USERRA Boot Camp:

What Employers Don't Know Can Hurt Them, Especially When It Comes to Returning Guardsmen and Reservists

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RETURNING GUARDSMEN AND RESERVISTS:

WHAT EMPLOYERS DON'T KNOW CAN HURT THEM[1]

by Brian A. Farlow and Worthy W. Walker

INTRODUCTION

As Operation Iraqi Freedom and Operation Enduring Freedom enter their fifth and seventh year respectively, more and more reservists and members of the National Guard are being mobilized and deployed in support of these operations—and subsequently returning to their civilian careers. More than 550,000 reservists and guardsmen from all branches of the service have been activated (and then deactivated) since September 2001.[2] There are currently more than 107,000 reservists and guardsmen on active duty today.[3]

Returning reservists and members of the National Guard are protected by the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), a

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[2] DEFENSE MANPOWER DATA CENTER, RESERVE COMPONENTS: UNIQUE SSAN ACTIVATIONS AS OF AUGUST 5, 2008, 1 (2008). The total deactivations since 9/11 are 551,110 and the currently active are 107,754. The total activations for operations Noble Eagle, Enduring Freedom and Iraqi Freedom total 658,864. This number far exceeds the 253,000 reservists called up for the Gulf War in 1990 and 1991. The Commander, Army Reserve estimates that approximately 30,000 to 35,000 reservists have been activated more than once since 2001. Id.

[3] *See* DEFENSE MANPOWER DATA CENTER, RESERVE COMPONENTS: UNIQUE SSAN ACTIVATIONS AS OF AUGUST 5, 2008, 1 (2008).

statute that is – somewhat surprisingly – not well known to many employers.[4] In general, USERRA provides benefits to employees throughout the United States when they are called upon to take time away from work to serve in the military. USERRA has two primary purposes: (1) to protect employees from discrimination based upon their military service; and, (2) to protect the job of the employee when he or she returns from military service.[5]

USERRA was passed by Congress in 1994 in response to the Supreme Court decision of *Monroe v. Standard Oil Co.,* 452 U.S. 549 (1981). The *Monroe* decision interpreted USERRA's predecessor, the Veterans' Reemployment Rights Act ("VRRA"), to require an employee to demonstrate that the discrimination was motivated "solely" by the employee's military status.[6] Congress noted that the *Monroe* decision "misinterpreted" the legislative intent of the VRRA – which was to place the burden of proof on the employer once a prima facie case of discrimination was established by the employee.[7] Accordingly, Congress included an express burden-shifting test in USERRA, which is generally referred to as the "substantial or motivating factor" test.[8]

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[4] *See* 38 U.S.C.A. §4301 *et seq.*

[5] *Id.*

[6] *See Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981).

[7] *See* H.R. Rep. No. 103-65, at 24 (1994), *reprinted in* 1994 U.S.C. C.A.N. 2449, 2457.

[8] *See Velazquez-Garcia v. Horizon Lines of Puerto Rico,* 473 F.3d 11, 16 (1st Cir. 2007).

Under the "substantial or motivating factor" test, an employee must present a prima facie case that his military status was at least a motivating or substantial factor in the employer's action.[9] Upon such a showing, the employer must prove – by a preponderance of the evidence – that the complained-of action would have been taken against the employee despite the employee's protected military status.[10]

Importantly, this two-step burden-shifting approach is different than the burden-shifting approach adopted in Title VII actions.[11] Unlike the burden of proof analysis in Title VII actions, the employee in a USERRA matter does not have the burden of demonstrating that the employer's stated reason is a pretext.[12] Rather, the *employer* must demonstrate, by a preponderance of the evidence, that the stated reason was not a pretext. Stated differently, the adverse action would have been taken against the military employee in the absence of the employee's military service.[13]

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[9] *See Velazquez-Garcia,* 473 F.3d at 17; *Sheehan v. Dep't of Navy,* 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Gagnon v. Sprint Corp.,* 284 F.3d 839, 853-54 (8t[h] Cir. 2002); *Hill v. Michelin N. Am., Inc.,* 252 F.3d 307, 312 (4th Cir. 2001).

[10] *See Velazquez-Garcia,* 473 F.3d at 17; *Sheehan,* 240 F.3d at 1014.

[11] *See id.*

[12] *See id.*; 38 U.S.C. §4311(c).

