



The Uniformed Services Employment and Reemployment Rights Act (USERRA)

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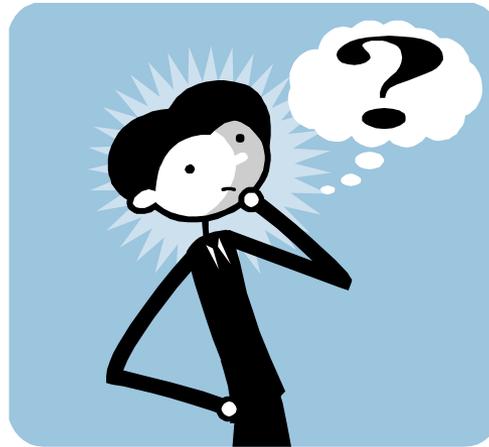
USERRA



... is a federal statute
(38 U.S.C. § 4301 et seq.)
that protects the civilian
employment and **reemployment** rights of
persons who are or have been members of a
"uniformed service."



USERRA Purposes



The 3 purposes
of USERRA are to. . .



USERRA Purposes



Encourage non-career
military service by reducing
the disadvantages to civilian
careers that result from such
service.



USERRA Purposes



Minimize disruption to
service members' civilian
lives via prompt reemployment.



USERRA Purposes



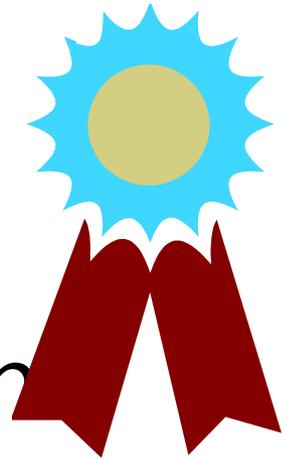
Prohibit employment
discrimination because of
past, present, or future
military service.



USERRA Purposes



“It is the sense of Congress
that the Federal Government
should be a model employer in
carrying out the provisions of
[USERRA].”



38 U.S.C. § 4301(b)



USERRA Coverage



“Uniformed Services” are:



- Armed Forces Active & Reserve Components
 - Army and Air National Guards
- FEMA's “Disaster Assistance” teams



- Commissioned Corps
of the Public Health Service



USERRA Coverage



“Uniformed Service” includes:

- **Active duty**
 - **Active duty for training**
 - **Active duty for Special Work**
 - **Weekend or Weekday Drill**
 - **Funeral honors**
 - **Fitness for duty examination**

...Whether voluntary or involuntary



USERRA Outline



Five Key Periods and Events:



1. Before service member is hired.
2. While service member is employed.
3. When service member gives notice.
4. While service member is absent.
5. When service member returns (i.e., reemployment).



Before Hired





Before Hired:
Prohibited Activity



USERRA's anti-discrimination provision states that an agency shall not deny initial employment because of past, present, or future military service.

38 U.S.C. § 4311(a)

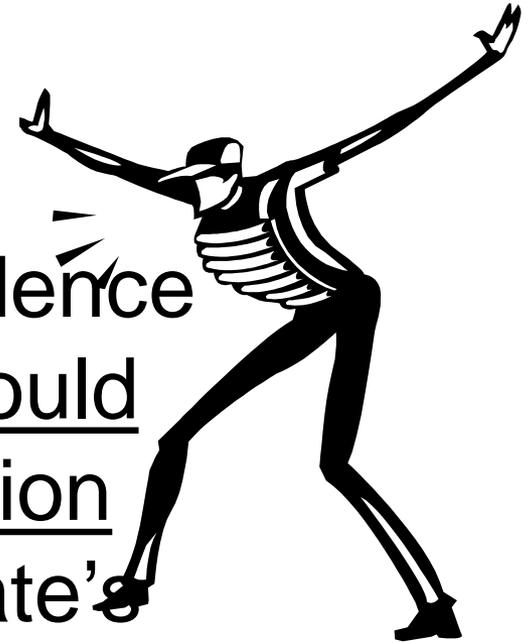


Before Hired



Agency Defense

No violation where the evidence shows that the agency would have taken the same action in the absence of candidate's past, present, or future military service.



