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# After the Homecoming: A User's Guide to the Uniformed Services Employment and Reemployment Rights Act

Christopher W. Miller, Esq., Mastagni, Holstedt, Amick, Miller & Johnsen

In the last decade, the wars in Afghanistan and Iraq have called into uniform thousands of California public employees who would otherwise have been working in state and local government agencies. Over the next five years, reports the U.S. Department of Labor, some 300,000 active duty, Guard, and Reserve service members will leave the military to return to civilian life.[1] Many of these veterans and reservists are coming home to public employers obligated under the Uniformed Services Employment and Reemployment Rights Act to reemploy them in a changing economy where positions may no longer exist and questions of seniority, status, pay, and benefits must be answered based on the rights of the returning soldier.

Reviewing the key provisions and court decisions under USERRA, and related provisions of the California Military and Veterans Code, this article gives an overview of the federal and state requirements for integrating returning military reservists into the civilian workforce.

USERRA became law in 1994, replacing the Veterans' Reemployment Rights Act and other federal statutes that had been passed to afford reemployment rights to "the Greatest Generation" returning from World War II. Codified at 38 USC 4301-4335, USERRA exists 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";[2] to minimize the disruption to reservists and their employers by providing for prompt reemployment;[3] and to prohibit workplace discrimination on the basis of military service.[4] The statute is to be broadly construed "in favor of its military beneficiaries";[5] however, USERRA rights, like many other military benefits, are not available to persons separated from military

service with a dishonorable, bad conduct, or other-than-honorable discharge.[6] USERRA applies to federal, state, and local governments and agencies as well as private companies of any size.[7]

The centerpiece of USERRA — and the source of most of the litigation under the statute — is its three provisions establishing the rights and limitations on employment and reemployment of service members. Sections 4311-4313 prohibit discrimination and retaliation on the basis of military service, establish the preconditions and requirements for reemployment, and describe the "escalator principle" that governs how an otherwise-qualified reservist may be reemployed. For reservists, practitioners, and public agency staff, these are the sections of the statute most fraught with peril for the unwary.

**Prohibition Against Discrimination and Reprisal**

The first of these key provisions, Section 4311, prohibits discrimination and retaliation against any person who is, was, or has applied to be, a member of the uniformed services. That section provides, in part, that such persons

> …shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[8]

Under Section 4311(b), employers are prohibited from discriminating in employment or taking any adverse employment action against a person who has taken an action to enforce his or her USERRA rights, has participated in a USERRA investigation or proceeding, or has exercised any rights under the statute.

For both provisions, the statute defines prohibited employment actions broadly as any action where the person's military status is a "motivating factor."[9] Under USERRA, the employee has the burden to show, by a preponderance of evidence, that his or her military service was a "substantial or motivating factor" in the adverse employment action.[10] This is a "but-for" test; therefore, once the employee establishes discriminatory motive or intent, the burden shifts to the agency to prove it would have taken the action despite the employee's protected status as a military reservist.[11]

**USERRA Sets Minimum Requirements to Trigger Reemployment Rights**

Subject to some exceptions and conditions, an employee returning from military service is entitled to USERRA-mandated reemployment rights and benefits, provided the employee:

> (1) gave advance written or verbal notice of the service obligation to the employer (unless "military necessity" or other circumstances make

it impossible or unreasonable to provide such notice);

(2) was absent for military service for less than five years total time, not including training periods;

(3) received an honorable discharge from the active duty service or obligation; and

(4) submits an application for reemployment or reports to the employer, depending on the length of the absence for military service.[12]

These basic requirements can serve as a checklist for evaluating whether a returning reservist is initially eligible for reemployment. The requirements are simple, and usually simply met; however, in keeping with USERRA's purposes favoring military duty, the statute prohibits employers from delaying or attempting to defeat a reemployment obligation by, for example, demanding the employee provide additional documentation of service.[13]

