UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

I. REFERENCES.

A. Uniformed Services Employment and Reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149, as amended, mostly codified at 38 U.S.C. §§ 4301-4333, as amended by Pub. L. 105-368, Veterans Programs Enhancement Act of 1998, 112 Stat 3315 (10 Nov. 1998).

B. Department of Defense Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Armed Forces [63 Fed. Reg. 3465, to be codified at 32 C.F.R. Part 104] (23 Jan 98).

C. JA 270, The Uniformed Services Employment and Reemployment Rights Act (USERRA) Guide (June 1998). [TJAGSA Publication on JAGCNET-Legal Assistance or LAAWS BBS Files-TJAGSA Pubs.]

D. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (10 Sep 95) [Appendix A].

E. Restoration to Duty from Uniformed Service, 5 C.F.R. Part 353 (1999).

F. Note, *Employers Cannot Require Reservists to Use Vacation Time and Pay for Military Duty*, The Army Lawyer, December 1996, at 22.

G. Note, *Merit System Protection Board Addresses the Uniformed Services Employment and Reemployment Act*, The Army Lawyer, September 1997, at 47.

H. Note, *Interpreting USERRA "Mixed Motive" Discrimination Cases*, The Army Lawyer, December 1997, at 30.

I. Note, *Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees*, The Army Lawyer, February 1998, at 33.

J. Note, *Jury Trials for USERRA Cases*, The Army Lawyer, June 1998, at 15.

K. Note, *How Do You Get Your Job Back?* The Army Lawyer, August 1998, at 30.

L. Note, *The 1998 USERRA Amendments*, The Army Lawyer, August 1999, at 52.

II. OVERVIEW.

A. What are the prerequisites (i.e., requirements) for a returning service member to gain the protections of USERRA?

B. What are the protections granted by USERRA?

C. How are the USERRA protections enforced if an employer doesn't comply with the law?

III. PREREQUISITES FOR APPLICATION OF STATUTE. [38 U.S.C. § 4312].

A. Employee must have held a civilian job.

1. USERRA applies to virtually all employers: the federal government, state governments, all private employers. No exemption for small size, etc.

2. Even a temporary job may get USERRA protections, if there was a "reasonable expectation that employment will continue indefinitely or for a significant period." Burden is on employer to prove that the job was not permanent.

3. Certain Federal employees may be excluded from active duty and maintained in the Standby Reserve, if they are designated "key employees" under DoD Directive 1200.7, Screening the Ready Reserve, (6 Apr 84), and AR 135-133, Ready Reserve Screening, *(*10 Jul 89). ***See Dew v. United States***, 1998 WL 159060 (S.D.N.Y. 1 Apr. 98) (FBI agents argued FBI policy [violates USERRA] that no Special Agents may serve in the Ready Reserve because of a "blanket" key employee designation. Suit dismissed for failure to exhaust administrative remedies), *affirm'd, on other grounds*, 192 F.3d 366, 1999 U.S. App. LEXIS 23710 (2d Cir. 28 Sep. 99) (FBI agents are intelligence agency employees under 38 USC 4325, and thus are not able to sue in federal court, and have no right to judicial review of agency USERRA decisions). The Federal Circuit Court of Appeals held that such a practice does not violate the USERRA. *Thomsen v. Department of the Treasury*, 169 F.3d.1378 (Fed. Cir. 5 Mar 99).

B. Employee must have given prior notice of military service to civilian employer.

1. Statute requires notice: it doesn't require that notice be written; written notice, however, will minimize proof problems. See Appendix B, USERRA Employer Notice Letters.

2. Notice may be given by the soldier or by a responsible officer from the soldier's unit.

3. Exceptions: "military necessity" precludes notice (e.g., fact of deployment is classified) or where giving notice would be otherwise "unreasonable." Clear from legislative history, and case law construing predecessor legislation, that this exception will be construed narrowly. Soldier should give notice as soon as possible.

C. Employee's period of military service cannot exceed five years [Appendix B].

1. Five year limit on military service is cumulative.

2. The five-year clock restarts when employee changes civilian employers.

3. Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) do not count toward the five year calculation.

4. Five year period does not start fresh on 12 December 1994 (effective date of USERRA) - it reaches back to include all periods of military service during employment with given employer, unless such service was exempted from old VRR law's four year service calculations.

D. **Employee must have been performing "service in the uniformed services."** Includes pre-enlistment examinations and processing, active duty, active duty for training, initial active duty for training, inactive duty training, and full-time National Guard duty. Does not include state-funded National Guard duty.

E. **Employee's service must have been under "honorable conditions" - that is, no punitive discharge, no OTH discharge, and no DFR.** For service of 31 (or more) days, employer can demand proof of honorable conditions. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

F. Employee must report back or apply for reemployment in a timely manner.

1. If service up to 30 days, must report at next shift following safe travel time plus 8 hours (for rest).

2. If service 31 days to 180 days, must report or reapply within 14 days.

3. If service 181 days (or more), must report or reapply within 90 days.

4. Extensions are available if employee can show that it was impossible or unreasonable, through no fault of the employee, to report or reapply.

5. Reapplication need only indicate that you formerly worked there, are returning from military service, and request reemployment pursuant to USERRA. The request need not be in writing. Written request for reemployment, however, will avoid proof problems. **See *Mc Guire v. United Parcel Service, Inc.***, 1997 WL 543059 (N.D. Ill. 1997) (unpub.), *aff'd.*, 152 *F.3d* .673 (7th Cir., 10 Aug. 1998).

6. A soldier who fails to comply with USERRA's timeliness requirements doesn't lose all USERRA protections. The employer, however, is entitled to treat (and discipline) that employee's late reporting just like any other unauthorized absence.

IV. PROTECTIONS AFFORDED BY THE STATUTE. [38 U.S.C. §§ 4311-18.]

If the employee meets the five reemployment prerequisites discussed above, the employee is entitled to **seven** basic entitlements**: prompt reinstatement; status; accrued seniority; health insurance coverage; training, retraining, or other accommodations; and special protection from discharge (except for cause)**. Note that these requirements apply to all employers: both public (federal, state, & local) and private. Unlike many other federal laws, there is no "small company" exception.

A. **Prompt Reinstatement.** If the employee was gone 30 (or fewer) days, the employee must be reinstated immediately; if gone 31 (or more) days, the reinstatement should take place within a matter of days.

B. **Status.** The employee may object to the proffered reemployment position if it does not have the same status as previous employment. Examples:

1. "Assistant Manager" is not the same as "Manager," even if both carry the same renumeration.

2. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).

3. A change in shift work (from day to night, for example) can be challenged.

C. **Seniority.** If the employer has any system of seniority, the employee returns to the "escalator" as if he or she had never left the employer's service.

1. If the service was for 90 days (or less), the employee is entitled to the same job (plus seniority). If the service was for 91 days (or more), the employee is entitled to same "or like" job (status and pay), at employer's option, plus seniority [See Appendix C].

