USERRA Guidance:
Critical Issues and Tips for Those Employing Servicemembers

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USERRA Guidance:
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Since 1940 those who have answered the call to duty and honorably served in the national defense have enjoyed protections in their civilian employment. First with the Selective Training and Service Act of 1940, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (later renamed the Veterans' Reemployment Rights Act "VRRA"), and, currently, the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"),[1] Congress has sought to encourage non-career uniformed service by minimizing disadvantages to civilian careers. USERRA accomplishes this by minimizing the disruption to servicemembers and their employers by requiring prompt reemployment and prohibiting discrimination based upon an employee's uniformed service. Because USERRA is intended to protect the rights of servicemembers, it is construed broadly and "in favor of its military beneficiaries."[2]

The need for USERRA protections has been heightened by the events following 9/11. Nearly half of the uniformed servicemembers mobilized since 9/11 to combat terrorism, and engage in other contingency operations in furtherance of our national security, have been Reserve Component servicemembers. More than 910,000 Reserve Component servicemembers have been called to active duty since the terrorist attacks of 9/11, and many having been deployed multiple times. Thus, our national security is inextricably linked to providing our Reserve Component servicemembers stability in their civilian employment.

I. ELIGIBILITY FOR USERRA PROTECTION:

The first inquiry when considering a potential USERRA issue is whether the statute protects the employee. There are five basic requirements that must be satisfied to determine whether an employee is entitled to USERRA protections, each of which raises issues that may not be fully understood by employers. The servicemember must:

(1) be absent from a position of employment by reason of service in the uniformed services;

(2) provide the employer advance notice of the service;

(3) have five years or less of cumulative uniformed service with a particular employer;

(4) return to work in a timely manner after conclusion of service; and

(5) not have been separated from service with a disqualifying discharge.[3]

Absent From a "Position of Employment"…

Compared to other federal employment statutes, USERRA contains a very broad definition of employers who are covered, and is not limited to employers of a certain size.[4] Significantly, USERRA applies to entities that are not traditionally considered employers, such as plan administrators, unions, and even those who exert control over independent contractors, to the extent they control the terms and conditions of employment or the benefits provided to qualified servicemembers.[5] In certain circumstances, USERRA's obligations may be transferred to the successor-in-interest of the original employer if the servicemember would have remained employed by the successor had he remained continuously employed.[6] The position of employment includes applicants for initial employment, part-time and seasonal employment, management, and even co-owners, such as share-

Practice Tip 1: Callback Lists

A "position of employment" includes an employee's position on a callback list for employees laid off but subject to recall and reemployment. Thus, employers should ensure servicemember employees are maintained on such lists based on their seniority as though he was continuously employed during the uniformed service. Servicemembers, conversely, should "reapply" for reemployment to ensure compliance with USERRA and their recall position on the list once they return, even if the "reemployment position" is at that time unemployment.

holders/partners in professional organizations. It does not apply, however, to "brief, non-recurrent" positions of employment.[7]

… by Reason of "Uniformed Service?"

The statute's principal purpose is to protect civilian employment rights for employees who are called to perform uniformed service. This, of course, includes service in the various branches of the military, including the Coast Guard, and their reserve components – whether the uniformed service is "voluntary" or "involuntary."[8] It also protects those who are applicants for initial enlistment, even if they fail to pass the initial examination or training.[9] But it also includes some nontraditional services, such as uniformed service in the Public Health Service (PHS), Federal Emergency Management Agency (FEMA), and the National Disaster Medical System (NDMS).[10]

Uniformed service *not* protected by USERRA includes National Guard members activated for state service.[11] However, many states, including Minnesota, have enacted state statutes extending USERRA protections to guard members called up for state service, even if the servicemember is called up for duty by another state.[12]

Convalescence from injuries suffered or aggravated during military service, whether or not seeking treatment at the Veterans' Administration, is not "uniformed service." However, Minnesota recently granted employees of the state and its political subdivisions the right to unpaid leave-of-absence while convalescing from an injury or disease incurred during active military service.[13] Furthermore, for private employers, unpaid convalescence leave may be required as an accommodation under the disability provisions of USERRA, the ADA and/or FMLA.

"Prior Notice" to Employer

Another provision often misunderstood is the "prior notice" the servicemember must provide his employer. This notice may be *written or verbal* – an employer may not require written notice or documentation as a condition of USERRA-mandated benefits or reemployment.[14] There is no requirement regarding how far in advance the notice must be provided, only that it be provided prior to the next scheduled shift.[15] Indeed, it is often the case that servicemembers themselves are provided very little advance notice of uniformed service. And, of course, there are exceptions excusing the servicemember from providing such notice due to military necessity or where it is impossible or unreasonable.[16]

Practice Tip 2: Contractors

Although the regulations state that USERRA does not apply to independent contractors, the issue is not so simple for many employers. First, designating someone an independent contractor is not dispositive of the issue. Instead, the regulations make clear that a six-factor "economic realities" test, similar to that used in considering the issue under the FLSA, is applied. Second, even where the servicemember is a true "independent contractor" under this test, USERRA obligations extend to anyone who has "control over [the servicemember's] employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities." For instance, in *Silva v. DHS*, 112 M.S.P.R. 362 (2009), although the claimant was a contractor to the DHS, the MSPB found that his allegations were sufficient to establish that "DHS exercised control over his reemployment to such an extent that it should be considered his 'employer' under USERRA." Therefore, to the extent an employer exerts "control over employment opportunities" of non-employee servicemembers, it may be considered an "employer" subject to USERRA.

