

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## A military law primer

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Not since the height of the Vietnam War has the United States had the number of men and women, both in uniform or former servicemembers as now newly minted veterans.

Unlike Vietnam, where there were no mobilizations either of the Reserves or the National Guard, significant percentages of today's military serving on active duty are Reservists and National Guard members — some, having been mobilized numerous times post-Sept. 11.

Those numbers translate into ever increasing legal issues involving, for lack of a better term, "military law." Military law encompasses both criminal (courts-martial, for example) and a significant number of civil (meaning non-criminal) aspects that permeate and cause potential problems for civilian practitioners with no background in military law. Another area, veterans' law, deals with veterans' disabilities, medical issues and service-connected injuries, illnesses (including mental health issues), and is not part of military law. Indeed, veterans' law is so unrelated that most military law practitioners — myself included — do not practice veterans' law because of its idiosyncrasies and its highly specialized bar.

But, what is military law and how may it impact your practice? I want to focus on non-court-martial aspects, specifically on matters that one day may wander into any one of our law offices.

A few preliminary definitions are important — "active duty" refers to the legal status of serving on active duty with a component of the U.S. armed forces, including active duty in the Reserves and the National Guard; The Reserves are the reserve components of each separate military branch, including the U.S. Coast Guard; the National Guard is the most confusing for those who are unfamiliar with its legal status.

Members of the National Guard — what in times past was called "the Militia" — initially are members either of the Army National Guard or the Air National Guard. Members are "dual hatted," meaning they are initially sworn into one of the two components at the state level, under the command of the governor and adjutant general of the state; however, Guard members also are a component of the federal armed forces, subject to mobilization or being called to duty for federal service. When dealing with members of the National Guard, therefore, their legal status — state or federal — must be considered first. State and local laws may give members of the state Guard greater benefits and protections than those granted under federal law.

Employers — public and private, and including their lawyers — must have a working knowledge of the Uniformed Services Employment and Reemployment Rights Act of 1994, or USERRA, 38 U.S.C. §§4301-4333. The federal Act protects servicemembers' and

veterans' civilian employment rights. Under certain conditions, USERRA requires employers to put individuals back to work in their civilian jobs following military service. USERRA also protects servicemembers from workplace discrimination based on their military service or affiliation, and it applies to members of the Reserves and National Guard when mobilized for federal purposes.

The importance of USERRA can be demonstrated simply: A Westlaw "allfeds" search of the term "USERRA" with a date restriction of post-Sept. 11, recently produced 273 reported results. There are many more unreported cases, such as one recently settled by New York in the Northern District. The cases are investigated by the U.S. Department of Labor and civilly sued by the Department of Justice's Civil Rights Division on behalf of the aggrieved servicemember(s).

Equally as important for the average practitioner is the Servicemembers Civil Relief Act of 2003 (SCRA), 50 U.S.C. app §511 *et seq.* SCRA, formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA), is a federal law that provides protections for military members as they enter active duty. It covers issues such as rental agreements, security deposits, prepaid rent, eviction, installment contracts, credit card interest rates, mortgage interest rates, mortgage foreclosure, civil judicial proceedings, automobile leases, life insurance, health insurance and income tax payments, and applies to members of the Reserves and National Guard when mobilized for federal purposes.

SCRA applies in all U.S. states and territories. Procedural protections, for instance stays of proceedings, apply to all civil and administrative proceedings, including domestic relations' matters. It does not apply to criminal proceedings. SCRA also protects against any default judgment, unless its procedural requirements are not followed. An affidavit must be filed stating the individual either is not in the military, or if such status "unknown," the court may appoint counsel in an effort to ascertain status. False affidavits violate Title 18, U.S.C.

If a default judgment is granted, the servicemember can apply to the issuing court to set it aside — they are voidable, not void. It is a liberal stay provision providing that, in any civil or administrative proceeding, a court upon the necessary showing either must grant a stay or appoint counsel for the servicemember.

SCRA also applies to Child Custody and Paternity Disputes. An amendment to the Welfare Reform Act of 1996 mandates the Department of Defense to facilitate leave for servicemembers involved in such matters unless the member is deployed in a contingency operation or the "exigencies of military service" require it.

One important feature of SCRA provides for the tolling of any applicable statutes of limitation: "The period of a servicemember's

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military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a state [or political subdivision of a state] or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns."

The tolling does not apply to IRS provisions, however, although enforcement stays may be granted.

SCRA applies to evictions — both of servicemembers and their dependents. One area that is particularly complex involves the termination of leases, residential and others, for instance the leasing of automobiles. It is troublesome for both parties because the triggering mechanism is complicated, and a lessor may be subject to criminal penalties for non-compliance. Another provision grants mortgage foreclosure protections to servicemembers.

One ongoing and problematic issue for servicemembers, is interest, which is capped at 6 percent: "An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent per year during the period of military service."

The servicemember must request such in writing and provide proof of active duty service.

Medical malpractice issues under the Federal Tort Claims Act may arise for mobilized Reservists and members of the Guard whose

dependents are victims of malpractice from government physicians. The Feres doctrine precludes military members from bringing such actions.

Practitioners also may encounter what appears to be a basic contract action, when a client (or, most likely, a parent) seeks legal advice because a son or daughter has enlisted and now wants out of the deal. For those enlisting when younger than the age of 18, even with required parental consent, enlistment may be revoked before the enlistee's 18th birthday. Those older than 18, however, face a more difficult challenge because specific federal personnel laws govern enlistments to include Recruiter misrepresentations. For example, John Doe is persuaded to enlist in the U.S. Army for what he thinks is a three-year enlistment, with a \$15,000 signing bonus. A month into boot camp, he finds out he enlisted for eight years, the statutory military service obligation for all members of the armed forces. The Army may or may not let him off active duty at the end of three years but, if he is, he will be assigned to the Reserves for the remaining five years and, of course, will be subject to recall and mobilization during that time. Unlike traditional contract principles, once active duty commences, federal law generally does not allow rescission of the contract. The remedy is to seek an administrative discharge, which is dependent on the policies of the various branch.

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