

# UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)





# USERRA BRIEFING OUTLINE

- Background
- Prerequisites to coverage
- USERRA protections
- Possible employer defenses
- Who to contact if you have a USERRA-related issue



# USERRA BACKGROUND INFORMATION

- 38 USC 4301-4335, enacted in 1994
- Congressional intent:
  - encourage citizens to engage in military service by minimizing disadvantages to civilian careers;
  - provide for prompt reemployment to one's civilian job after military service; and
  - prohibit discrimination based on military service.
- USERRA protects military service members/veterans from employment discrimination on the basis of their service, and allows them to regain their civilian jobs following a period of uniformed service.



# USERRA BACKGROUND INFORMATION

- Implementing authority is the Department of Labor (DOL)
- DOL: 1-866-4-USA-DOL (1-866-487-2365)
- [www.dol.gov/vets/](http://www.dol.gov/vets/)



# USERRA BACKGROUND INFORMATION

In general, USERRA:

- Prohibits employment discrimination based on past, current, or possible future military service
- Protects reemployment rights for persons absent from employment because of military service
- Preserves benefits for persons absent from employment because of military service



# PREREQUISITES FOR COVERAGE

- Civilian job
- Absence due to military service
- Advance notice to employer
- Military service cannot exceed 5 years\*
- Separation under Honorable conditions
- Report back in a timely manner



# CIVILIAN JOB

- Claimant must be “employed by someone else”
- USERRA does NOT cover persons who are:
  - Self-employed
  - Employed for brief, non-recurrent periods
  - Independent contractors\*; or
  - Students (there are USERRA-like protections for students under 20 U.S.C. § 1091c)



# ABSENCE DUE TO MILITARY SERVICE

- “Service in the uniformed services” includes:
  - Active and Reserve components of the Armed Forces of the United States (to include National Guard duty under Federal authority - Title 10 & 32);
  - Public Health Service;
  - As designated by President in emergencies
  - Voluntary or involuntary call-ups;
  - Intermittent disaster response service/training
- USERRA does NOT cover National Guard duty in purely state status.





# ADVANCE NOTICE TO YOUR EMPLOYER

- Notice can be either verbal or written  
BUT  
Should be in writing to protect all parties
- No time frame specified in USERRA  
BUT  
Regulations recommend at least 30 days prior
- Exception to notice requirement:  
“military necessity” or “unreasonableness”

# MILITARY SERVICE CANNOT EXCEED 5 YEARS

- The 5 Year Rule: USERRA protections do not apply if period of military service exceeds 5 cumulative years

BUT

- The 5 year rule does NOT include:
- IDT, AT, involuntary recall or retention, partial mobilization, presidential selected reserve call-up, full mobilization; OR
- Periods of military service with previous civilian employer; a separate 5-year clock exists for each employer.



# DISCHARGE CHARACTERIZATION

No USERRA rights if:

- Dishonorable or Bad Conduct Discharge (enlisted)
- Dismissal (officers)
- Under Other Than Honorable Conditions discharge
- Officer dropped from rolls



# TIMELY REPORTING

- Up to 30 days: Report to work after safe travel + 8 hours
- 31 - 180 days: Submit reemployment application w/in 14 days
- 181 days or more: Submit reemployment application w/in 90 days
- Failure to meet timelines: Normal employer rules apply



# TIMELY REPORTING

Disabled or Impaired due to military service:

- Have up to 2 years to request reinstatement
- Employer must make “reasonable accommodations,” unless doing so results in an undue hardship



# USERRA PROTECTIONS

- Protection from discrimination due to military status
- Prompt reemployment and training
- Accrued seniority
- Health insurance coverage
- Special protection from discharge

# ANTI-DISCRIMINATION PROVISION

“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 in a uniformed 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 . . . .”



# BENEFIT OF EMPLOYMENT

“[A]ny advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement, or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.”





# PROMPT REEMPLOYMENT

- USERRA: An employee who meets the criteria “upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment.”



# ESCALATOR PRINCIPAL

Increasing employee seniority, concurrent with military service:

- Employee returns to the seniority escalator at same level as if had remained continuously employed



# SENIORITY

“A person who is reemployed under this chapter 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 in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.”



# PROMPT REEMPLOYMENT

- USERRA: “a position of employment”
  - Period of service up to 90 days
  - Period of service over 90 days
- Training for the position
- Disability: Another position which is equivalent – or the nearest equivalent – in seniority, status, or pay



# HEALTH INSURANCE COVERAGE

A Servicemember who has health a insurance plan through a civilian employer may continue coverage for the shorter of the following time periods:

- 24-month period beginning on date of service-related absence; or
- Period beginning on date of service-related absence and ending on date employee fails to return to employment under USERRA guidelines



# HEALTH INSURANCE COVERAGE

A Servicemember who elects to continue coverage must pay the following depending on length of military service:

- Service under 31 days: regular employee share of premiums
- Service over 31 days: no more than 102% of the full premium under the plan
  - Employee share
  - Employer share
  - 2% administrative costs



# SPECIAL PROTECTION FROM DISCHARGE

Grace Period – Can't be discharged from employment (except for cause)

- < 30 days – no grace period
- 31-180 days – 180 day grace period
- >180 days – 1 year grace period



# MISCELLANEOUS PROTECTIONS

SOME “LITTLE KNOWN FACTS.”

- Employee can't be forced to use vacation time to perform military service
- Employer, not employee, responsible for covering employee's shift or job (i.e. finding replacement)
- Pension Benefits:
  - Time performing military service counts toward pension “time” requirements;
  - Soldier must make contributions, if part of plan





# EMPLOYER DEFENSES

- Employer Change in Circumstances [Impossibility Defense]
- Undue Hardship on Employer
- Brief and Non-recurrent Employment
- Burden of Proof: On employer

# USERRA POCS

- DOL-VETS
- ESGR
- Local SJA Office



# DEPARTMENT OF LABOR – VETERANS' EMPLOYMENT AND TRAINING SERVICE (DOL-VETS)

- U.S. Department of Labor  
Frances Perkins Building  
200 Constitution Avenue, NW  
Washington, DC 20210
- 866-4-USA-DOL (1-866-4-USA-DOL)
- Website: [www.dol.gov/vets/](http://www.dol.gov/vets/)



# EMPLOYER SUPPORT OF THE GUARD AND RESERVE (ESGR)

- Primary initial point of contact
- Employer Support of the Guard and Reserve  
4800 Mark Center Drive, Suite 05E22  
Alexandria, VA 22350-1200
- Phone: 800-336-4590 Option 1
- Website: [www.esgr.mil](http://www.esgr.mil)



# PRIVATE LAWSUIT TO ENFORCE USERRA

A Servicemember who does not to use ESGR, VETS, or Attorney General assistance (or is unsuccessful with these entities) can file a private lawsuit (no exhaustion of administrative remedies required)

- State employee, file suit in Federal court (DOJ must prosecute the case)
- Private employee, file suit in Federal court
- Federal employee, special rules apply



# LEGAL ASSISTANCE ATTORNEY (JAG)

- Contact legal assistance JAGs for informational purposes only.
- AR 27-3: legal assistance attorneys cannot take action which could be construed as representation on a USERRA case. DOL and DOJ WILL NOT pursue relief in a USERRA case if the service member is represented by an attorney.
- Legal assistance attorneys (if allowed) may assist with redress exclusively in State courts or State agencies.



# CONCLUSION

- Know USERRA rights and obligations
- Keep the unit and employer informed
- Know who to contact if you have USERRA-related problems or issues