

# USERRA – The Rest of the Iceberg

by Gregory V. Murray

With the political debate escalating on the war in Iraq along with the sentiment to bring our soldiers home in large numbers, understanding the Federal Uniformed Services Employment and Re-Employment Rights Act<sup>1</sup> (“USERRA” or “the Act”) should be a priority for all employers. USERRA provides re-employment rights for veterans and members of the uniformed services following qualifying military duty; prohibits discrimination against any person on the basis of his<sup>2</sup> past, present or future military service; and creates a variety of substantive rights and obligations that may subject unwary employers to significant economic peril.

## The Basics

**Coverage:** USERRA applies to all public and private employers, regardless of size.<sup>3</sup> It prohibits discrimination against “a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service.”<sup>4</sup> USERRA also protects persons absent for duty in the uniformed services, which include the Armed Forces, Commission Corps of the Public Health Service, and any other category the president may designate in time of war or emergency.<sup>5</sup> Among other things, USERRA protects servicemen from termination resulting from absences due to training, active duty, fitness for duty examinations, funeral honors duty and, under appropriate circumstances, time spent in Reserved Officers Training Programs (“ROTC”).<sup>6</sup> It also provides re-employment rights following periods of leave. The protection applies whether the covered duty is undertaken on a voluntary or involuntary basis<sup>7</sup> and is generally available so long as “the cumulative length of the absence and of all previous absences from a position of employment with that employer ... does not exceed five years.”<sup>8</sup>

**Notice Requirement – Employers:** In order to protect re-employment rights provided under USERRA, an employee or an appropriate officer of the uniformed service to which the employee belongs must give advance notice that he will be leaving his job for military training or service.<sup>9</sup> Exceptions to this requirement apply when military necessity prevents the giving of notice or where the giving of notice is otherwise impossible or unreasonable.<sup>10</sup> The notice may be either oral or written and need not be consistent with other forms of employer-required notifications.<sup>11</sup>

**Notice Requirement – Employers:** All employers must provide employees with a notice of the rights, benefits and obligations imposed by the Act.<sup>12</sup> Posting a notice in the areas where the employer customarily posts notices to employees meets this requirement.<sup>13</sup> The DOL has issued two posters, one for private and state government employers and a second for federal agencies. Copies of the appropriate poster can be found on the DOL’s Web site.<sup>14</sup>

**Benefits:** USERRA creates substantive rights and obligations for both employers and employees, which affect periods before, during and after military leaves. These include:

**1. Use of Vacation:** USERRA provides that service members must, upon request, be permitted to use any accrued vacation during military service obligations rather than unpaid leave. However, employers are prohibited from requiring employees to do so.<sup>15</sup>

**2. Health Insurance Benefits:** Employers, regardless of size, must allow employees absent by reason of military service to elect to continue health insurance coverage for up to 24 months following departure for such service.<sup>16</sup> If the employer pays for health insurance coverage during other types of leaves, it generally must do so to the same extent for military leave. If the employer does not pay, an employer may require employees to pay for coverage. For leaves up to 30 days, that payment cannot be more than the employee’s normal share of contributions. If the length of service exceeds 30 days, employers may require employees to pay up to 102 percent of the full cost of continuing insurance coverage.<sup>17</sup> While this sounds like continuation coverage under the Omnibus Budget Reconciliation Act of 1985 (COBRA), please note that while USERRA’s health plan provisions are similar, they are not entirely consistent with COBRA. USERRA also provides that the employee and his eligible dependents must be reinstated to the employer’s healthcare plan upon re-employment without a waiting period or any exclusion that would otherwise have been imposed had coverage not been terminated.<sup>18</sup>

**3. Pension and Retirement Benefits:** USERRA also contains provisions regarding pension and retirement plans. As a general rule, USERRA provides that a re-employed person must be treated as not having incurred a break in service with the employer maintaining a pension plan, that military service must be considered service with

an employer for vesting and benefit accrual purposes, that the employer is liable for funding any resulting obligation, and that a re-employed person is entitled to any accrued benefits from employee contributions only to the extent the person repays his or her contributions. USERRA also contains specific provisions with regard to multi-employer plans and other pension-related provisions.<sup>19</sup>

