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WHEN JACK AND JILL RETURN FROM WAR

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The United States military has called men and women to service in the uniformed services in recent years due to various military conflicts across the globe. This action has resulted in a number of employees marching home from service duty call-ups expecting their jobs to be waiting for them upon their return. Since September 11th, there have been approximately 420,000 citizen-soldiers called to active service. The ratio of complaints to citizen-soldiers was 1-54 following Desert Storm. This ratio has dropped to 1-76 since the War on Terrorism began.

This article briefly discusses the rights of citizen-soldiers and their employers' obligations under the Federal Uniform Services Employment and Reemployment Rights Act of 1994.[i]

I. HISTORY OF USERRA

USERRA was enacted in 1994, after the first Gulf War, expanding the rights of returning service men and women to return to their civilian jobs. It succeeds the Selective Training and Service Act of 1940 and the Vietnam era Veteran's Readjustment Assistance Act of 1974.

Unlike other employment statutes, USERRA contains no exceptions to its coverage for small employers and instead applies to employers of any size. Employers include public and private employers, as well as persons, institutions, organizations or entities that pay salary or wages for work performed, control employment opportunities, or have those responsibilities delegated to them such as union halls. Joint employment is possible such as in the loaned/borrowed servant situation and successors in interest are also liable as employers even if they didn't have notice of the employee's service obligation. The Act also applies to foreign employers with employees working in the United States as well as domestic employers with employees abroad unless the law of the foreign state would be violated through the Act's enforcement.

The purposes of USERRA are 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; 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 to prohibit discrimination against persons because of their service in the uniformed services.

USSERA will be liberally construed following the United States Supreme Court's admonition that:

> 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. [ii]

II. USERRA BASICS AND NOTICE TO RETURN TO WORK

USERRA provides service employees who either volunteer for, or are called up to, "service in the uniformed services" the right to return to their civilian position as long as their total active duty while with that particular employer does not exceed five years. USERRA does not apply to temporary or casual employees. It does, however, apply to part-time, probationary, and seasonal employees. It also applies to employees who are on lay-off status with recall rights, on strike, or personal leave. The Act does not apply to independent contractors.

"Service in the uniformed services" includes the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes: active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard, and a period for which a person is absent from a position of employment for the purpose of an examination to determine fitness of the employment for the purpose of performing funeral honors duty as authorized by the Act. Only federal service provides rights under the Act. The Act applies to individuals serving in the service academies but not the R.O.T.C.

Covered employees must provide their employers advanced verbal or written notice of their service obligations in order to take advantage of the USERRA protections. Employees are not required to seek their employer's permission before beginning their service obligations. Usually, employers require employees to submit copies of their training notices or military orders as proof of their need for the leave of absence. USERRA provides for an exception to the requirement of advanced notice if military necessity prevents it, or if the advanced notice is impossible or unreasonable under all of the relevant circumstances. Military necessity is determined pursuant to regulations prescribed by the Secretary of Defense and is not subject to judicial review.[iii] There is no time limit in which an employee must begin his or her service obligation after taking leave from the employer.

Covered employees are also required to have completed their military service honorably in order to take advantage of USERRA'S protections. Less than honorable discharges include: (a) dishonorable discharges; (b) other than honorable discharges as characterized by the regulations of the uniformed services; (c) commissioned officers dismissed in a general court martial proceeding; and, (d) commissioned officers dropped from the active rolls due to absence for 3 months. The employee's branch of the service determines whether a discharge was honorable or dishonorable.

The returning employee has the responsibility of re-establishing contact with his or her employer within certain time frames after the completion of military service. These time frames vary with the length of the employee's service.

Employees whose service is less than 31 days must report to the employer no later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence, or as soon as possible after the expiration of the eight hour period if reporting as above is impossible or unreasonable through no fault of the employee.

