

# **A GUIDE TO LEAVE UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**

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An employer's obligation to provide leaves of absence under various federal and state medical and disability laws has garnered much attention in recent years. Often overlooked, however, is an employer's obligation to provide leave to accommodate an employee's military service. With the withdrawal of the American military from Iraq and Afghanistan, tens of thousands of American service members have returned and will continue to return to civilian life and the private sector workforce.<sup>1</sup> Employers must therefore be prepared to quickly and accurately respond to requests by returning veterans about their rights of reemployment.

This paper summarizes employer obligations and employee rights to take leave under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Please note that some states provide even greater employee protections and benefits for these types of leave.<sup>2</sup> Accordingly, employers are advised to consult legal counsel to determine whether any additional state laws apply.

## **1. USERRA.**

USERRA imposes affirmative obligations on public and private employers to provide employees with leave to serve in the military (including active duty, Reserves and National Guard). USERRA also requires employers to reinstate employees returning from military leave and to train or otherwise qualify those returning employees. The Act guarantees employees a continuation (at the employee's expense) of health benefits for the first 24 months of military leave and protects an employee's pension benefits upon proper return from leave. Finally, the

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<sup>1</sup> Remarks of President Barack Obama at Camp Lejeune, North Carolina, Feb. 27, 2009, *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-President-Barack-Obama-Responsibly-Ending-the-War-in-Iraq/](http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Responsibly-Ending-the-War-in-Iraq/); Remarks of President Barack Obama at Bagram Air Field, Afghanistan, May 1, 2012, *available at* <http://www.whitehouse.gov/blog/2012/05/01/president-obama-ending-war-afghanistan>.

<sup>2</sup> For example, in 2009, Wisconsin and California enacted laws covering civil air patrol leave. Wisconsin's law provides certain job protections to individuals who are members of the Wisconsin Civil Air Patrol. *See* WIS. STAT. §§ 106.54(8), 11.91(2), and 321.66. In California, the law creates a right to an unpaid leave of absence for some employees who are members of the California Wing of the Civil Air Patrol. *See* CAL. LAB. CODE §§ 1500–1507.

Act requires that employers not discriminate against an employee because of past, present, or future military obligations.<sup>3</sup>

All states, except North Dakota and the District of Columbia, impose obligations on employers with respect to military leaves. Some state laws may provide for more limited rights for employees—*e.g.*, Tennessee’s military protections merely prohibit an employer from terminating or refusing to hire an individual because of membership in the state National Guard.<sup>4</sup> Other states’ laws provide greater protections for employees. USERRA effectively establishes a “floor” for the protection of employees’ rights; states are authorized to implement these enhanced protections.

## **2. Employers Obligated to Provide Leave.**

Under USERRA, all public and private sector employers are required to provide leaves of absence to employees who need to satisfy their military obligations.<sup>5</sup> Unlike many other federal statutes that require an employer to have a minimum number of employees to be covered under the law, USERRA contains no minimum employee requirement.<sup>6</sup>

A successor employer may be required to fulfill the reinstatement obligations of a previous enterprise.<sup>7</sup> USERRA’s implementing regulations include a definition of “successor-in-interest”<sup>8</sup> and USERRA was amended in 2010<sup>9</sup> to add the same definition to USERRA.<sup>10</sup>

Prior to USERRA’s amendment in 2010, several federal courts considered the “successor-in-interest” issue under USERRA’s implementing regulation. In *Reynolds v. RehabCare Group East, Inc.*,<sup>11</sup> the Eighth Circuit Court of Appeals upheld the district court’s decision that the defendant was not a “successor in interest” to plaintiff’s employer prior to her being called to active military duty. Progressive Rehabilitation Associates (“Progressive”) had employed

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<sup>3</sup> The DOL’s regulations implementing USERRA, written in question and answer format, discuss an employer’s obligations and responsibilities regarding reemployment of employees returning to work after military service. 20 C.F.R. pt. 1002.

<sup>4</sup> TENN. CODE ANN. § 58-1-604.

<sup>5</sup> 38 U.S.C. §§ 4301 *et seq.*

<sup>6</sup> 38 U.S.C. § 4303(4).

<sup>7</sup> 38 U.S.C. § 4303(4)(A)(iv); *see also id.*, § 4303(4)(D) for the factors used in the successor-in-interest analysis.

<sup>8</sup> 20 C.F.R. § 1002.36.

<sup>9</sup> H.R. 3219 (2010).

<sup>10</sup> 38 U.S.C. § 4303(4)(D).

<sup>11</sup> 591 F.3d 1030 (8th Cir. 2010).

plaintiff prior to her military leave as a physical therapist; she was placed at Green Hills Retirement Community (“Green Hills”), which had a contract with Progressive. Before her return from active military duty, Green Hills ended its contractual relationship with Progressive and entered into a new contract with Deerfield Retirement Community, which in turn subcontracted with RehabCare to provide physical therapy services at Green Hills. RehabCare did not employ any Progressive employee at Green Hills. The district court held that no reasonable jury could conclude that RehabCare was a successor-in-interest to Progressive because plaintiff could not “demonstrate a continuity of business operations, a continuity of employees, or a similarity in supervisors and managers.” The district court further noted that Progressive and RehabCare were distinct, unrelated companies with no contractual or business relationship between them. The Eighth Circuit upheld the decision for the same reasons articulated by the district court.

Similarly, in *Coffman v. Chugach Support Services Inc.*,<sup>12</sup> the Eleventh Circuit Court of Appeals held that an employee of a defense contractor who went on military leave did not have a right under USERRA to be hired by a different contractor who later won the contract to provide support services at the military base where plaintiff had worked. The Eleventh Circuit held that there was no “successor-in-interest” between the two contractors because there was no merger or transfer of assets between them. As of the date of the opinion USERRA did not define “successor-in-interest” and its regulations had yet to be enacted. The court, therefore, relied upon the multi-factor test outlined by the Eighth Circuit Court of Appeals in *Leib v. Georgia-Pacific Corp.*<sup>13</sup> as a model for determining successor status under USERRA. The *Leib* test calls for examination of whether there is substantial continuity in the business operations, continued use of the same facility, continuity in the workforce, similarity in jobs and working conditions, similarity in supervisory personnel, similarity in machinery, equipment and production methods, and similarity in products or services.<sup>14</sup> It was these same factors that ultimately were adopted under USERRA.<sup>15</sup>

In *Hamovitz v. Santa Barbara Applied Research, Inc.*,<sup>16</sup> the plaintiff was employed by V.T. Griffin (Griffin), which had been awarded a contract by the United States Air Force Reserve Command to provide services to the Pittsburgh International Airport Reserve Station (PIARS). Plaintiff was deployed for military service in 2005. During plaintiff’s deployment, Griffin lost the contract at PIARS to another company, Santa Barbara Applied Research (SBAR). Upon plaintiff’s return from service, he applied to SBAR for reemployment, claiming that SBAR was

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<sup>12</sup> 411 F.3d 1231 (11th Cir. 2005).

<sup>13</sup> 925 F.2d 240 (8<sup>th</sup> Cir. 1991).

<sup>14</sup> 925 F.2d 240 (8<sup>th</sup> Cir. 1991); *see also Anthony v. Basic Am. Foods, Inc.*, 600 F. Supp. 352 (N.D. Cal. 1984); *Chaltry v. Ollie’s Idea, Inc.*, 546 F. Supp. 44 (W.D. Mich. 1982).

<sup>15</sup> *See supra* note 7.

