UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

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OUTLINE OF INSTRUCTION

I. REFERENCES.


C. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (21 Feb 96).


II. OVERVIEW.

A. Although a number of benefits are available under the law, the USERRA’s main provisions call for reinstatement of civilian employment following the conclusion of periods of duty with the armed forces.

B. This outline considers USERRA from the standpoint of the following three questions:

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

2. What are the specific reemployment protections granted by USERRA?

3. How are the USERRA protections enforced if an employer does not comply with the law?

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

A. Employee must have held a civilian job.
1. **USERRA applies to virtually all employers: the federal government, state governments, and all private employers. (There are no exceptions based on size.)**

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

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

1. **Statute requires notice. It does not require written notice. A writing will, however, minimize disputes and proof problems.**

2. **Notice may be given by the service member or by a responsible officer from the service member’s unit.**

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

**C. Employee’s period of military service cannot exceed five years.**

1. **Five-year limit on military service is cumulative.**

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

3. **Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) do not count toward the five-year calculation. See Appendix A for a discussion of exceptions to the five-year rule.**
4. The five-year period does not start fresh on 12 December 1994 (effective date of USERRA) - it reaches back to include all periods of military service during employment with given employer, unless such service was exempted from older Veterans’ Reemployment Rights Act’s (VRRA) four-year service calculations.

D. Employee’s service must have been under “honorable conditions” - that is, no punitive discharge, no OTH discharge, and no DFR.

1. For service of 31 (or more) days, employer can demand proof of honorable conditions.

2. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

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

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

2. If service is from 31 days to 180 days, the servicemember must report or reapply within 14 days.

3. If service is for 181 days or more, the service member must report or reapply within 90 days.

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

5. Reapplication need only indicate that:

   a. Service member formerly worked there;

   b. Service member is returning from military service; and,

   c. Service member requests reemployment pursuant to USERRA.

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d. The request need not be in writing. Written request for reemployment is preferred and will hopefully work to avoid disputes and proof problems.

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

IV. **PROTECTIONS.** [38 U.S.C. §§ 4311-18.]

A. There are several entitlements (protections) available if the service member (employee) meets the prerequisites discussed above.

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

C. **Leave of absence and reinstatement.**


3. See also 38 U.S.C. § 4303(13)(includes “funeral honors duty” within definition of “service in the uniformed services”).

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

1. “Assistant Manager” is not the same as “Manager,” even if both carry the same remuneration.

2. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).
3. A change in shift work (from day to night, for example) can be challenged.

E. **Seniority.** If the employer has any system of seniority, the employee returns to the “escalator” as if he or she had never left the employer’s service.

1. If the service was for 90 days (or less), the employee is entitled to the same job (plus seniority). If the service was for 91 days (or more), the employee is entitled to the same “or like” job (status and pay), at employer’s option, plus seniority.

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

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

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

   c. If the employer has a plan that involves employee contributions, employee must make up the contributions after returning to work. The employee has a period of three times the period of absence for military service, not to exceed five years, to make up the contributions. The employer may charge no interest. Federal employees are entitled to a period of four times the period of absence to make up contributions, per 5 C.F.R Part §1620.46 and §1605.11 (2004).

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

2. USERRA also offers continued employer health coverage, at the option of the employee, during the military service. (Federal employees should refer to 5 C.F.R. §890.305 (2004).)

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

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

   c. Period of coverage is for up to 2 years.

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

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

   2. If the employer cannot accommodate the employee, the employer must find a position which is the “nearest approximation” in terms of seniority, status, and pay.
H. **Special Protection Against Discharge.** Depending on the length of service, there are certain periods of post-service employment where, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or pro forma reinstatement.

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

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

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

   a. Employers cannot discriminate in hiring, employment, reemployment, retention in employment, promotion, or any other benefit of employment because of military service. Not only are current Active and Reserve Component military members covered, but so are veterans. See *Petersen v. Dep’t of Interior*, 71 M.S.P.R. 227 (1996).

   b. Employers cannot require someone to use vacation time/pay for military duty [38 U.S.C. § 4316(d)]. See *Graham v. Hall-McMillen Company, Inc.*, 925 F. Supp. 437 (N.D. Miss. 1996) (Reservist may not be fired for complaining about employer requiring him to use vacation pay/days for military duty.)

   c. Employers may not take adverse action against anyone (not just the military employee) when that person testifies or assists in a USERRA action or investigation or when that person refuses to take adverse action against a military employee. *Brandsasse v. City of Suffolk*, 72 F.Supp.2d 608, (E.D. Va. 1999) (Police Department may not initiate internal affairs investigation against Reservist police officer in retaliation for requesting accommodations to attend Reserve training.)

   d. Federal military veteran/Reserve employees may raise “hostile work environment” discrimination claim based upon the individual’s military status. See *Petersen v. Dep’t of Interior*, 71 M.S.P.R 227, 1996 MSPB LEXIS 735 (1996).
I. **Other Non-Seniority Benefits.** If the employer offers other benefits, not based on seniority, to employees who are on furlough or nonmilitary leave, the employer must make them available to the employee on military service during the service. (For federal employees, see 5 C.F.R. §353.106 9(c).)