Practice Tip 3: Documentation

Although an employer may not require documentation from a servicemember to preserve her USERRA rights, if the employer offers additional benefits, which are expressly permitted under the statute and encouraged by ESGR, those benefits may be conditioned upon receipt of documentation. Such additional bene-fits may be differential pay, employee discounts, or pension plan contributions during uniformed service, as long as a more favorable leave of absence benefit is not provided to other non-military employees. When administering such a plan, the employer should be careful to not adversely discriminate against service-member employees, and confirm that the employee understands that failure to satisfy those conditions placed upon those benefits will in no way affect the benefits and rights under USERRA.

The content of the notice need not express a desire to return to a position of employment, only that the employee will be absent from employment due to uniformed service.[17] Indeed, since the servicemember

cannot waive USERRA rights in advance, the notice may be in the form of an explicit resignation – the servicemember is still entitled to reemployment after uniformed service under USERRA.

Five-Year Cumulative Limit on Service Duration

USERRA provides that an individual may serve up to five years in the uniformed services, in a single period of service or in cumulative periods totaling five years, per an employer, and retain the right to reemployment by the pre-service employer.[18] This, too, is a provision frequently misunderstood by employers because of the numerous exceptions to the five-year limit. For instance, any involuntary service does not count against this limit, nor do voluntary activations for most of the counter terrorism and global contingency operations since 9/11, including, specifically, those in Iraq and Afghanistan.[19] Furthermore, there have been numerous operations requiring activation of reserve component servicemembers that have been deemed exempt from this limit. Thus, the five-year limit is rarely an obstacle to reemployment rights under USERRA, and the employer should be careful before invoking this as a reason to refuse reemployment.

A rather unique issue has arisen regarding civil service employees, where a servicemember has frequently volunteered for exempt, as well as non-exempt, service, but has not exceeded the five-year limit. Interestingly, these cases have applied a factor-based analysis to determine whether the servicemember has essentially elected to make the military a "career," in which case she has chosen to not pursue her civilian employment as a career.[20] The rationale for these decisions relies upon the preamble to USERRA, which states that "The purposes of this chapter are …to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service."[21] Thus, if an employee is actually pursuing a career in the military, notwithstanding the fact that they are part of the reserve components, they risk losing their reemployment rights—even if they have not reached the five-year aggregate limit.[22]

Practice Tip 4: ESGR Assistance

ESGR is mandated to assist civilian employers on various issues involving their servicemember employees. As a part of the Department of Defense, the ESGR may be able to provide guidance to employers to determine whether a particular employee has exceeded this five-year limit, as well as confirm other information necessary to determine USERRA eligibility, such as type of discharge. Contact ESGR (www.ESGR.mil) if you have any such inquiries.

Practice Tip 5: Employee Discounts

The author had one case which demonstrates the risk in tying benefits to USERRA eligibility. The employer provided very favorable discounts to its servicemember employees and their families. The employee provided copies of orders to retain his position as an employee on a military leave of absence status, even though his continuous service extended far beyond five years. Significantly, the employee's status under USERRA could not be determined definitively until (and unless) the employee returned from uniformed service and applied for reemployment. Although such benefits are in addition to those required by USERRA, tying such benefits to eligibility under USERRA would not be advisable. Instead, the author suggests that employers should tie eligibility for such benefits to some other standard.

When is Service Disqualified?

There are various types of discharges that are available to a servicemember, depending upon whether he is a commissioned officer or enlisted. Typically, a discharge that is the result of misconduct is disqualifying when it comes to USERRA reemployment rights.[23] However, a servicemember may obtain a retroactive upgrade of his discharge, thus qualifying him for reemployment under USERRA.[24]

Practice Tip 6: Documentation

There may be situations where an employer believes a servicemember has a disqualifying discharge, but has not received the proper documentation, or suspects the documentation has been falsified. ESGR is able to provide assistance to employers seeking specific information regarding the type of discharge for their employee. The employer should not deny or delay reemployment unless it has confirmed the servicemember is not entitled to USERRA protection.

Timely Return to Work? Depends on Length of Service

The timeline for the servicemember to return to work depends upon the length of the uniformed service. The issue that most frequently arises involves service of thirty days or less, in which case the employee

must report back to work the next day after service, safe transportation and eight hours of rest.[25] For service 31-180 days, the service-member must return to work within 14 days. If the service was 181 days or more, the servicemember has ninety days to apply for reemployment. However, any reapplication deadline may be extended up to two years due to convalescence.[26]

Practice Tip 7: When's the Next Shift?

Employers should inquire regarding when and where their servicemember employee will be released from duty. This will determine whether the servicemember can be required to report to duty for the next scheduled shift.

