

**EXPANDING THE UNIFORMED SERVICES EMPLOYMENT AND
RE-EMPLOYMENT RIGHTS ACT TO INCLUDE EMPLOYMENT LEAVE FOR
SERVICE MEMBERS' FAMILIES**

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*A time of war is a time for sacrifice, and the greatest burden falls
on military families.*

President George W. Bush¹

Stunned, Suzette Boler hung up the phone, dropped to the floor, and cried for two hours. She had just been fired for missing work and asked to come and collect her things. Boler's husband of 22 years had recently been called by the Indiana National Guard unit to active duty. He would be guarding convoys from insurgent attacks in Iraq, and Boler - a part-time receptionist at Benefits Management Administrators Inc. - was given the week off from work to prepare for her husband's departure.

Boler sent her husband off on Sunday, October 16, 2005. She remembers being asked - not told - to return on Monday, October 17. Feeling emotionally drained, Boler decided to wait until Tuesday to return. She was fired before she could follow through with this plan.

Boler's husband's service abroad foreseeably resulted in mental and emotional strain as well as a compounding of home responsibilities. What neither she nor her husband knew was that she would also have to deal with the crisis of being unemployed at this precarious time.²

Recently, there have been dramatic increases in the numbers of military personnel deployed overseas. Hundreds of thousands of families have watched loved ones go to war, unsure if and when they will return.³ Currently, the only federal employment protections relating to military service are provided by the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). USERRA has proven beneficial in protecting the employment of Reservists themselves. However, as Susan Bowler's case shows that Act does not provide for a military service member's family to take leave from employment to cope with, and manage, the new world of emotional, mental, and financial demands which deployment places upon the family.

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1 President's Message to Joint Armed Forces Officers' Wives, Weekly Comp. Pres. Doc. 1589, f44 (Oct. 25, 2005) available at www.whitehouse.gov/news/releases/2005/10/20051025.html.

2 *Woman Sees Husband Off to War, Gets Fired*, WASHINGTON POST, Oct. 26, 2005, available at www.washingtonpost.com.

3 U.S. Government Accountability Office, Military Personnel; DOD Needs More Data Before It Can Determine if Costly Changes to the Reserve Retirement System Are Warranted, GAO-04-1005, at 5 (2004), available at www.gao.gov/htext/d041005.html.

The plight of military families has been recognized by lawmakers at both the federal and state level. In 2003, and again in 2005, Senator Feingold introduced the Military Family Leave Act - legislation that sought to extend entitlement leave to family members of deployed soldiers by amending the Family and Medical Leave Act ("FMLA").⁴ Unfortunately, ambiguities in the FMLA itself have prevented the proposed amendment from becoming law. Meanwhile, state legislation addressing the problem without reliance on the FMLA has been successfully implemented in Illinois.

This article is an effort to learn from the failures of FMLA-based Military Family Leave Act and a call to extend federal employment protection to the families of uniformed service members through an amendment, not to the FMLA, but to the USERRA. Section I sets the foundation for the article, by explaining that the fundamental purpose of federal employment protection legislation relating to military service is to encourage volunteer military service by limiting the disruption to civilian employment caused by such service. It explores the burden military service places on the family of a deployed soldier and argues that the goal of minimizing the disruption to civilian employment caused by deployment is more effectively served if employment protection is extended to service members *and their families*. Section II discusses failed federal efforts to provide employment protection to military families through amendments to the FMLA and explains that these failures are the result of problems with the FMLA itself. Section III reviews the recent Illinois Military Families Leave Act - state legislation that has successfully achieved the goal of providing military families with a limited right to employment leave without reliance on the FMLA. Finally, Section IV advocates using the Illinois Military Families Leave Act as a template to expand the employment protections offered through USERRA, instead of the FMLA, so that the family members of our nation's part-time military force are provided with some much-needed leeway as they deal with the directly with the burdens of war.

I. THE NEED FOR FEDERAL EMPLOYMENT LEGISLATION PROTECTING FAMILY MEMBERS OF DEPLOYED SOLDIERS

During the early years of the Revolutionary War, John Adams ushered through the Continental Congress a statute that provided Patriot soldiers greater benefits for their service.⁵ Consequently, enlistment in the army increased and the American Revolution was successful.⁶ The legislation championed by Adams clearly demonstrates the role of government-created incentives in national defense. The concept is not difficult to grasp: the more benefits a uniformed service member is given, the more willing that service member will be to enlist and re-enlist. Similarly,

4 The Military Families Leave Act, S. 683, 108th Cong. (2003). The Military Families Leave Act, S. 798, 109th Cong. (2005).

5 WILLIAM MCCULLOUGH, JOHN ADAMS (2003).

6 *Id.*

as the burden of military service increases, a service member will become less and less likely to enlist.

Following John Adams's example, for almost a century, our government has used employment protection incentives to encourage participation in the military. Currently, the provisions of USERRA offer a variety of employment protections to the service members themselves. However, the lives of military family members are also severely disrupted when a family member is called to active duty. Federal employment protection that would provide family members of a deployed soldier the right to temporary employment leave is important if our nation hopes to maintain an environment in which volunteer military service will flourish.