2. Seniority applies to pension plans as well (including SEP, 401(k) and 403(b) plans). The seniority principle protects the employee for purposes of both vesting and amount of pension. Additional information is provided in IRS Revenue Procedure 96-49, which requires private pension plans to comply with USERRA pension requirements NLT 1 July 1998, and government pension plans NLT 1 January 2000.

   a. If employer has a plan that does not involve employee contribution, employer must give employee pension credit as if employee never left.

   b. If pension depends on a variable that is hard to estimate because of the employee's absence (e.g., amount of accrual pension depends on % of commissions earned by employee), employer may use what employee did in the 12 months before service to determine pension benefits. Employer may not, in any case, use military earnings as basis to figure civilian pension accrual.

   c. If the employer has a plan that involves employee contributions, employee must make up the contributions after returning to work. The employee has a period of three times the period of absence for military service, not to exceed five years, to make up the contributions. No interest may be charged by employer. Federal employees are entitled to a period of four times the period of absence to make up contributions, per 5 C.F.R Part1620, as amended by interim rule published 60 F.R. 19990 (21 Apr. 95), and final rule published 62 F.R. 18234 (14 Apr. 97). [See Appendix F--Federal Employee Reemployment Benefits.]

D. Health Insurance.

1. Immediately upon return to the civilian job, the employee (and his/her family) must be reinstated in the employer's health plan. The employer may not impose any waiting period or preexisting condition exclusions, except for service-connected injuries as determined by the Department of Veterans Affairs.

2. USERRA offers something new: continued employer health coverage, at the option of the employee, during the military service. [Federal employees should refer to 5 C.F.R. Part 890 (1996).]

a. Employers must, if requested, continue employee and family on health insurance up to first 30 days of service. Note: CHAMPUS does not cover dependents on tours of less than 31 days. Cost to employee cannot exceed normal employee contribution to health coverage.

b. Employees may request coverage beyond 31 days. Employer must provide this coverage up to 180 days or end of service (plus reapplication period), whichever occurs first. However, employers may charge employees a premium not to exceed 102% of total cost (employee + employer) of the entire premium from the first day of any tour over 30 days.

c. Federal regulations give extended FEHBP benefits to federal workers for up to 18 months from date of active duty. The employee only has to pay their health care premium share for up to 365 days of active duty, after that time they must pay the agency share and their share plus a 2% full subscription charge. See 64 Fed. Reg. 31485 (11 June 1999), to be codified at 5 CFR Part 890.

E. **Training, Retraining, and Other Accommodations.** An employee who returns to the job after a long period of absence may find his/her skills rusty or face some new organization or technology. An employer must take "reasonable efforts" to requalify the employee for his/her job.

1. "Reasonable efforts" are those that do not cause "undue hardship" for the employer. A claim of "undue hardship" requires an analysis of the difficulty and expense in light of the overall financial resources of employer (and several other factors). The USERRA language is similar to that employed in the Americans with Disabilities Act.

2. If the employer cannot accommodate the employee, employer must find a position which is the "nearest approximation" in terms of seniority, status, and pay.

F. **Special Protection Against Discharge.** Depending on the length of service, there are certain periods of post-service employment where, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or pro forma reinstatement.

1. For service 181 days (or more), the subsequent protection lasts a year.

2. For service of 31 days to 180 days, the subsequent protection lasts for 180 days.

3. There is no special protection for service 30 (or less) days. However, the statute's general prohibition against discrimination or reprisal applies.

    a. Employers cannot discriminate in hiring, employment, reemployment, retention in employment, promotion, or any other benefit of employment because of military service. Not only are current Active and Reserve Component military members covered by this provision, but so are former members--veterans. **See *Petersen v. Dep't of Interior***, 71 M.S.P.R. 227 (1996). Neither widows nor spouses of prior service members are covered by the USERRA anti-discrimination provision. *Lourens v. MSPB*, 193 F.3d. 1369 (Fed. Cir., 1999).

    b. Employers cannot require someone to use vacation time/pay for military duty [§ 4316(d)]. **See** Veterans' Benefit Improvement Act of 1996, Pub. L. No. 104-275, § 311, 110 Stat. 3322 (9 Oct. 96), and ***Graham v. Hall-McMillen Company, Inc.***, 925 F. Supp. 437 (N.D. Miss. 1996) (Reservist may not be fired for complaining about employer requiring him to use vacation pay/days for military duty.)

    c. Employers may not take adverse action against anyone (not just the military employee) because that person takes action to enforce rights under USERRA or testifies or assists in a USERRA action or investigation. *Brandsasse v. City of Suffolk*, 1999 U.S. Dist. LEXIS 16630, 1999 U.S. Dist. LEXIS 16630 (E.D. Va. 1999) [Police Department may not initiate internal affairs investigation against Reservist police officer in retaliation for requesting accommodations to attend Reserve training.]

d. USERRA makes it easier to prevail in allegations of unlawful discrimination - if plaintiff can show that such discrimination was a motivating factor (not necessarily the sole motivating factor), the burden of proof is then on the employer to show that the action would have been taken even without the protected activity. **See** ***Robinson v. Morris Moore Chevrolet,*** 974 F. Supp. 571 (E.D. Tex. 1997); ***Gummo v. Village of Depew,*** 75 F.3d 98 (2d Cir. 1996); ***Novak v. Mackintosh,*** 919 F. Supp. 870 (D.S.D. 1996); ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443 (N.D. Miss. 1996); ***Petersen v. Dep't of Interior***, 71 M.S.P.R. 227, 1996 MSPB LEXIS 735 (1996); and ***Hanson v. Town of Irondequoit***, 896 F. Supp. 110 (W.D. N.Y. 1995). Such cases are proven by direct evidence of discrimination or by indirect circumstantial evidence of discrimination. ***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86, 93-94 (1997).

e. An employee's intervening act of misconduct can overcome an inference of military status discrimination inferred by the close proximity between military duty and an adverse employer personnel action. ***Chance v. Dallas County Hospital District***, 1998 WL 177963 (N.D. Tex. 6 Apr. 98) (unpub.), *aff'd*, 176 F3d 294 (5th Cir. 1999).

f. Federal military veteran/Reserve employees may raise "hostile work environment" discrimination claim based upon the individual's military status. **See** ***Petersen v. Dep't of Interior,*** 71 M.S.P.R 227, 1996 MSPB LEXIS 735 (1996). Currently, there is one reported state/local agency employer case on this theory, and the court refused to find any basis for "hostile work environment" protection in USERRA. **See** *Church v. City of Reno*, 1999 WL 65205(9th Cir. 9 Feb. 99) (unpub.).

G. **Other Non-Seniority Benefits.** If the employer offers other benefits, not based on seniority, to employees who are on furlough or nonmilitary leave, the employer must make them available to the employee on military service during the service. For federal employees, see 64 Fed. Regis. 31485, 31487 (June 11, 1999), to be codified at 5 CFR Section 353.106 (c).

1. Examples: ESOP, low cost life insurance, Christmas bonus, holiday pay, etc.

2. If the employer has more than one leave/furlough policy, the military employee gets the benefit of the most generous. However, if policies vary by length of absence, the military employee may only take advantage of policies geared to similar periods of absence (e.g., 6 months, 1 year, etc.) of absence.

3. The employee may waive the right to these benefits if the employee states, in writing, that he/she does not intend to return to the job. Note, however, that such a written waiver cannot deprive the employee of his other reemployment rights should he "change his mind" and seek reemployment.

