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What Employers Still Don't Get About Benefits For Veterans

By **Jason Ranjo and Kurt Perhach** (January 13, 2020, 4:25 PM EST)

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The end of 2019 marked the 25th anniversary of the Uniformed Services Employment and Reemployment Rights Act, or USERRA, the principal federal statute that protects our military service members in the civilian workforce. USERRA is arguably the most employee-friendly federal employment law, and there are approximately 10 million veterans in the U.S. labor force who may qualify for the statute's protections.

Yet the law remains relatively unfamiliar to employers who tend to hold the same misconceptions about the employment rights of service members. If these employers do not develop at least a basic understanding of USERRA, they face exposure to potentially significant risk.

USERRA's Broad Scope

Effective Oct. 13, 1994, USERRA applies to all public and private employers — regardless of size — and their employees who serve in the uniformed services, which includes the U.S. Army, U.S. Navy, U.S. Air Force, U.S. Marine Corps and U.S. Coast Guard, and under certain circumstances, the Army National Guard, the Air National Guard, the commissioned corps of the Public Health Service, and the National Disaster Medical System.[1]

USERRA provides to these service members a plethora of protections, such as the right to reemployment upon the completion of service, job protection following extended periods of service, and certain specific employment benefits, including continued health coverage and retirement contributions.[2] Those specified benefits are in addition to the broad entitlement to seniority-based and nonseniority benefits, which, together, may implicate virtually all benefits ordinarily offered to employees. But more on that later.

While the scope of USERRA is broad, employment issues involving service members are relatively rare with veterans comprising only approximately 6% of the nation's workforce.[3] Regardless of the frequency, however, USERRA litigation can have significant consequences.[4]

Potential Consequences for Noncompliance

Because Congress expressly eliminated any statute of limitations applicable to USERRA claims in 2008,[5] those claims can arise from alleged conduct that occurred over a decade ago (and potentially longer).[6] This can lead to lawsuits that are difficult to defend due to evidentiary issues caused by the passage of time, such as fading memories and the unavailability of witnesses and documents.

USERRA cases can also carry significant exposure based on the accumulation of years of potential damages. Moreover, while emotional distress and punitive damages are not available under USERRA, the statute allows the recovery of attorney fees and liquidated damages (double award) for willful violations.[7]

Litigation consequences aside, employers confronted with potential USERRA claims also face reputational harm. In a time of unprecedented support for veterans, to be viewed as unsupportive of service members can adversely impact an employer's personnel recruiting efforts and even its revenues.

Recurring Issues

Although USERRA has been in effect for just over a quarter century, employers remain relatively unfamiliar with the statute's requirements, leaving them potentially exposed to litigation and other consequences. While familiarity with USERRA generally varies from employer to employer, there appear to be several common and recurring issues.

1. USERRA may cover voluntary service.

Many employers' general perception is that USERRA protects employees who are forced to leave their jobs to serve the country in war. The prime example is a reservist whose unit is mobilized for a year-long deployment to Iraq or Afghanistan.

For any given service member, that situation is relatively rare, and when it does happen, it ordinarily will only occur once or twice during a military career. Typically, employers are supportive of employees called to service under those circumstances, where it is easy to understand why federal law provides employment protections. But USERRA does not only cover service members who have been involuntarily ordered to active duty.

In many instances, employees volunteer for military duty that requires them to leave their civilian jobs, sometimes frequently and for extended periods. This type of service can be extremely burdensome on employers who are generally obligated to accommodate those situations.

For instance, USERRA applies to service members who voluntarily enlist in the regular Army or Navy, and those employees may be entitled to reemployment for up to five years or more.[8] USERRA may also apply to employees who volunteer for full-time positions in the National Guard if that service is federally authorized.

In fact, in Mueller v. City of Joliet, the U.S. Court of Appeals for the Seventh Circuit recently reversed the dismissal of a police officer's USERRA claim, finding that his voluntary assignment to a full-time position in the Illinois National Guard Counterdrug Task Force was covered by USERRA.[9]

In short, whether an employee's service is voluntarily is generally irrelevant in determining whether

USERRA's protections apply. These protections should be evaluated on a case-by-case basis using the express statutory language.

