

The Uniformed Services Employment and Reemployment Rights Act of 1994

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An indelible piece of American iconography is the image of the colonial-era farmer laying down his hoe to take up arms in defense of liberty, then returning to his fields when freedom had been secured. But this image is more than a hazy bit of folklore or exaggerated civil mythology. It is, in fact, emblematic of the way Americans have fought virtually every major conflict that threatened their homeland. Noncareer volunteers and conscripts, along with on-call reservists, have been essential to the security of America for over 350 years.

The concept of citizen-soldier or citizen-airman is alive and well in twenty-first century America. The United States has relied on an all-volunteer force for more than twenty-five years. In the last decade, as the Cold War ended, reliance on the reserve components to perform “real world” missions has increased. Total Force integration is such a reality that the Air Force cannot do without its Air Reserve Components. That integration will be key to the air expeditionary force concept currently being implemented in the Air Force.¹

The Air National Guard, for example, has 100 percent of the Air Force’s fighter-interceptor capability, 44 percent of the tactical airlift forces, 43 percent of the air refueling capability, 28 percent of the rescue assets, and more than two-thirds of the combat communications resources.² The Air Force Reserve Command has three numbered air forces with thirty-five flying wings and approximately 74,250 personnel.³

The current state of national defense policy has resulted in a smaller force tasked by a tempo of operations probably greater than that during most of the Cold War. So once again, the proverbial farmer is leaving his field to take up the cause of liberty. But, what if there was no field for him to return to?

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¹ Honorable Charles L. Cragin, Acting Assistant Secretary of Defense for Reserve Affairs, Speech to Air National Guard Commanders Conference (Nov. 18, 1998).

² *USAF Almanac*, AIR FORCE MAGAZINE, May 1997, at 114.

³ *Id.* at 112; Strom Thurman National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 411, 112 Stat. 1920, 1997 (1998) (authorizing end strength of Air Force Reserve).

Would he be as eager to go, especially (to mix metaphors), if the wolf is on somebody else's doorstep?

Increased utilization of reserve components necessarily affects businesses and communities almost as an additional tax. Thus, conflicts between service member/employees and their employers are inevitable. It becomes essential to have a mechanism to resolve these conflicts. This article describes the background and essential provisions of reemployment rights legislation which is the mechanism for resolving employer/employee conflicts over absences for military duties. It is imperative to the success of our current modes of operation that legal assistance attorneys, both on active duty and in the reserve components, be prepared to give accurate advice on reemployment rights.

I. THE HISTORY OF REEMPLOYMENT LEGISLATION

Reemployment legislation has existed continuously for nearly sixty years. The legislation has served to support different aspects of national defense policy over the years. In an unusually prescient legislative action, Congress first enacted reemployment rights for returning service members just before the outbreak of World War II. As the clouds of war gathered, Congress foresaw the need to train and induct a substantial number of civilians into the small standing military establishment. If no war occurred, these individuals would return to their usual livelihoods after training. If war did indeed break out, they would nonetheless go back to their jobs at the conclusion of their service. The new reemployment provisions, designed to facilitate the return of the service member to their civilian jobs, were part of the Selective Training and Service Act of 1940.⁴ The key substantive provisions of that early legislation remain virtually unchanged today.

After the war, in 1948, Congress reenacted the employment protection legislation as part of the Military Selective Service Act.⁵ This time, the purpose was to support the conscription-based force management policies that existed for the first twenty-five years of the Cold War.⁶ The typical draftee served two or three years and then returned to civilian life. Without legal protection against employment discrimination, the draft may have become even more unpopular with "Middle America" a lot sooner than it eventually did.

⁴ Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 885 (1940) (formerly codified at 50 U.S.C. app. § 308, *repealed by* Pub. L. No. 759, § 17, 88th Cong., 2d Sess., 62 Stat. 625 (1948)).

⁵ Pub. L. No. 759, §9, 88th Cong., 2d Sess., 62 Stat. 614 (1948) (formerly codified at 50 U.S.C. app. § 459; *repealed by* Pub. L. No. 93-508, § 405, 88 Stat. 1600 (1974)).

⁶ *See generally* S. Rep. No. 1286, 88th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S.C.C.S. 1989, 2011 (1948).