V. ASSISTANCE AND ENFORCEMENT. [GENERALLY, 38 U.S.C. §§ 4322-24].

A. The National Committee for Employer Support of Guard and Reserve (1-800-336-4590). DoD agency. Provides information on USERRA to employees and employers, and seeks to resolve disputes on an informal basis. National and state ombudsman program first step to resolve employer-employee USERRA disputes. Website: **http://www.ncesgr.osd.mil**

B. **The Veterans' Employment and Training Service (VETS) (1-202-693-4701).** Department of Labor agency. Primary responsibility to formally investigate claims of USERRA violations. Website: http://www.dol.gov/dol/vets/. VETS will:

1. Investigate to determine if any violation occurred.

2. In cases of USERRA violation, VETS will attempt to negotiate a suitable resolution with the employer.

3. When resolution is not possible, VETS will refer the case as appropriate (MSPB Office of Special Counsel for Federal employees or Department of Justice for other employees).

4. Upon referral, the OSC or DOJ may choose to provide counsel for representation free of charge. If they do not, or the veteran does not wish government representation, the individual may retain private counsel. Action against the employer may then be taken in Federal Court or the MSPB (for federal employers).

5. Veteran NEED NOT request VETS assistance prior to suing, but must wait for completion of VETS action if assistance requested. *See* 38 U.S.C. § 4323 (a)

C. **Formal Enforcement.** Course of action depends on employer. *See generally*, 38 U.S.C. § 4323

1. Private Employers: Action in U.S. District Court. Venue wherever the private employer maintains a place of business.

2. State employees:

a. Cases brought on employee's behalf by the United States are under the jurisdiction of any Federal district court located where the state exercises authority. Originally, the DOJ simply provided free representation to the veteran. Statute changed in 1998 to make the United States the party in interest because of Supreme Court finding in Seminole Tribe v. Florida, 517 U.S. 44 (1996) that Congressional abrogation of State sovereign immunity violates the 11th Amendment of the Constitution. This defense was applied successfully in the USERRA context. *See* ***Palmatier v. Michigan Dep't of State Police***, 981 F. Supp. 529; ***Velasquez v. Frapwell***, 994 F.Supp. 1138 (S.D. Ind 1998), 160 F.3d 389 (7th Cir., Nov. 12, 1998), *vacated in part*, 165 *F.3d*.593 (7th Cir. 20 Jan. 1999); and *Forster v. SAIF Corporation*, 23 F.Supp.2d 1196 (D. Ore. 15 Oct. 1998). **BUT See *Diaz-Gandia v. Dapena-Thompson,*** 90 F.3d 609, 614 n. 9 (1st Cir. 1996) (Court ruled Eleventh Amendment immunity defense raised by Seminole Tribe does not apply to USERRA/VRRA cases, since USERRA/VRRA are War Power Clause legislation, not Commerce Clause legislation.)

b. 1998 USERRA amendments also provide for personal State court USERRA action by state employee. True availability of that remedy is doubtful in light of the U.S. Supreme Court decision in *Alden v. Maine*, 119 S. Ct. 2240 (1999) (Held State courts do not have to enforce federal law-based employee damage actions against state agencies since it violates the Eleventh Amendment) [Appendix G]. National Guard technicians appear to fall into this group that must depend on the good graces of the United States Attorney to bring USERRA action on behalf of the United States. *See Larkins v. Dep't of Mental Health*, 1999 U.S. Dist. LEXIS 9137 (M.D. Ala. 1999).

3. Federal Employees. *See Generally* 5 CFR 1208. The MSPB has appellate jurisdiction over probationary, and non-probationary federal employees for USERRA claims. *See* 5 CFR 1208.2. There are no time limits for individuals to file USERRA discrimination claims before the MSPB. ***See*** 5 CFR 1208.12 (2000). Process:

a. Veteran may choose to request assistance from VETS or go directly to MSPB. If assistance from VETS requested, must wait for VETS process completion before filing MSPB action.

b. File appeal with MSPB. MSPB Office of Special Counsel may choose to represent veteran, or veteran may retain counsel (and, if a prevailing party, request attorneys fees).

c. If dissatisfied with MSPB administrative hearing result, appeal to MSPB, and if necessary to Court of Appeals for the Federal Circuit as in other MSPB appeals.

4. VETS has informally retained its policy, dating from the preceding statutory scheme, of not assisting veterans who are represented by counsel. Legal assistance attorneys should beware of holding themselves out to employers or to VETS as the veteran's "counsel." **See also** AR 27-3, The Army Legal Assistance Program, para 3-6e(2), concerning limits on Army legal assistance in USERRA cases (Appendix A).

5. The USERRA adds several new "teeth" to the enforcement of reemployment rights.

a. Gives the DOL (VETS) subpoena power to aid in the conduct of its investigations.

b. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgement interest), attorney's fees, and litigation costs. **See** 62 F.R. 17046 (9 Apr. 97), to be codified at 5 C.F.R. § 1201.202(a)(7), and ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 446-447 (N..D. Miss. 1996).

c. Employees who can demonstrate that reinstatement is not a viable remedy may seek "front pay" damage remedies. **See *Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443-446 (N.D. Miss. 1996).

d. If the court finds that the violation was willful, the court may double the back pay award. (Does not apply to MSPB cases involving the federal government as employer.) Where there is evidence of willful employer noncompliance that could result in a double damage award, a jury trial may be authorized. ***Spratt v. Guardian Automotive Products, Inc.,*** 997 F.Supp.1138 (N.D. Ind. March 17, 1998).

6. Extraterritorial Jurisdiction. Congress passed an amendment to USERRA giving Reservists and veterans residing overseas protections under the Act, provided that they work for the federal government or a private company incorporated in the United States or controlled by a United States corporation. There is an exception from coverage for foreign companies whose compliance with the Act would violate local nation law. Pub. L. No. 105-368, Section 212, 112 Stat 3315 (10 Nov 98) [Appendix G].

7. Extension of MSPB Jurisdiction and OSC Representation to Pre-USERRA cases filed after USERRA's enactment in October 1994. Pub. L. No. 105-368, Section 213, 112 Stat. 3315 (10 Nov 98) [Appendix G]. The 1998 Amendments to USERRA provided at 38 USC Section 4324(c) that the MSPB may now hear complaints "without regard as to whether the complaint accrued before, on, or after October 13, 1994"[Day before USERRA enacted]. The MSPB has interpreted this provision not to create any retroactive application of USERRA to pre-USERRA cases, but rather to allow the MSPB to hear and the OSC to represent federal employees in VRRA (predecessor statute) cases that accrued before or on October 13, 1994. The MSPB opined that Congress was attempting to ensure that the OSC would represent federal employees on VRRA cases before the MSPB. *Williams v. Dep't of Army*, 83 M.S.P.R. 109 (1999) and *Venters v. U.S. Postal Service*, 84 M.S.P.R. 34 (1999).

