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## LEGAL NEEDS OF MILITARY VETERANS, SERVICEMEMBERS, AND THEIR FAMILIES

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# Employment Law and How the Uniformed Services Employment and Reemployment Rights Act Protects Servicemembers

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The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is the latest iteration in a series of laws protecting servicemembers' employment and reemployment rights dating back to the Selective Training and Service Act of 1940.<sup>1</sup> Congress enacted the USERRA to clarify and expand the employment and reemployment protections and obligations of those previous laws, establish new enforcement procedures, and expand remedies.<sup>2</sup> The Act has succeeded on all fronts.

The USERRA not only provides eligible servicemembers with significant employment and reemployment protections but also sets forth obligations for employees and employers. In general terms, the USERRA provides three types of protection: it protects the reemployment rights of servicemembers absent from employment because of uniformed service, preserves employment benefits for servicemembers absent from employment because of uniformed service, and prohibits employment discrimination or retaliation on the basis of past, current, or future service in the uniformed services.

The USERRA sets the minimum standards by which an employer must abide. The USERRA supersedes any state or local law that reduces, limits, or eliminates any of the protections set forth under the Act.<sup>3</sup> The USERRA does not supersede any law—including federal law—that “establishes a right or benefit that is more beneficial to, or in addition to, a right or benefit” prescribed by the USERRA.<sup>4</sup>

The USERRA applies to all employers in the United States. It broadly defines “employer” as “any person, institution, organization, or other entity that pays salary or

<sup>1</sup>Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301–4335. The USERRA replaced the Veteran's Readjustment Assistance Act of 1974 (commonly referred to as the Veteran's Reemployment Rights Act).

<sup>2</sup>The USERRA has been amended several times (see KATHRYN PISCITELLI & EDWARD STILL, *THE USERRA MANUAL: UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS* § 1:3 (2009 ed.)). In 1996 the USERRA was amended to prohibit employers from forcing employees to use vacation time during uniformed service (38 U.S.C. § 4316(d)). In 2004 an amendment was added to require employers to notify employees of USERRA rights (38 U.S.C. § 4334). For a sample notice, see [www.dol.gov/vets/programs/USERRA/USERRA\\_Poster.pdf](http://www.dol.gov/vets/programs/USERRA/USERRA_Poster.pdf). In 2008 a provision was added to prohibit the application of statutes of limitations to USERRA claims (38 U.S.C. § 4327).

<sup>3</sup>38 U.S.C. § 4302(b).

<sup>4</sup>*Id.* § 4302(a).

wages for work performed or that has control over employment opportunities....”<sup>5</sup> Employers are covered without regard to size.<sup>6</sup> Thus an employer with one employee falls within the purview of the USERRA. The reemployment processes and enforcement rights are somewhat different when the employer is a private or state employer as opposed to a federal employer. U.S. Department of Labor regulations govern private and state employers, while the Office of Personnel Management regulations govern federal employers.<sup>7</sup>

Here we discuss the prerequisites to USERRA eligibility, the USERRA’s protections and benefits, and employer defenses to reemployment. We also outline USERRA enforcement and remedies and the resources available to servicemembers and employers with USERRA-related problems.

### Prerequisites to Protection

Generally servicemembers must meet six prerequisites to qualify for employment and reemployment protections under the Act: they must be employed, their absence from employment must be due to service in the uniformed services, they must give their employer advance notice of entry into uniformed service, their uniformed

service cannot generally exceed five years, their discharge from service must be under honorable conditions, and they must report to work or apply for reemployment in a timely manner.<sup>8</sup>

**Employment.** To be eligible for USERRA protections, the person must have a job and be employed by someone else.<sup>9</sup> Persons who are self-employed or independent contractors are not covered.

**Absence Due to Uniformed Service.** The absence from employment must be necessitated by service in the uniformed services.<sup>10</sup> The USERRA defines “service in the uniformed services” (hereinafter referred to as “service” or “uniformed service”) as the performance of voluntary or involuntary duty in a uniformed service, including “active duty, active duty for training, initial active duty for training, inactive duty training,” and full-time National Guard duty in a federal status.<sup>11</sup> The “uniformed services” includes the Armed Forces and National Guard.<sup>12</sup> Preservice time off, in most instances, does not affect a servicemember’s rights under the USERRA.<sup>13</sup>

**Advance Notice of Service to the Employer.** The servicemember must generally give advance notice of pending service to the employer.<sup>14</sup> Notice may be given

<sup>5</sup>*Id.* § 4303(4).

