

# SMITH ANDERSON

## **UNIFORMED SERVICES EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT (USERRA): WHAT PRIVATE EMPLOYERS SHOULD KNOW ABOUT DOL'S POSITION ON EMPLOYER OBLIGATIONS**

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## APPENDIX A

Uniformed Services Employment and Reemployment Rights Act of  
1994, 38 U.S.C. § 4301 et seq.

## APPENDIX B

“Your Rights Under USERRA,” Appendix to 20 C.F.R. § 1002

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## **UNIFORMED SERVICES EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT (USERRA): WHAT PRIVATE EMPLOYERS SHOULD KNOW ABOUT DOL'S POSITION ON EMPLOYER OBLIGATIONS**

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was signed into law on October 13, 1994. It clarifies and strengthens prior veterans rights laws and supersedes any state or local law or agreement, policy, plan or practice that reduces any rights afforded under the federal law or establishes additional prerequisites to the receipt of such rights. 38 U.S.C. § 4302. It does not, however, supersede any such law, agreement, policy, plan or practice that affords greater rights. Id.

USERRA is intended to encourage noncareer uniformed service so that America can enjoy the protection of those services, staffed by qualified people, while maintaining a balance with the needs of private and public employers who also depend on these same individuals. Specifically, USERRA is intended to minimize the disadvantages to an individual that occur when that person needs to be absent from his or her civilian employment to serve in this country's uniformed services. 38 U.S.C. § 4301. USERRA makes major improvements in protecting service member rights and benefits by clarifying the law and improving enforcement mechanisms. Specifically, USERRA expands the cumulative length of time that an individual may be absent from work for uniformed services duty while retaining reemployment rights.

USERRA potentially covers every individual in the country who serves in or has served in the uniformed services, and applies to all employers (regardless of size) in the public and private sectors, including Federal employers. The law seeks to ensure that those who serve their country can retain their civilian employment (full or part-time) and benefits, and can seek employment free from discrimination because of their service. USERRA provides enhanced protection for disabled veterans, requiring employers to make reasonable efforts to accommodate the disability.

USERRA is administered by the United States Department of Labor, through the Veterans' Employment and Training Service (VETS). VETS provides assistance to those persons experiencing service-connected problems with their civilian employment, and provides information about the Act to employers.

### **GENERAL PROVISIONS**

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Employees who are past, present or future service members are subject to all employment policies affecting them as long as these policies do not penalize them for their uniformed service. Where a policy or procedure contains provisions that infringe on USERRA rights, those policies have no legal force. Under such circumstances, the employer may not take adverse action against the employee for failure to follow those policies. USERRA protects all members of the uniformed service regardless of whether their service was in the present, is presently ongoing or will be in the future.

USERRA governs all aspects of employment including:

- Initial hiring
- Release for service
- Return from service
- Retention after return
- Promotion
- Benefits
- Pay

Employers are required to notify employees of their rights, benefits and obligations under USERRA. See Appendix B (Appendix to 20 C.F.R. § 1002). The Department of Labor has issued a poster that contains the notice information employers are required to provide to employees regarding USERRA. The poster appears on the Department of Labor website at <http://www.dol.gov/vets/programs/userra/poster.pdf>. The Department of Labor states that employers may satisfy the notice requirement by placing the poster in locations where employee notices are customarily placed in the workplace such as break rooms. Also, employers may provide the notice to employees in other ways such as mailing the notice or distributing the notice by electronic mail.

## WHO QUALIFIES

**Q: What qualifies as service in the uniformed services?**

A: Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes Active Duty, Active Duty for Training, Inactive Duty Training, full time National Guard Duty and any period for which a person is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform any such duty.

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38 U.S.C. § 4303(13). Uniformed services means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training or full time National Guard duty, the commissioned corps of the Public Health Service and any other category of persons designated by the President in time of war or national emergency. 38 U.S.C. § 4303(16).

**Q: Are there circumstances in which an individual's separation from uniformed service may render them disqualified from USERRA protection?**

A: A person's entitlement to USERRA protection terminates upon his or her separation from uniformed service with a dishonorable or bad conduct discharge or separation under other than honorable conditions as characterized pursuant to regulations prescribed by the Secretary concerned, dismissal pursuant to Title 10 U.S.C. § 1161 (a) or dropping from the rolls pursuant to Title 10 U.S.C. § 1161(b). 38 U.S.C. § 4304.

