

**CALL TO DUTY: WHAT EVERY SMALL BUSINESS OWNER SHOULD KNOW
ABOUT USERRA**

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Abstract

According to a recent article in *Fortune: Small Business*, many small business owners are simply not prepared for the deployment of key employees, including the owner (Sloane, 2003). Yet, 581,462 Reservists and National Guard troops have been called to active duty since the attacks on September 11, 2001. This research describes the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the obligations employers, especially small business owners, have to their employees. Unlike other well known labor laws, such as Title VII of the Civil Rights Act of 1964 and The Americans with Disabilities Act of 1991 that only apply companies with over 15 employees, USERRA is applicable to all businesses. Thus, small businesses that usually find that they are exempted from many U.S. labor laws will find that they are not exempted from USERRA due to their size.

This study, using public documents and case decisions, explores the consequences of failure to understand and comply with USERRA and finds the issue is not trivial. The application is broad and the findings may be useful for small business owners, advisors, public policy officials and consultants.

Introduction

Since September 11, 2001, over 663,534 National Guard and Reservists have been called to active duty according to the Department of Defense (DOD, 2007). This represents the largest deployment of the Guard and Reserves since World War II according to the Government Accounting Office (2006). When called to active duty, the guard and reservists will leave family, friends and job on short notice to serve their country. What legal rights and duties do those affected by the deployment have? What are the legal obligations of small business owners trying to run their firms during the absence of the duty-bound reservist? Is the returning service

member entitled to his/her own job back? In this study we address the legal obligations an employer, especially a small business owner, has to his employees who are called to active duty in the Reserves or National Guard. We do this in light of the enactment of USERRA, the singularly most important federal regulation governing rights and obligations of businesses under these circumstances.

The internal legal protocol of firms coupled with external laws and regulations affecting those firms can significantly alter business performance (Robinson, et al, 1998). If the small business owner, with fewer human and financial resources available compared with big corporations, is unaware of critical legal factors, then he or she runs the risk of violating the law. Poor management practices, particularly dealing with human resources, have also been identified (especially in leading textbooks used in colleges and universities) as a major cause of failure in small businesses (e.g., Longenecker, Moore, Petty and Palich, 2007; Katz and Greene, 2007; Scarborough and Zimmerer, 2006).

The legal implications of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) are dangerous and significant even to small business owners. This study, using public documents and case decisions, explores the consequences of failure to understand and comply with USERRA and finds the issue is not trivial, the application is broad and the findings may be useful for small business owners, advisors, planners and consultants.

Five Influential Factors

There are five basic reasons USERRA is especially significant to entrepreneurs and small business owners. First, 99.7% of all employers in the U.S. are small businesses (SBA, 2007). Second, 70% of members of the National Guard and Reserves are employed by small businesses according to Department of Defense estimates (Palmer, DOD personal e-mail message, 2007).

Third, 83,618 members of the Guard and Reserves are currently on active duty (DOD, 2007) and their deployment may last for a considerable length of time. Fourth, several thousand complaints worthy of being investigated are filed each year according to the Office of the Secretary of Defense. Fifth, only a small percentage of small businesses generally have human resource expertise in place to identify legal issues related to employment and reemployment rights; the failure to deal with human resource issues in a proper manner can subject the small business to litigation that it cannot afford. These five factors, when coupled with recent deployments of reservists and guardsmen to Iraq, Kosovo, Afghanistan, and stateside locations as part of the U.S. government's War on Terror have exacerbated the potential consequences of USERRA.

Background Literature

There are numerous articles which advise a small business owner about how to handle difficult circumstances; these include everything from AIDS in the workplace (Franklin and Gresham, 1992; Hoffman and Clinebell, 2000) to sexual harassment (Robinson, et. al. 1998) and taxes. Compliance with tax regulations, environmental regulations, employment regulations, accessibility regulations, industrial and safety regulations, and the impact of federal laws on business are just a few of the myriad of legal topics addressed by the literature. When examining industry-specific topics, legal oversight includes specialized standards for performance and operations, quality and control, and industry-wide guidelines. Legal concerns include the rights and duties of ownership of land and facilities and the impact of the locality on zoning and planning regulations that affect the business. Each of these concerns may be determinative of how a firm channels its limited legal resources, and each is the subject of much research and informed academic pronouncements.