Notwithstanding the employee's deadline to apply for reemployment, if she decides to seek reinstatement earlier, the employer must reemploy her "promptly" upon request.[27] Depending on the length of service, this may mean "immediately" or within days, but *not* weeks or months.[28]

Finally, where the servicemember fails to return to work before the deadline, he does not necessarily lose his reemployment rights. Instead, the employer must apply its regular disciplinary process.

II. WHAT ARE AN EMPLOYER'S OBLIGATIONS UNDER USERRA?

The statute provides *four* general rights and obligations for the employer once USERRA protections are established under the criteria described above: First, the servicemember must be promptly reemployed at the "escalator position" and is entitled to any other benefits and protections under USERRA. Second, employers are prohibited from discriminating against an employee based upon an employee's service. Third, anybody, civilian or servicemember, is protected from retaliation. Fourth, the employer must post USERRA protection notices in their workplace.

Practice Tip 8: "Most Favorable" LOA?

Employers should review their leave-of-absence policies to determine whether there are "more favorable" leave of absence policies for non-military employees. For instance, full pay for jury duty, maternity leave, etc. If so, the servicemember employees must be provided the most favorable policies.

Practice Tip 9: Rehire Before You Fire!

Employers who believe a returning servicemember may be subject to termination for cause should be careful about the procedures used under USERRA. The standards are different for claims regarding reemployment and discrimination. If the service-member satisfies the five requirements for USERRA protection, the employer must reemploy the servicemember to the escalator position before proceeding with any disciplinary proceedings. This is so even if the employer suspects, but does not then know, the employee may have engaged in misconduct that would result in termination – the employer must "promptly" reemploy the servicemember.

USERRA: The "Floor"

USERRA requires the employer to provide the service-member the *most favorable* policies or conditions of employment available to *any* other employee on a "leave of absence" or similar status.[29] Furthermore, regardless of any state law, local ordinance, collective bargaining agreement, or contract, the employer may provide additional protections or benefits to servicemember employees.[30] However, no employer may provide less than what is required under USERRA.

Reemployment Rights and Protections: "Escalator Position"

The crux of USERRA is the requirement that the servicemember be reemployed at the same position she would have had if she had remained continuously employed during the period of uniformed service – the "Escalator" position.[31] USERRA entitles a returning servicemember 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."[32] USERRA protects seniority-based rights, including supervisory status, location, hours/shifts, and opportunity for promotion or for assignments. The escalator position is determined by the "reasonable certainty" test – not "absolute" certainty – regardless of whether it involves "discretionary" and "nondiscretionary" benefits or personnel actions.[33] The "escalator" position may require retraining and/or requalification, which is the employer's responsibility *after* reemploying the servicemember.[34] Given the economic realities of businesses, the escalator may also go down, as expressed in the regulations: "Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated."[35] Consequently,

a careful assessment should be conducted to evaluate what the employee's position and benefits would have been had she been continuously employed during the uniformed service.

Even if employer suspects that a servicemember's conduct while on uniformed service would be cause for termination, it is advisable to strictly apply the reemployment provisions and promptly reemploy the servicemember if she is qualified under the five factors. Under circumstances where the servicemember meets the five requirements under USERRA, the employer should reemploy the servicemember, and *then*, if advisable, apply its disciplinary procedures.[36] Any delay in reemployment may be a USERRA violation, regardless of whether the servicemember could have been discharged for cause after being reemployed.

Reemployment obligations would be meaningless if the employer could terminate the employee at will. Therefore, once an employer reemploys the servicemember it is prohibited from terminating the servicemember except for cause for six months after the date of reemployment if the period of uniformed service was for 31 to 180 days, [37] and one year after the date of reemployment if the period of military service was more than 180 days.[38] Cause, under the statute, is not only misconduct on the part of the employee, but also includes layoffs or elimination of the position, as long as the cause is the result of legitimate nondiscriminatory reasons.[39]

Reemployment may be Excused

Reemployment of a servicemember is excused if an employer's circumstances have changed so such that reemployment would be impossible or unreasonable. A reduction-in-force that would have included the servicemember would be an example.[40] Employers are excused from making efforts to qualify returning service members, or from accommodating individuals with service connected disabilities, when doing so would be of such difficulty or expense as to cause "undue hardship."[41] "USERRA defines 'undue hardship' as actions taken by the employer requiring significant difficulty or expense when considered in light of various factors such as "the overall financial resources of the employer."[42]

Commission-Based Positions

The escalator principle is applicable even in difficult situations such as a commissioned salesperson returning from an extended deployment. An interesting case exploring this situation is *Serricchio v. Wachovia Sec. LLC*[43] where the court concluded that the employer violated USERRA when it reemployed the servicemember at the same commission rate, but without the established book of business as when he left. The court, largely based upon the Secretary of Labor's amicus letter,[44] concluded that "Wachovia was not required to provide Mr. Serricchio his exact previous book of business so long as what it offered him gave him the opportunity to reenter the work force with comparable status and commission opportunity as of the date of reinstatement that he would have had had he not taken military leave, regardless of whether the same clients were in his substituted book of business provided on his return."[45] In such situations, careful consideration should be given to the servicemember's pre-service status and what is offered upon his return.

