USERRA and FMLA Dos and Don'ts

Employing Members of the Armed Forces

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A review of employers' statutory obligations and the rights of service men and women, from initial hiring to the post-duty return to work.

With American troops fighting the global War on Terrorism, the number of people leaving their civilian jobs and reporting for military duty has risen. We can expect this trend to continue, particularly in light of President Obama's November 2009 announcement of the deployment of an additional 30,000 troops to Afghanistan. That increase has resulted in over 100,000 U.S. troops in the Afghan theater alone. More businesses will probably confront, often for the first time, issues associated with the employment of service men and women. It is critical for employers to understand their obligations and the rights and protections to which members of the armed services are entitled. Two federal statutes, in particular, are essential to understanding the "dos and don'ts" of employing members of the armed forces or their family members: the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §4302, (USERRA) and the Family and Medical Leave Act, 29 U.S.C. §401(b), (FMLA).

A few ground rules. First, an employee's military service can manifest in a variety of ways, ranging from weekend training to several weeks of training to deployment for a year or more. Although this article primarily focuses on extended deployments, all types enjoy USERRA protection. Second, although many states have laws providing their own brand of military, family and medical leave protections, which USERRA or the FMLA do not preempt, this article will not address state laws. Finally, this article will not address the myriad issues relating to the return and reemployment of disabled veterans.

Purposes of USERRA and FMLA

Congress intended both of these laws to help employees. USERRA is the most recent federal statute in a series of laws dating back to the 1940s aimed at safeguarding the employment and reemployment rights of veterans and members of the uniformed services. As stated in the legislative history of a USERRA predecessor, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, "If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent

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possible." H.R. Rep. No. 1303, 89th Congress; *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (applying USERRA's predecessor: "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job."); *Spadoni v. Easton Area School District*, No. 07-5348, 2009 WL 449108, at *2 (E.D. Pa. 2009) ("[M]ilitary service ranks as one of the highest forms of public service a citizen can undertake. Thus, [members of the armed forces]…and their families, merit the nation's gratitude for their sacrifices on our behalf, and must not endure discrimination in the workplace because of their absence while defending our nation").

While other federal employment laws will not apply to some small businesses, these business will almost certainly fall within USERRA's scope.

The purpose of USERRA is three-fold: (1) to encourage non-career military service by eliminating disadvantage to civilian careers that can result from military service, (2) to ensure prompt reemployment on completion of military service, and (3) to prohibit discrimination based on past, present, or future military service. 38 U.S.C. §4301(a)(1)–(3). Given these objectives, USERRA is employee-friendly and should be "liberally construed for the benefit of those who left private life to service their country in its hour of great need." *Ala. Power Co. v. Davis*, 431 U.S. 581, 587 (1977) (applying USERRA's predecessor); *see also Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005) (interpreting USERRA).

Given the exceptional number of reservists and National Guard activated and deployed in the last several years, Congress also recognized that their families needed time to prepare for and deal with issues relating to their absences. As part of the National Defense Authorization Act of 2008, Congress amended the FMLA to create another type of FMLA leave for family members of people in the reserve component of the Armed Forces, including the National Guard, to take care of business related to a call to active duty, termed "qualifying exigency leave." In November 2009, Congress once again used the National Defense Authorization Act to extend qualifying exigency leave rights to the families of active duty military personnel deployed in a foreign country. *See* P.L. 111-84, at 120. Again, the FMLA is employee-friendly. The FMLA is "intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 29 U.S.C. §2601(b)(1).

Employers Covered by USERRA and FMLA

These statutes define "employer" very differently. USERRA defines "employer" to include "any person, institution, organization, or other entity that pays salary or wages for work performed, or that has control over employment opportunities." 38 U.S.C. §4303(4)(A). Given the breadth of this definition, USERRA covers practically every employer, including federal and state governments. 38 U.S.C. §4303(4)(A)(ii)–(iii). And, depending on their employment-related responsibilities, in some circumstances, hiring halls or employer associations must comply with USERRA. 20 C.F.R. §1002.38. In some cases, however, USERRA may not apply to religious institutions. *See Schleicher v. The Salvation Army*, 518 F.3d 472 (7th Cir. 2008) (holding that First Amendment considerations barred employees' Fair Labor Standards Act claims); *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1167–69 (4th Cir. 1985) (holding that the Free Exercise Clause of First Amendment barred a Title VII claim); *McClure v. Salvation Army*, 460 F.2d 553, 558–61 (5th Cir. 1972) (same); *Minker v. Baltimore Annual Conference, United Methodist Church*, 699 F. Supp. 954, 955 (D.D.C. 1988) (holding that the Free Exercise Clause barred a minister's Age Discrimination in Employment Act claim against a church). On the other hand, the FMLA has a more limited reach than USERRA and applies only to employers with 50 or more employees. 29 U.S.C. §2611(4).