Nonetheless, both the Human Resource management literature and the small business literature are largely mute about USERRA. Beginning in 1990, continuing with terror attacks on U.S. soil in 2001, and in light of U.S. foreign military policies relying upon U.S. presence overseas, it is likely that USERRA influence upon small business effectiveness will continue well beyond the first decade of the millennium. While this federal law and its predecessor have not always had as large an impact on business practices in the U.S., continuing events in the Middle East have brought USERRA center stage for companies that want to be in full compliance with federal law. The anticipated demand for knowledge of USERRA rules and the lack of current knowledge supply regarding USERRA within the realm of academic and applied literature makes USERRA an excellent topic for practical and applied research.

Impact even on very small firms

Even lawyers presume that micro/small businesses are exempt from many US labor laws due to a pre-ordained legally stated or judicially created “magic” number of employees in the firm required for the law to apply. For example, both the Title VII of the Civil Rights Act of 1964 and The Americans with Disabilities Act of 1991 will apply only to companies with a threshold number of 15 employees (Title VII, 1964, Facts About the Americans, 2007). Another federal employment law giant, the Age Discrimination in Employment Act, only applies to companies with over 20 employees (Facts About Age, 1997). Thus, in some firms, the exact number of employees retained by the firm can become a strategic business decision made expressly to avoid legal consequences or legal liabilities. Some firms utilize a “Stay small and avoid the law” mentality and it is effective for many small businesses.

The size thresholds of the other well known federal employment laws, like the ADA, Title VII, and ADEA and others, could lead micro/small business owners to disregard Federal

employment laws and rely upon having only a small number of employees to create a safe haven of no liability. This unfortunately, is a flawed supposition; in fact, there is no safe haven based upon small size under USERRA.

It is a little known fact that USERRA has no minimum firm size requirement. Even an employer with one single employee would have to comply with the requirements of USERRA, if that employee was called to active military service.

Many small firms do subscribe to the USERRA core values. The heart of USERRA stands for respect and honor towards those who fulfill military and service related duties; these employees should not be disadvantaged or punished for their service.

USERRA Requirements

The bones and flesh of USERRA are uncomplicated; however, it is necessary to describe exactly what USERRA means for U.S employers and to warn about the implications of running afoul of these federal enactments. USERRA can be evaluated from either the employer's or the employee's perspective by resorting to using primary and secondary data sources. The best primary source is found in the language of the enactment itself and USERRA is clearly stated compared with some federal enactments.

The Uniformed Services Employment and Re-employment Act of 1994 (USERRA) grants a set of certain rights to employees in the military who seek leave under certain circumstances. (Apruzzese, 2003). The act specifies that its purposes include elimination or minimization of the penalties to civilian careers that may occur due to service in the military, and the long absences that such service may require (USERRA, 1994). Essentially, the goal is to return the person to their career and life, as though they had not left for military service. In order

to accomplish this, the law has several provisions regarding the employment and re-employment of military personnel who have been called up for service.

In order to protect members of our armed services from detrimental impacts on their career, the USERRA requires that employers must obey several regulations. First, Employers are prohibited from discriminating against members of the armed services, in initial employment (hiring), retention, promotion, or any benefit offered to employees. (USERRA, 1994).

Additionally, USERRA requires that employers make certain allowances for employees who serve in the armed forces. The employee also has specific responsibilities, in order to receive those benefits. However, in order to receive these benefits, the employee must meet certain requirements, and fulfill certain responsibilities. The following paragraphs cover the rights that USERRA grants, and the employee's responsibilities.

The Right of Re-Employment with “Escalator”

The initial right granted by USERRA is the right to return to the same job, without penalty. Employers are required to rehire the employee, to the position, rank and salary that they would have held, had they not been deployed (USERRA Summary, 2007). If the company promotes employees after a certain time period, they must include the time deployed in calculating the position that the serviceperson is rehired into. This is often referred to as the “escalator provision”. As an example, if a company normally promotes employees after 2 years, and an employee with 1 year of service is deployed for 18 months, when they return, they are to be rehired into the position they would have been promoted into after 2 years. They are also entitled to their full seniority, benefits and other privileges, as if they had not been gone during those 18 months. If that requires additional training of the serviceperson, then the company is

required to provide that training, within reason. If the employee cannot reasonably be trained to perform the new job, then the company must provide alternate employment (VETS, 2007).