38 U.S.C. § 4311(c)(1)



While Employed





While Employed: Prohibited Activity



USERRA's anti-discrimination provision also states that an agency shall not deny retention in employment, promotion, or any benefit of employment because of past, present, or future military service.

38 U.S.C. § 4311(a)



While Employed



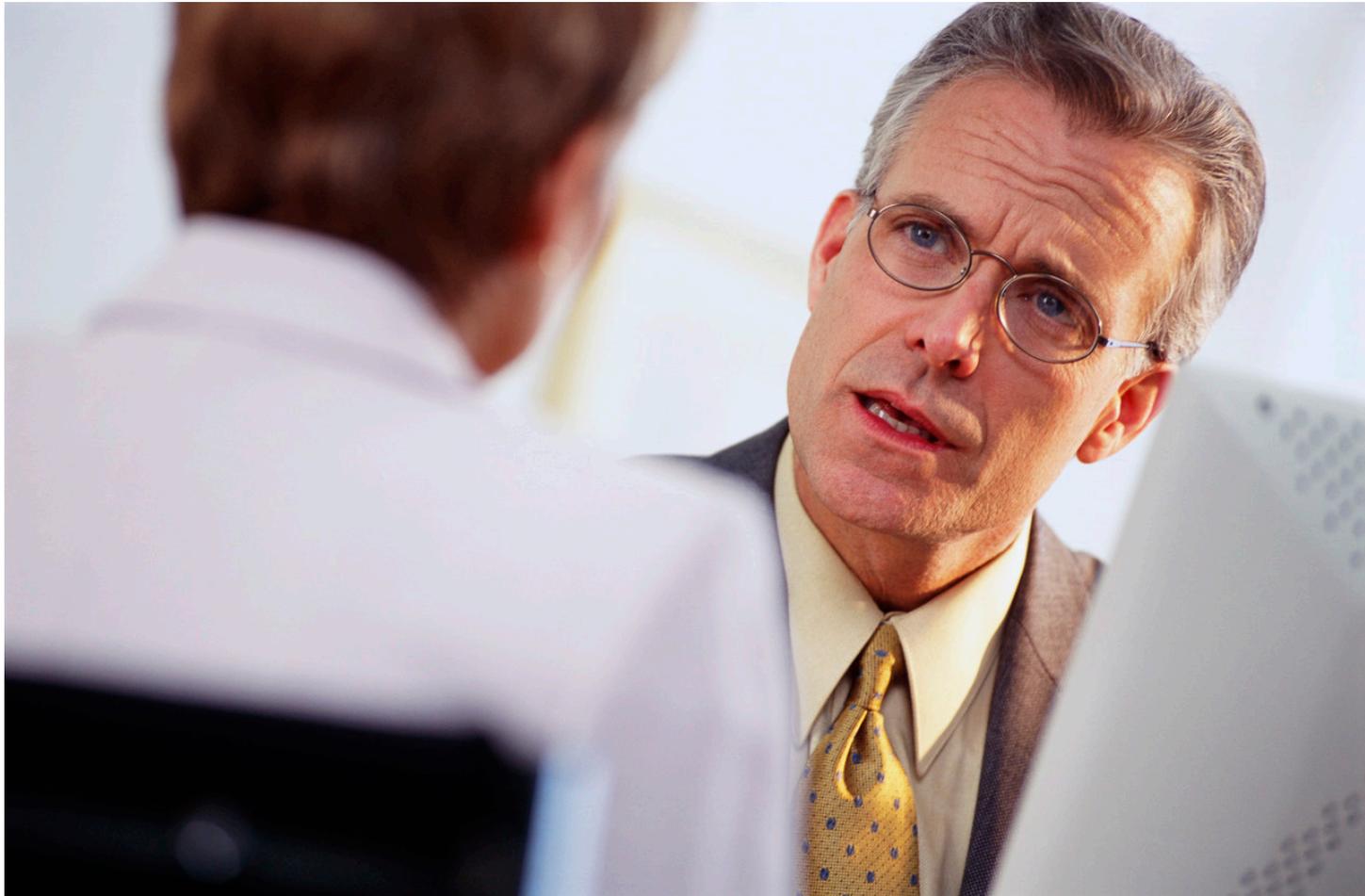
“Benefit of Employment”