Congress next passed reemployment legislation at the end of the Vietnam conflict.⁷ Large numbers of service members were being separated as involvement in Southeast Asia came to an end. Additionally, the draft had ended and the nation was transitioning to a peacetime all-volunteer force. Employment protection was important in luring the potential one-term volunteer (to replace the draftee) and to induce separating members to continue to serve in the reserve forces.⁸

Between major reenactments, Congress amended the reemployment legislation numerous times in bills that concerned veterans' affairs or military personnel policy or fiscal authorizations. Although there was never a formal name to the reemployment provisions, prior to 1994 this legislation was popularly known as the Veterans' Reemployment Rights (VRR) law.⁹ A more formal name was used for the present reemployment rights legislation, the Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA),¹⁰ and its passage reflected yet another shift in national defense

⁷ Vietnam Era Veterans Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1594 (1974) (formerly codified at 38 U.S.C. §§ 2021-2027 (1976), *redesignated* 38 U.S.C. §§ 4301-4307 (1992)) [hereinafter Vietnam Veterans Readjustment Act]. Tracking the numbering of the sections of Title 38, United States Code, which comprise the present Uniformed Services Employment and Re-employment Rights Act (USERRA) and the last "pre-USERRA" veterans reemployment legislation (the 1974 Act cited in this footnote) can be a bit confusing. As indicated in this footnote, the Vietnam-era reemployment legislation was codified originally in sections 2021 through 2027 of Title 38. For some reason not now clear, these sections were codified in Chapter 43 of Title 38, following Chapter 19 and preceding Chapter 21. In 1992, sections 2021 through 2027 were redesignated as sections 4301 through 4307 and transferred to a new Chapter 43 of Title 38 in proper numerical sequence. *See* Pub. L. No. 102-568, § 506(a), 106 Stat. 4340 (1992). The present statute, USERRA, was enacted in 1994 and codified in Chapter 43 of Title 38 as sections 4301 through 4333. *See* Pub. L. No. 103-353, § 2(a), 108 Stat. 3150 (1994). This new legislation provided for a sixty-day transition period. Any reemployments "initiated" during the sixty-day transition period remain subject to the 1974 legislation in the prior sections 4301 through 4307. *See* Pub. L. No. 103-353, § 8, 108 Stat. 3175 (1994). It is conceivable that even as of this writing (late 1999) or later, a legal assistance attorney could be confronted with an issue arising out of that transition period. Reference to the prior sections 4301 through 4307 would then be necessary.

⁸ *See generally* S. Rep. No. 93-907, at 110 (1974).

⁹ The reemployment legislation was never an "Act" with its own special title. Some courts, commentators, and practitioners found it convenient to refer to the legislation in its various pre-1994 forms as the Veterans' Reemployment Rights Act or VVRA. *See, e.g.,* Gummo v. Village of Depew, New York, 75 F.3d 98 (2d Cir. 1996); Newport v. Ford Motor Co., 91 F.3d 1164 (8th Cir. 1996); Beattie v. Trump Shuttle, 758 F. Supp. 30 (D.D.C. 1991); Kevin G. Martin, *Employment Law*, 46 SYRACUSE L. REV. 499, 507 (1995); Margery Sinder Freidman & Mark A. Trank, *Reservists' Rights to Re-employment and Benefits*, 14 L.A. LAW., Mar. 1991, at 30; Judith Bernstein Gaeta, *Kolkhorst v. Tilghman: An Employee's Right to Military Leave Under the Veterans' Re-employment Rights Act*, 41 CATH. U. L. REV. 259 (1991); Penni P. Bradshaw & Richard E. Fay, "When Johnny Comes Marching Home Again": *The Veterans' Re-employment Rights Act and Employer Obligations to Military Reservists*, 15 AM. J. TRIAL ADVOC. 79 (1991). This usage is perfectly acceptable.

¹⁰ 38 U.S.C. §§ 4301-4333 (1998).

policy on this issue. The Cold War had ended and another drawdown of active duty forces had begun. The nation would place greater reliance on its reserve forces. These reserve forces would look different from the reserve forces of the Cold War era. During the Cold War, the reserve components were, for the most part, forces in reserve as part of a planned redundancy with active duty forces.¹¹ After the fall of the Berlin Wall,¹² greater emphasis was placed on reserve component roles and missions as part of, but not as an adjunct to, the “Total Force.”¹³ Indeed, as one military official put it, the reserve components have a “full-time commitment to America and to America’s military.”¹⁴ Additionally, the United States, in this post-Cold War era, faces different security threats and different geographic positioning in that not nearly as many military personnel are forward-based in foreign countries. The consequence of these facts is that both active and reserve components are called on to deploy for varying and, often, unpredictable lengths of time. This places significant strain on active duty and reserve members and on their families. Moreover, for the reserve component members, there is the added pressure of maintaining their civilian employment.

