

# Uniformed Services Employment and Reemployment Rights Act

## USERRA

38 U.S.C. §§ 4301-4335

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# USERRA Purposes

## Uniformed Services Employment and Reemployment Rights Act 28 U.S.C. §§ 4301-4335

- Encourage non-career service; eliminate disadvantages that may result to civilian careers
- Prevent discrimination against members of the National Guard and Reserves and Veterans
- Minimize disruption to lives of Service Members, as well as their employers, by requiring prompt reemployment upon completion of service

# USERRA context

- Enacted in 1994
- Latest in a series federal veterans' reemployment laws that date back to 1940
- USERRA broadened substantive rights, established new enforcement procedures, expanded remedies, clarified previously existing rights and obligations, codified prevailing case law

# Overview of Protections

- Prohibits employment **discrimination** on basis of past military service or current or future military obligations
- Protects **reemployment** rights for individuals who leave their civilian employment to perform military service
- Ensures continuation of certain employee **benefits** during military service, including participating, vesting and accruing pension benefits for reemployed employees
- Prohibits **retaliation** against employees engages in protected conduct
- Provides right to file a **complaint** with the Department of Labor

# Regulations

- USERRA Regulations for Private Employers and States: 70 Fed. Reg. 75,246 (2005), 20 C.F.R. Part 1002
- USERRA Regulations for Federal executive agencies, 5 C.F.R. Part 353
  - Relevant for employees of Federal agencies

# USERRA Employer Coverage (38 USC § 4303(4))

- All private employers regardless of size
  - Including foreign employers doing business in the U.S.
- Federal, state, and local governments
- Successors in interest to employers

# USERRA Employee Coverage

- Depends on discrimination protections or reemployment rights
- “Employee”= “any employee employed by an employer” (38 USC § 4303(3))
- “Uniformed Service”=broad. Covers voluntary service (38 USC § § 4303(13)&(16))
  - Active/Reserve Service Members, Public Health Service Commissioned Corps, FEMA responders, disaster responders, anyone designated by President in war or national emergency

# Discrimination

## 38 U.S.C. § 4311(a)

- Employers may not discriminate:
  - In hiring, promotion, retention in employment, reemployment, benefits of employment
  - On the basis of a person's prior service, current obligations, or intent to join a uniformed service

# Discrimination

- Not all work problems a former, current, or prospective service member faces are viable USERRA claims.
- To make out a discrimination claim, it's not enough to show that something bad happened!
  - Must meet the legal standard

# Discrimination- legal standard

USERRA sets out a two part test:

- Prima Facie Case: Employee must prove that service or protected activity was “**motivating factor**” in adverse employment action (38 USC § 4311, 20 C.F.R. § 1002.22). This means the service or activity was one of the reasons the employer took the action.
- Burden then shifts to employer to prove that adverse action would have been taken anyway, regardless of the military service. *See Sheehan v. Dep't. of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001)

# USERRA Discrimination- circumstantial evidence elements establishing discriminatory motive

- Knowledge of Claimant's military or protected activity.
- Proximity in time between Claimant's military or protected activity and the adverse action.
- Employer's expressed hostility towards military members or military duty.
- Disparate treatment toward the Claimant compared to other employees with similar work records or offenses.
- Inconsistencies between the proffered reason(s) and other actions of Employer.
  - *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)

# Retaliation

## 38 U.S.C. § 4311(b)

- Employers may not retaliate:
  - In hiring, promotion, retention in employment, reemployment, benefits of employment
  - On the basis of **any person's** action to enforce anyone's USERRA rights, testimony or statement made in connection with a proceeding under the chapter, participation in an investigation, exercise of a USERRA right

# Reemployment- Introduction

- “any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if...” 38 U.S.C. § 4312

# Reemployment compared to Discrimination Protections

- USERRA reemployment rights- narrower coverage than discrimination protections.
- Different analysis
- Must establish eligibility for reemployment protections

# Reemployment- eligibility

38 U.S. Code § 4312; 20 C.F.R. Part 1002, Subpart C

- A person who is absent from employment due to military service is entitled to reemployment by the pre-service employer, if the person:
  - 1) Left a civilian job to perform service
  - 2) Provided advance notice to employer, unless notice impossible/unreasonable
  - 3) Cumulative length of all absences with that employer due to military service does not exceed five years\*
  - 4) No disqualifying discharge
  - 5) Timely returned to work or applied for reemployment following service

# Employer Affirmative Defenses to Reemployment(38 USC § 4312)

- **Brief, non-recurrent position** – job was not expected to continue indefinitely or for significant period
- **Changed circumstances** -- reemployment is impossible or unreasonable
- **Undue hardship** -- employee cannot be qualified for reemployment position

# Reemployment- eligibility

## No additional requirements to reemployment

- An employer cannot impose prerequisites to reemployment or the receipt of reemployment benefits beyond those required under USERRA.
- However, an employer may ask a military department to adjust the scheduled absences from employment of an employee who is a member of the National Guard or Reserves