<sup>6</sup>PISCITELLI & STILL, *supra* note 2, § 2:2.

<sup>7</sup>For U.S. Department of Labor regulations, see 20 C.F.R. pt. 1002. Office of Personnel Management regulations are at 5 C.F.R. pt. 353. Other agencies such as the U.S. Department of Defense (32 C.F.R. pt. 104) have also promulgated regulations implementing the USERRA.

<sup>8</sup>The employee has the burden of proving eligibility.

<sup>9</sup>38 U.S.C. § 4303 (the term “employee”).

<sup>10</sup>*Id.* § 4312(a). Note that performance of service in the uniformed services is not required as the sole purpose for the absence (20 C.F.R. § 1002.73 (2009)).

<sup>11</sup>38 U.S.C. § 4303(13). Also qualifying as duties are performing military funeral honors or completing an examination to determine the physical or mental fitness of a person to perform military service (*id.*). National Guard service performed under state, rather than federal, authority is not protected by the USERRA. National Guard persons performing duty during drill weekends or annual training are in a federal status. National Guard persons performing riot control or disaster relief are generally in a state status unless the president declares a national emergency and activates the National Guard. A number of states have enacted laws that provide employment and reemployment rights to National Guard members performing duty under state authority. E.g., Wisconsin has enacted its own version of the USERRA, codified at WIS. STAT. § 321.65 (2008).

<sup>12</sup>38 U.S.C. § 4303(13).

<sup>13</sup>20 C.F.R. § 1002.74 (2009). Factors used in determining whether preservice is justified include the length of service, how far in advance the employee received notice of service, the location of the service, and whether additional time is needed to rest or arrange affairs (*id.*). See PISCITELLI & STILL, *supra* note 2, § 4:5.

<sup>14</sup>38 U.S.C. § 4312(a). The servicemember is not required to tell the employer whether the servicemember intends to seek reemployment after completing uniformed service (20 C.F.R. § 1002.74 (2009)). Giving advance notice of intent not to seek reemployment prior to the conclusion of service may affect other rights and benefits under the USERRA.

orally or in writing by either the employee or an officer or noncommissioned officer, such as a commander or supervisor.<sup>15</sup> The USERRA does not address what constitutes “advance” notice. Labor Department regulations state that “an employee should provide notice as far in advance as is reasonable under the circumstances.”<sup>16</sup> U.S. Department of Defense regulations recommend that notice be given at least thirty days in advance, when feasible.<sup>17</sup> Employment or reemployment rights may be affected if an employee unjustifiably fails to give advance notice or gives short notice that causes a significant disruption in the employer’s business.<sup>18</sup>

Advance notice is excused if military necessity prevents it or it is otherwise impossible or unreasonable to give notice under the circumstances.<sup>19</sup> For example, notice may be excused when the employer is unavailable or when a servicemember is required to report for uniformed service in an extremely short period.

**Service Generally Not Exceeding Five Years.** The cumulative absence due to uniformed service with any one employer must not generally exceed five years.<sup>20</sup> The five-year limitation applies only to actual time spent performing duty.<sup>21</sup> Preservice or postservice absence does not count toward the five-year limita-

tion. Types of service exempt from the five-year limitation are, among others, (1) service required beyond five years to complete an initial period of active service, (2) involuntary active-duty service extensions or recalls, and (3) National Guard and Reserve service during drill weekend and annual training periods.<sup>22</sup>

**Service Characterized as Honorable.**

The service must be characterized as under honorable conditions.<sup>23</sup> A separation from service under other than honorable conditions terminates any entitlement to benefits under the USERRA.<sup>24</sup> Retroactive upgrade to an honorable characterization of service gives rise to reemployment rights if the servicemember satisfies the USERRA’s other eligibility requirements.<sup>25</sup> Note that the retroactive upgrade does not entitle the employee to back wages or lost benefits for the time between the date of discharge from service and the retroactive upgrade.<sup>26</sup>

**Timely Application or Reporting to Work.**

The servicemember must notify the employer, in a manner required by the USERRA, of the servicemember’s intent to return to work.<sup>27</sup> Notification must be made, depending on length of service, by reporting to work or by submitting an application for reemployment. The notification must be made to the employer

<sup>15</sup>*Id.* Notice in writing is preferred because it protects all parties involved.

