

# REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

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### I. INTRODUCTION

a) Uniformed Service Employees Reemployment Rights Act, Ch. 43 of Part III, Title 38, United States Code §§ 4301-4322, also known as USERRA is the 1994 amendment to a series of laws going back to the post-World War II era.

#### b) Policy behind USERRA

- i) The statute is to be construed liberally in favor of the uniformed service member.
- ii) USERRA overrides collective bargaining agreements, individual contracts and the doctrine of “employment-at-will.”
- iii) See §4302 (USERRA preempts state law and invalidates contracts that limit its force)

### 2) BASIC ELIGIBILITY REQUIREMENTS

#### a) Employers covered: §4303(4)

*NOTE: USERRA covers all employers.*

- i) USERRA covers any person, institution or organization that pays salary or wages for work *or has control over employment opportunities*. There is no exception for small businesses, government employers, etc.

*NOTE:* The provision for “control over employment opportunities means that union hiring halls, pension, health and welfare plans, and training committees are fully covered for the responsibilities delegated to them by employers. All those entities, and unions themselves, are also covered regarding their own employees.

- ii) The Federal government and States (including District of Columbia, territories, agencies and political subdivisions) are included.

*NOTES:* Constitutionality: Because the law is enacted pursuant to Congress’ War Powers clause in the U.S. Constitution, states have no immunity.

- iii) Successors-in-interest: Generally, a successor is covered unless it is a mere purchaser of assets.

- iv) Trust Funds: USERRA makes funds "employers" only with respect to the benefits they pay, except as to their employees-in-fact. Members can sue trust funds under USERRA with respect to those benefits.
  - v) Hiring Halls: See note above. Hiring Halls are employers with respect to the functions delegated to them by employers.
  - vi) Foreign Employers: §4319 was added in 1998 to cover foreign employers controlled by a domestic employer.
  - vii) Construction Industry / Long Shoring: In these and similar industries where employees are referred to employment, "employer" means the entire group of employers defining the multi-employer collective bargaining unit
- b) Type of military service covered:
- i) Now defined broadly in §4303(13) and (16) to include voluntary or involuntary duty, active duty, active duty for training, initial active duty for training, inactive duty training, *full-time* National Guard duty, and absence due to fitness examinations.
  - ii) Uniformed services includes the five traditional Armed Forces (Army, Navy Air Force, Marine Corps and Coast Guard); Army and Air National Guard when engaged in active duty for training, inactive duty training, or *full-time* National Guard duty; the commissioned corps of the Public Health Service; and anyone else designated by the President in time or war or emergency.
  - iii) §4304: Rights are terminated upon separation on other than honorable conditions or certain AWOL or court-martialed commissioned officers
- 3) BASIC PROHIBITION ON DISCRIMINATION: §4311
- a) No employer can deny employment, reemployment, retention, promotion or any other benefit of employment on the basis of membership, application, or performance of uniformed service.
  - b) "Benefit of employment" means any privilege, status, fringe benefit, insurance or retirement benefit, vacation, ESOP, bonuses, opportunities to select work hours or location **but not** wages or salary

- c) "The Escalator Principle." Cases decided under former versions of this law held that returning veterans must be provided seniority, automatic progression of pay rates, cost of living increases, longevity increases, merit increases (if they were automatically provided to workers who remained on the job), promotions (if they were automatic), holiday pay (regardless of day-before or day-after work requirements), sick leave (if automatically accrued by virtue of being on the payroll), and annual profit sharing contributions.

Vacation pay: If there is a work requirement, vacation levels automatically increase for veterans, but vacation pay itself is only accrued while on military leave if it accrues automatically regardless of work performed.

Returning veterans can bump junior employees upon return using seniority accrued while in the military.

There was substantial disagreement in the cases concerning missed overtime opportunities and transfer/bidding rights which occur while the veteran is away on military service.

- d) "On the basis of" means uniformed service was a motivating factor unless the employer can prove the action would have been taken otherwise (not necessarily "the" motivating factor or the sole factor). This standard is the same as the *Wright Line* standard used for discrimination on account of union activity in NLRB proceedings.
- e) Retaliation is prohibited against anyone (whether in a uniformed service or not) for testifying or taking an action to enforce this law

4) REINSTATEMENT AND RETENTION RIGHTS: §4312 and §4313

- a) Employee must give advance written *or oral* notice, except as precluded by military necessity. (Employers *cannot require* written notice.) The person must leave civilian employment for the purpose of military service.
- b) Cumulative length of service (or absences) cannot exceed 5 years EXCEPT
  - i) as required to complete an initial obligation
  - ii) if the uniformed service person cannot obtain release orders through no fault of his own
  - iii) unless certain additional obligations are imposed by the Federal government for training, active duty, in war, or for a critical mission

- c) Discharge must not be “other than honorable”

NOTE: Each branch of service defines what are “other than honorable conditions.” Generally, bad conduct or dishonorable discharges, or the dismissal of an officer count as “other than honorable.” A general discharge is NOT “other than honorable.” Entry level separation is also not “other than honorable” for purpose of re-employment rights.