The Gulf War was the first post-Cold War opportunity to test America’s new defense posture and, consequently, the first significant chance to see its effects on the personnel. Over 250,000 members of reserve components served on active duty during the Gulf War.¹⁵ This brought the war home to “Main Street America” like no other military involvement since Vietnam.

II. THE UNIFORMED SERVICE EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT

USERRA was enacted with congressional mindfulness of the new realities of military policy and strategy in the post-Cold War era. Congress explicitly declared that the purpose of the statute is “to encourage noncareer

¹¹ Charles L. Cragin, *The Demise of the Weekend Warrior*, BANGOR DAILY NEWS, May 27, 1999 <<http://raweb.osd.mil/news/articles/bangornews.htm>>.

¹² The Berlin Wall was torn down by East and West Germans on November 9, 1989. The actual demise of the Wall is used as a metaphor for the eventual collapse of the Soviet empire, which occurred during the period 1989 to 1991.

¹³ Memorandum from Honorable William S. Cohen, Secretary of Defense, *Integration of the Reserve and Active Components* (Sep. 11, 1997).

¹⁴ Honorable Charles L. Cragin, Acting Assistant Secretary of Defense for Reserve Affairs, Remarks at the Reserve Officers Association National Convention (June 24, 1999) [hereinafter Cragin ROA Speech].

¹⁵ Honorable Deborah R. Lee, Assistant Secretary of Defense for Reserve Affairs, Remarks at TELECON XV Convention (Oct. 27, 1995).

service . . . by eliminating or minimizing the disadvantages to civilian careers and employment [and to] minimize the disruption to the lives of people serving in the uniformed services as well to their fellow employees, their employers, and their communities.”¹⁶ Congress also sought to prohibit discrimination against individuals because of their service in the military.¹⁷ To insure success in this regard, Congress borrowed several concepts from other federal employment discrimination statutes with which most employers are familiar. USERRA also represents a simplification of the original veterans’ reemployment legislation that, over the years, had become less comprehensible as various amendments were added. To that end, the Secretary of Defense has promulgated regulations that interpret certain provisions of USERRA.¹⁸ In an effort to achieve its goals, Congress separated the statute into three major elements: (1) a prohibition on employment discrimination against service members, former service members, or prospective service members; (2) reemployment rights for persons absent from employment because of military service; and (3) preservation of benefits for persons absent from employment because of military service.

A. Who is Covered by USERRA?

Every employer in the United States, including the federal and state governments, is subject to USERRA by the express terms of the statute.¹⁹ Coverage in this regard is so extensive that, unlike certain other federal employment statutes, USERRA has no exception for small businesses.²⁰

The application of this legislation to employees is quite clear. An employee or an applicant for employment²¹ may claim protection under USERRA if the employee “is a member of, applies to be a member of,

¹⁶ 38 U.S.C. § 4301 (a)(1)-(2)(1998).

¹⁷ *See id.* § 4301(a)(3).

¹⁸ *See* 32 C.F.R. pt. 104.1 (1998).

¹⁹ *See* 38 U.S.C. § 4303(4). *See also* H.R. Rep. No. 103-65, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2454 (1994) (term *employer* broadly construed; every employer in United States is covered). As to state governments, however, see discussion *infra* notes 174-186 and accompanying text.

²⁰ *See* *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992) (holding employer with two employees not exempt from 1974 VRRRA). *See also* H.R. Rep. No. 103-65, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2454 (1994). By comparative example, Title VII of the Civil Rights Act of 1964 applies only to entities with fifteen or more employees. *See* 42 U.S.C. § 2000e (1998). Other statutes with similar small business exemptions include the Americans with Disabilities Act, 42 U.S.C. § 12111(5) (fifteen or more employees), the Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (1998) (twenty or more employees), and the Family and Medical Leave Act, 29 U.S.C. § 2611(4) (fifty or more employees).