More employers are subject to USERRA than to most of the other federal employment laws because USERRA disregards an employer's size. 20 C.F.R. §1002.34. Unlike Title VII's or the Americans with Disabilities Act's 15 employee thresholds, 42 U.S.C. §§2000e(b), 12111(5), USERRA applies to an employer with just one employee. *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992). Thus, while other federal employment laws will not apply to some small businesses, these business will almost certainly fall within USERRA's scope.

Rights of Military Employees and Obligations of Employers

USERRA touches every phase of the employment relationship: hiring, retention, promotion, reemployment, and other employment benefits, while the FMLA, in the military-related leave context, provides protected leave to uniformed service members' families.

Initially Hiring and Employing a Soldier

USERRA's protections are triggered at the earliest stage of the employment relationship: initial hiring. USERRA prohibits retaliation and discrimination in employment based on past, present, or future participation in the military, including prohibiting hiring discrimination. 38 U.S.C. §4311. This means, for example, that an employer cannot refuse to hire someone due to concern that he or she will regularly miss work to fulfill his or her National Guard obligations. *See Atteberry v. Avantair, Inc.*, No. 8:08-cv-01034, 2009 WL 1615519 (M.D. Fla. 2009) (denying a summary judgment motion to an employer that retracted a job offer after learning that a plaintiff had two more years of military service that would require him to miss work); *McLain v. City of Somerville*, 424 F. Supp. 2d 329 (D. Mass. 2006) (holding that an employer violated USERRA when it failed to hire a serviceperson as a police officer because his discharge date made him unavailable for work until two months after the police academy began). The protections against discrimination and retaliation based on military service last throughout the employment relationship.

EXAMPLE: An employee served a six-month tour in the reserves in Iraq last

year. She applies for a promotion to supervisor in her department. She is qualified, but her manager is concerned that she will be deployed again, and this department simply cannot function without a supervisor for six months should that happen. The company cannot consider that she may be redeployed in the future in deciding whether to offer the promotion to this employee.

Employers have obligations under both USERRA and the FMLA to notify employees of their rights. 38 U.S.C. §4334(a); 29 U.S.C. §109(a). The Department of Labor (DOL) website provides sample notices (http://www.dol.gov). An employer must post these notices in a location where it customarily places other notices for employees. Additionally, the FMLA regulations require that if an employer has an employee handbook or other benefits packet, the handbook or packet must include the contents of the posted notice, and if an employer does not have this type of handout, the employer must provide a copy of the posted notice to each new employee. 29 C.F.R. §825.300.

Call to Duty

USERRA is also triggered when a soldier is preparing to leave his or her civilian job and report for military service. First, either the employee or an appropriate military officer must provide the company with notice of the impending military leave. The employee or an appropriate military officer can give notice either verbally or in writing, preferably at least 30 days prior to the leave date, but as much in advance as is reasonably possible under the circumstances. 20 C.F.R. §1002.85. This advance notice gives a company sufficient time to make necessary adjustments and otherwise prepare for an employee's absence.

However, USERRA does recognize that advance notice is not always possible or appropriate. 20 C.F.R. §1002.86. For instance, "military necessity" can sometimes prevent advance notice. 38 U.S.C. §4312(b). Suppose an employee is called upon for a covert, classified military operation that could become adversely compromised if details became publicly known. Not surprisingly, in these circumstances USERRA does not require advance notice to an employer. *Id.* (stating that what constitutes "military necessity" is determined by Department of Defense and not subject to judicial review). The advance notice requirement may also be excused if the circumstances simply prevent it. For example, if an employee received short notice of a deployment, he or she may not have the opportunity to give advance notice, triggering an exception. *Id.* Absent an exception to the advance notice requirement, if an employee fails to provide notice, he or she may forfeit the right to reemployment. *See* 38 U.S.C. §4312(a)(1) (stating that advance notice of leave is required for reemployment eligibility).