1. Examples: employee stock ownership plans (ESOP), low cost life insurance, Christmas bonus, holiday pay, etc.

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

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


1. Court notes that “USERRA defines ‘benefit of employment’ as ‘any advantage, profit, privilege, gain status, account or interest’ arising from an employment contract, including ‘the opportunity to select work hours or location of employment.’” (Citing 38 U.S.C.A. § 4303(2).)

2. Facts in dispute about whether employee’s transfer was at his request or improperly motivated due to his service in the USNR.

3. Regardless, transfer was from one section of plant described as “a clean working environment [where] employees are allowed to wear street clothes and [where they] are not required to shower at the end of their shifts.”

4. Held, *in dicta*, that these were benefits of employment when employee transferred to section of plant described as “very dirty and [where] employees are required to wear coveralls and to shower at the end of their shifts.”
K. Compensation and related matters.

   a. Facts: Police officer returns from military service. Employer willing to rehire him as a detective. Union objects saying that this will adversely impact other members. Employer hires service member back at an entry level and sues for declaratory judgment to resolve matter. Hired back approximately five months later than he was otherwise ready to return.
   b. Service member awarded backpay (difference between entry level pay and detective pay), accrued sick leave prior to entry on active duty, accrued sick leave from time he returned from active duty, accrued seniority, and pension benefits.
   c. Service member also awarded clothing allowance even though he did not work as a detective, the position for which the allowance was designed.

   a. Facts: Plaintiff postal worker enters a 90-day training period with periodic evaluations at 30, 60, and 90 days. Performs two week annual training during first 30 days. Was not given a two-week extension. Although there was an evaluation on the 60th day, she was also not evaluated after 30 days.
   b. Holding: A two-week extension and evaluation at the 30th day were benefits of employment.

   a. Facts: Retired LTC hired, but salaried at $1000.00 less because he lacked experience in industry.
   b. Holding: USERRA does not protect wages as a “benefit of employment.”
c. See also, 38 U.S.C. § 4303(2).

4. **Fink v. City of New York**, 129 F. Supp. 2d 511, 521 (E.D.N.Y. 2001) (denial of opportunity to take a “promotional” test, a test that serves as a benchmark for promotion, held to be an unlawful employment practice).

K. **Paid military leave.**


   a. Issue in case was whether Federal military leave statute meant that employees would be given military leave as against their workdays or calendar days. (5 U.S.C. § 6323(a)(1) grants 15 days per year.)

   b. OPM practice, prior to 21 December 2001, had been to count calendar days whether or not the employee had been scheduled to work for all of those days unless the days fell at either the beginning or ending of the period. (E.g., a reservist who left work for reserve duty on Friday, the fourth and who returned to work on Monday the fourteenth would be charged eight days of military leave. Even though not scheduled to work at the civilian job on Saturday the fifth or Sunday the sixth, these days would be charged as military leave. A reservist who left work on Monday the seventh and who began training on that day and who returned on Monday the fourteenth would be charged for only five days.)

   c. Held that statute giving military leave meant workdays.

   d. Petitioners had also challenged the practice as a denial of a benefit of employment under USERRA, but the court ruled otherwise noting that the petitioners had not been denied leave. The only real question was the meaning of 5 U.S.C. § 6323(a)(1).

   e. OPM has put out guidance for employees who wish to make an administrative claim. This guidance notes that the Barring Act (31 U.S.C. § 3702) means that “a leave claim against the Government must be received by the agency . . . . within 6 years after the claim accrues.”
2. *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002).

   a. Similar facts in that firemen worked 24-hour shifts. Local policy construed state military leave statute to mean that the absence from one 24-hour shift amounted to the loss of three days military leave.

   b. Unlike the court in *Butterbaugh*, the court spent little time interpreting the state statute as state authorities had held that missing a 24-hour shift translated to the loss of three days military leave.

   c. As to the plaintiffs’ USERRA claims, the court found that there was no discriminatory treatment. Other firemen, who were guardsmen or reservists, but who did not work 24-hour shifts, were treated similarly. That is, other employees were caused to use their military leave at an equal rate.

