

A LEGAL CALL TO ARMS: PROTECTING THOSE WHO PROTECT US

By Marc Lowry¹

Due to the deployment of military personnel to Afghanistan and elsewhere in the wake of September 11, 2001, the State Bar of New Mexico has initiated a program to assist members of the armed forces in need of legal services. The program, called Lawyers Care, seeks to assure that military service to our Nation does not adversely affect the rights of military personnel. This article promotes the goals of that program by fostering awareness of the rights of military personnel called to active duty. It does so by exploring briefly the rights of military personnel who are protected under federal law, focusing in particular on the rights granted by the Soldiers' and Sailors' Civil Relief Act and the Uniformed Services Employment and Re-employment Act.

The Soldiers' and Sailors' Civil Relief Act

Our Nation recognizes that military service may hamper, if not entirely thwart, a person's ability to meet pre-existing legal obligations. In 1940, Congress passed the Soldiers' and Sailors' Civil Relief Act to address that problem. The Civil Relief Act allows people who dedicate themselves to military service to put their legal obligations aside so that they can "devote their entire energy to the defense needs of the Nation." 50 U.S.C. § 510. The law accomplishes that goal by temporarily suspending "legal proceedings and transactions which may prejudice the civil rights of persons" actively participating in military service. *Id.* Through procedural safeguards and equitable remedies, the Civil Relief Act stops creditors and other litigants from taking unfair advantage of a person's military service.

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Who Does the Civil Relief Act Protect?

The Civil Relief Act protects any person who, before joining the military, has incurred a financial, contractual, or legal obligation that becomes difficult to satisfy due to military service. The law extends protections to people serving in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, and officers of the Public Health Service detailed for duty with the Army or Navy. 50 U.S.C. § 511. Members of the National Guard and Reserves who are ordered to active duty are entitled to protection under the law as well. With some limitations, citizens of the United States who serve with armed forces of nations that are allied with the United States during a conflict may apply for relief under the law. 50 U.S.C. § 514.

In addition to those actively participating in military duty, a person who is directly affected by the military service of another may claim protections offered by the law. For example, dependents of military personnel may assert rights under the Civil Relief Act if their ability to meet financial obligations are affected by a family member's military service. *E.g.*, 50 U.S.C. § 536. Similarly, "sureties, guarantors, endorsers, accommodation makers, and others" who are liable along with military personnel may assert protections under the law. 50 U.S.C. § 513.

Although the class of people protected by the Civil Relief Act is large, this article tends to focus on members of the National Guard or Reserves who are ordered to active duty. Those members of our armed forces are likely to be most affected by the recent deployment of troops to combat terrorism.

What Does the Civil Relief Act Do?

Although the Civil Relief Act speaks to many dilemmas active duty personnel face, its provisions focus on two key problems. The first problem is the financial distress an order to active duty may impose on a person in military service. To combat that problem, the law provides equitable relief to a person when military service has “materially impaired” that person’s ability to fulfill a financial obligation. *E.g.*, 50 U.S.C. § 522 (authorizing a court to strike contractual fines and penalties when the ability to pay or perform was “materially impaired” by military service). Such relief may include a stay of the proceedings to allow a service member to liquidate a liability in an orderly fashion.

The second major problem addressed by the Civil Relief Act is the inability of a person in active duty to assert legal rights in judicial proceedings that take place during that person’s military service. The law resolves that problem by holding civil proceedings in abeyance until active duty personnel can appear and participate in the proceedings. 50 U.S.C. § 521.

When Do the Act’s Protections Apply?

Protection under the Civil Relief Act starts on the date a person enters active service and ends on “the date of discharge from active service or death while in active service.” 50 U.S.C. § 511 (2). For a member of the National Guard or the Reserves coverage is extended. A member of those reserve components of the military may assert rights under the law beginning on the date a person receives an order to report for military service. 50 U.S.C. § 516.

Protections Offered by the Act.

In addition to stays applicable to all judicial proceedings, the Civil Relief Act addresses specific problems a person in active duty may encounter. Key provisions of the specific relief offered by the law are discussed below.

Default Judgments.

A person's call to active duty should not allow anyone to secure a default judgment against that person simply because military service made an appearance in the action impossible. To avoid the chance that a person called to active duty will inadvertently suffer a default judgment, a plaintiff must file an affidavit stating whether the defendant is participating in military service before a court can enter a default judgment. 50 U.S.C. § 520 (1). If the defendant is in military service, the court must appoint an attorney to protect the defendant's interests. If a plaintiff is unable to determine whether a defendant is in military service, a default judgment may not be entered "without first securing an order of court directing such entry." *Id.*

Should a court enter a default judgment against a defendant who is serving in the military, the defendant may attempt to set aside that judgment by petitioning that court within ninety days after the end of the defendant's military service. 50 U.S.C. § 520 (4). However, the right to open a default judgment is limited. In order to have a court set aside a default judgment, a defendant must demonstrate a meritorious legal defense to some part of the action. *Id.*

Stays for Judicial Proceedings.

