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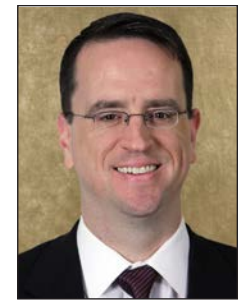

After 20 Years of USERRA, Employers Still Struggle with Employing National Guard/Reserve Members

If you are not familiar with employers' responsibilities under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) with respect to the employment of members of the National Guard or Reserves (i.e., reserve component members), you are not alone. According to a survey conducted by the Department of Defense's Manpower Data Center, 45 percent of employers who did not employ reserve component members said they did not fully understand their obligations under USERRA (Title 38 U.S.C. 4301-4335). Out of the surveyed employers who *did* employ reserve component members, only 26 percent felt they knew everything about USERRA that they needed to know in order to comply with the law.[1]

So why the dearth in awareness about the employment rights of reserve component members? It is not as though the concept behind USERRA—that reserve component members should not be penalized in the civilian workforce for serving their country—is new. Last October 13 marked the 20th anniversary of when President Bill Clinton signed the law. But it only bolstered service members' employment rights that had already existed, beginning with the Selective Training and Service Act in 1940 and then the Veterans' Readjustment Assistance Act, otherwise known as the Veterans' Reemployment Rights Act.[2]

Reserve component members do not serve in the military full time. They annually participate in military training and could be activated and deployed for months, posing unique challenges for their civilian employers. According to the RAND Corporation, private sector employers (excluding nonprofits, self-employment, and family businesses) accounted for 53 percent of the civilian employment of reserve component members who work full time. Nineteen percent of reserve component members work for the federal government.[3] Federal active duty service under Title 10 or Title 32 of the U.S. Code is covered by USERRA.[4] Additionally, many states provide employment protections for reserve component members reentering the workforce.

Due to their military obligations, employees who serve in the National Guard or Reserves tend to be absent more frequently and unpredictably than non-reserve component employees. The United States' recent military campaigns in Iraq (i.e., Operation Iraqi Freedom) and Afghanistan (i.e., Operation Enduring Freedom) heavily relied on reserve component members and, by extension, their employers. During Operations Desert Storm and Desert Shield in the early 1990s, the total number of active-duty days for reserve component members peaked at 44.2 million, whereas it reached a zenith in 2005 at 68.3 million days. During the Iraq troop surge in 2007, the total number of active-duty days reached 56.3 million and, by 2010, it had fallen to 37.2 million days.[5]

USERRA Basics

USERRA applies to all employees, public and private, regardless of size, so long as the employer "pays salary or wages for work performed or has control over employment."[6] The law does not protect service members who separated from the military with a dishonorable or bad conduct discharge or who were separated under other than honorable conditions.[7] USERRA's protections fall into four main categories, which are examined below. They include: (1) protections against discrimination based on military duty; (2) reemployment protections; (3) protections of the employees' rights, benefits, and seniority; and (4) protections against reprisal for asserting their rights under USERRA.[8]

Discrimination

Military obligation discrimination disputes are the most common type of USERRA dispute confronted by employers, accounting for 40 percent of the USERRA cases opened in fiscal year 2012 by the U.S. Department of Labor's Veterans' Employment and Training Service (DOL VETS).[9] The law prohibits employers from denying "initial employment, reemployment, retention

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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."[10] The act also prohibits employers from retaliating against people who assert their USERRA rights, which could include filing a USERRA complaint with DOL VETS or filing a lawsuit in federal court.[11]

USERRA initially did not protect reserve component members from hostile work environments, which are prohibited under other anti-discrimination laws such as Title VII of the Civil Rights Act, as the 5th U.S. Circuit Court of Appeals held in *Carder v. Cont'l Airlines, Inc.*[12] But the Veterans Opportunity to Work (VOW) to Hire Heroes Act of 2011 overruled this decision and added a hostile work environment protection provision to USERRA.[13]

Importantly, the U.S. Supreme Court in *Staub v. Proctor Hosp.* ruled that employers can be held liable for discriminatory employment actions prohibited by USERRA when a supervisory employee who lacks the authority to make employment action decisions—and who holds a discriminatory animus toward reserve component members—influences the decision-maker behind an adverse employment action. Under the so-called "cat's paw liability" theory, the court said, "if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[14]

Reinstatement

Reinstatement disputes are also a very common type of USERRA dispute confronted by employers, accounting for 27 percent of the USERRA cases opened by DOL VETS in fiscal year 2012.[15] So long as certain pre- and post-deployment notification requirements are satisfied and the cumulative length of absence for service in the uniformed services does not exceed five years, employers must re-employ qualified individuals who have returned from authorized leave for uniformed service.[16] Prior to leaving for uniformed service, employees must provide written or verbal notification of their orders to their employers.[17] The amount of time employees have to report to employers for re-employment, upon returning from active duty, depends on the duration of their uniformed service. The reporting deadline can be as long as 90 days for periods of uniformed service exceeding 180 days, 14 days for periods between 31 and 180 days, and fewer days for periods of less than 31 days.[18] Workers hospitalized or recovering from service-related injuries or illnesses are subject to a two-year reporting deadline.[19]

USERRA requires employers to re-employ service members to "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform."[20] This USERRA provision is commonly referred to as the Escalator Principle. If the employee had been on active duty for more than 90 days, the employer can reemploy the service member to "a position of like seniority, status, and pay, the duties of which the person is qualified to perform."[21] USERRA exempts employers from this re-employment requirement when its "circumstances

have so changed as to make such reemployment impossible or unreasonable"; when the reemployment would impose an "undue hardship" on the employer; or when "the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."[22] As with an escalator, reinstatement status can go up or go down.

