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AMERICAN BAR ASSOCIATION

**General Practice,
Solo & Small Firm
Division**

**Serving Those Who Serve Our Country:
Military Issues**

**Saturday, October 17, 2009
9:45 a.m. - 10:45 a.m.**

**2009 Fall Meeting and
National Solo and Small Firm Conference
October 16 - 17, 2009
Millennium Biltmore Hotel
Los Angeles, CA**



Henry M. DeWoskin is a partner at the law firm of Alan E. DeWoskin, P.C. in St. Louis, Missouri. His practice consists of family law, military law, wills, estate planning, probate, social security and general civil litigation. Henry is admitted to practice law in Missouri, Illinois, the U.S. Supreme Court, U.S. Federal District Court, Eastern District of Missouri, and the United States Court of Appeals for the Armed Forces.

Henry is a member of the American Bar Association, the Missouri Bar, the Illinois State Bar Association, and the Bar Association of Metropolitan St. Louis. He holds multiple leadership positions in the Section of Family Law, General Practice, Solo & Small Firm Division and the Young Lawyers' Division of the American Bar Association (ABA) and the Bar Association of Metropolitan St. Louis. Currently, he serves as Vice-Chair of the Membership Board for the ABA General Practice, Solo & Small Firm Division, serves on the ABA Section of Family Law Council, is the ABA Young Lawyers Division Liaison to the Section of Family Law and is a member-at-large of the Board of Governors for the Bar Association of Metropolitan St. Louis.

Further, Henry has taught seminars for the Missouri Bar, the Bar Association of Metropolitan St. Louis, the Illinois State Bar Association, Indiana State Bar Association and the U.S. Army Reserve on topics including Divorce, Paternity and the Military, Military and Family Law, Military Support, the Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act.

He is a Major in the Judge Advocate General's Corps in the United States Army Reserve. Henry received his B.A. from Bucknell University in 1992 and his J.D. from Temple University in 1996.



Joseph (Joe) A. DeWoskin is a partner in the law firm of Waits, Brownlee, Berger & DeWoskin in Kansas City, Missouri. He practices in the area of family law, military law, debt collection, landlord/tenant, personal injury, Uniform Services Employment and Reemployment Rights Act (USERRA), and general civil litigation. Joe is admitted to practice law in Missouri, Kansas, the U.S. Supreme Court, U.S. Federal District Court, U.S. Federal District Court of Kansas, United States Army Criminal Court of Appeals, and the United States Court of Appeals for the Armed Forces.

He is a member of the American Bar Association (General Practice, Solo & Small Firm Division and Family Law Section), the Missouri Bar, the Kansas Bar, the Kansas City Metropolitan Bar Association, the Johnson County (KS) Bar Association, and the Creditors Rights and Assets Protection Group. Joe holds multiple leadership positions, including Chair-Elect, in the General Practice, Solo & Small Firm Division (GPSolo) of the American Bar Association. He currently serves on the ABA Standing Committee on Armed Forces Law. Joe has taught seminars for the Missouri Bar, the Indiana Bar, the Creditors Rights and Asset Protection Group and the United States Army Reserves on topics including Divorce, Military Issues in Divorce, Military Family Support, Creditor and Debtor Rights Under the Servicemembers Civil Relief Act (SCRA), USERRA, and the SCRA.

He has also been retained as an expert and has testified as an expert in cases involving the division of military retirement, SCRA, and rights under the Uniformed Services Former Spouses Protection Act.

He currently holds the rank of Lieutenant Colonel in the Judge Advocate General's Corps in the United States Army Reserve. He received his B.A. from Washington & Jefferson College in 1988 and his J.D. from the University of Missouri-Kansas City in 1991.

HELPING THOSE WHO
SERVE OUR COUNTRY



Presented by: Joseph A. DeWoskin and Henry M. DeWoskin

THE
SERVICEMEMBERS
CIVIL RELIEF ACT

50 US Code Appendix 501 *et seq.*

A SHIELD NOT A SWORD





U.S. SUPREME COURT

“Protect those who have been obliged to drop their own affairs to take up the burdens of the nation”

Boone v. Lightner 319 U.S. 561, 575 (1943)



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2008 AMENDMENTS

- Added the phrase “including any child custody proceeding” to the applicability section of §521 Protection of Servicemembers Against Default Judgments

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“Who’s covered by the SCRA?”