The second right granted by USERRA, is the right to re-employment if injured/disabled during their service. Employers are required to make reasonable accommodation of any service disabilities. Additionally, a convalescing employee may have up to two years after the completion of their deployment to re-apply for their job (VETS, 2007).

USERRA also requires employers to continue to provide health coverage for employees on deployment for over 30 days. However, the employees may be required to pay for this coverage, up to a maximum of 102% of the full premium. Employees deployed for less than 30 days are entitled to health coverage as if they had been working for the company during that time, at their normal employee portion of premium (Vets, 2007). These rights protect service members, allowing them to focus on their military duties, rather than worrying about their job once they return. However, in order to be eligible for the above, the employee must follow certain procedures, and meet certain criteria.

Obligations by Employees to Earn USERRA Protection

To take advantage of these rights under USERRA, the employee must give advance notice of their service, unless they meet certain exemptions. These exemptions include circumstances in which the employee has an inability to give notice, where it is unreasonable to give notice or situations when notice would be precluded by military necessity. For example, a serviceperson called up to respond to a natural disaster (such as the aftermath of Hurricane Katrina) may be called up on short notice, and not given time to make phone calls. Alternately, if someone was called up to participate in a surprise attack, advance notice might compromise the

integrity of the maneuver. Notice should be given as far in advance as possible, given the specific situation. (Vets, 2007)

Second, in order to be eligible for re-employment, the individual must re-apply in a “timely” manner (USERRA Summary, 2007). What constitutes “timely” varies by the duration of the service. For service of less than 31 days, the employee must return for the beginning of the next scheduled work period during a full day after being released from service. In other words, an employee released from service at noon on Tuesday, will not be required to show up for work on Tuesday, regardless of whether their shift normally begins at 8am, or at 4pm. However, in both cases, they would need to report to work on time on Wednesday. If the service is more than 30 days, but less than 181, the employee has 30 days to submit an application for re-employment. For terms over 180 days, the employee has 90 days to re-apply (Vets, 2007). If the term of service exceeds five years, the employer may not have to re-employ the serviceperson, except in certain cases. If the initial enlistment was for over 5 years, the enlistment was extended or recalled involuntarily, or the service is periodic, as in the case of National Guard training, then the 5 year limit does not apply. (USERRA Summary, 2007, Vets, 2007).

In addition, two other criteria must be met, in order to be eligible for re-employment under USERRA. First, the individual must have held a civilian job and left it for military service (USERRA Overview, 2007). Second, the release from the service must have been honorable or general. This may include medical discharges (USERRA Summary, 2007).

Uniformed Services Which are USERRA Eligible

In order to be eligible for USERRA protections, the employee must be a member of the uniformed services. Under USERRA, the "uniformed services" consist of the following:

Army, Navy, Marine Corps, Air Force, or Coast Guard; Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve; Army National Guard or Air National Guard; Commissioned Corps of the Public Health Service; any other category of persons designated by the President in time of war or emergency.

(Source: A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 2004 pg. 2).

Business owners, particularly small business owners, are likely not to be aware that USERRA applies to a broad range of service. Furthermore, as noted in A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 2004 pg. 3, USERRA stipulates that a wide range of designated service to these agencies constitute “covered” services. These include the following:

- Active duty
 - Active duty for training
 - Initial active duty for training
 - Inactive duty training
 - Full-time National Guard duty.
 - Absence from work for an examination to determine a person’s fitness for any of the above types of duty.
 - Funeral honors duty performed by National Guard or reserve members.
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Homeland Security – Emergency Preparedness and Response Directorate (FEMA), when activated for a public health emergency, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). Source- Title 42, U.S. Code, section 300hh-11(e).

As can be seen by even a cursory review of the various types of covered service under USERRA, when an employer makes decisions relative to USERRA the scope is much broader than might be expected and the consequences can be extreme.