An employee's military obligation disrupts business operations to varying degrees, depending on the employee's job and the timing, length, and frequency of the military absence. A company may have to pay overtime to others who might fill in during a soldier's absence. Alternatively, a company may have to hire and train a temporary replacement. A company may also have to put certain projects on hold until a soldier returns from military duty. Given the sacrifice made by an employee, however, USERRA expects an employer to bear these burdens.

Despite these burdens, USERRA imposes no obligation on an employee to schedule his or her military duty to accommodate his employer's business operations or otherwise reduce the inconvenience. 20 C.F.R. §1002.114. This differs from the FMLA, which requires employees to "consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee." 29 C.F.R. §825.302(e); 29 U.S.C. §2612(e)(2)(A). However, a company is not entirely without recourse. An employer may voice its concerns about the timing, frequency, or duration of an employee's military service to the appropriate branch of the uniformed service, and hope to obtain relief. 20 C.F.R. §1002.114. Additionally, a company need not give a military employee special scheduling preferences. *See*, *e.g.*, *Crews v. City of Mt. Vernon*, 567 F.3d 860 (7th Cir. 2009) (holding that military employees are not entitled to preferential treatment under USERRA).

EXAMPLE: Employee and coworkers in the department work one weekend per month on a rotating basis. The company schedules this employee's weekends around her reserve military duty weekends. The company's action could be interpreted as effectively denying the reservist her leave-related rights. The company made its scheduling decision, which employee considers adverse, because of her military obligations. Conversely, the employee could not demand that the company schedule around her military duty weekends so that she receives pay those weekends, unless it schedules around other employees' non-military leave requests.

Employers have obligations under both USERRA and the FMLA to notify employees of their rights.

Finally, USERRA also allows employees to take time off between leaving their civilian employment and reporting for duty. Congress intended to give an employee a sufficient amount of time to travel safely to the uniformed service site and arrive fit for duty. 20 C.F.R. §1002.74. What constitutes a sufficient amount of time depends on the particular circumstances, including the amount of notice received, the location of the reporting site, the length of the impending service, the time needed to rest, or the time needed to make necessary arrangements before reporting to duty. *Id.* Accordingly, employers may not be able to require employees to work right up until their deployment dates.

Family Members' Leave Rights with Call to Duty

When a soldier is called to active duty, USERRA will protect his or her employment. Deployment, however, does not affect only a soldier. It also affects that soldier's family. A spouse might need time to make alternative child care arrangements, perhaps with fairly short notice, or to obtain a power of attorney. Because of changes that went into effect in Janu-

ary and November 2009, the FMLA protects uniformed military personnel family members who need to take leave related to the call to active duty.

If a company meets the FMLA's 50-employee threshold, an employee with a spouse, son, daughter, or parent called to "covered active duty" in support of a contingency operation, as defined by the Department of Defense, may be entitled to 12 weeks of unpaid FMLA leave for certain purposes. This applies to (1) a member of the National Guard or reserves called to duty or currently serving active duty, or (2) active-duty military personnel deployed to a foreign country. The family member still must meet the FMLA eligibility requirements. He or she must have worked for the employer for at least 12 months, have worked 1,250 hours in the prior 12 months, and work at a site with at least 50 employees within 75 miles. 29 U.S.C. §2611(2). If an employer must abide by the FMLA and an employee is eligible for this type of leave, the next step is to determine whether a qualifying exigency arising from the employee's family member's call to or performance of covered active duty in support of a contingency operation.

An employee may elect but an employer cannot require an employee to use accrued paid vacation, annual leave, or personal time off during his or her military leave.

If an employee can foresee the need for qualifying exigency leave, the employee must provide notice "as soon as practicable, regardless of how far in advance such leave is foreseeable." 29 C.F.R. §825.302(a). An employer can and should have the employee provide a "Certification of Qualifying Exigency for Military Family Leave." 29 C.F.R. §825.302(c), Appendix D (Form WH-384). The certification requires the employee to provide the relevant military orders, or other military documents, and a statement regarding the amount of leave that the employee will need. An employee can take this leave intermittently. 29 C.F.R. §825.202(d). An employee on FMLA family-member military-related leave can use accrued time consistent with the company's policy. If a company has a properly drafted policy, an employer can require employees to use accrued paid time off while on FMLA leave. 29 C.F.R. §825.207.

In general, an employee may take leave for the following qualifying exigencies when a family member is called to duty.

