



USERRA Uniformed Services Employment and Reemployment Rights Act

More employee rights than you thought.

David J. B. Froiland, Partner

Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53211
414.297.5579
dfroiland@foley.com

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Why USERRA Matters Now

- 487,000 Guard and Reserve since 9/11/2001
- 169,000 on active duty
- USERRA
 - Prohibits Discrimination
 - Provides Reemployment Rights
 - Statistics from Donald D. Carter, Jr.
 - U.S. DOL, Counsel for Int'l Affairs and USERRA

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Do you know USERRA?

- Transforms "At-Will" employment to "Just Cause" Employment?
- Different legal analysis than Title VII?
- Protects employees who are never involved in military armed forces?
- Requires promotion for some returning vets?
- Extra credit:
 - What is the "Escalator Principle"?

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Veterans Rights Laws

- Selective Training and Service Act of 1940
- Veterans' Readjustment Assistance Act of 1974
- USERRA – signed into law by President Clinton in 1994
- Amended in 2004 – additional protections

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Moral of Today's Presentation

- Even though we do not have a lot of case law interpreting the veterans rights laws, we know that Congress has continued to strengthen these laws in favor of members of the Uniformed Services.
- Employers should not expect to receive the benefit of the doubt.

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That was then . . . (1946)

- *"He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. . . . He shall be 'restored without loss of seniority.' He 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. . . .*

■ (continued . . .)

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That was then . . . (1946)

- “This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . . And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act.”

- *Fishgold v. Sullivan Drydock & Repair Corp.* (S. Ct. 1946)

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This is now.

- “Our military personnel can serve secure in the knowledge that their civilian jobs will be waiting for them when they conclude their active service It is imperative that we as a nation do all we can to make sure that the men and women whom we are asking today to stand in harm’s way – whether in the active armed forces or the Guard or Reserves – have every opportunity to provide for themselves and their families when they enter or return to the civilian labor force.”

- Dept. of Labor Secretary Elaine Chao

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Which employees?

- “Service in the uniformed services.”
 - Active reserve components of Armed Services
 - Army National Guard and Air National Guard when engaged under federal authority (incl. training)
 - Commissioned corp. of Public Health Serv.
- Service
 - Can be voluntary or involuntary
 - Intermittent disaster response service/training

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Guard Duty under Federal Authority

- The National Guard has a dual status.
- It is a reserve component of the military branches, which is under federal authority.
- It is also a state military force subject to call-up by the State Governor for duty that is not subject to federal control (riots, floods).
- Only the federally authorized service is covered by USERRA.
 - Some states have laws that protects Guard Duty under state authority.

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Other protected Persons

- Persons who testify in a USERRA proceeding (even if they never had any uniformed service)
- Persons who assist in USERRA proceeding
- Persons who are preparing to serve in the Uniformed Services

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Employers Must Give Notice

- Must give notice of USERRA rights to employees who are in uniformed services
- Must use the Dept. of Labor's text
- May use Dept. of Labor's Poster
 - http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf (see attachments)
- Effective March 10, 2005

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Employees should give notice too

- Before leaving for service, employee should provide notice to employer.
- No special format.
- Even though the regulations suggest 30 days, the amount of notice need only be “reasonable.”

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Prohibited Actions

- No discrimination
- No retaliation
- Legal Analysis more favorable to employee than other discrimination cases (Title VII, ADEA, ADA)

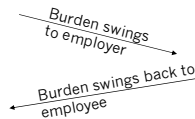
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Normal Legal Analysis--3 pronged

1. Employee must establish prima facie case
 - (1) Protected category, (2) met legitimate expectations of employer, (3) adverse action, (4) treated less favorably than employees outside the protected class



2. Employer must state legitimate and nondiscriminatory reason.

3. Employee must show that employer's reason is pretext (i.e., a lie). Ultimate burden is Employee's.

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USERRA Legal Analysis--2 Prongs

- Employee must establish same prima facie case

Burden swings
to employer
(and remains
with employer)

Employer must prove that the stated reason was NOT pretext for discrimination. Must show that the action would have been taken anyway, regardless of the employee's unformed service.

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Stated Differently

- Regular Discrimination cases – Employee must show that the protected category was the reason for the adverse action.
- USERRA Discrimination cases – Employer must show that the protected category was not even a reason for the adverse action. Not a motivating factor.

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While on USERRA leave

- USERRA does not require employers to pay for military leave. Some employers do so voluntarily, in whole or in part.
- Employee is deemed to be “on leave” while serving.

