The Uniformed Services Employment and Reemployment Rights Act
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USERRA Introduction

The Uniformed Services Employment and Reemployment Rights Act is a federal statute that protects the civilian employment and reemployment rights of persons who are or have been members of a "uniformed service." 38 U.S.C. § 4301 et seq.

USERRA Introduction

Purpose:
• To encourage "service in the uniformed services" by minimalizing the disadvantages to civilian careers
• To minimize the disruption to servicemembers and their workplaces
• Prohibit discrimination against servicemembers
38 U.S.C. § 4301
USERRA Introduction

“Service in the Uniformed Services”
- Duty performed on a voluntary or involuntary basis
- Active duty for training, inactive duty training, fitness examination, National Guard duty, funeral duty, etc. 38 U.S.C. 4303(13)
- Applies to National Guard and reserve military personnel AND persons serving in the active components of the Armed forces. 20 C.F.R. § 1002.6

Mueller v. City of Joliet, No. 18-3609 (7th Cir. 2019)
- District court dismissed Mueller’s USERRA case, finding that National Guard counterdrug duty was authorized under Illinois law and not covered by USERRA. Seventh Circuit reversed, finding:
  - “service in the uniformed services” explicitly covers full-time National Guard duty, including counterdrug activities. 38 U.S.C. 4303(13).
  - USERRA does not limit protection to those in “Federal service” like the Army or Navy but to those in “service in a uniformed service,” which explicitly includes Title 32 full-time National Guard duty.
  - The Posse Comitatus Act likewise bars the Army and Air Force from domestic law enforcement, but does not apply to Title 32 National Guard duty. 18 U.S.C. 1385.

Prohibits employment discrimination
- Prohibits retaliation against employees that engage in protected conduct
- Provides for prompt reemployment following uniformed service
- Ensures continuation of certain benefits during military service and upon return
- Provides right to file a complaint with the Department of Labor
- 38 U.S.C. §§ 4311-18 & 4322
USERRA Introduction

• Nearly 998,240 Guard and Reserve members mobilized since September 11, 2001
• Nearly 958,243 have returned, with 39,997 remaining on active duty as of January 14, 2020
• USERRA complaints received by the Department of Labor since averaging around 1,000 complaints annually

USERRA Introduction

• Statute: 38 U.S.C. § 4301-4334
• Regulations for private, local, and state employers:
  20 C.F.R. Part 1002
• Regulations for federal sector employers:
  5 C.F.R. Part 353

USERRA General

• Protects employees:
  • (Not independent contractors, students, volunteers)
  • Citizen, national or permanent resident, even if working abroad for U.S. employer
  • Part-time, temporary, and seasonal employees covered*
• Covers Employers
  • Any entity that pays salary or wages for work performed or that has control over employment opportunities. No size requirement. 38 U.S.C. § 4303

As President of VTC, Captain Costello earned a salary, a 25% ownership interest, and a 9% interest in profit sharing.

VTC Operating Agreement expressly provided that members were to be treated as partners only for purposes of taxation.

Costello was terminated based in part on Naval Reserve leave. Sued under USERRA as an employee.

Rights While Absent

While on orders employees:

- Are deemed to be on leave of absence or furlough.
- May elect to use accrued vacation, PTO, or similar leave, but cannot be compelled to do so.
- Are entitled to non-seniority rights/benefits available to employees on leave of absence/furlough.
- May elect continuation of health plan coverage.
  - For the lesser of either 24-month period beginning when absent or period beginning when absent and ending when employee fails to return or apply for position of employment
  - Upon reemployment, health plan must be generally reinstituted with no waiting period

38 U.S.C. § 4311-16; 20 C.F.R. Part 1002, Subpart D


- Class action consisting of all past and present pilots of American Airlines who are or were members of the United States Armed Services and who took military leave from January 2001 to 2006.
- Alleged that American Airlines violated USERRA by discriminating against pilots who took military leaves of absence were prevented from bidding on flight schedules, and earning vacation and sick leave.
- Alleged that pilots who had taken comparable types of non-military leave were not similarly penalized.
Discrimination

- Employers may not discriminate, or take an adverse employment action:
  - In hiring, promotion, retention in employment, reemployment, benefits of employment
  - On the basis of a person’s past, present, or future service.
- 38 U.S.C. § 4311(a)

Retaliation

- Employers may not retaliate, or take an adverse employment action:
  - In hiring, promotion, retention in employment, reemployment, benefits of employment
  - On the basis of any person’s action to enforce anyone’s USERRA rights, testimony or statement made in connection with a proceeding under the chapter, participation in an investigation, exercise of a USERRA right.
- 38 U.S.C. § 4311(b)

