

TJAGLCS Practice Note

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Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) Amendments and Updates

Background

For the third year in a row, Congress has amended the longstanding civil relief protections available to servicemembers. In 2002, the familiar rights and benefits of the Soldiers' and Sailors' Civil Relief Act (SSCRA)¹ were extended to National Guard personnel serving in a Title 32 status.² A year later, Congress made broad changes to the SSCRA, replacing it with the Servicemembers Civil Relief Act (SCRA).³ This last year saw the passage of the Veterans Benefits Improvement Act of 2004,⁴ which brought several changes to the SCRA.

This note examines the latest legislative amendments to the SCRA. It also considers some changes that Congress made to the Uniformed Services Employment and Reemployment Rights Act (USERRA),⁵ as well as additional activity relevant to that legislation.

Servicemembers Civil Relief Act Amendments and Changes

The Meaning of the Word "Judgment"

The first change adds the term "judgment" to the SCRA's definitions section, defining it as "any judgment, decree, order, or ruling, final or temporary."⁶ This provision was added so that the term, when used in the SCRA, would "be broadly construed and not be interpreted as limited to final judgments in cases."⁷

The SCRA uses the word "judgment" five times. The first usage is in the section extending certain protections "to a surety, guarantor, endorser, accommodation maker, comaker," or other like person.⁸ The second appears in the section

¹ Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. §§ 501-594 (2000) (current version at 50 U.S.C. app. §§ 501-596 (LEXIS 2004)).

² Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 305, 116 Stat. 2820, 2826-7 (codified as amended at 50 U.S.C. app. § 511(2) (LEXIS 2004)). The relevant portion of this legislation indicates that

[t]he term "military service" means . . . in the case of a member of the National Guard, . . . service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds.

50 U.S.C. app. § 511(2)(A)(ii) (LEXIS 2004).

³ Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-596 (LEXIS 2004)). For an overview of this legislation, see John Meixell, *Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, ARMY LAW., Dec. 2003, at 38.

⁴ Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, 118 Stat. 3598. The Senate version of the legislation began on June 1, 2004, as Senate Bill 2486. See 150 CONG. REC. S6288-91 (daily ed. June 1, 2004) (statement of Sen. Specter). At that time, the legislation contained veterans housing, education, and employment benefits provisions not related to either the SCRA or the USERRA. Those provisions were added following a joint conference of the House and Senate Armed Services Committees. See *id.* at S10884 (statement of Sen. Frist). As it formed up, the Veterans Benefits Improvement Act of 2004 combined provisions from a number of bills from the Senate and the House of Representatives. *Id.* Chief among these was House of Representatives Bill 4658. See Servicemembers and Veterans Legal Protections Act of 2004, H.R. 4658, 108th Cong. (2004).

⁵ 38 U.S.C. §§ 4301-4333 (2000).

⁶ 50 U.S.C. app. § 511(9) (LEXIS 2005).

⁷ H.R. REP. NO. 108-683, at 14 (2004). This report accompanied House of Representatives Bill 4658 (HR 4658). The heart of HR 4658 contained the SCRA and the USERRA ultimately adopted. Servicemembers and Veterans Legal Protections Act of 2004, H.R. 4658, 108th Cong., § 101 (2004). See also *supra* note 4.

⁸ 50 U.S.C. app. § 513 (LEXIS 2005).

offering protection from default judgments.⁹ The third usage is in the section calling for stays of civil and administrative proceedings when the servicemember has notice.¹⁰ The fourth time is when a court stays a judgment when the servicemember's military service affects compliance.¹¹ The fifth time is within the section curtailing a servicemember's inappropriate use of the act.¹²

Waiver of Rights Under the SCRA

Servicemembers may waive their SCRA rights and protections after the right becomes applicable to them. To strengthen this protection, Congress now requires that the waiver be "in writing and . . . executed as an instrument separate from the obligation or liability to which it applies."¹³ Furthermore, "[a]ny waiver . . . that applies to a contract, lease, or similar legal instrument must be in at least 12 point type."¹⁴