VI. CONCLUSION.

- **Post -Secondary Education Student Mobilization Assistance - Appendix D.**
- **NCESGR Handouts on USERRA - Appendix E.**
- **OSC Federal Employee USERRRA Representation - Appendix F.**
- **USERRA Pub. Law Amendments of 1998 - Appendix G.**

APPENDIX A

Army Regulation 27-3 Extract

THE ARMY LEGAL ASSISTANCE PROGRAM

10 September 1995

3-6. Types of Cases

e. Economic

. . . . (2) Legal assistance will also be provided to those seeking reemployment under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 U.S.C. ' ' 4301-4333), and comparable State statutes subject to the following restrictions:

(a) Under USERRA, service members who leave civilian jobs to go on active duty have the right to return to those jobs when they are released from active duty. The primary responsibility for enforcing the protection afforded by USERRA rests with the United States Department of Labor (DOL) through its Veterans' Employment and Training Service (VETS). **DOL and Department of Justice (DOJ) will not pursue any relief in a reemployment case where a service member is represented by an attorney**. Therefore, in cases where a service member desires to pursue relief pursuant to USERRA, attorneys providing legal assistance will not take any action which could be viewed as legal representation of the service member (for example, contacting an employer on a USERRA case constitutes legal representation).

(b) **Legal assistance on VRRL [i.e., USERRA] matters is limited to the following**: (1) Conducting mobilization briefings and advising service members of the notice requirements of USERRA; (2) Conducting demobilization briefings and otherwise advising returning service members of their rights under the USERRA and applicable State law, if any; (3) providing sample letter formats for use by returning service members in asserting their USERRA rights with their employers; (4) Referring service members to VETS or the National Committee for Employer Support of the Guard and Reserve (NCESGR); (5) Providing service members DOL Form 1010 (Eligibility Data Form: Veterans' Reemployment Rights Program) to open a file with VETS and assisting in the preparation of the form; (6) Periodically contacting service members who have sought help on employment problems to determine if their employment problems have been resolved.

(c) Legal assistance on USERRA matters should be coordinated with officials within appropriate State agencies or DOL. Any request for an exception to the foregoing limitations must be approved in advance by the Chief, Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200 [(703) 697-3170].

(emphasis added)

APPENDIX B

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA]

NOTES:

1. Effective 1994, several of the Reserve Officer Personnel Management Act (ROPMA) exceptions to the five year limit have been changed. The new Title 10 section numbers are noted in italics and underlined.

2. The term "Reservist" means member of the National Guard or Reserve unless used specifically to identify as such.

3. State call-ups of National Guard members are not protected under USERRA.

4. The symbol "§" means "section."

Title 38, U.S. Code § 4312(c) "...does not exceed five years, except that any such period of service shall not include..."

Obligated Service -- 4312(c)(1)

Applies to obligations incurred beyond 5 years, usually by individuals with special skills, such as aviators.

Unable to Obtain Release -- 4312(c)(2)

Self explanatory. Needs to be documented on a case-by-case basis.

Training Requirements -- 4312(c)(3)

10 U.S.C. §270(a) *(10147)*----------regularly scheduled inactive duty training (drills) and annual training.

10 U.S. C. §270(B) & (c) *(10148)*----------ordered to active duty up to 45 days because of unsatisfactory participation.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

32 U.S.C§502(a)----------NATIONAL GUARD regularly scheduled inactive duty training and annual training.

32 U.S.C.§503----------NATIONAL GUARD active duty for encampments, maneuvers, or other exercises for field or coastal defense.

Specific Active Duty Provisions -- 4312(c)(4)(A)

10 U.S.C.§672(a) *(12301(a))*----------involuntary active duty in wartime.

10 U.S.C.§672(g) *(12301(g))*----------retention on active duty while in a captive status.

10 U.S.C.§673 *(12302)*----------involuntary active duty for national emergency up to 24 months.

10 U.S.C.§673b *(12304)*----------involuntary active duty for operational mission up to 270 days.

10 U.S.C.§673c *(12305)*----------involuntary retention of critical persons on active duty during a period of crisis or other specific condition.

10 U.S.C.§688----------involuntary active duty by retirees.

14 U.S.C.§331----------COAST GUARD involuntary active duty by retired officer.

14 U.S.C.§332----------COAST GUARD voluntary active duty by retired officer.

14 U.S.C.§359----------COAST GUARD involuntary active duty by retired enlisted member.

14 U.S.C.§360----------COAST GUARD voluntary active duty by retired enlisted member.

14 U.S.C.§367----------COAST GUARD involuntary retention of enlisted member.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

14 U.S.C.§712----------COAST GUARD involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

War or Declared National Emergency -- 4312(c)(4)(B)

Provides that active duty (other than for training) in time of war or national emergency is exempt form the 5 year limit, ***whether voluntary or involuntary activation***.

Certain Operational Missions --4312(c)(4)(C)

Provides that active duty (other than training) ***in support of an operational mission*** for which Reservists have been activated under Title 10, U.S. Code Section 673b *(12304)* is exempt from the 5 year limit, whether voluntary or involuntary activation. NOTE: In such a situation, involuntary call-ups would be under §673b *(12304)*. Volunteers may be ordered to active duty under a different authority.

Critical Missions or Requirements -- 4312(c)(4)(D)

Provides that active duty in support of certain critical missions and requirements is exempt from the 5 year limit, ***whether call-up is voluntary or involuntary***. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of the Reserves were not exercised.

Specific National Guard Provisions -- 4312(c)(4)(E)

10 U.S.C. Chapter 15----------NATIONAL GUARD call into Federal service to suppress insurrection, domestic violence, etc.

10 U.S.C.§§3500/8500 *(12406)*------ARMY/AIR NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces

.APPENDIX C

REEMPLOYMENT POSITIONS UNDER USERRA

IF PERIOD OF SERVICE WAS FOR LESS THAN 91 DAYS

1. Escalator Position

if not qualified for this position after reasonable effort then

2. Position Held at Beginning of Service

if can't become qualified for position 1 or 2 with reasonable effort then

3. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

IF PERIOD OF SERVICE IS MORE THAN 90 DAYS

1. Escalator Position or

2. Position of Like Seniority, Status and Pay

if not qualified for either position 1 or 2 after reasonable effort then

3. Position Held at Beginning of Service or a Position of Like Seniority, Status, and Pay

if not qualified for any of the above after reasonable effort then

4. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

PERSONS WITH SERVICE RELATED DISABILITY

1. Escalator Position (with reasonable accommodation)

if not qualified for this position after effort to accommodate disability then

2. Any Other Position Equivalent in Seniority, Status, and Pay Qualified to Perform with Reasonable Effort

if no such position exists or if not employed as above then

3. Nearest Approximation to Equivalent Position (consistent with person's circumstances with full seniority)

APPENDIX D

ASSISTANCE FOR MOBILIZED RESERVE COMPONENT COLLEGE AND VOC-TECH STUDENTS

10 June 1996

MEMORANDUM FOR Reserve Component Judge Advocate Officers

SUBJECT: Assistance for Mobilized Reserve Component College and Voc-Tech Students

1. Like regularly employed Reserve Component members who are activated for mobilization, operational missions, and other military duty and training, significant disruption of the plans of Reserve students occurs upon notice of military duty and upon return to school after military service ends. Among the problems encountered are loss of tuition and fees paid, loss of college credit, and often loss of the right to re-enroll at their schools upon the completion of military service, especially in the highly competitive admission professional schools for medicine, law, and graduate business education. Unlike their employed Reserve brothers and sisters, the student Reservist is not protected by a broad federal reemployment statute, such as the Uniformed Services Employment and Reemployment Act (USERRA). The Assistant Secretary of Defense, Reserve Affairs Office estimates approximately 30% of National Guard and Reserve members are students enrolled in post high school educational institutions.