## INITIAL HIRING

**Q: May the company take into consideration an applicant's past, present or future uniformed service obligations in making hiring decisions?**

A: An applicant's past, present, or future uniformed service duty or obligation must not be a negative factor in any hiring decision. 38 U.S.C. § 4311. This includes Reserve and National Guard members, veterans, and those who report for enlistment or entry training.

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## RELEASE FROM WORK FOR SERVICE

### Notice Requirements

**Q: May an employee leave for uniformed service without giving advance notice?**

A: Generally, the employee or an officer of the uniformed service should notify the company verbally or in writing prior to the employee's absence for uniformed service. This requirement does not apply if the failure to provide the notice is due to military necessity or the impossibility or unreasonableness of giving notice under the circumstances. 38 U.S.C. § 4312(b). In these cases, the company should place the employee on leave for uniformed service and, upon release from such service, the employee will be entitled to all USERRA reemployment and benefit rights provided that he or she meets the other eligibility requirements.

### Denial of Leave

**Q: May leave be denied on the basis of timing, frequency, duration, the nature of the service, etc.?**

A: Generally, no. Leave timing, frequency, duration of service, nature of the service (including voluntary service) is not a lawful basis for denying leave provided that the service limits have not been exceeded and the notice and notification requirements have been satisfied. 38 U.S.C. § 4312(h).

### Status During Leave

**Q: What status do employees absent for uniformed service have during their absence?**

A: Employees absent for uniformed service are deemed to be on furlough or leave of absence while performing such service and are entitled to all rights and benefits (not determined by seniority) as are provided by the employer to employees having similar seniority, status and pay who are on furlough or leave of absence under a contract, agreement, policy, practice or plan in effect at the beginning of the uniformed service or established while the employee is absent for

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performing such service with the following exception: Employees who knowingly provide written notice of intent not to return to work after uniformed service are not entitled to any such rights or benefits. Employees who are entitled to such rights or benefits during the uniformed service absence may be required to pay the employee cost, if any, of any such benefit to the extent other employees on furlough or leave of absence are required to pay. 38 U.S.C. § 4316(b). If an employer's policies or practices vary among types of non-military leaves of absence, Congress intends that the most favorable treatment given any type of leave also must be accorded to uniformed service leave, regardless of whether the non-military leave is paid or unpaid. For example, an employer that allows employees who take family leaves of absence to continue to be covered under a group life insurance plan, but does not extend this right to employees on education leave, would have to continue covering service members within the group life plan while they were on service leave.

## **Pay During Leave**

**Q: Is the company required to pay employees on leave for uniformed service?**

A: No; however, the company may provide paid military leave, if it so chooses.

## **Health Benefits During Leave**

**Q: Must the company continue the employee's health benefits while he or she is absent for uniformed service?**

A: USERRA provides for COBRA-like benefit continuation for employees absent from work for uniformed service, even when the company is not covered by COBRA. If the employee's health plan coverage would terminate because of the uniformed service absence, the employee may elect to continue the health plan coverage for up to 18 months after the absence begins or the length of the uniformed service, whichever is shorter. The employee cannot be required to pay more than 102% of the full premium for the coverage--if the uniformed service is for 30 or fewer days, then the employee cannot be required to pay more than the normal employee share of any premium. 38 U.S.C. § 4317.

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**Note:** If the company does not provide health benefits to employees, then the company has no obligation under USERRA to provide these benefits for uniformed service absences.

## **Use of Vacation Time**

**Q: May an employee on leave for uniformed service use earned vacation time?**

A: USERRA requires the company to allow an employee absent for uniformed service to use earned vacation time only if the employee requests to do so. 38 U.S.C. § 4316(d).

**Q: May the company require that employees on leave for uniformed service use accrued vacation time?**

A: Generally, no. The company may not require the use of accrued vacation for these absences unless the absence coincides with a period, such as plant shutdowns, etc., when all employees are required to take vacation. 38 U.S.C. § 4316(d).