Unless employers have cause to terminate a reserve component member, they cannot discharge someone re-employed under USERRA for at least one year if his or her period of uniformed service lasted more than 180 days.[23] For periods of uniformed service more than 30 days but less than 181 days, employers must wait at least 180 days to discharge the re-employed person without cause.[24] So long as the employer reinstated a reserve component member with the "same salary, benefits, and other conditions of employment that he [or she] received before he [or she] left" for uniformed service, that employer—upon the start of re-employment—could notify the person of its intent to terminate him or her after USERRA's mandatory re-employment period expires. One federal appellate court observed that the re-employment section of USERRA calls for the qualifying individual to be "'re-employed on his return from his leave for 180 days, with the same seniority and other rights and benefits or lack of benefits that he had … before he left on his tour.' That is all [the statute] requires."[25]

Benefits of Employment

USERRA cases over the benefits of employment are usually closely related to reinstatement cases. Employers who re-employ reserve component members often fail to provide them with the proper benefits of employment; therefore making the reinstatement incomplete under the law.

The term "benefit of employment" encapsulates far more than the typical set of benefits negotiated over in job offers. This term 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." The term also includes the "terms, conditions, or privileges of employment, including any 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."[26]

Vacation, status, and pay rate were benefits of employment commonly disputed in USERRA cases opened by DOL VETS in fiscal year 2012.[27] Quite often, the problem is not that employers flat out deny returning reserve component members these benefits of employment; instead, they fail to provide the proper amounts of, or rates for, these benefits. USERRA requires employers to reinstate qualified reserve component members to the "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform."[28]

In other words, even if an employee is on military leave and in Afghanistan, the employer must provide the employee, upon his or her reinstatement, with the same amount of vacation time, seniority, and other benefits of employment as though he or she had been working at his or her desk the entire time. Resentment over USERRA's as-though-there-was-no-interruption-in-employment requirement often drives supervisors to harass or discriminate against reserve component members, particularly when it comes to promotions.

Retaliation

Similar to Title VII of the Civil Rights Act and other federal anti-discrimination laws, USERRA protects qualifying individuals who engage in covered activities, such as filing a complaint or lawsuit or participating in an investigation. These protections against retaliation are not exclusive to service members. USERRA specifically prohibits reprisals in the form of an "adverse employment action."[29] Looking at the case law of other civil rights statutes, the 7th Circuit Court of Appeals found "[m]aterially 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."[30]

Damages

USERRA's remedies are "essentially equitable in nature. … The statute does not allow for the recovery of damages for mental anguish, pain, or suffering."[31] Along with authorizing courts to order an employer to employ or re-employ a reserve component member, USERRA allows courts to order compensation for any loss of wages or benefits and, in cases with willful violations, an amount equal to the amount of any such lost wages or benefits as liquidated damages. Courts may also award to prevailing parties reasonable attorney fees, expert witness fees, and other litigation expenses.[32]

Re-employment USERRA cases can be extremely costly for employers. For instance, *Serricchio v. Wachovia Securities LLC, Prudential Securities, Inc.*, a USERRA re-employment case, resulted in an award of $1.6 million, which included $778,906 in damages following a jury verdict, $36,568 in prejudgment interest, and $830,107 in attorneys' fees and costs.[33]

USERRA cases involving the depravation of benefits can also be costly, especially in the aggregate. For example, in the federal sector, there is a type of USERRA case referred to as a "*Butterbaugh*" case after the U.S. Court of Appeals for the Federal Circuit case, *Butterbaugh v. Dep't of Justice.*[34] This case opened the federal government to substantial liability by holding that the Department of Justice, in accordance with Office of Personnel Management rules, improperly "require[d] federal employees to expend military leave days for reserve training days on which they were not required to work." This practice effectively denied service members a benefit of employment due to their military service in violation of USERRA. While the recovery for most reservists was modest on an individual basis, there have been thousands of such USERRA cases that have resulted in recovery for claimants since 2003.

Conclusion

Since its enactment in 1994, USERRA has helped thousands of reserve component members serve their country without sacrificing their civilian livelihoods. However, there remain far too

many out-of-work—and employed—reserve component members who should be benefitting from USERRA's protections. In 2013, Gulf War II veterans, many of whom continue to serve in the Guard and Reserves, remained unemployed at a far higher rate than their civilian counterparts.[35] ⊙

Endnotes

[1]S. Gates et al., Supporting Employers in the Reserve Operational Forces Era: Are Changes Needed to Reservists Employment Rights Legislation, Policies, or Program? RAND Corporation, National Security Research Division, 2013, 71-72.

