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# EMPLOYING SERVICEMEMBERS: WHAT YOU SHOULD KNOW ABOUT USERRA

**SMALL BUSINESS ASSISTANCE OFFICE  
MINNESOTA DEPARTMENT OF  
EMPLOYMENT AND ECONOMIC DEVELOPMENT  
AND  
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***Employing Servicemembers:  
What You Should Know About USERRA***

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# Employing Servicemembers: What You Should Know About USERRA

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Employment and Economic Development  
and  
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# **Employing Servicemembers: What You Should Know About USERRA**

*Mathew M. Meyer, Esq.*

Since 1940, those who have answered the call to duty and honorably served in the national defense have enjoyed protections in their civilian employment. First with the Selective Training and Service Act of 1940, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (later renamed the Veterans' Reemployment Rights Act "VRRRA"), and, currently, the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"),<sup>1</sup> Congress has sought to encourage non-career uniformed service by minimizing disadvantages to civilian careers. USERRA accomplishes this by requiring prompt reemployment and prohibiting discrimination based upon an employee's uniformed service. Because USERRA is intended to protect the rights of servicemembers, it is construed broadly "in favor of its military beneficiaries."<sup>2</sup>

The need for USERRA protections has been heightened by the events following 9/11. Nearly half of the uniformed servicemembers mobilized since 9/11 to combat terrorism—and engage in other contingency operations in furtherance of our national security—have been Reserve Component ("RC") servicemembers. More than 910,000 RC servicemembers have been called to active duty since the terrorist attacks of 9/11, and many have been deployed multiple times. This heavy reliance upon our RC servicemembers demonstrates why our national security is inextricably linked to providing those servicemembers stability in their civilian employment.

## I. ELIGIBILITY FOR USERRA PROTECTION:

When considering whether you have a potential USERRA issue, you must first determine whether the employee is entitled to protection under the statute.<sup>3</sup> There are five basic requirements that must be satisfied to determine whether an employee is entitled to USERRA reemployment protections, each of which raises issues that may not be fully understood by employers. The servicemember must:

- (1) be absent from a position of employment by reason of service in the uniformed services;
- (2) provide the employer advance notice of the service;
- (3) have five years or less of cumulative uniformed service with a particular employer;
- (4) return to work in a timely manner after conclusion of service; and
- (5) not have been separated from service with a disqualifying discharge.<sup>4</sup>

### ***Absent From a “Position of Employment”...***

Compared to other federal employment statutes, USERRA contains a very broad definition of employers who are covered and is not limited to employers of a certain size.<sup>5</sup> Significantly, USERRA recognizes “joint” employer situations and extends its application to entities that are not traditionally considered employers, such as plan administrators, unions, and even those who exert control over contract employees.<sup>6</sup> In certain circumstances, USERRA’s obligations may be transferred to the successor-in-interest of the original employer if the servicemember would have been employed by the successor had he remained continuously employed.<sup>7</sup> It is the

broadest federal employment statute, extending its protections of reemployment and nondiscrimination to employees of domestic companies who employ U.S. citizens overseas, as well as foreign employers of U.S. citizens in the United States.<sup>8</sup>

A position of employment includes applicants for initial employment, part-time and seasonal employment, management, and even co-owners, such as shareholders/partners in professional organizations. It does not apply, however, to “brief, non-recurrent” positions of employment.<sup>9</sup>

### ***... by Reason of “Uniformed Service?”***

The statute’s principal purpose is to protect civilian employment rights for employees who are called to perform uniformed service. This, of course, includes service in the various branches of the military, including the U.S. Coast Guard, and their reserve components – whether the uniformed service is “voluntary” or “involuntary.”<sup>10</sup> It also protects those who are applicants for initial enlistment, even if they fail to pass the initial examination or training.<sup>11</sup> But it also includes some non-traditional services, such as uniformed service in the Public Health Service (PHS), Federal Emergency Management Agency (FEMA), the National Disaster Medical System (NDMS), and, as recently amended, the National Urban Search and Rescue System (NUSRS).<sup>12</sup>

Uniformed service *not* protected by USERRA includes National Guard members activated for state service.<sup>13</sup> However, many states, including Minnesota, have enacted state statutes extending USERRA protections to guard members called up for state service, even if the servicemember is called up for duty by another state.<sup>14</sup>

Convalescence from injuries suffered or aggravated during military service, whether or not seeking treatment at the U.S. Veterans’ Administration, is not “uniformed service” under USERRA.



However, Minnesota recently granted employees of the state and its political subdivisions the right to unpaid leave-of-absence while convalescing from an injury or disease incurred during active military service.<sup>15</sup> Furthermore, for private employers, unpaid convalescence leave may be required as an accommodation under the disability provisions of USERRA, ADA, and/or FMLA.

### ***“Prior Notice” to Employer***

Another USERRA provision often misunderstood is the “prior notice” the servicemember must provide his employer. This notice may be *written or verbal* – an employer may not require written notice or documentation as a condition of USERRA-mandated benefits or reemployment.<sup>16</sup> Although the U.S. Department of Defense (DoD) directs servicemembers to provide at least 30 days advance written notice,<sup>17</sup> USERRA contains no requirement regarding how far in advance the notice must be provided, only that it be provided prior to the next scheduled shift.<sup>18</sup> Indeed, it is often the case that servicemembers themselves are provided very little advance notice of uniformed service. And, of course, there are exceptions excusing the servicemember from providing such notice due to military necessity or where it is impossible or unreasonable.<sup>19</sup> If such circumstances exist, the DoD requires the servicemember’s unit to provide written verification of such upon request.<sup>20</sup>

The content of the prior notice need not express a desire to return to a position of employment, only that the employee will be absent from employment due to uniformed service.<sup>21</sup> Indeed, since the servicemember cannot waive USERRA rights in advance, the notice may be in the form of an explicit resignation. However, if the servicemember meets USERRA’s requirements, she is still entitled to reemployment after uniformed service.