Missed Promotions

Missed promotions is another issue that arises frequently after an extended absence due to military service. What is the servicemember's "escalator position" when a servicemember missed a promotion during uniformed service? The regulations specifically reject the characterization of whether the promotion was "discretionary" or "nondiscretionary" as determinative.[46] Instead, the question is whether the service-member was "reasonably certain" to have received the promotion had she remained continuously employed.[47] If so, then the escalator position would be the promotion position. The same standard applies to discretionary promotions, but involves a more detailed analysis of the likelihood of the promotion given the various factors.

A related question is what are the employer's obligations when the servicemember missed an "opportunity" for a promotion. This typically involves a promotion, or placement on a promotion list, based upon a test or examination given while the employee was on a military leave of absence. "If a reemployed service member was eligible to take such a promotional exam and missed it while performing military service, the employer should provide the employee with an opportunity to take the missed exam after a reasonable

period of time to acclimate to the employment position."[48] The "reasonableness" of the period of time is subject to various factors.

Probationary/Apprenticeship Programs

One issue that arises when the employer has a probationary or apprenticeship program in place is the status of the returning servicemember who left midway through the program for the purpose of uniformed service. The regulations address this specifically, and provide that as long as the program is "bona fide and not merely a time-in-grade requirement," the returning servicemember picks up where he left the program and must continue to complete the program satisfactorily.[49] Once the program is completed, the servicemember must be provided all seniority-based benefits as if she had completed the program without having taken a military leave of absence.[50]

Vacation Days

Another common issue the author has seen concerns an employer's polices regarding the use of vacation or PTO days. Under USERRA, an employee's use of vacation days is completely up to the discretion of the servicemember – the employer is prohibited from mandating how the days are used.[51]

Documentation

There is no requirement that the servicemember provide documentation prior to taking a military leave of absence. The servicemember's only obligation is to provide documentation if he was absent for military service longer than thirty days, and even then it is only to establish the five requirements for USERRA protection under the guidelines described above. Once a servicemember applies for reemployment after uniformed service longer than thirty days the employer may require documentation specifically focused on confirming eligibility under the five requirements for USERRA protection.[52] However, the employer may *not* delay reemployment pending receipt of such documentation.[53]

Benefits: Health Plans

Under USERRA, an employer must continue to provide health care insurance coverage at no additional expense to the employee absent for uniformed service for thirty days or less.[54] If the uniformed service extends beyond thirty days, the employee may be charged up to 102% of the costs for the policy, up to 24 months.[55] The employer may not impose any exclusions for preexisting conditions (unless service connected), nor can it impose a waiting period.[56]

Practice Tip 10: Use of PTO

Frequently employers seek to schedule a service-member's days off from his civilian employment to correspond with his military training schedule – the employer should resist the temptation. Doing so may be considered an adverse employment action based upon the employee's uniformed service, and thus a violation of Section 4311. Conversely, an employer is not required to grant special scheduling requests by the servicemember to accommodate his military training schedule, beyond providing the required unpaid military leave of absence – although it may do so regardless of any contract, CBA, etc., that provides otherwise.

Practice Tip 11: Documentation

Too often the author has been made aware of employers demanding specific documentation that is not required under USERRA or does not exist, i.e. a letter signed by commanding officer, written "official" orders, etc.--sometimes to the point of unreasonable harassment. Such circumstances may later be cited as evidence of discriminatory motive by the employer. Employers should therefore train their managers and HR personnel regarding what is and is not required for documentation provided by a servicemember.

Practice Tip 12: Health Benefits

Recent case law suggests that a servicemember employee must affirmatively elect to discontinue health care coverage, otherwise the employer may back charge the employee upon reinstatement. Although the author believes this result is at odds with the general principles of USERRA, it is a good practice to clarify in writing the servicemembers' wishes regarding continuing health coverage during any extended military leave of absence to avoid any misunderstanding.

Benefits: Pension / Retirement Plans

USERRA has specific requirements regarding employer-provided pension and retirement plans. First, as previously noted, plan administrators are deemed to be "employers" under the statute. Furthermore, the plan cannot impose any break in employment service, nor forfeiture of benefits already accrued by the servicemember.[57] The military service must be considered service with the employer for vesting and benefit accrual purposes.[58] The employee cannot be made to requalify for participation once he returns. Furthermore, during his military service the employee cannot be made to make contributions.

Upon reemployment the servicemember has three times the length of his military service, up to five years, to make up the contributions.[59] If the servicemember was on a military leave of absence of more than ninety days, the employer's obligations to match its obligations can be delayed until the servicemember provides satisfactory documentation establishing his eligibility under USERRA.

In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate the liability of the plan for pension benefits accrued. If no allocation or cost-sharing arrangement is provided, the full liability for the retroactive contributions to the plan will be allocated to the servicemember's last employer before the period of military service or, if that employer no longer exists, to the overall plan.[60] Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment.[61]

The contributions are determined by what the service-member would have earned during his service or the earnings during the twelve months prior to service. [62] His military compensation cannot be used to determine contributions.[63]

Practice Tip 13: Accommodations

The reasonable accommodations necessary to comply with USERRA/ADA depend upon the circumstances. Some examples of accommodations for employees diagnosed with PTSD include:

- Alternate position or "light-duty" status;
- Flexible scheduling;
- Job restructuring;
- Work environment and policy modification;
- Interpersonal interaction modification;
- Complex assignments broken down into steps;
- Specialized or modified equipment and technology;
- More frequent work breaks;
- Allowing service animals in the workplace;
- Allowing time off for treatment;
- Work at home/telecommute; and
- Leave.