²¹ The statute does not explicitly refer to applicants for employment. However, since the statute does explicitly prohibit discrimination as to, among other things, initial employment, applicants are covered. *See* 38 U.S.C. § 4311.

performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service.”²² Additionally, however, if the employee has been separated from the service, that separation must not have been as a result of a punitive discharge or a discharge under other than honorable conditions.²³

B. Employment Discrimination Against Service Members, Former Service Members, and Prospective Service Members

USERRA provides that an employee or applicant for employment cannot be denied employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of having served in the military.²⁴ This antidiscrimination provision, section 4311, applies to former active duty members, as well as members and former members of the Guard and Reserve.²⁵ It also applies to persons who are not military members or former military members, but who have applied for appointment or enlistment in the military.²⁶ Finally, by its plain language, section 4311 bars employment discrimination against active duty members who seek off-duty employment.²⁷ Unlike the reemployment rights provision, the antidiscrimination provision covers employees who hold or seek temporary positions with civilian employers.²⁸ Given the broad application of this legislation, it is not surprising that USERRA is not limited to merely one type of discrimination. To the contrary, USERRA’s protections preclude all forms of discrimination common in today’s workplace.

²² *Id.* § 4311(a).

²³ *See id.* § 4304. The 1974 law required “satisfactory completion of military service.” Vietnam Veterans Readjustment Act, *supra* note 7. The 1974 statute excluded from its coverage a person who received a discharge under other than honorable conditions. *Brotherhood of Railway Clerks v. Railway Express Agency, Inc.*, 238 F.2d 181 (6th Cir. 1956). The wording of the present section 4304 of USERRA would seem to extend coverage to persons with uncharacterized “entry level” separations. *See generally* Air Force Instruction 36-3208, Administrative Separation of Airmen ¶ 1.19.1 (Oct. 14, 1994) [hereinafter AFI 36-3208]; Air Force Instruction 36-3209, Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members ¶ A2.3.2 (Feb. 1, 1998) [hereinafter AFI 36-2909]. The present statute excludes coverage for members dropped from the rolls. 38 U.S.C. § 4304(4). *See generally* AFI 36-3208 ¶ 1.19.3; AFI 36-3209 ¶ A2.3.1. Unanswered by the statute is whether a person “released from the custody and control” of the military by reason of a void enlistment is entitled to coverage by USERRA. *See generally* AFI 36-3208 ¶ 1.19.2; AFI 36-3209 ¶ A2.3.3. Since the statute is to be broadly construed, it would seem that persons released for void enlistments (as opposed to fraudulent enlistments) should be entitled to coverage.

²⁴ *See id.* § 4311(a).

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See* 38 U.S.C. § 4311(c)(2).

A person suffers one type of unlawful discrimination under USERRA if the person's military membership or prospective military membership is "a motivating factor" in an adverse employment action,²⁹ unless the employer can prove that the adverse action would have been taken even in the absence of the military membership.³⁰ The motivating factor standard is a concept taken from Title VII mixed motive jurisprudence.³¹ Though no cases have yet been decided concerning the motivating factor language under USERRA, the courts will likely apply Title VII case law to this provision. Under Title VII, the employer must show by a preponderance of evidence that the adverse action would have been taken even absent the impermissible motive.³² To the extent and employer is unable to make such a showing, the employee would probably prevail on this theory of discrimination.

Another aspect of the anti-discrimination provision is the retaliation or whistleblower clause. An employer is prohibited from taking adverse action against a person for exercising rights under USERRA or testifying, assisting, or participating in any proceeding or investigation under USERRA.³³ Like other provisions, this is new to veterans' employment law and has been copied from other federal employment statutes.³⁴ This provision protects employees who may not themselves have any affiliation with the military, but who may have complained or assisted another employee with that person's USERRA issues.³⁵

Although not specifically addressed in the statute, "military status harassment" is another conceivable form of discrimination arguably covered under USERRA. Indeed, the Merit Systems Protection Board (MSPB), which adjudicates cases involving federal employees under USERRA,³⁶ has made this determination. In *Petersen v. Department of Interior*,³⁷ the Board

²⁹ The term *adverse employment action* is not particularly a term of art, nor is it used or defined in the statute. It is used here to mean any action unfavorable to the employee or applicant for employment.

³⁰ 38 U.S.C. § 4311(b).

³¹ See 42 U.S.C. § 2000e-2(m) (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The legislative history of USERRA indicates an intent to disapprove dicta in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), which some lower federal courts took to mean that military affiliation must have been shown to be the sole factor in discrimination under the previous reemployment rights statute. H.R. Rep. No. 103-65, reprinted in 1994 U.S.C.C.A.N. 2449, 2457 (1994). See also *Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988).