2. In light of Operation Joint Endeavor, which is predicted to result in at least 10,000 reservists being mobilized, Secretary of Defense William J. Perry has recently sent a letter to each state governor to ask them to work with their state educational institutions to insure Reserve students receive refunds for tuition and fees already paid, partial credit for semesters not completed because of military duty, and the right to reenrollment upon completion of military service. At this time, the effort is a voluntary one, being promoted by DOD officials, the National Committee for Employer Support of the Guard and Reserve (NCESGR) and their state counterparts, Reserve organizations such as NAGAUS, and ROA, and local Reserve organizations. No legislation like USERRA for college students is contemplated at this time.

3. Assistant Secretary of Defense for Reserve Affairs, Deborah R. Lee, and her staff have enlisted the support of the Servicemembers Opportunity Colleges (SOC), to work individually with student reservists and their educational institutions to mediate some solution to problems resulting from their Reserve duty, in a fashion similar to that of the NCESGR Ombudsman program. The SOC may be contacted by calling or writing to the Servicemembers Opportunity Colleges, One Dupont Circle, N.W., Suite 680, Washington, DC 20036. The SOC's toll-free number is 1-800-368-5622.

ASSISTANCE FOR MOBILIZED RESERVE COMPONENT COLLEGE AND VOC-TECH STUDENTS, continued...

4. Student Reservists should also be reminded that Federal student loans [Federal Stafford Loans (AKA GSL loans), Federal Supplemental Loans for Students (SLS), federal PLUS loans, and Federal consolidation loans] are not subject to the SSCRA 6% interest cap, according to the U.S. Department of Education, which relies on Section 1078(d), Title 20, U.S. Code, which says that federal student loans are not subject to any interest rate limits. Students should keep in mind that all other aspects of the SSCRA still apply, including the stay provisions under Title 50, U.S. Code Appendix Section 521, reopening of default judgments under Title 50, U.S. Code Appendix Section 520, and anticipatory relief by court order under Title 50, U.S. Code Appendix Section 590. Non-federal student loans would come under the 6% interest cap provision of Title 50, U.S. Code Appendix Section 526, provided military service materially affected the student's ability to pay their student loan. Students should also be aware that federal student loan payments may be deferred for up to six months, or payments can be temporarily adjusted downward upon showing of good cause, upon written or telephone request to the lender IAW 34 C.F.R. Section 682.211(1990). Students should also inquire with their lender about any possible economic hardship deferments of federal student loans for a specific deployment [e.g., Public Law 102-26, signed 9 April, 1991 for Desert Storm] for military reservists. There is no longer an automatic military deferment of federal student loans for military service.

APPENDIX E

DoD National Committee for Employer Support of the Guard & Reserve (NCESGR) Materials for Service Members and Employers

USERRA Facts for Employers

Note: This material is for information only and should not be considered a legal authority. While this factsheet is directed to civilian employers of members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

If you need more information concerning specific situations, please E-mail: NCESGR's WebMaster or call the National Committee at (800) 336-4590.

Note: Where applicable, a relevant section number of Title 38, United States Code, is provided in parentheses after the answer.

1. Is there a law governing a servicemember's right to reemployment rights after his or her completion of military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR). On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act – a comprehensive revision of the VRR, USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code, at chapter 43. (Sections 4301 through 4333)

2. Who is eligible for reemployment rights under USERRA following military service?

The individual must meet five conditions, or "eligibility criteria." The individual:
a. must hold or have applied for a civilian job. (Note: Jobs employers can show to be held for a brief, nonrecurrent period with no reasonable expectation of continuing for a significant period do not qualify for protection.)
b. must have given written or verbal notice to the civilian employer prior to leaving the job for military training or service except when precluded by military necessity.

c. must not have exceeded the 5-year cumulative limit on periods of service.
d. must have been released from service under conditions other than dishonorable.
e. must report back to the civilian job in a timely manner or submit a timely application for reemployment. (generally, Section 4312)

3. Are there reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA does not apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state or territory involved. (Section 4303)

4. When is prior notice to the civilian employer required? How is such notice to be given?

The person who is performing the service (or an official representative of the uniformed service) must give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but the Department of Defense advises members of the National Guard and Reserve that they should provide their employers as much advance notice as they can. (Section 4312)

5. Is an employer entitled to proof that military duty for which an employee was granted a leave of absence was actually performed?

Yes. USERRA provides that following periods of military service of 31 days or more, the returning employee must, upon the employer's request, provide documentation that establishes length and character of the service and the timeliness of the application for reemployment. Reemployment may not be delayed, however, if such documentation does not exist or is not readily available. In general, the following documents have been determined by the Secretary of Labor to satisfy proof of eligibility for

reemployment: discharge papers, leave and earnings statements, school completion certificate, endorsed orders, or a letter from a proper military authority.
While USERRA does not address documentation of shorter periods of military service, if doubt exists, an employer could contact the employee's military command with questions about a specific period of service. (Section 4312)

6. How is the 5-year limit computed?

Service in the uniformed services, except the types of service described below, counts toward the cumulative 5-year limit of military service a person can perform while retaining rights under USERRA. When a person starts a new job with a new employer, he or she receives a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.
USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of the individual) to obtain release from service or service in excess of five years to fulfill an initial period of obligated service (generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties).
b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.
c. Service performed during time of war or national emergency or for other critical missions/contingencies/military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of the mission/contingency/military requirement is also exempt. (Section 4312)

7. Can an employee be required to use earned vacation while performing military service?

No. As under the VRR law, a person may not be forced to use earned vacation. Employees are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and an employee's period of military service happens to coincide with that period. (Section 4316)

8. Now that USERRA has been enacted, can a person serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits contained in the old law. (transition rules—not codified)

9. How much time off is an employee entitled to prior to reporting for military service?

Although an exact amount of time is not specified in USERRA, an employee, at a minimum, needs to be given sufficient time to travel to the place where the military duty is to be performed.

10. After the completion of military service, what is the time frame within which a person has to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, the person must report back to work for the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of the employee, he or she must report back as soon as possible after the expiration of the 8-hour period.

After a period of service of 31-180 days, the person must submit a written or verbal application for reemployment with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of the employee, he or she must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, the person must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which a person was hospitalized for or convalescing from an injury or illness that occurred or was aggravated during a period of military service. (Section 4312)

In either case, the person does not automatically forfeit the right to reemployment, but will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work." (Section 4312)

11. Does USERRA give a person the right to benefits from the civilian employer

during a period of military training or service?

Yes. USERRA gives an employee the right to elect continued health insurance coverage, for himself or herself and his or her dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require the person to pay only the normal employee share, if any, of the cost of such coverage. For longer tours, the employer is permitted to charge the person up to 102 percent of the entire premium. If the employee elects coverage, the right to that coverage ends on the day after the deadline for him or her to apply for reemployment or 18 months after the absence from the civilian job began, whichever comes first.