<sup>16</sup>20 C.F.R. § 1002.85 (2009).

<sup>17</sup>32 C.F.R. § 104.6(a)(1)(B) (2009).

<sup>18</sup>PISCITELLI & STILL, *supra* note 2, § 4:9.

<sup>19</sup>38 U.S.C. § 4312(b). The secretary of defense determines whether military necessity precludes giving notice, and this determination is not subject to judicial review (*id.*).

<sup>20</sup>*Id.* § 4312(a).

<sup>21</sup>20 C.F.R. § 1002.100 (2009).

<sup>22</sup>*Id.* § 1002.103.

<sup>23</sup>38 U.S.C. § 4312(a), (f) (citing Section 4304 on when character of service terminates benefits). Characterization of service is generally found on a servicemember’s Defense Department (DD) Form 214 (Certificate of Release or Discharge from Active Duty). For periods of service less than ninety days a DD Form 214 may be unavailable. However, for separations for cause, a DD Form 214 is available regardless of length of service.

<sup>24</sup>*Id.* § 4304 (commissioned officers’ entitlement to benefits are terminated in certain types of dismissals).

<sup>25</sup>20 C.F.R. § 1002.137 (2009).

<sup>26</sup>*Id.* § 1002.138.

<sup>27</sup>38 U.S.C. § 4312(a), (e). These notification requirements also apply to persons absent for purposes of an examination to determine physical or mental fitness to perform service (*id.* § 4312(e)(1)(B)).

in a timely manner.<sup>28</sup> What is considered “timely” depends upon the length of service.

If time served is less than thirty-one days, the servicemember must generally report back to work within one to two days of the end of service.<sup>29</sup> If this time frame is unreasonable or impossible through no fault of the servicemember, the obligation is to report back to work as soon as possible. For service lasting between thirty and one hundred eighty-one days, the servicemember must reapply within fourteen days of completion of service. If this time frame is unreasonable or impossible through no fault of the servicemember, the application for reemployment must be submitted on the next calendar day when submission becomes possible.<sup>30</sup> If service was for more than one hundred eighty days, the reemployment application must be made to the employer no later than ninety days after the completion of service. Unlike the shorter periods, the ninety-day period is not extended if application is not timely made through no fault of the servicemember.<sup>31</sup>

For servicemembers who are hospitalized or convalescing because of service-related injuries, these deadlines are extended for up to two years. If unreasonable or impossible through no fault of the servicemember, the deadline may be extended to accommodate the circumstances.<sup>32</sup>

The servicemember may apply for reemployment orally or in writing.<sup>33</sup> The application should clearly indicate that the person is a returning servicemember who wants to return to work. It must be sub-

mitted to the employer or the employer’s agent, such as the human resources department, with apparent authority to receive applications.<sup>34</sup>

A servicemember who fails to report back to work or apply for reemployment in a timely manner does not automatically forfeit USERRA rights.<sup>35</sup> Instead the employer’s policy regarding unexcused absences governs. If, for example, an employer’s policy requires termination, a returning servicemember who fails to report back or apply for reemployment will be terminated and forfeit USERRA reemployment rights.

If the employer so requests, a returning servicemember who submits an application for reemployment must provide to the employer documentation showing that the application is timely, the period of service did not exceed five years, and the service was under honorable conditions.<sup>36</sup> Generally a Defense Department form (DD Form 214) has this information. If the form is not available or does not have the requested information, service orders, a letter from the commanding officer or service school, or other discharge documentation may be needed.

Not all documents are necessary or available in every instance. The USERRA prohibits employers from denying or delaying reemployment if the servicemember is unable to provide the requested documentation because it does not exist or is not readily available. If after reemployment, documentation becomes available and indicates that the employee did not meet the USERRA’s eligibility require-

<sup>28</sup>*Id.* § 4312(e).

<sup>29</sup>*Id.* § 4312 (e)(1)(A) (Reporting back to work must occur no later than the “beginning of the first full regularly scheduled work period on the first calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person’s residence....”).

<sup>30</sup>*Id.* § 4312(e)(1)(C).

<sup>31</sup>*Id.* § 4312(e)(1)(D).

<sup>32</sup>*Id.* § 4312(e)(2) (notice period extended for only the minimum time needed).