Stay Provisions Applicable to Plaintiffs

One of the SCRA's primary procedural protections involves stays of civil proceedings.¹⁵ Under the SSCRA, this protection was available to both defendants and plaintiffs.¹⁶ The SCRA extended this protection to defendants only, but the 2004 amendments work to bring the protection back to servicemember plaintiffs who may need to prosecute a suit at a later time.¹⁷ As under the prior law, the current provision will probably be read more broadly still to "cover those who are petitioners, respondents, movants or intervenors."¹⁸

Residential and Automobile Leases

Perhaps the most significant developments concern the SCRA's protections for servicemembers who need to terminate a residential¹⁹ lease. The SCRA allows servicemembers to terminate their leases upon "entry into military service."²⁰ They can also terminate their leases when they "receive military orders for a change of permanent station or to deploy with a military unit, or as an individual in support of a military operation, for a period not less than 90 days."²¹ Under the SCRA as enacted in 2003, the deployment benefit was only for servicemembers mobilized with a unit. With its 2004 amendment, Congress acknowledged that individuals are often called to deploy as individuals and not as members of a unit.²²

⁹ *Id.* app. § 521.

¹⁰ *Id.* app. § 522.

¹¹ *Id.* app. § 524.

¹² *Id.* app. § 581.

¹³ *Id.* app. § 517.

¹⁴ *Id.*

¹⁵ *Id.* app. § 522. In general, a court "may on its own motion and shall, upon application by [a] servicemember, stay the action." *Id.* app. § 522(b)(1).

¹⁶ *See* 50 U.S.C. app. § 521 (2000).

¹⁷ 50 U.S.C. app. § 521 (LEXIS 2005).

¹⁸ *See* *Shire v. Superior Court*, 162 P.2d 909, 912 (1945). *See also In re Burrell*, 230 B.R. 309, 312 n.1 (Bankr. D. Tex. 1999).

¹⁹ Actually, the premises include those "premises occupied, or intended to be occupied, by a servicemember or a servicemember's dependents for a residential, professional, business, agricultural, or similar purpose." 50 U.S.C. app. § 535(b)(1) (LEXIS 2005).

²⁰ *Id.* app. § 535(a)(1)(A). This is an obvious benefit to those who join the armed forces, but even more so to the thousands of reservists and guardsmen who have been voluntarily and involuntarily mobilized in the last few years.

²¹ *Id.* app. § 535(b)(1)(B).

²² H.R. REP. NO. 108-683 at 22 (2004).

The second change provides a great benefit to servicemembers who have joint leases. The SCRA's protections now extend to joint leases entered into by a servicemember and a servicemember's dependent.²³ This was added in order to assist those non-servicemember spouses (or other dependents) who were being held to a lease that they and their deployed spouse signed, but in a location where the non-servicemember spouse did not wish to reside without the servicemember.²⁴

The SCRA provides similar rights to servicemembers when they wish to terminate an automobile lease. Servicemembers are allowed to terminate their automobile leases when called to periods of active duty in excess of 180 days.²⁵ As with residential leases, there are provisions allowing for termination if the servicemember must "deploy with a military unit, or as an individual in support of a military operation."²⁶ In comparison to the residential leasing provisions, however, the deployment must be "for a period of not less than 180 days."²⁷

There are also provisions for the termination when a servicemember receives orders for a new assignment and a permanent change of station.²⁸ Finally, joint leases are protected.²⁹ The changes in automobile leases likewise involve the clarification that servicemembers can deploy with a unit or as individuals.³⁰ Additionally, when originally adopted the permanent change of station protection was for those who "receive[] military orders for a permanent change of station outside of the continental United States."³¹ This benefited servicemembers moving overseas from the continental United States, but it was of no consequence to similarly situated servicemembers moving from the United States and its territories back to the continental United States or another overseas location. In other words, it did nothing for those stationed in Alaska, Hawai'i and the like who were being transferred to an installation located in the contiguous forty-eight states. The new law makes it clear that the benefit is available to servicemembers being transferred in either direction.³² Those who are stationed in United States' territories are also covered because "[t]he term 'state' includes . . . a commonwealth, territory or