[13] *See id.*

Basics of USERRA Coverage

USERRA protects the employment rights of all persons in the armed forces of the United States, including the Army, Navy, Air Force, Marines and Coast Guard.[14] But, not all servicemen are entitled to the benefits of USERRA. Employees that were dishonorably discharged or discharged for bad conduct lose coverage under USERRA.[15] Likewise, USERRA coverage can lapse when a serviceman is dismissed under 10 U.S.C. §1161(a) or dropped from the rolls.[16]

Most importantly, USERRA's reemployment provisions only cover employees that return to work within its required timeframes, which vary depending on the length of military service. Specifically, the time frames are:

- for service up to 30 days, the employee should return to work on the next business day after returning home from service;
- for service between 31 and 180 days, the employee is expected to return to work within 14 days of returning home from service; and
- for service lasting over 181 days, the employee is expected to return to work within 90 days of returning home from service.[17]

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[14] *See* 38 U.S.C.A. §4303(16) (defining "uniformed services" to include the Armed Services, the Army National Guard, the Air National Guard, the commissioned corps of the Public Health Service, and "any other category of persons designated by the President in time of war or national emergency").

[15] *See* 38 U.S.C.A. §4304.

[16] *See id.* Dropped for the rolls is a formal personnel action taken against a person who has been AWOL (absent without leave) in excess of the AWOL limits.

[17] *See* 38 U.S.C.A. §4312(e)(1).

An allowance is made, however, for the person's safe transportation from the place of service to his/her residence plus an eight-hour period. If this is impossible or unreasonable through no fault of the returning veteran, then the returning veteran must give notice as soon as possible after the eight-hour period. And a veteran who is hospitalized or convalescing from a service-related injury or illness can be allowed up to two years for recovery before notice deadlines apply.[18]

Another difference from other employment-rights statutes is that USERRA defines "employer" very broadly and does not exclude employers with a limited number of employees.[19] Rather, USERRA defines "employer" to mean "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities."[20] USERRA also reaches any person or entity to whom the employer has delegated the performance-related responsibilities and expressly includes successors in interest to any covered person or entity.[21] Successor liability under USERRA, however, is not absolute—but may be found where the initial employer and the successor entity meet the "business continuity" test or the factors identified by the Department of Labor.[22]

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[18] *See* 38 U.S.C.A. §4312(e)(2).

[19] *See* 38 U.S.C.A. §4303(4).

[20] *See id.*

[21] *See id.*

[22] *See Murphree v. Communications Techs, Inc.*, 460 F.Supp.2d 702, 706 (E.D. La. 2006) (adopting the "business continuity" test to define successor-in-interest); *Reynolds v. Rehabcare Group East, Inc.*, 531 F.Supp.2d 1050, 1060-65 (S.D. Iowa 2008) (denying an application for preliminary injunction and

With respect to re-employment rights, USERRA sets the outer bounds of an absence from employment with a particular employer for military service to be five years.[23] In other words, an employee is entitled to unpaid job protection for the full term of military service up to five years. This rule is not inflexible, however, and there are actually eight exceptions this limitations period.[24] Many of the exceptions are only applicable to specific types of mobilizations.[25] However, one exception occurs when the service is required over five years to complete an initial period of obligated service.[26] Another exception is triggered when the employee is unable to obtain release orders during the five year period.[27] The most commonly-seen exception is the one allowing National Guard members and reservists time for a two-week annual training session and monthly weekend drills. These sessions are exempt from counting against the limit.[28]

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utilizing the Department of Labor's factors, but finding that successor-in-interest liability did not exist). The Department of Labor's "business continuity" factors can be found at 20 C.F.R. §1002.5. The Eleventh Circuit, however, adopted the narrower "ownership and control" test for determining USERRA successor-in-interest liability. *See Coffman v. Chugach Support Svcs., Inc.,* 411 F.3d 1231, 32-34 (11th Cir. 2005).

[23] *See* 38 U.S.C.A. §4312(a)(2).

[24] *See e.g.* 38 U.S.C.A. §4312(c).

[25] *See id.*

[26] *Id.*

[27] *See id.*

[28] *Id.*

Reemployment Benefits

USERRA's most impressive protection for employees concerns re-employment following service.[29] If an employee was absent for 90 days or less, the employee *must* be re-employed in the position he or she would have attained had the person's employment not been interrupted by service, or if the individual is not qualified to do such job, in a position the person last held.[30] If the period of service was for 91 or more days, the employee must be re-employed either in the position he or she would have attained if the employment had not been interrupted or one of like seniority, status and pay.[31] Generally, where a different position is offered to a returning veteran, questions of fact exist as to whether the offered position is "one of like seniority, status and pay."[32] If the person is not qualified for the position he