<sup>33</sup>20 C.F.R. § 1002.118 (2009) (application should be in writing to protect all parties involved).

<sup>34</sup>*Id.* § 1002.119 (if ownership has changed, application should be made to employer’s successor-in-interest).

<sup>35</sup>38 U.S.C. § 4312(e)(3).

<sup>36</sup>*Id.* § 4312(f)(1).

ments, the employer may terminate the employee.<sup>37</sup>

### Protections

A servicemember who meets the USERRA's prerequisites may take advantage of the USERRA's three types of employment and reemployment protection: First, the USERRA prohibits employers from discriminating against 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 in a uniformed service...."<sup>38</sup> An employer may not discriminate or retaliate against any person who (1) has taken action to enforce a USERRA protection, (2) has testified or otherwise has given a statement in or in connection with a USERRA proceeding, (3) has assisted or otherwise participated in an investigation, or (4) has exercised a USERRA right.<sup>39</sup> Second, the USERRA requires employers to reemploy returning servicemembers and lays out specific procedures for determining job placement. Employers do have affirmative defenses to reemployment. Third, the USERRA preserves employment benefits, such as health care, so that absence from employment does not adversely affect the servicemember's level or scope of benefits.

Servicemembers absent from employment because of service in the uniformed services remain employees and are considered to be on furlough or leave of absence from their employer while they are

in service.<sup>40</sup> The USERRA seeks to ensure that servicemembers are not penalized for leaving their jobs to perform in the uniformed services.

**Reemployment Rights.** The USERRA requires employers promptly to reemploy employees who are returning from service.<sup>41</sup> It seeks to have returning servicemembers placed into a job that reflects continuous employment, that is, into a job that the employee would have achieved but for service. But because jobs and job skill requirements may change, the USERRA sets forth in detail how employers are to take into consideration job qualifications in determining job placement of returning servicemembers. If a returning employee is not qualified for a particular position, the employer must make reasonable efforts to help the employee become qualified.<sup>42</sup> Placement requirements vary with the length of service, but in all cases the USERRA seeks to place the servicemember in the job that the servicemember would have achieved but for service. Undue delay in reemploying an eligible employee gives rise to a claim of back pay or a claim for damages.<sup>43</sup>

A returning employee who served less than ninety-one days is generally entitled to what is commonly known as the "escalator position"—the position of employment that the employee would have obtained with reasonable certainty if employment had not been interrupted by service.<sup>44</sup> If the servicemember is not or

<sup>37</sup>*Id.* § 4312(f)(3)(A).

<sup>38</sup>*Id.* § 4311(a).

<sup>39</sup>*Id.* § 4311(b).

<sup>40</sup>*Id.* § 4316(b).

<sup>41</sup>*Id.* § 4312(a). "Prompt reemployment" is defined as "as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time" (20 C.F.R. § 1002.181 (2009)). If more than one person is entitled to reemployment in the same position and more than one of them reports for reemployment, the person who left the position has the right to reemployment in that position (38 U.S.C. § 4313(b)).

<sup>42</sup>38 U.S.C. § 4313. "Qualified" is defined as "having the ability to perform the essential tasks of the position" (*id.* § 4303(9)). "Reasonable efforts" is defined as "actions, including training provided by an employer, that do not place an undue hardship on the employer" (*id.* § 4303(10)).

<sup>43</sup>PISCITELLI & STILL, *supra* note 2, § 5:3 (citing H.R. Rep. No. 103-65, at 32 (1993), reprinted in U.S.C.C.A.N. 2449, 2465 ("The Committee intends that any undue delay in reinstatement would be subject to a claim for lost wages.")).

<sup>44</sup>38 U.S.C. § 4313(a)(1)(A). "Reasonable certainty" is defined as "a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed" (20 C.F.R. § 1002.213 (2009)).

cannot become qualified for the escalator position, the servicemember must be placed in the preservice position if the servicemember is or is able to become qualified.<sup>45</sup> If the servicemember cannot become qualified for the escalator position or the preservice position, the servicemember must be placed in a position for which the servicemember is qualified and that most closely approximates the escalator position. If none of these positions is available, the employee must be placed in a position for which the employee is qualified and that most closely approximates the preservice position.<sup>46</sup>

