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Uniformed Services Employment and Reemployment Rights Act (USERRA)

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Webinar

What is USERRA?

- Federal law that minimizes the hardship and disruption that military service causes to civilian careers.
- Prohibits employers from discriminating or retaliating against persons based upon military service.
- Distinct from Servicemembers Civil Relief Act (SCRA)

What is USERRA?

- “Liberally construed for he who has laid aside his private concerns to serve his country in its hour of great need.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).
- **NO** Federal or State statute of limitations applies to USERRA – 38 U.S.C. 4327 (enacted in October 2008)
 - However, equitable doctrine of laches may apply if delay results in prejudice to employer

NOW MORE THAN EVER

- More than 1 million National Guard and Reserve members have been called to active duty since 9/11.
- COVID-19
 - **Testing and Vaccination Sites**
- Civil Unrest
 - **George Floyd Protests**
 - **January 6, 2021**
- Natural Disasters/Emergency Response

EMPLOYERS COVERED

38 U.S.C. 4303(4)

- Virtually all U.S. employers are covered, public or private, regardless of size and location
- Foreign employers covered for their employees working at U.S. job sites
- You only need to have one employee to be covered
 - *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992)

COVERED SERVICE

38 U.S.C. 4303(13)

- Most types of military service covered
 - **Voluntary or involuntary**
 - Peacetime or wartime
 - Active, Reserve and National Guard components

NATIONAL GUARD SERVICE

- USERRA covers ANG duty performed under Federal authority (Title 10 or Title 32)
- New Development – State Active Duty:
 - Effective January 5, 2021, USERRA now covers Guard duty performed under State law (e.g., call-up by the Governor) if:
 - 14 days or more, OR
 - Support of national emergency declared by POTUS (COVID), OR
 - Support of major disaster declared by POTUS

NATIONAL GUARD SERVICE

- State law provides additional protections
 - Washington’s “Mini USERRA”
 - RCW 73.16
 - Virtually identical to federal USERRA
 - Specific application State Active Duty service
 - Washington’s Law Against Discrimination (WLAD)
 - RCW 49.60
 - Prevents discrimination based on “military status”

DISCRIMINATION

38 U.S.C. 4311

- USERRA broadly prohibits discrimination in hiring, retention, promotion or providing any benefit of employment:
 - Because of membership in the military services, performance of service, application or service obligations
 - 4311(a)
 - Because the employee enforces a USERRA right, testifies, assists in an investigation, etc (NO RETALIATION)
 - 4311(b)

DISCRIMINATION, CONTINUED

38 U.S.C. 4311

- The employee only needs to prove that their protected military status was a MOTIVATING FACTOR – NOT the only reason for an adverse employment action
 - A factor the employer took into account, considered, etc
- Once the employee makes this *prima facie* case, the burden of production and persuasion shifts to the employer:
 - Would have taken the same action in the absence of the employee's protected status

REEMPLOYMENT ELIGIBILITY

38 U.S.C. 4304, 4312

- Certain criteria must be met to be eligible for reemployment following absence for service
 - Advance notice
 - 5-year cumulative service limit
 - Timely return or reemployment application
 - Character of service

20 C.F.R. 1002.32



ADVANCE NOTICE

38 U.S.C. 4312(a)(1)

- May be given to employer by service member or military unit
- May be oral or written
- Should be given as far in advance as is reasonable

20 C.F.R. 1002.85

ADVANCE NOTICE

38 U.S.C. 4312(b)

- Notice not required if precluded by military necessity
- Notice not required if giving of notice is impossible or unreasonable under all the circumstances
- It is strongly advised that the member give written notice to the employer by certified mail, return receipt requested
- Member is NOT required to provide military orders in advance

20 C.F.R. 1002.86



5-YEAR SERVICE LIMIT

38 U.S.C. 4312(a)(2)

- Applies to period of service, not absence
 - For example, does not apply to period of absence from employment before or after performance of service
- Does not include service performed while working for previous employer(s)

20 C.F.R. 1002.99 – 1002.102

5-YEAR SERVICE LIMIT

38 U.S.C. 4312(c)

- Specified types of service do not count toward the 5-year limit
 - Normal (monthly) drills
 - Annual training (2 weeks)
 - Duty during war or national emergency
 - Involuntary recall or retention on active duty
 - Certain operational missions
- For most Guard/Reserve, exceptions swallow the rule!

20 C.F.R. 1002.103



TIMELY RETURN / APPLICATION

38 U.S.C. 4312(e)

- If service is 30 days or less
 - Return to work, generally first shift next day after completion of service, with time added for travel and rest
- If service is for more than 30 but less than 181 days
 - Apply/return within 14 days after service complete
- If service is more than 180 days
 - Apply/return within 90 days after service complete

20 C.F.R. 1002.115



TIMELY RETURN / APPLICATION

38 U.S.C. 4312(e)

- Reporting/application deadlines can be extended up to 2 years for recovery from illness or injury incurred or aggravated during period of service
- Member must return to work as soon as possible, or else the employer's policies for unexcused absences will apply.

