

EMPLOYER AND EMPLOYEE OBLIGATIONS AND RIGHTS UNDER
THE UNIFORMED SERVICES EMPLOYMENT
AND REEMPLOYMENT RIGHTS ACT

By

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ABSTRACT

EMPLOYER AND EMPLOYEE OBLIGATIONS AND RIGHTS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

As more Reserve and National Guard troops are called to leave the civilian workforce and enter military service, employers must understand the legal rights those service members possess and the employers' legal obligations that are now required under The Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Current data and litigation trends suggest many employers are not fully aware of their legal obligations under USERRA and the punishing legal liability they may face. USERRA applies to virtually all employers and the law uniquely provides for both corporate and individual liability for discriminating against employees or applicants because of military service. This article gives an overview of the USERRA from the perspective of employers, employees, and potential employees. The article provides practical advice for those covered by the act and how best to adhere to this law as well as how to avoid liability under USERRA.

THE EXTENT OF MILITARY MOBILIZATION and RESULTING USERRA
PROTECTIONS

“About 500,000 of the 850,000 reservists and National Guard members who are eligible for duty have been mobilized since late 2001...”,¹ and more than 390,000 of these service members have now been released from active duty.² Ultimately, this has been “the largest call-up of reserves since the 1950-1953 Korean War.”³ Many Americans have been willing to place their lives, their families and their jobs on hold to answer the Nation’s call in time of war or crisis. In so doing, they risk their health, their lives, and their financial well-being.

Many of these reservists possess unique talents that are critical to both their civilian employer and the military. The data regarding the number of reservists who are key employees or who have highly specialized skills is largely anecdotal. However, survey information suggests that of the 826,000 reservists in the Selected Reserve (the main source of reserve personnel), between .8% and 3.3% of them probably hold key positions in small businesses. Further, given that more than 580,000 drilling reservists have been mobilized since the September 11 terrorist attacks, there may be as many as 20,000 small businesses which have “experienced financial losses or had significant problems managing their workloads or scheduling, or handling other interruptions to their operations.”⁴

While these service members have been called by their country in time of need, mobilizations have also resulted in disruptions and challenges for both the service member and their civilian employer. It is difficult for all parties to meet the needs of the nation, the reservists’ legal obligation to serve, and the needs of the employer. This is

especially true when reservists are typically mobilized for one year, but may be extended for an additional year. Furthermore, reservists may not be allowed to resign or retire from the military with the implementation of “stop loss” programs.

Ultimately, the employer’s attempt to hold service members’ positions open while they serve in the military can be expensive and disruptive of meeting corporate goals, demands, and the fiduciary responsibility to the company and its shareholders. An informal poll of 348 employers revealed 51% of employers would not hire a citizen-soldier “if they knew that a military reservist or National Guard member could be called-up and taken away from their job for an indeterminate amount of time.”⁵

However, this response and many other actions taken or not taken by employers are examples of violations of a federal law - The Uniformed Services Employment and Reemployment Rights Act (“USERRA”). Indeed, according to the Defense Department’s 2006 Status of Forces Survey, “nearly 11,000 reservists were denied prompt reemployment after they demobilized, and more than 22,000 lost seniority and rightful pay.”⁶

In addition to job loss, many reservists have experienced hostile working environments, as well as loss of promotions and pay. For example, from October 1, 1996 through June 30, 2005, there were 10,061 formal USERRA complaints filed by reservists with the Department of Labor.⁷ USERRA violations thus present an enormous problem not only for employee-service members, but also for employers and supervisors who are potentially exposing themselves to legal liability under USERRA.

USERRA: AN OVERVIEW OF THE LAW

USERRA was signed into law on October 13, 1994.⁸ The law expanded rights and benefits for employees and provided specific obligations for employers. The U.S. Department of Labor recently issued regulations that clarify its position on the rights of returning service members.⁹ As Secretary of Labor, Elaine L. Chao said, “These regulations will ensure that the seniority, promotion, health care, pensions and other benefits of our citizen-soldiers are protected when they return home to the jobs they left to serve our country.”¹⁰

In construing USERRA and previous laws regarding military service, the United States Supreme Court and other courts have stated:

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.¹¹

The congressional record indicates Congress intended USERRA to be broadly interpreted to protect service members’ jobs. “Restoring the citizen-soldier to the position he or she would have obtained had he or she remained continuously employed is the principle which undergirds the veteran's reemployment law.”¹²

Generally, the law is intended to minimize the disadvantages to an individual that occur when that person is absent from civilian employment to serve in the country’s uniformed services. The law seeks to ensure that those who serve their country retain their civilian employment. In addition, those employees also receive seniority and pay protection that provides them the same benefits they would have obtained had they

remained continuously employed. Finally, the law protects individuals from discrimination in hiring, promotion, and retention on the basis of present or future membership in the uniformed services.