**4. Other Benefits:** Other employee benefits, rights and obligations under USERRA generally depend on whether benefits are tied to or based on seniority. USERRA generally provides that seniority-related benefits must be provided to a returning employee as if he had never left.<sup>20</sup> A right or benefit typically is considered based on seniority if it is determined by or accrues with longevity of employment.<sup>21</sup> Depending on the circumstances, these may include promotions, pay raises, pensions, transfers, stock options, displacement allowances, severance pay and supplemental unemployment benefits.

Employers must provide non-seniority-based benefits to employees on military leave that are available to other employees "having similar seniority, status, and pay on furlough or leave of absence." The comparison should be made with regard to the employer's most generous form of comparable leave.<sup>22</sup> The problem, of course, is finding comparable leaves. Is recurring military training leave comparable to jury duty or bereavement? While the regulations state that there is no bright line, duration of the leave is perhaps the most important distinguishing factor.<sup>23</sup>

**Protected Re-Employment Rights:** One of the primary protections USERRA provides is entitlement to re-employment. Eligibility for re-employment depends on a variety of circumstances.<sup>24</sup> An employee must have left employment that was not brief or non-recurrent and that was reasonably expected to continue indefinitely or for a significant period. However, the job need not have been permanent or regular. A person holding a seasonal job may have re-employment rights if there was a reasonable expectation that the job would be available again at the next season.<sup>25</sup> A similar analysis applies to temporary employees.

## **A Word of Caution**

In order to fully comprehend the reach of this statute, one must become familiar with the DOL rules and regulations issued in December 2005. The reader should also pay special attention to the DOL's responses to comments received regarding the originally proposed regulations.<sup>26</sup> While a complete discussion of USERRA and its governing regulations is beyond the scope of this article, the hope is that a review of the following list of potential USERRA issues will encourage a more careful reading of the statute and its regulations.

**Who is an employer?** The definition of "employer" in USERRA is broadly written, encompassing private, public and governmental employers; Native American Tribes;<sup>27</sup> and any person, institution, organization or other entity to whom the employer has delegated the performance of employment-related responsibilities that are other than

purely ministerial in nature.<sup>28</sup> The language is broad enough to include individual supervisors and managers.

**Who is an employee?** The simple answer is anyone employed in the United States and any person who is a citizen, national or permanent resident of the United States who is employed in a foreign country by an employer that is an entity incorporated or organized in the United States, or that is controlled by an entity organized in the United States.<sup>29</sup>

**Preliminary time:** USERRA protects employees for the time spent in the uniformed services as well as the time needed to prepare for active duty, without imposing a defined limit on the amount of protected time between the date on which an employee leaves his job and the date he actually enters the uniformed services.<sup>30</sup> The DOL explains: "The amount of time that an employee may need to prepare for military service will vary, and will depend on the facts of each case. In addition, employees may need intermittent time off from work prior to military service for brief, but repeated periods to put their affairs in order, and such periods may be necessary to, for example, interview child care providers, go to meetings with bank officers regarding financial matters, or seek assistance for elderly parents."<sup>31</sup>

**Intent to return:** When leaving for active duty, the employee need not declare whether he intends to return to the pre-service employer, and the employer cannot rely on a statement of intent not to return. An employee cannot waive the right to re-employment by informing the employer that he does not intend to seek re-employment following service.<sup>32</sup>

**The five-year limit on protected service:** While preliminary time related to an active duty leave as well as the time between the end of active service and the service member's return to work are both protected under USERRA, neither pre- nor post-leave time is considered active duty for the purposes of the five-year period protected under USERRA, extending the effective amount of time that a serviceman can be away from the workplace without losing his right to re-employment.<sup>33</sup> Moreover, USERRA provides eight specific exemptions to the five-year maximum limit on uniformed service that effectively allow a serviceperson to remain on active duty longer than five years and still retain re-employment rights.<sup>34</sup>

**What if the employee is physically or mentally unable to return to work following active duty?** 20 C.F.R.

§1002.116 provides that if the employee's inability to return is due to hospitalization for, or convalescence from, a service-related illness or injury, the employee can retain his protected re-employment status for up to two years following completion of the service.