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## RETURNING FROM SERVICE

### Reemployment

As a general rule, employees absent for duty in the uniformed services are entitled to reemployment rights and benefits provided that: (i) the employee (or an appropriate officer of the uniformed service in question) has given advance written or verbal notice of such service to the employer; (ii) the cumulative length of the uniformed service absence and all previous absences with the employer for duty in the uniformed services does not exceed five (5) years;<sup>1</sup> and (iii) the employee timely reports to or timely submits an application for reemployment to the employer. 38 U.S.C. § 4312(a).

**Q. How soon after the employee's separation from the uniformed service must he or she apply for reemployment?**

A: Employees whose period of service was less than 31 days or who were absent for any period of time for an examination of their fitness to perform uniformed service must report to the employer no later than the beginning of the first full regularly scheduled work period following the completion of the uniformed service and the expiration of eight hours thereafter to allow their transportation from the place of uniformed service to their residence or if such reporting is impossible or unreasonable through no fault of their own, as soon as possible after the expiration of this eight-hour period. 38 U.S.C. § 4312(e)(1)(A), (B). Employees whose uniformed service exceeded 30 days, but was less than 180 days, must submit an application for reemployment not later than 14 days after completion of the uniformed service or, if submitting the application within

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<sup>1</sup> The five-year period does not include the following: (i) any service required beyond five years to complete an initial obligated service; (ii) any period during which the employee was unable to obtain orders releasing him or her before the expiration of the five-year period and such inability was through no fault of his or hers; (iii) service performed as required pursuant to 10 U.S.C. § 10147, 32 U.S.C. § 502(a), § 503 or to fulfill additional training requirements determined and certified in writing by the Secretary concerned to be necessary for professional development or for completion of skilled training or retraining; or (iv) performed by a service member who is ordered to or retained on active duty under § 688, 12301(a), 12301(g), 12302, 12304 or 12305 of Title 10 or under § 331, 332, 359, 360, 367 or 712 of Title 14; ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or Congress, as determined by the Secretary concerned; ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. § 12304; ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or called into Federal service as a member of the National Guard under Chapter 15 of Title 10 or under § 12406 of Title 10. 38 U.S.C. § 4312(c).

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this period is impossible or unreasonable through no fault of their own, the next full calendar day when submission of such an application becomes possible. 38 U.S.C. § 4312(e)(2)(C). Employees whose uniformed service exceeded 180 days must submit an application for reemployment no later than 90 days after completion of the uniformed service. 38 U.S.C. § 4312(e)(1)(D). Employees who are hospitalized for or convalescing from an illness or injury incurred or aggravated in uniformed service must report for reemployment at the end of the period necessary for their recovery, except that employees whose absence was for examination to determine their fitness to perform uniformed service are limited to a two-year recovery period provided, however, that this period shall be extended by the minimum time required to accommodate circumstances beyond their control which make reporting to the employer impossible or unreasonable. 38 U.S.C. § 4312(e)(2).

**Q: Does an employee who fails to report or apply for reemployment timely automatically forfeit USERRA rights and benefits?**

A: No. These employees are subject to the rules, policies and general practices of the employer pertaining to explanation and discipline with respect to absence from scheduled work. 38 U.S.C. § 4312(e)(3).

**Q: What documentation must an employee returning from uniformed service provide to the employer?**

A: The employee must provide documentation establishing that his or her application is timely, he or she has not exceeded the service limitations and he or she has not been disqualified from benefits for dishonorable discharge or other disqualifying separation. 38 U.S.C. § 4312(f)(1).

**Q: Must the company generally reemploy an employee who timely applies for reemployment upon return from uniformed service?**

A: Yes, unless one of the specifically identified reasons excusing reemployment exists.

**Q: How soon after the employee's timely application for reemployment must the company actually return the employee to work?**

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A: Generally, the period between the application for reemployment and reinstatement on the payroll should be days, not weeks or months.

**Q: If an employee returning from service does not timely apply for reemployment must the company reemploy him or her?**

A: Generally, no.

## **Denial of Reemployment**

**Q: May the company deny reemployment to an employee who timely applies for reemployment upon return from uniformed service because he or she fails to provide documentation relating to the absence?**

A: The company may not use lack of documentation as a basis for delaying or denying reemployment; however, if documentation is received later that shows that the employee is not eligible for USERRA protection, the employee may be terminated at that time. 38 U.S.C. § 4312(f)(3).