Court decisions under this section emphasize constructive compliance with the notification provisions but strict compliance with the application requirements. In *Vega-Colon v. Wyeth Pharmaceuticals*,[14] for example, the court held an employee's mere announcement to his employer that he intended to return to active duty after remaining inactive for several years was sufficient to trigger protection under USERRA.[15] Another district court has held an employee's notations on a fax cover sheet to his manager stating his mobilization date had changed were sufficient to trigger rights under the statute.[16]

Once a reservist returns from military service, however, the courts generally have strictly enforced the requirements governing applications for reemployment. Courts have rejected claims under the statute where reservists failed to request reemployment within the statutory period,[17] applied timely but to the wrong division of a company,[18] or even failed to contact the appropriate human resources employee after being directed to do so by a supervisor.[19] The burden is on the reservist, not the employer, to prove entitlement to reemployment.[20]

Other bars to reemployment under the statute include changed circumstances for the employer, such that reemployment of the reservist is "impossible or unreasonable."[21] A public employer can deny reemployment to a disabled reservist or one who cannot be trained to resume a position if reemployment "would impose an undue hardship on the employer."[22] The agency also may deny reemployment to a returning reservist where the employment was seasonal or otherwise short in duration and there was no reasonable expectation the position would be available.[23] The burden is on the employer to prove impossibility or unreasonableness, undue hardship despite accommodation or training, or the nature of the employment.[24]

**Using the "Escalator Principle" to Determine Reemployment Status**

Once a returning reservist meets the basic conditions for reemployment, the employee is entitled to prompt reinstatement "according to the following priority":

> (1) the position the employee would have held had the employment not been interrupted by military service, which is known as the "escalator position";
>
> (2) the employee's original, non-escalator position if the employee is not qualified to hold the escalator position and cannot be made qualified through reasonable efforts; or
>
> (3) a different position with the same seniority, status, and pay as the position the employee would have held had the employment not been interrupted by military service, or a different position of similar seniority, status, and pay as the original position.[25]

USERRA's "escalator principle" is so called because, "[t]he returning veteran 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 position continuously during the war."[26] The "escalator position" — the position the employee would have held had the employment not been interrupted by military service — is always the starting point for determining the proper reemployment position.[27] The reservist may end up at a lower position on the escalator, in other words, but those evaluating a reservist's reemployment status must start first with asking where the employee would have been in the organization had he or she not left for military duty.

The escalator rule can get tricky when an employee is returning after an extended absence on reserve duty. The phrase, "a position of like seniority, status and pay," has been the subject of much litigation when a reservist is not returned to the position he or she left, or there have been significant changes to the organizational structure. The statute requires the employer to place the reservist in the same or a similar job unless the reservist is not qualified for the position; in that case, the reservist must be given a job that is as nearly like the prior job as possible. The employer is obligated to provide any training necessary to qualify the reservist to assume or resume the job. The returning reservist even may "bump" any incumbent who has taken the employee's job in his or her absence. In order to put the service member in the "escalator position" he would have achieved but for his military absence, the reemployment position must include all of the benefits the service member would have received if continuously working.[28]

***The reemployment position must include seniority.*** Consistent with the statutory objective of restoring reservists to their non-military employment without penalty, USERRA entitles any person reemployed after military service to the same seniority and all seniority-based rights and benefits he or she would have had if continuously employed.[29] The sources of seniority rights, status, and pay include collective bargaining agreements, policies, and practices in effect at the beginning of the employee's military service, and any changes that may have occurred while the

employee was absent.[30]

Thus, “seniority” includes any advantage, privilege, status, or other “gain” (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice.[31] Seniority also may include rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.[32]

Seniority and seniority-based benefits are a two-way street. As California’s public agencies and labor associations negotiate reduced benefits, including pension reform, changes to benefits can be adverse. The returning soldier’s entitlement to the seniority and benefits he or she would have enjoyed had there been no break for military service may mean, in the current environment, that employee benefits are reduced rather than enhanced. There is no entitlement to the same pre-deployment benefits if those benefits do not exist for non-military employees.