Discrimination & Retaliation

- Service or protected activity only needs to be a "motivating factor" in adverse employment action.
  - Motivating factor: service or activity was one of the reasons the employer took the action. 38 USC § 4311; 20 C.F.R. § 1002.22
  - Prima facie case then both burdens of production and persuasion shift to employer
  - Claim fails where the evidence shows that the employer would have taken the same action in the absence of candidate’s past, present, or future military service or protected activity.
- 38 U.S.C. § 4311(c)(1)
Discrimination & Retaliation

Ana Santiago v. Pharmacia Lugo, Case 3:17-cv-01997 (D.PR)

• Santiago alleged that in response to receiving notice of Santiago’s military obligations, Lugo stated to Santiago, “you have to take off again for the military? This cannot go on,” and slammed his office door.

• Santiago alleged that after notified Lugo of an upcoming military training, Lugo angrily stated, “what, the Army again? I wish you would stay gone.”

• On November 11, 2015, Lugo terminated Santiago in front of other employees and customers at the Farmacia Lugo store. As Lugo terminated Santiago’s employment, Santiago alleged that Lugo raised his voice, mentioned that it was appropriate that the day was Veterans Day and noted that it was because of Santiago’s military service that he was terminating her employment.

Discriminatory motive can be inferred using circumstantial evidence through using the factors set forth in Sheehan v. Dept. of the Navy, 240 F.3d 1009, (Fed. Cir. 2001). “Sheehan Factors”:

1) Proximity in time between Claimant’s military or protected activity and the adverse action.

2) Employer’s expressed hostility towards military members or military duty together with knowledge of the claimant’s military or protected activity.

3) Inconsistencies between the employer’s stated reasons for the adverse action taken and other actions taken by the employer.

4) Disparate treatment toward the Claimant compared to other Employees with similar work records or offenses.

USERRA Litigation

Cruz v. City of Glendale (D. Ariz.) (2018)

• City of Glendale terminated Servicemember after learning of her Title 32 Orders.

• DOJ brought suit on behalf of Cruz in 2018 alleging discrimination.

• In February 2019, DOJ reached a settlement with City of Glendale for $45K in lost wages and $47k in pension contributions (about two years credit).
Reemployment Rights

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

Reemployment Rights- eligibility

An employee is entitled to prompt reemployment if the employee:

- Left a civilian job to perform uniformed service
- Provided employer advance notice (verbal/written) of service
- Non-exempt service with that employer totals < five years
- Did not receive disqualifying discharge
- Notified employer intent to return to reemployment (verbal/written) within certain timeframe in USERRA.

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

USERRA litigation


- Federal case brought by OSC where employee was terminated after extended military service (~15 years on exempt orders). Agency claimed “abandonment.”
- April 25, 2019 Administrative Judge ruled in Patrie’s favor
- USPS filed petition for review to Merit Systems Protection Board and challenges interim relief
Reemployment Rights - eligibility

- Employers may not impose additional requirements to reemployment, such as requiring written orders in advance.
- Notice scheme, not a permission scheme. 20 C.F.R. § 1002.87
  - Employers can ask military authority to adjust orders. 20 C.F.R. § 1002.104; 5 C.F.R. § 353.203 (employee expected to use influence over orders “to minimize the burden upon the agency”)
  - Employees may need to provide documentation of service upon reemployment if requested and length of service 30 days+
    - If documentation is not readily available employer cannot delay or deny reemployment. 20 C.F.R. § 1002.121-123

Reemployment Rights - position

- Reemployment position is generally the position the employee would have been in had the employee been at the work place and not away in military service.
  - “escalator principle”
    - Includes seniority, status, and pay, plus wage increases, promotions, more responsibility, and pension benefits treated as no break in employment
  - Standard: There needs to be reasonable certainty that the employee would have earned the position and benefits
    - Escalator goes up and down

USERRA Litigation

Coffer v. Warren County Board of Ed. (E.D.N.C.) (2019)

- Warren County eliminated Coffer’s Dean of Students position while he was on military leave and placed him in a lesser physical education teacher position upon his return.
  - DOJ brought suit on behalf of Coffer in 2019 alleging failure to properly reemploy and discrimination – 2nd suit on behalf of Coffer against this employer.
  - In August 2019, DOJ reached a settlement with Warren County to place Coffer back into a Dean of Students position and award $25K in back pay.
Reemployment Rights - position

• Other factors may allow or require the employer to reemploy the employee in a position other than the escalator position.
  - Length of service:
    • <90 days, escalator OR "like seniority, status and pay"
  - Qualifications of employee:
    • Employer required to put forth reasonable efforts to qualify returning employee; if still unqualified → next position → next position → next position
  - Service-incurred or aggravated disability:
    • Employer required to put forth reasonable efforts to accommodate and qualify returning employee; if still unqualified → position equivalent in seniority, status, pay → nearest approximation to equivalent position

  • Qualified = "ability to perform essential tasks of position"

Reemployment Rights - benefits

• Pension Benefits:
  - For non-contributory plans, employer contributes as if employee were continuously employed.
  - For contributory plans, employer makes contributions contingent on employee's contributions.