(1) ***Short notice deployment:*** up to seven calendar days to address issues that arise from a deployment notice, if the notice arrives seven or fewer days prior to the deployment date;
(2) ***Military events and related activities:*** to attend events related to the deployment, including official military ceremonies, programs, or events, as well as family support or assistance programs sponsored or promoted by the military, military-service organizations, or the Red Cross;
(3) ***Childcare and school activities:*** to make or change childcare or school arrangements necessitated by the deployment;
(4) ***Financial and legal arrangements:*** to make or update legal or financial arrangements to address a servicemember's absence while deployed, which could include, among others, obtaining power of attorney, updating a will, changing bank account signature authority, and to allow a family member to act on behalf of the covered servicemember to obtain, arrange, or appeal military service benefits. This leave can be taken for up to 90 days past the deployment;
(5) ***Counseling:*** "To attend counseling provided by someone other than a health care provider for oneself, for the covered military member," or a soldier's family member, if the need for counseling arises from the deployment; and
(6) ***Additional activities:*** to address other events arising from the deployment to which the employer agrees.

29 C.F.R. §825.126(a)(1)–(5), (8).

During or after the deployment, other qualifying exigencies may entitle an employee to this type of leave as a family member of a serviceperson.

Serving Military Duty

The soldier has actually left the building. Now what? Military leave of absence under USERRA is unpaid. However, USERRA merely establishes a floor, not a ceiling, for employment rights and benefits, and employers can always choose to be more generous than required. 20 C.F.R. §1002.7(c). Similarly, USERRA does not require preferential treatment of service members, other than that statutorily specified, and if an employer chooses to engage in it, it can revoke that treatment at its discretion. *See Crews*, 567 F.3d at 867 (observing that USERRA permits employers to provide greater benefits than statute requires, but holding that an employer did not violate USERRA by revoking a policy that gave Army National Guard members preferential work schedules because military employees are not entitled to better treatment). In revoking preferential treatment, however, employers should ensure that service members receive the same treatment as similarly situated employees.

An employee may elect but an employer cannot require an employee to use accrued paid vacation, annual leave, or personal time off during his or her military leave. 38 U.S.C. §4316(d). In contrast, USERRA regulations treat accrued *sick* leave differently, because "it is generally intended to provide income when the employee or family member is ill and the employee is unable to work." 20 C.F.R. §1002.153(a). Accordingly, whether an employee on military duty can use accrued sick leave depends on an employer's policy. If an employer permits use of accrued sick leave for any reason—not simply for illness—an employee can use sick leave while on military duty. *See Spadoni*, 2009 WL 449108, at *3–4 (holding that a school district was not required to allow a plaintiff unrestricted access to accrued sick leave while on military leave because the district's policy permitted employees to use sick leave for illness or injury only). Similarly, if an employer permits employees on comparable leaves of absence to exhaust accrued sick leave, then it must give employees on military leave the same access to their sick leave. *Id.*

An employee on military leave may also

be entitled to certain employment benefits while fulfilling his or her military obligation. USERRA deems a service member to be on a leave of absence from his or her civilian employer. 38 U.S.C. §4316(b)(1)(A). Thus, he or she is entitled to the same rights and benefits afforded to similarly situated employees on comparable leaves of absence. *Id.* at §4316(b)(1)(B); *see also* 20 C.F.R. §1002.150(b) (providing guidance for determining whether other types of leave are comparable to military leave). For example, if an employee on a personal leave of absence accrues vacation time, an employer must also permit an employee on military leave to do so as well. 20 C.F.R. §1002.150(c). Conversely, if an employee does not accrue vacation during nonmilitary leave, an employer need not allow a military leave taker to accrue that benefit. *Id.* USERRA treats holiday pay, bonuses, and other benefits similarly. For example, if an employer pays an across-the-board, year-end bonus that is not production-related, and employees on nonmilitary leave receive it, a company may need to pay that bonus to an absent soldier.

USERRA also has a special provision delaying pension contributions for an absent soldier until the employee returns to work. 20 C.F.R. §1002.259–1002.262.

> ***EXAMPLE:*** At year end, a company makes 401k-matching contributions and gives all employees a bonus. Although he has not received a payroll check in six months, an employee in the reserves deployed to Afghanistan sends an e-mail to the company asking the company to directly deposit the bonus check in his account. Whether the company should deposit the bonus check depends on whether employees on FMLA, worker's compensation or other comparable leaves will receive the bonus. The company must treat the reservist as it treats everyone else. The company, however, does not have to make 401k-match or other pension contributions until the employee returns to work.