<sup>16</sup> 2010 U.S. Dist. LEXIS 32523 (W.D. Pa., Feb. 26, 2010), *report adopted in toto*, 2010 U.S. Dist. LEXIS 31256 (W.D. Pa. Mar. 31, 2010). Later proceedings found at 2010 U.S. Dist. LEXIS 110937 (W.D. Pa. Oct. 19, 2010).

the successor-in-interest employer to Griffin. On cross-motions for summary judgment, the court concluded that SBAR was the successor-in-interest to Griffin based on the factors set forth in USERRA's controlling regulations.<sup>17</sup>

### **3. Employees Who Qualify to Take Leave.**

Under USERRA, reemployment rights and benefits extend to all employees absent from work due to "service in the uniformed services," which includes absences from work for training.<sup>18</sup> The "uniformed services" include the Armed Forces (Army, Navy, Air Force and Marines), the Army National Guard, the Air National Guard, full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.<sup>19</sup>

USERRA provides that an employer is not obligated to reemploy an individual if his or her employment, prior to military service, was for a "brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."<sup>20</sup> The burden of proving such employment, however, is placed on the employer.<sup>21</sup>

### **4. Reasons for Taking Leave.**

Performance of the following duties on an involuntary or voluntary basis constitutes "service in the uniformed services" under USERRA:<sup>22</sup>

- active duty;
- active duty for training;
- initial active duty for training;

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<sup>17</sup> See 20 C.F.R. §1002.35.

<sup>18</sup> 38 U.S.C. § 4301; 20 C.F.R. § 1002.6.

<sup>19</sup> 38 U.S.C. § 4303(16). The National Defense Authorization Act for Fiscal Year 2012 ("NDAA 2012") signed into law on December 31, 2011, expanded the reemployment rights provided under USERRA. Pursuant to the NDAA 2012, National Guard members who are called to respond to homeland security missions in the United States are also afforded USERRA's reemployment rights. Previously, protections were only afforded to National Guard members serving overseas. In addition, the NDAA 2012 exempts National Guard members who are serving on homeland security missions in the United States from USERRA's five-year limit on active military service. See Pub. L. No. 112-81, § 575 (Dec. 31, 2011).

<sup>20</sup> 38 U.S.C. § 4312(d)(1)(C).

<sup>21</sup> 38 U.S.C. § 4312(d)(2)(C).

<sup>22</sup> 38 U.S.C. § 4303(13).

- inactive duty training;
- full-time National Guard duty; and
- absence from work for an examination to determine an individual's fitness for any of the above types of duty.

## **5. Advance Notice & Verification Requirements.**

USERRA requires that all employees provide advance notice of their military service obligations.<sup>23</sup> This notice may be oral or written, and may be provided by the employee or by an officer of the military branch in which the employee is serving. Typically, employers request that an employee submit copies of their military orders, training notices or induction information. An employer may contact the officer in the military branch who issued the orders, notices or induction information to confirm their validity.

No advance notice is required if “military necessity” precludes doing so or if it is “otherwise impossible or unreasonable.”<sup>24</sup> USERRA provides that *military necessity* shall be defined under the regulations of the Secretary of Defense and shall not be subject to judicial review. However, questions regarding whether advance notice is “otherwise impossible or unreasonable” can be judicially determined.

## **6. Duration & Timing of Leaves.**

Under USERRA, the cumulative length of an individual's military leave absences from employment may not exceed five years.<sup>25</sup> Previously, the maximum period of time that an employee could serve in the military and maintain reemployment rights varied with the type of military service. The former rules governing military leave also contained a confusing “four plus one” provision which allowed a fifth year of military service if such service was at the request of the federal government. USERRA eliminates any such confusion by permitting an individual to accumulate a total absence of five years to serve in the military.

The following nine categories of service, however, may not be counted toward the five-year limitation.<sup>26</sup>

- Service required beyond five years to complete an initial period of obligated service.

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<sup>23</sup> 38 U.S.C. § 4312(a)(1); 20 C.F.R. § 1002.85.

<sup>24</sup> 38 U.S.C. § 4312(b); 20 C.F.R. § 1002.86.

<sup>25</sup> 38 U.S.C. § 4312(a), (c); *see also* 20 C.F.R. §§ 1002.32, 1002.99–1002.104.

<sup>26</sup> 38 U.S.C. § 4312(c); 20 C.F.R. § 1002.103.

- Service from which an individual, through no fault of his or her own, is unable to obtain a release within the five-year limit. For example, the five-year limit will not be applied to individuals whose service dates expire while they are at sea. Additionally, the five-year limit will not be applied to individuals who are involuntarily retained on active duty.
- Required training for Reservists and National Guard members. The two-week annual training sessions and monthly weekend drills mandated by statute for Reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements, certified in writing by the Secretary of the service concerned, to be necessary for professional development or for completion of skills training or retraining.
- Service under an involuntary order to, or retention on, active duty during domestic-emergency or national security-related situations.
- Service under an order to, or retention on, active duty (other than for training) during a war or national emergency declared by the President or Congress. This category includes service by persons involuntarily ordered to active duty and service by volunteers who receive orders to active duty.
- Active duty (other than for training) by volunteers supporting “operational missions” for which selected reservists have been ordered to active duty without their consent. Operational missions involve circumstances other than war or national emergency for which, under Presidential authorization, members of the Selected Reserves may be involuntarily ordered to active duty for no more than 270 days. Operations Desert Shield and Desert Storm were examples of operational missions. This exemption from the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would also be covered by the fourth exemption, above.
- Service by volunteers who are ordered to active duty in support of a “critical mission or requirement” in times other than war or national emergency and when no involuntary call-up is in effect. The secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.
- Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion or to execute the laws of the United States.
- National Guard members who are serving on homeland security missions in the United States.<sup>27</sup>

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<sup>27</sup> Pub. L. No. 112-81, § 575 (Dec. 31, 2011).

An employer cannot refuse to grant an employee a leave of absence because the employer finds the duration, timing or frequency of an employee's military obligations to be unreasonable. Indeed, in one case,<sup>28</sup> the statements of a plant personnel manager that an employee's frequent military obligations increased the burden on the employer were deemed evidence of a "motivating factor,"<sup>29</sup> which entitled the plaintiff to a jury trial in a USERRA wrongful discharge case. Nothing in the Act prevents an employer and an employee from voluntarily working together to accommodate each other's needs. For example, weekend and annual training might be scheduled in advance or rearranged to meet the needs of the parties.

## 7. Compensation During Leave.

Employers are not required to compensate employees for absences due to military service. An employee may elect to use any accrued vacation leave in lieu of unpaid military leave.<sup>30</sup> However, an employer cannot require an employee to use vacation time for the purpose of military leave.<sup>31</sup>

USERRA, however, provides that an employee who is absent from work for military service is "entitled to such rights and benefits not determined by seniority" that are generally provided "to employees having similar seniority, status and pay" who are on comparable nonmilitary leaves of absence "under a contract, agreement, policy, practice or plan" in effect at any time during that uniformed service.<sup>32</sup> This provision may require an employer to pay an employee on military leave if the employer provides pay to employees on "comparable nonmilitary" leaves of absence. A "comparable leave" under USERRA's implementing regulations examines the duration of the leave as the most critical factor.<sup>33</sup> Other factors include the purpose of the leave and the ability of the employee to choose when to take the leave at issue.<sup>34</sup>

Employers must also be mindful of the salary pay requirement when overtime-exempt employees miss part of a workweek due to military service. Under the Fair Labor Standards Act (FLSA),<sup>35</sup> an exempt employee cannot incur any reduction in weekly salary if the employee misses part of a

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<sup>28</sup> See *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002).

<sup>29</sup> See *Woodard v. New York Health & Hosps. Corp.*, 554 F. Supp. 2d 329, 349 (E.D.N.Y. 2008) ("An employer must prove, as an affirmative defense, that it would have taken the same action based on the other reasons alone, without regard to the employee's protected status").

<sup>30</sup> 38 U.S.C. § 4316(d); 20 C.F.R. § 1002.153.

<sup>31</sup> See *Graham v. Hall-McMillen Co.*, 925 F. Supp. 437 (N.D. Miss. 1996); see also 20 C.F.R. § 1002.153(b).

<sup>32</sup> 38 U.S.C. § 4316(b)(1); 20 C.F.R. § 1002.150.

<sup>33</sup> 20 C.F.R. § 1002.150(b).

<sup>34</sup> *Id.*

<sup>35</sup> 29 U.S.C. §§ 201 *et seq.*

workweek due to military leave.<sup>36</sup> An employer is not obligated to pay an employee's salary, however, if the employee is absent for a complete workweek due to military service.