For service of more than ninety days, an employee is generally entitled to placement in the escalator position. If not qualified or able to become qualified for the escalator position, the servicemember is entitled to a position of like seniority, status, and pay. If not qualified or able to become qualified for those positions, the servicemember must be placed in the preservice position of employment or a position of like seniority, status, and pay.<sup>47</sup>

A servicemember who has a service-related disability and who, after reasonable efforts by the employer to accommodate the disability, is not qualified for the escalator position because of the disability must be employed in a position of

equivalent seniority, status, and pay for which the servicemember is qualified or can become qualified. If unable to become qualified despite reasonable efforts by the employer, the servicemember must be employed in a position that is closest in seniority, status, and pay consistent with the servicemember's circumstances.<sup>48</sup>

The USERRA permits employers to assert three affirmative defenses to the reemployment of a returning servicemember.<sup>49</sup> The employer has the burden of proof in asserting each defense.<sup>50</sup> The most common affirmative defense is generally referred to as the "impossibility defense," where the employer's circumstances have changed so much as to make reemployment impossible or unreasonable. An employer who has financial troubles and is forced to lay off employees may be able to assert such a defense.<sup>51</sup> The impossibility defense is not available to the federal government.<sup>52</sup> Furthermore, it is meant to be a very limited defense.<sup>53</sup>

Another affirmative defense is that reemployment would cause undue hardship in qualifying the employee or accommodating the employee's service-related disability.<sup>54</sup> Or the employer may assert that the employment from which the servicemember left was for a "brief, nonrecurrent period" and that such employment

<sup>45</sup>38 U.S.C. § 4313(a)(1)(B). One reasonable effort on behalf of an employee is to grant the employee an opportunity to make up a skills test or examination that the employee would have had the opportunity to take but for the employee's absence due to uniformed service (20 C.F.R. § 1002.193 (2009)). In conjunction with the opportunity to take the test or examination, an employer is also required to grant the employee a reasonable period of time to prepare for the test or examination (*id.*).

<sup>46</sup>38 U.S.C. § 4313(a).

<sup>47</sup>*Id.* § 4313(a)(2).

<sup>48</sup>*Id.* § 4313(a)(3). We described the general priority of reemployment positions for nonfederal employees. In the case of a federal employee, refer to 38 U.S.C. §§ 4314–4315.

<sup>49</sup>*Id.* § 4312(d)(1).

<sup>50</sup>*Id.* § 4312(d)(2).

<sup>51</sup>The employee must be part of the group of employees subject to the reduction.

<sup>52</sup>38 U.S.C. § 4314(b).

<sup>53</sup>PISCITELLI & STILL, *supra* note 2, § 4:19 (H.R. Rep. No. 103-65, at 32 (1993), reprinted in U.S.C.C.A.N. 2449, 2465).

<sup>54</sup>38 U.S.C. § 4312(d). An employer has a legal obligation to make reasonable disability accommodation efforts (*id.* § 4313). For a detailed discussion of the reasonable disability accommodation efforts required by an employer, see PISCITELLI & STILL, *supra* note 2, § 5:11. These accommodation efforts may be in addition to any accommodations that the Americans with Disabilities Act requires.

is not reasonably expected to continue indefinitely or for a significant period.<sup>55</sup> That the employment was temporary, part-time, probationary, or seasonal is not, in and of itself, enough to assert the defense.<sup>56</sup>

**Preservation of Employment Benefits.**

The USERRA preserves employment benefits for servicemembers absent from employment because of uniformed service. The USERRA ensures that servicemembers do not lose the seniority, rights, and benefits determined by seniority that they had on the date they began service and ensures that returning servicemembers get the seniority, rights, and benefits that they would have gotten (with reasonable certainty) if they had not taken time from employment to serve.<sup>57</sup> Examples of the benefits that are protected under the USERRA are health insurance, pension plans, vacation time, and rate of pay.<sup>58</sup> The USERRA also grants special protection from discharge.<sup>59</sup>

*Continuation of Health Care Coverage.* Servicemembers may maintain their employee health care coverage while in service for the lesser of the following two periods: (1) twenty-four months from the date service began or (2) beginning on the date of service-related absence and ending on the date the employee fails to report for employment under USERRA guidelines.<sup>60</sup>

