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MILITARY LEAVE AND THE WORKPLACE AT WAR: USERRA OVERVIEW AND UPDATE

David A. Lowe
Andrew P. Lee
Rudy, Exelrod & Zieff, LLP

David A. Lowe is a Partner at Rudy, Exelrod & Zieff, LLP in San Francisco, California. Mr. Lowe gratefully acknowledges the assistance of Andrew P. Lee in writing this article.

I. Introduction

As National Guard members and military reservists are ordered to longer and more frequent deployments in the wars in Iraq and Afghanistan, employers are increasingly confronted with the challenge of accommodating extended and repeated military leaves. The Uniform Services Employment and Reemployment Rights Act ("USERRA") is the most recent in a series of federal laws[2] providing employment and reemployment protections to veterans and members of the armed forces. USERRA was enacted by Congress in order "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service … to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers … by providing for the prompt reemployment of such persons upon their completion of such service… and to prohibit discrimination against persons because of their service in the uniformed services."[3]

USERRA claims are on the rise. Since September 2001, over 600,000 members of the National Guard and Reserve troops have been mobilized, and approximately 133,000 have served more than one tour of duty.[4] Not surprisingly, the number of USERRA claims has increased over the past five years as returning servicemembers come back to find that their jobs are no longer waiting for them.[5] Continued reliance on reservists and National Guard troops and the increasing presence of veterans in the workforce requires employment attorneys to have a thorough understanding of the rights

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[2] The first law providing reemployment rights for veterans was the Selective Training and Service Act of 1940. *Nichols v. Dep't of Veterans Affairs*, 11 F.3d 160, 162 (Fed. Cir. 1993). Predecessor statutes also include the Military Selective Service Act of 1967 and the Veterans' Readjustment Assistance Act of 1974. *Id*. There are also state law analogs.

[3] 38 U.S.C. § 4301(a).

[4] Mary Beth Marklein, *They Don't Always Fit the GI Bill*, USA TODAY, July 10, 2007, http://www.usatoday.com/news/education/2007-07-10-gi-bill-report_N.html.; *see also* Supplementary Information, Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Rights Act, 70 Fed. Reg. 75313 (Dec. 19, 2005) (codified at 20 C.F.R. pt. 1002).

[5] In the fiscal year of 2001, the Department of Labor opened 895 new USERRA cases. This number increased to 1,195 cases in 2002, 1,315 cases in 2003, and to 1,465 new cases in 2004. In 2005, the number of new USERRA cases decreased to 1,241. The statistics for 2006 and 2007 have not yet been published. *Protecting the Rights of Those Who Protect Us: Public Sector Compliance With the Uniformed Services Employment and Reemployment Rights Act and Improvement of the Servicemembers Civil Relief Act: Hearing Before the House Comm. on Veterans' Affairs*, 108th Cong. 152, 153 (June 23, 2004) (prepared statement of Charles Ciccolella, Deputy Assistant Secretary for Veterans' Employment and Training, Department of Labor); DEPARTMENT OF LABOR, UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2005 4 (October 2006).

and obligations created by USERRA. This article provides a general overview of USERRA, focusing on employee and employer obligations.

II. Employer Coverage

USERRA's coverage of employers is extremely broad. Under USERRA, the term "employer" is defined as "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities…."[6] The statutory definition of "employer" also includes the federal government, all states, and all successors in interest.[7] Notably, unlike other federal statutes providing employment protections, USERRA makes no exception for small employers.[8] Certain employers are excluded, such as religious institutions, Native American tribes, foreign governments and international organizations.