## **8. Benefit Implications of Leave.**

Employees on military leave are entitled to the same non-seniority based benefits provided to employees on other leaves.<sup>37</sup> For example, if an employer provides employees on other types of unpaid leave with continued health insurance, life insurance, disability insurance, or other benefits, these same benefits must be provided to employees on military leave.

In *Tully v. Department of Justice*,<sup>38</sup> the Federal Circuit Court of Appeals held that the military leave must be comparable to the other type of leave used to determine an employee's rights to benefits while on military leave. Thus, the court held that an employer that provided paid holidays to employees on short leaves for jury duty was not required to provide paid holidays to employees on long-term military leave because the two types of leaves were not comparable.

In *Brill v. AK Steel Corp.*,<sup>39</sup> the district court considered whether paid leave for jury duty was a non-seniority based benefit to which the plaintiff would also be entitled while in military service pursuant to Section 4316(b).<sup>40</sup> The court ultimately held that leave for jury duty was comparable to military leave, and thus subject to being provided to employees on military leave, based on the following factors: (a) both leaves are involuntary in nature; (b) both leaves can extend for significant periods of time; and (c) the purpose of each leave is to permit civic duties.<sup>41</sup> The court rejected the employer's argument that the leaves were not comparable because an employee participating in military service is paid far more by the government than an employee participating in jury duty.<sup>42</sup>

USERRA generally prohibits the denial of a benefit of employment available to other employees due to a service member's military service.<sup>43</sup> In *Crawford v. Department of Transportation*,<sup>44</sup> the Federal Circuit Court of Appeals acknowledged that certain service activities may be excluded

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<sup>36</sup> 29 C.F.R. § 541.602.

<sup>37</sup> 38 U.S.C. § 4316(b)(1)(B); 20 C.F.R. § 1002.150.

<sup>38</sup> 481 F.3d 1367 (Fed. Cir. 2007).

<sup>39</sup> 2012 U.S. Dist. LEXIS 35251.

<sup>40</sup> 38 U.S.C. § 4316(b).

<sup>41</sup> 2012 .S. Dist. LEXIS 35251, at \*16-19.

<sup>42</sup> *Id.*

<sup>43</sup> *See* 38 U.S.C. § 4316; *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1336 (Fed. Cir. 2003).

<sup>44</sup> 373 F.3d 1155 (Fed. Cir. 2004).



from the computation of an employee's total length of military service for purposes of providing retirement benefits.<sup>45</sup> *Crawford* involved a federal retiree and former member of the Coast Guard who sued his former employer following a reduction in his annual leave accrual rate per pay period. The court in *Crawford* held that USERRA permitted the employer to make the reduction because the statute excludes "service while serving as a cadet" for officers of the Coast Guard.

In 2006, the U.S. Department of Justice filed a class action against American Airlines Inc., alleging that the carrier violated USERRA by denying three pilots employment benefits during their military service.<sup>46</sup> The suit was the first class action complaint filed by the United States under USERRA. The pilots brought allegations dealing with accrual of vacation time and accrual of sick time while on military leave and claims that the carrier should modify pilot bid rules for persons returning from military leave. The carrier argued that the pilots failed to state a claim for relief because both the 1997 collective bargaining agreement (CBA) and the 2003 CBA clearly delineated different types of leave. The court found that the pilots sufficiently pled their vacation and sick leave accrual claim. However, the court found that the pilots did not meet their pleading burden with respect to claims concerning trip bidding procedures. The court granted the pilots leave to amend their complaint regarding trip bidding.

#### **A. Vacation.**

The same analysis applies to paid vacation. If employees on other types of leave continue to accrue vacation, then employees on military leave must continue to accrue vacation.<sup>47</sup> If not, an employee returning from military leave is entitled to any vacation that had accrued prior to the date the leave began (assuming such vacation was not used voluntarily during the leave), and must begin to accrue vacation at the rate the employee would have attained if the employee had not taken military leave.

#### **B. Seniority Rights.**

Employees returning from military leave are entitled to "the seniority and other rights and benefits determined by seniority" that they would have attained with reasonable certainty had they not gone on leave.<sup>48</sup> A right or benefit is seniority-based if it is determined by or accrues due to longevity in employment.<sup>49</sup> In making this determine, USERRA's regulations focus on

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<sup>45</sup> 10 U.S.C. § 971(b).

<sup>46</sup> *Woodall v. American Airlines*, 2006 U.S. Dist. LEXIS 73007 (N.D. Tex., Oct. 6, 2006).

<sup>47</sup> 38 U.S.C. § 4316(b)(1); 20 C.F.R. § 1002.150(c).

<sup>48</sup> 38 U.S.C. § 4316(a); 20 C.F.R. §§ 1002.193, 1002.120 – 213; *see also Serricchio v. Wachovia Secs, LLC*, 556 F. Supp. 2d 99 (D. Conn. 2008) (finding that an employer's duty under USERRA was not to provide plaintiff financial advisor his exact previous book of business, so long as what was provided gave the employee the opportunity to reenter the workforce with comparable earning potential and a chance for advancement as his own book of business provided prior to his service).

<sup>49</sup> 20 C.F.R. § 1002.212.

several factors, including whether the right or benefit is a reward for length of service rather than a form of short-term compensation, and whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed.<sup>50</sup>

Individuals returning from military leave are required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leaves of absence would be required to pay. USERRA also provides that an employee may not be entitled to a leave of absence or non-seniority benefits if the employee knowingly provides a written notice of his or her intent not to return to employment after military service.<sup>51</sup>

Individuals returning from military leave are also entitled to count the number of hours they would have worked if not for the military leave towards FMLA eligibility. A reemployed service member would be eligible for FMLA leave if the number of months and the number of hours of work for which the service member was employed by the employer, together with the number of months and number of hours of work for which the service member would have been employed by the employer during the period of military service, meet FMLA's eligibility requirement.<sup>52</sup>

### **C. Health Benefits.**

USERRA requires that an employer offer individuals on military leave the option of continuing their health insurance coverage by self-paying the cost of such coverage.<sup>53</sup> This provision is similar to the protections offered by COBRA but it also applies to employers with fewer than 20 employees who are exempt from COBRA. The maximum period of continued coverage is the lesser of 24 months or the period of military service (beginning 31 days after the start of a military leave). If an employee's period of military leave does not exceed 30 days, the employee *cannot* be required to contribute more than the employee's normal share of any premium. If military service exceeds 30 days, the employee may be required to contribute up to 102% of the full premium under the health plan; the extra 2% can be added to cover an employer's administrative costs.<sup>54</sup> In the case of multiemployer plans, the plan may allocate the responsibility to pay for this coverage. If the plan does not make this allocation, however, the last employer assumes the liability. If the last employer is not functional, the plan retains the liability.<sup>55</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> 38 U.S.C. § 4316(b)(2)(A)(ii).

<sup>52</sup> 20 C.F.R. § 1002.210.

<sup>53</sup> 38 U.S.C. § 4317; 20 C.F.R. § 1002.164.

<sup>54</sup> 38 U.S.C. § 4317(a)(2).

<sup>55</sup> 38 U.S.C. § 4317(a)(3)(B).

If an employee's coverage under a health plan was terminated because the employee was on military leave and not working, USERRA mandates that a waiting period or exclusion period cannot be imposed upon reinstatement if health coverage would have been provided had that individual not been absent for military leave.<sup>56</sup>

#### **D. Pension Benefits.**

USERRA also provides expanded pension rights for employees on military leave.<sup>57</sup> The Act requires that a re-employed veteran must be treated as not having incurred any break in service for purposes of the employer's pension plan.<sup>58</sup> In accordance with this mandate, effective December 17, 2009, the Pension Benefit Guaranty Corporation (PBGC) guarantees defined benefit pension plan benefits for participants serving in the military at the time their pension plan terminates. As long as the service member is reemployed within the time limits set by USERRA, even if the reemployment occurs after the plan's termination date, PBGC will treat the participant as having satisfied the reemployment condition as of the termination date. This change applied retroactively to reemployments under USERRA initiated on or after December 12, 1994. Additionally, periods of military service must be considered as service with an employer for vesting and benefit accrual purposes.<sup>59</sup> Employers are required to make, on behalf of employees returning from military leave, any pension contributions that the employer would have made if the employee had not been absent due to military leave.<sup>60</sup>

For contributory plans, which offer benefits only where the employee makes contributions, employees returning from military leave must be given three times the period of the absence to make up missed contributions (not to exceed five years).<sup>61</sup> Under these types of pension plans, an employer is only required to make matching contributions to the extent that a returning employee makes the required contribution to the plan. Employer contributions to a pension plan that are not dependent on employee contributions must be made within 90 days following reemployment or when contributions are normally made for the year in which the military service was performed, whichever is later.<sup>62</sup>

While USERRA clarifies an employee's rights and the employer's obligations with respect to benefits, the Act is still quite complicated, especially with respect to pension benefits. Accordingly, employers should contact experienced legal counsel when determining the benefit implications of an employee's military leave.

