

MILITARY LEAVE

- I. The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) was enacted in 1994.
 - A. Federal veterans’ reemployment rights laws date back to 1940.
 - B. USERRA litigation is becoming more common, particularly as individuals seek to return to civilian employment after an extended period of military service. Most USERRA case law had involved soldiers returning from Bosnia. More and more USERRA claims are arising as soldiers return from Iraq.
 - C. First-ever military leave regulations were issued by the Department of Labor in 2005.
- II. Who Is Eligible For Military Leave?
 - A. Individuals who serve in the “Uniformed Services”
 1. Army, Navy, Marine Corps, Air Force, Coast Guard
 2. Reserves of all the above
 3. Army National Guard and Air National Guard
 4. Others (e.g., commissioned corps of the Public Health Services, groups so designated by the President in times of war or national emergency, etc.)
 - B. Essentially all employers are covered (no size exceptions as in FMLA or in other federal discrimination laws)
 - C. Military leave is not required for “brief or nonrecurrent” positions
 - D. Employees wishing to use military leave must give advance notice.
 1. Notice can be either oral or written.
 2. Notice can come from either the employee or an appropriate officer.
 3. “Military necessity” and other exceptions exist to the notice requirement

- E. Five-year limit on employee's right to military leave at any one employer
 - 1. Five years are cumulative.
 - 2. Numerous exceptions in statute:
 - a. Additional service required to complete an initial period of obligated service (e.g., those assigned to Navy's nuclear power program)
 - b. Unable to retain a release from service within five years (e.g., employee is on a ship at sea when the five years expires)
 - c. Required training for Reserves and National Guard (e.g., summer and weekend training)
 - d. War or national emergency
 - e. "Operational missions"
- F. Under the regulations, employees on strike or layoff when they enlist and/or are called up for military service are eligible for military leave.

III. What Does USERRA Require Of Employers Regarding Employees' Military Leave?

- A. Under the regulations, employers cannot require departing employees to indicate whether or not they plan to return after completing their military service.
 - 1. A departing employee's explicit denial of an intent to return does not necessarily lead to forfeiture of reemployment rights under USERRA.
 - 2. In some cases, a resignation letter may lead to the forfeiture of certain non-seniority based benefits.
- B. Paid leave is not required by federal statute
- C. Employer's military leave policy must be, at the least, equivalent to furlough or other unpaid leaves of absence.
- D. Health insurance: USERRA applies to employer-sponsored plans

1. Service of 30 days or less: No change permitted
 2. Service more than 30 days: COBRA-like coverage for 2 years is required by the Veterans' Benefits Improvement Act of 2004
- E. Employees may choose whether or not to collect pay for accrued vacation days while on military leave. Employer cannot, under the regulations, require employees to use vacation days for military leave.
- F. The new regulations state that employees on military leave can be laid-off or terminated during reductions-in-force.
- IV. How Can Employees Obtain Reemployment Under USERRA?
- A. Time limits reporting to work and/or applying for reemployment
1. Service 30 days or less
 - a. Report to work at next regularly-scheduled shift
 - b. Statute provides for an eight hour rest period.
 - c. Employee's failure to report to work in a timely manner does not waive USERRA rights but may be treated as any other unexcused absence would be.
 2. Service more than 30 days: Submit an application for reemployment
 - a. Service 180 days or less: Application to be submitted within 14 days
 - b. Service more than 180 days: Application to be submitted within 90 days
- B. What constitutes an application?
1. Under the regulations: Application can be either oral or written.
 2. Do these regulations conflict with existing case law? See *McGuire v. United Parcel Serv.* (7th Cir. 1998). When Mr. McGuire returned home

from military service in Bosnia, Mr. McGuire asked his former supervisor at UPS whether he could come back to work. His supervisor told him to talk to UPS's Human Resources department. Mr. McGuire never did so and instead filed a lawsuit. The court held that it was perfectly legitimate for the UPS supervisor to instruct Mr. McGuire to speak to Human Resources. Unlike a corporate human resources department, not every supervisor can be expected to know the ins and outs of USERRA.

- C. When must the reemployment begin? The new regulations state that reemployment must take place within two weeks of application for reemployment, absent unusual circumstances.
- D. Requests for documentation:
 - 1. Proof of timely application for reemployment (i.e., confirmation of date released from service)
 - 2. Proof that service was not in excess of five years
 - 3. Proof that employee was not subject to dishonorable discharge

An employer should be careful not to delay reemployment where requested documentation is lost or does not yet exist, but the employer may be allowed to terminate employment if subsequently-obtained documentation contradicts facts believed at time of reemployment (e.g., employee did not receive honorable discharge).