The Civil Relief Act divides stays of judicial proceedings into two categories. The first type of stay applies when it impossible for a person to effectively participate in judicial proceedings. 50 U.S.C. § 521. Such stays are available to a plaintiff or defendant in military service upon application to the court, or a court may order a stay sua sponte if it becomes

apparent that active-duty service will prevent a person from participating in the proceedings. Applications to stay the proceedings will be denied only if the court finds that the ability to prosecute or defend the action is “not materially affected by reason of his military service.” *Id.* To determine if military service materially affects a person’s case, a court looks to the totality of the circumstances. *Tabor v. Miller*, 389 F.2d 645, 647 (3d Cir. 1968). Stays of this type may remain in effect throughout the time a person spends in military service, and may include up to three months after the end of a person’s military service. 50 U.S.C. § 524.

Financial hardships warrant the imposition of a second category of stays. A stay of that nature is appropriate when military service materially affects the ability of a person to fulfill financial obligations incurred before being ordered to active duty. Such stays apply to the execution of final judgments, *see* 50 U.S.C. § 523, the repossession of property purchased by installment contracts, *see* 50 U.S.C. § 531, the foreclosure of mortgages, *see* 50 U.S.C. § 532, the collection of tax liabilities, *see* 50 U.S.C. § 560 (2), or the collection of “any obligation or liability incurred,” *see* 50 U.S.C. § 590 (1). With the exception of stays under Section 590, an application for a financial hardship stay is used as a defensive procedure in ongoing litigation.

Section 590 (1) goes beyond defensive tactics and authorizes a military plaintiff to apply for a stay pro-actively, so the military plaintiff can avoid future litigation over debt. Under Section 590(1), stays may be secured against any financial obligation incurred before a person’s military service began, including any taxes that accrued before or during military service. To provide service members plenty of latitude to restructure their financial affairs, applications for stays under Section 590 may be made up to six months after a person’s military service has ended. Stays under Section 590 may last for the duration of active duty, plus a period of time after the

termination of military service (or application for a stay) equal to that spent in active duty. One should note, however, that a person who receives a financial hardship stay under Section 590 is nevertheless responsible for the obligation plus interest that accrues during the stay.

The length of any kind of stay is a discretionary matter for a court to determine based on the facts of a particular case. Within the time limitations set out in the Civil Relief Act, courts have equitable authority to set the terms of a stay “as may be just.” *Id.*

The application for or the procurement of a stay concerning any financial obligation cannot, by itself, be held against the person by a creditor. 50 U.S.C. § 518. Thus, a creditor cannot deny or revoke credit, change the existing terms of a credit agreement, or refuse to grant credit in similar amount or terms simply because a person in military duty has applied for protection from a debt. Nor can a creditor file an adverse report about the creditworthiness of a person in military service with a credit information agency because that person applied for relief from a debt. *Id.*

Statutes of Limitation

Statutes of limitation are tolled for the time a person ordered to active duty spends in military service. 50 U.S.C. § 525.² This feature of the Civil Relief Act is self-executing, which means that a court does not have to find that a particular person is materially affected by reason of his or her military service to begin the tolling period. To the extent that the tolling of limitation periods aids military personnel as plaintiffs by preserving a claim, as defendants tolling undermines

² The tolling period of the Civil Relief Act is probably not applicable to state defendants who have not consented to be sued in federal court. *Lance Raygor v. Regents of the University of Minnesota*, 534 U.S. ___, ___, 122 S. Ct. 999, 1008 (2002) (holding that the tolling period expressed in 28 U.S.C. § 1367 (d) does not apply to “state law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds”).

a defense based on a limitations period by extending the time frame of the limitations period. Only limitations periods prescribed by the Internal Revenue Service are exempt from the law's tolling provision. 50 U.S.C. § 527.

Contractual Relief

When military service prevents a person from fulfilling a contractual obligation, no contractual fines and penalties will be imposed if "by reason of such service the ability of such person to pay or perform was thereby materially impaired." 50 U.S.C. § 522. Similarly, no financial obligation or liability bearing interest may exceed an annual interest rate of 6% unless the court finds that the person's ability to pay is not materially affected by reason of military service. 50 U.S.C. § 526.

