

Making Sense of Veterans' Employment Rights in a Bad Economy

Unraveling USERRA

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Since 2001, hundreds of thousands of reservists and non-career military personnel have temporarily left their civilian jobs to serve in the United States' military campaigns in Afghanistan and Iraq. Many of these individuals have been called up or volunteered for multiple tours of duty. Recently, however, returning service members have faced a grim economic situation at home. Employers have been shedding jobs at record rates. The national unemployment rate has hovered near or above 10% for almost a year. Although there are signs of recovery, many service members are finding that the jobs they temporarily left behind are no longer available.

Until recently, few employers have had reason to pay attention to USERRA, the federal statute protecting the employment and reemployment rights of military service members. The Uniformed Services Employment and Reemployment Rights Act is the latest in a series of federal veterans' employment laws dating back to 1940. *See* 38 U.S.C. § 4301, *et seq.* In 1994, following the First Gulf War, Congress enacted USERRA to strengthen provisions of pre-existing veterans' employment laws and, in some instances, establish new employment and reemployment protections for returning service members. USERRA has generated little attention in the first decade of its existence—indeed, the case law on USERRA is sparse—but that is certain to change.

Given that the U.S. is in the midst of its first major military conflict since USERRA was enacted and is also experiencing one of the worst economic downturns in its history, the relevance of USERRA has been heightened. It is critically important at this time for employers and returning service members to familiarize themselves with USERRA. The purpose of this article is to provide an introduction to this increasingly prominent area of the law.



Does USERRA apply to me?

USERRA is unique among federal employment laws with respect to its expansive coverage. All private and public sector employers are subject to USERRA, regardless of size or revenue. This means that a non-profit organization with one employee may be covered. Employers that have recently undergone restructuring should also be aware that successors-in-interest are expressly covered. Also, unlike most federal employment statutes, individual liability under USERRA extends to supervisors and human resources personnel.

Regarding the type of military service that is covered, USERRA's definition of "service" is quite broad and includes active duty, inactive duty, inactive and active duty training, full-time National Guard duty, funeral honors duty, and duty performed

by intermittent employees of the National Disaster Medical System. Keeping with the theme that USERRA is meant to be broadly applied, the law's protections extend to full-time, part-time, probationary, seasonal, and even temporary employees—unless, of course, the employee does not have a reasonable expectation of ongoing employment. With some exceptions, employees may take up to an aggregate of five years of leave under USERRA while employed by a particular employer.

What notice is an employee required to give?

An employee who wishes to take leave under USERRA must provide his or her employer with either oral or written advance notice of the need for military leave "as far in advance as is reasonable under the circumstances." 20 C.F.R. § 1002.85(c)-(d). Because mili-

tary leave is not always planned or scheduled, USERRA prohibits employers from requiring employees to provide notice in any particular format or within any certain time period. The Department of Defense, however, advises that when practicable, an employee should provide at least 30 days notice to his or her employer.

What happens when the employee returns home?

Congress enacted USERRA in order to encourage non-career service in the military by minimizing the disadvantages to civilian careers that can result from such service. The statute aims to accomplish this by requiring employers to promptly reemploy eligible employees returning from military service. Generally speaking, a returning service member must be reemployed to his or her “escalator position,” which is the position or equivalent position the service member would have been in with reasonable certainty had he or she never left. *See* 38 U.S.C. § 4313; 20 C.F.R. § 1002.191. The purpose of this provision is to allow the returning service member to benefit from any job promotions or pay raises he or she missed during the military leave. If the employee is not qualified for his or her escalator position, the employer must give the employee a reasonable opportunity to attain the necessary training and qualifications. 20 C.F.R. § 1002.191. And if the employee is no longer qualified for the position due to a service-related disability, the employer must either make reasonable accommodations to qualify the affected employee for that position, or make reasonable efforts to place the employee in a position with equivalent seniority, status and pay. 20 C.F.R. § 1002.225-.226. Employers should also be aware that placing a covered employee in an escalator position may require bumping another employee from that position.

For employers that determine job advancement strictly according to seniority, the escalator position analysis will likely be straight forward. But for other employers, determining an employee’s escalator position can be challenging, particularly if job advancement is based on discretionary factors. For example, a school teacher who

would have been eligible for tenure during the period of deployment may not be entitled to a tenured position upon return where it cannot reasonably be determined that the teacher would have met the performance requirements for tenure. Or a sales associate who relinquished her sales territory or client base during her service may not be entitled to that same book of business when she gets back if that book of business is not portable. The case law is generally unsettled on many of these scenarios, making it even more difficult for employers to determine the appropriate reemployment position for a returning service member.