A. *The History and Purpose of Federal Employment Legislation Relating to Uniformed Service.*

The roots of military reemployment statutes stretch back to the 1940's,⁷ when Congress enacted the Selective Training Service Act ("STSA") on behalf of potential World War II draftees.⁸ In 1973, the conclusion of the Vietnam War marked the end of the draft, resulting in an increase in dependence on civilian soldiers.⁹ Thrown into the business of marketing military service, Congress passed the Vietnam Era Veterans' Readjustment Assistance Act ("VRAA") in 1974 to provide reservists additional employment protections.¹⁰

The VRAA was not seriously tested until over 220,000 volunteer soldiers returned from the Persian Gulf War.¹¹ Many or most of these soldiers sought their former jobs¹² and, though the VRRA was helpful, it failed in some key areas. Principally, the VRRA was too complex. Employers did not understand their obligations and veterans did not understand their rights.¹³ The resultant confusion led to the loss of many jobs that otherwise could have been preserved.¹⁴

In 1993, capturing Congress's fear that this would hurt enlistment, Congressman Clement warned:

7 Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. Rev. 55, 56 (1999) (citing the Selective Training Service Act, Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 885 (1940) (formerly codified at 50 U.S.C. app. § 308, repealed by Pub. L. No. 759, § 17, 88th Cong., 2d Sess., 62 Stat. 625 (1948))).

8 The STS A was amended in 1951 and renamed the Universal Military Training and Service Act. In 1967, Congress reenacted employee protection legislation and created the Military Selective Service Act of 1967. In 1971 the Act was renamed as the Military Selective Service Act. *See id.*; *see also Lapine v. Town of Wellesley*, 970 F.Supp. 55, 58 (D. Mass. 1997).

9 *See, e.g.*, Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 Wm. MITCHELL L. REV. 797, 803 (2004); Manson, *supra* note 7, at 57.

10 38 U.S.C. §§ 2021 et seq. (1988); *see* Manson, *supra* note 7, at 57.

11 Manson, *supra* note 7, at 57.

12 Testimony before Senate Armed Services Committee by Stephen A. Duncan, Assistant Secretary of Defense (Reserve Affairs) Dept, of Defense, June 11, 1991.

13 *See* 139 CONG. REC. H2203 (daily ed. May 4, 1993) (statement of Rep. Brown).

14 139 CONG. REC. H2203 (daily ed. May 4, 1993) (statement of Rep. Clement).

If the men and women of the Guard and Reserve are not protected from discrimination or reprisal on the job as a result of their service, it will be increasingly difficult to recruit Americans to serve. This would seriously jeopardize the All-Volunteer Force concept. Many of my fellow Guard members served proudly in the Gulf War. Upon their return, some of these individuals experienced additional hardships and inconveniences in the workplace as a direct result of their deployment overseas. These experiences have caused a great deal of skepticism among the troops and reluctance on the part of others to join the Guard and Reserves.¹⁵

Consequently, "to cultivate voluntary enlistment by minimizing the disruption caused by uniformed service," Congress enacted USERRA to replace the VRRRA.¹⁶ USERRA more effectively minimizes the disadvantages to civilian employment associated with military service by clearly granting service members the right to take leave from civilian employment to serve in the uniformed services.¹⁷ The Act defines "service in the uniformed services" as the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.¹⁸

The right to reemployment after leave is conditioned on the employee's compliance with two procedural requirements. First, the service member must provide his or her employer advance notice of service.¹⁹ Second, when the service member returns from service, he or she must report back to work and apply for reemployment.²⁰ Depending on the length of military deployment, the service member may be required to report back to work as soon as 8 hours after returning from duty.²¹ However, for service members who have spent between 30 and 181 days apart from their families and civilian lives, USERRA recognizes that a period of adjustment will likely be required and allows the service member to wait up to two weeks to reenter the workforce.²² If the service member has been deployed for more than 181 days, he or she has 90 days to reapply for the civilian job.²³

¹⁵ *id.*

¹⁶ See 38 U.S.C.A. §§ 4311(a) (3) and 4301.

¹⁷ 38 U.S.C. § 4312(a); For more in depth discussion of USERRA's reemployment provisions, see Kevin G. Martin, *Employment Law*, 46 SYRACUSE L. Rev. 499 (1995).

¹⁸ 38 U.S.C. §4303(13).

¹⁹ 38 U.S.C. §4312(a)(1).

²⁰ 38 U.S.C. §4312(a)(2).

²¹ 38 U.S.C. § 4312(e)(1)(A)(ii).

²² 38 U.S.C. §4312(e)(1)(C).

²³ 38 U.S.C. § 4312(e)(1)(D).

From its inception, USERRA has proven to be a powerful tool in protecting the employment of reservists and guardsmen. And this protection had undoubtedly had a positive effect on our citizens' willingness to volunteer for part-time military service. However, as discussed below, the service member is not the only person directly affected by a call to active duty.

B. The Burden of Military Service on the Family

The family members of uniformed service members are also faced with serious challenges associated with deployment. The most obvious burden on military family members presents itself in the day-to-day familial responsibilities, which must suddenly be shouldered without the help of the deployed soldier. Many of the new responsibilities are unfamiliar, such as managing finances, repairing a car or a home, mowing the lawn, cooking, feeding children, disciplining children, caring for sick children, maintaining a clean home or caring for elderly family members.²⁴ Juggling new roles and responsibilities can cause an overload, leading to stress, exhaustion, and other physical illnesses, which bring challenges of their own.²⁵ While some have family and friends on whom they can rely, not all families enjoy such a support system. They must "face the day-to-day demands of family life with one less set of hands around the home."²⁶