- d) Exceptions to obligation to re-employ

- i) Excusing conditions: Where it is impossible or unreasonable to reinstate employee because of changed circumstances

Cases decided under prior law indicate that employer good faith is not a defense. Excusing conditions are limited to things such as complete elimination of the work in question, or hostile acts by the veteran such as setting up a business in competition with the employer. Filling the position with another employee is not a defense.

- ii) Undue Hardship in reinstating a disabled veteran

- iii) Temporary nature of employment: A brief, non-recurrent period with no reasonable expectation that such employment will continue for a significant period (see below)

- iv) Employer has the burden of proof

NOTE: Prior law indicated that an employee who enlists during his probationary period completes the probation in the military and becomes a permanent employee.

- e) Obligation to re-apply varies with the length of the absence:

- i) If service was less than 31 days--

- (1) report to the employer at the first regularly scheduled work period, on the first full calendar day following completion of service—

- (2) plus 8 hours, after allowing a reasonable amount of time for travel from the place of service to the place of residence--

- (3) or as soon after the 8 hours as possible if impossible or unreasonable to report through no fault of veteran.
  - ii) Persons absent for induction examination, for any length of time, report as in #1
  - iii) If more than 30 but less than 181 days, apply within 14 days of completion, or as soon as possible if impossible or unreasonable to apply through no fault of veteran.
  - iv) If more than 180 days, apply within 90 days of completion of service
  - v) If hospitalized or convalescing from service-related illness or injury, then report or apply after the period necessary to recover (up to a maximum of two years, but can be extended for reasons beyond the veteran's control)
  - vi) A person who fails to report/apply does not forfeit his rights, but must be treated equally under the employer's policy for absence from work
  - vii) For absences exceeding 30 days, the employee can be required to produce evidence of the dates of, and satisfactory completion of, service. Documentation provided by Secretary of Defense must be accepted by employer as sufficient. Absence of documentation is not a basis to refuse to reemploy if it does not exist, or is not readily available. Satisfactory documentation includes form DD-214 (separation papers), a letter from the employee's commanding officer, or a copy of the employee's endorsed orders.
  - viii) Timing, frequency, and duration of service cannot be the reason for an adverse employment action except as noted above for length of service and application requirements. An employer has no right to limit number of reservists, Kolkhorst v. Tilghman, 897 F.2d 1282 (4th Cir. 1990)[police department policy limiting number of reservists to 100], or the length of leave. King v. St. Vincent's Hospital, 116 L.Ed.2d 578 (1991)[unreasonableness of length of leave requested is no defense].
- f) Employer shall "promptly" reinstate the employee
- i) If service was less than 91 days, then in the position the employee would have been in, if qualified for that position, or his old position if

the employee cannot qualify after reasonable efforts by the employer to qualify the employee

- ii) If service was more than 90 days, then in the position the employee would have been in or a position of like seniority, status, and pay, if qualified, or his old position or a position of like seniority, status, and pay, if the employee cannot qualify after reasonable efforts by the employer
  - iii) In the case of service related disability, if not qualified for the position he would have been in, then an equivalent position for which he can become qualified after reasonable effort by the employer, or the nearest approximation
  - iv) If the employee cannot be qualified for the position he would have been in, or his old position, except for reasons of service related disability, then a lesser position, with full seniority
  - v) "Reasonable efforts by the employer" is defined to include training unless it causes an undue hardship upon the employer
- g) "Ties" between returning veterans
- i) The senior veteran takes the job
  - ii) The other veteran takes job with similar status and pay, and full seniority, or in the case of a disabled veteran, follows the priority in E.3.