Tenants Who Become Military Personnel

Landlords are limited in their ability to evict active-duty personnel or their dependent families from a family dwelling. 50 U.S.C. § 530. However, limitations on landlords under the Civil Relief Act apply only if a military tenant pays \$1,200 a month or less for the dwelling. If a military tenant's rent is equal to or less than \$1,200 a month, a landlord must first have applied to and received from a court an order approving of the eviction.

When the landlord applies for a court order, the military tenant or his dependents may request that the court stay the eviction. The law directs the courts to grant such stays, "unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service." 50 U.S.C. § 530 (b). Stays under Section 530 (b) may last a maximum of three months. The law assumes that three months is ample time for military tenants to secure alternative living arrangements.

In a similar vein, proprietors of storage facilities may not “exercise any right to foreclose or enforce any lien for storage of household goods, furniture, or personal effects of a person in military service” without a court order. 50 U.S.C. § 535 (2). The court may order foreclosure on a storage lien if, “in the opinion of the court the ability of the defendant to pay the storage charges due is not materially affected by reason of his military service.” *Id.* Protections for a military person’s stored property lasts throughout the period of military service and for three months thereafter. Under this provision the court may fashion an equitable remedy “to conserve the interests of all parties.” *Id.*

The provisions addressing landlords and proprietors of storage facilities have teeth. A person who evicts a service member or takes possession of a service member’s personal property without a court order can be fined or imprisoned up to one year, or both. *See* 50 U.S.C. §§ 530 (c) & 535 (3).

Yet, landlords need not worry about military tenants who fail to pay the rent. A landlord whose rental proceeds are adversely affected because a military tenant is unable to pay rent is entitled to relief with respect to the rental property. The relief available to a landlord is “similar to that granted to persons in military service . . . [and] to such extent and for such period as may appear to the court to be just.” 50 U.S.C. § 530 (b). Thus, if a military tenant’s failure to pay the landlord adversely affects the landlord’s ability to meet his mortgage on the rental property, the landlord is entitled to relief from that mortgage just as if he were in military service.

Aside from the ability to stay an eviction, military tenants may unilaterally terminate rental leases if, after the execution of a lease, the lessee is ordered to active duty. 50 U.S.C. § 534 (1).

A service member may terminate a rental lease any time after receiving an order to report to active duty. Termination of a rental lease is accomplished by delivering notice in writing to the lessor or the lessor's agent. Placing a properly stamped and addressed letter in the United States mails satisfies the written notice requirement. 50 U.S.C. § 534 (2). The actual termination date of a lease depends on the type of lease involved, but normally takes effect at the end of the monthly billing cycle following the notice of termination. *Id.*

The right of a person ordered to active duty to unilaterally terminate leases is broad, and extends to "any lease covering premises occupied for dwelling, professional, business, agricultural, or similar purposes." 50 U.S.C. § 534 (1). Further, a person in active duty does not have to demonstrate the value of the lease or show that military service has materially affected the lessee's ability to pay.

Landlords or proprietors of storage facilities are prohibited from keeping the military lessee's property in an attempt to collect on a canceled portion of a lease. A person who knowingly takes or interferes with the military personnel's property in order to collect on a canceled lease can be fined, imprisoned for up to a year, or both. 50 U.S.C. § 534 (3).

Mortgages

If foreclosure proceedings begin because military service prevents a person from satisfying the terms of a mortgage on real or personal property, the service member may request the court to stay the foreclosure proceedings. Such a stay is available only if the obligations arising under the mortgage originated before military service began. Once again, the court should grant a stay unless military service has not materially affected the person's ability "to comply with the terms of the obligation." 50 U.S.C. § 532 (2). In lieu of a stay, the court may

fashion an equitable remedy to dispose of an obligation if that remedy “conserve[s] the interest of all parties.” *Id.*

Installment Contracts

A person who started payments on an installment contract for the purchase of real or personal property before being ordered to active duty is protected from a diminished earning capacity due to military service. Neither real nor personal property may be repossessed for nonpayment without an order from a court of competent jurisdiction authorizing the seller’s repossession. 50 U.S.C. § 531. When considering a seller’s application to repossess property, a court has the option of (1) ordering the party seeking repossession to repay a just sum to the person in military service before retaking possession of the property, (2) staying the proceedings, or (3) ordering appropriate equitable relief. Stays should be granted unless the court finds that military service has not materially affected the person’s ability to comply with the terms of the contract. A person who knowingly repossesses property without a court order can be punished with fines, a term of imprisonment not to exceed one year, or both. *Id.*

Even when a proceeding to foreclose a mortgage on personal property is stayed, the court retains the option of ordering repossession of personal property. The court may order repossession “unless in its opinion an undue hardship would result to the dependents of the person in the military service.” 50 U.S.C. § 533. Service members or their dependents bear the burden of demonstrating an undue hardship. Before ordering repossession of personal property during a stay, the court must first “appoint three disinterested parties to appraise the property.” *Id.* Based upon that appraisal, the court must order a just sum to be paid to the person in military service or his dependent as a condition of repossession. *Id.*

Nothing in the Civil Relief Act prevents the parties from modifying the terms of a financial obligation after a person has entered military service. 50 U.S.C. § 517. However, one should bear in mind that when contracts are renegotiated and reduced to writing after joining the military, the resulting contract waives the protections offered under the law.