The company has the right to require an employee who is absent for a period of uniformed service of 31 days or more to provide documentation showing that: (i) the application for reemployment was timely; (ii) the 5-year service limit was not exceeded; and (iii) the separation from service was not under circumstances set forth in 38 U.S.C. § 4304.

**Q: May the company deny reemployment to an employee who timely applies for reemployment upon return from uniformed service because of a change in circumstances at the company?**

A: Reemployment of an employee upon return from uniformed service is excused if company circumstances have changed so much that reemployment would be impossible or unreasonable. 38 U.S.C. § 4312(d)(1)(A). An example of these circumstances would include a reduction-in-force that would have resulted in the employee's termination. The company has the burden of proving (not simply asserting) the impossibility, unreasonableness, or other circumstances excusing reemployment. 38 U.S.C. § 4312(d)(2).

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**Q: May the company deny reemployment to an employee who timely applies for reemployment upon return from uniformed service because doing so would impose an undue hardship on the company?**

A: The company is excused from making efforts to qualify returning service members or from providing reasonable accommodation to returning service members with disabilities incurred during service only when doing so would be of such difficulty or expense as to cause "undue hardship." 38 U.S.C. § 4312(d)(1)(B). Undue hardship has the same meaning under USERRA as it has under the Americans with Disabilities Act. Moreover, the company has the burden of proving (not simply asserting) undue hardship. 38 U.S.C. § 4312(d)(2).

**Q: May the company deny reemployment to an employee who timely applies for reemployment upon return from uniformed service because the employee's position was temporary?**

A: The company is not required to reemploy the employee where the position he or she left was for a brief and non-recurrent period which reasonably could not be expected to continue indefinitely or for a significant period. 38 U.S.C. § 4312(d)(1)(c). The company has the burden of proving (not simply asserting) the brief non-recurrent nature of the employment which reasonably could not be expected to continue indefinitely or for a significant period. 38 U.S.C. § 4312(d)(2).

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**Q: What obligations does the company have to reemploy an employee who was disabled during the uniformed service?**

A: Reemployment of an employee who incurs a disability during uniformed service must comply with a 3-part process:

1. The company must make a reasonable effort to accommodate the employee's disability so that the employee can perform the position that he or she would have held if he or she had remained continuously employed.

2. If, despite these reasonable accommodation efforts, the employee is not qualified for the position identified in paragraph 1 above due to his or her disability, then the employee must be reemployed in a position of equivalent seniority, status and pay so long as he or she is qualified to perform the duties of that position or could become qualified to perform them with reasonable efforts by the company.

3. If the employee does not become qualified for the position identified either in paragraphs 1 or 2 above, the employee must be employed in a position that, consistent with the circumstances of his or her case, most nearly approximates the position identified in paragraph 2 above in terms of seniority, status and pay. Importantly, these requirements apply to all employers regardless of size. 38 U.S.C. § 4313(a)(3).

## **Position Offered to Returning Service Member**

**Q: What position must be offered employees reemployed after uniformed service absences of 91 days or more (excluding travel)?**

A: An employee whose uniformed service lasted 91 days or more must be promptly reemployed in the following order of priority:

1. In the job the employee would have held had he or she remained continuously employed or a position of equivalent seniority, status and pay so long as the employee is qualified for the job or can become qualified with reasonable efforts by the company to qualify him or her;

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2. If the employee cannot become qualified for the position identified in paragraph 1 above, then the employee should be reemployed in his or her pre-service position so long as he or she is qualified for that job or can become qualified after reasonable efforts by the company; or
3. If the employee cannot become qualified for the position identified in either paragraphs 1 or 2 above, then the employee should be reemployed in any other position which is the nearest approximation of the position identified in paragraph 1 above for which he or she is qualified with full seniority. 38 U.S.C. § 4313(a)(2).

