

# Protecting the Rights of Servicemembers

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# OVERVIEW

- Why do we need protection for our servicemembers?
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Other Statutes
  - Servicemembers Civil Relief Act (SCRA)
  - Americans with Disabilities Act (ADA)
- Housing

“They’re not taking us to war again without the Reserves!”

*General Abrams*

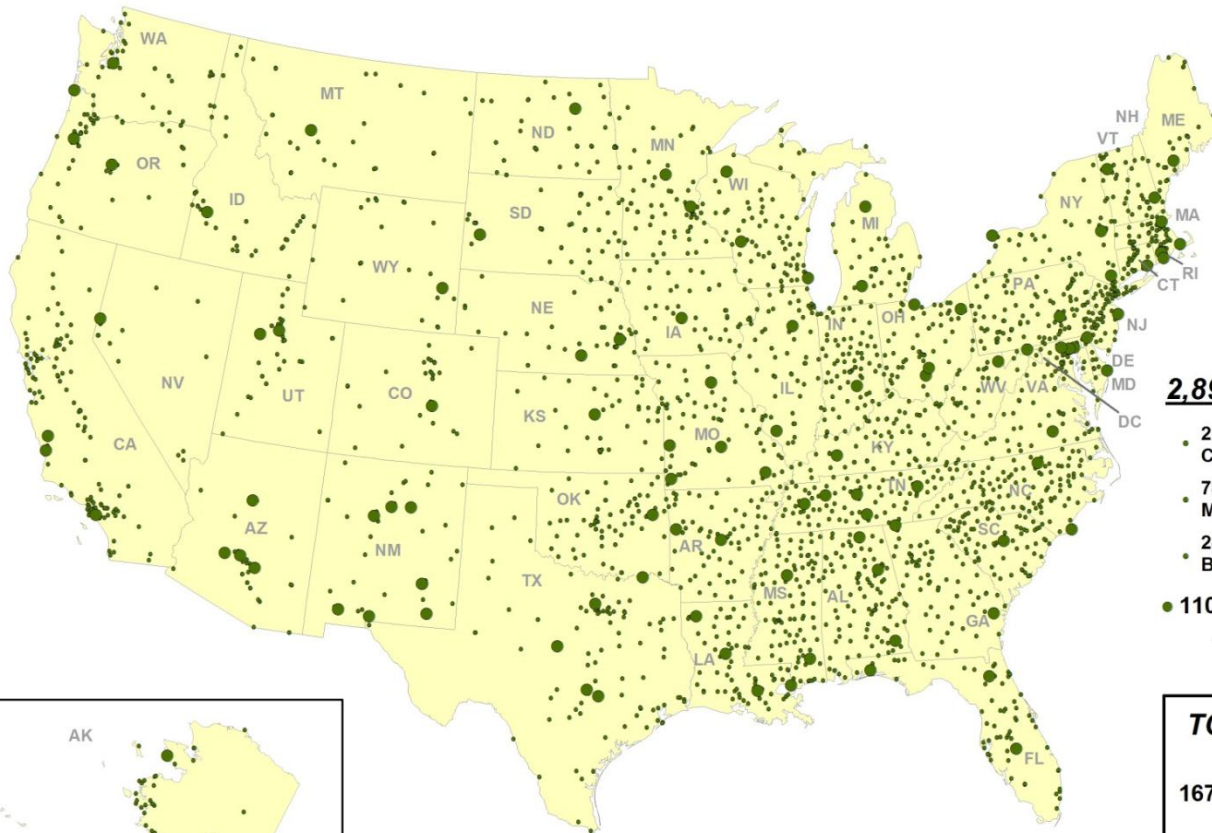
- July 1965
  - Secretary of Defense McNamara asks for 235,000 Reservists
  - President Johnson refuses
  - Result:
    - Minimal deployment by Reservists/National Guard to Vietnam
    - Increased reliance on draft
    - Relatively little taking of established workers out of their civilian lives
- Military restructures – “Total Force Policy” & “Abrams Doctrine”
  - Active and Reserve components closely integrated
  - Serves as an additional constraint on the exercise of military power
  - Maintains clearer link between the large-scale use of the military and the public

# SERVICEMEMBERS TODAY

- Desert Storm
  - 60,000 Guard soldiers mobilized
  - 37,000+ served in Persian Gulf
- In mid-September 2003:
  - 180,000 soldiers deployed to Iraq, Afghanistan, et al.
  - 128,000 Reservists/Guard members mobilized
  - 20,000 Reservists/Guard members in Iraq or Kuwait for 1-year tours
- Local example – 6<sup>th</sup> Motors in Providence
  - Approximately 140 Marines from all over New England
  - 2007 – 2011: approximately 1/3 of the unit deployed each year to Iraq or Afghanistan
  - Not uncommon for someone to have been deployed two or three times

