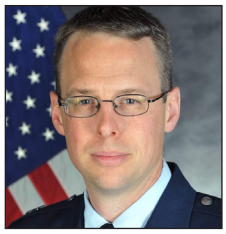
Succeeding in Successor in Interest Determinations Under USERRA

by Capt. Bradley E. Richardson



Capt. Bradley E. Richardson is the chief of legal assistance at the Office of the Staff Judge Advocate, 23 WG/JA, Moody Air Force Base, Ga. He has been an active member of the FBA since 2010.

A lot can happen at home while a servicemember is deployed. For the deployer, each additional state-side stress adds to the already stressful reality of combat operations, only serving to distract them from their mission. A short list is that children grow up, cars breakdown, and home projects pile up. Legal issues also arise. Typical issues involve family law, consumer finance, landlord/tenant disputes, and estate planning. Most of these problems are resolved, or at least delayed, by the Servicemembers Civil Relief Act. However, reservists and National Guard members on active duty orders have an additional legal concern—their civilian jobs.

Again, a lot can happen while a servicemember is deployed. Companies can merge, be bought out, restructure, go through bankruptcy, or go out of business. When one of those situations occurs, what happens to the part-time warrior's civilian job? What happens when the deployed reservist or National Guard member's civilian job gets lost in a merger?

To protect reservists and veterans, Congress enacted the Uniform Services Employment and Reemployment Rights Act (USERRA) of 1994.[1] This law protects reservists, National Guard members on active duty orders, and veterans from employment discrimination based on their military status.[2] States have also passed additional protections for National Guard members, often providing the same protections to guard members on state orders that USERRA provides for federal orders. Specific to this article, USERRA's protections continue even when an employer has gone through some sort of restructuring or merger. This is known as the "successor in interest" provision, codified at 38 U.S.C. § 4303(4)(A)(iv).

This article is a short guide for determining whether a company is a successor in interest, thereby requiring the extension of USERRA protections to servicemembers to the new business entity. It will first provide a brief overview of USERRA as well as the successor-in-interest rule. It will also provide a process to assist reservists or guard members (hereinafter "servicemember(s)") to assert their USERRA rights against a successor in interest, both prior to deployment and upon returning home.

USERRA, Generally

USERRA provides three basic rights: (1) reemployment following a term of federal military service; (2) freedom from discrimination and retaliation based on status as a reservist or National Guard member; and (3) the right to continue an employer-based health plan while on active duty orders.[3] For reemployment, the servicemember needs to provide the employer written or verbal notice prior to deployment. Following deployment, the servicemember needs to either report to work or apply for reemployment in a timely manner.[4] It should be noted that an application for reemployment does not mean that an employer has to necessarily rehire the servicemember. Rather, a person must be eligible for rehire. A common example of someone not eligible is that the service member lost a required security clearance due to misconduct while deployed. A person eligible for reemployment "shall be promptly reemployed" in the same position or a position in which the servicemember is qualified.[5] If a member has been on active duty orders for more than five years, USERRA may not provide any reemployment protections. However, there are certain exclusions of time in service to the five-year period.[6] Additionally, a punitive or discharge under other than honorable conditions forecloses USERRA rights.[7]

With regard to discrimination protections, an employer cannot discriminate against a person based on past or present uniformed service. This includes initial employment, reemployment, retention, promotion, or any other benefits. An employer may also not retaliate if one of their employees has applied for enlistment.[8]

The lesser known protection of employer-based health insurance coverage allows a servicemember to retain his or her health plan for 24 months while in the military. If the member enrolls in the military health plan (currently TriCare) while on orders, then the civilian employer-based health plan must be reinstated after reemployment without regard to any waiting periods or exclusions. The only exception is that the employer-based health plan does not cover service-connected illnesses or injuries arising while on orders.[9]

Enforcement and investigation of USERRA violations falls under the Department of Labor's (DOL) Veterans Employment and Training Service (VETS). If VETS does not resolve the claim, the Department of Justice (DOJ) or the Office of Special Counsel (OSC) may also enforce USERRA violations, depending on the situation. USERRA also provides a private cause of action. Regardless, the reality is that judge advocates general (JAGs) at base legal offices, nonprofit law firms, and private attorneys tend to become the first place reservists and National Guard members turn to when a USERRA issue arises. Hopefully, the issue can be resolved without involving VETS, DOJ, or OSC.[10]

Generally, the servicemember needs to demonstrate a prima facia case that his or her military status was at least a motivational factor in the employment decision of the employer.[11] Upon establishing prima facia, the burden shifts to the employer to prove by a preponderance of the evidence "that the [employment] action would have been taken despite the protected status."[12]

USERRA, Successor in Interest Rule

An employer is "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities."[13] A definition of "successor in interest" is included in the definition of employer.[14] Prior to 2010, Congress did not define "successor in interest" under USERRA.[15] Although the term is now defined in 38 U.S.C. 4303(4)(A)(D), the history of the definition's codification is relevant.

