

USERRA: What Matters in Protecting Our Service Members' Employment Rights

Veterans' Employment & Training Service

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Why USERRA is Important

- More than **1,001,000** Guard and Reserve members mobilized since September 11, 2001
- More than **962,000** have returned, with more than **39,000** remaining on active duty as of March 3, 2020
- **Increase in USERRA complaints** received since 9/11/2001 currently averaging slightly less 1,000 complaints annually
- Tremendous **increase in USERRA inquiries**



USERRA Generally

- Prohibits employment discrimination on basis of past, current, or future military obligations
- Protects reemployment rights with pre-service employers for veterans, Reserve, and National Guard members
- Prohibits retaliation



USERRA Overview

Uniformed Services Employment and Reemployment Rights Act (USERRA)

- Enacted in 1994, but its roots date back to 1940.
- Covers virtually all U.S. employers, regardless of size, both here and overseas



Who is Covered?

- Anyone who performs, applies to perform, or has an obligation to perform:
 - Service in the armed forces: **Active, Reserve and National Guard**
 - Service in the U.S. Public Health Service Commissioned Corps
 - Service in the National Disaster Medical System (NDMS) and the National Language Service Corps (NLSC)
 - An examination to determine fitness for military service



USERRA Codified

- **38 U.S.C. 4301-4335 (Statute)**
- **20 C.F.R. 1002.1-1002.314 (non-Federal sector regulations)**
- **5 C.F.R. 353.101-353.304**
(Federal sector regulations)



VETS USERRA Overview

- The Secretary of Labor, acting through the Veterans' Employment and Training Service (VETS) is charged with interpreting and administering the USERRA statute itself. *See generally*
38 U.S.C. § 4102A



Basic USERRA Protections

- Discrimination/Retaliation prohibited
 - Initial hiring
 - Promotions
 - Retention in employment
 - Employment benefits (seniority v. non-seniority)
- Benefits during service
 - Health plan continuation of coverage
 - Benefits after reinstatement:
 - Health plan, pension benefits, seniority



Discrimination, Retaliation

- An employer may not take any adverse action against an employee ***due in any part*** to employee's military service or obligations
- An employer may not take any adverse action against an employee for exercise of his/her USERRA rights, or for rendering assistance in exercising those rights



Comparative Analysis: (Discrimination, Retaliation)

1. Proximity in time between employee's military or protected activity and adverse employment action;
2. Inconsistencies between proffered reason and other actions of the employer;
3. Employer's expressed hostility towards members protected by USERRA together with knowledge of employee's military or protected activity; and
4. Disparate treatment of certain employees compared to other employees with similar work records or offenses.

Sheehan v. Dep't. of the Navy, 240 F.3d 1009 (Fed. Cir. 2001)



Reinstatement

- Returning employee must be promptly reinstated in same position of **seniority, status, and rate of pay** s/he would have attained had s/he remained continuously employed
- “Escalator Principle” dating back to 1946, *Fishgold v. Sullivan Drydock*



USERRA Reemployment Eligibility; 5 Criteria

- For USERRA protections, the employee must:
 - Be absent from civilian employment due to service
 - Provide advance notice to employer
 - Have 5 years or less service (w/ exceptions)
 - Submit timely application for reemployment
 - Have no disqualifying discharge



Reinstatement, continued

- Escalator principle may result in negative consequences in private sector (e.g., layoffs, terminations, transfers, etc.)
- Active duty does not toll contractual periods or term appointments



Escalator Generally

- Promotion plans should provide a mechanism by which absent employees can be considered
- Communication is key to avoiding potential disputes upon employees' return
- Consider past performance, performance during service, or similar in evaluating advancement possibilities



Disability Provisions

- Standard is very similar to Americans with Disabilities Act of 1990 (ADA)
- For comparison – USERRA v. ADA, see: www.eeoc.gov.
- USERRA escalator principle still applies.



Disability Provisions, Cont'd.

- USERRA requires employer make reasonable efforts to accommodate service-incurred disability.
- If SM cannot perform duties of escalator position after employer's reasonable efforts, then should be placed in alternative position of like status, seniority, pay.



Disability Provisions, Cont'd.

- If a position of like status, seniority and pay cannot be found within SM's ability to perform, employer may offer next best position available.
- Employer not required to create a position to accommodate if one does not exist.



Disability Provisions, Cont'd.

- Department of Veterans Affairs (VA) provides assistive prosthetics, devices to aid in employer's accommodation efforts
- Few disabilities cannot be overcome through assistive technology
- USERRA violation to fail to make reasonable accommodation for service-incurred disability



USERRA Health Benefits

- 38 U.S.C. 4317(a)(1)(a)
Employee may elect to continue employer-sponsored coverage for 24 months upon leaving for active duty.
- Similar to COBRA, but **no restriction on employer size**



Pension Benefits

Employee considered to be in LWOP status while on active duty

- USERRA incorporates ERISA definition of employee pension benefit plan
- Regulations provide criteria and time frame for matching and make-up contributions



Compliance Assistance Efforts

- Outreach and education
- Briefings and technical assistance
(Over 1M since 9/11)
- MOUs with DOJ and OSC
- Electronic complaint forms
- E-Laws USERRA Advisor
- Senior Investigators
- USERRA rights poster



Enforcement Generally

- VETS investigators in all States
- Most cases resolved without litigation
- Referral of State and private sector cases to DOJ
- Referral of Federal executive branch cases to OSC



VETS Investigation Process

- VETS' USERRA investigations are complaint driven
- Must be completed w/in 90 days, but can obtain an extension from claimant
- Complaints can originate from a variety of sources
 - Technical Assistance Requests
 - ESGR Referrals
 - VETS 1010 Complaint Form



Investigation Process Continued

- No investigations or contacts with an employer initiated absent a signed 1010
- Once 1010 received, formal investigation opened within 5 business days. (e1010's processed more rapidly)
- All documentary evidence will be obtained, and all available identified witnesses interviewed
- VETS has subpoena power; increasingly used



Enforcement Continued

- DOJ/OSC have independent discretion whether or not to offer representation in Federal District Court, or before MSPB
- At any point during investigative process, claimant may elect to withdraw case and pursue enforcement through private counsel



General Considerations

- VETS may not offer representation or engage in investigation when claimant is actively represented by third party
- “Active representation” means third party obtaining evidence, contacting employer/witnesses directly in a manner that disrupts VETS’ investigation
- **Third party acting as claimant’s agent is acceptable**
- VETS cannot discuss open cases with outside parties, including VSOs, media



General Considerations

- Always best to avoid litigation; attempt to resolve disputes at lowest level possible
- Two-way communication essential for avoiding disputes
- Education highly effective in preventing disputes



P.L. 110-389, VBIA of 2008

- 90-day time limit for USERRA investigations (longer if claimant agrees to an extension)
- 60-day limit for DOJ/OSC to make a merit determination
- Quarterly reports to Congress
- GAO program review
- **No Statutes of Limitations Apply**
- **Fed. Agencies must train their HR staff(s) on USERRA**



Recent Developments

- **Hostile work environment** --now a recognized cause of action under the law (DOL, DOJ, OSC always considered this to be so; some Federal Circuits disagreed; now we have a uniform standard.)
- **Similar standard of proof as under Title VII**
- ***Patrie v. U.S.P.S.***



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