

New Case and Regulations Beef Up Employer Duties to Returning Troops

By Michael S. Kalt

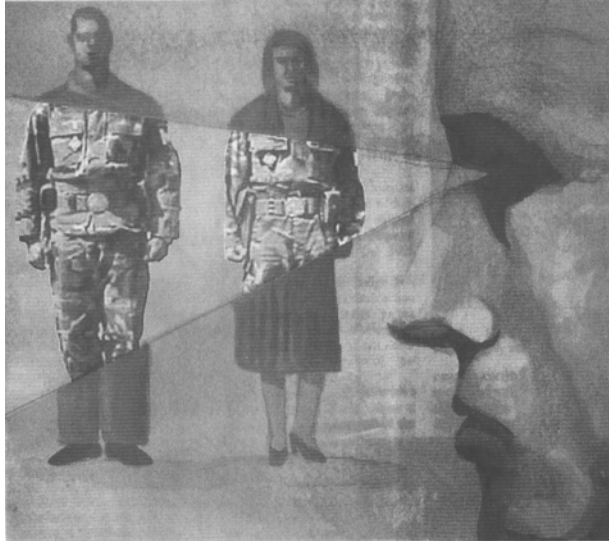
The Department of Labor's long-awaited regulations implementing and clarifying the Uniformed Services Employment and Re-employment Rights Act of 1994 took effect this year. Projections of a future troop demobilization, coupled with a recent 9th U.S. Circuit Court of Appeals decision upholding \$256,000 in damages for violating the act (*Wallace v. City of San Diego*, 460 F.3d 1181 (2006)), require employers to become familiar with these new regulations.

The act (38 U.S.C. Sections 4301 et seq.) has three purposes: to increase civilian participation in the uniformed services; to minimize disruption in uniformed service members' lives; and to prohibit discrimination against service members. To achieve these goals, USERRA's provisions are liberally construed in favor of the service member, while employer defenses are narrowly construed and contrary state laws or private agreements are prohibited. Further, the act applies to every employer, regardless of size and to almost every type of employee.

Preventing Discrimination

USERRA prevents discrimination or retaliation against service members or persons assisting service members. While similar to other federal anti-discrimination provisions, the act only requires employees to show their service or invocation of USERRA rights was a "motivating factor" in the discrimination. *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2001).

Once an employee satisfies this lower standard, both the burden of production and persuasion shift to the employer to prove that it would have taken the same action regardless of the employee's protected status.



Coffman v. Chugach Support Services, Inc., 411 F.3d 1231 (11th Cir. 2005).

Re-Employment Rights

USERRA guarantees re-employment, provided the employees give notice prior to deployment, served less than five years uniformed service with that particular employer, reported to work in a timely fashion after their service was completed, and were not dishonorably discharged.

The notice of future deployment can be verbal and informal. There is also no minimum notice period, although the regulations strongly recommend 30 days notice when feasible. There is also no requirement the employer approve the leave or that the employee provide advance assurances of an intent to return.

In most cases, an eligible employee must be "promptly" re-employed, which the new regulations (20 C.F.R. 1002 et seq.) suggest means within two weeks. An employer cannot refuse reinstatement because no opening exists, a hiring freeze is in effect, or another person was hired to fill the position. *Davis v. Halifax County School System*, 508 F.Supp 966 (E.D.N.C. 1981)

The reinstatement right is not limited to positions held when leave commenced. Rather, under the so-called "escalator principle," employees are entitled to return to the positions they would have attained with reasonable certainty but for the absence. This means employees may be entitled to promotions upon return, and employers may have to provide additional training to help employees qualify for the promotions they likely would have received if continuously employed.

The act provides several narrowly construed affirmative defenses to these reinstatement rights. The first provides that employers need not re-employ a returning service member if the employers' circumstances have so changed as to make such re-employment impossible or unreasonable.

Unlike other leave laws, employers cannot refuse to reinstate employees because pending pre-leave disciplinary actions would have resulted in the employee's termination. USERRA prohibits post-reemployment discharges except for cause for up to one year depending on the length of deployment. Employers may still terminate employees during this period if they satisfy this heightened for-cause standard.

An employer is also not required to re-employ a returning service member if it imposes an undue hardship on the employer. But this defense only applies when employees are not qualified for a position because of disability or other bona fide reason, and after reasonable efforts have been made by employers to help them become qualified.

Employment Benefits

Generally, employers assessing benefit issues should be mindful of USERRA's general guidelines that service members shall not be disadvantaged for serving, and often will be treated as if continuously employed.

Covered employees may elect to continue health care coverage during the leave. For military leaves less than 31 days, employees cannot be required to pay more than their regular share, if any, for such coverage. Employees may also elect to continue coverage for up to a 24-month period and, as under COBRA, shall not be required to pay more than 102 percent of the full premium.

A re-employed service member is also entitled to reinstate health care coverage previously terminated by reason of service without regard to any waiting periods or exclusions.

With regard to pension benefits, USERRA-related leaves are not treated as breaks in service, meaning military service periods are counted for eligibility, vesting and benefit accrual purposes. Ultimately, employers must provide employees the benefits they would have had under the plan if they had remained continuously employed. During the leave, the employer is liable to the pension benefit plan to fund any obligation to provide benefits attributable to the employee's period of service.

A returning service member is entitled to all seniority-based benefits the employee had when the leave began, and would have attained if continuously employed. For non-seniority benefits (e.g., vacation accrual), the service member employee must be treated at least as favorably as employees on other comparable forms of leave, and if the employer has multiple policies for non-seniority benefits depending on the type of leave, the service member must be treated under the most favorable.

Enforcement

Employees need not exhaust administrative remedies before pursuing a private action. Rather, the service member may either file a complaint with the Veterans' Employment and Training Service for investigation, or immediately sue in federal court. A service member who prevails is entitled to back pay, reinstatement, attorney

fees, and in the case of willful violations, liquidated damages equal to lost wages.

USERRA specifically disclaims any specific statute of limitations, but it is unresolved whether the four-year catch-all limitations period in 28 U.S.C. Section 1658 applies.

Federal courts are also split concerning arbitration of USERRA claims. Compare *Garrett v. Circuit City Stores Inc.*, 449 F.3d 672, (5th Cir. 2006) (no preclusion) and *Breletic v. CACI, Inc.*, 413 F.Supp.2d 1329, 1337 (N.D. Ga. 2006) (preclusion).

While Federal Rule of Civil Procedure 54(d) generally provides that costs are allowed prevailing parties as a matter of course, USERRA provides that "no fees or court costs may be charged or taxed against any person claiming rights under this chapter." One decision has interpreted this provision as immunizing a service member from any costs associated with an unsuccessful USERRA claim. *Chance v. Dallas County Hosp. Dist.*, 176 F.3d 294 (5th Cir. 1999).

Several courts have limited service members to the remedies identified in USERRA's statutes, meaning that no punitive or emotional distress damages are allowed. *Vander Wal v. Sykes Enterprises, Inc.*, 377 F.Supp.2d 738, 746 (D.N.D. 2005); *Schmauch v. Honda of North America Mfg., Inc.*, 311 F.Supp.2d 631 (S.D. Ohio 2003).

The new regulations clarified many ambiguities with USERRA, but uncertainties remain. Nonetheless, as soldiers return from service employers must consider and meet their obligations to help support the troops.

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