Insurance

Life insurance, professional liability insurance, and health insurance are addressed under the Civil Relief Act. People entering active duty who have life insurance policies may suspend the payment of their premiums under the law by writing to their insurers and the Secretary of Veterans Affairs requesting that the law's protections be implemented. 50 U.S.C. § 541. The Secretary of Veterans Affairs then determines whether that person's policy qualifies for government protection. 50 U.S.C. § 543. If the policy qualifies for protection, nonpayment of premiums cannot terminate the policy while a person is in military service or for two years thereafter. *Id.* During that time frame, the United States guarantees that a service member's premium payments will be made to the insurer. 50 U.S.C. § 546. However, the insured ultimately remains liable for all the payments plus interest.

Upon maturation of a life insurance policy due to a death or other qualifying event while the United States guarantees the premium payments, the insurer must settle the policy by deducting from its proceeds the outstanding premiums, plus associated interest. 50 U.S.C. § 545. When a policy is still in effect two years after an insured's military service has ended, the outstanding premiums then due on the policy are settled in one of two ways. If the cash surrender value of the policy exceeds the value of the premiums and interest then due, the outstanding amount due is treated as a loan on the policy. 50 U.S.C. § 546. In that circumstance the

outstanding debt is resolved between the insurer and insured. If, however, the cash surrender value of the policy is less than the amount of premiums and interest then due, the policy terminates and the United States pays the insurer the difference. Under the law the United States expressly reserves the right to recover payments made to the insurer from the insured. *Id.*

Likewise, a person called to active duty may suspend any professional liability insurance and premiums for the duration of military service. 50 U.S.C. § 592. The right to suspend professional liability insurance extends to health-care and other service providers whom the Secretary of Defense determines to be professionals. An insurer must grant suspensions of professional liability insurance upon receipt of a written request from the insured. Suspended policies are renewed only if the military professional requests reinstatement of the policy within 30 days of the end of the professional's military service.

Similarly, if a person's health care insurance terminates after being ordered to active duty, that person may have the health insurance reinstated once released from active duty. 50 U.S.C. § 593. Except in limited circumstances, an insurance carrier cannot impose a waiting period for the reinstatement of health insurance. 50 U.S.C. § 593 (b).

The Uniformed Services Employment and Re-Employment Rights Act.

Federal law requires employers to hold jobs for employees who have been ordered to active duty or have decided to leave a job temporarily to join the military in a non-career capacity. Under the Uniform Services Employment and Re-Employment Act (the "Act"), refusing employment or otherwise discriminating against an employee returning from temporary military service is prohibited.

Who Qualifies for Re-Employment under the Act?

An employed person who reasonably expects to hold a position with an employer for the indefinite future or a significant period of time notwithstanding military service qualifies for re-employment protection. 38 U.S.C. § 4312 (d)(1)(C). To secure re-employment rights under the Act, an employee must first provide advance written or verbal notice to the employer that the employee will serve in the military and return to the employer after the employee's military service is complete. 38 U.S.C. § 4312. As long as the employee leaves the military under favorable conditions, such as a general or honorable discharge, the employee may assert the right to re-employment. 38 U.S.C. § 4304.

Re-employment rights are perfected when an employee submits an application for re-employment to the employer. 38 U.S.C. § 4312 (e). Applications for re-employment are time sensitive, and are tied to the amount of time a person spent in military service. A person who spent more than 180 days in active duty has 90 days following the end of military service to submit an application for re-employment. For military service lasting from 31 to 180 days, an employee must submit an application for re-employment to the employer "not later than 14 days" after the military service ends. 38 U.S.C. § 4312 (e)(1)(C). A person who served less than 30 days in the military must report for re-employment on the first full day of work following the trip home from military duty. For service members who are disabled as a result of military service, applications for re-employment may be filed after that person's rehabilitation ends, up to a maximum of two years. 38 U.S.C. § 4312 (e)(2)(A). Re-employment rights are not necessarily lost if an application is submitted outside of the listed time frames, but rather become subject to the existing rules and policies of the employer governing absences from work. 38 U.S.C. § 4312

(e)(3).