Nonetheless, while a collective bargaining agreement or MOU can give the returning veteran greater or additional rights, it cannot take away the veteran’s federal statutory reemployment rights. “No practice of employers or agreements between employers and unions can cut down…benefits that Congress has secured the veteran under the Act.”[33]

***Status means more than formal rank or title.*** Restoration of an employee’s “status” upon reemployment means more than a rank or title. “Status” includes opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.[34] Thus, a court has held that placing a veteran in a part-time position with irregular hours violated USERRA and entitled the employee to additional pay and benefits because the job was not the same as his previous position.[35] Similarly, a court held that placing a veteran in a position which lacked the same opportunity to earn extra pay violated the statute and justified a jury’s “generous” damages award.[36]

Returning veterans also must be afforded any opportunity for promotion that occurred during their absence, meaning the employer must provide a promotional examination to the veteran within a reasonable time of his or her return.[37] Assignments, areas of responsibility, and the location of the workplace all must be commensurate with the employee’s pre-deployment status, subject to employer claims of undue hardship or impossibility.

***Special rules apply to healthcare benefits and pensions.*** USERRA gives reservists who are called up for service the right to elect to continue existing health plan coverage for the service member and his or her dependents for up to 24 months.[38] Where the service period is less than 31 days, the employee and employer pay the usual premium share, but where service is longer than 31 days, the employee may be required to pay up to 102 percent of the premium.[39] A reservist who elects not to continue coverage during military service still has the right to be reinstated to the public employer’s health plan immediately upon

reemployment, without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for military service-connected illnesses or injuries.[40]

Public employee pension plans are not exempt from USERRA's "make whole" rules. While the employer is not required to make contributions to pension or 401(k) plans during the reservist's absence on military leave, the employer must make up those contributions upon the employee's return.[41] Time spent on military leave cannot be treated as a break in service and must count as continuous employment for determining vesting and accrual of retirement benefits. The returning veteran is allowed up to three times the length of the amount of military leave taken, up to a maximum of five years, to make up 401(k) contributions.[42]

**Disabled Veterans**

Many veterans returning from the wars in Iraq and Afghanistan have disabling injuries, such as amputations, traumatic brain injuries, or post-traumatic stress disorder (PTSD), which may prevent them from returning immediately to work or assuming the same duties and responsibilities of the pre-deployment assignment. USERRA requires employers to make reasonable efforts to accommodate the disabled veteran, including providing retraining, and to make reasonable efforts to assist the veteran in becoming qualified for the same or another job.[43] Service members convalescing from injuries received during service or training may have up to two years from the date of completion of service to return to the job or apply for reemployment.[44] USERRA requirements differ from those under the Americans with Disabilities Act (ADA), and a disabled veteran still must meet ADA standards before he or she can claim reasonable accommodation under that statute.

**California Law Mirrors USERRA**

State laws that give greater rights than those afforded reservists under federal law are expressly preserved under USERRA.[45] In California, the Military and Veterans Code provides protections similar to the federal law. The statute "is designed to, and reasonably should, aid and expedite the recruiting service of the United States."[46] Like USERRA, "[t]he legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[47]

California law makes it a misdemeanor to discriminate against an employee on the basis of membership in the military.[48] The statute also requires employers to afford a returning reservist "all of the rights and privileges…of employment which he or she would have enjoyed" had the reservist not been absent.[49] As with USERRA, the reservist must be returned under California law to an "escalator" position of like status, seniority, and pay.[50] The California veteran "steps back on the [seniority escalator] at the precise point he would have occupied had he kept his position continuously during the war," and is entitled to the rights and privileges he or she would have enjoyed had there been no deployment.[51]

Some local governments extended salary and benefits to deploying reservists after 9/11. The state statute limits to 30 days the period for which a reservist who is a public employee must receive a salary from the public agency while absent for military duty.[52] The statute does not, however, prohibit an agency from continuing the reservist's salary and benefits for any period of time while absent.