A service member's deployment can also place an economic burden on the family members left behind. Uniformed service members generally leave more lucrative civilian employment and some leave self-owned businesses,²⁷ which can easily dry up while the boss is out of town.²⁸ Once mobilized, reservists receive active duty pay, which is typically lower than civilian income.²⁹ For example, a Private First Class with 10 years of experience receives \$20,304 a year for active duty pay.³⁰

24 See Julia Whealin & Ilona Pivar, *Coping When a Family Member has been called to War*, www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/familycoping.html (last updated on May 22, 2007). This can be especially difficult if the mother is the one deployed. "During Operation Desert Shield/Storm, more than 40,000 women were deployed, thousands of them mothers with dependent children." *Id.*

25 *Id.*

26 Congressional Record Statement of Senator Russell D. Feingold on the Military Family Leave Act, available at Feingold.senate.gov/statements/05/04/2005510A25.html (last viewed Aug. 21, 2006).

27 Sandra Block, *Reservists Pay Steep Price for Service*, USA TODAY, June 9, 2003, at 1, available at www.usatoday.com/money/world/iraq/2003-06-08-reserve-cover_x.htm; See also Stephen Greenhouse, *After the War: The Reservists; Balancing Their Duty to Family and Nation*, N.Y. TIMES, June 22, 2003, at 114.

28 Part of the reason small businesses may fail while the boss is deployed is due to the loss of customers. Other reasons can be falling behind on bills or the inability of those left at home to run the business. See Block, *supra* note 27, at 3.

29 Active duty pay varies according to the pay grade and number of years of service. Office of the Secretary of Defense, Monthly Basic Pay Table, available at www.defenselink.mil/-militarypay/pay/bp/paytables/FY2006_4Drill.html (last updated Jan. 2006); See Julie N. Lynem, *Wages of War Entry-level Salaries of Troops Barely Higher than a Theatre Usher's*, SAN FRANCISCO CHRONICLE, Mar. 29, 2003, at 2; see also Block, *supra* note 27.

30 Monthly Basic Pay Table, *supra* note 29.

In comparison, a groundskeeper makes \$23,010;³¹ a telemarketer makes \$24,190 a year;³² an elementary school janitor makes \$37,460 a year;³³ and a library assistant makes \$22,940 a year.³⁴ In 2005, the poverty level for a family with three children (equaling five people in the family) was \$22,610, over \$2,000 above the Private First Class's salary.⁵

Also having a "profound financial impact on individual soldiers and their families"³⁶ are problems with pay, such as underpayment or late payments.³⁷ Soldiers and their families can be involved in addressing pay problems for a year or longer, finding their already-trying financial situation more difficult until the money is recovered.³⁸

Finally, military families deal with unique emotional and mental stresses when a family member is deployed. "Fluctuating emotions such as pride, anger, fear, and bitterness" can be common among military family members before, during, and after deployment.³⁹ Feelings of sadness, loneliness, and withdrawal are prevalent as the family members deal with new living conditions and a life without the uniformed family member.⁴⁰ Holidays can be emotionally taxing for military families. The case of Petty Officer 1st Class Jeff McGuffin's family is not unique. McGuffin's wife, Tracy, and son, Michael, have spent three Christmases apart from Jeff since the 2003 U.S. invasion of Iraq.⁴¹ Such repeated absences during holidays and birthdays can cause children to doubt the absent parent's love.⁴² When things become too emotionally challenging, mental illness often arises.⁴³

Aggravating the psychological strain on family members even further is the indefinite length of service required of uniformed service members.⁴⁴ At the introduction of the War on Terror, service members were promised they would not

31 U.S. Dept. of Labor, Bureau of Labor Statistics, May 2006 National Occupational Employment and Wage Statistics, available at www.bls.gov/oes/current/oes_nat.htm.

32 *Id.*

33 *Id.*

34 *Id.*

35 Federal Register: Feb. 18, 2005 (Volume 70, Number 33), Annual Update of the HHS Poverty Guidelines, Department of Health and Human Services, aspe.hhs.gov/poverty/05fedreg.htm.

36 *Id.* at 2.

37 95 percent of those reservists audited, as part of a study done by the GAO, have experienced at least one problem with their pay. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, MILITARY PAY: ARMY RESERVE SOLDIERS MOBILIZED TO ACTIVE DUTY EXPERIENCED SIGNIFICANT PAY PROBLEMS, GAO-04-990T 4 (2004), available at www.gao.gov/htext/d04990t.html.

38 *Id.* at 4.

39 Whealin, *supra* note 24.

40 *Id.*

41 Steve Liewer, *Military Families, Separated by Deployments, Try to Find Ways to Cope During Holidays*, OPERATION HOMEFRONT NEWS, Dec. 24, 2005, available at www.operationhomefront.net/news.asp (last viewed Aug. 24, 2006).

42 Petty Officer 2nd Class William Ashley has missed all six of his six-year-old daughter's birthdays. Sometimes her mother finds her crying because she wants her daddy to come home. *Id.*

43 There are a "growing number of military families who find themselves dealing with what psychologists are beginning to recognize as Secondary Traumatic Stress Disorder." See Peter Gorman, *The Families*, ALTERNET, Mar. 18, 2005, www.altemet.org/story/21534.

44 Jim Kendall, *Deployment Stress*, www.vanderbilt.edu/HRS/wellness/WLC-EAP/wlcedepstress.pdf.

spend more than a year overseas. That promise has since been retracted, and when called to active duty overseas, most soldiers spend eighteen or more months in combat zones.⁴⁵ Additionally, many have had their stays extended beyond their deployment instructions.⁴⁶

In sum, military families are faced with serious challenges when a family member is deployed. Mentally, emotionally, temporally, and financially, family members are often pushed to their limits.