More specifically, the law provides that a person who is a member of the “uniformed services” shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of membership, performance of service, or obligation.¹³ In addition, USERRA prohibits reprisals against any person who testifies or otherwise assists in the investigation or other proceedings under USERRA.¹⁴

The law applies to all U.S. employers, regardless of size. It applies to public, private, and federal employers. The law provides protection for all employees including those who occupy “professional, executive and managerial positions”¹⁵ as well as part-time, seasonal, and probationary employees. It allows necessary absences to perform voluntary or involuntary military duty, including active duty, training, and weekend drills.¹⁶

APPLICATION of USERRA to EMPLOYERS and EMPLOYEES

USERRA protects against discrimination in initial hiring decisions. If an employer has denied initial employment on the basis of the applicant’s membership, application for membership, performance of service, or obligation for service in the uniformed services, then the employer’s actions constitute violations of USERRA. An employer is also liable under USERRA if the employer withdraws a job offer because the job applicant is called to fulfill a uniformed service obligation. Consequently, while it is

not unlawful for a potential employer to ask a prospective applicant about his or her military experiences, these inquiries may be used to demonstrate evidence of unlawful discrimination.¹⁷

Current employees must generally provide their employers with written or verbal notice of their military service to receive USERRA protection.¹⁸ The laws protections apply whether the employee has volunteered for service or has been involuntarily called to service. It should be noted, however, that USERRA only protects employees when their absence due to military service is for less than five years.¹⁹ However, there are numerous exceptions to both of these rules, including when military necessity prevents the giving of notice.²⁰

After the employee is released from military service, the law provides time limits for their return to civilian employment. These time limits are based on the duration of the employees military service.²¹ Service members are allowed time to make the transition from military service back to their civilian employment. The longer the term of service, the longer the time employees have to transition.

To illustrate, USERRA provides that for military service of 1 to 30 days, an employee must report back to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of military service, after allowing for travel home from the military duty location and an 8 hour rest period. For military service of 31 to 180 days, an application for reemployment must be submitted no later than 14 days after completion of military service. However, for employees whose military service is 181 days or more, the employee has 90 days after completion of military service to submit an application for reemployment.²²

Thus to receive USERRA protection, employees must show that their application for reemployment is timely and that the five-year service limitation has not been exceeded. In addition, the employee's service must be characterized by the military as "honorable" and not otherwise disqualifying.²³

a) Job Placement, Rate of Pay, and "The Escalator Position"

Employees whose military service lasted from 1 to 90 days must be "promptly reemployed"²⁴ in their former position. For employees returning from military service of 91 days or more, USERRA requires employers to promptly reemploy the individual in the position he/she would have held if the employee's employment had not been interrupted, or in "a position of like seniority, status and pay."²⁵ Employees who are temporarily or permanently disabled due to military service must also be accommodated in a position that most nearly approximates their original employment position.

Prompt reemployment means as soon as practicable and generally must occur within two weeks of the employee's application for reemployment.²⁶ Also, "an employer does not have the right to delay or deny reemployment because the employer filled the service member's pre-service position and no comparable position is vacant, or because a hiring freeze is in effect."²⁷ Finally, the employer may not "refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee."²⁸

This reemployment protection is referred to as the "escalator position," which is a key concept in federal veterans' reemployment legislation. The escalator position requires the employer to allow each returning service member to actually step back on to

the seniority escalator at the point they would have occupied, if the person had remained continuously employed.²⁹ Therefore, the service member *does not* return to the position on the escalator he previously held, but rather “steps back on [the seniority escalator] at the precise point he would have occupied had he kept his position”³⁰ without interruption. The escalator position applies not only to employment position and seniority rights, but also to rate of pay.³¹ Therefore, returning employees are required to be paid at a rate they would have attained with reasonable certainty had they remained continuously employed.

Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee’s skills in situation where the employee is no longer qualified due to technological advances....

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation of status and pay that the person is qualified to perform....³²

Two recent cases illustrate these points. In the first case, the employee was fired after having served six months in the U.S. Marines. The federal court of appeals ruled there was sufficient evidence of possible USERRA violations based on evidence that his superiors complained and pressured him about the difficulty of rescheduling his shifts and that he was sometimes referred to at work as “G.I. Joe,” “little lead soldier,” and the “Girl Scout.”³³

In a second case the employee quit his civilian job after returning from military training and after having learned he had been demoted in his civilian job. A court found sufficient evidence to warrant a trial based on the fact that the employee’s demotion

occurred at a time close to his military service and that he was told the National Guard was filled with “Weekend Warriors.” In addition, one of the employee’s supervisors had stated that the employer should recruit more from state universities to reduce the employers exposure to military who might frequently be called on for service and have to take military leave. The court found these statements could be “interpreted as indicative of animus toward military personnel. . . .”³⁴

b) Pensions and Retirement Plans

Under the law, an employee’s military service is not to be considered a break in employment for pension benefit purposes.³⁵ Therefore, a person’s military service must be considered service for both vesting and benefit accrual purposes.³⁶ In addition, the employer is liable for funding any resulting obligation and the reemployed person is entitled to any accrual benefits from employee contributions.³⁷ Defined benefits plans, defined contribution plans, and profit sharing plans are all retirement plans covered under USERRA.

The employee has the right to make-up any missed contributions or matching contributions that would have been made if the employee had not been on active military duty. The employee has three times the duration of military service, but not to exceed five years, to make up contributions after reemployment.³⁸ To determine an employer’s liability or an employee’s contributions, the employee’s compensation during the period of military service is based on the rate of pay the employee would have received from the employer but for the period of absence for uniformed service.³⁹

c) Health Care Benefits

The law also provides for the continuation of health care benefits for employees and their dependents when employees are absent from work to serve in the military.⁴⁰ If the period of service is fewer than 31 days, the employee pays their normal share for health care coverage.⁴¹ After that, the employee may elect to continue the employer-provided health insurance for up to 18 months of military service. If the employee so elects, he or she could be required to pay up to 102% of the total health care premium.⁴² Generally, upon reemployment, a waiting period or exclusion cannot be imposed upon reinstatement of a health care plan for employees who are called to military service.⁴³

d) Protection from Discharge

In addition, the law also protects employees from being unjustly discharged. If an employee's period of military service was for more than 180 days, he or she can not be discharged without cause for one year after the date of reemployment.⁴⁴ If the employee's period of military service was from 31 to 180 days, he or she not be discharged without cause for six months after the date of reemployment.⁴⁵ Employees who serve less than 30 days are not protected from discharge without cause. However, like all employees, they are still protected from discrimination because of military service or obligations.

These protections ensure that the employee has a reasonable amount of time to get accustomed to the employment position after a significant absence. These protections also help to ensure that any post-service discipline or discharge will be justifiable, legitimate and not pre-textual. The employer bears the burden of proving that the discharge was based on the employee's conduct or was the result of some other legitimate, non-discriminatory reason that would have affected any employee.⁴⁶

Regarding all rights and benefits, it should also be noted that even if the employer provides additional benefits to employees who are performing military service, the employer is not excused from providing the other rights and benefits to which the employee is entitled under the USERRA.

KEY ISSUES FOR STAKEHOLDERS

a) The Employer

The economic costs of compliance with USERRA can indeed be significant for employers. As one commentator suggested,

While becoming familiar with the protections and consequences of USERRA, businesses will likely notice the absence of any real incentive, other than patriotism, for employers to hire or reemploy reserve or guard members. Similar to other discrimination statutes, USERRA speaks in mandates. But USERRA has such an economic impact on employers that it should also address the economic burden to employers. In an age when the bottom line means everything, employers may not see a business reason to offer and maintain jobs for guard and reserve members.⁴⁷

As outlined above, not only are employers responsible for rehiring the reservist and providing requisite benefits and promotions, but also they must ensure that the returning employee is not subject to a hostile work environment. That environment can be created by supervisors, managers or co-workers who may be resentful toward the returning soldier. Much like the language of Title VII of the 1964 Civil Rights Act, USERRA's benefits include freedom from a hostile work environment, and more.⁴⁸