2. Determining compliance with USERRA often requires a review of nonmilitary leave policies.

By now, most large employers have a written (and often robust) military leave policy. Those policies often track the language in the USERRA statute and include detailed provisions outlining reemployment rights and procedures, the election of continued medical benefits, required retirement contributions, and the like.

Employers may assume that because their policy aligns with the express requirements of USERRA, it necessarily complies with the statute. But that may not be the case, particularly as it relates to nonseniority benefits, which generally include just about any benefit offered by an employer that is not based on seniority.

Under USERRA, employees on military leave are entitled to the nonseniority benefits "that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace."[10] In other words, the nonseniority benefits provided to employees on military leave should be the same as those provided under the most generous policy applied to other, comparable forms of leave.[11]

Accordingly, determining compliance with USERRA is not as simple as merely ensuring that the employer's military leave policy contains all of the benefits expressly covered by the statute. Employers instead must evaluate what other forms of leave are comparable to military leave, then determine whether service members are being treated at least as favorably as employees who take comparable, nonmilitary leave.

For example, it is widely understood that USERRA requires employers to provide unpaid leave to employees who perform qualifying military service. However, because paid leave is considered a nonseniority benefit under USERRA, courts recently have held that service members may also be entitled to compensation during military service if that benefit is provided to employees on jury duty or sick leave, for example.[12]

Life insurance, disability insurance and the accrual of vacation time are other examples of nonseniority benefits to which employees serving in the military may be entitled. Again, the guiding principle is that employees on military leave should receive treatment at least as favorable as employees on similar, nonmilitary leave types. Thus, it is critical for employers to conduct a thorough review of their leave policy to ensure compliance with USERRA.

3. USERRA's notice and documentation requirements are very limited.

By their nature, employment policies are designed to promote orderly administrative processes. They generally require supporting documentation for any request (e.g., for time off or medical accommodations), and they impose relatively strict deadlines for the submission of those requests. While employers may wish to impose similar order to their military leave policies, USERRA may prohibit those efforts.

For example, even though employees on military leave are entitled to various benefits, USERRA drastically limits the requirements of preservice notice. While employees generally are required to

"notify the employer that [they intend] to leave the employment position to perform service in the uniformed services," that notice doesn't have to follow a particular format and may be verbal or written.[13]

In fact, under USERRA, employees are not even required to tell their employer that they "[intend] to seek reemployment after completing uniformed service," and they do not waive their reemployment rights by telling their employer that they do not intend to return.[14]

By the same token, USERRA significantly limits an employer's ability to verify whether an employee is entitled to reemployment benefits upon the completion of service. Only when an employee's leave extends beyond 30 days may an employer require documentation to confirm qualifying military service.[15] And, even then, employers cannot demand specific documentation (such as the service member's DD Form 214) but instead should accept any available documents to establish USERRA's requirements for reemployment.[16]

These limitations unquestionably make the administration of military leave policies challenging. But there are certain workarounds that can provide some level of structure to the process. For example, while USERRA prohibits employers from demanding documentation to verify short-term military service, applicable regulations contemplate a limited interactive process between civilian employers and the military, such that inquiries directly to an employee's military chain of command may be permitted.

This interactive process has proven helpful to employers in various contexts. For instance, employers have uncovered fraudulent claims of military service through direct communications with employees' military chain of command. Collaboration with the military has also been used successfully in situations where employees protected under USERRA volunteer to mobilize on active military duty because they have become aware that their jobs are in jeopardy either due to restructures or misconduct.

In these situations, gaining support from the military can lead to greater cooperation from the employee, and it can ease concerns that potential disciplinary action arising from the misconduct will be perceived — either internally or externally — as demonstrating a lack of support for service members.

4. Employers may also be required to comply with state military leave laws.

USERRA's protections provide a floor not a ceiling for the rights of service members. Many states have passed their own military leave laws, and if those laws are more beneficial to employees than USERRA, employers are obligated to comply with them.

In the most common case, a state law will provide reemployment protections to members of state military organizations who may not be covered by USERRA.[17] State laws may also provide additional benefits to federal service members. For example, New York law provides reemployment rights to employees who serve in either state or federal military organizations, regardless of whether the employee provides advance notice to the employer in contrast to USERRA's notice requirement.[18]

These varying laws make it difficult for employers — particularly those that operate nationally — to maintain military leave policies that are fully compliant. Thus, employers would be wise to evaluate employment decisions involving service members on an individualized basis with a view toward any state or federal laws that may apply.

