

New Developments

Administrative & Civil Law

Readmission Rights of Servicemembers

On 14 August 2008, Congress enacted the Higher Education Opportunity Act (HEOA), which reauthorized the Higher Education Act of 1965.¹ In addition to reauthorizing existing programs, it created new requirements for institutions of higher education.² One such requirement is a little known provision pertaining specifically to members of the armed forces.³ Under 20 U.S.C. § 1091c(b), “a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform, service in the uniformed services shall not be denied readmission to an institution of higher education on the basis of that membership.”⁴ In essence, the HEOA creates readmission rights for servicemembers who are students, similar to the reemployment rights contained in the Uniform Servicemembers Employment and Reemployment Rights Act (USERRA).⁵

Under 20 U.S.C. § 1091c(c), student-Soldiers must satisfy three prerequisites to qualify for readmission rights.⁶ First, the student must give advance written or verbal notice of military service to the appropriate official at the institution of higher education.⁷ Second, the cumulative length of the absence (and of all previous absences) from the institution of higher education by reason of service cannot exceed five years.⁸ Finally, upon their return, students must submit a notification of intent to reenroll in the institution.⁹ As with USERRA, the implementing regulations for the readmission section of the HEOA contain important provisions that clarify and expand the language of the original statute.¹⁰

Pursuant to 34 C.F.R. § 668.18(a)(2), an institution must promptly readmit a servicemember whose absence was necessitated by military service with the same academic

status as the student had when the student last attended the institution.¹¹ This means student-Soldiers receive the same enrollment status, the same number of credit hours, and the same academic standing on their readmission to the institution.¹² Most importantly, if the student-Soldier is readmitted into the same academic program, for the first academic year after returning, the tuition and fees will be the same as the academic year during which the student-Soldier left the institution.¹³

Another significant right provided to returning student-Soldiers is the right to receive refresher training to prepare for their academic programs.¹⁴ Under 34 U.S.C. § 668.18(a)(2)(iv), if an institution determines student-Soldiers are not prepared to resume their program at the same academic status, the institution must make reasonable efforts at no extra cost to the student to assist them to become prepared.¹⁵ These reasonable efforts may include providing free refresher courses and allowing the students to retake pretests at no extra cost.¹⁶

There are two important distinctions between the readmission provisions of the HEOA and USERRA.¹⁷ First, the HEOA only applies to active-duty service “under Federal authority” for thirty or more consecutive days.¹⁸ This means that inactive duty training (IDT), training pursuant to Title 32 for National Guard Soldiers, and active duty for fewer than thirty consecutive days are excluded from its protections.¹⁹ Conversely, USERRA applies to IDT, Title 32 training periods, and active duty of any duration.²⁰ In addition, the HEOA allows returning Soldiers up to three years to provide notice of intent to return to their institution upon completion of their military service.²¹ In contrast,

¹¹ *Id.* § 668.18(a)(2).

¹² *Id.* § 668.18(a)(2)(iii).

¹³ *Id.* § 668.18(a)(2)(iii). If the students are admitted into different programs, they will be assessed no more than the tuition and fees that other students in the same program are assessed for that academic year. *Id.*

¹⁴ *Id.* § 668.18(a)(2)(iv).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* § 668.18(b), (c)(1)(iii); 20 C.F.R. §§ 1002.6; 1002.57; 1002.15 (2013).

¹⁸ 34 C.F.R. § 668.18(b).

¹⁹ *Id.* State active duty for the National Guard is excluded from both the HEOA and USERRA. *Id.*; 20 C.F.R. § 1002.57.

²⁰ *See* 20 C.F.R. §§ 1002.6, 1002.57.

²¹ *See* 34 C.F.R. § 668.18(c)(1)(iii)(A). If student-Soldiers are injured during service, they are allowed up to two years from recovery to give notice of intent to return to their institution. *Id.* § 668.18(c)(1)(iii)(B).

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¹ *See* 20 U.S.C. §§ 1001–1161aa-1 (2012).

² *Id.* § 1091c (2012).

³ *Id.*

⁴ *Id.* § 1091c(b).

⁵ *See id.* § 1091c (2012); 38 U.S.C. §§ 4301–4335 (2012).

⁶ *See* 20 U.S.C. § 1091c(c).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See* 34 C.F.R. § 668.18 (2013).

USERRA only allows a maximum of ninety days for returning Soldiers to provide notice of their intent to return to their employers.²²

In conclusion, the HEOA contains a little known but very important provision protecting servicemembers attending institutions of higher learning.²³ This provision and its implementing regulations create a regime of readmission rights applicable to all servicemembers serving on active duty for thirty or more consecutive days.²⁴ To the

maximum extent possible, these readmission rights seek to place the absent servicemember in the same position as those students who did not leave their studies to answer their nation's call to duty.²⁵ This is a laudable goal that Judge Advocates should foster through education and training with respect to this important legislation.

—MAJ T. Scott Randall

²² See 20 C.F.R. § 1002.15.

²³ *Id.* § 1091c.

²⁴ *Id.*; see also 34 C.F.R. § 668.18.

²⁵ See generally 20 U.S.C. § 1091c.