One major limitation on USERRA's employer coverage is the Eleventh Amendment. Although USERRA purports to cover state employers, federal courts have held that Congress does not have the power under Article I of the Constitution to abrogate the sovereign immunity of the states.[9] For example, in *Velasquez v. Frapwell* 160 F.3d 389 (1998), the Seventh Circuit held that the states' sovereign immunity guaranteed by the Eleventh Amendment barred the USERRA claim of a state employee.[10] The *Velasquez* court reasoned that USERRA could not be applied to the states through Section 5 of the Fourteenth Amendment because discrimination is not inherently invidious or irrational and military personnel do not constitute an historically disadvantaged group ("suspect class").[11] The court further reasoned that USERRA's constitutional basis is the grant of war power in Article I, which predates and is subject to the Eleventh Amendment.[12]

Congress responded to cases such as *Velasquez* by giving state courts jurisdiction over USERRA claims against state government.[13] This attempt by Congress to subject the sovereign states to federal law is unlikely to succeed in light of the Supreme Court's holding in *Alden v. Maine*, 527 U.S. 706 (1999), which declared that state governments

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[6] 38 U.S.C. § 4303.
[7] *Id*.
[8] For example, the ADA (Americans with Disabilities Act) and Title VII applies to employers with 15 or more employees, and the ADEA (Age Discrimination in Employment Act) applies to employers with 20 or more employees. *See also Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).
[9] *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998) (holding that the Eleventh Amendment bars a suit brought against the state under USERRA), *vacated in part on other grounds*, 165 F.3d 329 (7th Cir. 1999).
[10] *Id*. at 394.
[11] *Id*. at 391.
[12] *Id*. at 392.
[13] 38 U.S.C. § 4323(b)(2).

were not subject to the FLSA.[14] A state employee pursuing USERRA claims may, however, bring claims for injunctive relief against state officials in their official capacity, or seek to have the United States sue on his or her behalf pursuant to 38 U.S.C. § 4323(a).[15]

III. Employee Coverage

USERRA protects "[a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service."[16] The "uniformed services" include the Army, Navy, Marine Corps, Air Force, Coast Guard, Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, Coast Guard Reserve, Army National Guard, Air National Guard, the Commissioned Corps of the Public Health Service, and any other category of persons designated by the President in time of war or emergency.[17] USERRA coverage also extends to individuals who applied for appointment or enlistment, but never actually became a member of the uniformed services.[18] With respect to former members of the uniformed services, an honorable discharge is required for USERRA protections to apply.[19]

IV. Employment Discrimination

The USERRA mandates that members of the protected class "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of [military] membership, application for membership, performance of service, application for service, or obligation."[20] Thus, USERRA provides a remedy for an employee that is subject to an adverse employment action on account of uniformed members status. USERRA also specifically prohibits retaliation against any individual for exercising a right under USERRA or testifying, assisting, or otherwise participating in a USERRA investigation or proceeding.[21]

It is also likely that USERRA provides a cause of action for military status harassment. At least two courts and the Merit Systems Protection Board ("MSPB")[22] have examined the issue of whether USERRA protects employees from uniformed

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[14] USERRA, like the FLSA, purports to give state courts jurisdiction of claims brought under each statute. 38 U.S.C. § 4323(b)(2); 29 U.S.C. 216(b).
[15] *Velasquez*, 160 F.3d at 394.
[16] 38 U.S.C. § 4311.
[17] A NON-TECHNICAL RESOURCE GUIDE TO THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA), U.S. DEP'T OF LABOR, VETERANS' EMPLOYMENT AND TRAINING SERVICE 2 (2005)
[18] 38 U.S.C. § 4311.
[19] 38 U.S.C. § 4304.
[20] 38 U.S.C. § 4311(a).
[21] 38 U.S.C. § 4311(b).
[22] The Merit Systems Protection Board adjudicates the USERRA claims of individuals employed by a federal agency.

member status harassment. In *Petersen v. Dep't of Interior*, the MSPB concluded that severe or pervasive harassment on account of prior service in the military violated Section 4311(a) despite the differences in statutory language describing the prohibited discrimination: Title VII prohibits discrimination in "terms, conditions, or privileges of employment," while USERRA prohibits a denial of any "benefit of employment."[23] In supporting its decision, the MSPB reasoned that Congress intended USERRA to be interpreted broadly, and that well-established, discrimination jurisprudence supports a cause of action for harassment under USERRA.[24]