The legislative history of USERRA indicates that Congress' intent was for courts to apply the multifactor analysis set forth in *Leib v. Georgia-Pacific Corp.*[16] when analyzing whether an employer was a successor interest.[17] The non-exhaustive factors considered by the *Leib* Court were the "substantial continuity of the same business operations" and the totality of the circumstances, including: (1) the use of the same plant; (2) continuity of workforce; (3) similarity of jobs and working conditions; (4) use of the same supervisors; (5) use of the same machinery, equipment, and production methods; and (6) similarity of the products and services. Although often ignored, the *Leib* court added an additional analysis of whether there was any change of circumstances that would make it impossible or unreasonable to rehire the employee.[18] When compared to the current statutory definition, servicemembers had a harder fight to prove whether an employer was successor in interest.

In 2005, the Eleventh Circuit added a threshold requirement to the *Leib* factors in *Coffman v. Chugach Support Services Inc.* The court required a claimant to demonstrate privity in the form of a merger or transfer of assets prior to reaching the *Leib* factors.[19] However, shortly thereafter, the DOL Office of the Assistant Secretary for Veterans' Employment and Training promulgated 20 C.F.R. § 1002.35, which provides a more lenient test for successor in interest.

First, the regulation generally defines a "successor in interest" as a new employer that has "a substantial continuity of operations, facilities, and workforce from the former employer."[20] The regulation then states that whether an employer is a "successor in interest" is determined by:

> [A] case by case analysis using a multi-factor test that considers the following:
> (a) Whether there has been a substantial continuity of business operations from the former to the current employer;
> (b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;
> (c) Whether there has been a substantial continuity of employees;
> (d) Whether there is a similarity of jobs and working conditions;
> (e) Whether there is a similarity of supervisors or managers; and,
> (f) Whether there is a similarity of products or services.[21]

The importance of this regulation is that it rejects not only the Eleventh Circuit's threshold requirements, but also eliminates the final and ignored *Leib* factor considering the "change of circumstances that would make it impossible or unreasonable to rehire the employee." In other words, the regulation was far friendlier to the servicemember.

In 2010, Congress finally codified the definition of successor in interest in the Veterans Benefits Act of 2010.[22] The definition mirrors the DOL's definition from 20 C.F.R. § 1002.35. Currently, the definition of a successor in interest is as follows:

> (i) Whether the term "successor in interest" applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:
>
> (I) Substantial continuity of business operations.
> (II) Use of the same or similar facilities.
> (III) Continuity of workforce.
> (IV) Similarity of jobs and working conditions.
> (V) Similarity of supervisory personnel.
> (VI) Similarity of machinery, equipment, and production methods.
> (VII) Similarity of products or services.
>
> (ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test[.][23]

Therefore, the Eleventh Circuit's requirements of a transfer of assets of merger are no longer required and a servicemember has an easier test to prove successor in interest liability.

There are also two noteworthy opinions that apply to typical employers that commonly employ reservists and guard members, namely: (1) an elected official should be considered a successor in interest,[24] and (2) a military contractor should be considered a successor in interest. [25]

Assisting a Servicemember When a Successor in Interest Issue Arises

Hopefully, a reservists or guard member on active duty orders will contact a base legal office prior to deployment. The obvious first step is to do your own analysis using the statutory definition. If the employer is a successor in interest based on those factors, the general standard operating procedure is to write a letter asserting USERRA

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rights and explaining why the employer must honor them. Writing letters at the front end of a deployment or significant term of federal military service reduces the potential for issues to arise at the end of the deployment. However, if a merger or buyout is expected, then several entities need written notice.[26]

The first letter should be sent to the client's immediate supervisor. However, in the context of a merger or buyout, there is very real possibility that a supervisor could be transferred or laid off. Therefore, letters need to be sent to higher levels of the company. For medium-sized companies, it is prudent to send a letter to a regional manager or vice president. If a general counsel's office exists, send one to them along with a follow-up phone call. Finally, VETS should receive a letter—but it should not assert a claim, as one has not arisen. Rather, it is more of a "situational awareness" letter.

But sending a letter is not enough. Your client needs peace of mind. In fact, the whole policy behind military legal assistance programs is to prevent legal issues from distracting servicemembers from their missions. Explain to the company's representative that your client is serving her country and does not need to be thinking about whether her job will be there when she gets back. It sounds cliché, but legal assistance attorneys should never downplay the realities of any mission, regardless of whether that mission is fought from a desk (like mine) or on patrol (like my clients).