- Active duty servicemember [SM]
- Mobilized Guard/Reserve
- Nat. Guard [Title 32, federal emergency & funds]
- Dependents
 - SM’s spouse or child
 - Person that SM provided more than 1/2 support for 180 days preceding application for relief under act

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DEFINITIONS §511

“Court”

- Court
- Administrative Agency
- Whether or not of record
- Mandatory arbitrations in employment agreements are NOT covered by SCRA

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DEFINITIONS (con't)

- “Judgment” – defined for the first time
 - “Any judgment, decree, order or ruling, final or temporary.”
 - (2004 technical amendment)

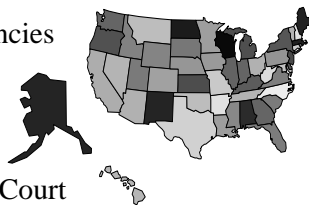
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JURISDICTION §512

- All U.S. Courts & Administrative Agencies

- Civil Cases Only

- May apply to ANY Court which would otherwise have jurisdiction



RESERVES ORDERED TO DUTY -- §516

- **Members of Reserve component entitled to protection of SCRA from receipt of mobilization orders**
 - **Allows for time to put affairs in order**
 - *Make sure servicemembers understand the effective date of their protection under the SCRA*

WAIVER OF RIGHTS -- §517

- **Member may waive protections**
- **Waiver must be in a separate writing, not less than 12 point type (2004 technical amendment)**
 - ♦ **Contract, lease or bailment**
 - ♦ **Mortgage, trust, deed, lien, other security**
 - ♦ **Repossession, retention, foreclosure, sale, forfeiture, taking possession of property**
- **Must be made during or after period of service**

EXTENSION OF PROTECTION §§514 and 538

- **§514 - Citizens of the U.S. serving with allied forces if service similar to “military service”**
- **§538 - Dependents of SM if dependents ability to comply is materially affected by SM’s military service they may apply for the protections found in Title III**

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PROTECTION AGAINST DEFAULT JUDGMENTS

- Plaintiff's Affidavit, Certificate, etc.
 - Defendant not in military, and
 - Factual basis; or
 - Unable to determine status - court may require plaintiff to bond
- Court-Appointed Attorney before entering default
 - Duties? Payment?

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CERTIFICATES OF SERVICE §582

- **A Certificate of the Service Secretary shall be prima facie evidence as to all aspects of a person's military service, or non-service.**
- **Such a certificate shall be furnished upon application (by whom???) – try DMDC**
- **A SM missing in action is presumed to continue in service until accounted for.**



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PROTECTION AGAINST DEFAULT JUDGMENTS 50 USC App. §521

- Court **SHALL** Stay Proceedings
 - Minimum 90 Days
 - Application of counsel or court’s own motion
- When Court Determines
 - May be a defense that cannot be presented w/o presence of Defendant, OR
 - After due diligence counsel has been unable to contact Defendant or otherwise determine if a meritorious defense exists

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PROTECTION AGAINST DEFAULT JUDGMENTS 50 USC App. §521

- Court shall reopen when...
 - SM applies on Active Duty or within 90 days thereafter, and shows
 - Material effect, plus
 - Meritorious defense



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What is “Material Effect”???

- No single definition
- Impairment of ability to participate in civil suit due to military duties -OR-
- Impairment of ability to pay financial obligations



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Stay of Proceedings - § 522

- Applies to plaintiffs and defendants (2004 technical amendment)
- Temporary delay in lawsuit till SM can appear -
 - During period of service + 90 days
 - SM has received notice of proceeding
 - Applies at any stage of proceedings



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Stay of Proceedings - 50 USC App 522

- Automatic 90 day stay if:
 - SM shows military duty materially affects ability to appear, and date when can appear
 - Commanding officer writes letter stating duty prevents appearance and leave not authorized

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STAY OR VACATION OF JUDGMENTS §524

If military service materially affects compliance with judgment or order

- Court ***SHALL*** on application of SM
 - Stay execution; ***and***
 - Vacate or stay attachment or garnishment
- Court may also act on its own motion

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STATUTE OF LIMITATIONS §526

- Any statute of limitations is tolled during military service
- Does not apply to IRS
- Material affect NOT required

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MAXIMUM RATE OF INTEREST §527

- PRE-SERVICE loans incurred by SM, or SM and spouse jointly
 - But not guaranteed student loans (20 USC §1078(d))
- Cap of 6% per annum; all excess FORGIVEN
- Have to recompute payments at 6% rate
- Cap rescinded if creditor shows no material affect
- SM must give written notice w/copy of orders
- Private right of action – *Cathey v. First Republic Bank*
2001 U.S. Dist. LEXIS 13150

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2008 Amendments to §527

- Two kinds of obligations or liabilities now defined:
 - Obligations secured by a mortgage, trust deed or other security in the nature of a mortgage
 - All other obligations
- For obligations secured by a mortgage, the duration of the 6% cap is now extended to *one year after REFRAD*
- For all other obligations, the 6% cap ends at REFRAD

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HOW TO ENFORCE 6% CAP?