A district court in the Western District of Tennessee reached a similar conclusion in *Vickers v. City of Memphis*.[25] The *Vickers* court used different reasoning to support its ruling, however.[26] Citing a 6th Circuit decision[27] construing the Vietnam Era Veterans Readjustment Assistance Act of 1974 (USERRA's precursor), the *Vickers* court reasoned that a denial of a "benefit of employment" must be determined by reference to the employer's rules and policies.[28] Thus, the court reasoned that the plaintiff's claim of hostile environment harassment under USERRA was actionable if he could demonstrate, by "virtue of an employer policy," that working in a harassment-free environment was a benefit of employment.[29]

USERRA discrimination claims are analyzed under a burden shifting framework different from that of Title VII. An individual alleging discrimination under USERRA must demonstrate by a preponderance of the evidence that the individual's military service or membership in the uniformed services was a motivating factor in the adverse employment action.[30] Under this standard, the employee must demonstrate that his or her protected status was a "substantial or motivating factor" in the adverse employment action, rather than showing that it was the "sole motivating factor."[31] The employer then has the burden of demonstrating by a preponderance of the evidence that it would have

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[23] *Petersen v. Dep't of Interior*, 71 M.S.P.R. 227, 236 (M.S.P.B. 1996).
[24] *Id*.
[25] *Vickers v. City of Memphis*, 368 F.Supp.2d 842, 845 (W.D. Tenn. 2005).
[26] *Id*. at 844.

[27] *Monroe v. Standard Oil Co.*, 613 F.2d 641, 645 (6th Cir. 1980).
[28] *Vickers*, 368 F.Supp.2d at 845.
[29] *Id*. at 845. Other cases involving hostile environment claims under USERRA include *Miller v. City of Indianapolis*, 281 F.3d 648, 653 (7th Cir. 2003) (applying a hostile environment standard to dismiss a harassment claim based on military status); *Steenken v. Campbell County*, No. 04-224-DLB, 2007 WL 837173 (E.D. Ky. 2007) (denying defendant's motion for summary judgment on claim of military-status harassment).
[30] 38 U.S.C. § 4311(c)(1);
[31] *Velasquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 13 (1st Cir. 2007); *Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231, 1238-39 (11 Cir. 2005); *Gagnon v. Sprint Corp*., 284 F.3d 839, 853-54 (8th Cir. 2002); *Leisek v. Brightwood Corp*.**,** 278 F.3d 895, 899 (9th Cir. 2002); *Hill v. Michelin North America, Inc.*, 252 F.3d 307, 312 (4th Cir. 2001); *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Gummo v. Village of Depew*, 75 F.3d 98, 106 (2nd Cir. 1996).

taken the action regardless of the employee's protected status, for some other valid reason.[32] In other words, the employer, not the employee, has the ultimate burden of demonstrating that the employer's stated reason for the adverse action is not a pretext.

In contrast, the burden in a Title VII case shifts back to the employee to demonstrate that the employer's proffered reason for the adverse action was a pretext for discrimination.[33] This form of burden shifting applies to both mixed motive and pretext cases.[34] In practice, USERRA's burden-shifting framework makes obtaining summary judgment more difficult for employers because a plaintiff will survive summary judgment if a colorable issue of fact exists regarding the employer's motive.[35] Moreover, "USERRA is liberally construed for the benefit of those who left private life to serve their country."[36]

V. Reemployment Rights

In addition to prohibiting discrimination, USERRA also requires an employer to promptly reemploy a returning uniformed-services member.[37] Significantly, depending on the length of the absence, the employer must reinstate the employee to the job that the employee *would have had* if the employee had not taken the military leave.[38]

The concept of crediting the employee with seniority in order not to penalize the employee for taking military leave dates to a World War II case regarding the Selective Training and Service Act of 1940:

> He who was called to the colors was not to be penalized on his return by his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld form those who stayed behind.... Thus he, does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his positions continuously during the war.[39]

The *Fishgold* "escalator principle," as it has come to be called, dictates that if an employee would have received a promotion but for the military leave, she must be

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[32] 38 U.S.C. § 4311(c)(1); *Sheehan*, 240 F.3d at 1013.
[33] *Velasquez-Garcia*, 473 F.3d at 17; *Sheehan*, 240 F.3d at 1014.
[34] *Sheehan*, 240 F.3d at 1014.
[35] *See* THE EMPLOYMENT RIGHTS OF RESERVISTS ON ACTIVE DUTY, 29 Los Angeles Lawyer 20, 21 (September 2006).
[36] *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1997); *see also* H.R. Rep. No. 103-65 at 23 (1993) *reprinted in* 1994 U.S.C.C.A.N. 2449, 2456 ("The Committee intends that these antidiscrimination provisions be broadly construed and strictly enforced.")

[37] 38 U.S.C. § 4312(a).
[38] 38 U.S.C. § 4313(a)(1)(A).

[39] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

reinstated into the promoted position, rather than the position which she occupied at the time of the leave.[40]

If the employee is not qualified to perform the duties of the position, the employer must make reasonable efforts to qualify the servicemember for the position.[41] Only after reasonable efforts to qualify the returning servicemember for the position have failed may the employer place the person in the nearest approximation of to the position of continuous employment or, if that is not possible, to the nearest approximation to the position held at the time of the leave.[42]

The right to reemployment may be conditioned on the employee meeting certain procedural requirements. First, the military member must give adequate notice of impending service.[43] Notice can be provided by the military member or the member's appropriate officer, in either written or verbal form.[44] Notice is not required, however, if it is precluded by military necessity (classified military operation) or if it would be impossible or unreasonable under the circumstances.[45]

Second, the employee must report back to work or apply for reemployment. The application for reemployment should be specific and more than a mere attempt to contact a supervisor.[46] Moreover, one court has held that the application should not be conditioned on the occurrence of another event.[47] Third, the reapplication for employment must be made within a specified time period depending on the length of military service. If the length of service is less than 31 days, the employee must report back to work at the beginning of the first regularly scheduled work period, following safe travel home and an eight hour rest period.[48] The time period is extended to "as soon as possible" if reporting at the required time is "unreasonable or impossible."[49]

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[40] Lt. Col. H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994,* 47 A.F. L. REV. 55, 71 (1999)

[41] 38 U.S.C. 4313(1),(2).

[42] 38 U.S.C. 4313(4).

[43] 38 U.S.C. § 4312(a)
[44] *Id*.
[45] 38 U.S.C. § 4312(b).
[46] *Shadle v. Superwood Corporation*, 858 F.2d 437, 440 (8th Cir. 1988) (holding that unsuccessful attempts to contact a former supervisor does not constitute an "application for reemployment" under the VRRA).
[47] *Baron v. United States Steel Corp. Inc.*, 649 F. Supp. 537, 541 (N.D. Ind. 1986) (holding that no application had been made where a discharged serviceman notified his pre-service employer that he would seek reemployment only if he was not accepted to college).
[48] 38 U.S.C. § 4312(e)(1)(A)(ii).
[49] *Id*.

For short leaves such as those required for regular training, the military member may return to work the next scheduled work day after training. If the military member returns home less than eight hours before the next shift, he or she can wait to the following shift to report.

If the military member is absent from work for more than 31 days but less than 181 days, the employee must report back to the employer or reapply for work within 14 days.[50] If the absence is longer than 181 days, the employee must report back or reapply within 90 days.[51] The reporting period is subject to a two-year extension in the event the employee is injured and needs time to heal.[52] An employee who fails to report within the proper time period is subject to the normal policies and procedures of the employer and may be disciplined accordingly. Moreover, "prompt reemployment" requires reinstatement "as soon as practicable under the circumstances of each case."[53] but as a general rule of thumb, reemployment should occur within two weeks of reapplication for work.[54]

Lastly, an employee that returns from a military absence of over 31 days cannot be immediately terminated after reemployment without cause. If the military absence was more than 31 days but less than 180 days, the employee cannot be terminated without good cause for 180 days after reemployment.[55] If the military absence was more than 180 days, this special protection exists for a one-year period after reemployment.[56]

A. Exceptions to Reemployment

There are a few narrow exceptions to USERRA's reemployment requirement. First, an employer may refuse to rehire an employee where the employee volunteers for military service and is absent from employment with the same employer for a cumulative period of more than five years.[57] However, there are numerous exclusions. For example,

[50] 38 U.S.C. § 4312(e)(1)(C).
[51] 38 U.S.C. § 4312(e)(1)(D).
[52] 38 U.S.C. § 4312(e)(2).
[53] 20 C.F.R. § 1002.181 (stating, for example "absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position").

[54] 20 C.F.R. § 1002.181.
[55] 38 U.S.C. § 4316(c)(2).
[56] 38 U.S.C. § 4316(c)(1).
[57] 38 U.S.C. § 4312(a)(2).

initial military obligations, inactive duty training and leaves for annual training are not counted toward the cumulative five year total.[58]

Second, the employer may refuse to rehire an employee where the "employer's circumstances have so changed as to make such reemployment impossible or unreasonable."[59] Regulations promulgated by the Department of Labor provide that "an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. The employer may not, however, 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…."[60] This exception to reemployment existed in USERRA's predecessors and was implemented with similar language.[61]

Courts have narrowly construed this defense to ensure that employers do not exploit a layoff or reorganization as an opportunity to evade the law's re-employment obligations. For example, courts have held that the elimination or sale of an employee's entire department does not constitute changed circumstances justifying the denial of reemployment.[62] "[L]oss of efficiency or economy of operation" does not render reemployment unreasonable, but creation of a "useless" job is not required.[63] In addition, employers may invoke this defense where there has been a substantial reduction in the need for the employee's services.[64] The employer bears a heavy burden in establishing this defense.

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[58] 38 U.S.C. § 4312(c)(1) and (3).

[59] 38 U.S.C. § 4312(d)(1)(A).

[60] 20 C.F.R. § 1002.139.

[61] *See* The Selective Service and Training Act, 50 U.S.C.A. Appendix § 50 (stating that an employer is obligated to reemploy "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so"); The Veterans' Reemployment Rights Act, 38 U.S.C. § 2021 (stating the same).

[62] *Allyn v. Abad*, 167 F.2d 901, 903 (3rd Cir. 1948) (holding that elimination of the employee's department due to reorganization did not constitute changed circumstances); *Sullivan v. West Co.*, 67 F. Supp. 177, 178 (E.D. Pa. 1946) (holding that the sale of the employee's entire department to another company did not constitute changed circumstances).

[63] *Kay v. General Cable Corp.*, 144 F.2d 653, 655 (3rd Cir. 1944); *Meyers v. Barenburg*, 161 F.2d 850 (4th Cir. 1947).

[64] *Meyers v. Barenburg*, 161 F.2d 850 (4th Cir. 1947) (holding that reemployment would be unreasonable where the employee was a debt collector and employer had a substantial decrease in the number of customers owing money). Courts have accepted this defense in other unique situations. In *Barisoff v. Hollywood Baseball Association*, a court found reemploying baseball players to be unreasonable because the returning service members were unable to meet the league's level of play. 71 F. Supp. 493 (S.D. Cal. 1947).

The third exception provides that an employer may refuse to rehire where the employment was "for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."[65] Lastly, an employer may refuse to rehire a military member if reemployment would create an undue burden for the employer, but only where the returning employee incurred or aggravated a disability. [66] The definition of "undue hardship" is taken directly from the ADA.[67] Moreover, an employer must comply with all obligations under the ADA including reasonable accommodation if an undue hardship does not exist.

B. Entitlement to Wage Increases and Employment Benefits

Consistent with the *Fishgold* escalator principle described above, returning servicemembers are entitled upon reemployment "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."[68] Thus, pay increases, bonuses or equity awards based on length of service must be provided as if the employee had never left for service.

Similarly an employer must allow an employee to make up missed pension contributions due to military service, or the employer must credit the employee for time spent on military leave if the pension plan is based on service credits.[69] Health benefits may be terminated upon the person's commencement of military service, however an employer-sponsored health plan must allow a military member to continue coverage during military leave for up to 24 months.[70]

VI. Enforcement

A. Administrative Remedies and Court Procedures

A military member with a USERRA claim has the option of pursuing an administrative remedy or filing directly in court.[71] If the military member chooses to pursue an administrative remedy, he or she must file a claim with the Secretary of Labor. The Secretary of Labor has a duty to investigate and attempt to resolve the dispute.[72] If the Secretary's investigation finds a violation but fails to resolve the dispute, the plaintiff may commence an action in the United States District Court at his or her own expense, or seek representation from the Attorney General of the United States.[73] If the employer is a

[65] 38 U.S.C. § 4312(d)(1)(C).
[66] 38 U.S.C. § 4312(d)(1)(B).
[67] 38 U.S.C. § 4303(15).
[68] 38 U.S.C. § 4316(a) (emphasis added).
[69] 38 U.S.C. § 4318(a)(2); 4318(b)(2).
[70] 38 U.S.C. § 4317; 4317(a)(1)(A).
[71] 38 U.S.C. § 4322(a); 4323(2)(A).
[72] 38 U.S.C. § 4322(d).
[73] 38 U.S.C. § 4322(a).

federal agency, the military member must file a complaint with the Merit Systems Protection Board at his or her own expense, or request representation from the Office of Special Counsel.[74]

B. Remedies

Under USERRA, the district court may use its full equity powers and may award compensatory damages for lost wages or benefits.[75] If the court determines that an employer's violation of USERRA was willful, it may require the employer to pay liquidated damages in the amount equal to the compensatory damages.[76] Furthermore, the court may award attorney fees, expert witness fees, and other litigation costs to the prevailing party.[77]

Although courts have disallowed emotional distress damages on USERRA claims, USERRA plaintiffs have successfully maintained claims for emotional distress as separate causes of action.[78] In addition, a plaintiff may pursue emotional distress and punitive damages in a USERRA case on a related state law public policy claim.[79]

VII. Conclusion

As the Supreme Court observed in *Fishgold*, those who serve in uniform should not be penalized in their civilian jobs because they were called to duty. This principle is reflected in USERRA's provisions requiring reemployment of returning servicemembers and outlawing discrimination based on military service, which are broadly construed and strictly enforced. Employers who fail to observe the statute's extensive protections risk not only legal exposure, but also the potentially devastating public perception that the employer violated the rights of a soldier serving our country.

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[74] 38 U.S.C. § 4324(a)-(b).

[75] 38 U.S.C. § 4323(d); 4323(e).

[76] 38 U.S.C. § 4323(d)(1)(C).

[77] 38 U.S.C. § 4323(h).

[78] *Jordan v. Choa*, 2006 U.S. Dist. LEXIS 82561, at *2 (S.D. Cal. 2006); *Lees v. Sea Breeze Health Care Ctr., Inc.*, 391 F. Supp. 2d 1103, 1104 (S.D. Ala. 2005); *Murphree v. Commun. Techs., Inc*., 460 F. Supp. 2d 702, 711 (E.D. La. 2006).

[79] *Patton v. Target Corp.*, Slip Copy, 2007 WL 894560, *9-10 (D. Or. March 21, 2007).