20 C.F.R. 1002.116



DOCUMENTATION OF SERVICE

38 U.S.C. 4312(f)

- Upon employer request, employee must present documentation following service of more than 30 days
- Documentation establishes employee is eligible for reemployment, i.e. application is timely, five-year limit not exceeded, separation not disqualifying
- Employer cannot delay reemployment while waiting for documentation

20 C.F.R. 1002.121 – 1002.122

CHARACTER OF SERVICE

38 U.S.C. 4304

- Certain types of discharge or separation from service make an individual ineligible for reemployment under USERRA
 - Dishonorable or bad conduct discharge
 - Separated under other than honorable conditions
 - Dismissed or dropped from the rolls

20 C.F.R. 1002.135



AFFIRMATIVE DEFENSES TO REEMPLOYMENT

- Employer's changed circumstances make reemployment impossible or unreasonable (high bar)
- Pre-service employment was brief, non-recurrent and no expectation of continuation for a significant period
- Employer has the burden to raise and establish these affirmative defenses
- See 38 U.S.C. 4312(d)

BENEFITS DURING SERVICE

38 U.S.C. 4316(b)

- Employee considered on furlough or leave of absence while performing service
- Entitled to non-seniority benefits (e.g., bonuses, life insurance, vacation accrual) given to similarly situated employees on non-military leave of absence
 - Maternity/Paternity leave, FMLA, etc

20 C.F.R. 1002.149

BENEFITS DURING SERVICE

38 U.S.C. 4316(b)

- If non-seniority benefits provided by employer vary for different types of non-military leave, service member is to be given most favorable treatment, so long as non-military leave is “comparable”
- “Comparability” explained in the DOL USERRA regulations

20 C.F.R. 1002.150

VACATION

38 U.S.C. 4316(d)

- Employee must be permitted to use accrued vacation or similar paid leave while performing service
- Employee may not be required to use accrued vacation or similar paid leave while performing service

20 C.F.R. 1002.153

HEALTH PLANS

38 U.S.C. 4317

- Employee, upon request, is entitled to continuation coverage under employer health care plan during absence for service (up to 24 months max)
- Applies to both employee and to covered dependents

20 C.F.R. 1002.164

HEALTH PLANS

38 U.S.C. 4317

- Employee may be required to pay up to 102% of total cost of continuing coverage if the period of service is 31 days or more
- Employee only pays the normal employee share for coverage if period of service is less than 31 days

20 C.F.R. 1002.166

HEALTH PLANS

38 U.S.C. 4317

- If coverage is terminated during period of service, it must be reinstated immediately upon reemployment
- No waiting periods or exclusions permitted, except for exclusions of conditions determined by VA to be service-connected

20 C.F.R. 1002.167 – 1002.168

REEMPLOYMENT POSITION

38 U.S.C. 4316

- Basic entitlement is to the “escalator” position – the position the person would have attained with reasonable certainty had employment been continuous
- “The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946)

20 C.F.R. 1002.191 – 1002.193

REEMPLOYMENT POSITION

- The “escalator” does not always go up. The “escalator” position reflects what would have happened if person had remained at work
- The reemployment position could involve a promotion, no change, or even termination depending on circumstances

20 C.F.R. 1002.194

REEMPLOYMENT POSITION

38 U.S.C.4313

- After service, employee entitled to reemployment at:
 - “escalator” position, or, if not qualified,
 - pre-service position, or, if not qualified,
 - nearest approximation of “escalator” or pre-service position (in that order) for which the person is or can become qualified

20 C.F.R. 1002.196, 197

DISABLED DURING SERVICE

38 U.S.C. 4313

- Employer must make reasonable efforts to accommodate the disability and qualify the employee for reemployment positions in the following order
 - “escalator” position
 - position equivalent to “escalator” position
 - nearest approximation to the above

20 C.F.R. 1002.225

PROTECTION FROM DISCHARGE

38 U.S.C. 4316(c)

- Reemployed person may not be discharged, except for cause
 - within one year after reemployment if the period of service was more than 180 days; or,
 - within 180 days after reemployment if the period of service was for more than 30 but less than 181 days
- No special protection for less than 30 days of service, but general prohibitions against discrimination and reprisal apply

20 C.F.R. 1002.247

PROTECTION FROM DISCHARGE

38 U.S.C. 4316(c)

- Employer has burden to prove a discharge during protected period was for cause
- Proper cause can be based on conduct or on other legitimate reason
 - if conduct, it must be reasonable to discharge an employee for the conduct in question
 - example of “other legitimate reason” for discharge might be a company downsizing

20 C.F.R. 1002.248

PENSIONS

38 U.S.C. 4318

- Upon reemployment, a returning service member is treated, for pension purposes, as if employment had been continuous
- Credit given for purposes of participation, vesting and accrual of benefits
- USERRA applies to most pension plans, but not to the Federal Thrift Savings Plan

20 C.F.R. 1002.259 – 1002.260

CONCLUSION

- Remember that each situation is unique
- If you think that you may have a USERRA issue with your civilian employer, the 141 ARW legal office is here to assist you
 - Employer letter templates
 - Legal Assistance appointments





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