An employer may deny re-employment to a person under limited conditions. If the employer's circumstances "have so changed as to make such re-employment impossible or unreasonable," the employer may legally avoid rehiring a former employee. 38 U.S.C. § 4312 (d)(1)(A). An employer carries the burden of proving that re-employment was impossible or unreasonable. 38 U.S.C. § 4312 (d)(2). Additionally, an employer is not required to rehire a employee if the cumulative length of an employee's absences due to military service exceeds five years with the employer. In any case, the terms of the Act are liberally construed to promote a service member's re-employment because re-employment is the primary goal of the Act.

What are the terms of re-employment under the Act?

Re-employment is not the equivalent of resuming the employee's former position under the same conditions as when the employee departed. Under the Act, an employee should be rehired in the job that the employee would have been promoted to had that employee never departed for military service. 38 U.S.C. § 4313 (a). Additionally, an employer must allocate a rehired employee the rights of seniority and associated benefits that the employee would have accrued had the employee never left for military service. 38 U.S.C. § 4316. Advancing and promoting an employee in this manner is referred to as the escalator principle, and it is the preferred form of re-employment under the Act. Employers may deviate from the escalator principle only after making reasonable efforts to qualify an employee for the appropriate position—the one the employee would have obtained had the employee not departed for military service. 38 U.S.C. § 4313 (a).

Similar efforts must be made to accommodate an employee who becomes disabled as a result of military service. If reasonable efforts to accommodate a disabled employee fail, then the employer must offer that person a position equivalent in “seniority, status, and pay consistent with circumstance of such person’s case.” 38 U.S.C. § 4313 (a)(3).

Another key component of the Act is job security after re-employment. Depending on the length of military service, an employer can fire an employee returning to work after military service only “for cause.” 38 U.S.C. § 4316 (c). If an employee serves more than 180 days in active duty, an employer can terminate the employee only for cause in the year following re-employment. When an employee serves between 30 days and 181 days in active duty, the employer can terminate only for cause in the 180 days following re-employment. Those provisions apply even in jurisdictions where at-will employment rules prevail, such as New Mexico.

Retirement benefits for those rehired are also affected by the Act. Employers maintaining pension plans are obligated to consider the time an employee spent in military service as time spent with the employer. Thus, once rehired, an employee’s time with the military must be included in the computation of that employee’s pension benefits and vesting periods. 38 U.S.C. § 4318.

Unlike pension plans, health benefits are not tied to re-employment. However, health benefits may be retained only for a limited period of time after departing for military service. Under the Act, an employee may keep the benefits of a former employer’s health plan for up to 18 months after departing for military service. To continue coverage under that plan an employee must pay the full premium for the insurance. 38 U.S.C. § 4317. The full premium

payments cannot exceed 102 percent of the rate the employer charges other employees.

How Is the Act Enforced?

A person experiencing discrimination in the rehiring process should contact the Veterans' Employment and Training Service (VETS). Once a person has made a written request to the Secretary of VETS for assistance, the Secretary must investigate the complaint and provide assistance with the claim. 38 U.S.C. § 4322 (b). The Secretary of VETS must make reasonable efforts to ensure that both parties have complied with the provisions outlined in the Act. Although VETS is usually successful in resolving claims, the agency may refer a claim to the appropriate legal agency for litigation if an employer continues to discriminate in the rehiring process.

The VETS representative in Albuquerque is Sharon I. Mitchell. Any complaints regarding re-employment discrimination in New Mexico should be addressed to her.

Sharon I. Mitchell
Mitchell-Sharon@dol.gov
(505) 346-7502
FAX (505) 346-7503
Veterans' Employment and Training Service
U.S. Department of Labor
501 Mountain Road N.E.
Albuquerque, New Mexico 87102

Mailing address:

P.O. Box 25085
Albuquerque, New Mexico 87125-5085

A person may commence a civil action without the aid or intervention of VETS. A person who retains private counsel and prevails on a claim of discrimination under the Act is entitled to

an award for attorney fees, expert witness fees, and other litigation expenses. 38 U.S.C. § 4323

(h)(2). No matter who prosecutes the case, if a court finds that an employer's violation of the Act was willful the usual compensation for loss of wages and benefits may be doubled.

Military personnel who have additional questions concerning their legal rights should call the State Bar's Lawyers Care Referral Program for assistance. The telephone number for the Albuquerque calling area is 797-6077. Callers from outside the Albuquerque area should dial 1-888-876-6227 for toll free assistance.