C. The Need for Employment Legislation Providing Military Family Members with the Right to Take Limited Leave.

When the significant burdens faced by the family members of a soldier called to active duty are considered, it is difficult to argue that USERRA alone achieves its goal of encouraging military enlistment by “eliminating the disruption to civilian employment caused by uniformed service.”⁴⁷ A deployed reservist will no doubt be troubled by workplace issues affecting a spouse and the struggle faced by family members can tip the scale when an individual decides whether to volunteer as a part-time soldier.⁴⁸ Staff Sgt. Noel Cortez presents a perfect example. A twice-deployed uniformed service member with a wife and two sons, Sgt. Cortez decided that it was time to “take a break” from the Reserves after seeing the hardship that his absences imposed on his family. “I wasn’t there for a whole year and I missed a whole lot,” said Cortez, who plans to attend college in January and become a nurse. “I don’t want to go through it again and I don’t want them [his family] to go through it again.”⁴⁹

Those responsible for military recruitment clearly recognize the relationship between family protection and military enlistment. The Assistant Secretary of Defense for Reserve Affairs, Thomas F. Hall, describes the successful military recruitment environment as a “three-legged stool”: the soldier, the family, the civilian employer. “If any of those legs fall off the stool tilts over.”⁵⁰

As Defense Secretary Hall’s stool analogy so aptly illustrates, protecting the employment of reservists, while ignoring the employment-related stresses of military families, fails to adequately encourage military enlistment. The right for employees to take leave to address issues related to the deployment of a family member seems small compared to the struggles through which military families must pass. But it would help. Providing additional protections for families of uniformed service members is a key move for the government to fulfill its duty to edify a wall of security about its citizens. By helping military families, Congress is cultivating the

45 See Jack Kelly, *Reserve, Guard Unit Tours Extended*, POST-GAZETTE, Sept. 10, 2003, available at www.postgazette.com/pg/03253/220169.stm.

46 Congressional Record Statement of Senator Russell D. Feingold, *supra* note 26.

47 See 38 U.S.C.A. §§ 4311(a) (3) and 4301.

48 See Dave Montgomery & Kevin G. Hall, *Leaned On as Never Before, Reservists Weigh Re-Enlistment*, MCCLATCHY TRIBUNE, Dec. 10, 2006, www.mcclatchydc.com/staff7dave_montgomery/story/15375.html.

49 *Id.*

50 *Id.*

ground on which an all-volunteer military can blossom. This issue is of utmost importance, and the status quo is simply unacceptable.

II. THE MILITARY FAMILIES LEAVE ACT: FAILED EFFORTS TO EXTEND THE AMBIGUOUS PROTECTIONS OF THE FMLA TO MILITARY FAMILIES

The need to provide the family members of deployed uniformed service members the right to limited employment leave has not gone unnoticed by federal law makers. In 2003, and again in 2005, Senator Feingold introduced the Military Families Leave Act, which sought to amend the FMLA by extending employment leave entitlement to a category of military family member employees.⁵¹ Unfortunately, Senator Feingold's amendment failed both times. A review of both the FMLA and the path the *Feingold Amendment* followed on its way to extinction shows that FMLA-based legislation is not an effective way to extend employment protection to the family members of our soldiers.

A. *The Family and Medical Leave Act*

At approximately the same time USERRA was enacted, and for purposes unrelated to military preparedness, Congress enacted the FMLA.⁵² As "[t]oday's families are challenged as never before to balance the difficult demands of the workplace with tremendous responsibilities of caring for family members,"⁵³ the FMLA was designed to ameliorate work/family tension caused by the increasing numbers of working mothers and dependent elderly family members.⁵⁴

Congress's hope was that the statute would benefit both employers and employees.⁵⁵ Employers would benefit from happier, more loyal and productive employees and employees would enjoy job security and a better home life.⁵⁶

51 The Military Families Leave Act, S. 683, 108th Cong. (2003); The Military Families Leave Act, S. 798, 109th Cong. (2003).

52 The Family and Medical Leave Act, 29 C.F.R. § 825.101(a) (1993). In 1993, President Bill Clinton enacted the FMLA by signing this Act as his first piece of legislation while in office. Shelly B. Kroll, *An Employee's Perspective on the Family and Medical Leave Act*, 38-OCT B. B.J. 4,4 (1994).

53 U.S. Office OF Personnel Management, Review of Federal Family-Friendly Workplace Arrangements, available at fehb.opm.gov/wrkfam/report.txt (July 1998).

54 The Family and Medical Leave Act, 29 C.F.R. § 825.101 (1993); see Stephanie C. Bovee, *The Family Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection*, 7 WM. & MARY J. WOMEN & L. 1011, 1015 (2001). Historically, women have had to bear the majority of the responsibilities of the household. Although common household chores such as laundry, cooking, and cleaning have also traditionally fallen on women, the big responsibility that often conflicts with the working mother is caring for sick children. Parents have to leave their place of employment to take a sick child to the doctor or to stay home with the sick one; however, if employment conditions do not allow the employee to do so, health conditions may actually become worse. Research shows that "parental presence helps children recover more rapidly from illnesses and injuries" and the absence of parental presence is detrimental to a sick child's health. JODY HEYMANN, ALISON EARLE, STEPHANIE SIMMONS, STEPHANIE M. BRESLOW, & APRIL KUEHNHOFF, THE WORK, FAMILY, AND EQUITY INDEX: WHERE DOES THE UNITED STATES STAND GLOBALLY 20 (Harvard School of Public Health, n.d.) available at www.hsph.harvard.edu/globalworkingfamilies/images/reportpdf.)