Practice Tip 14: PTSD Terminations

When terminating a servicemember employee, be sure to evaluate whether the servicemember has a disability which may have caused the performance-related issues that led to the termination. The author was assigned a case where the servicemember, a longtime and exemplary employee prior to deployment, was promptly given a promotion by his employer upon his return. However, due to sever PTSD incurred during his uniformed service, but not discovered until after his reemployment, his performance was clearly not satisfactory in the new position and he was eventually terminated. To the employer, the situation was merely a for-cause termination based upon poor performance. However, the termination was likely a violation of USERRA since the employer became aware of the disability and did not restart the reemployment process to determine the appropriate position for which the employee was qualified with reasonable accommodation.

III. USERRA DISABILITIES

It is without dispute that the frequent deployments and lengthy combat missions since 9/11 have taken their toll on the men and women who have served this nation so admirably. It is estimated that 52,281 servicemembers were wounded in action, 128,496 recorded cases of PTSD, and 307,282 cases of Traumatic Brain Injuries (TBI) across all branches of the military since 2001.[64] With nearly half of the uniformed services in the Reserve Components, service-members who are pursuing a civilian employment career, it is fair to say their civilian employers will increasingly have to deal with disability issues.

Although there is some overlap between USERRA and the ADA,[65] the former provides broader protections for a returning servicemember—most significantly in that USERRA requires placement of the service-member in the appropriate position, regardless of whether it is occupied by another employee. The USERRA disability protections are triggered for any disability incurred in, or aggravated during, uniformed service.[66] The disability does not have to be due to military service. However, a disability incurred between employment and uniformed service would not be covered.[67]

Disability and the Escalator Position

The servicemember must be reemployed in the "escalator" position, provided he is qualified or can be made qualified with reasonable effort by the employer.[68] To be qualified, the employee must be able to perform the duties of the position.[69] The employer is required to make reasonable efforts to qualify the servicemember for the escalator position. If not qualified, he must be placed in a position of equivalent seniority, status and pay. If not qualified for that, then the reemployment position which is the "nearest approximation" to that position.[70]

Hidden and Temporary Disabilities

Occasionally the servicemember may not realize that he is suffering from a disability, even though it was incurred in, or aggravated during, uniformed service.[71] For instance, in situations involving PTSD the condition may not be diagnosed until after the servicemember reports back to work. "If the disability is discovered after the service member resumes work and it interferes with his or her job performance, then the reinstatement process should be restarted under USERRA's disability provisions."[72]

A similar situation is where the disability is temporary rather than permanent. This may be PTSD or any injury that prevents the servicemember from performing the duties required by the escalator position until he has properly healed. Under these circumstances, the employee "may be entitled to interim reemployment in an alternate position provided he or she is qualified for the position and the disability will not affect his or her ability to perform the job. If no such alternate position exists, the disabled service member would be entitled to reinstatement under a 'sick leave' or 'light duty' status until he or she completely recovers."[73] Whether or not that position is occupied, the employee should be placed in that position. If no position exists, there is no obligation for the employer to create such a position. However, once the servicemember is qualified for the escalator position, with or without reasonable accommodation, the employer must move the employee to that position.

"Direct Threat" Situations

Occasionally an employee may exhibit violent tendencies due to a mental disorder, whether or not accompanied by PTSD, that legitimately causes concern for the employer. To establish a "direct threat" situation there must be "A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[74] Direct threat situations require "an individualized assessment of the individual's present ability to safely perform the essential functions of the job" based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[75] The burden of proof is on the employer. Factors in assessing a direct threat include (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.[76]

Practice Tip 15: Discrimination & PTSD

Employers should be leery of imposing any adverse employment actions against a servicemember who has, or is regarded as having, PTSD. Because of the popular myths that such veterans are violent, and may pose a risk to coworkers, managers may impulsively make a decision without proper fact finding. Even if the ADA does not apply, any adverse decision based upon a perception that servicemembers generally suffer from service-related PTSD, may be sufficient to find that it was partially motivated by the employee's uniformed service, and thus a violation of USERRA.

Practice Tip 16: Accommodations

When considering reasonable accommodations: •**Understand** the nature of an employee's disability, particularly in cases involving PTSD; •**Use caution** when discontinuing accommodations; •**Carefully consider** whether a communication is a request for reasonable accommodation; •**Request clarification** if an accommodation request is vague or incomplete; •**Engage in the interactive process** in good faith; •Use care when **disciplining employees** who may suffer from PTSD, and determine whether there is an obligation to investigate reasonable accommodations.