An employee on military leave, on his or her election, is also entitled to continue health insurance coverage for him- or herself and any dependents during his or her military leave for up to 24 months. 38 U.S.C. §4317. Who pays the insurance premium—the employer, the employee, or some combination of the two—depends on the length of the military leave. For a leave of 30 days or fewer, such as weekend duty or summer training, an employer cannot require an employee to pay more than his or her regular share for health coverage. 38 U.S.C. §4317(a)(2). On the other hand, for more than 30 days leave, an employer can require an employee to pay the entire premium amount, the employer's share plus the employee's share, plus a two percent administrative fee. *Id.*

While a soldier is on leave, his or her family members also have special FMLA rights for rest and recuperation leave. Specifically, if a covered servicemember obtains short-term, temporary, rest and recuperation leave during deployment, a family member may take up to five days of leave to spend time with him or her. 29 C.F.R. §825.126(a)(6). As with other FMLA leave, this leave would add to the family member's vacation or paid time off, although an employer can certainly require that an employee use accrued time off, consistent with company policy.

Returning to Work

The general rule under USERRA is that an employer must promptly reinstate an employee who left a job to fulfill a military obligation. 38 U.S.C. §4312. Reinstatement is the default, and an employer should assume that it will reinstate an employee. This reinstatement right is so strong that even if an employee tells his or her employer that he or she does not intend to return to work but later changes his or her mind, the company must reinstate that employee. 20 C.F.R. §1002.152. To be eligible for reemployment under USERRA, an employee must satisfy four criteria: (1) the employee or appropriate military office gave the employer advance notice of the employee's military service, (2) the cumulative length of all the employee's military-related absences, current and previous, from this employer totals no more than five years, (3) the employee returns to work or applies for reemployment in a timely manner, and (4) the employee's military discharge has not disqualified him or her from future service or occurred under other than honorable conditions. 38 U.S.C. §4304, 4312(a); 20 C.F.R. §1002.32. Although a company can require a returning employee to provide documentation to confirm his or her reemployment eligibility, if the documentation does not exist or is not immediately available, a company cannot deny or delay reemployment. 38 U.S.C. §4312(f)(3)–(4).

As mentioned, an employee must report back to work or submit an application for reemployment in a timely manner after completing his or her service. Whether he or she must simply report to work or submit an application and the deadline for doing so depends on the length of his or her military duty. If leave lasted 30 days or fewer, an employee must simply report to work at the next regularly scheduled shift, following safe travel and eight hours of rest. 38 U.S.C. §4312(e)(1)(A). Following a leave of more than 30 days, a returning employee must reapply, verbally or in writing. *Id.* at §4312(e)(1)(C), (D). The deadline for the application depends on the length of the leave: 14 days for leaves of 31 to 180 days and 90 days for longer leaves. *Id.*

Not surprisingly, certain circumstances may extend these deadlines. For example, a hospitalized employee or an employee recovering from a military service-related injury has until the end of his or her convalescence to report or reapply. An employee may extend this deadline for a maximum of two years from the date on which he or she completed military duty, absent circumstances beyond the employee's control. 38 U.S.C. §4312(e)(2); *see also* 20 C.F.R. §1002.115 (permitting additional time to report or reapply if an employee can show that it was impossible or unreasonable to report or reapply within the allotted time through no fault of his or her own).

Failing to report or reapply in a timely manner does not necessarily result in automatic forfeiture of the right to reemployment. 38 U.S.C. §4312(e)(3). Rather, a returning employee then becomes subject to a company's established rules, policies, and practices concerning absences from work. *Id.* In denying reinstatement, even after the deadlines have passed, an employer should carefully consider how it treats other employees who have failed to report to work for a similar amount of time. *Id.* If an employer has never fired an employee for not showing up to work, it should think twice before not reinstating a soldier who missed a reporting deadline.

EXAMPLE: A reservist has been on leave for four months. The company finds out from the reservist's ex-wife, who also works for the Company, that the reservist has been back a week. The reservist shows up to work on the sixteenth day after his return. Although the reservist may have missed the 14-day reapplication deadline, the company should make sure it has all the facts and not simply the ex-wife's version before deciding what to do.