**Return documentation:** An individual applying for re-employment who served more than 30 days in the uniformed services must provide documentation upon the employer's request to establish that: the individual's application for re-employment has been timely filed; the employee has not exceeded the five-year service limitation; and the type of separation from service, discussed below, does not disqualify the employee from re-employment.<sup>35</sup> USERRA, however, also establishes that the employer may

not deny or delay re-employment if the requested documentation is not available.<sup>36</sup> While an employer can terminate an employee if the documentation provided proves that the employee was not eligible for re-employment, the DOL asserts that terminating the employee for failing to provide the documentation within a prescribed period of time is inconsistent with the statute.<sup>37</sup>

**Retroactive re-qualification:** 38 U.S.C. §4304 (20 C.F.R. §1002.135) lists the grounds for loss of re-employment rights, specifying four cases in which an individual may lose the right to re-employment. Basically these involve discharge from service of a dishonorable or bad conduct nature. However, if a service member subsequently has his discharge retroactively upgraded, that upgrade may reinstate the individual's re-employment rights if the service person otherwise meets the Act's eligibility criteria.<sup>38</sup>

**Multi-employer health care plans:** Similar to the regulations that govern the Family and Medical Leave Act (FMLA), if an employer cancels health plan coverage for its workforce while an employee is in active service, or if the employer discontinues its business, the service member's coverage typically terminates under USERRA. However, USERRA treats multi-employer health plans differently. 20 C.F.R. §1002.170 requires a multi-employer plan to continue healthcare coverage for the service member even if the service member's employer no longer exists or no longer participates in the plan. Liability for this coverage would be allocated as provided by the sponsor maintaining the plan. If there is no provision for allocation, the responsibility will fall to the last employer, or where that employer is no longer in business, to the plan itself.

**Reinstatement:** USERRA provides that employees returning from active military duty will be promptly re-employed.<sup>39</sup> While there is no bright line regarding the meaning of "prompt," in general, reinstatement should occur within two weeks after the returning employee applies for re-employment.<sup>40</sup> Employers must be aware that, barring application of one of the statutory defenses enumerated in 38 U.S.C. §4312(d),<sup>41</sup> the DOL expects that:

1. An employer will not delay or deny re-employment because the employer filled the service member's position, no comparable position is vacant, or a hiring freeze is in effect;
2. Prompt re-employment will be required even in cases in which retraining or recertification is mandated by law; and
3. If the period of service is less than 31 days, the returning employee may simply report back to work at his next regularly scheduled shift.<sup>42</sup>

**The re-employment escalator:** Generally, the returning employee must be restored to the position he would have held if he had remained continuously employed. This means that a returning serviceperson is entitled to a promotion, shift re-assignment or other position-related benefit upon re-employment if there is a reasonable certainty that he would have been promoted, transferred or otherwise qualified absent military service.<sup>43</sup> In addition,

the serviceperson is entitled to whatever pay increases and benefits he would have otherwise received but for the military leave. This includes merit-related increases if they were reasonably certain to have been awarded.<sup>44</sup>

**Discipline and discharge:** Employers must remember that the DOL interprets the statute to require that a returning employee who is subject to discipline at the beginning of his service, or about whom the employer receives after-acquired evidence while on service leave, is nonetheless entitled to reinstatement, even if the employee would have been discharged but for the military leave. This is not to say that upon return the service person cannot be subject to discipline or discharge. The employer, however, must be conscious of the re-employment requirement imposed by USERRA that, for a specific period of time, depending on the length of military service, a returning serviceman is protected from termination except for cause.<sup>45</sup>

**Disabled employees:** USERRA regulations include provisions for the re-employment of returning servicepersons with disabilities. Employers must accommodate any disability incurred or aggravated during a period of service.<sup>46</sup> Protection is provided for any disability incurred or aggravated during the period of service but does not include disabilities incurred or aggravated during preliminary or postliminary periods.<sup>47</sup> The DOL has specifically declined to adopt the Americans With Disabilities Act's (ADA) regulatory standards with regard to defining a qualified individual with a disability and reasonable accommodation.<sup>48</sup> Employers must be cautious not to confuse the two Acts. The scope of USERRA is much broader. It covers not only disabilities as defined in the ADA, but any disability – temporary or otherwise – incurred or aggravated during service in the uniformed services.