55 29 C.F.R. §825.101 (c)(1993).

In order for the FMLA to apply, an eligible employee must work for a covered employer.⁵⁷ Covered employers employ 50 people for at least 20 work weeks in a calendar year⁵⁸ and have worked for the employer for at least 12 months and 1250 hours.⁵⁹ If both employee and employer are covered, the employee is eligible for benefits.

When exercising FMLA rights, the employee must provide notice to the employer of her intent to take FMLA leave.⁶⁰ If the need is foreseeable, the employee must give notice at least 30 days in advance.⁶¹ In emergencies, the employee must give the employer whatever advance notice is possible and practical.⁶² Once the employer receives and approves the notice, the employee can take FMLA leave.

Under the FMLA, an employee is entitled to 12 weeks of unpaid leave in a 12-month period.⁶³ This leave can be taken all at once or intermittently, as needed.⁶⁴ FMLA leave can be taken: 1) for the birth of a child or to care for a newborn child, 2) for the placement with the employee of an adopted or foster care child,⁶⁵ 3) to care for a family member⁶⁶ with a serious health condition,⁶⁷ or 4) because the

⁵⁶ *Id.*

⁵⁷ The Family and Medical Leave Act, 29 C.F.R. § 825.100 (a) (1993). Two-thirds of the U.S. labor force works for employers covered by the FMLA. See Lisa Bomstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 Colum. J. Gender & L. 77, 85 (2000) (quoting A Workable Balance: Report to Congress on Family and Medical Leave Policies 99 (1996)).

⁵⁸ 29 C.F.R. § 825.104 (a). The 50 employees must be employed "for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." *Id.* The 50 employees must be employed within 75 miles of the employee's worksite. 29 C.F.R. § 825.110 (a) (3). As the number of employees can vary from year to year, the "covered employer" status could change for private employers. Public employers, however, are covered on all government levels, local, state, and federal, regardless of the number of employees.

⁵⁹ 29 C.F.R. § 825.110 (a) (1) (2). The 1250 hours must have been worked during the last 12-month period.

⁶⁰ The employee does not need to request FMLA leave by name, but does need to give the employer a sufficient amount of information in order for the employer to know the employee needs FMLA leave. The Family and Medical Leave Act, 29 C.F.R. § 825.302 (c) (1993).

⁶¹ *Id.*

⁶² *Id.*

⁶³ Employers may substitute paid leave if the employee has earned or accrued it or if the employer deems to do so. The Family and Medical Leave Act, 29 C.F.R. § 825.100 (a) (1993).

⁶⁴ 29 C.F.R. § 825.203. This provision is practically beneficial, as the need for parents to take FMLA leave to care for sick children is typically sporadic.

⁶⁵ This Act is a gender-neutral policy, making it equally fair for a man or woman to take time off to care for a newborn child or an adopted child. 29 C.F.R. § 825.112 (b).

⁶⁶ A family member is considered to be a spouse, parent, child, or a legal ward. 29 C.F.R. § 825.100 (a). See also 29 C.F.R. § 825.113.

⁶⁷ A "serious health condition" is an illness, injury, impairment, or physical or mental condition that requires inpatient care or continuing treatment by a health care provider, includes a period of incapacity (inability to work or to perform other regular daily activities due to the serious health condition) of more than three consecutive calendar days and/or treatment two or more times by a health care provider. See 29 C.F.R. § 825.114 (a)(1) (2).

employee's own serious health condition makes the employee unable to perform the functions of his or her job.⁶⁸

Upon her return from FMLA leave, the employer must reinstate the employee to her previously held position⁶⁹ or, if that is not possible, to an equivalent position.⁷⁰ Employers are not allowed to interfere with, restrain, or deny employees the right to exercise their rights to request FMLA leave,⁷¹ and cannot retaliate against an employee for exercising an FMLA right.

B. *The Feingold Amendment*

On March 21, 2003, in an attempt to expand the FMLA to benefit military families, Senator Russ Feingold introduced the Military Families Leave Act of 2003 (*Feingold Amendment*) to Congress. Now known as the Feingold Amendment,⁷² the bill read:

To amend the Family and Medical Leave Act of 1993 to provide entitlement to leave to eligible employees whose spouse, son, daughter, or parent is a member of the Armed Forces serving on active duty in support of a contingency operation or notified of an impending call or order to active duty in support of a contingency operation.⁷³

Intending to disturb the FMLA as little as possible, the proposed amendment did not alter the scope of covered employees or employers,⁷⁴ notification

68 An employee is unable to perform the functions of the position if the health care provider finds the employee is unable to work at all or is unable to perform even one of the essential functions of the position within the meaning of the Americans with Disabilities Act in the regulations at 29 C.F.R. § 1630.2(n). The Family and Medical Leave Act, 29 C.F.R. § 825.115 (1993). See also 29 C.F.R. § 825.112 (stating what kinds of circumstances the employer is required to grant family or medical leave).

69 29 C.F.R. §825.214 (a).