If the issue arises on the backend of federal military service, the attorney should assist the client in filing a claim with VETS. This will give the attorney some leverage against the employer. Further, most legal assistance attorneys cannot represent the client in a civilian court, so any leverage is gold in context of legal assistance. Simultaneously, the attorney should contact the employer with both a letter emailed to the employer and a phone call. Generally speaking, many supervisors and business executives are simply not aware of USERRA's protections. This is especially the case with smaller businesses. It is always acceptable to appeal to the employer's patriotism. In today's world of "I support the troops," rarely do you find an employer that wants to be pegged as unfriendly to servicemembers. Moreover, many of these types of issues are basic misunderstandings between the employer and employee. Therefore, the combination of the claim, explanation of USERRA, and clarification of any misunderstandings may resolve the issue. If the issue is not resolved, then VETS may take the claim. Referral to other pro bono assistance organizations, such as the ABA Military Pro Bono program, may also be necessary.[27]

Conclusion

The current military conflicts are likely to continue to require substantial support from the National Guard and Reserve components. Their members not only provide the backfill for the combined forces, but also serve in forward deployed combat areas. The stresses of combat and being away from home are matters that legal assistance attorneys cannot help. However, resolution of legal issues can provide the member with at least some relief, thereby allowing them to complete their mission and come home. The "successor in interest" is but one of many issues that only pertain to reservists and guard members on federal orders. Legal assistance attorneys need to have broad understanding of the protections under USERRA, as well as the state protections provided to guard members. Legal assistance is part of the mission and for JAGs, it should be considered among the most important job they do.

Endnotes

[1]38 U.S.C. §§ 4301-4335.

[2]*Coffman v. Chugach Support Servs.,* 411 F.3d 1231 (11th Cir. 2005).

[3]*See* 38 U.S.C. § 4301-4335, generally; *see also* "Know Your Rights," *About USERRA,* U.S. Dep't of Labor, www.dol.gov/vets/programs/userra/aboutuserra.htm#yourrights (last visited on July 27, 2016).

[4]20 C.F.R. § 1002.15 (2016). If the servicemember's period of service is less than 31 days, then he or she must report to work no later than the next full regularly scheduled work period. *Id.* § 1002.15(a). For a period of service between 30 and 180 days, the servicemember must submit an application for reemployment not later than 14 days. *Id.* § 1002.15(b). For a period of service more than 180 days, the servicemember must submit an application for reemployment not later than 90 days.

[5]38 U.S.C. § 4313.

[6]For the exceptions, *see* 38 U.S.C. 4312(c).

[7]"Know Your Rights," *supra* n.3.

[8]38 U.S.C. § 4311.

[9]38 U.S.C. § 4317.

[10]38 U.S.C. §§ 4322-23; *see also* "Know Your Rights," *supra* n.3.

[11]38 U.S.C. § 4311(c); *see also Croft v. Vill of Newark,* 35 F. Supp. 3d 359, 366-67 (2d Cir. 2014); *Valezquez-Garcia v. Horizon Lines of P.R. Inc.,* 473 F.3d 11, 17 (1st Cir 2007).

[12]*Id.*

[13]38 U.S.C. § 4303(4)(A).

[14]*Id.*

[15]Veterans Benefits Act of 2010; Veterans Small Business Verification Act; Corey Shea Act, 111 P.L. 275, 124 Stat. 2864, 2888, 111 P.L. 275, 2010 Enacted H.R. 3219, 111 Enacted H.R. 3219. *See also Coffman, supra* n.2.

[16]*Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Cir. 1991).

[17]H.R. Rep. No. 103-65, *reprinted in* 1994 U.S.C.C.A.N. 2449 at 2454. For an exhaustive history of how courts have viewed "successor in interest" in the veterans and military context since 1948, *see Hamovitz v. Santa Barbara Applied Research Inc.*, 2010 WL 1337713 (W.D. Penn. 2010) (unpublished).

[18]*Leib*, 925 F.2d at 245.

[19]411 F.3d. 1231, 1237 (11th Cir. 2005).

[20]20 C.F.R. § 1002.35 (2016).

[21]*Id.*

[22]*Supra* n.15.

[23]38 U.S.C. § 4303(4)(D).

[24]*United States v. Nevada*, 817 F. Supp. 2d 1230, 1243 (D. Nev. 2011).

[25]*Murphee v. Communications Tech., Inc.,* 460 F. Supp. 2d 702 (C.D. La. 2006).

[26]Although the statute allows for verbal notice, verbal notice is rarely sufficient for much of anything. A good legal assistance attorney understands the benefit of leaving a paper trail.

[27]Military Pro Bono Project, www.militaryprobono.org (last visited on July 27, 2016).