Companies continue to hire reservists, but they also continue to make mistakes in handling USERRA issues. Such mistakes resulted in 2,500 USERRA-related cases being filed in 2007, down from 3,000 in 2006.⁴⁹ The one common mistake employers make is failing to realize they are required to rehire an employee who has been serving in the

military (for five years or fewer). Regardless of whether the employer has already filled the position, it is required by USERRA to give that employee's job back.⁵⁰

In order to steer well clear of any USERRA violations, employers should examine their policies to ensure that all company executives, managers and supervisors handle military reserves and National Guard issues appropriately. Proactive steps to ensure such compliance might include making information about the rights of military personnel readily available to all employees. Companies should also ensure that company officials and managers are trained on how to avoid USERRA violations. Managers should also consider having a meeting with the mobilized employee before deployment in order to review USERRA so the employee knows what his or her rights and obligations are as well as the rights and obligations of the employer.⁵¹

Mobilizations obviously create unexpected job vacancies and uncertainty associated with the duration of the mobilization. In a study conducted by the Congressional Budget Office, it was determined that while some businesses may be able to respond to the loss of personnel with little cost or disruption, others may experience slower production times, reduced or lost sales, or other expenses as they try to compensate for the absent reservist. Some firms may be incapable of operating without the employee and may thus incur financial losses or even insolvency. The problems may be most severe for:

- Small businesses that lose essential employees,
- Businesses that require workers with highly specialized skills, and
- Self-employed reservists.⁵²

Temporarily replacing employees can certainly be difficult and expensive. Furthermore, as war has become increasingly more sophisticated, there is a resulting need for employees with high tech skills. Modern soldiers with these necessary skills are more likely to be white collar workers. Their absence has the potential to create an even larger void for the employer.⁵³

b) Wounded Warriors

Employers are also likely to face significant challenges due to the numbers of reservists returning home with major injuries. “Here is the reality: more workers are absent from their jobs for extended periods of time than in any time since World War II. When they do return to work, a small but significant portion of them will have physical impairments and psychological problems that may, in addition to devastating personal consequences, pose thorny workplace challenges.”⁵⁴

Soldiers are being diagnosed with serious mental health disorders such as post-traumatic stress disorder, depression and anxiety. Tens of thousands of servicemen and women have been wounded in combat operations and the numbers continue to rise. While improvements and advances in medicine and protective gear have reduced the chances of death there is a resulting increase in the number of significant physical or mental impairments.⁵⁵

Furthermore, because soldiers are facing an enemy with sophisticated bomb-making ability, doctors and hospitals that treat wounded soldiers report “a sharp spike in the occurrence of traumatic brain injuries (TBIs) and amputations. Some 60 percent of troops wounded in Afghanistan and Iraq by explosions or bombs have TBIs. Frequently,

however, the injury is subtle and the effects much more insidious: mood disorders sleep disturbances, problems with organization, or sudden and unpredictable impulsivity.”⁵⁶

The resultant cost to the employer and to the health insurance provider may be significant.

c) Issues and Advice for the Reservist-Employee

Reservist should ensure they are informed of their rights and protections under USERRA. Most indications are that the military is doing a better job of providing the necessary information to Reservists. The Department of Defense and the Department (DoD) of Labor have taken steps to conduct outreach efforts to educate service members and employers about their respective responsibilities under the law. Much of the DoD’s outreach is accomplished through volunteers. The Labor Department meanwhile, conducts outreach through its investigators. There is evidence that the military is paying increased attention to educating soldiers on their USERRA rights. In the June 2006 Status of Forces Survey results, “[s]ervice members reported being briefed on USERRA an average of 1.8 times compared with 1.5 times in May 2004. Additionally, in May 2004, 27 percent of the service members reported that they had never been briefed on USERRA and in June 2006 that number had decreased to 21 percent.”⁵⁷

It is incumbent upon employees to keep their employers advised, to the extent possible, of upcoming training, mobilizations and deployments. Encouraging a partnership approach where employers are recognized by the reservist and the military for their enormous contribution to national defense may help to ease the transition once the mobilization tour ends.