Finally, a related issue is the amount of time-off an employer must give a servicemember *prior* to military service. This issue arises typically for uniformed service of a short duration, such as weekend drills and annual training. Although the U.S. Department of Labor (DOL) regulations do not provide specific guidance on this issue, they do require that the servicemember be released from work with sufficient time for safe travel and to arrive at his duty station “fit for service.”<sup>22</sup> Thus, the employer should provide a comparable amount of time as provided under USERRA for a servicemember to reapply for reemployment given the length of uniformed service. For military service of fewer than 31 days, the servicemember should be allowed the “safe travel time” and eight hours of rest prior to the time he must report for duty.

### ***Five-Year Cumulative Limit on Service Duration***

USERRA provides that an individual may serve up to five years in the uniformed services, in a single period of service or in cumulative periods totaling five years, per an employer, and retain the right to reemployment by the pre-service employer.<sup>23</sup> This, too, is a provision frequently misunderstood by employers because of the numerous exceptions to the types of uniformed service that count against the five-year limit. For instance, any involuntary service does not count against this limit, nor do voluntary activations for most of the counter terrorism and global contingency operations since 9/11, including, specifically, those in Iraq and Afghanistan.<sup>24</sup> Furthermore, there have been numerous operations requiring activation of RC servicemembers that have been deemed exempt from this limit. Thus, the five-year limit is rarely an obstacle to reemployment rights under USERRA, and the employer should be careful before invoking this as a reason to refuse reemployment. For guidance on whether a particular servicemember has exceeded this five-year limit, please contact the U.S. Department of Defense’s Employer Support of the Guard and Reserve program (ESGR) or the servicemember’s unit representative.

### ***When is Service Disqualified?***

There are various types of discharges that are available to a servicemember, depending upon whether he is a commissioned officer or enlisted. Typically, a discharge that is the result of misconduct is disqualifying when it comes to USERRA reemployment rights.<sup>25</sup> However, a servicemember may obtain a retroactive upgrade of his discharge, thus qualifying him for reemployment under USERRA.<sup>26</sup> To confirm the type of discharge its employee received, an employer should contact ESGR or the servicemember's unit representative. But the employer is cautioned *not* to delay reemployment pending confirmation of the type of discharge the employee received.

### ***Timely Return to Work? Depends on Length of Service.***

The timeline for the servicemember to return to work depends on the length of the uniformed service. The issue that most frequently arises involves service of thirty days or less, in which case the employee must report back to work for the next regularly scheduled shift after service, safe transportation, and eight hours of rest.<sup>27</sup> An employer may not require an employee to report for a partial shift or a shift that is not "regularly scheduled." However, if the employee voluntarily agrees to report earlier than the timeline set forth in USERRA, the employer can so schedule her for that shift. For uniformed service of 31-180 days, the servicemember must return to work within 14 days. If the service was 181 days or more, the servicemember has ninety days to apply for reemployment. However, any reapplication deadline may be extended up to two years due to hospitalization or convalescence.<sup>28</sup>

Notwithstanding the employee's deadline to apply for reemployment, if she decides to seek reinstatement earlier, the employer must reemploy her "promptly" upon request.<sup>29</sup> Depending on the length of service, this may mean "immediately" or within days but *not* longer than two weeks, if circumstances dictate.<sup>30</sup>

Finally, where the servicemember fails to return to work before the deadline, she does not necessarily lose her reemployment rights. Instead, the employer must apply its regular disciplinary process used for non-servicemember employees.

## **II. WHAT ARE AN EMPLOYER'S OBLIGATIONS UNDER USERRA?**

The statute provides *four* general rights and obligations for the employer once USERRA protections are established under the criteria described above:

- First, the servicemember must be promptly reemployed at the "escalator position" and is entitled to any benefits or protections associated with that position.
- Second, employers are prohibited from discriminating against an employee based upon his uniformed service.
- Third, employees are protected from retaliation in making or assisting in USERRA claims.
- Fourth, the employer must post USERRA protection notices in their workplace.<sup>31</sup>

## ***USERRA: The “Floor”***

USERRA requires the employer to provide the servicemember the most favorable policies or conditions of employment available to any other employee on a comparable “leave of absence” (LOA) or similar status.<sup>32</sup> For example, if the employer offers continued life insurance coverage, holiday pay, bonuses, or other non-seniority benefits to its employees on furlough or leave of absence, the employer must also offer the servicemember similar benefits during the time she is absent from work due to military service.<sup>33</sup> This extends to paid LOA policies where an employer provides pay for maternity leave, jury duty, bereavement leave, or provides other benefits to employees on a non-military LOA, as long as the type of leave is “comparable” to the military LOA at issue.<sup>34</sup> The “duration of the absence” is the most important factor in determining whether it is comparable, with the purpose of the leave and ability to choose when to take the leave as additional factors.<sup>35</sup>

Finally, regardless of any state law, local ordinance, collective bargaining agreement, or contract, the employer may provide additional protections or benefits to servicemember employees.<sup>36</sup> However, no employer may provide less than what is required under USERRA.

