

YOUR OBLIGATIONS TO EMPLOYEES SERVING IN THE ARMED SERVICES

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The massive buildup of our armed forces, and the continuing war in Iraq and Afghanistan, creates certain employment rights for employees, who have been called to active duty while in the reserve armed services. The employee has special rights to reemployment, and freedom from discrimination. Being cognizant of those rights and your duties will help prevent costly litigation.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USC §4301, et. Seq., is the federal law which governs in these situations. The law applies to any employer, regardless of size. USERRA prohibits employers from discriminating on the basis of military status, whether past, present, future or contemplated, and requires the employer to grant unpaid leave to the employee, and provides a means for continuation of medical coverage. The principle underlying this law of protecting reemployment rights of veterans is that one who is called to colors is not to be penalized on his return by reason of his absence from his civilian job.

This article is not designed to provide legal advice or render legal opinions for specific situations. The law in other states may vary from Colorado on these issues. For specific legal questions, contact the attorney of your choice. If you wish to consult with the author on any matter relating to Colorado employment issues, call our office today at 303-825-2700, or directly to Nathan Davidovich at 303-TALK-LAW (303-825-5529).

STEPS NEEDED TO TRIGGER REEMPLOYMENT RIGHTS

Any employee missing work due to service in the uniformed services is entitled to the reemployment rights and benefits and other employment benefits of USERRA, provided that the following conditions are complied with:

1. “Uniformed services” includes the Army, Navy, Marine Corps, Air Force, Coast Guard, Army National Guard, Air National Guard and Public Health Service commissioned corps, as well as the reserve components of each of these services.
2. The employee (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to the employer;
 - a. No notice is required if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable.

3. In the event that the employee has had previous absences from his/her employment, by reason of service in the uniformed services, the cumulative length of the future absence and of all previous absences with that employer does not exceed five years;

a. There are certain limited conditions in USERRA under which the cumulative five year period may be extended. See, 38 USCS § 4312; and,

4. The employee, upon completion of his service must, in a timely manner, submit an application for reemployment to the employer according to the following schedule:

A. Less than 31 days service: By the beginning of the first regularly scheduled work period after the end of the last calendar day of duty, plus time required to return home safely and an eight hour rest period. If this is impossible or unreasonable, then as soon as possible;

B. 31 to 180 days service: No later than 14 days after completion of military service. If this is impossible or unreasonable, then as soon as possible; and,

C. 181 days or more service. No later than 90 days after completion of military service.

DOES AN EMPLOYER HAVE A RIGHT TO NOT RE-EMPLOY?

An employer is not required to re-employ a person if any of the following conditions exist:

1. The employer's circumstances have so changed as to make such re-employment impossible or unreasonable. The employer has the burden of proving impossibility or unreasonableness;

2. The re-employment would impose an undue hardship on the employer. The employer has the burden of proving the existence of an undue hardship;

3. The employment from which the person leaves to serve in the uniformed services is for a brief period with no reasonable expectation that such employment would continue indefinitely or for a significant period; or,

4. The employee has been separated from such uniformed service with a dishonorable or bad conduct discharge.

RIGHT TO BE FREE FROM DISCRIMINATION:

USERRA protects employees from discrimination in employment, including any adverse employment action, such as unwarranted discipline or termination, or denial of benefits and wages paid to other employees, by virtue of the exercise by the employee of the rights provided in USERRA.

The type of discrimination protected against not only includes, demotion, termination or failure to reemploy after completion of service, but also includes any advantage, profit, privilege, gain, status, account, or interest (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 and includes bonuses, bonus days for perfect attendance, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

PROOF OF DISCRIMINATION:

USERRA provides in part, as follows:

An employer shall be considered to have engaged in actions prohibited . . . if the person's membership, application for membership, service, application for service, or obligation to serve in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.

The term "'motivating factor' means that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, one of those reasons would be the employee's military position or related obligations. In other words, a plaintiff's military position and related obligations would be a motivating factor if the employer" relied upon, took into account, considered, or conditioned its decision on the employee's military-related absence.

The circumstances of any adverse employment action an employer takes against a returning veteran may be sufficient to lead to a finding of discriminatory conduct, even absent an obvious discriminatory motive. As we find in most cases of discrimination, whether racial, gender or age, there is rarely a "smoking gun" or direct evidence of USERRA discrimination. The courts have held that absence of direct evidence of improper motivation is not fatal to an employee's case. Improper employer motivation may be inferred from circumstantial as well as direct evidence. Improper motivation under USERRA may be reasonably inferred from a variety of factors, including the time between the employee's military activity and the adverse employment action, inconsistencies between the employer's proffered reason for the adverse action, and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and different treatment of certain employees engaged in military activity as compared to other non-military employees with similar work records or offenses. Obtaining competent legal advice before engaging in any questionable activity toward a returnee may save the employer the expense and inconvenience of litigation. [Nathan Davidovich](#) is available to

advise employers in these matters.

Unlike many discrimination cases, an employee who feels discriminated against, by virtue of activity within the uniformed services, has no administrative filing requirement before being able to file suit. The Equal Employment Opportunity Commission has nothing to do with USERRA cases. A complaint may be made with the United States Department of Labor, who will then investigate, but that is not necessary before filing suit. Once a lawsuit is filed, the employee must first present a *prima facie** case. A *prima facie* case exists when the plaintiff offers evidence to show that (1) the plaintiff engaged in a protected activity with regard to the uniformed services, (2) the defendant knew about the protected activity, (3) the plaintiff suffered an adverse employment action, and (4) there is a "causal connection" (related in time and motive) between the protected activity and the adverse employment action. The plaintiff must show that his military status was "at least a motivating or substantial factor in the adverse employment action suffered. Once such a showing has been made, the employer must prove, by a preponderance of the evidence that the action would have been taken despite the protected status.

**Prima facie* proof means sufficient proof of the facts of a case to require the employer to respond to the claim. If a *prima facie* case is not proved, the court will dismiss the claim. However, proof of a *prima facie* case does not mean that the plaintiff will win his/her case. It is only the threshold, first step of many factors that must be proven in any case.

REMEDIES AVAILABLE FOR DISCRIMINATION:

A successful plaintiff is entitled to, as closely as possible, be "made whole" for the damages suffered. He is entitled to reemployment at the same or similar position, and at the current salary and benefits that he would have earned, as if his employment had not been interrupted for military service. In the case of a "willful" violation of the USERRA, the successful plaintiff may also be entitled to liquidated damages in an amount equal to the lost wages and benefits. Following successful litigation he is entitled to an award of reasonable attorney fees and costs incurred in prosecuting his case.

CONCLUSION

There are many more intricacies involved with the USERRA than have been discussed in this article. Learn more about protecting your company from a claim of USERRA violation by selecting a competent lawyer to represent you.

FOR A REVIEW OF YOUR POLICIES AND PRACTICES FOR PREVENTION OF AGE DISCRIMINATION OR FOR DEFENSE OF A CLAIM PLEASE CONTACT NATHAN DAVIDOVICH BY EMAIL AT nathandavidovich@talk-law.com, by telephone AT (303) TALKLAW ((303) 825-5529),or by fax at (303) 265-9797.

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