Nevertheless, employees often encounter difficulty in returning to their old jobs. A reservist may seek to redress of USERRA violations by contacting the Department of Labor's Veterans' Employment and Training Service ("VETS"). The reservist will be required to complete a questionnaire that asks about the reservist's military information, the employer's information, and whether the claim relates to employment or reemployment discrimination. VETS will then conduct an investigation during which it is required to maintain a neutral position as "an advocate for the law [USERRA] and not either party in a complaint."⁵⁸

“If VETS determines the employer violated USERRA, VETS makes ‘reasonable efforts’ to ensure the employer is in compliance with the Act. Should VETS fail to convince the employer to comply with USERRA, it has the option, at the reservist's request, to refer the case to the United States Attorney's Office.”⁵⁹

LITIGATION CONSIDERATIONS

Being cavalier about compliance with USERRA may prove expensive for employers. Disputes involving USERRA claims may result in litigation. As mentioned above, VETS has the option to refer cases to the U.S. Attorney's Office. Meanwhile, the employee also has the option of filing a complaint directly against the employer. In such a private suit, no court costs or fees are charged to the reservist claiming rights under USERRA.⁶⁰

If an employer is found to have violated USERRA, the court may award damages. Such damages may include back pay and lost benefits. The court may also allow attorney fees, expert witness fees and other litigation expenses for successful employees.⁶¹

Further, for willful violations, the employee may be awarded, as liquidated damages, an amount equal to twice the amount of lost pay and benefits.⁶²

USERRA imposes liability for violations upon “any person... [who]...has control over employment opportunities” including “a person...to whom the employer has delegated the performance of employment-related responsibilities.”⁶³ Consequently, the Department of Labor has taken the position that supervisors and managers are included in the regulatory definition of employer under USERRA and they may be found individually liable for violating USERRA - just like the employer.

To prove a USERRA violation, the employee must produce either direct or circumstantial evidence of discrimination based on the employee’s status.⁶⁴ The employee is not required to show that his/her military status was the sole cause of the adverse action, but that “it is one of the factors that a truthful employer would list if asked for the reasons for its decision.”⁶⁵ Military status is thus a motivating factor if the employer “took into account, considered or conditioned its decision on that consideration.”⁶⁶

One circuit court has held that a “court can infer discriminatory motivation under USERRA from a variety of considerations, such as:

- [1] proximity in time between the employee’s military activity and the adverse employment action,
- [2] inconsistencies between the proffered reason and other actions of the employer,
- [3] employer’s expressed hostility toward members protected by the statute together with knowledge of the employee’s military activity, and

[4] disparate treatment of certain employees compared to the other employees with similar work or offenses.”⁶⁷

When the employee has met the initial burden, the burden then shifts to the employer to prove that the employee’s military activities or status was not a motivating factor in the adverse employment action, and that the employer would have taken the same action without regard to the employee’s protected status.⁶⁸

In one case before a federal district court, the employee, after having taken military leave to serve in the Army Reserves, received a “partially effective” rating in his performance evaluation. In ruling for the employee, the court noted the evaluation itself negatively referenced the employee’s military service and cited it as a cause for his poor performance.⁶⁹

PUBLIC POLICY CONSIDERATIONS

One significant outcome of not protecting the employment rights of the reservist-employee is that many prospective reservists may choose not to enlist or to serve. This in turn could have drastic implications for national security. As then Secretary of Defense William S. Cohen stated in his 1998 report to the President and Congress,

A quiet evolution has occurred within the Total Force since the end of the Cold War. During the Cold War, the Reserve components were structured to contain and, if necessary, defeat the Soviet Union and its allies. In the post-Cold War era, the Reserve components now comprise a greater percentage of the Total Force and are essential partners in a wide range of military operations, from smaller-scale contingencies to major theater wars.

Guard and Reserve forces provide trained units and individuals to fight in wartime and to support the complete spectrum of DoD peacetime operations. Today, Reserve component forces are fully integrated into all war plans, and no major military operation can be successful without their participation.⁷⁰

Thus it is not only the employee but also society which has much to lose if employers fail to comply with their legal obligations under USERRA. Fundamentally, the Pentagon recognizes that using reservists “inextricably links the defense of this nation to employers.”⁷¹ National Security, therefore, depends on employer compliance with USERRA and the associated encouragement that it provides to employees to continue to serve.