# Reemployment Position

- A person who is eligible shall be promptly reemployed (38 USC § 4313(a)); 20 CFR 1002.181 § 1002.181)
- General Rule: “**Escalator position**” – Job position that would have been obtained with “reasonable certainty” but for the period of service (might be better or worse) based upon employer procedure or practice
  - Includes **seniority, status, and pay**, plus wage increases, promotions, more responsibility, if **reasonably certain** these would have been earned (38 USC § 4313)

# Reemployment- position

- Other factors may allow or require the employer to reemploy the employee in a position other than the escalator position: (20 C.F.R. § 1002.195)
  - Length of service (if gone 90 days or less, escalator position unless unqualified)
  - Qualifications of employee (employer must make reasonable efforts to qualify)
  - Service-incurred or aggravated disability

# Reemployment Benefits

- If proper reemployment position is a non-escalator position, employee still entitled to seniority and seniority-based rights and benefits would have attained had he or she remained continuously employed
  - Must have reasonable certainty (high probability)
  - Seniority benefits= due to passage of time
  - (non-seniority benefits– non-discrimination principle)

# Reemployment Benefits

- Protection against being fired for a certain time period, except for cause (38 USC § 4316)
  - If service was more than 180 days, for one year
  - If service was between 30-180 days, for ~six months (180 days)
- For cause= employer must prove reasonable to fire and employee had notice that conduct is grounds for discharge
  - Layoffs are allowed and considered cause

# Reemployment- position benefits pensions

38 U.S.C. §§ 4316(b)(6) and 4318

- Under USERRA, the employee must be treated as having been continuously employed with the employer or employers maintaining the pension plan
  - Employer is liable to the plan for USERRA funding obligations

# Reemployment- position benefits pensions

- Employer obligations
  - For non-contributory plans, employer contributes as if employee were continuously employed
    - employer's contribution must be made within 90 days or when contributions are normally due
  - For contributory plans, employer makes contributions contingent on employees' contributions
    - Employer can't be delinquent.
  - If employee gone for 90+ days, employer can delay making contributions until receives from employee documentation showing reemployment eligibility

# Reemployment- position benefits pensions

- Contribution amount
  - rate of pay employee would've received with reasonable certainty had employee remained continuously employed (including overtime or other pay)
    - If not a fixed rate, look to average rate of pay during 12 month period before leaving for military service.
      - If less than 12 months, then base on months there

# Benefits During Service

- Employee considered to be on furlough or leave of absence (38 USC § 4316(b)(1)(A))
  - Entitled to take accrued paid leave but cannot be required
- Entitled to non-seniority benefits given to similarly-situated employees (e.g., life insurance) (38 § USC 4316)
  - If provides written notice of intent not to return then lose entitlement to non-seniority rights. No waiver of reemployment rights.

# Health Plans (38 U.S.C. § 4317)

- Employees may elect continuation of coverage
  - For the lesser of either 24-month period beginning when absent or period beginning when absent and ending when employee fails to return or apply for position of employment
- Upon reemployment health plan must be generally reinstated with no waiting period

# USERRA Investigations

- Complaint driven; **investigated** by VETS within 90 days; also private right of action
- **90 percent** of claims resolved informally during investigation
- If claim remains unresolved, claimant can seek representation from USDOJ (private or state employer) or the Office of Special Counsel (OSC) (federal agency employer) by requesting referral
- In referral, VETS makes a **representation recommendation** to DOJ or OSC of litigation recommended (merit) or litigation not recommended (non-merit) within 60 days
- Then DOJ/OSC must make a **determination** within 60 days (38 USC 4323) whether to represent, relying on the case file
- **Remedies** include injunctive relief, lost wages and benefits, liquidated damages (2X) for willful violations (38 USC 4323<sub>27</sub>)

# Remedies 20 CFR § 1002.312

- A court may order:
  - reinstatement, even if that means displacing another worker, back pay, pension adjustments, restored vacation days or other lost benefits, seniority restored retroactively, promotion with a retroactive effective date if appropriate
  - other forms of appropriate relief (for example, prohibiting the employer from making disparaging statements about the employee to other employers)

# Basic Back Pay Entitlement—

- Difference between what an employee was actually paid and what he or she should have been paid if not for wrongful action.
  - Termination
  - Denial of Initial Hiring
  - Denial of Reemployment

# Mitigation of Damages Required

- A Claimant who seeks to recover lost wages must try to find another comparable job.
  - Situations where claimant is unlawfully terminated, failed to reinstate, or failed to hire.
- If not, employer may assert as an affirmative defense that claimant failed to mitigate losses.

# Elements of Back Pay— Special Pay and Benefits

- Basic pay, special pay, overtime should be included if reasonably certain would have been earned by claimant
- Use claimant's and co-workers' work histories to determine total pay that would have been received
- Include value of other benefits such as vacation days and health insurance; if claimant purchases stop-gap health insurance, include difference between what claimant paid and ordinary employee share
- If continuation coverage cannot be obtained, include out-of-pocket medical expenses in back pay award

# Other damages

- No punitive damages
- No damages for emotional distress
- If an employer willfully violated USERRA, it may be required to pay the claimant liquidated damages— that is, the amount of lost wages and benefits will be doubled
  - E.g. Employer: “I don’t care what you say about USERRA, I don’t listen to the Feds, I’m not reemploying you.” If unemployed for 5 weeks at \$200/week, and would normally get \$1000, entitled to \$2000.