²³ 50 U.S.C. app. § 535(a)(2) (LEXIS 2005). Legal assistance practitioners undoubtedly think of a joint lease as one that is entered into by a servicemember and the servicemember's spouse. It is important to note, however, that the statute contemplates that the servicemember may be residing with a dependent—an elderly parent—who has entered into the lease. These joint leases would also be covered. *See id.*

²⁴ Again, the provisions most directly affecting the SCRA and USERRA began life in HR 4658. *See supra* note 4. When the original legislation's sponsor introduced the legislation, he had this to say:

Mr. Speaker, this morning I chaired a hearing of the Veterans' Affairs Committee to examine how well the federal statutes protecting our servicemembers rights were being enforced. Testifying before the Committee were several servicemembers and family members with personal experiences in which their rights were not properly protected under existing laws.

One witness, Ms. Tammy Kimmel whose husband served in the Army at Fort Hood in Texas, told the Committee that when her husband was ordered to a new duty location, her landlord refused to release her from their joint housing lease as required by law. The landlord claimed that the law required the servicemember to be released, but not the spouse

Regrettably, despite sixty years of federal case law, culminating with the passage last year of the Servicemembers Civil Relief Act, there are still some individuals, businesses, and organizations who cynically refuse to provide all the relief required by statute.

150 CONG. REC. E1226 (daily ed. Jun. 24, 2004) (statement of Rep. Smith). Mr. Smith made a similarly strong statement evincing Congress' intent a few months later. Speaking about the application of the law to joint leases he stated that "[t]his has always been the intent of Congress, but some landlords have recently tried to argue there is a loophole, leaving the servicemember's spouse liable if the servicemember is relieved from liability under the lease." *Id.* at H8387 (daily ed. Oct. 6, 2004) (statement of Rep. Smith).

²⁵ 50 U.S.C. app. § 535(b)(2)(A) (LEXIS 2005). In fact, the coverage is for "[a] lease of a motor vehicle, used, or intended to be used by a servicemember or a servicemember's dependents for personal or business transportation." *Id.* § 535(b)(2).

²⁶ *Id.* app. § 535(b)(2)(B)(ii).

²⁷ *Id.* Care needs to be taken when examining a problem with a residential or automobile lease. This is because Congress saw fit to keep the residential and automobile provisions in the same section. As simple as it may seem, one needs to avoid applying the timelines applicable to residential leases to those for automobile leases and visa versa.

²⁸ *Id.* app. § 535(b)(2)(B).

²⁹ *Id.* app. § 535(a).

³⁰ *Id.* app. § 535(b)(2)(B)(ii).

³¹ 50 U.S.C. app. § 535(b)(2)(B) (LEXIS 2004).

³² The revised section indicates that an automobile lease can be terminated for the following: "a change of permanent station- (I) from a location in the continental United States to a location outside the continental United States; or (II) from a location in a State outside the continental United States to any location outside that State." 50 U.S.C. app. § 535(b)(2)(B) (LEXIS 2005).

possession of the United States.”³³ For those stationed in the United States, but outside the continental United States, the opportunity to terminate the automobile lease is available wherever they are transferred.³⁴

Not to be overlooked in this area is one final clarifying definition that Congress added. As noted, many of the leasing benefits come up when a servicemember is ordered to a station or to deploy. To clarify and to make sure that servicemembers are given the benefit of doubt, “[t]he term ‘military orders,’ with respect to a servicemember, means official military orders, or any notification, certification, or verification from the servicemembers’ commanding officer, with respect to the servicemember’s current or future military duty status.”³⁵