**Statute of limitations:** USERRA contains no statute of limitations. While there is at least one case that has applied the four-year residual statute of limitations period contained in 28 U.S.C. §1658 to USERRA claims, the DOL argues that because USERRA specifically prohibits the borrowing of state statutes of limitations, it is not the type of statute Congress had in mind when it enacted §1658. While the regulations encourage returning servicepeople to assert their claims within four years, the DOL steadfastly asserts that the only applicable limitations defense is laches.<sup>49</sup>

## **An Employer's Dilemma**

Assume a hypothetical in which an employer hires as its CFO a highly talented CPA, who is also a member of the Air Force Reserve. During his first week on the new job, the reserve officer is called to active duty status. While on military leave, the company is sold, merging into a new entity. Meanwhile, the former CFO serves five years in the military, is wounded, honorably discharged, and unable to work during a two-year period of rehabilitation. Disabled but nonetheless now able to work with restrictions, the returning veteran applies for re-employment with the new entity in the CFO job that he held for four days, seven years ago. In the interim, his previous position has been

filled by an employee who now has seven years seniority and the new entity was not even aware that the former CFO was on military leave.

**What are the employer's obligations?** Barring application of one of the statutory defenses,<sup>50</sup> they likely include the following:

1. Returning the servicemember to his position as CFO, even if that means terminating the seven-year seniority employee currently in the position;<sup>51</sup>
2. Immediately restoring healthcare coverage for the servicemember and his dependents;<sup>52</sup>
3. Computing the returning employee's salary and benefits considering what level he reasonably could be expected to have reached but for his absence;<sup>53</sup>
4. Calculating his seniority and entitlement to benefits to include the seven-year period during which he was absent due to active duty status and rehabilitation;<sup>54</sup>
5. Reasonably accommodating the employee's disability;<sup>55</sup>
6. Considering whether the returning employee would have reasonably expected to be promoted, and if so, returning the servicemember to the higher-rated position or, if applicable, permitting him to test for the position after an appropriate period of training;<sup>56</sup> AND,
7. Providing the returning employee with protection from discharge except for just cause for one year following his return.<sup>57</sup>

Add to this the fact that if re-employment is denied, the employee may have a nearly unlimited period of time before bringing suit, and you have a truly challenging situation.

## Conclusion

In closing, because USERRA and the regulations that apply to it are not consistent with the ADA, COBRA, FMLA and other employment-related statutes, cavalier application on USERRA matters of the concepts that have evolved from those Acts will undoubtedly result in wrong decisions. Employers should consult with their employment counsel before making any decisions that involve an employee or returning employee who is a member of the uniformed services. Employment lawyers should thoroughly review the USERRA regulations whenever a question arises concerning the rights of an individual who is a member of the uniformed services.

Finally, notwithstanding the employment problems inherent in USERRA, we should all be grateful for the dedicated men and women serving in the uniform services of the United States. The price they pay for our freedom far exceeds the cost of USERRA compliance.