**Q: What position must be offered employees reemployed after uniformed service absences of 90 days or less (excluding travel)?**

A: An employee whose uniformed service is less than 91 days must be promptly reemployed in the following order of priority:

1. In the job the employee would have held had he or she remained continuously employed so long as he or she is qualified for the job or can become qualified after reasonable efforts by the company to qualify him or her;
2. If the employee cannot be qualified for the position identified in paragraph 1 above, then the employee should be reemployed in his or her pre-service position so long as he or she is qualified for the job or can become qualified after reasonable efforts by the company; or
3. If the employee cannot become qualified for the position identified in either paragraphs 1 or 2 above, then the employee must be reemployed in any other position which is the nearest approximation of the position identified in paragraph 1 above for which he or she is qualified with full seniority. 38 U.S.C. § 4313(a)(1).

**Q: What happens if two or more persons are entitled to reemployment under USERRA in the same position and more than one of them has reported for such reemployment?**

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A: The person who left the position first shall have priority for reemployment in that position. All others shall be entitled to reemployment as follows: In any other position of employment as provided for absences of 90 days or less or more than 91 days as the case may be in the order of priority set forth for absences of that length that provides a similar status in pay to the position to which the employee otherwise would be reemployed. 38 U.S.C. § 4313(b).

## **Pay Rate for Returning Service Member**

**Q: What rate of pay must the company give returning service members?**

A: A returning service member is entitled to all general across-the-board pay raises which he or she would have received but for the absence for service. It does not matter if the raise resulted from a collective bargaining agreement or employer policy. Where the rate of pay is an attribute of the position, the returning service member must be paid the current rate of the position to which he or she is entitled, including all changes that occurred in his or her absence.

Where the pay system conditions increases on factors such as increased skill, qualifications or merit, the provisions of the pay system together with the actual practice followed must be examined. For example, if merit increases have been awarded consistently to nearly all employees, then the raises would be considered to be seniority-based and the returning service member will be entitled to these raises as well. In some cases, the company bases pay raises on both merit and seniority. For example, all employees receive a raise each year, however, the amount of the raise may depend on each employee's evaluation. In these cases, the returning service member whose absence may have spanned several years must be given at a minimum the seniority-based part of the raise. In some circumstances especially professional or managerial positions, the duties and responsibilities of the position may vary with the special skills, abilities, training and other attributes of the incumbent and pay is calculated in relation to the attributes of the individual holding the job rather than the job itself. In these cases, the returning service member would not necessarily be entitled to the incumbent's rate of pay; rather, the proper rate of pay would be the incumbent's pre-service rate adjusted by any general or cost-of-living increments added during his or her absence.

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Under USERRA, the term "pay" is not limited to wages received; rather, it includes all elements of compensation such as drawing accounts, bonuses, shift premiums, hourly rate, piece rate, salaries and commissions.

## **Promotions to be Given Returning Service Members**

**Q: When an employee returns from uniformed service, must the company allow the employee to make-up any promotional testing that he or she missed during the service-related absence?**

A: Probably yes. Unless it is impossible or unreasonable, the company is generally required to allow a returning service member to make up a test for promotion that was missed while he or she was absent. Although no specific guidelines have been established, the company should provide the make-up test as soon as possible after the employee's return. This requirement supersedes other laws or regulations requiring testing to take place during a specified period.

**Q: Must the company allow an employee returning from service apply for or receive any promotions that would have been available to the employee had he or she not been on leave?**

A: Generally, the company must allow the employee to bid or apply for a promotion that he or she would have bid or applied for but for his or her absence. For example, an employee leaving for service whose departure is before the closeout date on the promotion announcement, should be given the balance of the time to bid or apply on return.

As a general rule, if a returning employee would have with reasonable certainty been promoted but for his or her absence for uniformed service, then the employee should receive the promotion on return. The fact that another employee may have been selected and is currently occupying the position, does not deprive the returning service member of placement in the position.

If it is reasonably certain that an employee would have received a promotion during his or her absence from service but the employee is not qualified for the position, then the company must make reasonable efforts to qualify the person. These efforts may include training provided by the

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company. If the qualification is an external or legal one required for certification or licensing and it is entirely the employee's responsibility to obtain a needed license or certification, then the company is under no obligation to promote the employee unless he or she has obtained the required certification or licensing.

## Health Benefits

**Q: Upon return from uniformed service is the employee's reinstatement of health benefits subject to any waiting periods or pre-existing condition exclusions required by the plan?**

A: Generally, no. Upon return from uniformed service, health insurance coverage must be reinstated without any waiting period or exclusion for pre-existing conditions other than waiting periods or exclusions that would have applied had there been no absence for uniformed service. This requirement does not apply to the coverage of any illness or injury that is determined by the Secretary of Veterans Affairs to have been incurred or aggravated during the uniformed service. 38 U.S.C. § 4317(b).