70 29 C.F.R. § 825.214 (a). The position given upon return must be equivalent in pay, benefits, and other conditions of employment. The employer is not required to reinstate the returning employee if the employee would not have been employed at the time of restatement for the following reasons: layoffs, decrease in overtime available, elimination of a job or project, or if the employee was a "key employee." The Family and Medical Leave Act, 29 C.F.R. § 825.216 (a) (1) (2) (b) (c) (1993). A "key employee" is one who is determined to be a salaried employee who is among the highest paid 10 percent of all the employees. 29 C.F.R. § 217 (a). Congress included these provisions in order to protect small businesses from economic hardships, which could occur if the employer was obligated to hold an employee's job when that employee is essential to the life of the business; however, the employer must show that the restoration of an employee will cause "substantial and grievous economic injury" to the nature of the business. 29 C.F.R. § 825.218. It is not valid under the FMLA restrictions to deny an employee the benefit of returning to his/her position just because the employee has been replaced or because the position has been restructured to accommodate the employee's absence. See also 29 C.F.R. § 825.214 (a).

71 The Family and Medical Leave Act, 29 U.S.C.A. § 2615 (a) (1) (1993)

72 *Id.*

73 The Military Families Leave Act, S. 683, 108th Cong. (2003). See, The Military Families Leave Act, S. 798, 109th Cong. (2005).

74 *Id.*

requirements,⁷⁵ or benefits.⁷⁶ Rather, the bill extended FMLA leave entitlement to a new class of covered employees, specifically, family members⁷⁷ of a uniformed service member on active duty in a contingency operation or who has a call to active

duty in a contingency operation.⁷⁸

After its introduction, the Senate adopted the *Feingold Amendment* by unanimous consent, but in November 2003, the amendment was removed from the larger appropriations bill to which it was attached.⁷⁹ Undeterred, Senator Feingold reintroduced the amendment in April 2005.⁸⁰ This time, the bill was referred to the Committee on Health, Education, Labor, and Pensions, but progressed no further.⁸¹ Like its predecessor, the 2005 *Feingold Amendment* is now dead.

C. Obstacles to Amending the FMLA

Providing entitlement leave to military family members by expanding the FMLA's definition of "covered employee" to include families of deploying reservists seems like a good idea considering the qualifications, regulation, and notoriety already established within the Act.⁸² Simply adding one more category of protection to the well-known FMLA would seemingly facilitate a painless transition to protecting the military family. However, it appears that an overarching ambiguity associated with the FMLA has prevented - and will continue to prevent - FMLA-based amendments, even if enacted, from becoming effective law.

A recent study conducted the Society of Human Resource Management ("SHRM") found that 60 percent of HR professionals had problems conforming to the rules and regulations found within the FMLA.⁸¹ In addition, the study found 63

75 Employees should give notice as is "reasonable and practicable." The Military Families Leave Act, S. 683, 108th Cong. (2003).

76 The Military Families Leave Act would require that employees give their employers notice as soon as is practical. The Military Families Leave Act, S. 683, 108th Cong. (2003). In addressing what the amendment does and does not do, Senator Feingold stated, "This amendment does not expand eligibility for FMLA to employees not already covered by FMLA. It does not expand FMLA eligibility to active duty military personnel. It simply allows those already covered by FMLA to use those benefits in one additional set of circumstances - to deal with issues directly related to or resulting from the deployment of a family member." *Statement of U.S. Senator Russ Feingold on FMLA Benefits for the Families of Guardsmen and Reservists*, (Oct. 15, 2003), available at Feingold.senate.gov/speeches/03/10/-_2003A22655.html.

77 Eligible family members include a spouse, son, daughter, or parent of the employee. See The Family and Medical Leave Act, 29 C.F.R. § 825.113 (a) (b) (c) (1993).

78 The employee thus becomes eligible when the family member first receives notification of an order to active duty and eligibility continues throughout the course of the service abroad.

79 The Military Families Leave Act, S. 798, 109th Cong. (2005).

80 S. 798, 109th Cong. (2005)

81 GovTrack.us, available at www.govtrack.us/congress/bill.xpd?bill=s_109-798. It is in the Committee on Health, Education, Labor, and Pensions. Thomas Library of Congress, available at thomas.loc.gov/cgi-bin/query/z?c109:S.+798.

82 The Family and Medical Leave Act, 29 C.F.R. § 825.100 (a) (1993). Two-thirds of the U.S. labor force works for employers covered by the FMLA. See Bomstein, *supra* note 58.

83 Bill Leonard, *FMLA headaches-Family and Medical Leave Act*. HR MAGAZINE, July 1999, available at findarticles.com/p/articles/mi_m3495/is_7_44/ai_55307138.

percent of respondents were frequently uncertain about how to coordinate employee leave under the FMLA, the Americans with Disabilities Act and short-term disability programs.⁸⁴ The Department of Labor's regulations and occasionally conflicting interpretations of the law have resulted in significant administrative challenges, costs, and abuse by a small, but growing, portion of the workforce.⁸⁵

Based on the daunting administrative workload the current FMLA places on business, the US Chamber of Commerce has chosen to speak out forcefully against any amendments to the FMLA until significant revisions are made to clarify and alleviate the large loopholes and definition gaps found in the Department Of Labor's interpretation of the Act.⁸⁶ Many Human Resources Professionals have maintained that expanding the FMLA by way of the *Feingold Amendment* would "add confusion on top of confusion for employers and human resource professionals."⁸⁷ Professionals against the *Feingold Amendment* feel that it would allow additional abuse of the FMLA by employees due to its "extremely vague" wording,⁸⁸ which effectively grants extra leave to any employee who feels like taking it.⁸⁹

Credited with dealing the death blow to the 2003 amendment, the following US Chamber of Commerce letter to the United States Senate highlights the fundamental problems with the FMLA, and the reason why FLMA-based employment legislation aimed at protecting military families has failed:

The Chamber appreciates the intent of the amendment, to provide protection for family members of those called to serve in military contingency operations.... As you may know, implementation of the FMLA has proven difficult in a number of important respects, as highlighted in numerous Congressional hearings, and has caused excessive litigation, including 68 court decisions questioning the validity of the FMLA implementing regulations.