Practice Tip 17: Discrimination Evidence

The regulations and case law considering discrimination claims under USERRA recognize that direct evidence of discriminatory motive is often unavailable. In these situations, the courts will accept circumstantial evidence suggesting a discriminatory motive. Some of these factors include: temporal proximity between notice of uniformed service and employment action; negative comments regarding the military generally or the employee's uniformed service by supervisors and coworkers; treatment of other servicemembers in the same workplace; and qualifications of competing applicants for the position or promotion.

IV. DISCRIMINATION/RETALIATION

USERRA is clear that any discrimination based upon an employee's past, current or future military obligations is prohibited. However, many employers do not realize that they are violating USERRA when making employment decisions. Whether hiring, promotions, or termination decisions, employers routinely discriminate against servicemembers based upon their uniformed service. If uniformed service was "a motivating factor," the employer has the burden of proving it would have acted notwithstanding the employee's uniformed service.

Practice Tip 18: Investigate Complaints

With potential constructive discharge/hostile work environment claims under USERRA, and the repeal of any statute of limitations, employers should carefully investigate any claims by a servicemember who may have resigned as a result of (1) not being reemployed in an appropriate position; or (2) harassment from coworkers based on uniformed service. Notwithstanding your document retention policy, you should keep documentation relating to such investigations well beyond the typical SOL. Such claims may come back in litigation many years later making it significantly more difficult to defend.

Hostile Work Environment/Constructive Discharge

USERRA incorporates the "hostile work environment"[77] and "constructive discharge" concepts found in other employment statutes. In *Serricchio*, the court found the servicemember was constructively discharged where the employer failed to properly reemploy the returning servicemember in the appropriate "escalator" position. The servicemember worked solely on a commission basis and had built up a sizeable book of business before being called to service. During his absence, the employer split up his accounts among other sales staff, and offered the employee a position without any preexisting clients upon his return. The court found that this situation created an "intolerable work atmosphere" since "a reasonable person in the employee's shoes would have felt compelled to resign." Significantly, the servicemember repeatedly informed the employer that the reemployment position was not acceptable, which the employer ignored.

Retaliation

Like many employment statutes, any adverse action against an employee, whether the servicemember or another employee, for assisting or otherwise participating in an investigation or proceeding relating to a USERRA complaint, would be a violation of USERRA.[78]

Practice Tip 20: Contractual SOL?

Some employers have attempted to avoid the uncertainty of otherwise stale claims by including a contractual statute of limitations in the employment contract. Although USERRA preempts any law or contract that is inconsistent, two Courts of Appeal have allowed such terms, making a distinction between procedural rights, which can be waived in advance, and substantive rights, which cannot. Furthermore, it should be noted that the SCRA would not toll a contractual deadline to bring a claim during the employee's military service. However, the employers should be careful to not discriminate in applying such provisions to only servicemembers, and such a provision would be unenforceable if there is a more beneficial policy applicable to non-servicemember employees.

V. ENFORCEMENT

Servicemembers are encouraged to seek assistance from the ESGR Ombudsman program if they believe their employer violated USERRA.[79] The DoD is given this opportunity to resolve USERRA issues by virtue of a Memorandum of Understanding with the Department of Labor, which is the primary enforcement and rule making authority under the statute.

If mediation is unsuccessful, the servicemember will be referred to DOL-VETS for formal investigation.[80] If it is not able to resolve the situation, DOL-VETS may refer the case for prosecution by the Department of Justice ("DOJ").[81] If the DOJ is satisfied that a complaint is meritorious, it may file a court action on the complainant's behalf.[82] However, if the servicemember retains his own attorney at any point during this process, he will not be assisted by ESGR, DOL-VETS, or the DOJ in pursuing his claims.

Arbitration

Although the Eighth Circuit has yet to rule on whether pre-dispute agreements to arbitrate USERRA claims are enforceable, the Fifth, Sixth, Eleventh, and, just recently, the Ninth Circuits have found such agreements enforceable, relying upon the Federal Arbitration Act, 9 U.S.C. §§ 1-307 ("FAA") and the characterization of rights to bring a claim in court as "procedural."[83] This has led to efforts to have USERRA amended to

preclude enforcement of such provisions.[84] Courts finding them unenforceable rely upon USERRA's Section 4302(b)'s preemption of any laws or agreements that limit rights granted by the Act, therefore finding the right to court trial as "substantive."[85] However, even those courts that find arbitration clauses enforceable, and the right to bring the claim in court "procedural," may impose a heightened standard of whether the waiver of the right to bring a claim in court is "clear, convincing, specific [and] unequivocal," and will strike down the arbitration clause because it did not specifically reference rights under USERRA.