This is particularly true in the case of small businesses, which are less likely to have a professionally trained HR staff (Hornsby and Kuratko, 1990; Hornsby and Kuratko, 2003). In fact, Kotey and Slade, state that “HRM remains informal in the majority of firms, particularly in small firms.” Thus, the lack of formal HRM practices in a small company could lead to a failure to address USERRA issues. Given that most firms in America have fewer than 100 employees

(U.S. Small Business Administration, 2000) it is very likely that the requirements of USERRA could be ignored. The protections to “employees” under USERRA do not apply to self-employed reservists or reservist business owners, but it does extend to part-time employees.

Legal Opinions and Cases Issues under USERRA

One method to judge the impact of USERRA is to analyze the handful of published decisions affecting employees and employers. Information involving USERRA, like all confidential data, is difficult to obtain from direct sources due to imposition of confidentiality or related protective devices. The key to understanding the impact of USERRA involves researching and analyzing the select opinions published which involve USERRA litigation. The analysis of these cases permits the business owner to handle specific issues that are important for a small business owner in light of USERRA and perhaps to employ best practices to avoid harmful consequences. [Citations, when available, for these and additional cases are found in the appendix.]

Influential 7th Circuit Decisions on USERRA

Davis v. Advocate Health Center Patient Care Express published on April 28, 2008 was decided by Circuit Judges Kanne, Rovner and Sykes. In that case, Robert Davis, a Vietnam era veteran was fired in the Spring of 2007 while in the probationary phase of training to be an answering agent.

Davis sued for wrongful discrimination and termination based upon past military service stating his case under USERRA and thus filing his case in federal District Court. He also filed a motion to have a provision of USERRA apply which stated that he was entitled to a waiver of

filing fees under USERRA; he intentionally did not pay the standard filing fees to bring suit. The Judge in the trial court [District Court Judge] ruled on Davis' motion to forgo filing fees; he ruled against Davis. In fact, he gave Davis 25 days to pay the filing fees or else the case would be thrown out. After debating the technicalities of whether a final appealable dismissal had been entered or not, the 7th Circuit justices reached the heart of the matter and ruled on the merits of the filing fee issue. The 7th Circuit ruled that "We therefore construe USERRA liberally in favor of veterans seeking its protections.... [and found that] the District Court therefore wrongly believed that the phrase "fees and costs" as applied in other contexts precludes reading USERRA's fees-and-costs provision to include prepayment of filing fees." In fact, the 7th Circuit reviewed the history of precedents which liberally interpreted rights of veterans to proceed with this special [no need to pre-pay filing fees] legal recourse. It even ordered the refund of Davis' pre-paid filing fees for the appeal.

While even in published decisions [remember, only appealed decisions are generally publishable] detailed evidence is not always publicly available due to issues of confidentiality, settlement terms, etc. The 2008 Robert Davis case decision emphasized the 7th Circuit's attitude that reduction of barriers to file suit were inbuilt in USERRA and the fact that Congress "enacted USERRA to prohibit discrimination against persons because of their service in the uniformed services" (quoting precedent *Bowlds v. General Motors Mfg. Div. of the General Motors Corp.* 411 F. 23rd 808, 810 (7th Cir. 2005)). The subsequent Davis case makes clear that this premise should be honored by the judiciary.

The case of Davis "2"- Into the Future:

In an ironic twist, the plaintiff in one of the most current USERRA cases, filed July 25, 2008 in U.S. District Court in Selma, Alabama is also named Davis [Cynthia Davis]. The DOJ

[Department of Justice] filed a lawsuit on behalf of Cynthia Davis against the City of Marion, Alabama for violations of USERRA.

This federal case was filed after Cynthia Davis filed a complaint for USERRA violation when she returned from basic training and was not re-instated to her job as Dispatcher at the Marion Police Department. Her complaint triggered an investigation and attempts to reach a settlement were not successful. The case was then referred to the USERRA division of the Department of Justice; the DOJ filed the suit on behalf of Cynthia Davis. In this Davis case and in those cases in which the allegations demonstrate a willful or malicious violation, then special liquidated damages can be sought.