Any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of the employment relationship (e.g., employer policy, plan, or practice).



When Service Member Gives Notice





When
Service Member
Gives Notice



Agency's Obligations Include:

- Notice of USERRA Rights
 - Maintaining Records

See 5 C.F.R. §§ 353.104-105



While Service Member Is Absent





While
Service Member
Is Absent



-
- Deemed to be on leave of absence or furlough (but may use paid leave).
 - Entitled to benefits generally provided to employees having similar seniority, status, and pay who are on furlough or leave of absence.

38 U.S.C. § 4316(b)(1)(A)



While
Service Member
Is Absent



-
- Protected against Reduction-In-Force (RIF)
(If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status and pay).

5 C.F.R. § 353.209(a)



While
Service Member
Is Absent



Promotions

Agency promotion plans must provide a mechanism by which employees who are absent because of military service obligations can be considered.

5 C.F.R. § 353.106(c)



While
Service Member
Is Absent



“Incidents or Advantages”

Agencies have an obligation to consider employees absent due to military service for “any incident or advantage of employment” they may have been entitled to if not absent.

5 C.F.R. § 353.106(c)



When Service Member Returns





When Service Member Returns



A service member has
reemployment rights when . . .





When
Service Member
Returns



-
1. Gives Advance Notice of Service,
 2. Performs Qualifying Service, and
 3. Timely Reports for Duty /
Requests Reemployment

(and no affirmative defense applies).



USERRA Notice Requirements



What kind
and how much
advance notice
need the employee provide?



USERRA Notice Requirements



FORM: Written or **Verbal**

CONTENT: Notification of military service or intent to perform such service
(No special words)

TIMING: "In advance of military service"
(No specific time limit)





USERRA Notice Requirements



Must the employee
provide copies
of his or her
military orders?



USERRA Notice Requirements



NO!

Verbal Notice is Sufficient



An employer may not demand a copy of military orders when employee gives notice.



BUT, if the period of military service is more than 30 days, the agency may request orders when the employee requests reemployment.



USERRA Qualifying Service



Qualifying Service =

- "Service in the uniformed services"
- Discharge not dishonorable / "bad conduct" / under "other than honorable conditions", etc.
(See 38 U.S.C. § 4304)
 - Does not exceed 5 years



USERRA Qualifying Service



Five-Year Rule:

A service member can be absent for up to 5 years and still have reemployment rights.

- The 5 years is a cumulative total; it includes both past and present military service.
 - Five years per employer.
- Many exceptions (See 38 U.S.C. § 4312 (c)).



Requesting Reemployment



The time period for requesting reemployment depends on the length of military service.



Requesting Reemployment



If the period of service was 1-30 days:

Employee must report to work by the beginning of the first full regularly scheduled work period on the first full calendar day after completion of service, after time for safe transportation home, plus 8 hours.



Requesting
Reemployment



**Service between 31
and 180 days:**

Employee has 14 days
to request reemployment



Requesting
Reemployment



Service more than 180 days:

**Employee has 90 days
to request reemployment**



Untimely Request for Reemployment



What if the employee
does not return or request
reemployment in a
timely manner?