Failing to report or reapply in a timely manner does not necessarily result in automatic forfeiture of the right to reemployment.

In addition, USERRA requires "prompt" reinstatement. 38 U.S.C. §4301(a)(2). The particular circumstances of each case dictate what is considered prompt reinstatement. 20 C.F.R. §1002.181 (stating that an employer should reinstate an employee "as soon as practicable under the circumstances of each case"). Absent unusual circumstances, reemployment within two weeks of an application is adequate. 20 C.F.R. §1002.181; *see also Petty v. Metropolitan Gov't of Nashville-Davidson County*, 538 F.3d 431, 440 (6th Cir. 2008) (holding that an employer violated USERRA in not promptly reemploying veteran in a three-week period).

Generally speaking, an employee is entitled to return to (1) the position that he or she would have occupied but for his or her military leave in terms of seniority, status, and rate of pay known as the "escalator principle", (2) his or her pre-military service position, or (3) any other position that is the nearest approximation of either the "seniority escalator" or pre-military service positions. 38 U.S.C. §4313; 20 C.F.R. §1002.196–1002.197 (explaining the priority of reemployment positions). This may require an employer to displace an employee hired or promoted to replace an absent soldier. The "escalator principle," however, may not always benefit an employee. For example, if an employee would have been laid off during his or her military leave and that layoff status continued after his or her date of reemployment, he or she will retain layoff status. 20 C.F.R. §1002.194.

There are three exceptions to USERRA's general rule requiring reemployment. Even if an employee is eligible for reemployment, a business has no obligation to reemploy him or her if (1) the circumstances have changed so that reemployment is impossible or unreasonable, (2) assisting the employee in becoming qualified for reemployment would impose an undue hardship on the employer, or (3) the pre-service position was only for a brief, nonrecurrent period and the employee had no reasonable expectation that the employment would continue indefinitely or for a significant period of time. 38 U.S.C. §4312(d)(1). However, in all reinstatement decisions, employers should keep in mind that USERRA is designed to get soldiers back to work.

After Returning to Work

When an employee has returned to work, USERRA provides certain benefits and protections. First, if an employee participates in an employer-sponsored pension plan, the employer needs to determine his or her pension status. For purposes of participation, accrual, and vesting of benefits, a plan must treat the returning employee as having been continuously employed. Although USERRA does not require an employer to make pension contributions on behalf of an employee while he or she is on military leave, on his or her return employer contributions generally become due. If employer contributions are contingent upon employee contributions, an employer does not have to contribute its share until an employee makes his contributions. 20 C.F.R. §1002.262. Although not required, an employee may make up pension contributions that he or she missed while on leave. Should he or she choose to make up these contributions, the employee has the earlier of three times the length of the most recent period of service, five years, or as long as he or she is employed, to make the contributions. *Id.* If an employee fails to make up contributions in a timely way, the employer's match never becomes due.

In most cases involving employment benefits, an employer must treat an employee as if he or she had been at work during his or her military leave: "The returning veteran 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." *Fishgold*, 328 U.S. at 284–85. While this "escalator principle" certainly applies to an employee's status under a union contract, an employer needs to apply it to benefits affected by length of service as well, such as vacation benefits, vacation priority rights, or transfer rights. 20 C.F.R. §1002.210. Similarly, a returning employee is entitled to be reinstated in an employer's health plan without a waiting period or preexisting condition exclusions. 20 C.F.R. §1002.168(a).

The DOL's regulations clearly adopt this escalator principle for FMLA eligibility. For a returning soldier, an employer must count the military service in determining whether that employee meets the 12-month employment threshold. 29 C.F.R. §825.110(b)(2)(i). Additionally, in assessing the FMLA's 1,250-hour requirement, an employee counts "the hours of service that would have been performed *but for* the period of military service," generally based on the pre-leave work schedule. 29 C.F.R. §825.110(c)(2).