Employees whose service exceeds 30 days but is less than 181 days are required to submit an application for reemployment with the employer no later than 14 days after the completion of the period of service, or if submitting an application within such period is impossible or unreasonable through no fault of the employee, the next first full calendar day when submission of such application becomes possible.

Employees whose service exceeds 180 days have 90 days in which to submit their applications for reemployment to their employers. Employees recovering from illness or injury incurred in, or aggravated during, the performance of service shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (if service was less than 31 days) or submit an application for reemployment with such employer (if service was greater than 30 days). However, the period of recovery may not exceed two years.[iv]

An employee who fails to report or apply for employment or reemployment within the time specified shall not automatically forfeit such employee's entitlement to the rights and benefits of the Act but shall be subject to the employer's conduct rules, established policies, and general practices pertaining to explanations and discipline with respect to absences from scheduled work.

The required application shall provide to the employer (upon the request of the employer) documentation to establish that: (1) the employee's application is timely; (2) the employee has not exceeded the service limitations; and (3) the employee's entitlement to benefits has not been terminated. The failure to provide the necessary documentation shall not be a basis for denying reemployment if the documentation does not exist or is not readily available at the time of the request. The employer may terminate the reemployment if the documentation becomes available after the reemployment and such employee does not meet one or more of the requirements set forth above.

An employee is not required to advise their employer of their re-employment intentions at the time of giving their service notice. Additionally, an employee who chooses to do so at that time does not forfeit their rights to later re-employment under the Act.

III. THE EMPLOYER'S REEMPLOYMENT OBLIGATION AND USERRA'S ESCALATOR PRINCIPLE

An employee's right to return to the position held before military service is subject to the "escalator principle". Under the "escalator principle," an employer's obligation is not only to re-

employ a returning service person but to return him or her to the place on the seniority "escalator principle" where he or she would have been had he or she remained continuously employed.

USERRA'S "escalator principle" requires the employer to credit the employee with the seniority and other benefits based on length of service, including employer payment of pension contributions, that he or should would have received but for the leave of absence. Seniority based rights are those rights provided as a reward for length of service and which the recipient would have obtained with "reasonable certainty" but for the service.

The "escalator principle" also means that the employer must put the returning employee in the position that he or she would have attained but for taking the military leave, which may not be the same position the employee held before the leave. The position might be a promotion or a lower level or different job, or even a lay off status. It also includes putting the returning employee in the pay scale he or she would have obtained but for their service. Rate of pay includes: salary, pay increases, differentials, step increases, merit increases, periodic increases, performance bonuses, and any other item making up the employee's compensation package.

An employer's reemployment obligations are again determined by the employee's period of service. In the case of an employee whose period of service was for less than 91 days, the employer shall reemploy in the following order of priority: (a) in the position of employment in which the employee would have been employed if the continuous employment of such employee with the employer had not been interrupted by the service, the duties of which the employee is qualified to perform; or (b) in the position of employment in which the employee was employed on the date of the commencement of the service, only if the employee is not qualified to perform the duties of the position referred to in subparagraph (a) after reasonable efforts by the employer to qualify such employee. "Reasonable efforts" means actions, including training, provided by an employer that does not place an undue hardship on the employer. The term "undue hardship" means actions by the employer requiring significant difficulty or expense when considered in light of various factors set forth in the Act.

If the employee's service was for more than 90 days, the employer must reemploy in the following order of priority: (a) in the position of employment in which the employee would have been employed if the continuous employment of such employee with the employer had not been interrupted by the service, or a position of like seniority, status and pay, the duties of which the employee is qualified to perform; or, (b) in the position of employment in which the employee was employed on the date of the commencement of the service, or a position of like seniority, status and pay, the duties of which the employee is qualified to perform, only if the employee is not qualified to perform the duties of the position referred to in subparagraph (a) after reasonable efforts by the employer to qualify such employee.