USERRA gives an employee and previously covered dependents the right to immediate reinstatement of civilian health insurance coverage upon return to the civilian job. The health plan cannot impose a waiting period and cannot exclude the returning employee based on preexisting conditions (other than for those conditions determined by the Federal government to be service-connected). This right is not contingent on an election to continue coverage during the period of service. (Section 4317)

To the extent that an employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or a leave of absence, the employer is required to provide those same benefits to an employee during a period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (e.g., jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length. An employee may waive his or her rights to these other non-seniority benefits by knowingly stating, in writing, his or her intent not to return to work. However, such statement does not waive any other rights provided by USERRA. (Section 4316)

12. What is an employer required to provide to a returning servicemember upon reemployment?

There are four basic entitlements (if the eligibility criteria in answer #2 are met):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on the length of absence).

b. Accrued seniority, as if continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay,

pension vesting, and credit for the period for pension benefit computations.
c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year. (generally, Section 4313)

13. Is the returning employee always entitled to have the same job back?

No. USERRA provides that, if the period of service was less than 91 days, the person is entitled to the job he or she would have attained absent the military service, provided the person is, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, the person is entitled to the job he or she left.

For periods of service of 91 days or more, the employer may reemploy the returning employee as above (i.e., position that would have been attained or position left), or in a position of "like seniority, status and pay" the duties which the person is qualified to perform. (Section 4313)

14. What if a person is not qualified for the reemployment position?

If a person has been gone from the civilian job for months or years, civilian job skills may have been dulled by a long period without use. A person must be (or become) qualified to do the job to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify that person. "Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If a person can't become qualified in the positions described in #13 after reasonable efforts by the employer, and if not disabled, the person must be employed in any other position of lesser status and pay, which he or she is qualified to perform, with full seniority. (Section 4313)

15. What if a returning servicemember is disabled?

USERRA also requires the employer to make "reasonable efforts" to accommodate persons with a disability incurred or aggravated during military service. If a person returns from military service and is suffering from a disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy the person in some other position he or she is qualified to perform and which is the "nearest approximation" of the position to which the person is otherwise entitled, in terms of status and pay, with full seniority.

A disability need not be permanent to confer rights under USERRA. For example, if a person breaks a leg during annual training, the employer may have an obligation to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg has healed. (Section 4313)

16. How does the new law address discrimination by an employer or prospective employer?

Section 4311(a) of USERRA provides as follows:

"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 service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:

"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against employer discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA. (Section 4311)

17. Who has the burden of proof in discrimination cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken by an employer will be unlawful if a service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership or obligation." (Section 4311)

18. Where do I go for information or assistance?

Employers should contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. As mediators, they act as neutrals, with a goal of helping bring about solutions to conflicts that are legal and equitable to each of the parties involved.

Sometimes, employers are particularly inconvenienced by the timing of proposed military duty by an employee-Reservist. For example, a scheduled drill weekend by a "key" employee may disrupt a major project, special product promotion, annual inventory, etc.

In such cases, NCESGR suggests employers contact the military commander involved to seek relief from the impending hardship. Experience has shown that commanders are sensitive to employer concerns and can often assist, when military requirements permit, by rescheduling the proposed military duty or assigning someone else to perform it.

Ombudsman Services

National Guardsmen, Reservists, or their employers who experience problems resulting from employee participation in the National Guard or Reserve, may request assistance from one of NCESGR's ombudsmen.

Ombudsmen provide information about rights and responsibilities under the law and seek a solution through mediation that can provide quick problem resolution. This service (whether local or national) is informal; discussions are not entered into personnel records. The objective is to eliminate misunderstandings and resolve difficulties to the satisfaction of all.

Each of the 54 ESGR committees have trained ombudsmen who are ready to assist in resolving employer-reservist conflicts. Most state committee ombudsmen are local business leaders; they understand both sides of the problem and can help mediate. State committee ombudsmen may be identified through unit commanders, state Adjutants General, or by calling the toll-free number below.

The first attempt to resolve a problem should be made at the employer-employee an atmosphere of mutual cooperation. If that fails, unit commanders should be consulted. Commanders have a vested interest in the problem and may be able to explain the situation or suggest compromises that will satisfy everyone's needs.If those efforts fail, e-mail us at the address below and we'll put you in touch with an ombudsman who is qualified to help and is sympathetic to the needs of both employers and employees. As with all communications, you should provide full details of the problem and an address and telephone number where you can be reached.

For more information about ESGR Ombudsman Services, NCESGR's WebMaster
National Committee for Employer
Support of the Guard and Reserve
1555 Wilson Blvd, Suite 200
Arlington, VA 22209-2405
Toll-Free: 800-336-4590

Please note: NCESGR's ombudsmen handle only employer-employee conflicts involving military service. Recruiting and inspector general complaints should be forwarded to the appropriate agencies. None of the sources listed above have authority to enforce the law. Cases that require legal advice or assistance are referred to the United States Department of Labor.

Employment and Reemployment Rights Questions and Answers for National Guard and Reserve Members

NOTE: This material is for information only and should not be considered a legal authority. While this factsheet is directed to members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

1. Is there a law governing reemployment rights after military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR) law. On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act, a comprehensive revision of the VRR law. USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code at chapter 43.

2. Am I eligible for reemployment rights under USERRA if I perform military service?

Yes, provided you meet five conditions, or "eligibility criteria":

a. You must hold a civilian job. (Note: Jobs that are held for a brief, nonrecurrent period with no reasonable expectation that the employment will continue indefinitely or for a significant period do not qualify for protection.)

b. You must give notice to your civilian employer that you will be leaving the job for military training or service.

c. You must not exceed the 5-year cumulative limit on periods of service.

d. You must be released from service under "honorable conditions."

e. You must report back to your civilian job in a timely manner or submit a timely application for reemployment.

3. Do I have reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA doesnot apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state involved.

4. When is prior notice to my civilian employer required? How is such notice to be given?

It is necessary that the person who is performing the service (or an official representative of the uniformed service) give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but you should give your employer as much advance notice as possible.

5. How is the 5-year limit computed?

Service that you have performed, except the service described below, counts toward the cumulative 5-year limit of service you can perform while retaining rights under USERRA. When you start a new job with a new employer, you receive a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.

USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of yours) to obtain orders releasing you from service or service in excess of five years to fulfill an initial period of obligated service, generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties.

b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.

c. Service performed during time of war or national emergency or for other critical missions, contingencies, or military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of a mission, contingency, or military requirement is also exempt.

6. I am a Federal employee, and I receive 15 days of paid military leave each year. My agency's personnel office has informed me that I have no right to time off from work for military training or service beyond this 15 days. Is that right?

No. As a Federal employee, you have the right to 15 days of paid military leave each fiscal year, under Title 5 U.S. Code. When you have exhausted your right to paid leave under Title 5, you still have the right to use your accrued civilian leave or unpaid leave under USERRA, because USERRA applies to the Federal Government as well as all other civilian employers.