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<sup>56</sup> 38 U.S.C. § 4317(b)(1).

<sup>57</sup> 20 C.F.R. §§ 1002.259–1002.267.

<sup>58</sup> 38 U.S.C. § 4318(a)(2)(A).

<sup>59</sup> 38 U.S.C. § 4318(a)(2)(B).

<sup>60</sup> 38 U.S.C. § 4318(b)(1).

<sup>61</sup> 38 U.S.C. § 4318(b)(2).

<sup>62</sup> 20 C.F.R. § 1002.262(a).

## 9. Reinstatement Obligations

Both an employee and the employer have obligations under USERRA with respect to an employee's return to employment following a military leave.<sup>63</sup>

### A. Time Period Within Which to Seek Reinstatement.

Under USERRA, time limits for returning to work depend upon the *duration* of an individual's military service.<sup>64</sup>

If an employee's military service is less than 31 days, or is for the purpose of taking an examination to determine fitness for service, the employee must report for reemployment at the beginning of the first regularly scheduled workday that would fall eight hours after he or she has been provided with a reasonable time to return home.<sup>65</sup> If, due to no fault of the employee, reporting within that period is impossible or unreasonable, the employee must report back to work as soon as possible.<sup>66</sup>

If the period of service is 31 days to 180 days, the employee must submit an application to his or her employer no later than 14 days following completion of service.<sup>67</sup> If submission of a timely application is impossible or unreasonable through no fault of the employee, the application must be submitted as soon as possible.

If the period of military service is greater than 180 days, the employee must submit an application to his or her employer not later than 90 days after completion of the service.<sup>68</sup>

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<sup>63</sup> Please note that some state military leave statutes provide more benefits than USERRA. For example, Kentucky's military leave law provides that an employee who is "required to perform active duty or training in the National Guard" is permitted to return to his "former position of employment with the seniority, status, pay, or any other rights or benefits he would have had if he had not been absent." KY. REV. STAT. § 38.238. There are no requirements regarding the time frame for a returning employee to report for reinstatement. In Colorado, state law provides that an employee who takes military leave is entitled to reemployment if the position was not temporary, the employee provides evidence of the satisfactory completion of military duty, and the employee is still qualified to perform the work duties. COLO. REV. STAT. § 28-3-609. Colorado law makes no mention of an employee's obligation to seek reinstatement within a specific time frame following the end of military duty. Employers should consult legal counsel regarding state law.

<sup>64</sup> 20 C.F.R. § 1002.115.

<sup>65</sup> 20 C.F.R. § 1002.115(a).

<sup>66</sup> 38 U.S.C. § 4312(e)(1)(A)(ii).

<sup>67</sup> 20 C.F.R. § 1002.115(b).

<sup>68</sup> 20 C.F.R. § 1002.115(c).

USERRA provides for an extension of these time limits for up to two years if an employee is hospitalized or convalescing from a service-related illness or injury.<sup>69</sup> The two-year period may be extended by the minimum time required to accommodate a circumstance, beyond an individual's control, that would make reporting within the two-year extension period impossible or unreasonable.<sup>70</sup>

If an employee fails to report to work or to reapply for employment within the appropriate time frame under the Act, the employer can subject the employee to the employer's policy regarding unexcused absences.<sup>71</sup>

*Gordon v. Wawa, Inc.*<sup>72</sup> involved a military reservist who informed his employer of his return from weekend service duties and was allegedly told that he would be fired if he did not work that night's late shift. The reservist worked the shift and, while driving home, lost consciousness and died in a fatal crash. The reservist's mother claimed under USERRA that her son had been deprived of a mandatory period of eight hours of rest following service duties and that the threat to fire him constituted adverse employment action. Upholding the dismissal of her claims on appeal, the court determined that USERRA does not confer a right to rest upon service members and was "an inappropriate vehicle" for the plaintiff's tort claims. The court noted that the employee was required to give notice of his intent to return to work, but that the statute does not impose an "affirmative duty on an employer to prevent an employee from reporting to work prior to the expiration of an eight-hour period" after military service.<sup>73</sup>

## **B. Employee Reinstatement Obligations.**

As discussed above, to be eligible for reemployment rights under USERRA, an employee must have provided appropriate notice of his or her military leave obligations,<sup>74</sup> must have served for a period not exceeding five years (subject to the above-mentioned exceptions) and must have reapplied for employment within the appropriate time frame. If an employee's leave is "not necessitated by reason of service in the uniformed services" (*i.e.*, without appropriate leave orders),<sup>75</sup> then the employee is not entitled to reemployment rights under USERRA.<sup>76</sup>

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<sup>69</sup> 20 C.F.R. § 1002.116.

<sup>70</sup> 38 U.S.C. § 4312(e)(2)(A).

<sup>71</sup> 38 U.S.C. § 4312(e)(3); 20 C.F.R. § 1002.117.

<sup>72</sup> 388 F.3d 78 (3d Cir. 2004).

<sup>73</sup> 38 U.S.C. § 4312(e).

<sup>74</sup> *Bradberry v. Jefferson Cnty., Tex.*, 2013 U.S. App. LEXIS 21085 (5th Cir. Oct. 17, 2013) ("a finding that [the employee] was discharged due to a disagreement about [the duration of his] military service is not the equivalent of a finding that the [defendant] was motivated by this military status to discharge him").

<sup>75</sup> 38 U.S.C. § 4312(a).

Accordingly, an employer should always request a copy of an employee's active duty orders to determine whether the employer has reemployment obligations.

USERRA also requires that employees complete military-related service under *other than honorable conditions* in order to be eligible for reemployment rights.<sup>77</sup> The Act lists four circumstances under which an employee's reemployment rights terminate based on the status of the employee's separation from military service:<sup>78</sup>

- separation from service with a dishonorable or bad conduct discharge;
- dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war;
- dropping of a commissioned officer from the rolls when the officer has been absent without authority for more than three months or who is imprisoned by a civilian court; and
- separation from the service under other than honorable conditions.

Regulations for each military branch specify when separation from the service will be considered "other than honorable."

Additionally, under USERRA, an employer has the right to request that an individual on military leave for a period of 31 days or more provide documentation that establishes the timeliness of his or her application for reemployment, and the length and character of military service. If documentation is unavailable, the employer is obligated to reemploy the individual until the documentation becomes available. If, after reemploying the individual, the employer receives documentation that establishes one or more of the reemployment requirements have not been met, the employer may discharge the individual. Employers should note that termination under these circumstances would be effective as of the date that the documents are provided and cannot be applied retroactively.<sup>79</sup>

If an employee has been on military leave for a period of 91 days or more, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, employers are obligated to make retroactive pension contributions to individuals returning from military leave for periods of 90 days or less.<sup>80</sup> A more detailed discussion of pension obligations is discussed above.

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<sup>76</sup> *Leisek v. Brightwood Corp.*, 278 F.3d 895, 896–97 (9th Cir. 2002).

<sup>77</sup> 38 U.S.C. § 4304.

<sup>78</sup> 38 U.S.C. § 4304; 20 C.F.R. §§ 1002.134–1002.138.

<sup>79</sup> 38 U.S.C. § 4312(f)(3)(A).

<sup>80</sup> 38 U.S.C. § 4312(f)(3)(B).