This case will also invoke another unique feature of the USERRA law; the “Attorney General Statute” provision. When a complaint is deemed valid and no settlement is reached by the complainant and the defendant, then the complainant’s case can be prosecuted [brought] by an attorney from the DOJ who will act on behalf of the injured party. This provision brings the full force and power of the government to bear against the defending (offending) employer.

The final results of this legal action [Davis v. Marion] will take time; but the lesson is already in place. If the employee states a valid case under USERRA, then the employer may have to defend against NOT only the private attorney of the plaintiff, but against the full guns of the DOJ.

Using a Class Action Strategy under USERRA

An additional concern for legal thinkers is the use of a class action lawsuit technique to make a bold statement of public policy that USERRA must be obeyed. In the case, *Woodall v. American Airlines*, the Department of Justice employed the Goliath tactic of filing a class action

lawsuit, selecting the ideal plaintiff Woodall, to represent all other injured persons who may have been in similar circumstances, but who did not personally file suit.

This landmark case was filed in United States District Court, North Dallas, Texas, Dallas Division. In that case, Mark Woodall, Michael P. McMahon, Paul J. Madson, individually and on behalf of a class of all similarly situated persons, were Plaintiff(s), v. American Airlines, Inc., Defendant. The case has only a slip decision; it is cited as No. 3-06-CV-0072-M, and was decided on Oct. 6, 2006.

This case is significant for three reasons: first, it defined that USERRA cases could be properly filed as class actions; second, it utilized injunctive relief as a remedy; third it enforced the “escalator provision” of USERRA.

In the Woodall case, the plaintiffs were pilots for American Airline; each took relatively short leaves to fulfill military obligations. [Woodall 16 days, McMahon 14 days, Madson 20 days]. The airline placed all pilots who took military leaves to fulfill service obligations ranging from reserve training to active duty on a special status; “leave of absence”. The pilots thus lost their standard benefits ranging from vacation and sick leave to seniority, promotion and pay increases. They filed a suit under USERRA in federal court and sought injunctive relief and class certification. The class action nature of the suit meant that multiple plaintiffs, both named and unnamed, would be beneficiaries should the lawsuit be successful.

The class action suit asked for injunctive relief to prevent the airlines from placing pilots on this type of leave of absence in the future, and for reinstatement of benefits under the escalator provision of USERRA.

In contrast, the airlines asked that the class not be certified; that the CBA [collective bargaining agreement] be deemed to supersede USERRA, and that the plaintiffs’ injunctive relief

claims should be stricken for failure to state a cause of action. The court reviewed these issues and concluded that: USERRA did not prohibit class actions; that CBA would supersede USERRA where the CBA insured GREATER benefits than USSERA- but not if USERRA provided greater protection; only two of the plaintiffs several injunctive relief claims were dismissed for failure to state a cause of action under USERRA.

This landmark Woodall case sets the stage for a powerful interpretation of USERRA and emphasizes the legal power of employees to wield USERRA legal features in a class action technique This is one case which has tremendous implications for small business employers who fail to re-instate employees in violation of key USERRA provisions.

Data on USERRA Complaints

Public sources of information suggest that violations of USERRA are significant in both sheer numbers and in the magnitude of each violation. The remainder of this section provides some descriptive statistics as well as examples of the depth and breadth of exposure to USERRA liability in the U.S.

Employer Support for the Guard and Reserve (ESGR) is a Department of Defense organization. ESGR is assigned as a staff organization in the Office of the Assistant Secretary of Defense for Reserve Affairs (OASD/RA), which is a part of the Office of the Secretary of Defense. ESGR has a national network of over 900 volunteer ombudsmen who help resolve issues between employers and their employees who serve in the National Guard and Reserve. The ESGR Ombudsmen attempt to informally mediate USERRA complaints between the employer and the employee. In addition, they both inform and educate the employer and employee on what the law requires. Their goal is to find a mutually agreeable solution.

Table 1 shows the number of complaints that have been filed with ESGR since statistics were gathered. In FY 2007, over 13,000 complaints were filed. In 95 percent of cases, ESGR Ombudsmen were able to mediate the cases. When mediation does not work, the cases are referred to the Department of Labor for legal disposition.