³² *Price Waterhouse*, 490 U.S. at 252-253.

³³ 38 U.S.C. § 4311(c)(2).

³⁴ Compare 38 U.S.C. § 4311(c)(1) with 42 U.S.C. § 2000e-3(a) (antiretaliation provision of Title VII of the Civil Rights Act of 1964), and 42 U.S.C. § 12203(a) (prohibition against retaliation under Americans with Disabilities Act), and 29 U.S.C. § 623(d) (1998) (antiretaliation provision of Age Discrimination in Employment Act).

³⁵ See 140 Cong. Rec. H9136 (1994), reprinted in 1994 U.S.C.C.A.N. 2493, 2494 (1994) (Joint Explanatory Statement on H.R. 995).

³⁶ See 38 U.S.C. § 4324.

³⁷ 71 M.S.P.R. 227 (M.S.P.B. 1996).

considered the complaint of a park ranger who alleged that the National Park Service had engaged in harassment against him because of his past military service. A central issue was whether the Board had jurisdiction of a claim of harassment. An administrative law judge held that freedom from harassment is not a “benefit of employment” within the meaning of USERRA and therefore the Board had no jurisdiction over the complaint.³⁸ Returning the matter to the administrative law judge, the Board stated that Congress intended the statute to be construed broadly.³⁹ The Board examined cases construing other federal anti-discrimination statutes and found harassment to be encompassed within the ambit of discrimination under those statutes.⁴⁰ The Board borrowed the Title VII formulation of harassment: that is, to state a claim, the harassment must be “sufficiently pervasive to alter the conditions of employment and create an abusive working environment.”⁴¹ Thus, the Board concluded that Congress, in prohibiting discrimination against service members and former service members under USERRA, intended for the statute to cover harassment claims.⁴²

C. Reemployment Rights Under USERRA

A person who is absent from his or her civilian employment because of military service is generally entitled to be reemployed by his or her employer.⁴³ The reemployment rights provisions apply to individuals who leave employment to enter extended active duty in a Regular component of the armed forces, to Reserve and Guard members who perform active duty, active duty for training, and inactive duty training, and persons assigned to full-time National Guard duty.⁴⁴ Air Reserve Technicians⁴⁵ and National Guard

³⁸ *Id.* at 231.

³⁹ *See id.* at 236.

⁴⁰ *See id.* at 237. *See also* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (finding sexual harassment actionable as sex discrimination under Title VII).

⁴¹ Petersen, 71 M.S.P.R. at 239. *See also* Meritor Savings Bank, 477 U.S. 57.

⁴² Petersen, 71 M.S.P.R. at 239.

⁴³ *See* 38 U.S.C. §§ 4301(a)(2), 4312 (1998).

⁴⁴ Full-time National Guard duty refers duty in the National Guard called “Active/Guard Reserve” (AGR) duty. AGR duty is active duty (for Reserve members) performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard. It lasts for a period of 180 consecutive days or more and is for the purpose of organizing, administering, recruiting, instructing, or training the reserve components. *See* 10 U.S.C. § 101(d)(6)(A) (1998). *See also* Air National Guard Instruction 36-101, The Active Guard/Reserve Program (Dec. 29, 1993). Many AGR members serve entire careers in that status. There are about 992 AGR members in the Air Force Reserve and about 10,931 in the Air National Guard. *See* Strom Thurman National Defense Authorization Act for Fiscal Year 1999, Pub. L. 105-261, § 412, 112 Stat. 1920, 1997 (1998) (authorizing end strength of reserves on active duty for support of reserve components). AGR duty performed in the Air National Guard “shall be considered active duty in Federal service as a Reserve of the Air Force.” 10 U.S.C. § 12602(b)(2).

technicians⁴⁶ are also covered.⁴⁷

Notwithstanding that provision, National Guard AGRs perform duty under Title 32, United States Code, and are subject to state military control unless called to active duty under Title 10, United States Code. Title 32 is the portion of federal law that pertains to the National Guard and its members when not in Federal (Title 10) service. National Guard members on Title 32 status are under the control of the commander-in-chief of their state militia (the Governor of the State) and are not subject to the Uniform Code of Military Justice. *See* *Perpich v. Department of Defense*, 496 U.S. 334 (1990). Title 10 is the portion of federal law that generally governs the organization and training of the armed forces. *See* 10 U.S.C. § 802. National Guard members may be called or ordered to federal active duty under Title 10 under a variety of circumstances beyond the scope of this article. *See* 10 U.S.C. §§ 331-335, 12301-12304, 12311, 12406. National Guard members serving in Title 10 status are subject to the UCMJ. *See generally Perpich*, 496 U.S. 334, for an excellent discussion of the various roles in which members of the National Guard serve. AGRs are a distinct personnel category from military technicians and state active duty National Guard personnel.