L. **Liquidated damages, costs, and attorney fees.**


   a. Service member’s backpay award = $37,356.75 over approximately 2.5 years.

   b. Reasonable attorney fees = $32,736.50. (Costs also awarded against employer.)

   c. Liquidated damages not awarded.

   (1) No showing that employer had acted in a “willful” manner.

   (2) Employer had re-hired the service member following a period of active duty.

   (3) Employer was the plaintiff in the case seeking to resolve differences between its interpretation of USERRA and union’s interpretation evincing a concern over “effects on other Union members.”

V. BURDEN OF PROOF.


1. USERRA relationship to Title VII jurisprudence, ADEA, and ADA. (Relationship to ADA jurisprudence generally, but also more closely in relation to plaintiff’s specific ADA claim.)

2. Conflicting lines of decisions establishing burden of proof in USERRA cases. Adopts the so called “NLRB framework.”

3. After plaintiff makes a prima facie showing, employer may defeat the claim by establishing that the personnel action (dismissal, etc.) would have been take regardless.

B. Employer can defeat a claim of improper termination when it shows that termination would have resulted solely on the basis of some “permissible” reason. *Hill v. Michelin North America, Inc.*, 252 F.3d 307 (4th Cir. 2001).

C. USERRA makes it easier to prevail in allegations of unlawful discrimination - if plaintiff can show that such discrimination was a motivating factor (not necessarily the sole motivating factor), the burden of proof is then on the employer to show that the action would have been taken even without the protected activity. *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F. Supp. 571 (E.D. Tex. 1997).


E. On 1 March 2011, the Supreme Court held that “…if 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. *Staub v. Proctor Hospital*, 562 U.S. ___ (2011).


VI. EMPLOYER DEFENSES.

A. The statute, 38 U.S.C. § 4312(d)(1), provides for three defenses.

1. Employer suffers a change in circumstances that make the reemployment impossible or unreasonable.

2. The reemployment of a disabled person or a person who is not suited for the position would pose an undue hardship on the employer.


   b. Employer must make “reasonable efforts” to accommodate a disabled person (38 U.S.C. § 4313(a)(3)) and look to place the person “in any other position which is equivalent in seniority, status, and pay” when “the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer” (38 U.S.C. § 4313(a)(3)(A)).

   c. When the employer cannot find a position that is an “approximation” to another position, the employer must still look to employ the person in some position that is “consistent with [the] circumstances of such person’s case” (38 U.S.C. § 4313(a)(3)(B)).

   d. Others who are no longer qualified, but not disabled, receive similar treatment. (38 U.S.C. § 4313(a)(4)).
3. The employment is nonrecurring or brief and such that the person would not have had an expectation of returning.

B. Other potential defenses.

1. Waiver.

2. Estoppel.


C. The burden of proof is on the employer. [38 U.S.C. § 4312(d)(2)].

VII. ASSISTANCE AND ENFORCEMENT. [38 U.S.C. §§ 4322-24].

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


1. Investigate to determine if any violation occurred.

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

3. When resolution is not possible, VETS will refer the case as appropriate (Office of Special Counsel (OSC) for Federal employees or Department of Justice for other employees).
4. Upon referral, the OSC or DOJ may choose to provide counsel for representation free of charge. If they do not, or the veteran does not wish government representation, the individual may retain private counsel. Action against the employer may then be taken in Federal Court or the MSPB (for federal employers).

For example, in November 2005 the United States District Court for the Western of District of Washington approved a consent decree in a case brought by the Department of Justice on behalf of a Coast Guard reservist against the S.O.G. Specialty Knives & Tools Company (SSK). The plaintiff, who was mobilized and deployed to Iraq in 2003 as part of Operation Iraqi Freedom, alleged that he was terminated prior to his deployment, re-employed in a non-equivalent position upon his return, and then terminated again within 180 days of his return, all in violation of USERRA. Suit was filed by the DOJ Civil Rights Division and the USAO in Washington. The defendant company agreed to an out of court monetary settlement and consent decree enjoining them from taking retaliatory action or further actions in violation of USERRA. See White v. S.O.G. Specialty Knives & Tools, Inc., No. CV51800 (D. Wash. consent decree signed Nov. 1, 2005).

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

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

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

2. State employees:

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


a. Veteran may choose to request assistance from VETS or go directly to MSPB. If assistance from VETS requested, must wait for VETS process completion before filing MSPB completion.
b. File appeal with MSPB. OSC may choose to represent veteran, or veteran may retain counsel (and, if a prevailing party, request attorneys fees).