If an employee elects to continue health care coverage while in service, the employee may be responsible for payment of premiums based upon the length of uniformed service. The employer may not require an employee who has served less than thirty-one days to pay more than the employee share, if any, for such coverage. Employees who have served thirty-one days or more may not be required to pay more than 102 percent of the full premium under the plan.<sup>61</sup> For servicemembers who do not elect to continue coverage while in service, reinstatement of health insurance coverage must take place upon reemployment.<sup>62</sup> Exclusions or waiting periods are prohibited unless they would have been imposed under the health plan for reasons other than termination due to uniformed service.<sup>63</sup>

*Pension Benefits.* Upon reemployment, the returning servicemember is treated as not having had a break in employment for purposes of participation, vesting, and accrual of pension benefits.<sup>64</sup> The USERRA applies to any pension plan that provides retirement income to employees or defers employee income to a period extending to or beyond the termination of the employment.<sup>65</sup> The employer is liable to the pension benefit plan to fund any obligation of the plan to provide benefits that are attributable to the employee's period of service.<sup>66</sup>

<sup>55</sup>38 U.S.C. § 4312(d)(1)(C).

<sup>56</sup>PISCITELLI & STILL, *supra* note 2, § 4:6.

<sup>57</sup>38 U.S.C. § 4316(a). Seniority-based rights or benefits are generally those rights or benefits that are determined by length of employment. Labor Department regulations provide a three-factor test for determining whether a right is seniority based (20 C.F.R. § 1002.212 (2009)). A reemployed person is also entitled to those rights and benefits which are not determined by seniority but are provided to other employees who are in a leave-of-absence or furlough status.

<sup>58</sup>Other rights and benefits may include privileges, bonuses, severance pay, unemployment benefits, work assignments, and location of employment (PISCITELLI & STILL, *supra* note 2, § 6:1).

<sup>59</sup>38 U.S.C. § 4316(c).

<sup>60</sup>*Id.* § 4317(a)(1).

<sup>61</sup>*Id.* § 4317(a)(2) (USERRA allows employers to collect a 2 percent administrative fee for uniformed service of thirty-one days or more).

<sup>62</sup>*Id.* § 4317(b).

<sup>63</sup>*Id.* (exclusion of a preexisting service-related injury is authorized).

<sup>64</sup>*Id.* § 4318(a)(2); 20 C.F.R. § 1002.259 (2009).

<sup>65</sup>20 C.F.R. § 1002.260 (2009). The USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. § 8432b (38 U.S.C. § 4318(a)(1)(B)); 20 C.F.R. § 1002.260 (2009)).

<sup>66</sup>38 U.S.C. § 4318(b); 20 C.F.R. § 1002.261 (2009).

If the plan is a defined contribution plan, the employer must allocate any required employee and employer makeup contributions and elective deferrals in the same manner and to the same extent that the plan allocates the amounts for other employees in a leave-of-absence or furlough status. If the plan is a defined benefit plan, the returning servicemember's accrued benefit is increased for the period of service after the servicemember repays, if required, any amounts previously paid to the servicemember from the plan and made any required employee contributions.<sup>67</sup>

*Vacation or Leave.* The USERRA protects vacation and leave time. While performing uniformed service, employees have the sole discretion to use vacation, annual, or similar types of leave with pay that they may have accrued before beginning service.<sup>68</sup> Unless the employer allows "employees to use sick leave for any reason" or allows similarly situated employees on leave or furlough status to use sick leave, servicemembers may not use sick leave while in service.<sup>69</sup> Employees generally do not accrue vacation or leave while in service.

Employers who award vacation time based on length of employment must count any absence due to uniformed service as continuous employment.<sup>70</sup> A servicemember does not generally accrue vacation time if vacation is treated as compensation for work actually performed. If vacation benefits are subject to both length-of-employment and actual-work-performed requirements, a reemployed servicemember must be treated as having been employed throughout uniformed service for these purposes.<sup>71</sup>

*Rate of Pay.* A servicemember's rate of pay is determined by applying the same escalator principle used to determine reemployment position.<sup>72</sup> If the returning servicemember is reemployed in the escalator position, the servicemember must be compensated at the associated rate. If reemployed in the preservice or another position, the returning servicemember must be compensated at the rate associated with the position in which the servicemember is employed. Rate of pay must be determined by taking into account any pay increase, differentials, step increases, merit increases, or periodic increases that the returning servicemember would have attained with reasonable certainty had the servicemember remained continuously employed during the period of uniformed service.