Evictions

Although not a part of the recent Congressional activity, it is worth noting the annual change to eviction protection. When Congress passed the SCRA, it carried forward basic SSCRA protection from eviction absent a court order and a ninety day stay.³⁶ When the legislation was enacted, Congress set the limit for this protection on housing where the “monthly rent does not exceed \$2,400.”³⁷ Congress, however, indicated that this amount is to be adjusted for inflation.³⁸ This year, the amount is \$2534.32.³⁹

Uniformed Services Employment and Reemployment Rights Act Amendments and Developments

The Veterans’ Benefits Improvement Act of 2004 brought four changes to USERRA. Under USERRA, a mobilized guardsman or reservist is allowed to continue health care coverage “under a health plan in connection with [their] position of employment” for themselves and their dependents.⁴⁰ Congress extended the period for this coverage from eighteen to twenty-four months.⁴¹ If a servicemember chooses to take advantage of this benefit, the coverage will likely be in place for the full period of the mobilization.⁴²

Individuals who believe they have a claim against a private employer or a state may have their case reviewed by the Department of Labor (DOL). If the DOL is unable to resolve the matter and if they believe the case has merit, it can be referred to the Department of Justice (DOJ) for action.⁴³ If the individual is a federal employee, the case may wind up with the Office of Special Counsel (OSC).⁴⁴ The second legislative change requires that the Secretary of Labor return to issuing annual reports⁴⁵ about the numbers of cases the DOL reviews and the number of cases it refers to the DOJ or the OSC.⁴⁶

³³ *Id.* app. § 511(6)(A).

³⁴ *Id.*

³⁵ *Id.* app. § 535(i)(1).

³⁶ *See id.* app. § 531(b). The stay can be for more or less than ninety days if “justice and equity require.” *Id.* at app. 531(b)(1)(A). In addition to the stay and the court order, a court can “adjust the obligation under the lease to preserve the interests of all parties.” *Id.* at app. § 531(b)(1)(B). Also, when the court orders a stay, the landlord may also receive equitable relief. *Id.* at app. § 531(b)(2).

³⁷ *See id.* § 531(a)(1)(A)(ii).

³⁸ *See id.* § 531(a)(2).

³⁹ Publication of Housing Price Inflation Adjustment Under 50 U.S.C. App. § 531, 70 Fed. Reg. 2395 (Jan. 13, 2005).

⁴⁰ 38 U.S.C. § 4317(a)(1) (LEXIS 2005). In order to exercise this benefit, however, the employee “may be required to pay not more than 102 percent of the full premium under the plan.” *Id.* § 4317(a)(2).

⁴¹ *Id.* § 4317(a)(1)(A).

⁴² *See* H.R. REP. NO. 108-683 at 14 (2004) (stating that “[t]his change would bring eligibility for continued health care coverage in line with the period of time which a member of the Guard or Reserve may be involuntarily called to active duty”). *See also* 10 U.S.C. § 12302 (2000) (partial mobilization of up to 1,000,000 members of the reserves for up to 24 consecutive months); Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001) (authorizing activation of Ready Reserve in response to terrorist attacks of September 11, 2001).

⁴³ 38 U.S.C. § 4323.

⁴⁴ *Id.* § 4324.

⁴⁵ When originally enacted, USERRA required a report from the Secretary of Labor from 1996 through 2000. 38 U.S.C. § 4332 (LEXIS 2004).