## Remedies Available for Enforcing USERRA Rights

A reservist who believes he or she has been discriminated against or had other rights under USERRA or state law violated may seek administrative and civil remedies. The California Department of Industrial Relations receives complaints regarding violations of the Military and Veterans Code, while the U.S. Department of Labor may investigate USERRA complaints. Reservists may also pursue civil litigation.

Many veterans pursue USERRA claims first through the U.S. Department of Labor; however, there is no exhaustion of administrative remedies required before an employee files a USERRA action. There is no statute of limitations barring claims, but laches is available as an equitable defense to late or dilatory claims.[53] The Eleventh Amendment and sovereign immunity principles act as a jurisdictional bar to USERRA lawsuits against the State of California in the federal courts.[54] Remedies available under the statute include compensation for lost wages and benefits, double-damages for willful violation of the statute, and injunctive relief to enforce statutory rights.[55] USERRA plaintiffs are exempt from fees and court costs.[56]

A good resource for public agency managers dealing with reemploying returning reservists is the Employer Support for Guard and Reserve (ESGR), an organization operated by the Department of Defense to promote cooperation between reservists and civilian employers. The ESGR handbook, Employer Resource Guide for Business Leaders, has a wealth of information and FAQs. The U.S. Department of Labor website also has links to the statute and answers questions regarding USERRA and reemployment rights and obligations. There are useful USERRA fact sheets. The Department of Labor, Veterans' Employment and Training Service (VETS) investigates and resolves USERRA complaints.

## Conclusion

This overview of the Uniformed Services Employment and Reemployment Rights Act is not exhaustive. There are many avenues to avoid USERRA litigation and the publicity that can accompany such claims against public agencies. Practitioners, human resources professionals, and reservists should consult the many available public resources before making decisions that may adversely affect the employment status of a returning veteran.

Christopher W. Miller is a partner with Mastagni, Holstedt, Amick, Miller & Johnsen, where he emphasizes labor and employment law representation, including USERRA litigation, on behalf of public employee labor associations and clients. Miller was a lieutenant in the U.S. Navy, serving in the Persian Gulf and Pacific Fleet, and is a former prosecutor.

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[1] U.S. Department of Labor, FY 2011 USERRA Annual Report to Congress (2012).

[2] 38 USCA Sec. 4301.

[3] 38 USCA Sec. 4312; 20 CFR Sec. 1002.18.

[4] 38 USCA Sec. 4311; 20 CFR Sec. 1002.18.

[5] *Fishgold v. Sullivan Drydock & Repair Corp.* (1946) 328 U.S. 275, 286.

[6] 38 USCA Sec. 4304(1)-(4).

[7] *Cole v. Swint* (5th Cir. 1992) 961 F.2d 58, 60.

[8] 38 USCA Sec. 4311(a).

[9] 38 USCA Sec. 4311(c)(1), (2).

[10] *Sheehan v. Department of the Navy* (Fed. Cir. 2001) 240 F.3d 1009, 1013.

[11] *Id*. at pp. 1013-1014; 38 USCA Sec. 4311(c)(1).

[12] 38 USCA Sec. 4312(e) sets the requirements for post-discharge return to work depending on the length of time the returning employee was absent for military service. Employees absent for less than 31 days must report to the employer no later than the first full calendar day following completion of military service, so long as the employee has had eight hours to return home. (38 USCA Sec. 4312(e)(1)(A); 20 CFR 1002.115(a).) Employees absent more than 30 days but less than 181 days must submit an application for reemployment, if possible, no later than 14 days after the service period ends. (38 USCA Sec. 4312(e)(1)(C).) Employees absent more than 180 days must submit an application for reemployment, if possible, no later than 90 days after completing the service period. (38 USCA Sec. 4312(e)(1)(D).)

[13] 38 USCA Sec. 4312(f)(3)(A)(4).

[14] (1st Cir. 2010) 625 F.3d 22.

[15] *Vega-Colon v. Wyeth Pharmaceuticals* (1st Cir. 2010) 625 F.3d 22, 26.