Changes in the employer’s workforce during the past recession may further complicate matters. For instance, if an employer has eliminated the employer’s escalator position during the service member’s military leave, it is possible that the employee may be properly terminated upon his return. 20 C.F.R. § 1002.139. Additionally, the employer may be able to assert a number of hardship exemptions that otherwise would excuse its reemployment obligations. 38 U.S.C. §§ 4303(15), 4312(d); 20 C.F.R. § 1002.139.

What benefits must an employer provide during leave?

Unlike the Family and Medical Leave Act (FMLA), USERRA expressly prohibits employers from compelling an employee to exhaust previously accrued paid leave while away on duty (though employees who wish to utilize paid leave while on duty must be allowed to do so). When it comes to seniority and non-seniority-based benefits, however, USERRA and the FMLA provide employees with similar rights. USERRA deems employees on military leave to be on “furlough” or “leave of absence” status. 20 C.F.R. § 1002.149. Thus, as with the FMLA, employees are entitled to non-seniority rights and benefits (e.g., accrual of vacation) that are provided to employees who are also on furlough or leave of absence status for other reasons. For instance, if an employer allows employees on FMLA leave to accrue vacation, then employees on military leave must also be permitted to accrue vacation.

For additional guidance on USERRA, the Department of Labor’s website provides helpful information at: <http://www.dol.gov/compliance/laws/comp-userra.htm>.

An employee is entitled to those seniority-based rights and benefits to which he or she is entitled on the date that military leave begins and that would have accrued under the employer’s plan, custom, or practice had the employee been continuously employed. This means that for purposes of pension and other seniority-based plans, the employee’s period of absence due to military service should not be considered a break in employment upon the employee’s return to work.

An employer’s obligation to provide health care benefits during an employee’s military service leave varies according to the length of the employee’s leave. If the employee is gone for less than 31 days, the employer cannot require the employee to pay more than the regular employee share for health care. Generally speaking, for periods of leave that extend beyond 31 days, the employee is eligible for COBRA-type coverage (in other words, the employee pays the full premium) for a period of approximately 24 months. 20 C.F.R. §§ 1002.164; 1002.166.

Practical Considerations

It is no secret that employers and employees alike have found USERRA and its regulations to be complicated and confusing. Given the increasing number of employees who are leaving and reentering the workforce because of military service, it behooves all those who practice in this area to become better acquainted with USERRA’s guidelines. For those who employ members of our armed services, now is the time to review military leave policies and to carefully consider the reemployment of veterans who return home from war on a case-by-case basis. It is important to remember that the case law under USERRA remains relatively scant and there is often no black or white solution. Similarly, employees who leave

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but rather because she arguably displayed each attribute in excess. She suffered after “indulging in socially sanctioned behavior to an unsanctioned extent.”

Finally, Carlson also uses each case study to introduce and dissect various narrative concepts such as framing, alchemy of symbols, symbolic perfection, dramatic pentad, and representative anecdote. Her discussions on these topics constitute the weakest part of the book. At times her discussions of concepts and strategies became very technical and disrupted the flow of her own prose.

Overall Carlson’s insights and analysis were eye-opening and thought provoking. Her own narrative and analytical skills result in an entertaining, multi-dimensional book. It is a good read for anyone interested in how the courts have shaped and manipulated views of femininity, or for those interested in understanding the more technical aspects of rhetoric.

More than that, this book is a great for anyone who simply wants to enjoy a bit of salacious 19th century drama and learn how attorneys played upon gender norms to the benefit, or detriment, of the women involved. ■

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and reenter the workforce because of military service should closely heed USERRA’s notice requirements, as failure to do so may preclude the employee’s right to reemployment. Illinois lawyers practicing in this area should also note that the rights afforded under USERRA are substantively different than those provided under state law. ■

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Overview of the Briefing Process continued from page 38

31(e). That rule requires a digital version of each brief and the required appendix to be filed with the paper brief at the time the paper brief is filed. Counsel may certify that some material is not available electronically. The digital version of the brief and required appendix may be furnished on a properly labeled disk or CD-ROM, or via the internet. Instructions for internet uploading are on the Seventh Circuit web site. The digital version should be in searchable PDF format. One digital copy must be served on each party that is separately represented by counsel.

In the Illinois Appellate Court, a paper brief may be filed with a digital version (Adobe Acrobat PDF) that must be served on each party. An electronic copy of a brief must be filed if the Appellate Court or a judge thereof requests one. *See Ill. Sup. Ct. R. 341(e).*

Conclusion

The briefing process in the Seventh Circuit and in the Illinois Appellate Court requires mastery of many rules. The inadvertent violation of any rule can have serious consequences for your client’s case. Counsel should make every effort to take advantage of the services available in each court for pre-filing review of briefs. ■

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