⁴⁵ Air Reserve Technicians (ARTs) serve in the Air Force Reserve and are statutorily known as *military technicians*. *See* 10 U.S.C. §§ 10216, 10217; Air Force Instruction 36-108, Air Reserve Technician Program (July 26, 1994). These personnel are federal civilian employees who perform certain full-time functions with Air Force Reserve units. Most are “dual-status” technicians; that is, they are required to be military members of the Reserve organizations in which they are employed. ARTs wear military uniforms while engaged in their duties and observe military customs and courtesies. A termination of their military status (through administrative discharge, court-martial, medical discharge, or retirement) requires termination of their civilian employment. There are about 9,761 ARTs. *See* Strom Thurman National Defense Authorization Act § 413, 112 Stat. at 1998 (authorizing end strength of military technicians in Air Force Reserve). A very few technicians (perhaps less than 3 percent) are “non-dual status”; that is, they are not military members of their units. However, Congress has ensured that the non-dual status technician soon will be a thing of the past. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 513, 110 Stat. 186, 306 (1995) (stating that no more non-dual status technicians are to be hired six months after effective date of legislation). Without looking at personnel records, it is impossible to distinguish ARTs from active duty personnel or other reserve members on duty.

⁴⁶ National Guard technicians are a personnel category similar to ARTs, although the history of the National Guard Technician program is very different from that of the ART program. Like ARTs, National Guard technicians are federal civilian employees employed in National Guard units. Most are dual-status technicians required to be military members of the units in which they are employed. *See* 32 U.S.C. § 709 (1998). They are required to wear military uniforms and observe military customs and courtesies in the course of their duties. Termination of their military status requires termination of their civilian employment. Unlike ARTs, however, National Guard technicians are “nominal federal employees for a very limited purpose” and are subject to “the military authority of the states.” *American Federation of Government Employees v. Federal Labor Relations Authority*, 730 F.2d 1534, 1537-38 (D.C. Cir. 1984). There are about 22,408 National Guard technicians in the Air National Guard. *See* Strom Thurman National Defense Authorization Act § 413, 112 Stat. at 1998 (authorizing end strength of military technicians in Air National Guard).

⁴⁷ Of course, the civilian employer of ARTs and National Guard technicians is the federal government. ARTs and National Guard technicians generally must take leave from their *civilian* positions to perform *military* duty (frequently, but not always, in the exact same position). Under USERRA, they have the right to return to their civilian positions after a period of military duty. Presumably, such individuals have little need for the protections of USERRA. However, there are various scenarios in which potential conflicts may arise. For

The statute does, however, place some responsibility on the service member/employee to preserve reemployment rights. The employee must have given advance notice of the military service to the employer.⁴⁸ This notice need not be writing; indeed, no particular form of notice is specified by the statute.⁴⁹ An appropriate officer of the employee's military service may also give the notice.⁵⁰ The term *appropriate officer* includes commissioned officers, warrant officers, and non-commissioned officers.⁵¹ Notice is not required if precluded by military necessity or if impossible or unreasonable under the circumstances.⁵² *Military necessity* means that a mission, operation, or exercise is classified, or may be compromised or otherwise adversely affected if made public.⁵³ Notice is *impossible* or *unreasonable* when the employer or employer's representative is unavailable to receive notice, or the employee has been given forty-eight hours or less notice from competent military authority.⁵⁴ The Assistant Secretary of Defense for Reserve Affairs may also determine that other circumstances make or made notice impossible or unreasonable.⁵⁵

An employee who has been absent for military service must report back for work or submit an application for reemployment at the conclusion of the military service.⁵⁶ The rules concerning reporting back or applying for reemployment vary depending on the length of the absence. A person whose absence was less than thirty-one days must report back to work at the beginning of the first regularly scheduled work period.⁵⁷ Further, the member must report back on the first full calendar day after the completion of military

example, an ART might apply for a position on extended active duty (EAD) not related to the military or technician duties he usually performs. The person is entitled to be reemployed in his ART position, if all other applicable criteria are met, upon his return from EAD. See 38 U.S.C. § 4312.