## 5) OTHER RIGHTS AND BENEFITS

- a) Retain prior benefits and seniority PLUS additional seniority and benefits that person would have attained if continuously employed.
- b) Deemed to be upon leave of absence, and entitled to all other benefits not determined by seniority as provided to other employees on leave of absence
- c) Exceptions:
  - i) Persons who provide notice of intent not to return (employer has burden to prove that the person knew he was waiving his rights to reinstatement and other benefits)

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- ii) A person is not entitled to any benefit he would not have received if not continuously employed
    - iii) A person can be compelled to pay employee share of funded benefits to the extent others on leave of absence are so required
    - iv) See 6. and 7. below for entitlement to health and retirement benefits
  - d) Protection against discharge after return
    - i) Generally one year if service was over 180 days
    - ii) 180 days if period of service was over 30 but less than 181 days
    - iii) The employer must prove discharge for cause, which is similar to just cause under a collective bargaining agreement including fair notice of what conduct is expected of the returning veteran
  - e) Any person whose employment is interrupted by uniformed service can use any paid vacation, annual or similar benefit during his period of service
- 6) RIGHTS TO HEALTH INSURANCE COVERAGE
- a) NOTE: Members of the services are entitled to use the military health care system, TRICARE, for service that exceeds 30 days
  - b) Health care rights attach if the veteran meets 4)a and b above (that is, gave notice and was absent for five years or less) even if the veteran has not yet reapplied or met the "other than dishonorable" condition of service
  - c) If the absence is less than 30 days, the employee can continue insurance paying no more than the employer's normal share, if any, for coverage
  - d) If the absence is more than 30 days, the employer has no obligation to cover the veteran (because TRICARE covers him from day one). USERRA now provides COBRA-like continuation rights for the employee, his or her dependents, or all of them---
    - i) for 24 months
    - ii) at 102% of the full premium, or if the absence is less than 31 days, then only the employee's share of the cost

- iii) in the case of multi-employer plans, costs are allocated as the plan provides, or to the last employer, or if the last employer is not functioning, to the plan
- e) Waiting periods or exclusions for pre-existing conditions cannot be imposed upon a returning veteran (except for service related conditions certified by the Dept. of Veterans Affairs)

## 7) RIGHTS TO RETIREMENT COVERAGE

- a) No break in (pension) service due to (uniformed) service
- b) Service time counts for both non-forfeitability (vesting) and accrual of benefits
- c) Employer is liable to pay the cost of funding the benefit to the pension plan just as if the employee remained continuously employed
- d) Uniformed Service time is deemed to be service with the employer, and in the case of multi-employer plans, costs are allocated as the plan provides, or to the last employer, or if not functioning, to the plan
- e) To the extent benefits depend upon employee contributions or deferrals, employee must make the contribution or deferral, capped at the amount the employee could have made had he remained continuously employed; the employee must be afforded the opportunity to make up all missed contributions. The employee must be allowed a period of three times his absence, up to a maximum of 5 years, to make up his payments

## 8) ENFORCEMENT PROCEDURES: §§4322

- a) USERRA is normally administered through the US DOL VETS (Veterans Employment Training Service)
- b) Complaint to the Secretary of Labor in writing
  - i) The Secretary "shall" investigate each complaint, shall give "technical assistance," and if there is merit, shall attempt to secure compliance
  - ii) If unsuccessful, the Secretary informs complainant of rights to take legal action

- c) Legal Action against private employers/local governments
  - i) Referral to the Attorney General, who "may" appear on behalf of complainant
  - ii) Private Action where the employer maintains a place of business
  - iii) court has jurisdiction to--
    - (1) order compliance with any provision of the chapter (includes full power of injunction, restraining order, contempt, etc.)
    - (2) order back wages and benefits
    - (3) order liquidated damages = back wages and benefits if violation was willful
  - iv) fees and costs are not charged to a complaining party, but a prevailing veteran may receive attorneys fees, expert fees, and other litigation expenses
  - v) employers or entities with obligations have no right to sue under this chapter at all (only persons claiming rights under this chapter do)
  - vi) Only the employer or potential employer is a necessary party
  - vii) No state statute of limitations applies. One court has stated that four-year "catch-all" limitation applies. Rogers v. City of San Antonio, 2003 U.S. Dist. Lexis 4314 (W.D. Tex. 2003). Claims may however be subject to the doctrine of laches for inexcusable delay on the part of the veteran if the defendant employer is thereby prejudiced.
- d) Legal action against States: Since 1998, only the DOL can proceed against employers that are State governments. DOL must refer the case to DOJ.
- e) Federal Agency compliance: Complaints are referred to the Merit Systems Protection Board and the Office of the Special Counsel
- f) Informal mechanisms: Each command has a legal officer available to assist veterans. The National Committee for Employer Support of the Guard and Reserves is a volunteer organization that helps returning veterans through information and informal mediation services

9) RELATED WISCONSIN LAWS

- a) County Civil Service: Wis. Stats. §63.06
- b) State Civil Service: Wis. Stats. §230.32
- c) Private and other employment: Wis. Stats. §45.50

NOTE: Wisconsin law provides benefits to veterans slightly more advantageous than the federal law. Both laws should be checked before action is taken.