No Statute of Limitations

There is no statute of limitations for USERRA claims arising on or after October 8, 2008 based upon non-federal employment.[86] For claims arising prior to that date, the four-year statute of limitations applies.[87] However, the practitioner should be mindful of the fact that the SCRA may toll the statute of limitations during any periods of military service. Indeed, if the statute was tolled under the SCRA for a claim arising prior to October 8, 2008 until after that date, the claim would survive under the 2008 amendments.[88]

Damages

USERRA provides for the recovery of lost benefits and back pay, plus a doubling of that amount if the violation was willful.[89] "Willful" is not defined in Act, but the law's legislative history suggests that a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law. Willful violations may be proven by evidence that the employer's human resources manager knew of the obligations under USERRA, but the company failed to comply.[90] USERRA allows for, at the court's discretion, awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel.[91] Also, the law bans charging of court fees or costs against anyone who brings suit.[92]

VI. ESGR AND ITS MISSION

Established by Congress in 1972, the Department of Defense's Employer Support of the Guard and Reserve program ("ESGR") was formed to encourage support of civilian employers for their servicemember employees. ESGR is staffed by approximately 4,900 volunteers, of which the author is one, who are committed to strengthening the relationship between civilian employers and their servicemember employees. ESGR is often referred to as the principal advocate for employers within the Department of Defense. It provides training and briefings to employers and servicemembers regarding USERRA, neutral mediation services to resolve disputes or misunderstandings regarding USERRA's requirements, and recognizes employers who have demonstrated exceptional support. ESGR also provides free recruitment resources to employers seeking to hire servicemembers and their families. ESGR's website provides guidance and resources to both servicemembers and their civilian employers. (See www.ESGR.mil.)

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[1] 38 U.S.C. §§ 4301-4335.
[2] *Clegg v. Arkansas Dep't of Corr.,* 496 F.3d 922, 931 (8th Cir. 2007).
[3] 20 C.F.R. § 1002.32.
[4] The only employers exempt from USERRA are Native American tribes, Congress, and clergy.
[5] 20 C.F.R. § 1002.34.
[6] 20 C.F.R. §§ 1002.35-.36; see *Reynolds v. Rehabcare Group East Inc.*, 590 F.Supp.2d 1107 (S.D. Ia. 2008), adopting the Eighth Circuit's pre-USERRA analysis similar to Section 1002.35 in *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991).
[7] 38 U.S.C. § 4312(d)(1)(C).
[8] 38 U.S.C. § 4303(13).
[9] Id.; 20 C.F.R. § 1002.54.
[10] 38 U.S.C. § 4303(16); 20 C.F.R. 1002.58.
[11] 38 U.S.C. 4303(4); 20 C.F.R. § 1002.57(b); 70 Fed. Reg. 75,266.
[12] Minn. Stat. § 192.261, subd. 6.
[13] Minn. Stat. § 192.261, subd. 1.
[14] 38 U.S.C. § 4303(8); 38 U.S.C. § 4312(a)(1); 20 C.F.R. § 1002.85(c).
[15] 38 U.S.C. § 4312(a)(1); 70 Fed. Reg. 75,255 ("USERRA does not establish any brightline rule for the timeliness of advance notice"); 20 C.F.R. § 1002.85(d).
[16] 38 U.S.C. § 4312(b); 20 C.F.R. § 1002.86.
[17] 20 C.F.R. § 1002.88.
[18] 38 U.S.C. § 4312(c); 20 C.F.R. §§ 1002.99-.104.
[19] 20 C.F.R. § 1002.103.
[20] *Paisley v. City of Minneapolis*, 79 F.3d 722, 724 (8th Cir. 1996).
[21] 38 U.S.C. 4301(a)(1).
[22] See also *Woodman v. Office of Personnel Management*, 258 F.3d 1372 (Fed. Cir. 2001); *Moravec v. Office of Personnel Management*, 393 F.3d 1263 (Fed. Cir. 2004); *Gadue v. Office of Personnel Management*, 96 M.S.P.R. 285 (2004); *Erickson v. United States Postal Service*, 113 M.S.P.R. 41 (2010).
[23] See generally 38 U.S.C. § 4304; 20 C.F.R. §§ 1002.134 -.138; 10 U.S.C. §§ 1161(a), (b).
[24] 20 C.F.R. § 1002.138.
[25] 38 U.S.C. § 4312(e); 20 C.F.R. § 1002.115.
[26] 20 C.F.R. § 1002.116.
[27] 38 U.S.C. 4301(a)(2); 20 C.F.R. § 1002.180-.181.
[28] 70 Fed. Reg. 75,270 (Dec. 19, 2005).
[29] 20 C.F.R. § 1002.150.
[30] 20 C.F.R. § 1002.7.
[31] 38 U.S.C. § 4313(a)(describing the reemployment position based upon length of uniformed service).
[32] 38 U.S.C. § 4316(a).
[33] 20 C.F.R. § 1002.191.
[34] 20 C.F.R. § 1002.192.
[35] 20 C.F.R. § 1002.194.
[36] *Clegg*, 496 F.3d at 930.
[37] 38 U.S.C. § 4316(c)(1).
[38] 38 U.S.C. § 4316(c)(2).
[39] 20 C.F.R. § 1002.193(a).
[40] 38 U.S.C. § 4312(d)(1)(A)).
[41] 38 U.S.C. § 4312(d)(1)(B).
[42] See 38 U.S.C. § 4303(15) for the factors used to determine "undue hardship."
[43] *Serricchio v. Wachovia Sec. LLC*, 658 F.3d 169, 191 L.R.R.M. (BNA) 2617, 94 Empl. Prac. Dec. P 44262 (2nd Cir. 2011).
[44] https://www.justice.gov/sites/default/files/crt/legacy/2011/07/25/serricchioltrbrf.pdf
[45] *Serricchio*, 658 F.3d at 188.
[46] 70 Fed. Reg. 75,271.
[47] Id.; 20 C.F.R. § 1002.193(a).
[48] 70 Fed. Reg. 75,272.
[49] Id.
[50] Id.
[51] 38 U.S.C. 4316(d); 20 C.F.R. § 1002.153.
[52] See 20 C.F.R. § 1002.123 for examples of the types of documentation an employer may request.
[53] 38 U.S.C. § 4312(f)(3)(A); 20 C.F.R. § 1002.122.
[54] 38 U.S.C. § 4317(a); 20 C.F.R. § 1002.166.
[55] 38 U.S.C. § 4317(a)(2); 20 C.F.R. § 1002.164.
[56] 38 U.S.C. § 4317(b)(1).
[57] 38 U.S.C. § 4318(a)(2).
[58] 38 U.S.C. § 4318(a)(2)(B).
[59] 38 U.S.C. § 4318(b)(2).
[60] 38 U.S.C. § 4318(b)(1).
[61] Id.
[62] 38 U.S.C. § 4318(b)(3)(A).
[63] 38 U.S.C. § 4318(b)(3)(B).
[64] A GUIDE TO U.S. MILITARY CASUALTY STATISTICS: OPERATION FREEDOM'S SENTINEL, OPERATION INHERENT RESOLVE, OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM (Cong. Res. Serv. Aug 7, 2015). http://fas.org/sgp/crs/natsec/RS22452.pdf
[65] The Americans with Disabilities Act of 1990, as amended by the ADAAA, (42 U.S.C. §§ 12101 et seq.) Prohibits discrimination against qualified individuals on the basis of disability in all aspects of employment. The ADAAA, taking a much broader view of "substantially limits," "major life activity," and "regarded as" than the original ADA, specifically recognizes PTSD as a disability in the accompanying regulations.
[66] 20 C.F.R. § 1002.225.
[67] 20 C.F.R. § 1002.226.
[68] 20 C.F.R. § 1002.225.
[69] 38 U.S.C. § 4313(b)(2)(B); 20 C.F.R. §§ 1002.198, .225. The DOL adopted a definition of "duties" consistent with the term "essential functions" as used under the ADA. 70 Fed. Reg. 75,274. The regulations provide guidance regarding what "tasks" are essential. 20 C.F.R. § 1002.198.
[70] 20 C.F.R. § 1002.225.
[71] 70 Fed. Reg. 75,277.
[72] Id.