After the deployment ends, the family members of a serviceperson also continue to have military FMLA rights. For a 90-day period after a deployment ends, a family member can take qualifying exigency leave to attend arrival ceremonies, reintegration briefings and events, and other official ceremonies. *Id.* at §825.126(a)(7). Additionally, a family member may take qualifying exigency leave to address issues that arise from the death of a covered military member while on active duty. *Id.*

After reinstatement, the strongest USERRA benefit may be "for cause" discharge protection. Under USERRA, an employer cannot terminate a soldier whose most recent military duty lasted more than 30 days for a certain period of time after reinstatement. If an employee's military duty lasted between 31 and 180 days, the employee is protected for 180 days from discharge, except "for cause." 38 U.S.C. §4316(c)(1). For military duty of more than 180 days, the "for cause" discharge protec-

tion lasts an entire year. *Id.* at §4316(c)(2). A "for cause" termination may result from the employee's misconduct or the application of other legitimate, non-discriminatory reasons. 20 C.F.R. §1002.248. However, if an employer terminates an employee for a conduct-related reason, the employer bears the burden of proving that (a) it is reasonable to discharge the employee for the conduct in question, and (b) the employee received notice, express or implied, that the conduct would constitute grounds for termination. *Id.*

Litigating a USERRA Case

In many ways, USERRA-related claims resemble garden-variety federal employment claims. The plaintiff can sue in federal court, is entitled to a jury trial, and can recover the same types of damages available under the FMLA, the Age Discrimination in Employment Act (ADEA) or the Fair Labor Standards Act—for example, back pay, reinstatement, front pay, liquidated damages, or attorneys' fees. With that said, in a number of aspects litigating USERRA-related issues will not resemble garden-variety federal employment claims.

USERRA Administrative Proceedings

USERRA provides for an administrative proceeding similar to that involved in an Equal Employment Opportunity Commission (EEOC) charge in Title VII, Americans with Disabilities Act and ADEA cases. A soldier can file a written complaint with the Secretary of Labor. 38 U.S.C. §4322. The Veterans' Employment and Training Service (VETS), a DOL agency, has investigatory responsibility, complete with subpoena power. 38 U.S.C. §4322, 4326. If VETS concludes that a violation occurred, it will attempt to negotiate a suitable resolution with the violating employer. If the VETS negotiation fails, the attorney general can pursue a claim on the soldier's behalf. Even if the VETS does not find a legal violation, the soldier can request that the attorney general review the complaint. 38 U.S.C. §4323. The attorney general must then decide whether to sue on the soldier's behalf.

This administrative proceeding under USERRA is unlike the EEOC process in an important way: a soldier does not need to engage in the administrative process first as a prerequisite to filing a lawsuit. A soldier may initiate a lawsuit without applying to VETS for assistance or, if he or she does, even if VETS does not find a legal violation. 38 U.S.C. §4323(a)(3); 20 C.F.R. §1002.304.

Statutes of Limitations

Unlike most federal employment statutes, USERRA contains no statute of limitations and expressly prohibits a court from applying a state statutory limitations period. 38 U.S.C. §4327(b); *see*, *e.g.*, *Potts v. Howard Univ. Hosp.*, 598 F. Supp. 2d 36, 39–40 (D.D.C. 2009) (holding that a plaintiff's USERRA claim was not barred by the D.C. Code's three-year statute of limitations). Given this lack of a statute of limitations, an employer's only defense to a stale USERRA claim is the equitable doctrine of laches. The laches argument, however, is often difficult to establish because an employer must show both that the soldier's delay in filing suit was inexcusable and the delay has prejudiced the employer's defense (*i.e.*, witnesses have died, documents have been lost, *etc.*). *See*, *e.g.*, *Maher v. City of Chicago*, 406 F. Supp. 2d 1006, 1030–31 (N.D. Ill. 2006) (finding eight-year delay in filing lawsuit was reasonable because plaintiff feared retaliation and employer did not demonstrate any prejudice resulting from delay), *aff'd*, 547 F.3d 817 (7th Cir. 2008); *McLain*, 424 F. Supp. 2d at 336–37 (concluding doctrine of laches did not bar USERRA claim because employer failed to demonstrate any prejudice resulting from three-year delay).