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[29] While a returning service member must provide written notice of his or her desire to be reinstated, technical failures in the notice which do not prejudice the employer "will not" prevent USERRA's rehiring mandate from binding the employer. *See Serricchio v. Wachovia Securities, LLC,* 556 F.Supp.2d 99, 105 (D. Conn. 2006). Indeed, the Supreme Court has admonished that employment protections for service members must be "liberally construed for the benefit of those who left private life to serve their country." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). However, not all written notices will be acceptable—written notices with express conditions, for example, are generally not considered sufficient to invoke the rehiring mandate. *See Baron v. U.S. Steel Corp.,* 649 F.Supp. 537, 541-42 (N.D. Ind. 1986). On the other hand, an application under USERRA by a returning veteran is not improper simply because the application contains "a demand for something he erroneously believes to be his due." *See Martin v. Roosevelt Hosp.,* 426 F.2d 155, 159 (quoting *Trusteed Funds, Inc. v. Darcy,* 160 F.2d 413, 422 (1st Cir. 1947)).

[30] *See* 38 U.S.C.A. §4313(1).

[31] *See id.* at §4313(2).

[32] *See Serricchio,* 556 F.Supp.2d at 106 (denying employer's motion for summary judgment because questions of fact existed as to whether (1) the offered position met the requirements of USERRA; and (2) the employer did all that it could have done); *but see Maher v. City of Chicago,* No. 07-2911, ___ F.3d ___, 2008 WL 4755786 (7th Cir. Oct. 31, 2000) (upholding jury verdict that reassigned job was one of like seniority, status and pay).

or she would have attained he or she must be reinstated to the position last held, or one of like seniority, status and pay.[33] When deciding whether an employee is qualified to perform the duties of a position, employers are required to make reasonable efforts to qualify the employee.

Employers are not always required to re-employ returning service members, however. Under USERRA, employers may deny re-employment if: (1) the employer's circumstances have changed such that re-employment is impossible or unreasonable, (2) if employment of the person would impose an undue hardship on the employer, or (3) if the employment that the veteran left was for a brief, non-recurrent period and there was no reasonable expectation that such employment would continue indefinitely or for a significant period.[34] In these cases, the burden rests with the employer to prove the reason for the denial of re-employment.[35] Importantly, hiring a replacement for the departing veteran will not be considered changed circumstances sufficient to avoid the rehiring requirements of USERRA.[36]

With regard to notice, USERRA generally requires the employee or an appropriate officer of the armed force to give written or verbal notice, in advance, to

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[33] *See id.* at §4313(3).

[34] *See* 38 U.S.C.A. §4312(d).

[35] *See* 38 U.S.C.A. §4312(d)(2).

[36] *See Murphee,* 460 F.Supp.2d at 709-10 (recognizing that "if one's replacement of the employee would exempt an employer from the Act, its protection would be meaningless) (quoting *Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992)).

the employer.[37] But, when notice was made impossible or unreasonable under the circumstances or by military necessity, an employer cannot deny reinstatement based on a lack of notice.[38]

Health Plans

Under USERRA, military employees and their dependents are eligible to elect to continue health coverage for up to 18 months when military service is required.[39] When the employee's service period is 31 days or more, the employer is allowed to charge up to 102% of the premium for such coverage.[40] If an employee's period of service is less than 31 days, the employer can charge only the amount other employees paid for similar coverage.

Retirement Plans

USERRA provides that a returning service member be put in the same position he or she would have been in had he or she not served. So, for purposes of eligibility, vesting, and benefit accruals, employees must be placed in the same position they would have been "but for" the service.[41] When an employer has a defined contribution plan, a returning service member should be allowed to make

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[37] *See* 38 U.S.C.A. §4312(e)(1).

[38] *See* 38 U.S.C.A. §4312(e).

[39] *See* 38 U.S.C.A. §4317; *Murphee,* 460 F.Supp.2d at 710.

[40] *See id.*

[41] *See* 38 U.S.C.A. §4318.

up the 401(k) or after-tax contributions that could have made if he or she had not served in the military. And the returning service member is entitled to receive the employer contributions that would have been received had he or she not served in the military.

Discrimination

In addition to protecting returning employees, USERRA also prohibits discrimination in the initial hiring of employees.[42] An employer may not decline to hire a member of the National Guard or reserve when an applicant's military status is the "motivating factor" in the adverse employment decision.[43] The employer may avoid liability only if the *employer* "can prove that the action taken would have been taken in the absence of such membership."[44]

Alteration to At-Will Employment

While employers in Texas generally count on at-will employment for ability to discharge employees at any time, for any non-discriminatory reason, USERRA alters this doctrine.[45] Many employers are completely unaware of this protection.

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[42] *See* 38 U.S.C.A. §4311(a) ("A person who is a member of . . . a uniformed service shall not be denied *initial* employment, re-employment, retention in employment, promotion or any benefit of employment") (emphasis added); *Patterson v. Department of the Interior,* 424 F.3d 1151, 1160-61 (Fed. Cir. 2005).