- Notify Lender – See Section 527(b)(1) Notice
- What if Creditor Ignores Your Notice
 - Send Notice and just pay loan at the 6% interest rate amount amortization, and let the lender sue the soldier for default. Then counterclaim/defend raising SCRA.
 - Possible DOJ assistance?
 - Sue the lender for SCRA non-compliance

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EVICCTIONS & DISTRESS §531

- Can ONLY evict upon court order
 - Applies to SM or dependents
 - Residential rent does not exceed \$2,932.31/mo (in 2009) (Consumer Price Index adjusted)
 - Ability to pay materially affected by service
 - Court SHALL stay for minimum 90 days, or
 - Adjust the lease obligations
- Criminal sanctions for violation
- *Dependents have right to invoke*

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INSTALLMENT CONTRACTS FOR PURCHASE OR LEASE §532

- In event of breach of pre-service contract, no termination or repossession of property without court order
- Purchase, lease, or bailment of real or personal property
 - Payment or deposit made prior to service
- Misdemeanor offense for violation
- After hearing, a court may order repayment to SM to terminate contract, or
- SHALL stay the proceeding if SM's ability to comply is materially affected and SM applies– length of stay determined by Court
- May stay on court's own motion

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MORTGAGE FORECLOSURE PROTECTION §533

- **NO FORECLOSURES ON PROPERTY OWNED PRIOR TO ENTERING SERVICE WITHOUT A VALID COURT ORDER**
 - No self help foreclosures – EVER!!!!
- **2008 Amendment extends the protection against non-judicial foreclosures *until 9 months after REFRAD***
- **Federal misdemeanor for violation**
- **Bona fide third party purchasers are protected if property seized in violation of SCRA is sold to them**

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TERMINATION OF PREMISES LEASES

- **Applies to pre-service leases of premises (rent cap of \$2,932.31 for 2009); or**
- **Premises leases signed by SM (or on SM's behalf) after entering military service when SM receives PCS orders or deployment orders for not less than 90 days**
- **Qualifying lease is terminated by delivery of written notice with copy of orders to lessor or lessor's agent (hand delivery, mail, FedEx)**
- **Termination by SM also terminates lease co-signed by spouse (2004 technical amendment)**

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TERMINATION OF VEHICLE LEASES

- **Pre-service vehicle leases**
 - If SM is called up or enters service for 180 days or more; or
- **Vehicle lease executed after service commences if:**
 - SM receives OCONUS PCS orders or
 - SM receives deployment orders for period of 180 days or more
- **Notice of termination must be in writing, delivered to lessor (or lessor's agent or grantee) along with copy of military orders (by hand, mail or FedEx)**

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TERMINATION OF VEHICLE LEASES (con't.)

- **Vehicle must be surrendered within 15 days of termination notice**
- **Lease terminated effective date vehicle surrendered**
- **No penalties allowed for early termination**
- **Misdemeanor to wrongfully retain personal property or security deposit**
- **Leasing companies were initially clueless of this new section; now have industry and DOD-approved form for cancellation**

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TERMINATION OF LEASES

- **RELIEF TO LESSOR.**—Upon application by the lessor to a court before the termination date provided in the written notice, relief granted by this section to a Servicemember may be modified as justice and equity require.
- **SCRA recognizes right to seek award for consequential or punitive damages “otherwise available under law”**
- **Balloon financing contracts are NOT leases- they look a lot like leases. Ask *who owns the vehicle?***

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New §535A – Cell Phones

- **New §535A added to allow termination or suspension of certain cell phone contracts**
- **Statute added by P.L. 110-389 (*effective 10 Oct 2008*)**
- **Applies to overseas deployment of NLT 90 days or within-CONUS PCS if ability to utilize the service is materially affected**
- **If a CONUS-to-CONUS PCS – provider either terminates the contract or allows suspension with no termination/reinstatement fee**
- **If an overseas deployment, provider suspends the contract until servicemember returns without requiring extension of contract**

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USERRA Background Information

In general, USERRA:

Applies to virtually every U.S. Employer

Prohibits employment discrimination on basis of past military service, and current or future military obligations

Protects reemployment rights for persons absent from employment because of military service

Preserves benefits for persons absent from employment because of military service

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Prerequisites for Coverage

- Civilian job
- Absence due to military service
- Advance notice to employer
- Military service cannot exceed 5 years
- Separation under Honorable conditions
- Report back in a timely manner

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Civilian Job

- Claimant must be “employed by someone else”
- USERRA does NOT cover persons who are:
 - Self-employed
 - Employed for brief, nonrecurrent periods
 - Independent contractors; or
 - Students

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Absence Due to Military Service

- “Service in the uniformed services” includes:
 - Active and Reserve components of the Armed Forces of the United States (to include National Guard duty under Federal authority);
 - Public Health Service;
 - As designated by President in emergencies
 - Voluntary or involuntary callups;
 - Intermittent disaster response service/training
- USERRA does NOT cover national guard duty in state status for disaster relief; riots, etc.