## ***Reemployment Rights and Protections: The “Escalator Position”***

The guiding principle of USERRA is the requirement that the servicemember be reemployed at the same position she would have had if she had remained continuously employed during the period of uniformed service – the “Escalator” position.<sup>37</sup> USERRA entitles a returning servicemember to “the seniority and other rights and benefits determined by seniority that the

person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.”<sup>38</sup> USERRA protects seniority-based rights, including supervisory status, location, hours/shifts, and opportunity for promotion or for assignments. The escalator position is determined by the “reasonable certainty” test – not “absolute” certainty – regardless of whether it involves “discretionary” and “nondiscretionary” benefits or personnel actions.<sup>39</sup> The “escalator” position may require retraining and/or requalification, which is the employer’s responsibility *after* reemploying the servicemember.<sup>40</sup> Given the economic realities of businesses, the escalator may also go down, as expressed in the regulations: “Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated.”<sup>41</sup> Consequently, a careful assessment should determine what the employee’s position and benefits would have been had she remained continuously employed during the uniformed service.

Even if the employer suspects that a servicemember’s conduct while on uniformed service would be cause for termination, it is advisable to strictly apply the reemployment provisions and promptly reemploy the servicemember if she is qualified under the five factors. In such situations, only after reemploying the servicemember should the employer apply its disciplinary procedures and, if warranted, terminate the employee.<sup>42</sup> Any delay in reemployment may be a USERRA violation, regardless of whether the servicemember could have been discharged for cause *after* being reemployed.

Reemployment obligations would be meaningless if the employer could terminate the employee at will. Therefore, once an employer reemploys the servicemember, it is prohibited from terminating the servicemember except for cause for six months after the date of reemployment if the period of uniformed service was for 31 – 180 days,<sup>43</sup> and one year after the date of reemployment if the period of military service was more than 180 days.<sup>44</sup> Under the statute, cause is defined not only as misconduct on the part of the employee, but also includes layoffs or elimination of the position, as long as the cause is the result of legitimate nondiscriminatory reasons.

### ***Reemployment may be Excused***

Reemployment of a servicemember is excused if an employer's circumstances have changed such that reemployment would be impossible or unreasonable. A reduction-in-force that would have included the servicemember would be an example. Employers are excused from making efforts to qualify returning service members, or from accommodating individuals with service connected disabilities, when doing so would be of such difficulty or expense as to cause "undue hardship."<sup>47</sup> "USERRA defines 'undue hardship' as actions taken by the employer requiring significant difficulty or expense when considered in light of various factors such as 'the overall financial resources of the employer.'<sup>48</sup> The employer has the burden of proof for this affirmative defense.

### ***Commission-Based Positions***

The escalator principle is applicable even in difficult situations, such as a commissioned salesperson returning from an extended deployment. An interesting case exploring this situation is *Serricchio v. Wachovia Sec. LLC*<sup>49</sup> where the Second Circuit Court of Appeals concluded that the employer violated USERRA when it reemployed the servicemember at the same commission rate, but without the established book of business as when he left. The court, largely

based upon the Secretary of Labor’s amicus letter, concluded that “Wachovia was not required to provide Mr. Serricchio his exact previous book of business so long as what it offered him gave him the opportunity to reenter the work force with comparable status and commission opportunity as of the date of reinstatement that he would have had had he not taken military leave, regardless of whether the same clients were in his substituted book of business provided on his return.”<sup>50</sup> In such situations, careful consideration should be given to the servicemember’s pre-service status and what is offered upon his return.

### ***Missed Bonuses and Performance Incentives***

Employers often offer bonuses or other incentives to encourage, or discourage, certain behavior. Whereas an employer is not obligated to pay a servicemember while he is on a military LOA, neither should the servicemember be precluded from participating in a performance-related incentive program merely because he failed to qualify for it because of his military service. If the servicemember worked at least part of the relevant period for which the incentives are awarded, the employer should extrapolate from his performance while employed to determine if he would have, with reasonable certainty, met the threshold for participating in that bonus. Once it is confirmed that he would have shared in the incentives, then the employer may prorate the bonus to reflect that portion of the bonus period the servicemember actually worked.

Similarly, servicemembers should be allowed to participate in bonus programs that contemplate “lack of occurrences” of some event, such as those that reward perfect attendance or safety. The employer should *not* assume the employee would not have qualified for the bonus, but should instead award the bonus, without prorating, if the conditions were met during the periods the servicemember was actually employed during the period.



## ***Missed Promotions***

Missed promotions is another issue that arises frequently after an extended absence due to uniformed service. What is the servicemember's "escalator position" when a servicemember missed a promotion during uniformed service? The regulations specifically reject the characterization of whether the promotion was "discretionary" or "nondiscretionary" as determinative.<sup>51</sup> Instead, the question is whether the servicemember was "reasonably certain" to have received the promotion had she remained continuously employed.<sup>52</sup> If so, then the escalator position would be the promotion position. The same standard applies to discretionary promotions, but it involves a more detailed analysis of the likelihood of the promotion given the various factors.

A related question is what are the employer's obligations when the servicemember missed an "opportunity" for a promotion. This typically involves a promotion, or placement on a promotion list, based on a test or examination given while the employee was on a military LOA. "If a reemployed servicemember was eligible to take such a promotional exam and missed it while performing military service, the employer should provide the employee with an opportunity to take the missed exam after a reasonable period of time to acclimate to the employment position."<sup>53</sup> The "reasonableness" of the period of time is subject to various factors. Significantly, if the servicemember's absence was lengthy, this may involve multiple promotion opportunities that must be provided to the returning servicemember to restore her to the appropriate escalator position.<sup>54</sup>

## ***Probationary/Apprenticeship Programs***

One issue that arises when the employer has a probationary or apprenticeship program in place is the status of the returning servicemember who left midway through the program for uniformed service. The regulations address this specifically and provide the returning servicemember picks up where he left the program and must continue to complete the program satisfactorily, provided the program is “bona fide and not merely a time-in-grade requirement.”<sup>55</sup> Once the program is completed, the servicemember must be provided all seniority-based benefits as if she had completed the program without having taken a military leave of absence.<sup>56</sup>

## ***Vacation Days***

Another common issue under USERRA concerns an employer’s policies regarding the use of vacation days or PTO. Under USERRA, an employee’s use of vacation days is completely the servicemember’s discretion – the employer is prohibited from mandating how vacation days are used for military leave of absence.<sup>57</sup> A related issue involves an employer who adjusts its work schedule around the servicemember’s drill schedule without the employee’s consent. Although not entitled to preferential treatment, a servicemember should not be treated less advantageously than other non-servicemember employees, or discriminated against based on uniformed service.<sup>58</sup> Thus, the employer should be careful when dealing with scheduling issues without obtaining the consent of its servicemember employees.