Whether an employee met his or her obligation to apply for reinstatement must be analyzed by focusing on the intent and reasonable expectations of both the former employee and employer.<sup>81</sup> In 1998, one court found that a returning employee had an affirmative obligation to contact the human resources department of the company. In *McGuire v. United Parcel Service*,<sup>82</sup> a returning employee contacted his old supervisor about getting his job back. The supervisor informed the employee that the “law specifies that there are no requirements for reemployment,” and that the employee should contact the human resources department. The employee interpreted the supervisor’s statement to mean that there was no requirement that the company reemploy him; therefore, the employee never contacted human resources. Although the court recognized that the supervisor’s comment was ambiguous, the court held that the employee had an obligation to contact the human resources department, not just the supervisor. Because the employee did not contact the human resources department, the court held that the employee could not sustain a claim under USERRA.

### C. Employer Reinstatement Obligations.

If an employee has met the requirements for reinstatement, his or her former employer (or that employer’s successor in interest) has an affirmative obligation to reemploy the employee subject only to very limited exceptions.<sup>83</sup> Failure to reinstate an individual following a period of military service is one of the most common complaints under USERRA.

In *Vander Wal v. Sykes Enterprises, Inc.*,<sup>84</sup> a court found that an Iraq War veteran returning from a one year tour of duty had standing to sue under USERRA based on allegations that his employer misrepresented the availability of jobs and delayed rehiring him for approximately five weeks from the time of his application for work. The same court, in deciding another veteran’s motion to intervene in the *Vander Wal* action,<sup>85</sup> permitted intervention based on that veteran’s delay in reemployment by the defendant employer of just eight days. In a subsequent motion for summary judgment filed by the employer, the court also granted the employer’s motion concluding that the plaintiffs were promptly rehired and that the plaintiffs failed to set forth evidence showing any actions taken by the employer were based on their status as members of the military.<sup>86</sup>

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<sup>81</sup> *Shadle v. Superwood Corp.*, 858 F.2d 437, 439 (8th Cir. 1988).

<sup>82</sup> 152 F.3d 673 (7th Cir. 1998).

<sup>83</sup> 38 U.S.C. § 4312(h); 20 C.F.R. § 1002.139; *Jordan v. Air Prods. & Chems. Inc.*, 225 F. Supp. 2d 1206 (C.D. Cal. 2002) (discriminatory intent not required to show violation of USERRA’s reinstatement requirement).

<sup>84</sup> 327 F. Supp. 2d 1075 (D.N.D. 2004).

<sup>85</sup> 2004 U.S. Dist. LEXIS 18208 (D.N.D. Sept. 10, 2004).

<sup>86</sup> 377 F. Supp. 2d 738 (D.N.D. 2005).

Under USERRA, individuals are entitled to reinstatement to the position the individual *would have attained* if he or she had not gone on military leave. Utilizing a concept known as the *escalator principle*, USERRA regulations require that a service member who properly returns from a qualified leave be reemployed into the escalator position. The *escalator position* is the position that the employee would have attained with “reasonable certainty” if the employee had not been absent for military service.<sup>87</sup>

In *Rivera-Meléndez v. Pfizer Pharmaceuticals, L.L.C.*,<sup>88</sup> the First Circuit Court of Appeals considered whether USERRA’s reinstatement provisions apply to non-automatic, discretionary promotions. On appeal, the First Circuit held that the escalator principle and reasonable certainty test under USERRA apply to non-automatic, discretionary promotions.

The application of the escalator principle can also result in adverse consequences when an employee is reemployed. For example, the regulations provide that if an employee’s job classification or seniority would have resulted in the employee being laid off during the period of service and the layoff continued after the date of reemployment, the employee would be reinstated to a layoff status.

In *Milhauser v. Minco Products, Inc.*,<sup>89</sup> the Eighth Circuit considered the proper analysis to apply to claims under Sections 4312 and 4313 where the plaintiff’s position was eliminated during military leave. The plaintiff in *Milhauser* argued that the reinstatement position under Sections 4312 and 4313 cannot, as a matter of law, be a layoff or termination of employment. Rather, according to the plaintiff, an employee must be reinstated and an employer may then rely only on the “impossible or unreasonable” affirmative defense provided under Section 4312(d)(1)(A).

The Eighth Circuit rejected this analysis. The court started its analysis with the undisputed recognition that an employee returning from military leave is required to be reemployed in the escalator position—the position the employee would have occupied had his employment not been interrupted by the military commitment, as provided in Section 4313(a). Recognizing that reinstatement must be based on a “reasonable certainty,” the court held that “[t]he principle is that the employee should be in the same position he would have been in had he not taken military leave, no better and no worse.”<sup>90</sup> The court also relied on USERRA’s regulations, which specifically state that “[d]epending 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>91</sup> Finally,

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<sup>87</sup> 20 C.F.R. §§ 1002.191–1002.199.

<sup>88</sup> 2013 U.S. App. LEXIS 19398 (1st Cir. Sept. 20, 2013).

<sup>89</sup> 701 F.3d 268 (8th Cir. 2012), *aff’g* 855 F. Supp. 2d 885 (D. Minn. 2012).

<sup>90</sup> 701 F.3d at 271. The court recognized that the employee must be reinstated to the position he would have, with “reasonable certainty” held but for his military service. *See* 20 C.F.R. §1002.191.

<sup>91</sup> 701 F.3d at 273 (quoting 20 C.F.R. §1002.194). The court accorded this agency interpretation considerable deference. *Id.*



the court recognized that at least one other court had reached a similar conclusion.<sup>92</sup> Based on this analysis, the court held that the affirmative defense provided in Section 4312(d)(1)(A) was not necessary, because the issue of reinstatement is initially governed by the general analysis provided under Sections 4312 and 4313. That analysis permits a finding that the proper reinstatement position may be termination of employment.

USERRA provides that an individual with fewer than 91 days of military service must be “promptly reemployed” in a position that he or she would have attained if continuously employed, so long as the individual is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the individual. If the individual is not qualified for the position, the individual must be reemployed in the position he or she left prior to military service. Under the Act, employers no longer have the option of offering other jobs of equivalent seniority, status, and pay to returning employees. If, however, the individual is not qualified for the position he or she would have attained or the position he or she previously held, the employer must reemploy the individual in any other position that is the nearest approximation of which he or she is qualified, with full seniority.<sup>93</sup>

For employees who have served 91 days or more of military service, the employer’s reinstatement obligations are very similar. The Act requires employers to promptly reemploy individuals returning from military service of 91 days or more in a position that he or she would have attained if continuously employed, so long as the individual is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person. If the individual cannot become qualified for the position he or she would have attained, the employer is obligated to reemploy that individual in his or her former position, or in a position of equivalent seniority, status, and pay, so long as the individual is qualified for the job or could become qualified after reasonable efforts by the employer to qualify the individual. Those employees serving 91 days or more of military service who cannot qualify for the position they would have attained, their former positions, or a position of equivalent seniority, status, and pay must be placed in a position of like seniority, status and pay for which they are qualified to perform, with full seniority.<sup>94</sup>

USERRA expands the obligations of an employer by requiring employers to “promptly” reemploy individuals returning from military leave.<sup>95</sup> The regulations implementing the Act explain that “[a]bsent unusual circumstances, reemployment must occur within two weeks of the employee’s application for reemployment.<sup>96</sup> Whether reemployment is prompt will likely depend

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<sup>92</sup> *Id.*

<sup>93</sup> 38 U.S.C. § 4313(a).

<sup>94</sup> 38 U.S.C. § 4313(a)(2).

<sup>95</sup> 20 C.F.R. § 1002.180; *see also Petty v. Metropolitan Gov’t of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008) (finding that USERRA supersedes an employer’s return-to-work process and, therefore, the employer delayed and limited the employee’s reemployment rights by requiring him to comply with such process prior to being reemployed).

<sup>96</sup> 20 C.F.R. § 1002.181.

upon the circumstances of each individual case. Reinstatement after a weekend of reserve duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following several years of military leave might require a period of time for the employer to give notice to an incumbent employee who has occupied the returning employee's position and who must now vacate that position.