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


(1) The case’s discussion is illustrative of certain additional USERRA protections found in 5 C.F.R. such as the rule than an employee can be separated “for cause” but a “reduction in force is not considered ‘for cause.’” *See also*, 5 C.F.R. § 351.404 (2004).

(2) Case is important, if for nothing else, than for its statement that “the agency [(the Army)] seriously misapprehends its obligations under USERRA.”

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

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

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

b. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgment interest), attorney’s fees, and litigation costs. *See* 5 C.F.R. §1201.202(a)(7).
c. Employees who can demonstrate that reinstatement is not a viable remedy may seek “front pay” damage remedies. See Graham v. Hall-McMillen Company, 925 F. Supp. 437, 443-447 (N.D. Miss. 1996).

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

6. Extraterritorial Jurisdiction. USERRA gives Reservists and veterans residing overseas protections under the Act, provided that they work for the federal government or a private company incorporated in the United States or controlled by a United States corporation. There is an exception from coverage for foreign companies whose compliance with the Act would violate local national law.

7. Extension of MSPB Jurisdiction and OSC Representation to Pre-USERRA cases filed after USERRA’s enactment in October 1994. The 1998 Amendments to USERRA provided at 38 USC Section 4324(c) that the MSPB may now hear complaints “without regard as to whether the complaint accrued before, on, or after October 13, 1994 (the day before USERRA enacted). The MSPB holds that this provision does not lead to USERRA’s retroactive application. However it does allow the MSPB to hear and the OSC to represent federal employees in Veterans’ Reemployment Rights Act (VRRA) (predecessor statute) cases that accrued before or on October 13, 1994. The MSPB opined that Congress was attempting to ensure that the OSC would represent federal employees on VRRA cases before the MSPB. Williams v. Dep’t of Army, 83 M.S.P.R. 109 (1999) and Ventes v. U.S. Postal Service, 84 M.S.P.R. 34, (1999).


a. Although plaintiff should specifically plead USERRA, the requirement is easily met.
b. Plaintiff met requirement when she “assert[ed] . . . (1) performance of duty in a uniformed service with the United States; (2) . . . a loss of a benefit of employment; and (3) an allegation that the benefit was lost due to the performance of duty in the uniformed service.

9. Arbitration. The Fifth Circuit held in 2006 that the provisions of USERRA do not preempt an otherwise valid agreement to arbitrate between an employer and an employee. In Garrett v. Circuit City Stores, Inc., the plaintiff, a marine reservist, alleged he was terminated in 2003 during the buildup for Iraqi Freedom because of his status as a Marine Reserve officer. In 1995, as part of a nationwide policy for resolving employment related disputes, Circuit City had promulgated a program which required employees who did not opt out of the program to submit employment disputes to binding arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq. The plaintiff had acknowledged this new program in writing and had failed to opt out. Despite this provision of his employment with Circuit City, plaintiff filed his USERRA claim in federal district court without submitting it to arbitration. The district court denied a defense motion to compel arbitration finding that USERRA preempted the arbitration agreement. The appellate court reviewed this decision de novo. After reviewing the text of USERRA, its legislative history, and the underlying principles behind the statute, the appellate court reversed finding that Congress had not intended USERRA to preempt otherwise valid arbitration agreements and holding that USERRA claims are subject to the FAA. Garrett v. Circuit City Stores, Inc., 449 F.3d 675 (5th Cir. 2006). While it did not specifically address the question, the appellate court implied its decision would remain the same even if the Department of Justice had brought the claim on behalf of the plaintiff (see B.4. above relating to enforcement of USERRA rights by a federal agency on behalf of the plaintiff).

VIII. OTHER MATTERS.

A. USERRA in state court.

1. Miller v. City of Indianapolis, 281 F.3d 648 (7th Cir. 2002).

a. Although not a state court decision, decision is made, in large part, based on state and local legislation granting guardsmen and reservists periods of paid military leave.


1. Facts: USAR member quits job as town police officer, expressing his deep dissatisfaction with the department. Around the time of his resignation, he begins processing a request for active duty as an AGR. Resignation letter says nothing about leaving employment because of active duty. Withdraws $31,021.79 from state retirement account explaining he has no interest in ever being employed with the state again.

2. Case decided under VRRA because plaintiff began seeking reemployment with police department in 1993 before USERRA’s effective date.

3. Holding: Service member entitled to return to his employment.

IX. NEW/FUTURE DEVELOPMENTS.

A. The 2004 USERRA amendments solidified the investigative role of the OSC. Although they will work to develop this role on a trial basis, it can be anticipated that they will take over this function completely with respect to federal sector employees.

forth in the Veterans Benefits Improvement Act of 2004. In part, the amendments require employers to provide a written notice of the rights, benefits, and obligations of employees and employers under USERRA. Employers can provide the notice by mailings, handouts, email, or by posting the notice in the place that employee notices are customarily placed. This amendment is codified at 38 U.S.C. 4334.