[43] *See* 38 U.S.C.A. §4311(c).

[44] *See* 38 U.S.C.A. §4311(c)(1).

[45] *See* 38 U.S.C.A. §4302(b) (stating "this Chapter [USERRA] supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this Chapter").

USERRA actually protects re-employed service members from termination for up to one year unless "cause" exists for the termination.[46]

USERRA Penalties

Employers are subject to administrative action and private claims under USERRA. Employers that violate USERRA can be held liable for lost pay, benefits and reinstatement.[47] USERRA also allows an award of additional damages when the employer's violation is found to be "willful."[48] Furthermore, a prevailing plaintiff in a USERRA action can recover attorneys' fees, expert witness fees, and other litigation and court costs.[49]

Texas Statutes

In addition to USERRA, the Texas Government Code, Chapter 613, also provides "public employees" with re-employment rights after military service.[50] A "public employee" for the purposes of the statute is an employee of the state, a state institution or a local governmental body. The protections are similar to USERRA regarding re-employment, and like USERRA, Section 613.005 also provides that a

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[46] *See* 38 U.S.C.A. §4316(c)(1).

[47] *See* 38 U.S.C.A. §4323(d).

[48] *See* 38 U.S.C.A. §4323(d).

[49] *See* 38 U.S.C.A. §4323(h).

[50] *See* Tex. Gov't Code §613.002.

returning service member cannot be discharged without cause for the first year of re-employment.[51]

Furthermore, Section 431 of the Texas Government Code provides private employees that are members of the "state military forces" with re-employment rights.[52] For purposes of the statute, "state military forces" includes the Texas National Guard, the Texas State Guard, and any other armed force "organized under state law."[53] This statute provides employees with a claim for re-employment after military service similar to USERRA, and statutory damages for a violation. Under Section 431, an employer may be held liable for up to six months of pay at the rate the employee enjoyed prior to service, as well as attorneys' fees.[54] Like USERRA, employers are afforded a defense if the re-employment is impossible or unreasonable due to changed circumstances.[55]

Arbitration of USERRA Disputes

An additional issue exists with respect to arbitration and USERRA coverage. USERRA § 4302(b) provides "[T]his Chapter supersedes any State law . . . contract, agreement, policy, plan, practice or other matter that reduces, limits, or eliminates

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[51] *See* Tex. Gov't Code §613.005.

[52] *See* Tex. Gov't Code §431.005-06.

[53] *See* Tex. Gov't Code §431.001.

[54] *See* Tex. Gov't Code §431.006.

[55] *Id.*

in any manner any right or benefit provided by this Chapter, including the establishment of additional prerequisites to the exercise of any such right or receipt of any such benefit." Courts have disagreed as to whether this provision precludes mandatory arbitration of USERRA claims.

The Federal Circuit Courts continue to decide that USERRA claims are subject to arbitration.[56] However, several district courts outside the Fifth and Sixth Circuits have ruled that USERRA claims are not subject to arbitration.[57] Generally, the courts that uphold USERRA claims that are subject to arbitration conclude that the USERRA is not ambiguous and does not expressly preempt arbitration agreements.[58]

Alternatively, courts deciding that USERRA claims are not subject to general arbitration provisions in employment contracts note that the USERRA provides that "[i]n the case of an action against a private employer by a person, the district courts of the United States *shall* have jurisdiction of the action."[59] Such courts also rule that (1) §4302(b) expressly provides that USERRA "supersedes any . . . contract, agreement, policy, plan [or] practice . . ." – which necessarily includes arbitration

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[56] *See Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 674-75 (5th Cir. 2006); *Landis v. Pinnacle Life Care, LLC*, 537 F.3d 559, 561-63 (6th Cir. 2008).

[57] *See e.g. Breletic v. CACI, Inc.*, 413 F.Supp.2d 1329 (N.D. Ga. 2006); *Lopez v. Dillard's, Inc.*, 382 F.Supp.2d 1245 (D. Kan. 2005).

[58] *See Landis*, 537 F.3d at 562; *Garrett*, 449 F.3d at 676.

[59] *See* 38 U.S.C.A. §4323(b)(3).

agreements;[60] and (2) that the legislative history of USERRA – and Section 4302(b) in particular – suggests that arbitration is not required and not binding.[61]

[60] *See* 38 U.S.C.A. §4302(b); *Breletic,* 413 F.Supp.2d at 1336-37; *Lopez,* 382 F.Supp.2d at 1249.

[61] *See* 4.R.Rep.No. 103-65, 1994, *as reprinted in* 1994 U.S.C.C.A.W. 2453.4 ("[T]his section [4302(b)] would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law.").