Table 1. **USERRA Complaints to ESGR, FY2004 – FY2007**

| Fiscal Year | Complaints | Cases | Referred to DOL |
|-------------------|---------------------|-------|-----------------|
| 2007 ¹ | 13,116 ² | 2,274 | 430 |
| 2006 | 7,765 | 3,152 | 87 |
| 2005 | 5,298 | 4,682 | 141 |
| 2004 | 7,712 | 5,978 | 139 |

Non Published Legal Issues related to USERRA

A review of individual legal cases involving USERRA demonstrates the financial and personal significance of violations to both the employer and the employee. Legal action, even if informal resolution tactics such as mediation, negotiation or third party arbitration are used, cost parties time, money and lost opportunities. The cost of resolution of a claim based on USERRA is high; especially to small firms.

Employers are prohibited under USERRA from the practice of discrimination against members of the services, including reserves. Prohibited acts include: hiring, firing, failure to promote, and denial of any other benefits based upon membership in the services, including specifically the obligation to serve.

Employers are also prohibited from retaliation against any one who has invoked the protective features of USERRA. Retaliation of all types is prohibited, even for the filing of a claim or for testifying in an action under USERRA.

¹ The numbers are higher on referrals in FY 2007 because ESGR entered into an agreement that they would refer a service member to the Department of Labor after 14 days if significant progress wasn't being made.

² In FY 07 the state with the most cases was Texas - 169, followed by Calif at 152, Mo with 109, PA with 108 and Florida with 100. Georgia had 87 cases. In FY 07 the Top 5 incident types were Discrimination, job placement, pay, termination protection and vacation time.

One of the most important features of USERRA is the reservist's right to re-employment after service. There is a sliding scale of rights and entitlements dependent upon the length of the service and tied to the service member's lost opportunities as a result of the absence from the job. Under USERRA, there is no retroactive limit or statute limiting the timely filings of USERRA claims. So far, claims filed under USERRA have been interpreted to allow federal employees who are also Reservists to seek retroactive benefits under the escalator provision of USERRA; this includes reaching back as far as 1980, according to some experts. (Tully, Wright).

According to Wright (2008), "USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense." (Citing 20 C.F.R. 1002.41.)

Length of employment before deployment is not critical for USERRA protection, but it will play strongly to both Judge and juries. The vast majority of USERRA claims are reviewed and then investigated by the local federal action agency in the geographic vicinity of the complainant.

As is true of most legal inspired actions brought by the injured party to redress a perceived wrong, most claims are settled by the parties without a formal recording of the result. In some cases, partial facts and circumstances are published to shed light on the case. For example, 1st Sgt. Tracey Y. Marshall had worked full time for the Hillsborough County Clerk Pat Frank (Florida) since 1992. Sgt. Marshall was activated for just two months in August 2005. She filed a lawsuit brought against the circuit court clerk's office in Florida because after she

returned from her tour of active duty, she was not re-instated to her old job. The U.S. Justice Department, who brought the claim on Sgt. Marshall's behalf, alleges that Sgt. Marshall would have been employed as a supervisor if her civilian employment had not been interrupted by her activation for full-time military duty in August 2005. Under USERRA, she would be entitled to re-instatement plus the protection of the escalator provision of USERRA.

Conclusions and Implications

According to a recent article in *Fortune: Small Business*, many small business owners are simply not prepared for the deployment of key employees, including the owner (Sloane, 2003). Clearly USERRA is a law that impacts all U.S. businesses, regardless of size. However, for small businesses, the impact that compliance with USERRA has can be much larger, and more devastating. If a large company, with 100 mechanics, has one called up for duty, the company will be able to cope. They can rely on overtime to make up for the employee, or can rely on attrition of other employees to provide them with a position into which they can place the serviceperson when they return. On the other hand, if a small shop, with one mechanic, has that person called for duty, the choices are more difficult. Also, larger corporations have succession plans, professional HR staff, and standardized hiring practices (Hornsby and Kuratko, 2003), all of which would help the company to quickly fill their needs with a qualified replacement.

