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Update on Veterans' Employment Rights: USERRA 2009

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Purpose and Entitlements of USERRA

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") was enacted after the Gulf War to encourage reservist activities. The codified purposes include: (1) to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.[1]

This protection is extended to any employee, no matter the length of employment, for voluntary or involuntary military enlistment as long as it is not career service (five years or less cumulative service).[2] Individuals qualifying under USERRA are generally entitled to reinstatement to the same or equivalent position upon honorable discharge and application to the employer within 90 days after military service. This reinstatement application deadline can be extended up to two years after military service if the individual is unable to return to employment because of injury suffered while in the military.[3] If an individual meets the criteria and is

[1] 38 U.S.C.A. § 4301(a) (2005).
[2] 38 U.S.C.A. § 4312(a)(2) (2005).
[3] 38 U.S.C.A. § 4312(e)(1) (2005).

eligible to be reemployed, he or she must be restored to the job and the benefits they would have attained had they not been absent due to the military service.[4]

Enforcement of USERRA

The United States Department of Labor ("DOL") Veterans' Employment and Training Service ("VETS") is authorized to investigate and resolve complaints of USERRA violations and can refer a case to the United States Attorney General if it is unable to resolve it.[5] VETS investigators are advocates for the law and the veteran, but they must remain neutral until the investigation is complete.[6] An individual may also bypass the VETS process and bring a direct civil action against the employer.[7]

The Basic Framework

Statute of Limitations: There is no statute of limitations provision within the USERRA; however, the Fifth Circuit Court of Appeals has inferred the four-year general statute of limitations for federal causes of action that are not governed by an explicit statute of limitations.[8]

Burden of Proof: The returning veteran initially bears the burden of proof to show that his or her military status was a motivating factor in the adverse employment decision.[9] The burden then shifts to the employer to show a non-pretextual, legitimate reason for the employment decision and that the action would have been taken "but for" military service.[10] In *Smith v. School Board of Polk County*, the Plaintiff's evidence of the supervisor's comment that the employee needed to decide if he wanted to be a principal or a soldier was sufficient to shift the burden of proof to the Defendant employer.[11] In that case, though, the employer was ultimately

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[4] 38 U.S.C.A. § 4312 (2005).
[5] 38 U.S.C.A. § 4322 (2005).
[6] *Id.*
[7] *Id.*
[8] *Rogers v. City of San Antonio*, 392 F.3d 758 (5th Cir. 2004).
[9] 38 U.S.C.A. § 4316 (2005).
[10] 38 U.S.C.A. § 4316(b)(2)(B) (2005).
[11] *Smith v. School Board of Polk County, Florida*, 205 F.Supp.2d 1308, 1315 (M.D.Fla. 2002); *See also Benitez v. International Paper Co.*, WL 4436874 (W.D.Tex. 2007).

successful because the employee had not adequately completed the principal program as required; therefore, the employer surpassed the standards of the "but for" test.[12]

Contract Preemption: An individual's rights cannot be waived through collective bargaining agreements or civil service rules.[13] USERRA trumps any state laws or employment contracts that could limit the application of reemployment under USERRA.

Individual Liability: A manager, such as a director of personnel, with authority over the hiring and firing of employees can be individually subject to liability as the "employer."[14]

Right to Benefits: A returning veteran who is eligible to be reemployed under USERRA must be restored to the job and benefits he or she would have attained but for the absence due to military service.[15] This "escalator principle" requires that each returning service member actually step back onto the seniority "escalator" at the point the person would have occupied if the person had remained continuously employed.[16] Further, individuals who leave their jobs to perform military service have the right to elect to continue their existing employer-based health plan coverage for themselves and any dependents for up to 24 months while in the military.[17] Even if they do not elect to continue coverage during military service, they have the right to be reinstated in the employer's health plan when reemployed, generally without any waiting periods or exclusions except service-connected illnesses or injuries.[18]

Texas State Law: Texas additionally requires governmental (state, local, special district, etc.) employers to provide 15 days of paid military leave annually, as well as the normal unpaid military leave required under USERRA.[19] These 15 days are over and above any other paid time off provided by the employer, and the employee's compensation and leave banks may not be

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[12] *Id.*
[13] *Wrigglesworth v. Brumbaugh*, 129 F.Supp.2d 1106 (W.D.Mich. 2001).
[14] *Brandsasse v. City of Suffolk, VA*, 72 F.Supp.2d 608, 617 (E.D.Va. 1999).
[15] 38 U.S.C.A. § 4313 (2005).
[16] *See* "A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)", U.S. Department of Labor Veteran's Employment and Training Service, July 2004.
[17] "Your Rights Under USERRA", http://www.dol.gov/VETS/programs/userra/USERRA_Private.pdf (last visited July 20, 2009).
[18] *Id.*
[19] TEX. GOV'T. CODE ANN. § 431.005 (2007).

reduced. It is currently an open question if the public sector employer would be able to off-set these expenses by any pay the employee receives from the military under a theory of "double dipping." We do not, at this point, recommend that a governmental employer reduce the amount of the paid time off, based on the strong presumption in favor of the Reservist employee, unless the employer is eager to test this issue in the courts.