Notably, an employer generally satisfies its statutory duty to reemploy an employee following USERRA leave at the moment he or she returns to the job from leave. This is so even if he or she is terminated shortly thereafter. In *Patton v. Target Corp.*,<sup>97</sup> the plaintiff was fired approximately one week after returning to work from military training. The U.S. District Court for the District of Oregon found that plaintiff could not bring a claim for alleged failure to reemploy under USERRA because the employer's statutory duty to reemploy was satisfied the moment plaintiff returned to work from military leave. The court based its holding on a review of other jurisdictions where other courts have held that the Act only requires immediate reemployment; and that the Act is not violated even if the returning service member is fired soon thereafter.

An employer's training obligations are also expanded under USERRA. Employers now have a duty to make reasonable efforts to provide refresher training and any other training necessary to update a returning employee's skills in circumstances where the employee is no longer qualified due to technological advances. Employers are excused from providing training only if the required training would be of such difficulty or expense as to cause undue hardship for the employer. "Undue hardship" has the same meaning under USERRA as it does under the ADA. In addition, employers that conduct promotional examinations have a duty to promptly allow returning veterans to take a make-up examination if the employee missed the test by virtue of service in the military.<sup>98</sup>

Employers also have specific obligations to those individuals returning from military leave with service-related disabilities or a disability that was aggravated by the military service.<sup>99</sup> Under the regulations, a disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained with reasonable certainty but for military service.<sup>100</sup> If the disability is not an impediment to the service member's qualifications for the escalator position, then the disabling condition is irrelevant for USERRA purposes. If the disability limits the service member's ability to perform the job, however, the regulations impose a duty on the employer to make reasonable efforts to accommodate the disability so that the employee can perform the position he or she would have held but for military service.<sup>101</sup> If, despite reasonable accommodations, the employee is not qualified for that position due to his or

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<sup>97</sup> 2007 U.S. Dist. LEXIS 20712 (D. Or. Mar. 21, 2007).

<sup>98</sup> See *Fink v. City of N.Y.*, 129 F. Supp. 2d 511, 519 (E.D.N.Y. 2001).

<sup>99</sup> 20 C.F.R. §§ 1002.225–1002.226.

<sup>100</sup> 20 C.F.R. § 1002.225.

<sup>101</sup> 38 U.S.C. § 4313(a)(3).

her military-related disability, the employee must be reemployed in a position of equivalent seniority, status, and pay for which he or she is qualified or could become qualified to perform. Failing this, the employee must be reemployed in a position that is the “nearest approximation” in terms of seniority, status and pay consistent with that individual’s case.

However, in *Bowlds v. General Motors Manufacturing Division*,<sup>102</sup> the Seventh Circuit Court of Appeals ruled that a Vietnam War veteran exposed to Agent Orange was not entitled to reinstatement to his position under USERRA after a disability leave. The employee went on total and permanent disability leave in 1977 caused by a worsening of his skin disorder. When his condition improved, the employee requested that he be able to return to work, but the company did not rehire him for another six years. When the employee eventually, retired the company based his pension on 24.8 years of service to the company by excluding the years he was not on the job. The employee wanted the years of his disability to be added to his time on the job under USERRA. The Seventh Circuit said that USERRA could not apply retroactively to claims originating in the 1980s and that USERRA was not intended to require reinstatement after a disability leave.

In 2012, in *Brown v. Con-Way Freight, Inc.*,<sup>103</sup> the central issue before the court was an employer’s duty under USERRA to reemploy a disabled veteran who was no longer “qualified” to perform his or her job with or without a reasonable accommodation. In granting summary judgment in favor of the employer, the court determined that because of the employee’s disability, he could neither perform his pre-deployment job, nor could he perform a supervisor position, even if one were available. As the court noted, under USERRA, “an employer is not required to reemploy a veteran on his return from service if no position exists that he is capable of performing.”<sup>104</sup> The court further found that the employer did not violate USERRA by offering the employee a position at a lower hourly rate.

Finally, USERRA provides expanded protection to individuals with conflicting reemployment claims. Under the Act, the individual who left first has the superior right to the position, while the other returning employees are entitled to reemployment with full seniority in any other position that provides similar status and pay or in a position that is the nearest approximation consistent with the circumstances of the individual’s case.<sup>105</sup>

## **10. Protection from Discharge or Discrimination.**

Employees reemployed after a military leave of 181 days or more may not be discharged without cause for one year after the date of reemployment.<sup>106</sup> Additionally, an employee who is

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<sup>102</sup> 411 F.3d 808 (7th Cir. 2005).

<sup>103</sup> 2012 U.S. Dist. LEXIS 67658 (N.D. Ill. May 15, 2012).

<sup>104</sup> 2012 U.S. Dist. LEXIS 67658, at \*\*17–18; *see also* 20 C.F.R. § 1002.198.

<sup>105</sup> 38 U.S.C. § 4313(b)(1).

<sup>106</sup> 20 C.F.R. § 1002.247(b); *see also* *Duarte v. Agilent Techs. Inc.*, 366 F. Supp. 2d 1039 (D. Colo. 2005) (ordering an employer to pay a former employee almost \$385,000 in lost wages and benefits for

reemployed after a military leave of 30 days but less than 180 days may not be discharged without cause for six months after the date of reemployment.<sup>107</sup> Courts have held that discriminatory motive may be reasonably inferred from “a variety of factors including proximity in time between the employee’s military activity and the adverse employment action.” For example, a high school football coach in *Harris v. City of Montgomery*<sup>108</sup> overcame summary judgment based on assertions under USERRA that he was demoted from head football coach, required to use accrued vacation time for service in military reserve and denied a merit-based raise. The court determined that the coach was denied benefits of employment and, furthermore, that the coach’s evidence, including biased statements from superiors regarding his military service, reasonably supported his USERRA discrimination claims.

In contrast, the plaintiff in *Snowman v. Imco Recycling, Inc.*<sup>109</sup> failed to show that his military service was a motivating factor in the decision to terminate him where the employer proffered evidence that the discharge decision preceded notice of the employee’s service status and obligations, and was based on documented inadequate performance and cost-cutting measures that also preceded such notice.<sup>110</sup> In addition, in *Aldridge v. Daikin America Inc.*,<sup>111</sup> the court ruled that a member of the Army National Guard who quit his job following a workplace altercation had no constructive discharge claim under USERRA. The plaintiff showed that he was the target of negative comments regarding his National Guard service and that he was under a closer watch than were other employees, but the court determined that the employee resigned willingly without pressure from his employer to do so and not under such intolerable conditions that would lead a reasonable person to resign.

While USERRA prohibits discrimination based on military service, subject to the service periods mentioned above where an employer may only discharge an employee “for cause,” according to the Second Circuit Court of Appeals, USERRA does not impose a duty to employ a returning service member beyond the number of days required by law. In *Hart v. Family Dental Group*,<sup>112</sup> the Second Circuit affirmed the district court’s granting of a directed verdict in favor of the

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firing him several months after returning from military service because the employee was protected under USERRA from being terminated for one year).

<sup>107</sup> 20 C.F.R. § 1002.247(a).

<sup>108</sup> 322 F. Supp. 2d 1319 (M.D. Ala. 2004).

<sup>109</sup> 347 F. Supp. 2d 338 (N.D. Tex. 2004).

<sup>110</sup> See also *Mills v. Earthgrains Baking Co., Inc.*, 2004 U.S. Dist. LEXIS 14582 (E.D. Tenn. July 19, 2004) (USERRA claim survived summary judgment based on evidence of hostile statements from plaintiff’s superiors in regards to his service obligations followed by the plaintiff’s post-service termination from employment for minor incident involving a customer).

<sup>111</sup> 2005 U.S. Dist. LEXIS 27389 (N.D. Ala. Oct. 6, 2005).

<sup>112</sup> 645 F.3d 561 (2d Cir. 2011).

employer as to the plaintiff's claims under USERRA.<sup>113</sup> In that case, after the plaintiff returned from service in Iraq, the employer afforded him the same salary, benefits and other conditions of employment that he received before his deployment. However, three days after the plaintiff began working, the employer notified him that his employment would be terminated in 60 days. The plaintiff immediately obtained assistance from the DOL, who informed the employer that under USERRA, the employer was obligated to employ the plaintiff at least 180 days following his return from service. The employer complied with the DOL's directive, and then immediately terminated the plaintiff's employment.