# FOOTPRINT OF THE ARMY NATIONAL GUARD

FY 2012

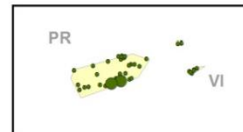
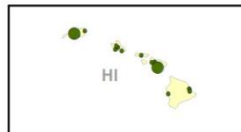
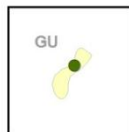
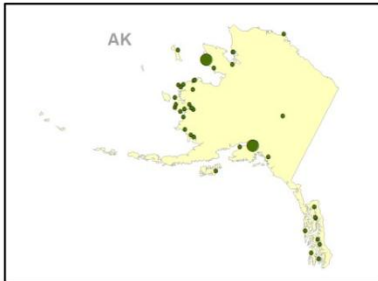


## **2,899 COMMUNITIES**

- 2,645 Readiness/Reserve Centers
- 786 Ground/ Vehicle Maintenance Buildings
- 286 Aviation Support Buildings
- 110 Training Centers  
- 12,151 Training Buildings

## **TOTAL FACILITY FOOTPRINT**

**167.1 M SQUARE FEET  
2.0 M ACRES**



11/01/2011 ARNG-ILI-E



\* Note: Inset maps not to scale.

# UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

## USERRA

38 U.S.C. 4301-4335

- USERRA Regulations for Private Employers and States: 70 Fed. Reg. 75,246 (2005), 20 C.F.R. Part 1002
- USERRA Regulations for Federal executive agencies, 5 C.F.R. Part 353



# PURPOSES

- **Encourage** non-career service
- **Prevent discrimination** against members of the National Guard and Reserves and Veterans
- **Minimize disruption** to lives of Service Members by requiring reemployment to “escalator position”

# WHO IS COVERED BY USERRA?

- **Employers**
  - All private employers
  - Federal, state, and local governments
- **Employees**
  - Active/Reserve Service Members
  - Public Health Service Commissioned Corps
  - FEMA responders
  - Those designated by President in war or national emergency



# WHAT DOES USERRA PROHIBIT?

- **Discrimination:**
  - On the basis of past service, current service obligations, intent to join a uniformed service
  - In hiring, promotions, retention in employment, reemployment, other benefits
- **Retaliation** against employees who seek to enforce USERRA rights or who testify/assist in proceeding (38 USC 4311)

# BURDEN OF PROOF

- **Employee must prove** that service or protected activity was “**motivating factor**” in adverse employment action
- Burden then shifts to **employer to prove** that **adverse action would have been taken anyway**

# **EMPLOYEE BENEFITS DURING SERVICE**

- **Considered to be on furlough or leave of absence**
- **Non-seniority benefits** given to similarly-situated
- Up to 24 months of continued coverage under **employer health plan**

# REEMPLOYMENT: WHO IS ELIGIBLE?

- Left civilian job to perform/prepare for service
- **Written or verbal advance notice** to employer
- 5 year cumulative service limit
- No dishonorable or bad conduct discharge
- **Timely** return to work/application for reemployment after service

# REEMPLOYMENT: WHAT MUST THE EMPLOYER DO?

- Must make reasonable efforts to qualify returning veteran for reemployment position (e.g., training, certification)
- Employer must make reasonable accommodations for returning veteran with service-connected disability

# REEMPLOYMENT: “ESCALATOR POSITION”

- “Escalator position”
  - Job that would have been obtained with “reasonable certainty”
  - But for the period of service
  - Based upon employer procedure or practice
- Includes **seniority, status, and pay**, plus wage increases, promotions, more responsibility, if reasonably certain these would have been earned



# REEMPLOYMENT: OTHER BENEFITS

- No discharge except for cause up to one year, depending on length of service
- Health plan reinstated
  - No waiting period
  - No exclusions
- Pension benefits restored
  - No break in service for vesting and accrual purposes
  - Employee may make up contributions missed during the period of service

# REEMPLOYMENT: EMPLOYER DEFENSES

- Changed circumstances
- Undue hardship
- Brief, non-recurrent position

# WHERE CAN YOU FILE A COMPLAINT?

- ESGR (DoD), which may attempt informal resolution
- USDOL/VETS (also private right of action)
  - USDOL/VETS has 90 days to investigate
  - Many claims resolved informally at this stage
- If claim unresolved, can seek representation from USDOL (private or state employer) or the Office of Special Counsel (OSC) (federal agency employer)
  - SOL must make a representation recommendation within 60 days
  - Then DOJ/OSC must make a determination within 60 days