⁴⁶ 38 U.S.C. § 4332 (LEXIS 2005). The report, more specifically, must provide the following:

Next, the OSC is to undertake a “demonstration project” where it takes an active role in the initial investigation of complaints.⁴⁷

The fourth amendment to USERRA adds a new section to Title 38 requiring that employers notify employees about USERRA.⁴⁸ This provision also involves the DOL, because that agency is required to provide a model statement for employers’ use.⁴⁹ This subtle approach will hopefully work to educate employers and employees and ward off potential problems.⁵⁰

A final USERRA development concerns the DOL’s work to promulgate a proposed set of implementing regulations.⁵¹ In doing so, DOL opted for “the more personal style advocated by the Presidential Memorandum on Plain Language.”⁵² The result is a highly readable, yet comprehensive discussion of how USERRA works.⁵³

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- (1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.
 - (2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.
 - (3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.
 - (4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).
 - (5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

Id. The Secretary is also on notice to make other recommendations as appropriate. *Id.* In fact, during testimony before Congress, the Department of Justice explained that “[t]he number of USERRA claims DOL referred to DOJ annually has increased approximately 20 percent since September 11, 2001.” H.R. REP. NO. 108-683 at 38 (2004).

⁴⁷ Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 204, 118 Stat. 3598, 3606-8.

⁴⁸ 38 U.S.C. § 4334. The section’s main provision states that

Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

Id. § 4334(a).

⁴⁹ *Id.* § 4334(c)(1).

⁵⁰ One of the chief sponsors of the original legislation had this to say about the notification section:

It seeks to promote understanding between employees and employers when it comes to their rights and obligations under USERRA. [It] would require the Department of Labor to produce a poster – similar to the Family and Medical Leave poster – for employers to post at work sites.

. . . .
. . . . In posting USERRA and familiarizing themselves with the law, employers and employees will gain a deeper understanding of USERRA and preferably work out any potential conflicts before employees are activated.

150 CONG. REC. H8389-90 (daily ed. Oct. 6, 2004) (statement of Rep. McGovern). *See also* Patriotic Employer Act of 2004, H.R. 4477, 108th Cong. (2004) (including a bill introduced by Rep. McGovern, which became incorporated into the legislation actually adopted). Apparently, the lack of understanding on the part of employers can run deep. For some rather remarkable examples, *see* U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON PERSONNEL, COMMITTEE ON ARMED SERVICES, U.S. SENATE, RESERVE FORCES: DOD ACTIONS NEEDED TO BETTER MANAGE RELATIONS BETWEEN RESERVISTS AND THEIR EMPLOYERS, 37-42 (Jun. 13, 2002).

⁵¹ Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 69 Fed. Reg. 56,265 (to be codified as amended at 20 C.F.R. pt. 1002). The USERRA allows the DOL to publish implementing regulations. *See* 38 U.S.C. § 4331.

⁵² 69 Fed. Reg. at 56,267. *See also* President’s Memorandum on Plain Language in Government Writing, 34 WEEKLY COMP. PRES. DOC. 1010 (Jun. 1, 1998).

⁵³ Consider the following passage to be codified at 20 C.F.R. § 1002.22:

Who has the burden of proving discrimination or retaliation in violation of USERRA?
You have the burden of proving that activity protected by USERRA was one of the reasons that your employer took action against you, in order to establish that the action was discrimination or retaliation in violation of USERRA. If you succeed in proving this point, your employer can prevail by proving that he or she would have taken the action anyway, unless you can prove that but for your service the employer would not have taken the action.

69 Fed. Reg. at 56,288.

Conclusion

Congress continues to show interest in the protections and benefits available to servicemembers from all components. Although they worked, comprehensively, to modernize and update the Soldiers' and Sailors' Civil Relief Act protections through the passage of the Servicemembers Civil Relief Act, problems with the residential and automobile leasing provisions became apparent. Congress reacted swiftly to further strengthen the legislation's provisions. As to reemployment rights, Congress acted in a subtle fashion to educate employers and employees on certain key principles. They have also worked to move along USERRA protections for federal sector employees. Legal assistance practitioners, labor counsel, and administrative lawyers should take note of these developments and be prepared for further activity. Given the activity over the last few years and the continual reporting requirements for DOL, one should conclude that Congress is focused on protecting servicemembers, their families, and veterans.