[73] Id.
[74] 29 C.F.R. § 1630.2(r); *Jarvis v. Potter*, 500 F.3d 1113 (10th Cir. 2007).
[75] 29 C.F.R. § 1630.2(r).
[76] Id.
[77] Amendments to USERRA on November 21, 2011 expanded the statute to include situations involving a "hostile work environment" by defining "benefit of employment" to include the "terms, conditions, or privileges of employment." 38 U.S.C. § 4303(2). This mirrors the language under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e–2.
[78] 38 U.S.C. § 4311(b); 20 C.F.R. §§ 1002.19, .23.
[79] ESGR Ombudsmen are subject to and protected by the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104-320, 110 Stat. 3870.
[80] 20 C.F.R. §§ 1002.288-.290. The process varies if the servicemember is a federal employee.
[81] 20 C.F.R. §§ 1002.291-.292.
[82] 38 U.S.C. § 4323(a)(1).
[83] See *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006); *Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559 (6th Cir. 2008); *Bodine v. Cook's Pest Control, Inc.,* 830 F.3d 1320 (11th Cir. 2016); *Ziober v. BLB Resources, Inc.*, 2016 U.S. App. LEXIS 18516 (9th Cir. October 14, 2016). But compare *Lopez v. Dillard's, Inc.*, 382 F.Supp. 2d 1245 (D.Kan. 2005), and *Breletic v. CACI, Inc.* 413 F.Supp.2d 1329 (N.D. Ga. 2006), finding such arbitration agreements unenforceable.
[84] One of the Department of Justice's legislative priorities has been to amend USERRA in various respects, including clarifying that agreements to arbitrate USERRA claims are unenforceable under Section 4302(b). The "Justice for Servicemembers Act of 2016," introduced in the Senate as S.3042, would have accomplished this. However, the bill did not advance this Congress, and it will likely be reintroduced during the 115th Congress this January.
[85] Section 4302(b) of USERRA provides:

> This chapter [USERRA] supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the enjoyment of any such benefit.

[86] 38 U.S.C. § 4327(b).
[87] 28 U.S.C. § 1658(a).
[88] *Middleton v. City of Chicago*, 578 F.3d 655, 662-65 (7th Cir. 2009).
[89] 38 U.S.C. § 4323(d)(1)(C).
[90] See *Serricchio*, 658 F.3d at 192-93 ("willful" violation when HR manager knew of USERRA obligation to reemploy servicemember "promptly" but employer failed to comply).
[91] 38 U.S.C. § 4323(h)(2).
[92] 38 U.S.C. § 4323(c)(2)(A).