Nevertheless, the Federal government should consider incentivizing employer support by adopting measures designed to minimize the adverse impact on businesses which may be facing the extended absence of employees.

a) Mitigating the Effects of Reservists' Activations

In order to lessen the adverse effects of call-ups, “two broad approaches are available: Policymakers could enact legislation, or DoD could change its policies within the authorities currently provided by legislation.”⁷² These broad approaches, however, would require resolving the potential conflict between the employee’s goal of protecting his or her employment, the military’s goal of recruitment and the employer’s goal of minimizing economic costs.

There are several potential measures which could be considered to mitigate the undesirable effects of mobilization of reservists. Such options could include:

1. Compensating businesses through tax credits or direct payments,
2. Subsidizing loans to employers,
3. Providing or subsidizing call-up insurance for businesses, or

4. Exempting certain reservists from call-ups.⁷³

While the first three options may prove expensive to taxpayers, they could arguably lessen the impact on employers and further each stakeholder's goals. The options would at least partially offset financial losses for firms with mobilized employees. Also, these measures might "increase employers' support for reservists' military service, which could in turn encourage more individuals to either join or remain in the reserves. Moreover, if mechanisms could be developed so that DoD faced more of the costs associated with call-ups, it would then be better able to evaluate the most cost-efficient mix of reserve and active-duty personnel. In particular, it might have an incentive to recruit civilians whose absence from their positions would pose less cost to employers and thus decrease any amounts DoD might pay in compensation."⁷⁴

RESULTS OF USERRA

USERRA represents the latest attempt by Congress to protect and strengthen veterans' employment and reemployment rights. This law and the specific protections discussed above will help ensure veterans will be able to return to their civilian employment without penalty or discrimination after having honorably served their country.

¹ B. Slavin, Reserve Troops Facing Job Woes, *USA Today*, Dec. 8, 2006, pg. 1.

² Gaudio, B. (2006), New Rules Protect Military Service Members, National Federation of Independent

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- Business (NFIB), Retrieved January 28, 2008, from , http://www.nfib.com/object/IO_26046.html.
- ³ B. Slavin, Reserve Troops Facing Job Woes, *USA Today*, Dec. 8, 2006, pg. 1.
- ⁴ Golding, H. (2007, May 17). CBO analyst testimony: The effects of reserve call-ups on civilian employers, before the Commission on the National Guard and Reserves. Washington, DC: Congressional Budget Office. Retrieved February 15, 2008, from <http://www.cbo.gov/ftpdocs/81xx/doc8114/05-17-ReserveCallUps.pdf>
- ⁵ K. Jowers, Employers Now Reluctant to Hire Reservists, *Army Times*, 67(28), January 29, 2007, pg. 25, quoting
“Workforce Management Magazine.”
- ⁶ K. Jowers, Reservists Fare Bureaucracy “Maze” In Job-Rights Fight, *Army Times*, 68(21), November 26, 2007, p. 30.
- ⁷ Report of Brenda S. Farrell, Director, Defense Capabilities and Management, USGAO, to Sen. Edward Kennedy, para. 2.a. (January 9, 2008). Retrieved February 15, 2008 from <http://www.gao.gov/htext/d08397r.html>.
- ⁸ 38 United States Code (U.S.C). § 4301 - 4334.
- ⁹ 20 CFR Part 1002.
- ¹⁰ Gaudio, B. (2006), New Rules Protect Military Service Members, NFIB, Retrieved January 28, 2008, from http://www.nfib.com/object/IO_26046.html.
- ¹¹ See Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 285 (1946), cited in Alabama Power Co. v. Davis, 431 U.S. 581, 584-85 (1977); King v. St. Vincent’s Hosp., 502 U.S. 215, 221 n.9 (1991); Also see, Hill v. Michelin N. Am., Inc., 252 F.3d 307, 312-13 (4th Cir. 2001) and McGuire v. United Parcel Serv., 152 F.3d 673, 676 (7th Cir. 1998).
- ¹² Uniformed Services Employment and Reemployment Rights Act, H.R. 995, 103d Cong., 1st Sess. (1994).
- ¹³ 38 U.S.C. § 4311 (a).
- ¹⁴ 38 U.S.C. § 4311 (c) (1).
- ¹⁵ Federal Register, December 19, 2005, 70 (242) pg. 75253.
- ¹⁶ Id.
- ¹⁷ Id. at pg. 75298.
- ¹⁸ 38 U.S.C § 4312 (a) (1).
- ¹⁹ 38 U.S.C. §4312 (c).
- ²⁰ For example, 38 U.S.C. § 4312 lists twelve exceptions to the five year cumulative service protections.
- ²¹ 38 U.S.C. § 4312 (e).
- ²² Federal Register, December 19, 2005, 70 (242) pg. 75302.
- ²³ 38 U.S.C. § 4304. Separation from service with a dishonorable or bad conduct discharge, under other than honorable conditions, dismissal as a commissioned officer or being dropped from the rolls are statutory examples of disqualifying service.
- ²⁴ 38 U.S.C. § 4313 (a).
- ²⁵ 38 U.S.C. § 4313 (a) (2) (A).
- ²⁶ Federal Register, December 19, 2005, 70 (242) pg. 75270.
- ²⁷ Id.
- ²⁸ Federal Register, December 19, 2005, 70 (242) pg. 75304.
- ²⁹ Rogers v. City of San Antonio, 392 F. 3d 758, 763. The requirement that the service member be reemployed in the escalator position is now codified in § 4313 of USERRA.
- ³⁰ Id.
- ³¹ Id.
- ³² A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA), The U.S. Department of Labor Veterans’ Employment and Training Service, April 2005.
- ³³ Carlos Velazquez-Garcia v. Horizon Lines of Puerto Rico, 473 F.3d 11, 13 (1st Cir. 2007).
- ³⁴ Patton v. Target Corporation, 2007 U.S. Dist. LEXIS 20712, 18 (Dist. Oregon 2007).
- ³⁵ 38 U.S.C. § 4318 (a) (2) (A).
- ³⁶ 38 U.S.C. § 4318 (a) (2) (B).
- ³⁷ 38 U.S.C. § 4318 (b) (1) and 38 U.S.C. §. 4318 (b) (2).
- ³⁸ Id.