## ***Documentation***

Although recently published DoD regulations instruct servicemembers to provide documentation, when available, to their employers verifying military service, up to 30 days prior to service, failure to do so does not jeopardize his reemployment rights since USERRA has no such requirement.<sup>59</sup> The servicemember's only obligation is to provide documentation if he was absent for military service longer than thirty days, and, even then, it is only to verify USERRA eligibility under the five requirements described above.<sup>60</sup> Once a servicemember applies for reemployment after uniformed service longer than 30 days, the employer may require documentation specifically focused on confirming eligibility under the five requirements for USERRA protection.<sup>61</sup> However, the employer may *not* delay reemployment pending receipt of such documentation.<sup>62</sup> If an employer has concerns regarding the eligibility of a returning employee who was gone for less than 30 days, it can request, but not require, documentation from the servicemember. Employers who are still not satisfied with the employee's response may contact ESGR or the unit representative to confirm the returning employee's USERRA eligibility.

## ***Benefits: Health Plans***

Under USERRA, an employer must continue to provide health care insurance coverage at no additional expense to the employee absent for uniformed service for thirty days or less.<sup>63</sup> If the uniformed service extends beyond thirty days, the employee may be charged up to 102% of the costs for the policy, up to 24 months.<sup>64</sup> The employer may not impose any exclusions for pre-existing conditions (unless service connected), nor can it impose a waiting period.<sup>65</sup> Although neither the statute nor the regulations establish a procedure for continuation of benefits, servicemembers

and their employers should clearly document the servicemember's preference as to whether health insurance should continue during extended absences due to military service.

### ***Benefits: Pension / Retirement Plans***

USERRA has specific requirements regarding employer-provided pension and retirement plans. Plan administrators cannot impose any break in employment nor forfeiture of benefits already accrued by the servicemember.<sup>66</sup> The military service must be considered service with the employer for vesting and benefit accrual purposes.<sup>67</sup> The employee cannot be made to requalify for participation once he returns. Furthermore, during his military service, the employee cannot be made to make contributions.

Upon reemployment, the servicemember has three times the length of his military service, up to five years, to make up any employee contributions required under the plan.<sup>68</sup> The employer's required contributions are triggered as the employee's contributions are made. If no employee contributions are required, then the employer must make its contributions within ninety days of reemployment of the returning servicemember or when otherwise required.<sup>69</sup> If the servicemember was on a military leave of absence for more than 90 days, the employer's obligations to match its obligations can be delayed until the servicemember provides satisfactory documentation establishing his eligibility under USERRA.

In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate the plan liability for pension benefits accrued. If no allocation or cost-sharing arrangement is provided, the full liability for the retroactive plan contributions will be allocated to the servicemember's last employer before the period of military service or, if that employer no longer exists,

to the overall plan.<sup>70</sup> Within 30 days after a servicemember is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the servicemember's reemployment.<sup>71</sup>

Recent DOJ enforcement actions have raised the issue of how to calculate contributions a returning servicemember can make after an extended absence, thus triggering the employer's contributions under the plan. Contributions are typically determined by what the servicemember was reasonably certain to have earned during his period of uniformed service or, alternatively, the earnings during the 12 months prior to service.<sup>72</sup> His military compensation cannot be used to determine contributions.<sup>73</sup> The issues litigated by the DOJ have involved circumstances where the employer or the pension plan administrator applied the base compensation level for the returning employee without regard to extra compensation that the employee was "reasonably certain" to have earned through overtime or extra duty allowances that would have greatly increased his compensation.<sup>74</sup> The DOL and the DOJ take the position that plan administrators must take into account these additional forms of compensation if the servicemember was "reasonably certain" to have earned them had he remained continuously employed during uniformed service.

### **III. DISABILITIES INCURRED OR AGGRAVATED DURING UNIFORMED SERVICE**

Although there is some overlap with the ADA,<sup>75</sup> USERRA provides broader protections for a returning servicemember. Not only does USERRA cover substantially more employers than the ADA, but it also requires placement of the servicemember in the appropriate reemployment position regardless of whether it is occupied by

another employee. The USERRA disability protections are triggered for any disability incurred or aggravated during uniformed service.<sup>76</sup> The disability does not have to be due to military service. However, a disability incurred between employment and uniformed service would not be covered.<sup>77</sup>

### ***Disability and the Escalator Position***

The servicemember must be reemployed in the “escalator” position, provided he is qualified or can be made qualified with reasonable effort by the employer.<sup>78</sup> To be qualified, the employee must be able to perform the “essential tasks” of the position.<sup>79</sup> Once the servicemember has disclosed the extent of his disability, his education, and his experience, the employer must identify what positions are available for the servicemember, with or without accommodation.<sup>80</sup> The employer then must make reasonable efforts to qualify the servicemember for the escalator position. If that is not possible, he must be placed in a position of equivalent seniority, status and pay for which he is qualified. If not qualified for that, then the reemployment position is the “nearest approximation” to that position.<sup>81</sup> The servicemember is entitled to the final reemployment position regardless of whether it is already occupied. Only after the employer has made reasonable efforts to qualify the returning servicemember for any reemployment position can it seek to be relieved of its reemployment obligation by proving that it would suffer “undue hardship” in qualifying the employee for a position<sup>82</sup> – a very remote scenario. USERRA defines “undue hardship” as actions taken by the employer requiring significant difficulty or expense when considered in light of the factors set out in 38 U.S.C. 4303(15).<sup>83</sup>

## ***Hidden and Temporary Disabilities***

Occasionally a servicemember may not realize that he is suffering from a disability, even though it was incurred in, or aggravated during, uniformed service.<sup>84</sup> For instance, in situations involving PTSD, the condition may not be diagnosed until after the servicemember reports back to work. "If the disability is discovered after the service member resumes work and it interferes with his or her job performance, then the reinstatement process should be restarted under USERRA's disability provisions."<sup>85</sup> Thus, the interactive process would require the parties to discuss the nature of the disability and the reasonable accommodations necessary to move the servicemember into the proper reemployment position.

A similar situation is where the disability is temporary rather than permanent. This may be PTSD or any injury that prevents the servicemember from performing the essential tasks of the escalator position temporarily. Under these circumstances, the employee "may be entitled to interim reemployment in an alternate position provided he or she is qualified for the position and the disability will not affect his or her ability to perform the job. If no such alternate position exists, the disabled service member would be entitled to reinstatement under a 'sick leave' or 'light duty' status until she completely recovers."<sup>86</sup> Whether or not that position is occupied, the employee should be placed in that position. If no position exists, there is no obligation for the employer to create such a position. However, once the servicemember is qualified for the escalator position, with or without reasonable accommodation, the employer must move the employee to that position.<sup>87</sup>

## IV. DISCRIMINATION

USERRA is clear that any discrimination based on an employee's past, current, or future military service is prohibited.<sup>88</sup> However, many employers do not realize that they are violating USERRA when making employment decisions involving servicemember employees. Whether hiring, promoting, or terminating servicemember employees, employers routinely discriminate against servicemembers based upon their uniformed service. If the employee can show that his uniformed service was "a motivating factor" for the employer's actions or conduct, the employer will not succeed on a summary judgment motion, and has the burden of proving at trial that it would have made the same decision notwithstanding the employee's uniformed service.<sup>89</sup> Recognizing that direct evidence of discriminatory motive may be difficult to find, the regulations and courts have relied upon circumstantial evidence to prove discriminatory motive, including (1) temporal proximity between notice of military service and adverse employment action; (2) statements or conduct reflecting hostility toward the military or military service; and (3) statements questioning the employee's dedication to his civilian career because of his military service. Therefore, employers should be concerned when an adverse employment decision appears to be based upon any animus towards the employee's uniformed service.

### ***Hostile Work Environment / Constructive Discharge***

USERRA incorporates the "hostile work environment"<sup>90</sup> and "constructive discharge" concepts found in other employment statutes. "To establish hostile work environment, [an employee] ... must show harassing behavior 'sufficiently severe or pervasive to alter the conditions of their employment.'"<sup>91</sup> When this happens, even if the employee voluntarily resigns, he may claim



it was essentially a “constructive discharge” resulting from those conditions. Indeed, even reemploying a returning servicemember in an unsuitable position, rather than in the escalator position, may result in a “constructive discharge.”<sup>92</sup> In the *Serrichio* case, the servicemember worked solely on a commission basis and had built up a sizeable book of business before being called to service. During his absence, the employer split up his accounts among other sales staff and offered the employee a position without any pre-existing clients upon his return. The court found that this situation created an “intolerable work atmosphere” since “a reasonable person in the employee’s shoes would have felt compelled to resign.” Significantly, the servicemember repeatedly informed the employer that the reemployment position was not acceptable, which the employer ignored.

### ***Retaliation***

Like many employment statutes, any adverse action against an employee, whether a servicemember or a civilian, for assisting or otherwise participating in an investigation or proceeding relating to a USERRA complaint, would be a violation of USERRA.<sup>93</sup>

## **V. ENFORCEMENT OF USERRA RIGHTS**

Servicemembers are encouraged to seek assistance from the DoD ESGR Ombudsman program if they believe their employer violated USERRA.<sup>94</sup> The DoD is given this opportunity to resolve USERRA issues through informal mediation by virtue of a Memorandum of Understanding with the Department of Labor, which is the primary enforcement and rulemaking authority under the statute.

If mediation is unsuccessful, the servicemember will be referred to DOL-VETS for formal investigation.<sup>95</sup> If DOL-VETS is not able to resolve the situation, it may refer the case for civil enforcement by the Department of Justice.<sup>96</sup> If the DOJ is satisfied that a complaint is meritorious, it may file a lawsuit on the complainant's behalf.<sup>97</sup> However, if the servicemember retains his own attorney at any point during this process, he will not be assisted by ESGR, DOL-VETS, or the DOJ in pursuing his claims.

### ***Arbitration***

Although the Eighth Circuit has yet to rule on whether pre-dispute agreements to arbitrate USERRA claims are enforceable, the Fifth, Sixth, Eleventh, and, just recently, the Ninth Circuits have each found such agreements enforceable, relying upon the Federal Arbitration Act ("FAA")<sup>98</sup> and the characterization of rights to bring a claim in court as "procedural."<sup>99</sup> This has led to congressional efforts to have USERRA amended to prohibit enforcement of such provisions.<sup>100</sup>

### ***No Statute of Limitations***

There is no statute of limitations for USERRA claims arising on or after October 8, 2008, based upon non-federal employment.<sup>101</sup> For claims arising prior to that date, the four-year statute of limitations applies.<sup>102</sup> Consequently, employers should be proactive in ensuring compliance under USERRA since claims may be raised by former employees long after their employment was terminated. Indeed, in cases involving "hostile work environment" and "constructive discharge," the employee may have voluntarily terminated their employment, albeit as a result of harassment or hostility based upon his uniformed service, and the employer is unaware of any potential claims until years later.

## ***Damages***

USERRA provides for the recovery of lost benefits and back pay, plus a doubling of that amount if the violation was willful.<sup>103</sup> “Willful” is not defined in USERRA, but the law’s legislative history suggests that a violation is willful if the employer’s conduct was knowingly or recklessly in disregard of the law. Willful violations may be proven by evidence that the employer’s human resources manager knew of the obligations under USERRA, but the company failed to comply.<sup>104</sup> USERRA allows for, at the court’s discretion, awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel.<sup>105</sup> Also, the law bans charging of court fees or costs against anyone who brings suit.<sup>106</sup>

## **VI. DEPARTMENT OF DEFENSE ASSISTANCE TO EMPLOYERS**

Employers are often frustrated with USERRA and their limited rights to demand documentation regarding their employee’s uniformed service. In response, the DoD recently promulgated regulations and issued instructions directing servicemembers and their units to cooperate with their employers’ reasonable requests for documentation.<sup>107</sup> To be clear, the DoD Regulations and instructions do not, and cannot, modify, reduce, or affect the employer’s obligations under USERRA and the DoL’s regulations, nor do they provide any remedies if the units do not comply with these instructions. However, the DoD’s regulations should provide some relief for employers as they navigate their responsibilities under USERRA.

## ***Written Notice and Documentation Upon Return***

The DoD regulations direct servicemembers to provide advance notice of upcoming uniformed service in writing as soon as practicable, preferably at least 30 days prior to service.<sup>108</sup> It specifically encourages written notice whether in the form of a letter from the unit command or by providing written drill schedules to employers once they are available. Sample letters are provided to servicemembers on the ESGR website.

Although USERRA does not require servicemembers to provide documentation to the employer unless the service was longer than 30 days, the DoD regulations recommends that servicemembers provide their employers with the necessary documentation verifying their eligibility for reemployment under USERRA, regardless of the length of service.<sup>109</sup> The units are also directed to respond to employer requests for documentation verifying the dates of uniformed service and discharge status.<sup>110</sup>

## ***Employer Requests to “Delay, Defer, Cancel, or Reschedule Military Service”***

Significantly, the DoD Regulations establish a procedure for employers who are facing disruption to their business or financial operations to have their employee’s orders delayed, deferred, canceled, or rescheduled.<sup>111</sup> Each unit is required to designate an officer with authority to adjust the servicemember’s military obligation. If an employer believes its employee’s absence for military duty “imposes adverse financial or severe operating impact” to its business, it can submit a written request to the unit for relief from the employee’s military orders. The request must explain how the employee’s absence would cause financial or operating impact on the employer, as well as when the employer’s hardship is expected to end due to the servicemember’s

absence.<sup>112</sup> The unit's designee will consider such a request, "unless prevented by military necessity or otherwise impossible or unreasonable under all the circumstances," and has complete discretion whether to grant the request.<sup>113</sup> If the employer is dissatisfied with the decision, it has no other recourse.

## **VII. ESGR AND ITS MISSION**

Established in 1972, the ESGR was formed to encourage support of civilian employers for their servicemember employees. ESGR is staffed by approximately 4,900 volunteers, of which the author is one, who are committed to strengthening the relationship between civilian employers and their servicemember employees. ESGR is often referred to as the principal advocate for employers within the Department of Defense. It provides training and briefings to employers and servicemembers regarding USERRA, its neutral mediation services to resolve disputes with RC servicemembers, and recognizes employers who have demonstrated exceptional support for their RC servicemember employees. ESGR's website provides guidance and resources to both servicemembers and their civilian employers. (See <http://www.ESGR.mil>)

## Endnotes

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<sup>1</sup> 38 U.S.C. §§ 4301-4335.

<sup>2</sup> *Clegg v. Arkansas Dep't of Corr.*, 496 F.3d 922, 931 (8th Cir. 2007).

<sup>3</sup> Note that all employees are protected from discrimination based upon past, present, or future uniformed service, and civilians are protected from “retaliation” from their employer for making or assisting in claims under Section 4311.

<sup>4</sup> 20 C.F.R. § 1002.32.

<sup>5</sup> The only employers exempt from USERRA are Native American tribes, Congress, and clergy.

<sup>6</sup> 20 C.F.R. § 1002.34.

<sup>7</sup> 20 C.F.R. §§ 1002.35-.36; see *Reynolds v. Rehabcare Group East Inc.*, 590 F.Supp.2d 1107 (S.D. Ia. 2008), adopting the Eighth Circuit’s pre-USERRA analysis similar to Section 1002.35 in *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991).

<sup>8</sup> 20 C.F.R. § 1002.34.

<sup>9</sup> 38 U.S.C. § 4312(d)(1)(C).

<sup>10</sup> 38 U.S.C. § 4303(13).

<sup>11</sup> *Id.*; 20 C.F.R. § 1002.54.

<sup>12</sup> 38 U.S.C. § 4303(16); 20 C.F.R. 1002.58.

<sup>13</sup> 38 U.S.C. 4303(4); 20 C.F.R. § 1002.57(b); 70 Fed. Reg. 75,266.

<sup>14</sup> Minn. Stat. § 192.261, subd. 6.

<sup>15</sup> Minn. Stat. § 192.261, subd. 1.

<sup>16</sup> 38 U.S.C. § 4303(8); 38 U.S.C. § 4312(a)(1); 20 C.F.R. § 1002.85(c).

<sup>17</sup> 32 C.F.R. § 104.6(a)(2)(iii)(A), DoD Instr. 1205.12.