*Special Protection from Discharge.* Servicemembers who are reemployed get special protection from discharge.<sup>73</sup> If the employee's uniformed service lasted at least thirty days but less than one hundred eighty-one days, the reemployed servicemember may not be discharged except for cause for one hundred eighty days after the date of reemployment. If the period of service was for more than one hundred eighty days, the reemployed servicemember may not be discharged except for cause for one year after the date of reemployment. No special protection applies for uniformed service of less than thirty days.

### Assistance in Compliance

Servicemembers who encounter problems in their employment or reemployment may seek the help of the Labor Department in resolving those conflicts.

<sup>67</sup>20 C.F.R. § 1002.261 (2009). If an employee's absence for uniformed service exceeds ninety days, the employer may delay making retroactive pension contributions until the employee submits satisfactory documentation showing eligibility for reemployment (38 U.S.C. § 4312(f)).

<sup>68</sup>38 U.S.C. § 4316(d) (employers may not require employees to use accrued leave during uniformed service).

<sup>69</sup>20 C.F.R. § 1002.153 (2009).

<sup>70</sup>PISCITELLI & STILL, *supra* note 2, § 6:3.

<sup>71</sup>*Foster v. Dravo Corporation*, 420 U.S. 92, 95 (1975).

<sup>72</sup>20 C.F.R. § 1002.236 (2009).

<sup>73</sup>38 U.S.C. § 4316(c).

A number of organizations can help servicemembers secure employer compliance with the USERRA.<sup>74</sup> The Employer Support of the Guard and Reserve, part of the Defense Department, is a resource for those with questions about rights and responsibilities under the USERRA, as is the Reserve Officers Association.

The secretary of labor is charged by statute with assisting any person or entity “with respect to employment and reemployment rights and benefits” under the USERRA.<sup>75</sup> The secretary administers the USERRA through the Veterans’ Employment and Training Service (VETS). The U.S. attorney general enforces the USERRA against private and state employers.<sup>76</sup>

An individual may file a complaint with the nearest VETS office by mailing VETS Form 1010 or e-filing VETS Form e1010.<sup>77</sup> The complaint must have the name and address of the employer, a summary of the basis for the complaint, and a request for relief.<sup>78</sup> Not later than five days after receiving a complaint, VETS must notify the complainants of their rights with respect to filing a complaint and actions that VETS must take in pursuing the complaint and enforcement options.<sup>79</sup>

VETS is required to investigate every complaint.<sup>80</sup> If after investigation VETS

determines that the employer violated the USERRA, VETS must make reasonable efforts to ensure that the employer complies with the USERRA. If VETS cannot resolve the complaint, it must notify the complainant of the results of the investigation and of the complainant’s right to seek enforcement action.<sup>81</sup> VETS must complete its investigation and efforts to resolve the complaint and notify the complainant all within ninety days of receiving the complaint.<sup>82</sup>

If VETS is asked to refer a complaint against a state or private employer for enforcement, it refers the complaint to the U.S. attorney general for enforcement.<sup>83</sup> The attorney general must decide whether to bring an action and notify the complainant of that determination within sixty days of receiving the complaint.<sup>84</sup> A suit brought by the attorney general must be brought in federal district court.<sup>85</sup> A servicemember may bring suit without going through the attorney general. The suit must be brought in federal court unless the employer is a state.<sup>86</sup>

The USERRA makes available to courts three remedies for violations:<sup>87</sup> First, the court may require the employer to comply with USERRA provisions. Second, the court may require the employer to compensate the individual for any loss

<sup>74</sup>The staff judge advocate’s office at the nearest military installation may be a good place to start.

<sup>75</sup>38 U.S.C. § 4321.

<sup>76</sup>If the employer is a federal agency, the complaint is referred to the Office of Special Counsel for representation before the Merit Systems Protection Board (*id.* § 4324 (a)). For enforcement of rights with respect to federal employers, see *id.* §§ 4324–4325.

<sup>77</sup>20 C.F.R. § 1002.288 (2009). An individual reserves the right to bypass the Labor Department and file a private suit against an employer (*id.* § 1002.303).

<sup>78</sup>38 U.S.C. § 4322(b).

<sup>79</sup>*Id.* § 4322(c) (Veterans’ Employment and Training Service must provide a potential claimant, upon request, with technical assistance in filling out and submitting claim and, where appropriate, must assist employer).

<sup>80</sup>*Id.* § 4322(d).