C. Government Accountability Office Report (GAO-02-608), Reserve Forces: DoD Actions Needed to Better Manage Relations between Reservists and Their Employers (June 2002). This is a very revealing report. The statements from mobilized guardsmen and reservists in Appendix III are quite remarkable and establish that there is an apparent lack of understanding on the part of employers and employees.

X. CONCLUSION.
APPENDIX A

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

NOTES:

1. Effective with enactment of the Reserve Officer Personnel Management Act (ROPMA) on October 6, 1994, several section numbers from Title 10 U.S. Code that are referenced as exceptions to the five year limit have been changed.

2. The term “Reservist” means member of the National Guard or Reserve. Sections that apply only to the National Guard or the Coast Guard are identified as such.

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

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

Obligated Service -- 4312(c)(1)

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

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

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

Training Requirements -- 4312(c)(3)

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

10 U.S. C. §10148---------------------------ordered to active duty up to 45 days because of unsatisfactory participation.
EXCEPTIONS TO 5-YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE
SECTION 4312(c) [USERRA], continued...

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

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

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

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

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

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

10 U.S.C.§12304-------------------------------involuntary active duty for operational mission up
to
270 days.

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

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

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

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

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

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

14 U.S.C.§367-------------------------------COAST GUARD involuntary retention of enlisted
member.
EXCEPTIONS TO 5-YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE
SECTION 4312(c) [USERRA], continued...

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

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

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

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

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

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

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

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

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

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

FORT McCOY MEMORANDUM

SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty
MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty

1. References:
   b. Title 5, Code of Federal Regulations, Part 353
   c. AR 690-300, Chapter 353.

2. The following procedures are to be used when employees enter and return from military duty in the uniformed services.

   a. Employees Entering Military Duty. Employees entering military duty are entitled to be carried on leave without pay (LWOP) unless they elect to use other leave or freely and knowingly provide written notice of intent not to return to a position of employment with the Department of the Army (DA), in which case the employee can be separated. The employee’s reemployment rights are the same whether the employee elects LWOP or separation. When an employee enters service in the uniformed services, the following procedures apply:

      (1) When the employee notifies his/her supervisor that he/she is entering military service, the supervisor will inform the employee of his/her option to be carried in a LWOP status or be separated. The supervisor will have the employee sign the Information for Employees Entering Military Active Duty and Checklist for Employees Entering Extended Military Active Duty (Enclosure 1). The employee must also provide a copy of the military orders. The supervisor should fax or mail these documents to the organization’s civilian personnel POC for forwarding to the Fort McCoy Civilian Personnel Advisory Center (CPAC).
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SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty

(2) The organization civilian personnel POC will send to the CPAC a Request for Personnel Action (RPA) for the LWOP or separation action and the appropriate supporting documents.

b. Determining Reemployment Rights. Employees have reemployment rights if the cumulative length of their absences for uniformed service while employed with DA does not exceed five years. Service in the uniformed services includes active duty, active duty for training, and initial active duty for training. There are certain situations or types of services that may extend the five year period, as explained in reference 1a. Upon receipt of the RPA from management, the CPAC will determine whether the employee has reemployment rights based on a review of the Official Personnel Folder for documentation of prior absences for military duty while employed with DA.

c. Filling Positions Vacated by Employees on Military Duty. If an employee has reemployment rights, management has three options for filling a position during the employee’s absence for military duty:

(1) Fill as a temporary appointment not to exceed (NTE) one year or NTE the ending date of the incumbent’s period of active duty, if less than one year. A temporary appointment may be extended up to a maximum of two years. Employees on temporary appointments are ineligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. They are also ineligible for coverage under the Federal Employees Health Benefits (FEHB) program until they have completed one year of continuous employment. After a year of continuous employment they may enroll in health benefits but will be charged 100% of the premium plus a 2% administrative fee. Temporary General Schedule employees are not eligible for within-grade increases (WGIs), but temporary Federal Wage System employees are eligible for WGIs. Temporary employees are excluded from retirement system coverage and if later converted to a permanent appointment, the temporary service is not creditable toward retirement.

(2) Fill as a term appointment NTE four years or NTE the ending date of the incumbent’s period of active duty, if less than four years. A term appointment cannot be extended
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SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty

four years unless a request for extension is approved by the Office of Personnel Management. Employees on term appointments are eligible to enroll in FEHB and FEGLI, are entitled to retirement system coverage, and are eligible to receive WGIs.