• Contribution amount:
  • Total amount, including overtime, employee would've received had employer remained continuously employed.
  • Or if not reasonably certain, average rate of pay during 12 month period prior to military service.

• 38 U.S.C. § 4318; 20 C.F.R. §§ 1002.259 - 1002.267


• Alleged the Iron Workers violated USERRA by refusing to grant Shea pension credits that he earned while on military duty unless and until he:
  • worked at least 300 hours in the one-year period following his discharge from the military;
  • accrued 2.5 pension credits, which is equal to 3,000 hours, in the subsequent five-year period following his release from active duty.

• Court found both of these requirements exceed the requirements placed on other members of the pension fund who do not take military leave and violate USERRA.
Reemployment Rights

- Protection against discharge for a specified time period upon return from service, except for cause
  - If service was more than 180 days, for one year
  - If service was between 30-180 days, for ~six months (180 days)

USERRA Remedies

- Remedies include:
  - Reinstatement or promotion or restoration of seniority
  - Any lost wages and any lost benefits, such as restoring pension benefits or leave days
  - Ordering an employer to comply with USERRA
  - Liquidated damages (2X) for willful violations

USERRA Litigation

**Strong v. City of Chicago (ND IL)(2019)**

- Derrick Strong was deployed in 2016 when the City of Chicago administered a promotional exam for Fire Department engineers.
- DOJ brought suit representing Strong claiming that the City was required to give Strong the exam when he returned from active duty.
- City administered another exam in 2019 and continues to require deployed individuals to take exam while deployed.
USERRA Enforcement

- No statute of limitations post 2008
- Joint employment
- Successors in interest
- Venue: "any district in which the employer maintains a place of business" 38 USC § 4323
- “liberally construed for the benefit of the returning veteran.” Coffy v. Republic Steel Corp., 447 U.S. 191, 196, 100 S. Ct. 2100, 2104 (1980); numerous courts

Relation to other laws and plan or agreements:

- "(a)Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner 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." 38 U.S.C. 4302

DOL-VETS USERRA Investigations

- Investigations are complaint-driven; commenced with the filing of a Form 1010 complaint
- Complainant contacted within 5 business days of filing
- Investigations must be completed within 90 days, but may be extended with approval of complainant.
- Authorized reasonable access to, and right to interview persons with information relevant to the investigation, as well as the right to copy and receive documents relevant to the investigation.
- Authority to subpoena attendance and testimony of witnesses and production of documents relating to any matter under investigation.
38 U.S.C. Subchapter III
DOL-VETS USERRA Investigations

- In FY 2018, DOL-VETS investigated 1,095 cases:
  - ~20% were substantiated;
  - ~80% of those substantiated cases informally resolved by DOL-VETS.
- FY 2018 Top 5 USERRA complaint topics:
  1. Discrimination (43.8%);
  2. Reinstatement (15.3%);
  3. Retaliation (11.9%);
  4. Initial Hiring Discrimination (6.5%);
  5. Promotion (6.1%).

FY 2018 USERRA Annual Report to Congress, at 8, 11-12, 19

DOL-VETS USERRA Investigations

- Claimants may request representation from DOJ (private, local, or state employer) or OSC (federal agency employer) for unresolved claims by requesting that DOL-VETS refer the case.
  - No statute of limitations.
- In FY 2018, DOL-VETS referred 50 cases to DOJ (17 substantiated) and 25 to OSC (6 substantiated).
- Decisions to represent/bring suit made <60 days of receiving referral. 38 U.S.C. §§ 4323 & 4324
  - DOJ and OSC try to settle cases before filing suit
- 104 USERRA lawsuits filed by DOJ since 2004
  38 U.S.C. Subchapter III; FY 2018 USERRA Annual Report to Congress, at 15

Other Enforcement Avenues

- Private right of action at any point in time.
- ESGR- DoD’s Employer Support for the Guard and Reserve- informally mediates USERRA complaints but does not investigate or evaluate.
  - No exhaustion requirement.
### Questions

- Thank you

### Questions?

All attendees attending via webinar can submit questions in the Q&A feature on the webinar interface.