10) MILITARY FAMILY LEAVE PROVISIONS OF THE FMLA

- a) FMLA was amended in 2008 to provide two types of “military family leave:” “qualifying exigency leave” and “military caregiver leave”
- b) NOTE: These are amendments to FMLA, **NOT** USERRA. As a result, the provisions of USERRA do not apply. For example, an employer is not covered by FMLA unless it has at least 50 employees. USERRA covers all employers regardless of size. These amendments apply only to the more limited set of employers covered by FMLA. Employees must meet the work requirements in FMLA (generally 1250 hours). Like all other FMLA leave, military family leave is unpaid. Like other FMLA leave, the military serviceperson called to active duty must be a spouse, parent or child of the employee.
- c) “Called to active duty” or “active duty” means notice to a member of the National Guard or Reserves that a contingency operation is impending. This statute does NOT apply to families of service-members in the Regular Armed Forces. Unlike regular FMLA leave, however, the son or daughter called to active duty can be older than 18. “In laws” are NOT included.
- d) Qualified Exigency Leave: Allows family members of a person in the services on active duty or called to active duty to take leave for a broad list of reasons such as deployment on short notice (7 days or less), attending military functions, making financial or legal arrangements, certain types of counseling, rest and recuperation for up to 5 days in the midst of deployment, certain post-deployment activities for up to a maximum of 90 days after termination of active duty status, and alternative childcare.

- i) Leave can be taken to pick up children from school in an emergency , but not on a routine basis, or for school events such as plays
  - ii) The employee must provide notice, usually on the same day as the emergency, or the next day
  - iii) The employee must provide a copy of the service orders on the initial request, and the employer may request re-certification every time the leave is used subsequently. The DOL has a new optional form for this purpose, the WH-384. Certification is otherwise subject to the same rules and timing as certification of a serious health condition under the FMLA.
- e) Military Caregiver Leave is leave by an employee to care for a covered service-member with a serious illness or injury
- i) Unlike QEL, service-members include Regular Armed Forces personnel as well as National Guard and Reserves
  - ii) Unlike QEL, next of kin are covered as well as spouse, parent and child, but not in-laws
  - iii) Coverage is for a current service-member, in medical treatment, therapy, recuperation, or outpatient status, or on the *temporary* disability retired list, for serious illness or injury incurred in the line of duty. "Serious" means the person is rendered unfit for duties of the member's office, rank, rating or grade.
  - iv) Unlike normal FMLA or QEL, the period of leave may be 26 weeks *per service-member per injury, up to a maximum of 26 weeks per 12-month period*. The 12-months in which the leave may be taken begins on the first date leave is taken for this purpose regardless of how the employer otherwise counts leave. Other FMLA purposes count against the 26 weeks, but cannot exceed 12 weeks (in effect, giving the employee 14 extra weeks for military caregiver leave).
  - v) Next of Kin: The nearest blood relative other than parent, child or spouse, in the following priority order: legal guardians; siblings; grandparents; aunts/uncles; first cousins. The service-member may designate someone else (who must be a blood relative) in writing.

- vi) Former members of the military are not covered: Retired members are not covered except for those on the temporary disability retired list. Those on the permanent disability retired list are not covered.
- vii) Notice: 30 days advance notice is required, unless not practicable, just as in the normal use of FMLA leave for injury or illness
- viii) Certification: also required as in the normal use of FMLA leave for serious health conditions. The DOL has created new optional form WH-385 for this purpose. DOD health care providers, TRICARE authorized private healthcare providers and Veterans Affairs providers may complete the form.
- ix) ITO or ITA. Invitational travel orders or authorizations are exceptions to viii) above. No certification is required in that case for the duration of the ITO/ITA and the order/authorization must be accepted by the employer in lieu of certification. If the stay exceeds the time in the ITO/ITA, then the employer can require additional certification.
- x) For injury or illness that qualifies both as "serious health condition" leave for a family member and Military Caregiver Leave, the employer must count it as Military Caregiver Leave first, and cannot count the leave twice (i.e., cannot count it both against the 26-week entitlement in the special 12-month period and the 12-week entitlement for normal FMLA purposes).

END