Conclusion

This article addresses just a few of the many issues still commonly faced by employers endeavoring to comply with USERRA. And, as time passes and litigation continues, additional issues are certain to surface.

While employment matters involving service members are relatively rare, the consequences of USERRA litigation can be dire. Thus, it is incumbent upon employers to develop a working knowledge of USERRA's requirements and to ensure their military leave policy establishes a foundation for compliance.

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[1] See 20 U.S.C. §§ 1002.5(o), 1002.34(a).

[2] USSERA also contains general anti-discrimination and –retaliation provisions, which, protects service members from adverse treatment based on their military status certain protected activity. See 38 U.S.C. § 4311.

[3] Annual Report to Congress, Fiscal Year 2018, U.S. Department of Labor, Veterans' Employment and Training Service, at 6, available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/VETS_FY_2018_Annual_Report_to_Congress.pdf.

[4] Despite the relative infrequency, the U.S. Department of Labor recorded 888 unique USERRA administrative complaints filed in fiscal year 2018. See USERRA Annual Report to Congress for Fiscal Year 2018, U.S. Department of Labor, Veterans' Employment and Training Service, at 19, available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Annual_FY2018.pdf.

[5] See 38 U.S.C. § 4327(b) ("If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.").

[6] Courts have held that claims that expired prior to 2008 under the federal catchall limitations period remain time-barred. See Middletown v. City of Chicago, 578 F.3d 655 (7th Cir. 2009); Baldwin v. City of Greensboro, 714 F.3d 828, 837 (4th Cir. 2013); Moore v. United Air Lines, Inc., No. 10-CV-02100-WYD-CBS, 2011 WL 2144629, at *6 (D. Colo. May 31, 2011); Roark v. Lee Co., No. 3:09-0402, 2009 WL 4041691, at *5 (M.D. Tenn. Nov. 20, 2009).

[7] See 38 U.S.C. §§ 4323(d)(1)(C), 4323(h).

[8] See 38 U.S.C. § 4303(13) ("The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the employment for the purpose of performing funeral honors duty . . . .").

[9] Mueller v. City of Joliet, No. 18-3609, 2019 WL 6522618, at *3 (7th Cir. Dec. 4, 2019).

[10] See 20 C.F.R. § 1002.150(a); see also 4316(b)(1)(B).

[11] While determining whether other types of leave are comparable to military leave is a fact-specific inquiry, USERRA's regulations indicate that "the duration of the leave may be the most significant factor to compare." 20 C.F.R. § 1002.150(b).

[12] See Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 527 (E.D. Pa. 2019) ("While compensation for time on military leave is not required when it would be preferential treatment, [USERRA] mandates payment when failure to pay such compensation constitutes unequal treatment for those on reserve duty."); Clarkson v. Alaska Airlines, Inc., No. 2:19-CV-0005-TOR, 2019 WL 2503957, at *7 (E.D. Wash. June 17, 2019) (recognizing that paid military leave may be required if compensation is provided to employees on comparable non-military leave types), motion to certify appeal denied, No. 2:19-CV-0005-TOR, 2019 WL 3773756 (E.D. Wash. Aug. 8, 2019).

[13] See 20 C.F.R. § 1002.85.

[14] See 20 C.F.R. § 1002.88.

[15] See 20 C.F.R. § 1002.121 (providing that employees may be "required to submit documentation" when "the period of service exceeded 30 days and if requested by the employer to do so").

[16] See 20 C.F.R. § 1002.123(b) ("The types of documents that are necessary to establish eligibility for reemployment will vary from case to case.").

[17] See e.g., Alaska Stat. Ann. § 26.05.075 (providing reemployment rights to state militia members); Idaho Code Ann. §§ 46-224, 46-225, 46-407, 46-409 (same for Idaho National Guard members and members of the national guard of any other state); Md. Code Ann., Pub. Safety, § 13-705; Md. Code Ann., Lab. & Empl., § 3-1001 to 3-1007 (same for Maryland National Guard and Defense Force members); W. Va. Code § 15-1F-8 (same for West Virginia militia members).

[18] N.Y. Mil. Law § 317.