(3) Fill the position with a permanent appointment as an obligated position. The employee who left the position to perform military service has statutory reemployment rights to that position. When the obligated position is filled permanently, the selectee will be required to sign an agreement acknowledging that he/she is aware of the position obligation (Enclosure 2). If management chooses this option, they must include the following statement in the remarks section, Part D, of the Recruit/Fill RPA: “This is an obligated position due to the reemployment rights of (name of employee).”

d. Exercise of Reemployment Rights.

(1) Employees who wish to exercise reemployment rights must submit a request to do so within the time limits specified in reference 1a. Management must return the employee to his/her former position as soon as practicable, but no later than 30 days after receiving the application for reemployment.

(2) If the employee’s position has been filled on a temporary basis, the incumbent of the temporary position will be terminated as soon as practical after the reemployment of the returnee. If the position has been filled on a term basis, the incumbent will be terminated on the NTE date of the appointment or management will initiate a reduction in force (RIF) action if necessary. If the position has been filled on a permanent, obligated basis, the CPAC will notify the incumbent of the reemployment of the former employee and placement assistance for the incumbent of the obligated position will begin. If no placement can be arranged, management will initiate a RIF action.
e. Failure to Exercise Reemployment Rights. If an employee fails to request reemployment within the time limits specified in reference 1a, management should initiate action to remove the employee for failure to report for work after completion of active duty.

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SUBJECT: Procedures Covering Civilian Employees Entering and Returning from Military Duty

3. If you have any questions concerning this issue, feel free to contact Dawn Pastick, Personnel Management Specialist, at 608-388-4942 or DSN 280-4942.

4. FORT McCoy - TOTAL FORCE TRAINING CENTER.

/s/
2 Encl
KIM M. MEYER
as
Chief, Military Technician
Program Division

DISTRIBUTION:
USARC RSCs/DRCs
USARC DCSPER
USACAPOC
7TH ARCOM
Information for Employees Entering Military Active Duty

On October 13, 1994, the Uniformed Services Employment and Reemployment Rights Act (USERRA) was passed. USERRA expanded the rights of employees entering uniformed services, therefore, giving employees options related to their employment and benefits. The following is information and a checklist designed to counsel employees on their rights and benefits and provide an opportunity for them to make elections regarding their options.

**Annual/Military Leave.** Employees who enter into active duty may choose to have their annual leave remain to their credit until they return to their civilian position, OR receive a lump-sum payment for all accrued annual leave. This provision applies whether or not an employee is placed on leave without pay (LWOP) or separates.

Permanent employees who perform active military duty may request the use of paid military leave while in a LWOP status. Eligible full-time employees accrue 15 calendar days of military leave and may have up to 30 calendar days of military leave for use during the fiscal year. Employees who wish to use military leave while on LWOP must submit a request to the supervisor of their civilian position in accordance with applicable leave request procedures.

**Health Benefits.** Employees who are covered by the Federal Employees Health Benefits Program (FEHBP) and are either separated or placed in a LWOP status to perform military service may continue to be covered by FEHB for up to 18 months, unless the employee elects in writing to have the enrollment terminated. If the employee chooses to continue the FEHB, he/she is responsible for paying the employee share of the premium for the first 12 months and 102% for the final 6 months of continued coverage. Employees may pay currently or incur a debt to be paid upon their return.

Note: You may cancel your FEHB at any time by notifying your personnel office. When you cancel an enrollment, it is considered a break in coverage. Termination is not considered a break.

**Life Insurance.** Employees who separate or are placed on LWOP to perform active duty service continue to be covered by the Federal Employees’ Group Life Insurance (FEGLI) for up to 12 months at no cost to the employee.

**Retirement.** An employee who is placed on LWOP while performing active military duty continues to be covered by the retirement law, i.e., CSRS or FERS. Death and disability benefits under the civilian retirement rules would apply if the employee continues in LWOP.

If an employee separates to perform active military duty, he/she would generally receive retirement credit for the period of separation if a deposit for the military service is made.

Upon restoration to the civilian position, the employee may make a deposit for the military service. The deposit is calculated in two ways: 1) Using 7% of military base pay if you are CSRS or 3% if you are FERS, and 2) a percentage* of the civilian pay you would have earned. You would pay the lesser amount.

*Note: Beginning January 2001, the CSRS retirement contribution rate is 7% and FERS is .8%. For service in 2000 the percentages were 7.4% for CSRS and 1.2% for FERS; for service in 1999 the percentages were 7.25% for CSRS and 1.05% for FERS. For service prior to 1999, the percentages were 7% for CSRS and .8% for FERS. Contact the Fort McCoy Civilian Personnel Advisory Center (CPAC) upon your return for more information.