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Health Benefits During Service

- Continuation of health plan coverage.
- Employee may be required to pay 102% of cost if period of service is more than 30 days.
- Coverage similar to COBRA, but for 24 months instead of 18.
- No waiting periods or exclusions for returning members of uniformed services.

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Reemployment

- In general, the purpose is to restore the employee to the same job he would have held if there had been no military service.
- Five part test:
 - Absence to perform service, including preparation
 - Notice must be given to employer, where possible.
 - Five year leave limit, per employer
 - No dishonorable discharge
 - Timely Application for reemployment

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Timely Application for Reemployment

- < 31 days – report first regularly scheduled work day
- 31-180 days – apply within 14 days
- > 180 days – apply within 90 days

- These limits get extended for individuals hospitalized or rehabilitating from injuries incurred during period of service.

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Employer Defenses

- Three exceptions to Reemployment Obligations:
 - Employer's changed circumstances where reemployment is impossible or unreasonable. (i.e., position was subject to "RIF")
 - "Undue Hardship" where employee is not qualified.
 - "Brief Non-Recurrent Position" that cannot be expected to continue indefinitely.

- These are affirmative defenses.

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Which Reemployment Position?

- General Rule – "Escalator Position" – the job the returning service member would have attained but for the service.
- Service of 91 days or more – an additional employer option: "or job of like seniority, service, and pay.
- Disabled returning veteran? -- Duty to accommodate.
- Reasonable employer efforts to qualify the employee.

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How promptly to reemploy?

- Prompt reemployment means as soon as practicable, but usually within two weeks.
- Sliding scale
 - After a weekend of National Guard Duty, "prompt reemployment" means next regularly scheduled working day.
 - After years of service, prompt reemployment may take longer.

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Protection from Discharge

- No discharge except “for cause.”
 - This applies for 1 year from the time of the employee’s return from service, for service of 181 days or more.
 - This applies for 6 months, for service of 31-181 days.

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Escalator Principle

- For seniority and seniority based benefits, employee gets to step on where he would have been. (“Reasonable Certainty” test)
 - Examples
 - 3 weeks of vacation for employees with 5 years seniority.
 - 5% year-end bonus for every employee (missed six months)
 - Pension: no break in service for vesting
 - Make-up periods for employee contributions
- For merit-based and incentive bonuses, employee, escalator principle not applicable.

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Hypo

- Suppose an employee is required to report to an out-of-state location for military training and she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that state. Does employee lose USERRA rights because she used some of her leave time for purposes other than uniformed service?

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Hypo

- Employees announces that he is leaving for a tour of duty in Iraq. Also announces that he does not expect to return to the same employer. Has the employee forfeited his reemployment rights?

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Returning after Four Years

- Employer obviously hired someone else to do the employee's job. No other jobs available. Do we have to bring him back?
 - "The employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee"
 - USERRA regulations Sec. 1002.139(a)

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Documentation from Employee?

- Is the employee required to submit documentation to the employer in connection with the application for reemployment?
 - Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:
 - Application is timely
 - Not over the five year limit per employer
 - Dismissal or separation from service was not disqualifying

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How Vets Can Sue

- Via DOL investigation
 - Investigative Process
 - Employer contact
 - Fact finding and resolution
 - Subpoena authority

- Right of Private Action (court action)

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Remedies

- Injunctive Relief
- Lost wages and benefits
- Liquidated Damages (2x for willful violations)
- Attorneys Fees
- No statute of limitations

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USERRA and FMLA

- How should the 12-month FMLA requirement be calculated for returning service members?

- How should the 1250 hours-of-service requirement be calculated for returning service members?

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USERRA and State Laws

- Many states have laws that provide protections above and beyond the protections afforded by USERRA
- Wisconsin laws:
 - Reemployment Rights after national guard, state defense force, or public health emergency service. (Wis. Stat. Sec. 21.80)
 - Reemployment Rights after completion of military service (Wis. Stat. Sec. 45.50)

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Query this:

- What are the implications of asking your applicants whether they have served in the uniformed services?
- Your company has a RIF and employee returns from Iraq asking for reemployment into rifed job.

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Conclusion

- The Goal: Reemploy returning service members to the position and with the benefits they would have enjoyed but for the service to their country (escalator principle).
- Employee gets benefit of the doubt.

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 - Donald D. Carter, Jr.
 - Counsel for Int'l Affairs and USERRA

- Final Regulations, found at <http://www.dol.gov/vets/regs/fedreg/final/2005023961.htm>

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