# WHAT RELIEF IS AVAILABLE UNDER USERRA?

- Injunctive relief
- Lost wages and benefits
- Liquidated damages (2X) for willful violations

# SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

- Intended to allow persons on active duty/activated reservists to devote attention to USA's defense needs
  - Certain provisions may also cover dependent (e.g., spouse, child)
- Some of the SCRA's protections, if requirements are met:
  - Court or hearing officer must grant **minimum 90-day stay** of proceedings upon proper notification
  - **Maximum 6% interest rate per year** for debts/obligations incurred prior to military service (individual debt or incurred jointly with spouse) upon proper request
  - **Lease termination** under certain circumstances
  - **Mortgage foreclosure** protection under certain conditions

# AMERICANS WITH DISABILITIES ACT (ADA)

- Prohibits discrimination based on disability in all aspects of employment
- Requires employers to provide a reasonable accommodation to applicants/employees with disabilities
  - Examples of reasonable accommodation
  - Employer must engage in dialogue with employee
  - Accommodation need not be exactly what the employee wants
- ADA is separate statute from USERRA
  - Employers covered by both statutes must comply with both statutes
- Other provisions of statute include:
  - Reasonable accommodation in public accommodation (e.g., restaurants, hotels, retail/grocery stores)
  - Public services can't deny services/participation in programs/activities available to those without disabilities (e.g., public transportation)



# FAIR HOUSING & EQUAL OPPORTUNITY

- Fair Housing Act – Title VIII
  - The Act prohibits housing discrimination on the basis of:
    - Race, color, national origin,
    - religion, sex, familial status or
    - disability
- Rehabilitation Act – Section 504
- Americans with Disabilities Act (ADA)

# VETERANS & FAIR HOUSING

- Veterans are among those protected by the FHA
- HUD asks every complainant of their Veteran Status as it is currently tracked for informational purposes
- With advances in medicine and combat medical care, more service members who might have been fatalities in past wars are now survivors, and many of these have disabilities due to their combat injuries
- Veterans with disabilities may require a modification in their housing needs

# MODIFICATION VS. ACCOMMODATION

- Accommodation refers to a rule or policy
- Modification refers to a structural change

# MODIFICATION

- Structural Change
  - Ramp instead of stairs
  - Flashing light for door bell or alarm
  - Grab bars in bathroom
  - Making a door wider for a wheelchair
- For rental housing, the resident pays for the modification if:
  - There is no federal funding involved and
  - It is not operated by a government agency

# ACCOMMODATION

- Example: Housing provider has a policy of “no pets,” but veteran has a service animal or an emotional support animal to address needs related to his or her disability

# FEDERAL FUNDS & GOVERNMENT AGENCIES

- If the housing provider receives federal funds, Section 504 applies.
  - Housing provider pays for the modification
- Government agencies – such as a state funded Public Housing Authority – several of these in Massachusetts
  - ADA was modified so that Section 504 rules apply to these entities
  - Therefore, they must abide by the applicable regulatory requirement



# COMPLAINT PROCESS

- To report a violation:
  - 1-800-827-5005
- Intake Analyst assesses the issues.
  - If there appears to be enough to warrant an investigation, the case is filed
  - May be retained by HUD or referred to FHAP agency
- Enforcement branch
  - Assigns Investigator
  - Assigns Conciliator

# INVESTIGATIVE PROCESS (HUD)

- Investigator – Impartial investigation
- Conciliator – Attempts to find mutually agreeable solution and close case before investigation ends
- Case closure – Possible outcomes
  - Finding of Probable Cause – a “charge” issued
  - Finding of No Probable Cause – Case closed
  - Conciliated – Case closed and HUD monitors compliance with the agreement

# RESOURCES

- Veterans' Employment & Training Service (VETS)
  - [www.dol.gov/vets](http://www.dol.gov/vets)
- United States Department of Justice
  - [www.servicemembers.gov](http://www.servicemembers.gov)
- U.S. Attorney's Office—Massachusetts
  - [www.justice.gov/usao/ma](http://www.justice.gov/usao/ma)
  - Click: “About” > “Priorities” > “Safeguard Civil Rights of Citizens/Fight Public Corruption”
- INSERT HUD CONTACTS....