On appeal, the plaintiff argued that USERRA provides him additional protections beyond 180 days of employment. The Second Circuit disagreed, finding that USERRA "only entitles a service person to immediate reemployment and does not prevent the employer from terminating him the next day or even later the same day."<sup>114</sup> Satisfied that the employer met its obligations to employ the plaintiff for 180 days following his return from active duty, the court affirmed the trial court's directed verdict.

USERRA also protects witnesses, even if they themselves have not performed military service. USERRA provides: "This chapter supersedes any State law ... contract, agreement, policy, plan, practice or other matter that reduces, limits or eliminates in any matter any right or benefit provided by this Chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."<sup>115</sup>

If an employee's past, present or future military obligations are a substantial or motivating factor in an employer's adverse employment action against that employee, the employer has violated the Act unless it can prove that it would have taken the same action regardless of the employee's military obligations.<sup>116</sup> In *Sheehan v. Department of Navy*,<sup>117</sup> the court applied the regular, two-step motivating factor analysis, which allocates the burden of proof between the employee and the employer. The employee must first establish by a preponderance of the evidence that the employee's military service was a substantial or motivating factor for the employer's adverse employment action.<sup>118</sup> If the employee meets this burden, the burden shifts to the employer to

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<sup>113</sup> *Hart*, 645 F.3d at 562–63.

<sup>114</sup> 645 F.3d at 565.

<sup>115</sup> 38 U.S.C. § 4302(b).

<sup>116</sup> 38 U.S.C. § 4311(b); *see also* *Murphy v. Radnor Twp.*, 2013 U.S. App. LEXIS 21529, at \*5 (3d Cir. July 8, 2013) ("USERRA requires that [an employer] show a legitimate reason for not hiring [an applicant] that is 'so compelling' and 'so meagerly contested' that there is no genuine dispute that [the applicant] would not have been hired regardless of his future military obligations").

<sup>117</sup> 240 F.3d 1009 (Fed. Cir. 2001).

<sup>118</sup> *Stadtmiller v. UPMC Health Plan, Inc.*, 2011 U.S. Dist. LEXIS 73277, at \*68 (W.D. Pa. June 29, 2011) ("Under the burden of proof allocation applicable in USERRA cases, an employee must show, by a preponderance of the evidence, that his or her protected status as a member of the service was a substantial or motivating factor in an adverse employment action").

prove that the employer would have taken the adverse action anyway for a valid reason. The court noted that this is a different procedure than the *McDonnell Douglas* order of proof used in a typical employment discrimination case where the burden of proof remains with the employee.<sup>119</sup> Thus, to avoid liability, an employer must prove that a reason other than military service would have been sufficient to justify its action.<sup>120</sup> Additionally, in *Velazquez Garcia v. Horizon Lines of P.R. Inc.*,<sup>121</sup> the First Circuit Court of Appeals explained USERRA discrimination claims should be analyzed using the two-prong approach applied to National Labor Relations Act cases and not the traditional three-pronged analysis applied to Title VII of the Civil Rights Act cases. As such, the employee need only show that military service was a motivating factor to prove liability, unless the employer can prove that the adverse employment action would have been taken regardless of the employee's military service.

Adverse employment actions are not limited to discharge. Employers must ensure that employees on military leave are not denied any "benefits of employment." For example, in *Allen v. United States Postal Service*,<sup>122</sup> an employee on military leave was not notified of a promotion that he would have been entitled to bid for if he was working at the time. Instead, the promotion went to another employee with lesser seniority. By not allowing the employee to bid for the promotion, the employer violated USERRA. Employers, therefore, must be careful to ensure that employees on military leave are not denied any "benefits of employment" such as the chance to bid on a job by virtue of their seniority or to take a make-up promotional test missed while the employee was on military leave.<sup>123</sup>

To establish a case of employer discrimination, the person's membership, application for membership, performance of service, application for service or obligation for service in the

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<sup>119</sup> See also *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002); *Madden v. Rolls Royce Corp.*, 563 F.3d 636 (7th Cir. 2009); *Fink v. City of N.Y.*, 129 F. Supp. 2d 511 (E.D.N.Y. 2001).

<sup>120</sup> 38 U.S.C. § 4311(b).

<sup>121</sup> 473 F.3d 11 (1st Cir. 2007).

<sup>122</sup> 142 F.3d 1444 (Fed. Cir. 1998); see also *Vega-Colon v. Wyeth Pharmaceuticals*, 625 F.3d 22 (1st Cir. 2010) (holding that the extension of a PIP was an "improper discriminatory action" under USERRA); *Serricchio v. Wachovia Sec. L.L.C.*, 706 F. Supp. 2d 237 (D. Conn. 2010) (jury awarded plaintiff \$1.64 million dollars because employer reinstated employee to an inferior financial advisor position).

<sup>123</sup> See *Fink*, 129 F. Supp. 2d at 519. But see *Crews v. City of Mt. Vernon*, 2008 U.S. Dist. LEXIS 41710 (S.D. Ill. May 27, 2008) (finding that USERRA does not require an employer to provide special work-hour scheduling for military reservists because equal, not preferential, treatment is what is required under the Act); see also *Crews v. City of Mt. Vernon*, 567 F.3d 860 (7th Cir. 2009) (finding that the preferential work scheduling policy that the police department previously extended to Guard employees was not a benefit of employment because it was not generally available to all employees; therefore, the police department's rescission of that policy could not be a denial of any benefit of employment actionable under section 4311(a)).

uniformed services must be a “motivating factor” in the employer’s actions or conduct. The initial burden of proof of discrimination or retaliation rests with the claimant alleging discrimination. The claimant must first establish that his or her protected activities or status as a past, present or future service member was a motivating factor in the adverse employment action. The claimant must also prove the elements of a violation; membership in a protected class (*e.g.*, past, present or future affiliation with the uniformed services); an adverse employment action by the employer or prospective employer; and a causal relationship between the claimant’s protected status and the adverse employment action (the “motivating factor”). The claimant is not required to provide direct proof of employer animus; intent to discriminate or retaliate may be established through circumstantial evidence.

After the claimant establishes the elements of an alleged violation, the employer may avoid liability by proving by a preponderance of the evidence that the claimant’s military activities or status was not a motivating factor in the adverse employment action. At this stage, the employer carries the burden to affirmatively prove that it would have taken the action anyway, without regard to the employee’s protected status or activity.

In *Wallace v. San Diego*,<sup>124</sup> the Ninth Circuit Court of Appeals revived a \$256,800 jury verdict because the court found that the plaintiff showed that he was constructively discharged from his position because of discrimination. The Ninth Circuit held that the plaintiff’s receipt of a transfer he had been seeking did not negate the alleged USERRA discrimination he experienced.

The same evidentiary framework is provided for adjudicating allegations of reprisal against any person (including individuals unaffiliated with the military) for engaging in activities to enforce a protected right under the Act; providing testimony or statements in a USERRA proceeding; assisting or participating in a USERRA investigation; or exercising a right provided by the Act.

Importantly, employers should note that in 2011, the U.S. Supreme Court held in a unanimous decision that the “cat’s paw” theory of employer liability applies in cases where a claimant alleges that an employer has taken adverse employment actions against him or her in violation of USERRA.<sup>125</sup> Under the *cat’s paw theory*, a non-decision maker’s discriminatory animus is imputed to the decision maker where the non-decision-maker has singular influence over the decision maker and uses that influence to cause an adverse employment action. In *Staub v. Proctor Hospital*, plaintiff, an angiography technologist and veteran Army reservist, sued his former employer under USERRA after he was discharged from his position.<sup>126</sup> The plaintiff alleged the reasons given for his termination were a pretext for discrimination based on his association with the military. A jury entered a verdict in favor of the plaintiff, and the district court denied the hospital’s renewed motion for judgment as a matter of law for a new trial.

The hospital appealed to the Seventh Circuit Court of Appeals, arguing that the district court gave an erroneous jury instruction regarding the “cat’s paw” theory and, improperly admitted

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<sup>124</sup> 460 F.3d 1181 (9th Cir. 2006).