If you wish to continue your civilian pay uninterrupted and you have annual leave on the books, you can use that annual leave for your military training or service. USERRA gives you the explicit right to do this.

If your employer is a state or local government that grants paid military leave, the result would be the same. Most states and many local governments do grant employees paid military leave. When you have exhausted your paid leave, USERRA gives you the right to use of accrued vacation or unpaid leave of absence.

7. Can I be required to use my earned vacation while performing military service?

No. As under the VRR law, you may not be forced to use earned vacation. You are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and your period of military service happens to coincide with that period.

8. Now that USERRA has been enacted, can I serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits in the old law.

9. After military service, how long do I have to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, you must report back to work for the first full regularly scheduled work period on the day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of your own, you must report back as soon as possible after the end of the 8-hour period.

After a period of service of 31-180 days, you must submit an application for reemployment, either written or verbal, with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of your own, you must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, you must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which you were hospitalized for or convalescing from a service-connected injury or illness.

10. What if I am late in reporting back to work or applying for reemployment without a valid excuse?

In either case, you do not automatically forfeit your right to reemployment, but you will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

11. Does USERRA give me the right to benefits from my civilian employer during my military training or service?

Yes. USERRA gives you the right to elect continued health insurance coverage, for yourself and dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require you to pay only the employee share, if any, of the cost of such coverage.

For longer tours, the employer is permitted to charge you up to 102 percent of the entire premium. If you elect coverage, your right to that coverage ends on the day after the deadline for you to apply for reemployment or 18 months after your absence from your civilian job began, whichever comes first.

USERRA gives you and your previously covered dependents the right to immediate reinstatement of your civilian health insurance coverage upon return to your civilian job. There must be no waiting period and no exclusion of preexisting conditions (other than for those conditions determined to be service-connected). This right is not contingent on your having elected to continue that coverage during your period of service.

To the extent that your employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you, during your period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length.

12. To what am I entitled upon my application for reemployment?

You have four basic entitlements (if you meet the eligibility criteria in answer #2):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on your length of absence).

b. Accrued seniority, as if you had been continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.

c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.

d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year.

13. When I return from military duty will I get my old job back?

USERRA provides that, if your period of service was less than 91 days, you are entitled to the job you would have attained if you hadn't left, provided that you are still, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, you are entitled to the job you left.

For periods of service of 91 days or more, the employer may reemploy you as above (i.e., position you would have attained or position you left), or in a position of "like seniority, status and pay" the duties of which you are qualified to perform.

14. What if I'm not qualified for my reemployment position? What if I'm injured or disabled?

If you have been gone from your civilian job for months or years, your civilian job skills may have been dulled by a long period without use. You must be qualified to do the job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify you.

"Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If you can't become qualified in the positions described in #13 after reasonable efforts by your employer and you are not disabled, you must be employed in any other position of lesser status and pay, the duties of which you are qualified to perform, with full seniority.

USERRA also requires the employer to make "reasonable efforts" to accommodate a service-connected disability. If upon your return from military service you are suffering from a service-connected disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy you in some other position that you are qualified to perform and which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status, and pay.
A disability need not be permanent in order to confer rights under USERRA. For example, if you break your leg during your annual training, your employer may have an obligation to make reasonable efforts to accommodate your broken leg, or

to place you in another position, until your leg has healed.

15. Does the new law protect me from discrimination by my employer or a prospective employer?

Yes. Section 4311(a) of USERRA provides the following:

"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 service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:

"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA.

16. Who has the burden of proof in these cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken against you by an employer will be unlawful if your service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership ... or obligation."

17. Where do I go for information or assistance?

National Guard and Reserve members with questions or concerns about their civilian job rights should first consult with their command.

For assistance, contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. If you believe your employer has violated your rights under USERRA and you wish to file a formal complaint, you should contact the Veterans' Employment and Training Service of the United States Department of Labor.

APPENDIX F

Office of Special Counsel (OSC) Considerations Regarding MSPB Representation on USERRA Cases

1. What is the Office of Special Counsel?

The Office of Special Counsel is an independent federal executive agency that investigates and prosecutes cases involving:

a. Prohibited Personnel Practices (PPPs) under 5 U.S.C. Section 2302(b).

b. Federal employee violations of the Hatch Act, which regulates the partisan political activities of federal employees.

c. Agency violations of law, rule, or regulations; fraud, waste, and abuse of authority; gross mismanagement or a substantial and specific danger to public health and safety, disclosed by federal employee whistleblowers.

d. Agency denials of veteran and reservist employment or reemployment rights, discrimination based upon military status, and denial of any promotion, or other benefit of employment because of military status.

7. What obligations does USERRA give the Office of Special Counsel, with respect to federal employees who allege agency discrimination, failure to hire or reemploy because of their military or veteran status?

a. 38 U.S.C. Section 4324(a)(1):

A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall also refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

b. 38 U.S.C. Section 4324(a)(2)(A):

If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

c. **38 U.S.C. Section 4324(a)(2)(B):**

If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

3. What action does the Office of Special Counsel take upon referral?

a. Obtains the DOL-VETS investigative file and report/memorandum from the Office of the Solicitor, Department of Labor.

b. Reviews the entire investigative file in detail.

(1) Direct Evidence of Military Status Discrimination

(2) Circumstantial Evidence of Military Status Discrimination

A. Statements of Animus

B. Agency's Explanation

C. Disparate Treatment

D. Time Chronology

E. Conduct of the Veteran/Reserve Component Employee

c. Reviews the legal analysis from Secretary of Labor, Office of the Solicitor

d. Determines if further investigation is needed

e. Conducts their own legal analysis of the facts and law

4. What is the legal standard for a finding of military status discrimination?

a. The employee's affiliation (or former affiliation) with the active component Armed Forces or the Reserve Components of the Armed Forces (including the National Guard) played **a "substantial or motivating" part** in the agency's adverse action against the employee.

b. A "substantial or motivating factor" must be more than "some weight", but less than the "sole reason" for agency adverse action against an employee. Each case is examined on its unique facts. The employee must show by a preponderance of evidence (>50%) that military status was a "motivating" or "substantial" basis for adverse agency action. Petersen v. Department of the Interior, 71 M.S.P.R. 227 (1996); *Accord,* Gummo v. Village of Depew, New York, 75 F.3d 98, 106 (2d Cir. 1996)

c. Once an employee raises a USERRA claim of military status discrimination, the agency must prove that **it would have taken the same action against the employee even if the employee had no military affiliation**. The employee can then rebut the agency's claims by use of direct or circumstantial evidence, showing the agency's defense is really a **pretext for discriminatory conduct**. 38 U.S.C. Section 4311(b).

5. What would be considered "direct evidence" of military status discrimination?

a. Uncontradicted evidence that something was done or not done to an agency employee because of his or her status as a veteran or military member.

(1) Statements found in performance evaluations, letters of reprimand, e.g., that "X is not a 'team player' because of his or her numerous absences for Reserve duty and meetings."

(2) Stated reasons given to a veteran or reservist for a particular assignment or demotion. ("You are gone on military duty so much that we can't consider you for X position, as we can't count on you being here when we need you.")

b. Direct evidence is gathered from documents, witness statements, independent sources (internal inspector general investigations/audits), and agency policy and conduct/past practices.