<sup>81</sup>*Id.* § 4322(e)(2).

<sup>82</sup>*Id.* § 4322(f) (the ninety days begins upon receiving complaint).

<sup>83</sup>*Id.* § 4323(a). The term “private employer” includes a state political subdivision (*id.* § 4323(i)). Enforcement of rights with respect to a state or private employer are contained in *id.* § 4323.

<sup>84</sup>*Id.* § 4323(a).

<sup>85</sup>*Id.* § 4323(b) Any action brought by the attorney general is at no cost to the servicemember.

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* § 4323(d).

of wages or benefits suffered because of the employer's failure to comply with the USERRA. Third, if the court determines that the employer's failure to comply with the USERRA is willful, it may require the employer to pay liquidated damages. Note that any wages, benefits, or damages awarded are in addition to and must not diminish the available USERRA rights such as the right to reemployment. The court also may award reasonable attorney fees, expert witness fees, and other litigation expenses to a prevailing servicemember claiming USERRA rights.<sup>88</sup>

The USERRA was amended in 2008 to preclude expressly the application of any statute of limitations to USERRA actions.<sup>89</sup> At least one court, the Seventh Circuit, held that this provision did not apply retroactively. Because the action before the Seventh Circuit arose prior to October 10, 2008, the date that the USERRA was signed into law, the court applied a federal four-year statute of limitations, barring the action.<sup>90</sup> Advocates may want to assume, at least in the Seventh Circuit, that a four-year statute of limitations applies to actions accruing before October 10, 2008.

In considering USERRA claims, note that the legislative history clearly establishes that Congress intended to continue the precedent established by the U.S. Supreme Court in *Fishgold v. Sullivan Drydock and Repair Corporation* that the law "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."<sup>91</sup>

The Defense Department's Employer Support of the Guard and Reserve (ESGR) is another source of assistance for those with questions regarding employment and

reemployment rights and benefits under the USERRA.<sup>92</sup> ESGR assists members of the National Guard and Reserve forces of all branches of the armed forces and their employers in resolving employment conflicts that arise from an employee's military commitment. A reserve component servicemember may file a complaint with ESGR by electronically completing ESGR Form 100 or by calling ESGR's toll-free number.<sup>93</sup> ESGR will conduct informal mediation between the parties in an attempt to resolve the complaint. The Reserve Officers Association, chartered by Congress to advise it on military policy, may also be a good source of information, particularly for advocates. The association's website contains a law review library with opinion letters on many USERRA topics.



The USERRA is the latest iteration of a series of laws protecting servicemembers' employment and reemployment rights dating back to the 1940s. Unlike its predecessors, the USERRA provides significant employment and reemployment protections, establishes new enforcement procedures, and expands remedies available to those who leave private life to serve their country in its hour of great need. We strongly urge servicemembers and employers alike to become familiar with the USERRA's protections, the prerequisites to protection under the USERRA, and the means by which the USERRA's provisions can be enforced.

**Authors' Note**

*This article reflects our personal opinions, not our employers, the Wisconsin National Guard, the United States Army, or the Office of the Milwaukee City Attorney.*

**COMMENTS?**

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—The Editors

<sup>88</sup>*Id.* § 4323(h)(2). No fees or court costs may be awarded against any person claiming rights under the Act. *Id.* § 4323(h)(1).

<sup>89</sup>38 U.S.C. § 4327.

<sup>90</sup>*Middleton v. City of Chicago*, No. 08-2806, 2009 U.S. App. LEXIS 18979 (7th Cir. Aug. 24, 2009). For a discussion of USERRA statute-of-limitations issues, such as how some courts have interpreted employment contract limitations, see the Law Review section of the Reserve Officers Association's website, <http://bit.ly/m901X>.

<sup>91</sup>*Fishgold v. Sullivan Drydock and Repair Corporation*, 328 U.S. 275, 285 (1946). See also 38 U.S.C. § 4301 (2009).

<sup>92</sup>See the Employer Support of the Guard and Reserve (ESGR) website, [www.esgr.org/site/](http://www.esgr.org/site/). ESGR is a staff group within the Office of the Assistant Secretary of Defense for Reserve Affairs, which is itself a part of the Office of the Secretary of Defense.

<sup>93</sup>See <http://bit.ly/3CWknO>. ESGR's toll-free number is 800.336.4590.

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