The Chamber is concerned that adopting the *Feingold* amendment without fully vetting its provisions could lead to further difficulties for employees and employers as they try to comply with the FMLA."⁹⁰

As this letter demonstrates, objections to employment protection for military family members are based, not on a dispute over the importance of

84 *Id.*

85 Mike Eastmond, Real Experiences Administering the FMLA: Why the Regulations Need Reform, www.uschamber.com/NR/rdonlyres/eawos5gc6elj7bl15csuuni51zwhbfex75cyajgg5tley7y4bl6ogd31zyxjrhlkvcj3zmyl6nnb7xuv25rg5nwrmd/fmla_examples.doc.

86 *Id.*

87 *FMLA Expansion Amendment Offered to Unrelated Senate Measure*, available at www.shrm.org/government/insiders_published/CMS_008924.asp (July 2004). FIX

88 Bill Leonard, *Bid to Expand FMLA is Beaten back to Senate*, (June 24, 2004), available at www.shrm.org/hmews_published/archives/CMS_008812.asp

89 *Id.*

90 Letter from US Chamber of Congress Addressed to members of the United States Senate, (Oct. 16, 2003) R. Bruce Josten, Executive Vice President, Government Affairs U.S. Chamber of Commerce., available at www.uschamber.com/issues/letters/2003/031016emergency suppl.htm

protection, but on the problems associated with implementing *any* law which relies on the ambiguous provisions of the FMLA. If the *Feingold Amendment* were adopted, the exact criterion to be applied in determining the eligibility of an employee would be up for debate. For instance, the term “parent” doesn’t exclusively refer to a biological or even a legal relationship and could possibly be applied to anyone who stood *in loco parentis* to an employee when the employee was a young son or daughter.⁹¹ Likewise, uncles, grandparents, and family friends may be considered *in loco parentis* of an employee if they can prove that the relationship they had was “parent like.”⁹² Similar problems arise in the Act’s definition of a “child.” The FMLA defines a child as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of the person standing *in loco parentis*, who is under 18 years of age, or 18 years of age or older and incapable of self-care, because of a mental or physical disability.⁹³ The FMLA and subsequent proposed *Feingold Amendment* have also proven unclear in determining the time qualifications required for leave.⁹⁴

In sum, while attempts to amend the FMLA to protect military families recognize the critical importance of protecting those who make tremendous sacrifices, they have failed to adequately address legitimate concerns posed by the business community.

III. THE ILLINOIS FAMILY MILITARY LEAVE ACT: SUCCESSFUL STATE LEGISLATION GRANTING TEMPORARY EMPLOYMENT LEAVE RIGHTS TO FAMILY MEMBERS OF DEPLOYED SOLDIERS

The failure of the *Feingold Amendment* at the federal level has prompted at least one state to enact employment leave legislation for military family members on its own. Specifically, in 2005, the state of Illinois enacted the Military Family Relief Act (“*Illinois Act*”) to ensure family members of a deployed soldier have the right to

91 29 C.F.R. § 825.113(b).

92 *Id.* Jane Howard-Martin, *When Illness Strikes FMLA Lets Workers Take Time Off*, USA TODAY, Dec. 19, 2002, available at www.usatoday.com/money/jobcenter/workplace/employmentlaw/2002-12-19-fmla-illness_x.htm

93 *Id.*

94 *See* Rucker v. Lee Holding Co., 419 F. Supp. 2d 1 (D. Me. 2006). Kenneth Rucker worked as an employee of Lee Auto Malls for five years, upon which time he took another job with a different company. After working for the other company for five years he again sought employment with Lee Auto Mall. He was hired as a full time employee, and after seven months of employment he took FMLA leave of approximately two months. Upon his return to work he was terminated, due to the fact that he was ineligible for FMLA leave because he had not fulfilled the requirement of 12 months employment prescribed in the FMLA. Mr. Rucker filed a lawsuit against Lee Auto Malls, and the district court upheld the employer’s decision to terminate Rucker, based on the fact that his employment was not consecutively

12 months. Rucker appealed the decision and the first circuit court reversed favoring Rucker stating, “The complete separation of an employee from his or her employer for a period of years ... does not prevent the employee from counting earlier periods of employment with the employer towards satisfying FMLA’s 12- month requirement.” (Further proving the inconsistent interpretation of FMLA.)

