

Repeal of DADT: What it means for discharged servicemembers

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In 1996, one of my first cases as a military defense lawyer was representing a young sailor who was being processed for a discharge from the Navy because of her sexual orientation. My client was being separated under a three-year old Federal law, 10 U.S.C. § 654, known universally as the “don't ask, don't tell” (DADT) policy. In light of the recent repeal of DADT, I wonder what that client is doing today and what questions she might have about her discharge fourteen years ago.

This post will attempt to answer some of those questions from servicemembers who were separated from the service under DADT. First, however, allow me this opportunity to correct an oft-repeated error contained in the vast majority of media reports on DADT over the years. Commonly, when referring to DADT, news reports start off with something like this:

“The House today passed a bill to overturn the military's “don't ask, don't tell” ban on openly gay members of the armed force, pressuring the Senate to delay its holiday recess and take the last step to end the policy by voting on the bill.”

This is an actual excerpt from a recent story by ABC News. Can you spot the error? Think back to your high school Civics class and the concept of separation of powers. As an agency of the Executive branch of government, the Department of Defense (DoD) has no more authority that you or I to enact laws. It is the exclusive function of the Legislative branch (i.e. the Congress) to pass laws. To refer to DADT as the “military's policy” is simply wrong. When President Clinton signed 10 USC § 654 into law in 1993, the military was obligated to follow the law and remained obligated to follow the law until its repeal was signed by President Obama. Certainly the DoD has a vast amount of service directives, regulations and orders to implement the laws as written by Congress but it is not free to simply disregard the law. Some might say this is a minor gripe but as a member of a branch of the armed forces, I took offense to this continued misstatement because it implied to the public that since DADT was the “military's policy,” the military could change it or refuse to enforce it at will and this was simply not true.

So, what if that former client walked into my office today and asked what the repeal of DADT meant for her? What if a current member of the armed forces called and asked how this change in the law affected him? I imagine those exchanges may look something like this:

Q: I was discharged under DADT. Am I eligible to come back into the service?

A: According to a recently released policy memo from the Under Secretary of Defense (available here www.c-span.org/pdf/e012811_DADTmemo2.pdf), the answer is yes. When the repeal is final (although the President signed the repeal, it has not yet taken effect), former servicemembers whose discharge was based solely on DADT may apply to re-enter the service and will be evaluated under the same criteria as all former members seeking re-entry into the military. If there was some additional basis for your discharge which would prohibit your re-entry, you may still be barred from further service.

Q: If I come back into the service, will I be entitled to retroactive pay, rank and/or benefits?

A: Uncertain at this time but likely not. The policy memo cited above states that DoD will not

authorize compensation of any type, including retroactive full separation pay, for separated servicemembers. Additionally, the repeal legislation itself states that the law provides for no private cause of action. At some point in the future, the government could be judicially ordered to remit back pay but this is far from certain and will surely be resisted by DoD. Members who return to active duty would, however, likely be able to keep their years of prior service for retirement calculation and seniority purposes.

Q: I am an open homosexual and I want to apply to join the military. Will I be accepted?

A: Maybe. While statements about sexual orientation or lawful acts of homosexual conduct will no longer be a bar to service, you must still meet certain service-specific requirements for admission which apply to all new applicants.

Q: I am on active duty now and a homosexual. Is it safe for me to reveal my sexual orientation to my command?

A: As of this writing, DADT is still the law and coming out to your command could still result in your being processed for a discharge. As noted above, the President signed the repeal but the repeal does not take effect until 60 days after the services complete required training and certify that they are prepared to implement the repeal in a manner consistent with military readiness. Although I would rate the risk of being discharged fairly low given the time required for processing and the heightened levels of authority required to approve a discharge, I would advise members considering coming out to wait for the repeal to become final.

Q: If I am on active duty, will my same-sex partner be entitled to any benefits associated with my military service?

A: There are no changes to eligibility standards for military benefits in the repeal legislation. Other Federal laws (ex. the Defense of Marriage Act) restrict who is eligible to be a military “dependent.” Many benefits of service (like low-cost life insurance, retirement plans and death gratuities) are not dependent on such definitions and you are free to designate whomever you wish as your beneficiary. The DoD policy memo does state that it will “continue to study” whether other benefit programs should be revised following repeal.