**Thrift Savings Plan.** No contributions can be made to the TSP while on LWOP or separation from the civilian position. However, if the employee is restored to his/her civilian position, retroactive contributions and TSP elections may be made to cover that period of service. Employees interested in making retroactive contributions must contact their servicing payroll office to setup a payment plan.
Employees who separate may request withdrawal of their TSP funds; however, employees who are placed on LWOP cannot do so. Employees who have outstanding TSP loans and have questions concerning the effect of their military duty on their loans should contact the CPAC for more information or visit the TSP web site at http://www.tsp.gov.

**Application for Merit Promotion.** While absent on military duty, employees are entitled to be considered for promotions. Employees can access a listing of U.S. Army Reserve Command and Military Technician Program vacancy announcements and obtain copies of specific announcements through the Army Civilian Personnel Online web site, http://www.cpol.army.mil/va/scripts/public.html. An updated listing is posted at this web site each Monday, or Tuesday following a Monday holiday. Employees can also request faxed copies of the listing and vacancy announcements from the CPAC by calling 608-388-5127 or obtain recorded vacancy announcement information at 608-388-5627. Employees on military duty should use the application procedures explained in each specific vacancy announcement.

**Request for Reemployment.** Employees have reemployment rights if the cumulative length of all absences from employment with their employer (Dept of Army) for service in the uniformed services does not exceed five years, with certain exceptions. Service counting toward the five years includes active duty, active duty for training, and initial active duty for training. It does not include annual training. Employees who wish to exercise reemployment rights must submit a request to do so within the following time limits:

1) An employee whose uniformed service is for more than 30 days but less than 181 days must submit an application for reemployment with their former supervisor (copy furnished to the CPAC) no later than 14 days after completing the period of service. (If submitting the application is impossible or unreasonable through no fault of the individual, it must be submitted the next full calendar day when it becomes possible to do so.)

2) An employee whose uniformed service is for more than 180 days must submit an application for reemployment with their former supervisor (copy furnished to the CPAC) not later than 90 days after completing the period of service.

Employees who are in a LWOP status and fail to apply for reemployment within the above time limits will be subject to removal from Federal service.

**Appeal Rights.** Employees who believe their agency has not complied with the law or with the Office of Personnel Management’s regulations may file a complaint with the Department of Labor (202-219-5573) or appeal directly to the Merit Systems Protection Board (MSPB). Employees appealing to the MSPB would need to contact the Fort McCoy CPAC to obtain the appropriate address for their area.

**Changes in Status.** Employees who are absent on military duty are responsible for notifying the CPAC of any change in their mailing address and/or telephone number. If the employee’s initial military tour of duty is extended, the employee should also send a copy of the extension orders to the CPAC.
CHECKLIST FOR EMPLOYEES ENTERING EXTENDED MILITARY
ACTIVE DUTY (30 days or more)

(Please initial your election/acknowledgment)
I choose to be:
_____ Placed on LWOP, beginning __________________________.
_____ Separated, effective ____________________________.

Previous Absence for Uniformed Service:
_____ I have had previous absences for active duty in the uniformed services while employed with the Dept of Army (DA). (This includes active duty and ADT covered by annual leave, military leave, LWOP or separation. It does not include annual training.)
_____ I have not had previous absences for active duty in the uniformed services while employed with DA.

Annual/Military Leave:
_____ I have a balance of annual leave that I would like to be paid a lump sum.
_____ I want to leave my annual leave to my credit.
_____ I have military leave that I want to use. Number of days: ______

Health Benefits:
_____ I want to terminate my FEHB effective ____________________.
_____ I want to continue by FEHB. I understand that I can cancel at any time but it will be considered a break in coverage for retirement purposes.
_____ I want to pay for my FEHB on a continuing basis during my absence.
_____ I want to incur a debt to be paid upon my return.
(I understand that if I continue my FEHB after the first 12 months, I will pay 102% of the cost and it must be paid currently.)

FEGLI:
_____ I understand that my FEGLI coverage will continue for 12 months with no cost to me.

Retirement:
_____ I understand that if I am placed on LWOP, death and disability benefits continue under my retirement system.
_____ I understand that the military service is potentially creditable service but I must make a deposit for that service to avoid Catch-62 (CSRS must make a deposit if first hired before 10-1-82 – same applies for FERS). I understand the deposit will be calculated based on percentages of my military base pay or the civilian pay I would have earned and I may contact the CPAC for more information upon my return.