- E. Narrow exceptions to requirement of reemployment
 - 1. Changed circumstances make reemployment impossible or unreasonable
 - 2. Undue hardship for employer
- V. What Position, Pay, And Benefits Are Returning Employees Entitled To Under USERRA?
 - A. USERRA prohibits denial of "promotion" or "any benefit of employment" based on military service. See *Schmauch v. Honda of America Mfg., Inc.* (S.D. Ohio 2003). Employer adopted an "Attendance Improvement Program," creating a six-month time period during which the employer would closely monitor the

attendance of employees with attendance problems. An employee whose attendance did not improve during this time period would be terminated. If an employee went on military leave, this would toll the time period for the Attendance Improvement Program. Under these facts, a court held that an employee who was terminated for violation of the Attendance Improvement Program could proceed to a jury trial under USERRA where the six-month time period would have expired but for his military leave.

B. The “Escalator Principle”

1. Service of 90 days or less: Employee must be reemployed in position employee would have attained but for her military leave.
2. Service of more than 90 days: Employee must be reemployed in position employee would have attained but for her military leave or in a position of like seniority, status, and pay.

C. Retraining: Employer must undertake “reasonable efforts.”

1. New regulations on “reasonable efforts”:
 - a. Cannot impose costs on employee (i.e., employee cannot be required to pay for training course)
 - b. Does not place undue hardship on employer
2. Returning service member must be “qualified” for reemployment position
 - a. New regulations: “Qualified” means an ability to perform the “essential tasks” of the position.
 - b. “Essential tasks” are evaluated based on the following factors:
 - (1) The employer’s judgment about which tasks are essential
 - (2) Any job descriptions that were prepared before the hiring process began
 - (3) The amount of time spent performing the task

- (4) The consequences were an individual in the position not to perform the task
 - (5) The terms of any applicable collective bargaining agreement
 - (6) The past and current work experience of others in similar jobs
 3. Where employee does not, despite employer's "reasonable efforts," complete retraining in a satisfactory manner, employee may still be entitled to some other reemployment position with the employer.
 4. FMLA leave: The Department of Labor takes the position that time on military leave counts toward the requirement of hours worked.
 5. Escalator principle may not apply to non-seniority based benefits, as long as such benefits are not granted to employees returning from other types of leave. *See Rogers v. City of San Antonio* (5th Cir. 2004). Possible implications of *Rogers* may cover eligibility for overtime or accrual of vacation days based on hours actually worked, rather than years of service.
- D. "Just cause" protections upon return from military leave
 1. Time periods
 - a. Only applies to service in excess of 30 days
 - b. Service of more than 30 days (but less than 180 days): No discharge, except for cause, for six months
 - c. Service of more than 180 days: No discharge, except for cause, for one year
 2. A burden-shifting device
 - a. Employer who terminates a returning service member must explain, to a court, the reasons for the termination

- b. New regulations: For conduct-based discharges, employer has the burden of showing:
 - (1) Discharge a reasonable response to the conduct in question; and
 - (2) Employee had notice that such conduct would constitute cause for discharge.
 - 3. New regulations: "Just cause" provisions do not protect from lay-off or position elimination. Employer has the burden of demonstrating that employee's position would have been eliminated had employee not taken military leave.
- E. Discrimination provisions
- 1. Terminated employees often claim that their terminations were "pretexts" for discrimination based on their military service.
 - a. Example: Mr. Mills, a sales representative, was removed from a sales route because of a customer's complaint and as a result was terminated. Mr. Mills was able to reach a jury with his USERRA discrimination claims because his supervisors had repeatedly complained about his absences for training with the Army Reserves and because other employees had been removed from their routes without being terminated. *Mills v. Earthgrains Baking Co.* (E.D. Tenn. 2004)

VI. How Is USERRA Enforced?

- A. USERRA vests enforcement with the Department of Labor ("DOL"). The DOL, in turn, has established the Veterans' Employment and Training Service ("VETS").
- B. Employees can file complaints about potential USERRA violations with VETS.
 - 1. VETS will investigate every complaint.
 - 2. VETS has subpoena powers.

C. Court actions

1. Individuals may file suit under USERRA or the Department of Justice may bring actions on an employee's behalf.
2. A VETS complaint is not a necessary prerequisite to a lawsuit.
3. A split of authority exists on the question of whether USERRA claims can be covered by mandatory employment arbitration agreements
4. Double damages available for willful violation

Court granted double damages award for willful violation of USERRA where personnel director had stated, "I don't want to hear any more of this veteran's bullshit." *Fink v. City of New York* (E.D.N.Y. 2001).

D. USERRA itself does not have a statute of limitations.