6. What constitutes "circumstantial evidence" of military status discrimination?

a. The MSPB, in Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997), has determined that federal employees may **prove indirectly the agency's discriminatory intent** by providing relevant circumstantial evidence which a fact finder can infer discriminatory agency intent. The Board has directed that circumstantial evidence cases use the "burden-shifting analysis" provided under Title VII of the Civil Rights Act of 1964. The employee must establish a ***prima facie*** case that:

(1) he or she was a member of a protected group, the Armed Forces, Armed Forces Reserve Component, or a former member of the military (veteran), and the employer was aware of this status,

(2) he or she was similarly situated to an individual who was not a member of the protected group (e.g., someone on sabbatical or pregnancy leave), and

(3) he or she was treated more harshly or disparate than the individual who was not a member of the Armed Forces, Armed Forces Reserve Component or veteran.

Coleman v. Department of Air Force, 66 M.S.P.R. 498, 508 (1995), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996).

b. Once the employee has met the initial burden of proof, the burden "shifts" to the **agency to articulate a legitimate, nondiscriminatory reason for its action**. The agency meets this burden when it introduces evidence, which, on its face, would lead a fact finder to conclude that the agency had a nondiscriminatory basis for its action, regardless whether the agency proves the reason.

c. One the agency has raised a legitimate nondiscriminatory defense for its action, the employee must show that the agency's stated reason was really a **pretext for prohibited discrimination**. The employee must show both that the agency's stated reason was not the real reason for its action and that military status discrimination was a motivating factor for the dverse action.

d. Several types of information help the reservist or veteran prove his case:

(1) Statements of animus. Statements of animus are statements by supervisors and agency officials indicating a strong dislike of someone because of military or veteran status. In the Peterson case, the employee was a Vietnam veteran who was subjected to continuous abusive name calling by his supervisors and co-workers, such as "Psycho" and "Babykiller". Other common agency manager statements would be to disparage Reservists as "unreliable" or "disloyal", "non-team players", and "double dippers".

(2) Disparate Treatment. A good example is where a Reservist on active duty is denied an annual bonus, but a woman employee on pregnancy leave is given the annual bonus.

(3) Time Sequencing/Chronology. Where an agency immediately disciplines or fires an employee after he has asserted his USERRA rights or returned from military duty, despite agency protests of non-discriminatory purpose, a strong inference of discriminatory conduct may be found. *Accord*, Robinson v. Morris Moore Chevrolet, 974 F. Supp. 571 (E.D. Tex. 1997).

7. Does a Reserve or National Guard employee have an obligation to minimize the burden upon the agency by rescheduling military duty or training that conflicts with his agency job demands?

a. Practically speaking, the answer is generally yes. Whenever possible, Reserve and National Guard members should work with their commands to avoid unnecessary conflicts between their military duty and civilian work schedules. This is particularly true in shift work type jobs, such as firemen, policemen, prison guards, postal workers, and hospital workers. Employees should provide their agencies with as much advance notice as possible to avoid scheduling conflicts. Still, military employees do not always have a say as to when they must participate in military training or activations.

b. Agency management must understand that they cannot refuse to allow their military member employees to attend military duty or training for agency convenience. The military mission is paramount. *See* H. Rep. No. 103-65, 103d Cong., 1st Sess., at 30 (1993):

> [T]here is no obligation on the part of the service member to rearrange or postpone already scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience.

c. There are no reported MSPB cases where the Board has endorsed adverse action against an employee for failing to minimize the frequency, timing or duration of their military training or duty. The statute, 38 U.S.C. ' 4312(h), makes clear that civilian employers, including the federal government, do not decide when, where, or how often employee Reservists do their military duty or training. As Congress observed in creating this section of the Act:

> This section makes clear the Committee's intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limits under section 4312(C) and the servicemember has complied with the requirements under sections 4312(a) and (e).

H. Rep. No. 103-65, 103d Cong., 1st Sess., at 30 (1993). *See also* OPM Regulation, 5 C.F.R. Section 353.203(c), which urges federal employees to make a good faith effort to resolve work conflicts with their military duty. The 5 C.F.R. Section 353.203(c) provision should not be used as a test to determine whether the service member's military duty was "reasonable" or "fair to the agency", or whether the OSC should represent a federal employee with a USERRA issue.

8. How do you contact the Office of Special Counsel?

The OSC has a website at http://www.access.gpo.gov/osc . You can also contact the OSC senior counsel for USERRA cases, at telephone (202) 653-6005. Merit Systems Protection Board regulations and cases may be found at the MSPB website, http://www.access.gpo.gov/mspb .

APPENDIX G

Public Law 105-368, Veterans Programs Enhancement Act of 1998, 112 Stat 3315 (10 Nov 1998), USERRA Provisions [Sections 211-213].

H.R.4110

Veterans Programs Enhancement Act of 1998 (Enrolled Bill (Sent to President))

Subtitle B--Uniformed Services Employment and Reemployment Rights Act Amendments

SEC. 211. ENFORCEMENT OF RIGHTS WITH RESPECT TO A STATE AS AN EMPLOYER.

(a) IN GENERAL- Section 4323 is amended to read as follows:

`Sec. 4323. Enforcement of rights with respect to a State or private employer

`(a) ACTION FOR RELIEF- (1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

`(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person--

`(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

`(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

`(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

`(b) JURISDICTION- (1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

`(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

`(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

`(c) VENUE- (1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

`(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

`(d) REMEDIES- (1) In any action under this section, the court may award relief as follows:

`(A) The court may require the employer to comply with the provisions of this chapter.

`(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

`(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

`(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

`(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

SEC. 212. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

(a) DEFINITION OF EMPLOYEE- Section 4303(3) is amended by adding at the end the following new sentence: `Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319(c) of this title.'.

(b) FOREIGN COUNTRIES- (1) Subchapter II of chapter 43 is amended by inserting after section 4318 the following new section:

`Sec. 4319. Employment and reemployment rights in foreign countries

`(a) LIABILITY OF CONTROLLING UNITED STATES EMPLOYER OF FOREIGN ENTITY- If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.

`(b) INAPPLICABILITY TO FOREIGN EMPLOYER- This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by an United States employer.

`(c) DETERMINATION OF CONTROLLING EMPLOYER- For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.

`(d) EXEMPTION- Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.'.

(2) The table of sections at the beginning of chapter 43 is amended by inserting after the item relating to section 4318 the following new item:

`4319. Employment and reemployment rights in foreign countries.'.

(c) EFFECTIVE DATE- The amendments made by this section shall apply only with respect to causes of action arising after the date of the enactment of this Act.

SEC. 213. COMPLAINTS RELATING TO REEMPLOYMENT OF MEMBERS OF THE UNIFORMED SERVICES IN FEDERAL SERVICE.

(a) IN GENERAL- The first sentence of paragraph (1) of section 4324(c) is amended by inserting before the period at the end the following: `, without regard as to whether the complaint accrued before, on, or after October 13, 1994'.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply to complaints filed with the Merit Systems Protection Board on or after October 13, 1994.