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- ³⁹ 38 U.S.C. § 4318 (b) (3) (A).
- ⁴⁰ 38 U.S.C. § 4317.
- ⁴¹ Federal Register, December 19, 2005, 70 (242) pg. 75305.
- ⁴² 38 U.S.C. § 4317.
- ⁴³ Id.
- ⁴⁴ 38 U.S.C. § 4316 (c) (1).
- ⁴⁵ 38 U.S.C. § 4316 (c) (2).
- ⁴⁶ Duarte v. Agilent Technologies, Inc. 366 F. Supp. 2d 1039, 1046 (D. Colo. 2005).
- ⁴⁷ Crotty, M. (2008) The Uniformed Services Employment and Reemployment Rights Act and Washington State's Veteran's Affairs Statute: Still Short on Protecting Reservists from Hiring Discrimination, 43 *Gonz. L. Rev.* 178 at 189.
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- ⁵⁰ Id.
- ⁵¹ Id.
- ⁵² Heidi Golding, Principal Analyst for the CBO in statement on The Effects of Reserve Call-Ups on Civilian Employers, before the Commission on the National Guard and Reserves (May 17, 2007) found at: <http://www.cbo.gov/ftpdocs/81xx/doc8114/05-17-ReserveCallUps.pdf>
- ⁵³ Lee, K. S. (2008) "When Johnny Comes Marching Home Again" Will He Be Welcome at Work?, 35 *Pepp. L. Rev.* 247 at 250-51 (citing Jennifer Merrit, Sorry, The Boss Is In Baghdad, *Bus. Wk.*, Feb. 17, 2003, at 74).
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- ⁵⁶ Id.
- ⁵⁷ See Farrell, supra note 7.
- ⁵⁸ See Crotty, supra note 47, at 178.
- ⁵⁹ Id. at 178-179.
- ⁶⁰ Id. at 179.
- ⁶¹ 38 U.S.C. § 4318 (h).
- ⁶² 38 U.S.C. § 4323 (d).
- ⁶³ 38 U.S.C. § 4303 (4) (A) (i).
- ⁶⁴ Coffman v. Chugach Support Servs., Inc., 411 F. 3d 1231 (11th Cir. 2005); See also, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).
- ⁶⁵ Id. at 1238.
- ⁶⁶ Brandsasse v. City of Suffolk, VA., 72 F. Supp. 2d 608, 617 (E.D. Va, 1999).
- ⁶⁷ Coffman, 411 F. 3d at 1238.
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