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## Footnotes

- 1 38 U.S.C. §4301 et seq.
- 2 For the sake of space and to ease the writer's confusion, male pronouns and the term "man" or "men" are intended collectively to refer to both the men and women serving in the uniformed services.
- 3 38 U.S.C. §4303(4); 20 C.F.R. §1002.34
- 4 38 U.S.C. §4311
- 5 38 U.S.C. §4303(16); 20 C.F.R. §1002.6
- 6 20 C.F.R. §1002.61
- 7 38 U.S.C. §4303(13); 20 C.F.R. §1002.6
- 8 38 U.S.C. §4312; 20 C.F.R. §1002.99
- 9 38 U.S.C. §4312(a)(1); 20 C.F.R. §1002.85
- 10 38 U.S.C. §4312(b); 20 C.F.R. §1002.86
- 11 38 U.S.C. §4312(a)(1); 20 C.F.R. §1002.85(c)
- 12 38 U.S.C. §4334(a)
- 13 Id.
- 14 [www.dol.gov/elaws/userra.htm](http://www.dol.gov/elaws/userra.htm)
- 15 38 U.S.C. §4316(d); 20 C.F.R. §1002.153
- 16 38 U.S.C. §4317; 20 C.F.R. §1002.164
- 17 Id.
- 18 38 U.S.C. §4317(b); 20 C.F.R. §1002.168
- 19 38 U.S.C. §4318; 20 C.F.R. §§1002.259-267
- 20 38 U.S.C. §4316(a); 20 C.F.R. §1002.210
- 21 38 U.S.C. §4316(a); 20 C.F.R. §1002.212
- 22 38 U.S.C. §4316(b)(1)(B); 20 C.F.R. §1002.150
- 23 20 C.F.R. §1002.150(b)
- 24 38 U.S.C. §4312; 20 C.F.R. §§1002.115-138
- 25 20 C.F.R. §1002.21; See comments at 70 FR 75249-50
- 26 The regulations cited herein as well as the proposed regulations, DOL comments and Federal Register references can be found at: <http://www.dol.gov/vets/regs/fedreg/final/2005023961.htm>
- 27 With regard to Native American tribes, readers should recognize as does the DOL that "there is a difference between the right to demand compliance with the law and the means to enforce it." 70 FR 75252
- 28 38 U.S.C. §4303(4); 20 C.F.R. §1002.5(d)
- 29 38 U.S.C. §4303(3); 20 C.F.R. §1002.5
- 30 38 U.S.C. §4312; 20 C.F.R. §1002.74
- 31 70 FR 75255
- 32 20 C.F.R. §1002.88. However, under certain circumstances, an employee can waive non-seniority benefits in advance. See, 20 C.F.R. §1002.152
- 33 20 C.F.R. §1002.100
- 34 38 U.S.C. §4312(c); 20 C.F.R. §1002.103. The regulations also recognize a ninth exception. An employee is expected to mitigate damages under USERRA if that mitigation attempt consists of continued active duty in the uniformed services, that active duty time will not be counted toward the five-year limitation.
- 35 38 U.S.C. §4312(f); 20 C.F.R. §1002.121
- 36 38 U.S.C. §4312(f)(3)(A); 20 C.F.R. §1002.122
- 37 70 FR 75261
- 38 20 C.F.R. §1002.137
- 39 38 U.S.C. §4301(a)(2)
- 40 20 C.F.R. §1002.181
- 41 20 C.F.R. §1002.139
- 42 70 FR 75270
- 43 38 U.S.C. §4313; 20 C.F.R. §§1002.191-199
- 44 20 C.F.R. §1002.236
- 45 38 U.S.C. §4316(c); 20 C.F.R. §§1002.247-248
- 46 38 U.S.C. §4313(a)(3); 20 C.F.R. §1002.225
- 47 70 FR 75277
- 48 Id.
- 49 20 C.F.R. §1002.311
- 50 38 U.S.C. §4312(d); 20 C.F.R. §1002.139
- 51 20 C.F.R. §1002.181
- 52 38 U.S.C. §4317(b); 20 C.F.R. §1002.168
- 53 20 C.F.R. §§1002.191-199; 20 C.F.R. §1002.236
- 54 38 U.S.C. §4316(a); 38 U.S.C. §4318(a)(2); 20 C.F.R. §1002.210; 20 C.F.R. §1002.259
- 55 38 U.S.C. §4313(a)(3); 20 C.F.R. §1002.225
- 56 20 C.F.R. §1002.193
- 57 38 U.S.C. §4316(c); 20 C.F.R. §§1002.247-248

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