[2]*Ibid*, xvi.

[3]*Ibid*, 44, Figure 4.1.

[4]38 U.S.C. § 4303(13).

[5]*Ibid*, 3, Figure 1.1.

[6]38 U.S.C. §4303(4)(A).

[7]38 U.S.C. §4304(1)(2).

[8]38 U.S.C. §4311-4319.

[9]U.S. Department of Labor Veterans' Employment Training Service, USERRA: FY2012 Annual Report to Congress, December 2013, 11.

[10]38 U.S.C. §4311(a).

[11]38 U.S.C. §4311(b).

[12]C*arder v. Cont'l Airlines, Inc.*, 636 F.3d 172 (5th Cir. Tex. 2011).

[13]P.L. 112-56(251).

[14]*Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (U.S. 2011).

[15]U.S. Department of Labor Veterans' Employment Training Service, USERRA: FY2012 Annual Report to Congress, December 2013, 11.

[16]38 U.S.C. §4312(a)(1)(2).

[17]38 U.S.C. §4312(a)(1).

[18]38 U.S.C. §4312(e)(1)(A)(C)(D).

[19]38 U.S.C. §4312(e)(2)(A).

[20]38 U.S.C. §4313(a)(1)(A).

[21]38 U.S.C. §4313(a)(2)(A).

[22]38 U.S.C. §4313(d)(1)(A)(B)(C).

[23]38 U.S.C. §4316(c)(1).

[24]38 U.S.C. §4316(c)(2).

[25]*Hart v. Family Dental Group, PC*, 645 F.3d 561, 562 (2d Cir. Conn. 2011).

[26]38 U.S.C. §4311(a).

[27]U.S. Department of Labor Veterans' Employment Training Service, USERRA: FY2012 Annual Report to Congress, December 2013, 11.

[28]38 U.S.C. §4311(a)(1)(A).

[29]38 U.S.C. §4311(b).

[30]*Crews v. City of Mt. Vernon*, 567 F.3d 860, 869 (7th Cir. Ill. 2009).

[31]*Sutherland v. SOSi Int'l, LTD.*, 2007 U.S. Dist. LEXIS 58919 (E.D. Va. Aug. 10, 2007).

[32]38 U.S.C. §4323(d)(1)(h)(2).

[33]*Serricchio v. Wachovia Sec., LLC*, 258 F.R.D. 43, 44 (D. Conn. 2009); *Serricchio v. Wachovia Sec., LLC*, 706 F. Supp. 2d 237, 265 (D. Conn. 2010).

[34]*Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1337-38 (Fed. Cir. 2003).

[35]Kent A. Eiler, *The Dead Letter Veterans Preference Act: How the Federal Government Is Failing to Lead by Example in Hiring Veterans,* May 27, 2013, Creighton Law Review Accessed at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2175671.

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[18]*Railway Employees' v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).

[19]*Machinists v. Street*, 367 U.S 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961).

[20]*Harris v. Quinn*, 134 S.Ct. at 2630.

[21]*Abood v. Detroit Bd. of Ed.*, 431 U.S. at 212, 97 S.Ct. 1782.

[22]*Id*. at 212-213.

[23]*Harris v. Quinn*, 134 S.Ct. at 2631, quoting, *Abood*, 431 U.S. at 220-224.

[24]*Id*. at 2632.

[25]*Id*. at 2642.

[26]*Id*. at 2634 ("Consistent with this scheme, under which personal assistants are almost entirely answerable to the customers and not to the State, Illinois withholds from personal assistants most of the rights and benefits enjoyed by full-fledged state employees. As we have noted already, state law explicitly excludes personal assistants from statutory retirement and health insurance benefits. Ill. Comp. Stat., ch. 20, § 2405/3(f). It also excludes personal assistants from group life insurance and certain other employee benefits provided under the State Employees Group Insurance Act of 1971. *Ibid*. ('Personal assistants shall not be covered by the State Employees Group Insurance Act of 1971'). And the State 'does not provide paid vacation, holiday, or sick leave' to personal assistants. 89 Ill. Admin. Code § 686.10(h)(7))."

[27]*Id*. at 2638.

[28]*Id*. at 2636, quoting *Lehnert v. Ferris,* 500 U.S. 507, 556, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991).

[29]*Knox v. Service Employees*, 132 S.Ct. at 228; *see also*, *e.g., R.A.V. v. St. Paul,* 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Riley v. National Federation of Blind of N.C.,* 487 U.S. 781, 797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Wooley v. Maynard,* 430 U.S. 705, 713–715, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977).

[30]*Harris v. Quinn*, 134 S.Ct. at 2639, quoting, *Knox v. Service Employees,* 132 S.Ct. at 2288.

[31]*Id*., quoting, *Knox v. Service Employees,* 132 S.Ct. at 2288.

[32]*Knox v. Service Employees,* 132 S.Ct. at 2289.

[33]*Harris v. Quinn*, 134 S.Ct. at 2644.