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Advance Notice to your Employer

- Notice can be either verbal or written
BUT
Should be in writing to protect all parties
- No time frame specified in USERRA
- Exception to notice requirement:
“military necessity” or “unreasonableness”

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Military Service Cannot Exceed 5 Years

- The 5 Year Rule: Period of military service cannot exceed 5 cumulative years
BUT
- The 5 year rule does NOT include:
Weekend drills, Annual Training, involuntary recall/retention, and/or service in time of partial mobilization, full mobilization, or presidential selected reserve call-up
OR
Periods of military service with previous civilian employer; there is a separate 5 year clock for each employer

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Discharge Characterization

No USERRA rights if:

- Dishonorable or Bad Conduct Discharge (enlisted)
- Dismissal (officers)
- Under Other Than Honorable Conditions discharge
- Dropped from rolls

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Timely Reporting

- Up to 30 days: report to work after safe travel + 8 hours
- 31 - 180 days: submit application for reemployment w/in 14 days
- 181 days or more: submit application for reemployment w/in 90 days
- If you do not meet the timelines: normal employer rules apply

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Timely Reporting

Disabled / Impaired due to military service:

- Have up to 2 years to request reinstatement
- Employer must make "reasonable accommodations" unless doing so results in an undue hardship

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USERRA Protections

- Protection from discrimination due to military status
- Prompt reemployment / training
- Accrued Seniority
- Health Insurance Coverage
- Special protection from discharge

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Anti-discrimination Provision

“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 a uniformed service *shall not be denied employment, reemployment, retention in employment, promotion, or any benefit of employment* by an employer on the basis of that membership”

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Benefit or Benefit of Employment

“[A]ny advantage, profit privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.”

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Prompt Reemployment

- USERRA: an employee who meets the criteria “upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment.”

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Prompt Reemployment

- USERRA: “a position of employment”
 - Period of service fewer than 91 days
 - Period of service more than 90 days
- Training for your position
- Disability: any other position which is equivalent in seniority, status, or pay, or position that is the nearest approximation to that equivalent

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Seniority

“A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

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Escalator Principal

Escalator Principle:

- Employee put back on seniority escalator at same point he/she would have been had he/she remained continuously employed

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Health Insurance Coverage

If you have a health plan, you are allowed to continue coverage for the least of the following time periods:

- 24-month period beginning on date of service-related absence;
- Period beginning on date of service-related absence and ending on date employee fails to return to employment under USERRA guidelines

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Health Insurance Coverage

If you elect to continue coverage, you must pay the following depending on your length of service:

- Under 31 days: regular employee share of premiums
- 31 or more days: no more than 102% of the full premium under the plan
 - Employee share
 - Employer share
 - 2% administrative costs

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Special Protection From Discharge


Grace Period – Can't be discharged from employment (except for cause)

- < 30 days – no grace period
- 31-180 days – 180 day grace period
- >180 days – 1 year grace period

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Miscellaneous Protections

Some "little known facts."



- Employee can't be forced to use vacation time to perform military service
- Employer, not employee, responsible for covering employee's shift/job (i.e. finding replacement)
- Pension Benefits:
 - Time performing military service counts toward pension "time" requirements;
 - Soldier must make contributions if that is part of plan

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Employer Defenses

- Employer Change in Circumstances [Impossibility Defense]
- Undue Hardship on Employer
- Brief and Nonrecurrent Employment
- Burden of Proof: On employer

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Employer Support of the Guard and Reserve (ESGR)

- Primary initial point of contact
- National Committee for Employer Support of the Guard and Reserve
1555 Wilson Blvd, Suite 200
Arlington, VA 22209-2405
- Phone: 1-800-336-4590
- Website: www.esgr.org

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Department of Labor – Veterans’ Employment and Training Service (DOL-VETS)

- U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210
- 1-866-4-USA-DOL
- Website: www.dol.gov/vets/welcome.html

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Private Lawsuit to Enforce USERRA

- If you decide not to use ESGR, VETS, or Attorney General assistance, you can still file a private lawsuit
 - State employee, file suit in state court
 - Private employee, file suit in Federal court
 - Federal employee, special rules apply

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QUESTIONS???

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