"Same" Scope of Employment: The Seventh Circuit Court of Appeals stated in *Crews v. City of Mt. Vernon* that an adverse employment action must be materially adverse, not merely an inconvenience or a change in job responsibilities.[20] "[A]n adverse employment action is one that significantly alters the terms and conditions of the employee's job and materially adverse actions include termination, demotion accompanied by a decrease in pay, or a material loss of benefits or responsibilities, but *do not* include everything that makes an employee unhappy."[21]

Potential Employer Exclusion from Enforcement: Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service connected disabilities when doing so would be impossible or nearly so.[22] For example, if the job no longer exists, and there is no other job at the employer for which the employee is qualified, then reinstatement may be impossible. Simply having filled the veteran's former job, however, will not be enough to show impossibility because the reinstatement rights supersede the rights of other employees who filled the original or similar positions.

Retention after Reemployment: Anyone who is reemployed under USERRA after a leave of more than 180 days may not be terminated except for cause for one year.[23] In other words, "at-will" employment status is suspended for six months after reinstatement.

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[20] *Ryan P. Crews v. City of Mt. Vernon*, 567 F.3d 860 (7th Cir. 2009).
[21] *Id. Emphasis added.*
[22] 38 U.S.C.A. § 4312(d)(1)(A) (2005); "A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)", U.S. Dep't of Labor Veteran's Employment and Training Service (July 2004).
[23] 38 U.S.C.A. § 4316(c) (2005).

Potential Litigation Issues

The Federal Circuit Court of Appeals recently issued a decision which interprets the anti-discrimination portion of USERRA to disallow an employer to remove the employee while still on leave.[24] Previously, the statute was interpreted to primarily concern reemployment after the military service, not the ability to remove a current employee from an employment roster while on military leave. The Board's explanation that the adverse employment action was solely for the absence itself regardless of the reason and military service was not a "motivating factor" was not accepted by the Appellate Court.[25] The Court reversed this portion of the case stating that the absence itself could not be separated from the military reasons for the absence.[26] "An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of his absence when that absence was for military service."[27] Thus the fact that the employee could have been removed if his absence had not been service related does not excuse the action.[28] Nor did it matter that the employer still would have been obligated to reinstate the veteran on his return and reapplication. Here, the USPS was ruled to have violated the USERRA provisions because it removed the employee before a cumulative period of five years of military related absence had run its course. This is the first decision to use this reasoning, but if other Circuits follow, it could mean that an employer could not remove employees during their time of leave and then simply reemploy them after their term of service.

Another potential problem that has not yet been fleshed out in the case law is what happens if an employee quits in order to join the military. Is the former employee still eligible for USERRA protection in that job or is this considered "abandonment of a civilian career" for purposes of pursuing a military career? In *Wrigglesworth v. Brumbaugh*, a Michigan District Court stated that a resignation letter signed by the employee did not preclude him from seeking reemployment under USERRA.[29] The facts in that case demonstrated that the employee was convinced by the employer quitting was the proper procedure and the employer knew of his

[24] *Erickson v. U.S. Postal Service*, 2009 WL 2032043 (Fed. Cir. 2009).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Wrigglesworth*, 129 F.Supp.2d at 1106.

intention to return to work after military service.[30] This case suggests that it is possible for an employee to resign the position and still be protected; however, it is not conclusive due to the mitigating circumstances.

In the recent *Erickson* case discussed above, the administrative judge found that the employee had abandoned his civilian career, but this point was not ruled on by the Board, an oversight that the Circuit remanded in order to rectify.[31] In that case, the employee mentioned over the phone, during his leave, that he preferred his life in the military.[32] It unlikely that the ruling of the administrative judge will be upheld, as doing so would make it too easy for an employer to claim job abandonment without requiring something more concrete than a single phone call. This issue has yet to be litigated fully and has potential to be brought up in future USERRA cases.

Conclusion

Although there are still a few potential litigation issues that have not been completely fleshed out, the legal framework for the application of USERRA is well established. By and large, reservists serving less than five years on military leave are entitled to be reemployed when honorably discharged. There are a few exceptions, but it is typically a safe assumption that the employer is required to reemploy the service member if he or she falls within the requirements of USERRA, and any employment decisions should be approached accordingly.

[30] *Id.*
[31] *Erickson*, 2009 WL 2032043.
[32] *Id.*