USERRA Forums

In choosing a forum, a soldier can file an USERRA action against a private employer and the attorney general can file against a public employer in any United States district court for any district in which the employer maintains a place of business. 38 U.S.C. §4323(b)–(c). A soldier pursing a claim against a state employer must sue in state court. 38 U.S.C. §4323(b)(1). Not surprisingly, whether an employer can compel arbitration of a USERRA claim depends on the jurisdiction. Many courts have held that a USERRA claim can be subject to mandatory, binding arbitration if the claim falls within the scope of the arbitration agreement. *See Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006) (finding that USERRA's statutory language and legislative history did not preclude arbitration of USERRA claims); *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008); *Kitts v. Menard, Inc.*, 519 F. Supp. 2d 837 (N.D. Ind. 2007); *Klein v. City of Lansing*, 2007 WL 1521187 (W.D. Mich. 2007); *Will v. Parsons Evergreene, LLC*, 2008 WL 5330681 (D. Colo. 2008); *but see Breletic v. CACI, Inc.*, 413 F. Supp. 2d 1329 (N.D. Ga. 2006) (holding that a USERRA claim was not subject to mandatory arbitration because USERRA preempted arbitration the agreement); *Lopez v. Dillard's Inc.*, 382 F. Supp. 2d 1245 (D. Kan. 2005) (holding that USERRA superseded an arbitration agreement and thus an employer was not entitled to compel binding arbitration of USERRA action).

USERRA contains no statute of limitations and expressly prohibits a court from applying a state statutory limitations period.

Analytical Framework of a USERRA Claim

The framework for analyzing USERRA discrimination and retaliation cases diverges from the traditional *McDonnell Douglas* framework used in other federal employment cases. *See Gagnon v. Spring Corp.*, 284 F.3d 839, 854 (8th Cir. 2002) (explaining the difference between the burden-shifting framework used in Title VII cases and USERRA cases); *Fannin v. United Space Alliance, L.L.C.*, No. 6:07-cv-1315, 2009 WL 928302, at *7–*8 (M.D. Fla. 2009) (distinguishing USERRA's burden-shifting framework from the *McDonnell Douglas* framework). Under USERRA, a soldier bears the burden of proving that "a status or activity protected by USERRA was one of the reasons that the employer took action against him or her." 20 C.F.R. §1002.22. As codified,

(a) In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was

motivated by one or more of the following:

(1) Membership or application for membership in a uniformed service;
(2) Performance of service, application for service, or obligation for service in a uniformed service;
(3) Action taken to enforce a protection afforded any person under USERRA;
(4) Testimony or statement made in or in connection with a USERRA proceeding;
(5) Assistance or participation in a USERRA investigation; or,
(6) Exercise of a right provided for by USERRA.

20 C.F.R. §1002.23(a)(1)–(6).

A soldier need only show that one of these six activities was a substantial or motivating factor and not necessarily the *sole* motivating factor.

As with other employment discrimination claims, a court may reasonably infer discriminatory motive from a variety of factors, such as temporal proximity between the military service and the adverse employment action, inconsistencies between an employer's proffered reason for the decision and other actions it has taken, an employer's expressed hostility toward members of the armed services together with knowledge of the employee's military service, and an employer's disparate treatment of servicepersons compared with similarlysituated employees not serving in the military. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir. 2002). If a soldier meets his or her burden, an employer must prove by a preponderance of the evidence that it would have taken the same employment action anyway. 38 U.S.C. §4311(c); 20 C.F.R. §1002.22–1002.23; *Madden v. Rolls Royce Corp.*, 563 F.3d 636, 638 (7th Cir. 2009) ("if the defendant had two reasons for taking an adverse action against the plaintiff, one of them forbidden by the statute and the other not, and the defendant can show that even if the forbidden one had been absent the adverse action would still have been taken, the plaintiff loses."); *Velasquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 17 (1st Cir. 2007) ("under USERRA, the employee does not have the burden of demonstrating that the employer's stated reason is a pretext [as is the case with *McDonnell Douglas*]. Instead, the employer must show, by a preponderance of the evidence, that the stated reason was *not* a pretext; that is, that 'the action *would* have been taken in the absence of service.'").

A failure to reemploy claim is similar to strict liability in that discriminatory intent is irrelevant. *Jordan v. Air Products and Chemicals, Inc.*, 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2002); 20 C.F.R. §1002.33. A soldier need only show that he or she was eligible for, but was denied, reinstatement. Fortunately, USERRA provides employers with several affirmative defenses to these claims. *See* page 50 *supra* (listing three exceptions to USERRA's reemployment requirement); 38 U.S.C. §4323(d).

The other issue to keep in mind when litigating an USERRA claim is that case law has developed about prior statutes, which might control your issue. "In enacting USERRA,… Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA." 20 C.F.R. §1002.2; *see also Crews*, 567 F.3d at 864 (noting the effect of previously developed case law). Accordingly, when reading a pre-USERRA case that sounds either helpful or hurtful, remember to review the language of that prior statute to make sure that it is consistent with USERRA.