[16] *Hays v. Communication Technologies* (S.D. Iowa 2010) 753 F.Supp.2d 891, 898.

[17] *Ibid*. at p. 898.

[18] *Knowles v. Citicorp Mortgage, Inc.* (8th Cir. 1998) 142 F.3d 1082, 1085.

[19] *McGuire v. United Parcel Service* (7th Cir. 1998) 152 F.3d 673, 677-678.

[20] *Id*. at p. 676.

[21] 38 USCA Sec. 4312(d)(1)(A).

[22] 38 USCA Sec. 4312(d)(1)(B).

[23] 38 USCA Sec. 4312(d)(1)(C).

[24] 38 USCA Sec. 4312(d)(2).

[25] See 38 USCA Sec. 4313(a)(2)(A); 20 CFR Secs. 1002.191, 1002.192, 1002.197.

[26] *Fishgold v. Sullivan Drydock & Repair Corp.* (1946) 328 U.S. 275, 284-85; see also *Hogan v. United Parcel Service* (W.D. Mo. 2009) 648 F.Supp.2d 1128, 1141.

[27] 38 USCA Sec. 4313 (a)(2)(A); 20 CFR Sec. 1002.192.

[28] 20 CFR Sec. 1002.191.

[29] 38 USC 4316(a).

[30] 20 CFR Sec. 1002.193; *Smith v. U.S. Postal Serv.* (Fed.Cir. 2008) 540 F.3d 1364, 1366; *Hogan v. United Parcel Serv.*, *supra*, 648 F.Supp.2d at 1141-42.

[31] 38 USC Sec. 4303(2); 20 CFR Sec. 1002.5.

[32] *Id*.

[33] *Fishgold v. Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at p. 285; see also 38 USC Sec. 4302.

[34] 20 CFR Sec. 1002.193; *Smith v. U.S. Postal Serv.*, *supra*, 540 F.3d 1364, 1366.

[35] *Smith v. U.S. Postal Serv.*, *supra*, 540 F.3d at p. 1366.

[36] *Fryer v. A.S.A.P. Fire and Safety Corp., Inc.* (D. Mass 2010) 680 F.Supp.2d 317, 325-326.

[37] 38 USCA Sec. 4331(a); 20 CFR Sec. 1002.193(b).

[38] 38 USCA Sec. 4317(a); 20 CFR Sec. 1002.171.

[39] 38 USCA Sec. 4317(a)(1)(A)(2).

[40] 38 USCA Sec. 4317(b)(1).

[41] 38 USCA Sec. 4318(b)(1).

[42] 38 USCA Sec. 4318(b)(2).

[43] 38 USCA Sec. 4313; 20 CFR Secs. 1002.198, 1002.225-.226.

[44] 38 USCA Sec. 4312(e)(2)(A).

[45] 38 USCA Sec. 4302.

[46] *Cunningham v. Hart* (1947) 80 Cal.App.2d 902, 909.

[47] *Palaske v. City of Long Beach* (1949) 93 Cal.App.2d 120, 127.

[48] Mil. & Vet. Code Sec. 394(g).

[48] Mil. & Vet. Code Secs. 394(b), 395.1.

[50] Mil. & Vet. Code Sec. 395.1;*Cunningham v. Hart*, *supra*, 80 Cal.App.2d at p. 910.

[51] *Cunningham v. Hart*, *supra*, 80 Cal.App.2d at p. 910; *Palaske*, *supra*, 93 Cal.App.2d at p. 126.

[52] Mil. & Vet. Code Sec. 395.01.

[53] 38 U.S.C. 4327(b); *Maher v. City of Chicago* (N.D. Ill. 2006) 406 F.Supp.2d 1006, 1031.

[54] *Alden v. Maine* (1999) 527 U.S. 706, 712; 38 USCA Sec. 4323(b)(2).

[55] 38 USCA Sec. 4323(d), (e).

[56] 38 USCA Sec. 4323(h).