<sup>18</sup> 38 U.S.C. § 4312(a)(1); 70 Fed. Reg. 75,255 (“USERRA does not establish any brightline rule for the timeliness of advance notice”); 20 C.F.R. § 1002.85(d).

<sup>19</sup> 38 U.S.C. § 4312(b); 20 C.F.R. § 1002.86.

<sup>20</sup> C.F.R. § 104.6(a)(2)(ix)(F).

<sup>21</sup> 20 C.F.R. § 1002.88.

<sup>22</sup> 20 C.F.R. § 1002.74.

<sup>23</sup> 38 U.S.C. § 4312(c); 20 C.F.R. §§ 1002.99-.104.

<sup>24</sup> 20 C.F.R. § 1002.103.

<sup>25</sup> See generally 38 U.S.C. § 4304; 20 C.F.R. §§ 1002.134 -.138; 10 U.S.C. §§ 1161(a), (b).

<sup>26</sup> 20 C.F.R. § 1002.138.

<sup>27</sup> 38 U.S.C. § 4312(e); 20 C.F.R. § 1002.115.

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- <sup>28</sup> 20 C.F.R. § 1002.116.
- <sup>29</sup> 38 U.S.C. § 4301(a)(2); 20 C.F.R. § 1002.180-.181.
- <sup>30</sup> Fed. Reg. 75,270 (Dec. 19, 2005).
- <sup>31</sup> 38 U.S.C. § 4334.
- <sup>32</sup> 20 C.F.R. § 1002.150.
- <sup>33</sup> 70 Fed. Reg. 75,262.
- <sup>34</sup> 20 C.F.R. § 1002.150(b).
- <sup>35</sup> *Id.*
- <sup>36</sup> 20 C.F.R. § 1002.7.
- <sup>37</sup> 38 U.S.C. § 4313(a)(describing the reemployment position based upon length of uniformed service).
- <sup>38</sup> 38 U.S.C. § 4316(a).
- <sup>39</sup> 20 C.F.R. § 1002.191.
- <sup>40</sup> 20 C.F.R. § 1002.192.
- <sup>41</sup> 20 C.F.R. § 1002.194.
- <sup>42</sup> *Clegg*, 496 F.3d at 930.
- <sup>43</sup> 38 U.S.C. § 4316(c)(1).
- <sup>44</sup> 38 U.S.C. § 4316(c)(2).
- <sup>45</sup> 20 C.F.R. § 1002.193(a).
- <sup>46</sup> 38 U.S.C. § 4312(d)(1)(A).
- <sup>47</sup> 38 U.S.C. § 4312(d)(1)(B).
- <sup>48</sup> See 38 U.S.C. § 4303(15) for the factors used to determine “undue hardship.”
- <sup>49</sup> *Serricchio v. Wachovia Sec. LLC*, 658 F.3d 169, 191 L.R.R.M. (BNA) 2617, 94 Empl. Prac. Dec. P 44262 (2nd Cir. 2011).
- <sup>50</sup> *Serricchio*, 658 F.3d at 188.
- <sup>51</sup> 70 Fed. Reg. 75,271.
- <sup>52</sup> *Id.*; 20 C.F.R. § 1002.193(a).
- <sup>53</sup> 70 Fed. Reg. 75,272.
- <sup>54</sup> See e.g., Stipulation and Order dated Feb. 10, 2016, *United States v. City of Somerville, et al.*, No. 16-10223 (D. Mass. 2016)(DOJ enforcement action stipulation acknowledging returning firefighter/servicemember entitled to two promotion opportunities after returning from nine year military leave of absence).
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.*
- <sup>57</sup> 38 U.S.C. 4316(d); 20 C.F.R. § 1002.153.

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<sup>58</sup> Compare *Bello v. Vill. of Skokie*, 151 F.Supp.3d 849 (N.D. Ill., 2015)(analyzing issue as a discrimination claim under Section 4311) with *Rogers v. City of San Antonio*, 392 F.3d 758 (5th Cir. 2004)(analyzing and comparing issue under Sections 4316(b) and 4311, and concluding that “USERRA’s legislative history does not indicate that Congress intended to rely on § 4311(a)’s general discrimination ban to assure that reservist-employees on military leave receive benefits equal to those that other employees receive while taking comparable non-military leave. While new § 4316(b)(1)’s legislative history clearly reflects the intent to specifically guarantee reservists equality of on-leave benefits, the history of § 4311(a) shows an intent to continue and strengthen the anti-discrimination provision but not the specific goal of guaranteeing parity of benefits.”)

<sup>59</sup> 20 C.F.R. § 1002.121, but see 32 C.F.R. § 104.6(a)(2)(iii)(A), DoD Instr. 1205.12 directing servicemembers to provide written notice, at least 30 days in advance, if practicable, regardless of the length of service.

<sup>60</sup> 20 C.F.R. § 1002.123.

<sup>61</sup> See 20 C.F.R. § 1002.123 for examples of the types of documentation an employer may request.

<sup>62</sup> 38 U.S.C. § 4312(f)(3)(A); 20 C.F.R. § 1002.122.

<sup>63</sup> 38 U.S.C. § 4317(a); 20 C.F.R. § 1002.166.

<sup>64</sup> 38 U.S.C. § 4317(a)(2); 20 C.F.R. § 1002.164.

<sup>65</sup> 38 U.S.C. § 4317(b)(1).

<sup>66</sup> 38 U.S.C. § 4318(a)(2).

<sup>67</sup> 38 U.S.C. § 4318(a)(2)(B).

<sup>68</sup> 38 U.S.C. § 4318(b)(2).

<sup>69</sup> 20 C.F.R. § 1002.262.

<sup>70</sup> 38 U.S.C. § 4318(b)(1).