If the employee cannot be employed under either subparagraph (a) or (b) above for either period of service, the employer shall reemploy the employee in any other position which is the nearest approximation to a position referred to first in paragraph (a) and then paragraph (b) which such employee is qualified to perform, with full seniority. The employee who left the position first shall have the prior right to reemployment in that position should two or more persons be entitled to reemployment in the same position of employment.

Employees are to be returned to employment as soon as practicable but within at least two weeks of their return absent unusual circumstances. An employee has a duty to mitigate his or her damages while waiting to be re-employed.

USERRA places greater reemployment obligations upon employers than does the Americans With Disabilities Act. An employer's USERRA obligations are as follows in the case of an employee who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the employee would have been employed if the continuous employment had not been interrupted by such service: (a) in any other position which is equivalent in seniority, status, and pay, the duties of which the employee is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or (b) if not employed under subparagraph (a), in a position which is the nearest approximation to a position referred to in subparagraph (a) in terms of seniority, status, and pay consistent with the circumstances of the employee's case.

The returning employee must be provided a test or examination like similarly situated employees where an employer utilizes a test or examination to determine qualification for advancement. The employee must be immediately advanced upon successful completion of the test or exam if that's the employer's policy. Otherwise, the employer must place the employee within the "eligibility list" where he or she would have placed with "reasonable certainty".

IV. HEALTH, SENIORITY AND OTHER BENEFITS

USERRA requires employers to offer employees of military leave the option of continuing their health insurance coverage for themselves and their dependents for a period of 24 months beginning on the date on which the employee's absence begins, or the day after the date on which the employee fails to apply for or return to a position of employment. An employer may require employees whose leave exceeds 31 days to pay up to 102 percent of the premiums under the plan. An employee whose service is less than 31 days may not be required to pay more than the employee share, if any, for such coverage.

The employee also has the right to be reinstated in their employer's health plan when they are reemployed, generally without any waiting period or exclusions (i.e. pre-existing exclusions) except for service-connected illnesses or injuries, even if they don't elect to continue coverage during their military service.

An employee reemployed under the Act is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service plus the additional seniority and other rights that such employee would have attained if continuously employed. An employee absent from employment by reason of such service shall be: (a) deemed to be on furlough or leave of absence while performing such service; and (b) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer to employees having similar seniority, status and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in affect at the commencement

of such service or established while such employee performs such service. An employee deemed to be on furlough or leave of absence shall not be entitled to any benefits to which the employee would not otherwise be entitled if the employee had remained continuously employed. Such employee may be required to pay the employee cost, if any, of any funded benefit continued to the extent other employees on furlough or leave of absence are required to do so.

Any employee whose employment is interrupted by a period of service shall be permitted, upon request of that employee, to use during such period of service any vacation, annual, or similar leave with pay accrued by the employee before commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.

A Department of Labor Memorandum issued July 22, 2002 provides that returning service people must be credited with the number of hours they would have worked but for their military leave for purposes of determining their entitlement to FMLA leave.

With respect to employee pension benefit plans, an employee called to service shall be treated as not having incurred a break in service with the employer maintaining the plan by reason of such service. Each period served by an employee shall, upon reemployment, be deemed to constitute service with the employer maintaining the plan for the purpose of determining the nonforfeitability of the employee's accrued benefits and for the purpose of determining the accrual of benefits under the plan. An employer reemploying an employee shall, with respect to a period of service, be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described above and shall allocate the amount of any employer contribution for the employee in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included.

An employee reemployed shall be entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions or elective deferrals only to the extent the employee makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the employee would have been permitted or required to contribute had the employee remained continuously employed throughout the period of service. Any payment to the plan shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the employee's service, but in no event greater than five years.

Employer payments are to be made within 30 days of reemployment if the benefits are not contingent or elective. Otherwise, they are to be made as the employee makes their contingent or elective payments. The employer is not obligated to account for earnings or forfeitures that may have occurred during the employee's service.