In very simple terms this research sets the stage for significant future investigation into USERRA claims, their costs, and ways to minimize harm to both employees and employers. This study identifies a significant, but heretofore, largely ignored labor law from the political-legal dimension of a firm's external environment that may have profound implications for the human resource practices of small firms. USERRA is a relatively unusual law with which most business people, especially small businesses, are not familiar (Sloane, 2003). Yet, unlike other labor laws

established in the U.S., this law does not limit itself to larger firms. It is applicable to firms of all sizes, including micro-businesses with fewer than 10 employees. Thus, a small business owner needs to know how USERRA applies to her firm and the consequences of failure to anticipate the effects of USERRA.

This research has implications for both future research as well as public policy officials. USERRA is a noble effort that attempts to preserve the reemployment rights of service members returning to their civilian jobs following active duty. What about the rights of the entrepreneur that has endured risk and uncertainty to create a small enterprise? USERRA presents real challenges to a small business owner faced with the reality of trying to temporarily replace an employee deployed for active duty with someone that may or may not be asked to stay with the company once the Guard or Reserve member returns to his or her job.

The current state of our understanding of USERRA is limited to articles in trade journals, some case law, and the popular press. Future research should attempt to further extend our understanding of the relationship between USERRA and small businesses. Examples of possible future research questions include, but are not limited to, the following two theoretical issues:

1. What experiences have small businesses had when faced with an employee that has been activated and subsequently returned from active duty?
2. How might the federal government revise the law to help micro businesses while helping service members with their return to their former place of employment?

For researchers, this law may raise some challenges, albeit empirically, to data collection in future studies. We say “challenging” as the Department of Defense does not have specific data on reemployment issues, predominantly due to the fact that service members who are discharged from active duty are no longer under their jurisdiction. Thus, researchers may have to employ qualitative designs to capture data on this labor law and its impact on small firms. Nonetheless,

the present study provides a brief glimpse into this unique labor law learning. Future research needs to more fully explore the implications of this law on small firms.

References

Department of Defense (2007a). “National Guard (In Federal Status) and Reserve Mobilized as of May 23, 2007.” Retrieved May 29, 2007.

<http://www.defenselink.mil/releases/release.aspx?releaseid=10911>.

Department of Defense (2007b). National Guard and Reserves: The cumulative number of National Guard and Reserves activated since September 11, 2001. Electronic message from LTC Matt Leonard, Asst. for Public Services. Office of the Assistant Secretary of Defense for Reserve Affairs. May 29, 2007.

Department of Labor. “elaws – USERRA Advisor.” Retrieved May 24, 2007.

<http://www.dol.gov/elaws/vets/userra/mainmenu.asp>

Rushforth, Durward M. (1991). “Veterans’ Reemployment Rights.” *Employment Relations Today*. Vol. 18, Iss. 1; p. 3 – 8.

Facts About Age Discrimination (1997), <http://www.eeoc.gov/facts/age.html> (accessed 7/20/2007).

Facts About the Americans with Disabilities Act (1997), <http://www.eeoc.gov/facts/fs-ada.html> (accessed 7/20/2007).

Franklin, GERALYN McClure and Alicia Briney Gresham (1992). AIDS in the workplace: Current practices and critical issues. *Journal of Small Business Management*. 30(2), 61.

Government Accounting Office (2006). “Reserve Forces: Army National Guard and Army Reserve Readiness for 21st Century Challenges.” GAO Report 06-1109T. Testimony Before the Commission on the National Guard and Reserves by Janet A. St. Laurent, Director. Defense Capabilities and Management. September 21, 2006.

Hitt, Michael A., R. Duane Ireland, and Robert E. Hoskisson, (2001). *Strategic management: Competitiveness and globalization* (Fourth Edition). Cincinnati, OH: South-Western Publishing Company.

Hoffman, D. Lynn. and Sharon Clinebell, (2000). HIV/AIDS employees, the Americans with disabilities act, and their impact on small businesses. *Journal of Small Business Strategy*, 11(1), 50-63.

Hornsby, J. S. and D. K. Kuratko (1990). Human Resource Management in Small Firms: Critical Issues for the 1990. *Journal of Small Business Management*. Vol. 28(July), 9-18.

Hornsby, J.S. and D. K. Kuratko (2003). Human resource management in U.S. small businesses: A replication and extension. *Journal of Developmental Entrepreneurship*. Vol. 8, Iss. 1; pg. 73-92).