Thrift Savings Plan:
If you are restored to your civilian position, you may make retroactive contributions and elections.
_____ I understand that I will need to contact my personnel office to make retroactive TSP contributions and elections.

Promotion Consideration:
_____ I understand that I am entitled to apply and be considered for promotions while on active duty, and I understand how to obtain vacancy announcements.

Reemployment:
_____ I understand my reemployment rights and the time limits for applying for reemployment. I also understand that if I am on LWOP and fail to apply for reemployment within the time limits required by law, I will be subject to removal from Federal service.

Appeal Rights:
_____ I understand my appeal rights if I believe my agency has not complied with the law or with the Office of Personnel Management’s regulations.

I understand my rights, benefits and elections:

Signature: ____________________________ Date: _______________

Home Address: ____________________________________________
Military Duty Station Address (if known): ____________________________
The position I have been selected for,

___________________________________________________________
(Title/Pay Plan/Series/Grade)

at ________________________________________________________

on TDA paragraph/line number _____________________________,

is an obligated position. In accordance with 5 CFR 353.207, the previous incumbent
has military reemployment rights to this position.

I have been advised and understand this means I may be displaced by reassignment or
reduction in force procedures at a later time should the previous incumbent exercise
his/her reemployment rights.

_____________________________
(Typed Name)

_____________________________    __________________________
(Signature)                                            (Date)
APPENDIX C

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

1. **What is the Office of Special Counsel?**
   The Office of Special Counsel is an independent federal executive agency that investigates and prosecutes cases involving:
   
   
b. Federal employee violations of the Hatch Act, which regulates the partisan political activities of federal employees.
   
c. Agency violations of law, rule, or regulations; fraud, waste, and abuse of authority; gross mismanagement or a substantial and specific danger to public health and safety, disclosed by federal employee whistleblowers.
   
d. Agency denials of veteran and reservist employment or reemployment rights, discrimination based upon military status, and denial of any promotion, or other benefit of employment because of military status.

2. **What obligations does USERRA give the Office of Special Counsel, with respect to federal employees who allege agency discrimination, failure to hire or reemploy because of their military or veteran status?**
   
a. **38 U.S.C. Section 4324(a)(1):**
   
   A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall also refer the complaint to the Office of Special Counsel established by section 1211 of title 5.
   
   b. **38 U.S.C. Section 4324(a)(2)(A):**
   
   If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.
   
   c. **38 U.S.C. Section 4324(a)(2)(B):**
If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

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

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

   b. Reviews the entire investigative file in detail.
      (1) Direct Evidence of Military Status Discrimination
      (2) Circumstantial Evidence of Military Status Discrimination
         A. Statements of Animus
         B. Agency's Explanation
         C. Disparate Treatment
         D. Time Chronology
         E. Conduct of the Veteran/Reserve Component Employee

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

   d. Determines if further investigation is needed

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

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

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

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

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

a. Uncontradicted evidence that something was done or not done to an agency employee because of his or her status as a veteran or military member.
   (1) Statements found in performance evaluations, letters of reprimand, e.g., that "X is not a 'team player' because of his or her numerous absences for Reserve duty and meetings."
   (2) Stated reasons given to a veteran or reservist for a particular assignment or demotion. ("You are gone on military duty so much that we can't consider you for X position, as we can't count on you being here when we need you.")

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

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

a. The MSPB, in Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997), has determined that federal employees may **prove indirectly the agency's discriminatory intent** by providing relevant circumstantial evidence which a fact finder can infer discriminatory agency intent. The Board has directed that circumstantial evidence cases use the "burden-shifting analysis" provided under Title VII of the Civil Rights Act of 1964. The employee must establish a **prima facie** case that:
   (1) he or she was a member of a protected group, the Armed Forces, Armed Forces Reserve Component, or a former member of the military (veteran), and the employer was aware of this status,
   (2) he or she was similarly situated to an individual who was not a member of the protected group (e.g., someone on sabbatical or pregnancy leave), and
   (3) he or she was treated more harshly or disparate than the individual who was not a member of the Armed Forces, Armed Forces Reserve Component or veteran. Coleman v. Department of Air Force, 66 M.S.P.R. 498, 508 (1995), aff'd, 79 F.3d 1165 (Fed. Cir. 1996).

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

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

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

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

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

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

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

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

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

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

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

C.F.R. Section 353.203(c), which urges federal employees to make a good faith effort to
resolve work conflicts with their military duty. The 5 C.F.R. Section 353.203(c)
provision should not be used as a test to determine whether the service member's military
duty was "reasonable" or "fair to the agency", or whether the OSC should represent a
federal employee with a USERRA issue.

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

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