civilian job.

(2) The person, either himself or herself or through an appropriate officer of the military branch in which the person is serving, must give either written or oral notice to the employer that he or she is leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable (Section 4312(a)(1)).

(3) The cumulative period of service must not have exceeded five years unless one of the following exceptions applies (Section 4312(c)): Service is required beyond five years to complete an initial period of obligated service; service from which a person, through no fault of his or her own, is unable to obtain a release within the five-year limit; required training for reservists and National Guard members; service under an involuntary order to, or to be trained on, active duty during domestic emergency or national security related situations; service under an order to, or order to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress; active duty (other than for training) by volunteers supporting "operational missions" for which Selective Reservists have been ordered to active duty without their consent; 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; and federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or execute the laws of the United States.

(4) The person must not have been released from service under dishonorable or other punitive conditions (§§4304). The statute specifically enumerates four circumstances as "disqualifying" service: (1) Separation from the service with a dishonorable or bad conduct discharge; (2) separation from the service under other than honorable conditions (as specified by each military branch); (3) dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war; and (4) dropping an individual from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court.

(5) The person must have reported back to the civilian job in a timely manner or must have submitted a timely application for reemployment (Section 4312(e)). Time limits for returning to work depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

- Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning. If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

- Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible.

- Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service. Notably, the reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service. The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Significantly, a person's reemployment rights are not automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits. However, the person will then be subject to the employer's rules governing unexcused absences.

STEP 3: ENGAGE IN SPECIFIC MEASURES TO MEET ONE'S OBLIGATIONS AS AN EMPLOYER.

To maximize compliance, human resource managers must keep the following in mind:

Providing Notice of Rights -- Under the Veterans Benefits Improvement Act of 2004 (Public Law 108-454), employers must provide to persons entitled to the rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under the Act. To assist with this education process, employers may download and print a poster that is specifically designed to be displayed in a way that makes USERRA provisions easier to understand. Different versions exist for federal executive agencies (http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf) and for state and private employers (see http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf).

Allowing Leaves of Absence -- Employers must allow a leave of absence for service members to meet their obligations. In so doing, employers must not require service members to use vacation time or other personal leave for this purpose, but such leave may be used if so requested by the service member (see §§4316(d)).

Reinstating Employees to "Escalator" Positions -- Upon timely application for reinstatement, the employer must reinstate the service member in a timely manner to his or her "escalator position." The "escalator" principle requires that each returning service member actually step back onto the seniority "escalator" at the point the person would have occupied if he or she had remained continuously employed. This applies to the rights and benefits determined by seniority including status, rate of pay, pension vesting, and credit for the period for pension benefit computations. The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had he or she not been absent, the individual would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Documentation's Absence Not Justifying Failure to Employ or Reemploy Returning Service Members -
- The employer must not delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available (§§4312(f)(3)(A)). However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

Reasonably Accommodating Persons with Service-Connected Disabilities -- Here, it is worth keeping in mind that the number of individuals with service-connected disabilities is quite high. According to the U.S. Department of Defense, between October 2001 and February 2008 alone, 30,960 military personnel serving in the Global War on Terror (combining Iraq, Afghanistan, and surrounding duty stations) have been wounded in action (see DoD Personnel and Procurement Statistics at <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/castop.htm>). For these veterans and others who have come home, employers must provide training, retraining, or other accommodations to persons with service-connected disabilities. If the disability could not be accommodated after reasonable efforts by the employer, that employer must reemploy the person in some other positions he or she was qualified to

perform, which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay and with full seniority. Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a service member is reinstated is based on the length of his or her military service, whether 1 to 90 days (§§4313(a)(1)(A) and (B)) or 91 or more days (§§4313(a)(2)).