<sup>71</sup> *Id.*

<sup>72</sup> 38 U.S.C. § 4318(b)(3)(A).

<sup>73</sup> 38 U.S.C. § 4318(b)(3)(B).

<sup>74</sup> 38 U.S.C. § 4318(b)(3); 20 C.F.R. § 1002.267; See e.g. *Goodman v. City of New York*, No. 10 Civ. 5236 (S.D. N.Y. 2016) (Settlement agreement resulting from DOJ class action regarding calculation of compensation for NYPD pension obligations which did not take into account overtime and extra compensation “reasonably certain” to have been earned by servicemembers on MLOA).

<sup>75</sup> The Americans with Disabilities Act of 1990, as amended by the ADA, (42 U.S.C. §§ 12101 et seq.), prohibits discrimination against qualified individuals on the basis of disability in all aspects of employment. The ADA, taking a much broader view of “substantially limits,” “major life activity,” and “regarded as” than the original ADA, specifically recognizes PTSD as a disability in the accompanying regulations.



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<sup>76</sup> 20 C.F.R. § 1002.225.

<sup>77</sup> 20 C.F.R. § 1002.226.

<sup>78</sup> 20 C.F.R. § 1002.225.

<sup>79</sup> 38 U.S.C. § 4313(b)(2)(B); 20 C.F.R. §§ 1002.198, .225. The DOL adopted a definition of “duties” consistent with the term “essential functions” as used under the ADA. 70 Fed. Reg. 75,274. The regulations provide guidance regarding what “tasks” are essential. 20 C.F.R. § 1002.198. Typically, but not exclusively, the “tasks” is synonymous with “functions” under the ADA and EEOC guidance regarding the same. Nevertheless, the DOL has hesitated to adopt the EEOC’s interpretation and guidance regarding this issue.

<sup>80</sup> 70 Fed. Reg. 75,277.

<sup>81</sup> 20 C.F.R. § 1002.225.

<sup>82</sup> 70 Fed. Reg. 75,262; see also 38 U.S.C. § 4312(d)(1)(B).

<sup>83</sup> The factors used to determine “undue hardship,” set forth in 20 C.F.R. § 1002.5(n), are:

- (1) The nature and cost of the action needed under USERRA and these regulations;
- (2) The overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (3) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and,
- (4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

<sup>84</sup> 70 Fed. Reg. 75,277.

<sup>85</sup> *Id.*

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

<sup>87</sup> *Serricchio*, 658 F.3d at 188.

<sup>88</sup> 38 U.S.C. § 4311.

<sup>89</sup> 38 U.S.C. § 4311(c)(1); 70 Fed. Reg. 75250.

<sup>90</sup> Amendments to USERRA on November 21, 2011 expanded the Act to include situations involving a “hostile work environment” by defining “benefit of employment” to include the “terms, conditions, or privileges of employment.” 38 U.S.C. § 4303(2). This mirrors the language under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e–2.

<sup>91</sup> *Penn. State Police v. Suders*, 542 U.S. 129, 133, 124 S. Ct. 2342, 2347 (2004).

<sup>92</sup> *Serricchio*, 658 F.3d at 187-188.

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<sup>93</sup> 38 U.S.C. § 4311(b); 20 C.F.R. §§ 1002.19, .23.

<sup>94</sup> ESGR Ombudsmen are subject to and protected by the Administrative Dispute Resolution Act of 1996 (“ADRA”), Pub. L. No. 104-320, 110 Stat. 3870.

<sup>95</sup> 20 C.F.R. §§ 1002.288-.290. The process varies if the servicemember is a federal employee.

<sup>96</sup> 20 C.F.R. §§ 1002.291-.292.

<sup>97</sup> 38 U.S.C. § 4323(a)(1).

<sup>98</sup> 9 U.S.C. §§ 1-307.

<sup>99</sup> See *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006); *Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559 (6th Cir. 2008); *Bodine v. Cook’s Pest Control, Inc.*, 830 F.3d 1320 (11th Cir. 2016); *Ziober v. BLB Resources, Inc.*, 2016 U.S. App. LEXIS 18516 (9th Cir. October 14, 2016). But compare *Lopez v. Dillard’s, Inc.*, 382 F.Supp. 2d 1245 (D.Kan. 2005), and *Breletic v. CACI, Inc.* 413 F.Supp.2d 1329 (N.D. Ga. 2006), finding such arbitration agreements unenforceable.

<sup>100</sup> One of the Department of Justice’s legislative priorities has been to amend USERRA in various respects, including clarifying that agreements to arbitrate USERRA claims are unenforceable under Section 4302(b). The “Justice for Servicemembers Act of 2016,” introduced in the Senate as S.3042, would have accomplished this. However, the bill did not advance in that Congress.

<sup>101</sup> 38 U.S.C. § 4327(b).

<sup>102</sup> 28 U.S.C. § 1658(a).

<sup>103</sup> 38 U.S.C. § 4323(d)(1)(C).

<sup>104</sup> See *Serricchio*, 658 F.3d at 192-93 (“willful” violation when HR manager knew of USERRA obligation to reemploy servicemember “promptly” but employer failed to comply).

<sup>105</sup> 38 U.S.C. § 4323(h)(2).

<sup>106</sup> 38 U.S.C. § 4323(c)(2)(A).

<sup>107</sup> 32 C.F.R. § 104; DoD Instr. 1205.12.

<sup>108</sup> 32 C.F.R. § 104.6(a)(2)(iii)(A).

<sup>109</sup> 32 C.F.R. § 104.6(a)(2)(iii)(B).

<sup>110</sup> 32 C.F.R. §§ 104.6(b)(1), (2).

<sup>111</sup> 32 C.F.R. § 104.6(b)(3).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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