In multi-employer pension plans, the employee qualifies under the Act if he or she returns to any employer who contributes to the plan. The employing employer is required to notify the plan administrator of the employee's re-employment.

For purposes of computing an employer's liability or the employee's contributions, the employee's compensation during the period of service shall be computed as follows: (a) at the rate the employee would have received but for the period of service; or (b) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12 month period immediately preceding such period.

Pension plans subject to the Act include those of religious organizations as well as state and federal governments but does not include Social Security plans or Railroad Retirement plans.

V. PROTECTION FROM DISCHARGE/DISCRMINATION

USERRA also protects covered reinstated employees from termination and discrimination. Employees reemployed after a military leave of 180 days or more may not be discharged except for cause within one year after their reemployment date. Employees reemployed after a military leave of 30 to 180 days may not be discharged without cause within 180 days after their reemployment date.[v]

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service or obligation. An employer may not discriminate in employment against or take any adverse employment action against any person because such person: (a) has taken action to enforce a protection afforded any person under the Act; (b) has testified or otherwise made a statement in or in connection with any proceeding under the Act; (c) has assisted or otherwise participated in an investigation under this Act; or (d) has exercised a right provided for in the Act. The prohibition shall apply with respect to a person regardless of whether that person has performed service. The anti-discrimination provisions apply to both employers and potential employers.

VI. EXCEPTIONS TO USERRA REQUIREMENTS

There are exceptions to the employer's duty to reemploy returning employees. An employer is not required to reemploy someone covered by USERRA if the employer's circumstances have so changed as to make such reemployment impossible or unreasonable or, in certain cases specifically enumerated in the Act, if the employment results in an undo hardship to the employer, or the employment from which the employee leaves to serve is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.[vi] The employer has the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment.

VII. USERRA ENFORCEMENT

An employee may enforce USERRA rights by: (a) Filing a complaint with the Federal Department of Labor or by himself; (b) in federal district court; or (c) in the case of a state employer, in a state court in accordance with that state's laws. USERRA has no statute of limitations for the filing of a complaint or lawsuit but the regulations permit a court to apply the equitable doctrine of laches. The proposed regulations also make clear that court actions are subject to the same burden shifting analysis as used in other discrimination actions.

The U.S. Department of Labor, Veteran's Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations. An employee may request that the case be transferred to the Department of Justice or the Office of Special Counsel, depending on the employer, for representation if VETS is unable to resolve the complaint. An employee may also bypass the VETS process and bring a civil action against the employer for violations of USERRA. The DOL filed their 4th lawsuit on April 26, 2005.

Awards under USERRA may include not only lost wages and benefits, but also, in the case of a finding that the employer's non-compliance was willful, an additional equal amount as liquidated damages. An employer's actions will be considered willful if the employer knew or showed reckless disregard for whether its conduct was prohibited. The successful employee may also recover reasonable attorney's fees and litigation costs including expert witness fees and other litigation expenses not defined by the Act. The Act prohibits the taxing of fees or court costs against the unsuccessful employee.[vii] A court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders to vindicate fully the rights or benefits of employees under the Act.

An action under the Act may be initiated only by an employee claiming rights or benefits under the Act or by the United States as set forth in the Act. The regulations provide that a complaining employee need only show that his or her protective status was a factor, not the only factor and not even a substantial or determinative factor, in the employer's adverse decision.

Courts are to apply the typical employment discrimination burden shifting analysis used under discrimination statutes.

The two most frequent violations today include the failure to post the new mandatory poster noted immediately below and the failure to increase the right to continue health care insurance coverage from 12 to 24 months.

There is no statute of limitations provided in the Act. In fact, the Act specifically states that no state statute of limitations shall apply to actions under the Act. Courts have generally applied the "laches" doctrine in determining whether actions are timely.