- Johnson, J. L. & Kuehn, R. (1987) The Small Business Owner/Manager's Search For External Information. *Journal of Small Business Management*, 25(3), 53-68.
- Katz, Jerome A. and Richard P. Green (2007). *Entrepreneurial Small Business*. (New York: McGraw-Hill/Irwin).
- Kotey, Bernice and Peter Slade (2005). Formal Human Resource Management Practices in Small Growing Firms. *Journal of Small Business Management*. Vol. 43(1), pp. 16-40.
- A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 2004. <http://www.dol.gov/vets/whatsnew/userraguide0704.rtf>
- Robinson, Robert K., William T. Jackson, GERALYN McClure Franklin, and Diana Hensley. (1998). U.S. sexual harassment law: Implications for small businesses. *Journal of Small Business Management*, 36(2), 1-12.
- Scarborough, Norman and Thomas W. Zimmerer (2006). Effective Small Business Management. (Upper Saddle Creek: New Jersey).
- Sloane, Julie (2003). "Small Business Goes to War It's Tough Enough for Reservists to Maintain Their Country's Security. But When They're Called, Protecting Their Companies can be Harder." *Fortune Small Business*. Retrieved May 23, 2007. <http://money.cnn.com/magazines/fsb/fsb archive/2003/03/01/338770/index.htm>
- Smeltzer, L. R., Fann, G. L. & Nikolaisen, V. N. (1988) Environmental scanning practices in small business. *Journal of Small Business Management*, 26(3), 55-62.
- Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII),
- The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA 38 U.S.C. 4301-4334)
- Tully, NYARNG, & Breanne S. Skivington, Esq., Trilogy of New Rulings Affects Federal Employees Number 0614, June 2006:
- U.S. Small Business Administration (2000). *Small business and entrepreneurship in the 21st Century*. Washington, DC: The Third Millennium. Office of Advocacy.
- U.S. Small Business Administration. Failure Rates. Retrieved August 5, 2008 (<http://www.sba.gov/advo>).
- U.S. Small Business Administration. Office of Advocacy (2003). "Small Business by the Numbers," May, 2003. www.sba.gov/advo/stats

U.S. Small Business Administration. (2005). The State of Small Business: A Report of the President. Washington, D.C.: U.S. Government Printing Office.

USERRA Summary. <http://www.esgr.org/userra.asp?p=summary>.

VETS USERRA Fact Sheet 3, US DOL. http://www.dol.gov/vets/programs/userra/userra_fs.htm

Wheelen, Thomas L. and J. David Hunger (2006). *Concepts in Strategic Management and Business Policy, 10th edition*. (Upper Saddle River, NJ: Prentice-Hall Publishing, Inc.).

Wright, Samuel F., USN (ret.) JAGC, *USERRA Applies to Employment as Adjunct Professor*, LAW REVIEW 0804 (January 2008)

CASES Referenced and Citations:

Bowlds v. General Motors Mfg. Div. of the General Motors Corp., 411 F. 3rd 808(7th Cir. 2005).

Butterbaugh v. Department of Justice, 336 F.3d 1332, Fed. Cir. 2003.

Davis v. Advocate Health Center Patient Care Express, 7th Cir. 04-28-2008, Kanne, Circuit Judge, 07-2709.

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946)

Gagnon v. Sprint Corp., 284 F. 3rd 839, (8th Cir. 2002).

Garcia v. Department of State, 2006 MSPB 29, Docket No. DC-3443-05-0216-I-1.

Jacobsen v. Department of Justice, 2006 MSPB 26, Docket No. DC-3443-05-0092-A-1.

Lee v. Department of Justice, MSPB, Docket No. SF-3443-05-0162-I-1

Rogers v. City of San Antonio, 392 F 3d 758, (5th Cir. 2004).

Steenken v. Campbell County, No. 04-224-DLB, U.S. District Court for the Eastern District of Kentucky (March 15, 2007).

Tchemkou v. Mukasey, 517 F. 3rd 506, (7th Cir. 2008).

Woodall v. American Airlines, Inc. N.D. Tex., 2006, Slip Copy No. 3-06-CV-0072-M, Oct. 6, 2006.