employment leave if the stresses of military deployment became overwhelming.⁹⁵ The *Illinois Act* is similar in many respects to the *Feingold Amendment*. It provides military family members up to 30 days of unpaid leave,⁹⁶ protects against employer retaliation for the exercise of the leave rights,⁹⁷ and grants employees authority to file lawsuits directly against their employers.⁹⁸ The *Illinois Act* also adopts the FMLA requirement for employment, being 12 months or 1,250 hours of service. However, it clarifies that this requirement must be met in the 12 month period “immediately preceding the commencement of the leave.”⁹⁹ The *Illinois Act* alleviates some of the burden placed on small business by mandating that businesses with 15 to 50 employees are required only to provide leave up to 15 days.¹⁰⁰ Larger businesses (50+ employees) are required by law to provide as much as 30 days leave time for family members of deployed soldiers.¹⁰¹ The Act goes further than the *Feingold Amendment* in alleviating some of the responsibility of employers, by requiring 14 days’ notice of the intended date leave will commence.¹⁰² The employee has the responsibility to consult with the employer if the leave will consist of five or more work days, so as to not “unduly disrupt the operations of the employer.”¹⁰³

Perhaps the most significant difference between the *Feingold Amendment* and the *Illinois Act* is presented in a provision aimed at combating employee abuse. Specifically, Section 10(d) of the Act provides, “an employee shall not take leave as provided under this Act unless he or she has exhausted all accrued vacation leave, personal leave, compensatory leave, and any other leave that may be granted to the employee, except sick leave and disability leave.”¹⁰⁴ This provision discourages the use of leave in all but the most strenuous circumstances.

The *Illinois Act* has been successful in protecting the ability of reservist families to manage the deployment of a loved one.¹⁰⁵ In contrast to the *Feingold Amendment* - which relies on the ineffective and confusing provisions of the FMLA - the *Illinois Act* provides a simple and clear framework, which grants family members of soldiers the right to employment leave when they clearly need it. Because the *Illinois Act* does not depend on the FMLA, it has proven effective in avoiding many of the pitfalls associated with the FMLA. The distinction is significant, given the powerful and devoted opponents found at the federal level,

95 820 ILL. COMP. STAT. ANN. 151 (West 2007), available at www.ilga.gov/legislation/publicacts/94/-PDF/094-0589.pdf.

96 *Id.* at § 151/10.

97 *Id.* at § 151/25.

98 *Id.* at § 15/30. The Illinois act differs from USERRA in that employees under USERRA must file a complaint through a government intermediary (U.S. Office of Special Counsel) prior to any litigation.

99 *Id.* at § 151/5.

100 *Id.* at § 151/10(a).

101 *Id.* at § 151/10(b).

102 *Id.* at § 151/10(c).

103 *Id.*

104 *Id.* at § 151/10(d).

105 Letter to the U.S. Representative Judy Biggert, The Family and Medical Leave Clarification Act (HR 35). U.S. Chamber of Commerce (Jan. 21, 2003).

eager to expose FMLA's "vague, expansive and confusing implementing regulations."¹⁰⁶ Such opponents have proven capable of crushing meaningful expansion of the FMLA.¹⁰⁷

**IV. RECOMMENDATION: EXPAND USERRA TO INCLUDE EMPLOYMENT
LEAVE FOR FAMILY MEMBERS**

As explained above, the purpose of USERRA is "to cultivate voluntary enlistment by minimizing the disruption caused by uniformed service."¹⁰⁸ When a loved one volunteers to serve in the uniformed services, the family also volunteers to share in the financial, emotional, mental and physical burdens of that service. Thus, granting entitlement leave to military families through an amendment to USERRA seems like a natural extension of the legislation. USERRA could and should be amended.

The question remains, what should form the basis of an amendment to USERRA? The discussion in this article suggests that an amendment to USERRA should adopt many of the definitions, requirements, and protections found in the *Illinois Act*.¹⁰⁹ The *Illinois Act* dodges many of the problems associated with amending the FMLA and has proven effective in protecting the employment rights of military families. Key points adopted from the *Illinois Act* include:

- 1) Definitions of "employee" and "employer."¹¹⁰
- 2) Leave requirement being up to 15 days for employers with 15 to 50 employees, 30 days for employers with over 50 employees.¹¹¹
- 3) Employee shall give at least 14 days notice of the intended date upon which leave will commence.¹¹²
- 4) Employee shall consult with the employer so as not to unduly disrupt the operations of the employer.¹¹³
- 5) An employee shall not take leave as provided under this Act unless he or she has exhausted all accrued vacation leave, personal leave, and compensatory leave, and any other leave that may be granted to the employee, except sick leave and disability leave.¹¹⁴

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* part 11(c).

¹⁰⁸ See 38 U.S.C.A. §§ 4311(a) (3) and 4301; see *supra* part 1(a).

¹⁰⁹ 820 ILL. COMP. STAT. ANN. § 151 (West 2007), available at www.ilga.gov/legislation/publicacts/-94/PDF/094-0589.pdf.

¹¹⁰ *Id.* at § 151/5.

¹¹¹ *Id.* at § 151/10(a)&(b).

¹¹² *Id.* at § 151/10(c).

¹¹³ *Id.*

¹¹⁴ *Id.* at § 151/10(d).

V. CONCLUSION

The increase in the use of part-time military to support the “War on Terror” has placed an extraordinary burden upon families, who are required to share with the uniformed service member in the consequences of war. Given that an unprecedented number of Reservists and National Guard are leaving and returning to work, it is inevitable that the families supporting these brave soldiers will also need leave time to cope with deployment. A comprehensive amendment protecting military families is an extremely urgent matter and is necessary if we hope to maintain an environment conducive to volunteer enlistment in the uniformed services. Congress must thoughtfully consider the most efficient way to provide protection to military families. An amendment to USERRA that builds on the success of this state legislation is a logical way to expand these protections nationwide.