Recently, the United States Court of Appeals for the 5th Circuit held that the four year federal statute of limitations for federal statutes with no statute of limitations[viii] applies to USERRA actions.[ix] However, the court only addressed whether the four year federal statute or the two year Fair Labor Standards Act statute of limitations applied to plaintiff's case. The court specifically noted that the parties waived the argument that no statute of limitations applied to USERRA actions by failing to raise it at the trial court level.

VIII. MANDATORY LABOR LAW POSTING OF USERRA EFFECTIVE 3/10/05

All employers, regardless of the number of employees, were required to display a new mandatory labor law poster under USERRA as of March 10, 2005.

IX. ILLINOIS FAMILY MILITARY LEAVE ACT[x]

The Illinois Family Military Leave Act became effective on August 15, 2005. The Act requires Illinois employers to extend unpaid leave to workers whose spouse or child has been called into military service for 30 days or more. The Act imposes the following leave requirements on Illinois employers: Illinois employers with a payroll of 15 to 50 workers must offer up to 15 days of unpaid military leave during the time of either federal or state deployment. Those with 50 plus workers must provide up to 30 days of unpaid leave. Only those employed by the same employer for at least 12 months in which they worked at least 1,250 hours are eligible for leave. Independent contractors are considered employees for purposes of this Act and are entitled to the same protections.

Eligible workers are required to give 14 days notice if the leave will last more than five consecutive business days. Employers must restore those returning from leave to the same position or one with equivalent seniority. Returning workers must also receive the same salary, employment benefits, and other conditions of employment. Employers may not interfere with the worker requesting leave nor institute any form of adverse action against those exercising their right. Provisions of the Act may be enforced through the filing of a lawsuit in the Illinois circuit courts.

Employees taking military family leave for less than five consecutive days should give the employer advanced notice as soon as is practicable. Where able, the employee shall consult with the employer to schedule a leave so as not to unduly disrupt the operations of the employer. The employer may require certification from the proper military authorities to verify the employee's eligibility for the family military leave requested.

An employee shall not take leave as provided under this Act unless he or she has exhausted all accrued vacation leave, personal leave, compensatory leave, and any other leave that may be granted to the employee, except sick leave and disability leave.

An employee's right to return to the same position and same benefits is limited if an employer proves that the employee was not restored as provided because of conditions unrelated to the employee's exercise of rights under the Act. During any family military leave taken under the Act, the employer shall make it possible for the employee to continue their benefits at the employee's expense.

The taking of family military leave under the Act shall not result in the loss of any employee benefit accrued before the date on which the leave commenced. Furthermore, nothing in the Act shall be construed to affect an employer's obligation to comply with any collective bargaining agreement or employee benefit plan that provides greater leave rights to employees

than the rights provided under the Act. The family military leave rights provided under this Act shall not be diminished by any collective bargaining agreement or employee benefit plan.

An employer shall not interfere with, restrain, or deny the exercise or the attempt to exercise any right provided under the Act. An employer shall not discharge, fine, suspend, expel, discipline or in any other manner discriminate against any employee that exercises any right provided under the Act, or for opposing any practice made unlawful by the Act.

A civil action may be brought by an employee to enforce the Act in a circuit court having jurisdiction. The circuit court may enjoin any act or practice that violates or may violate this Act and may order any other equitable relief that is necessary and appropriate to redress the violation or to enforce this Act.

[i] Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA) 38 U.S.C. Sec.4301 et seq.

[ii] Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 285 (1946), cited in Alabama Power Co. v. Davis, 431 U.S. 581 (1977).

[iii] The implementing regulations can be found at 5.C.F.R. 353.101 et seq.

[iv] 38 U.S.C. Sec. 4312(e)(2).

[v] 38 U.S.C. Sec. 4316(c).

[vi] 38 U.S.C. Sec. 4312(d)(1).

[vii] 38 U.S.C. Sec. 4323.

[viii] 28 U.S.C. 1658

[ix] *Rogers v. San Antonio*, 392 F.3rd 758 (5th Cir. 2004).

[x] 820 ILCS 151/1 et seq.