## Company Service Calculations

**Q: If the company bases amount of vacation time available to employees on length of company service, must it count the absence for uniformed service as part of company service?**

A: Yes.

## Pension/Retirement Benefits

**Q: What obligations relating to pension and other retirement plans does the company have to employees on leave for service?**

A: USERRA requires that returning service members be treated as if they had been continuously employed for pension benefits regardless of the type of pension plan the employer has adopted (e.g., defined benefit, defined contribution, single employer plan, multiple employer plan, etc.). This requirement applies to vesting (determining when the employee qualifies for a pension) and benefit computation (determining the amount

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of the employee's monthly pension check). Absence for service is not considered a break in employment for pension purposes. Also, an employee who would have become eligible to participate in a pension plan during his or her time in service should be placed in the plan retroactive to the date of initial eligibility. If the employer contribution is contingent on the employee's contribution, then the employee must make his or her contribution before the employer is obligated to make its contribution. The employee's contribution must be made within the period immediately following reemployment of a length equal to three times the length of uniformed service not to exceed five years. Employer contributions shall be calculated at the rate the employee would have received but for the absence or, if such rate is not reasonably certain, the average rate of employee's compensation during the 12-months preceding the leave. 38 U.S.C. § 4318.

## **Vacation Benefits**

**Q: Does an employee on leave for uniformed service accrue vacation?**

A: Vacation accruals (i.e., the actual receipt of vacation time itself) is not usually tied to seniority. For example, a person returning from three years of service is not entitled to have three years of back vacation time waiting for his or her use upon return. If, however, the company allows accrual of vacation for employees who are on furlough or leave of absence, then an employee who is absent for uniformed service is entitled to the same benefit.

## **Seniority Rights and Benefits**

**Q: What seniority rights and benefits do employees have upon return from service?**

A: Employees returning from service are entitled to seniority and other rights and benefits determined by seniority that they had on the date their uniformed service began plus any additional seniority and rights and benefits that they would have attained had they remained continuously employed. 38 U.S.C. § 4316(a).

## **Limitations on Post-Reemployment Termination**

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**Q: Are there any limitations on the employer's right to terminate an employee who is reemployed after uniformed service?**

A: Employees whose uniformed service lasted more than 30 days but less than 181 days may not be discharged from employment except for cause during the 180-day period after the date of reemployment. Employees whose uniformed service lasted more than 180 days may not be discharged from employment except for cause within the one-year period after the date of such reemployment. 38 U.S.C. § 4316(c).

## **Enforcement**

**Q: Who enforces USERRA?**

A: USERRA is enforced by the Department of Labor, Veterans' Employment and Training Service ("VETS"), the Attorney General, and the courts.

**Q: How is USERRA enforced?**

A: The law provides for various enforcement mechanisms.

1. **Department of Labor.** The Secretary of Labor is empowered to issue regulations implementing the statute for states, local governments, and private employers. The proposed regulations are not yet final. 38 U.S.C. § 4331(a).

2. **VETS.** Reemployment assistance is provided by VETS of the Department of Labor. VETS investigates complaints and, if meritorious, attempts to resolve them. Filing of complaints with VETS is optional. 38 U.S.C. §§ 4321, 4322. VETS may: (a) examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right to reasonable access to interview persons with information relevant to the investigation. 38 U.S.C. § 4326(a); and (b) subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. 38 U.S.C. § 4326(b).

3. **Attorney General.** Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a

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complaint is meritorious, the Attorney General may file a court action on the complainant's behalf. 38 U.S.C. § 4323(a)(1).

4. **Private Court Actions.** Individuals continue to have the option to privately file court actions. They may do so even if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General. 38 U.S.C. § 4323(a). If the employee is successful, the employer could be liable for: (a) award of back pay or lost benefits that may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law. 38 U.S.C. § 4323(d)(1)(C); and (b) awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. 38 U.S.C. § 4323(h)(2). Also, the law bans charging of court fees or costs against anyone who brings suit. 38 U.S.C. § 4323(c)(2)(A).