<sup>125</sup> *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

<sup>126</sup> 131 S. Ct. at 1189.

evidence of animus by non-decision-makers. The Seventh Circuit held that the “cat’s paw” theory did not apply because a reasonable jury could not find that the non-decision-maker had singular influence over the decision maker. The court concluded that the decision maker exercised her independent judgment in the termination decision and was not a “cat’s paw” for the non-decision-maker who held discriminatory animus against the plaintiff because of his military affiliation. The Seventh Circuit reversed the jury’s verdict and instructed the district court to enter judgment in favor of the hospital.

The U.S. Supreme Court then reversed the Seventh Circuit Court of Appeals.<sup>127</sup> The Court held that “[i]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”<sup>128</sup> Although the Supreme Court’s decision resolved the question of whether the “cat’s paw” theory is applicable in USERRA cases, it may also have implications for other antidiscrimination laws.

In addition, while an employee may assert a claim for discrimination under USERRA, the Fifth Circuit Court of Appeals has held that employees cannot sustain a claim for hostile work environment under USERRA.<sup>129</sup> In *Carter v. Continental Airlines, Inc.*, plaintiffs, who were employed as pilots, alleged that they were subjected to “harassing, discriminatory, and degrading comments and conduct relating to and arising out of” their military service and service obligations.<sup>130</sup> The Fifth Circuit affirmed the district court’s dismissal of the plaintiffs’ hostile work environment claims and noted that Congress did not intend to create an actionable right to challenge harassment on the basis of military service under USERRA because it does not expressly prohibit discrimination in an employee’s “terms, conditions, or privileges of employment,” as provided for under antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964.<sup>131</sup> Even though the court rejected the proposition that an employee may sustain a cause of action for hostile work environment, the court explained that its decision does not alter an employee’s ability to sue under USERRA for the denial of contractual benefits or an employee’s right to sustain a cause of action for constructive discharge.<sup>132</sup>

## 11. Enforcement and Remedies.

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<sup>127</sup> 131 S. Ct. at 1192 (“So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA”).

<sup>128</sup> 131 S. Ct. at 1194 (emphasis in original); *see also Bobo v. UPS*, 665 F.3d 741 (6th Cir. 2012) (relied on the “cat’s paw” theory as articulated in *Staub* in finding that anti-military sentiments expressed to a manager may be grounds for a USERRA discrimination claim).

<sup>129</sup> *Carter v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011).

<sup>130</sup> 636 F.3d at 174.

<sup>131</sup> 636 F.3d at 177–81.

<sup>132</sup> 636 F.3d at 181–83.



Employers can be sued by the government or by employees under USERRA. USERRA complaints may be filed electronically on the DOL's website.<sup>133</sup><sup>484</sup> Based on the Veterans' Benefits Improvement Act of 2008 ("VBIA 2008"), there is "no limit on the period for filing" a complaint or claim under USERRA.<sup>134</sup> As for remedies, USERRA provides for the recovery of liquidated damages for a willful violation of the Act.<sup>135</sup> Willfulness is not defined by the statute; although, courts generally use the same willfulness standard applied under the Age Discrimination in Employment Act.<sup>136</sup>

In *Duarte v. Agilent Technologies Inc.*,<sup>137</sup> a federal court ordered an employer to pay a former employee almost \$385,000 in lost wages and benefits for illegally firing him several months after he returned from military service for violating USERRA. However, because the employer decided to terminate the employee based on an exercise of business judgment in response to the company's financial hardship, the court declined to award punitive damages. In *Serricchio v. Wachovia Securities*,<sup>138</sup> a federal district court awarded approximately \$779,000 in back pay, damages, and attorneys' fees in what is believed to be the largest USERRA judgment ever in a case that involved an Air Force reservist and civilian financial adviser who was called to active duty in September 2001 and was not restored to his previous pay after returning from active duty.

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<sup>133</sup> 149 Daily Lab. Rep. (BNA), Aug. 4, 2005, at A-12.

<sup>134</sup> Courts had previously held that a claim under USERRA had to be made within four years of the action complained of based on the four-year statute of limitations period for any federal claim brought under a later-enacted statute. See 28 U.S.C. § 1658. An employee could, however, agree to bring his or her USERRA claim within a shorter period. See *Aull v. McKeon-Grano Assocs.*, 2007 U.S. Dist. LEXIS 13008 (D.N.J. Feb. 26, 2007) (finding employee's agreement to bring USERRA claim within six months of any alleged violation was binding and enforceable). However, Congress did not provide for the retroactive effect of VBIA 2008. See *Baldwin v. City of Greensboro*, 714 F.3d 828, 835–38 (4th Cir. 2013) (rejecting employee's argument that the VBIA "meant to graft upon preceding legislation a statute of limitations that was never explicitly provided" and applying 28 U.S.C. § 1658(a)'s four-year statute of limitations); see also *Middleton v. City of Chicago*, 578 F.3d 655 (7th Cir. 2009) (finding that an Air Force veteran who filed a lawsuit under USERRA more than 13 years after the City of Chicago allegedly refused to hire him was not entitled to pursue the claim despite the elimination in 2008 of any time limit on USERRA complaints).

<sup>135</sup> 38 U.S.C. § 4323(d)(1)(C); see also 20 C.F.R. §§ 1002.312–1002.314.

<sup>136</sup> See *Wriggelsworth v. Brumbaugh*, 129 F. Supp. 2d 1106, 1110–11 (W.D. Mich. 2001); see also *Koehler v. PepsiAmericas, Inc.*, 268 F. App'x 396 (6th Cir. 2008) (finding the employer acted willfully in denying the employee a military pay differential, such that liquidated and punitive damages were appropriate).

<sup>137</sup> 366 F. Supp. 2d 1039 (D. Colo. 2005).

<sup>138</sup> 606 F. Supp. 2d 256 (D. Conn. 2009), *aff'd*, 658 F.3d 169 (2d Cir. 2011).

USERRA also provides aggrieved plaintiffs the right to a jury trial in federal court.<sup>139</sup> USERRA provides: “This chapter supersedes any State law ... contract, agreement, policy, plan, practice or other matter that reduces, limits or eliminates in any matter any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.”<sup>140</sup> In *Garrett v. Circuit City Stores, Inc.*,<sup>141</sup> the Fifth Circuit held that USERRA does not preempt private arbitration agreements. The Sixth Circuit reached a similar conclusion in *Landis v. Pinnacle Eye Care, L.L.C.*<sup>142</sup> However, in *Lopez v. Dillard’s, Inc.*<sup>143</sup> and *Breletic v. CACI, Inc.*,<sup>144</sup> federal district courts reached the opposite conclusion and found that USERRA claims are not subject to private arbitration agreements.

More recently, the Department of Justice (DOJ) has been increasing its enforcement efforts against employers it suspects have discriminated against Armed Forces members returning from active duty and seeking to re-enter the civilian workforce. Between 2010 and October 2013, DOJ filed at least 35 lawsuits based on USERRA violations.<sup>145</sup>

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<sup>139</sup> See *Spratt v. Guardian Auto. Prods., Inc.*, 997 F. Supp. 1138 (N.D. Ind. 1998); see also *Helton v. Flowers Bakery of Cleveland, L.L.C.*, 2009 U.S. Dist. LEXIS 94745 (E.D. Tenn. Oct. 9, 2009) (stating that none of the federal appeals courts have considered the availability of jury trials in USERRA cases, but denying a motion by defendant to strike the jury demand from plaintiff’s lawsuit).

<sup>140</sup> 38 U.S.C. § 4302(b).

<sup>141</sup> 449 F.3d 672 (5th Cir. 2006).

<sup>142</sup> 537 F.3d 559 (6th Cir. 2008).

<sup>143</sup> 382 F. Supp. 2d 1245 (D. Kan. 2005).

<sup>144</sup> 413 F. Supp. 2d 1329 (N.D. Ga. 2006).

<sup>145</sup> See U.S. Dep’t of Justice, *Civil Rights Cases and Investigations Involving Servicemembers and Veterans* (cases listed under the heading “USERRA”), available at [http://www.justice.gov/crt/spec\\_topics/military/cases.php](http://www.justice.gov/crt/spec_topics/military/cases.php).