Untimely Request for Reemployment



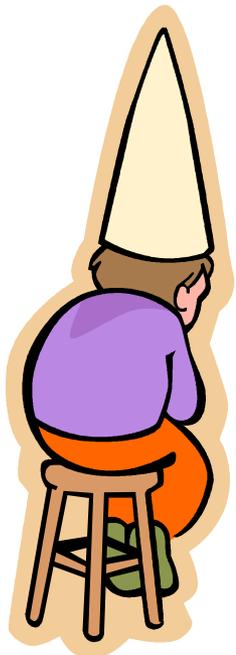
The employee must
still be promptly
reemployed



However . . .



Untimely Request for Reemployment



. . . agency may treat the delay as an unauthorized absence and may consider taking appropriate disciplinary action, if any (i.e., must be consistent w/treatment of other AWOL employees)



Affirmative Defenses to Reemployment



Change in Employer's Circumstances

making reemployment
“impossible” or “unreasonable.”



Affirmative Defenses to Reemployment



“Temporary” Employment

“Brief, non-recurrent period”
and “no reasonable expectation”
that employment will
continue indefinitely or
for a significant time.



Affirmative Defenses to Reemployment



Injured Service Members

Re-employing injured
serviceman would create
"undue hardship."



Affirmative Defenses to Reemployment



What if it is impossible
or unreasonable for
the agency to reemploy
the service member?



OPM Placement Assistance



The agency must notify **OPM**, which must provide placement assistance (i.e., identify a position of like seniority, status, and pay at another agency and ensure an offer is made).





Timing of Reemployment



Federal agencies must reemploy promptly:
within 30 days of the request.

See 5 C.F.R. § 353.207(a)



Reemployment Rights



To what position is the person entitled to be reemployed?

See **38 U.S.C. § 4313**

but generally...



Reemployment Rights



When determining the position, the **“escalator principle”** applies. That means employers must look at where employee “would have been” had he or she remained continuously employed (incl. career “ups” and “downs”).





Reemployment Rights



Other than a job,
to what else is the
returning employee
entitled under USERRA?



Reemployment Rights



Other Reemployment Rights:

- Seniority
 - Benefits based on seniority
 - Protection against discharge



Reemployment Rights



Benefits Based on Seniority:

- Credit toward time in **probationary status**
- Credit toward leave **accrual rate** category
(but not leave accrual while absent)
 - Credit toward **time in grade** for WIGI
- **Anything else** that is tied to the employee's longevity at the workplace



Reemployment Rights



Protection Against Discharge (except for cause):

For 6 months if absence was for 31-180 days.

For 12 months if absence was >180 days.



USERRA Enforcement



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- The U.S. Department of Labor, Veterans Employment and Training Service (VETS) investigates and attempts to resolve USERRA claims.
 - If VETS can't resolve a USERRA claim involving a federal agency, the claimant may request referral to OSC for possible representation before the U.S. Merit Systems Protection Board (MSPB).
 - In some circumstances, a USERRA claimant may file a claim directly with the MSPB.



USERRA Demonstration Project #1



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- From 2005-2007, Congress mandated Demonstration Project whereby OSC (instead of VETS) received approx. half of all federal USERRA cases to investigate and resolve (not just prosecute); purpose was to determine any benefit from having single agency (OSC) handle cases from beginning to end
 - OSC investigated and resolved 458 cases during the DP
 - Achieved a very high rate of “corrective action” (relief) for service members -> over 26% of all complaints filed
 - Cases were resolved, on average, in 120 days



USERRA Demonstration Project # 2



- The Veterans' Benefits Act of 2010, Pub. L. No. 111-175 (VBA), established a 36-month USERRA Demonstration Project which began on August 9, 2011.
- OSC receives and investigates all federal complaints
 - filed by individuals whose Social Security Number (SSN) ends in an odd number (“odd cases”) and
 - that include a related Prohibited Personnel Practice (PPP) allegation, regardless of SSN (“mixed cases”).
- GAO evaluation throughout project and at its conclusion



USERRA Resources



Statute: 38 U.S.C. § 4301 et. seq.

Federal Agency Regulations (OPM):

5 C.F.R. §§ 353.101-110 & 353.201-211

USERRA Rights Poster (required by law to be posted):

http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf