



**TULLY RINCKEY** PLLC  
ATTORNEYS & COUNSELORS AT LAW

## CLE: USERRA; Military Leave Rights and Landmark Cases

Presented by: Anthony J. Kuhn, Esq.



# About The Presenter



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In addition to being a Managing Partner at Tully Rinckey PLLC, Anthony is the National Chair of the firm's Military Law and National Security Practice Groups. He is the Section Chair of the firm's Emergency Military Leave (USERRA) claims section. He is also an adjunct professor and the co-director of the UB School of Law Veterans Law Practicum and a veteran of nearly 23 years in the Army and Army Reserve.

# The Uniformed Services Employment and Reemployment Rights Act (USERRA):

## A Review of USERRA's history:

- In 1951, Congress extended reinstatement rights to employees returning from training duty  
*See Pub L. 51, ch. 144 § 1 (s), 65 Stat. 75, 86-87.*
- In 1955, Reserves Forces Act of 1955, employees returning from active duty of more than three months in the Ready Reserve were provided the same employment rights as inductees  
*See Pub. L. 305, ch. 655 § 262(f), 69 Stat. 598, 602*
- In 1967, veterans reemployment rights were further amended by virtue of the Military Selective Service Act of 1967.  
*See 50 U.S.C. App. § 459 (1970 ed.)*
- In 1974, Congress passed the Veterans' Reemployment Rights Act, providing that any employee of a private employer "shall not be denied retention in employment..."  
*See Pub. L. No. 93-508, § 404(a), 88 Stat. 1578, 1594*  
(codified at 38 U.S.C. § 2021 et seq.)
- In 1994, USERRA was enacted "to clarify, simplify, and strengthen the *existing* veterans' employment and reemployment rights provisions."  
*H.R. Rep. No. 103-65(1), at 18 (1993) (emphasis added)*

# Importance of USERRA

- Nearly 850,000 National Guard and Reserve members have been called to active duty since 9/11/01- some more than once (older estimate)
  - USERRA requires employers to reemploy service members following a period of service of less than five (5) years where the employee provides notice and a request for reemployment
  - USERRA includes protection for employees denied benefits of employment, not just reemployment itself
  - USERRA forbids discrimination in hiring, retention and promotion
  - Seniority remains intact
- Covers all employers, no matter staff size with the following exceptions
  - Religious institutions
  - Native American tribes
  - Foreign embassies
  - International Organizations- (United Nations, World Bank, etc.)



# Types of Employment That Is Eligible

When a service member leaves a civilian job for voluntary or involuntary service in military, USERRA protects the service member.

- Applies to temporary, probationary and at-will jobs
- Applies to executive employees
- Applies to laid-off employees
- **Does not apply** to spouses or family members of service members
- **Does not apply** to partners or independent contractors, but that label is not controlling
- USERRA does not apply to the relationship between a student and an educational institution
- However, in 2008, Congress enacted 20 U.S.C. § 1091 c – giving USERRA-type protection to postsecondary students whose educational programs were interrupted by voluntary or involuntary service (There are additional educational laws in place in many states)

# USERRA Protects a Variety of Voluntary and Involuntary Service

- Applies to regular military service, as well as National Guard and Reserve
- Applies to examinations and fitness determinations
- Applies to funeral honors duty
- Applies to Public Health Services (USPHS)
- Applies to National Disaster Medical System (NDMS) service
- Does **NOT** apply to service in a foreign military service

USERRA protects returning members who are disabled

- Supplemental to the Americans with Disabilities Act (ADA)
- Employer must make reasonable efforts to accommodate veteran
- Right to another job if disability cannot be accommodated

# Handling a USERRA Case

## Step 1: Does USERRA Apply to the Client's Case?

- *USERRA provides rights to an individual that has left their civilian job for voluntary or involuntary service in the uniformed services*
- You only need one employee to be an employer for purposes of USERRA.  
*See Cole v. Swint, 961 F.2d 58, 60 (5<sup>th</sup> Cir. 1992)*
- State Laws may provide additional protection or benefits to both service members and non-service members
- **Davidson v. Department of Veteran Affairs**, 2011 MSPB 25 (Feb. 18, 2011) VA
  - Doctor, who was a disabled veteran himself, took leave without pay. On seeking to return to employment, his reemployment was refused. Executive Order 5396 is a “benefit of employment” protected by section 4311 of USERRA

# Handling a USERRA Case

## Step 2: What Type of USERRA Claim is it?

- Discrimination and Reprisal  
Section 4311 of USERRA- unlawful for an employer to deny employment because individual's membership in a uniformed service
- Right to Reemployment After Service  
Section 4312 of USERRA- gives an individual the right to reemployment
- Other Causes of Action under USERRA:
  - “Failure to Reemploy”
  - “Seniority Rights”
  - “Safe Harbor” (*1 year of 180+ days; 30 days if less than 181 days requires “cause”*)
  - “Employee pension benefit plans”

O'Farrell Claims: Recent U.S. Court of Appeals ruling has opened the door for federal employees to file claims with the MSPB to receive additional Paid Military Leave. Pursuant to 5 U.S.C. 6323(b), federal employees are entitled to an additional twenty-two (22) days of Paid Military Leave.



# Handling a USERRA Case

## Step 3: Where Can I Bring a USERRA claim?

- Enforcement of rights with respect to Federal Executive Agencies:
  - Against a Federal Agency or the Office of Personnel Management, filing will be to the Merit Systems Protection Board
    - May be entitled to reasonable attorney fees for successful claims*
    - Potential to settle without hearing*
- Enforcement of Rights with respect to a State or Private Employer:
  - Federal District Court
    - If an individual with private representation is suing a State as a private employer for a USERRA violation, they must proceed in State court in accordance with the laws of the State*

# Jurisdictional Issues

- Statute of Limitations: No statute of limitations shall apply to USERRA  
*However, the doctrine of Laches may still apply and the burden is on the employer to prove this defense*
- Failure to Exhaust Administrative Remedies  
*USERRA supersedes any State law, contract, ordinance, etc.*

# Handling a USERRA Case

## Step 4: How Can I Establish an Employer Violated USERRA?

- Violation under 38 USC § 4311- Prove *motivating factor* for the employer's decision to deny initial employment, fire, deny promotion, etc.
  - *Sheehan v. Department of the Navy*- employee must bear the initial burden of proof:
  - Proximity in time between the employee's military activity and the adverse employment action
  - Inconsistencies between the proffered reason and the other action of the employer
  - Employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity; and
  - Disparate treatment of certain employees compared to other employees with similar work records or offenses



# Handling a USERRA Case

Violation under 38 USC § 4312 – plaintiff need only prove that he or she meets the five objective USERRA eligibility criteria:

1. Voluntary or involuntary service in the military

*See 38 USC § 4312(a)*

2. The employee must give their employer prior oral or written notice (few exceptions)

*See 38 USC § 4312(1)*

3. Service must generally not have exceeded five years (few exceptions)

*See 38 USC § 4312(2)*

4. Released from the period of service without receiving a punitive or other than honorable discharge

*See 38 USC § 4304*

5. The employee must make a timely application for reemployment after release from the period of service (depends on the length of active duty service)

*See 38 USC § 4312(3)*

# Handling a USERRA Case

## Step 5: Defense to a Reemployment Case from Employers

- Employer's Affirmative Defenses to Reemployment under 38 USC § 4312  
The employer's circumstances have so changed as to make reemployment impossible or unreasonable
- Employer's Affirmative Defenses to the Rights to Reemployment under 20 CFR § 1002.248  
The employment from which the person leaves to serve in the uniformed services is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period
- Employee exceeded the five (5) year requirement for reemployment (but keep in mind the exceptions).

# Exceptions to 5-Year Limit

20 C.F.R. 1002.103(a)

USERRA creates the following exceptions to the five-year limit:

1. Service that is required beyond five-years to complete initial period of obligated service
2. If the employee is unable to obtain orders releasing him and the inability is not the employee's fault
3. Service performed to fulfill additional training requirements that is determined and certified by a proper military authority
4. Service performed under any number of codes: (12 separate sub-paragraphs)
5. Service performed under provision of law because of war or national emergency
6. Service performed in support of an operational mission for which personnel have been ordered to active duty
7. Service performed in support of a critical mission
8. Service performed if employee is called to respond to an invasion, danger of invasion, rebellion, etc.



# Handling a USERRA Case

## Step 6: Damages

### Liquidated Damages:

The employer may be required to pay the person an amount equal to any damages suffered by that employer

### Pain and Suffering:

Courts have consistently held that USERRA does not provide for the recovery of damages for mental anguish, pain, or suffering, nor does USERRA allow for the recovery of punitive damages

### The Escalator Principle:

Each returning veteran is entitled to receive the seniority he or she had before he or she was called to the colors plus the additional seniority he or she would have received had they remained continuously employed

# Handling a USERRA Case

## Step 7: How should I resolve the case?

### Overall Goal:

- Prompt reinstatement or promotion
- back-pay for the difference in pay between the current pay rate and the pay rate under the promotion during the relevant time period
- Correction of records
- Recovery of any missed entitlements, such as Emergency Military Leave

# Tips for Settlement

Remember USERRA's broad definitions in favor of service members:

- The court may require the employer to compensate the person for any loss of wages or benefits. 38 USC § 4323
- Liquidated damages: Double damages for willful violations
- Tax implications: With any settlement consider the implications of a lump sum payment versus back-pay
- Correction of records: If the employer is being recalcitrant in correcting the years of records, you can use this as a settlement carrot for negotiating a larger lump sum



# QUESTIONS?