⁴⁸ See *id.* § 4312(a)(1).

⁴⁹ See *id.* The legal assistance attorney will, of course, want to advise clients that written notice specifying the commencement and anticipated length of service is preferable.

⁵⁰ See *id.*

⁵¹ 32 C.F.R. § 104.3 (1999). The Department of Defense regulation refers to *service officials* who are "authorized by the Secretary [of the military department] concerned [to] provide advance notice to a civilian employer" of pending military duty. *Id.* The service secretaries are required to designate officials authorized to give advance notice to civilian employers. See 32 C.F.R. § 104.6(k). It does not appear that (as of November 1999) the Secretary of the Air Force has specifically authorized any particular officers or class of officers to give notice. It seems reasonable that a commander, first sergeant, or other supervisor is authorized by virtue of position to give such notice to the employer. Indeed, anyone who is empowered to notify the service member/employee should suffice to give notice to the employer.

⁵² 38 U.S.C. § 4312(b).

⁵³ 32 C.F.R. § 104.3.

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ See 38 U.S.C. § 4312(a)(3).

⁵⁷ *Id.* § 4312(e)(1)(A)(i).

duty *plus* eight hours after a period for safe transportation from the duty location to the employee's residence.⁵⁸

The rule most often will apply to Reserve and Guard members participating in inactive duty training, unit training assemblies, annual training, or brief periods of active duty for other purposes. Typically, the member will simply show up at work on the next scheduled shift after the duty. If, however, the member arrives home from military duty less than eight hours before the next scheduled shift, the member need not report at that next scheduled shift, but may wait until the subsequent shift to report. As a practical matter and in the interest of good relations with one's employer, a member would do well not to split hairs about this timing. The legal assistance attorney would do well to advise a client to report as soon as he is reasonably able to work (i.e., safely and competently) after a short absence for duty, notwithstanding the availability of an eight-hour rest period. If reporting after the eight hour period after returning home is impossible or unreasonable through no fault of the employee, the employee may report without penalty as soon as possible after the eight hour period.⁵⁹

A person who has been absent for examination or testing prior to entering the military service is subject to the short absence rules discussed above, regardless of the length of the absence.⁶⁰ Examples would include individuals who are taking physical examinations for entry into a service academy or persons taking tests like the Armed Forces Vocational Aptitude Battery.

A person who is absent for more than thirty days but less than 181 days must submit an application for reemployment to the employer within fourteen days of the end of the military duty.⁶¹ If, through no fault of the employee, submission of the application within fourteen days is impossible or unreasonable, the application must be submitted on the next full calendar day when submission becomes possible.⁶² As a practical matter, many employees absent for this medium term will simply report to work at some reasonable or agreed upon time after their return from duty. Again, the practical advice to a client should be to report back as soon as reasonable possible. Discussion with the employer in advance is the best course for the service member/employee.

⁵⁸ See *id.*

⁵⁹ See *id.* § 4312(e)(1)(A)(ii).

⁶⁰ See *id.* § 4312(e)(1)(B).

⁶¹ See *id.* § 4312(e)(1)(C).

⁶² See *id.* The terms *impossible* and *unreasonable* are not defined in the statute. The DOD regulation, however, defines these terms together as "the unavailability of an employer or employer representative to whom notification can be given, an order by competent military authority to report for uniformed service within forty-eight hours of notification, or other circumstances that the Office of the Assistant Secretary of Defense for Reserve Affairs may determine are impossible or unreasonable . . ." 32 C.F.R. § 104.3.

Only a few employers, and only with respect to certain types of jobs, likely will require a member to actually submit an application for reemployment after relatively brief periods of military duty. But, the nature of the application for reemployment is within the discretion of the employer, subject of course to the requirement that the employer not discriminate against the returning employee on the basis of military service.⁶³

In the current state of international security affairs, Guard and Reserve members are absent more frequently than before for deployments that fit in this intermediate range. Many Guard and Reserve members may be away for these types of deployments several times a year. This fact may be difficult to accept for those employers who adhere to the obsolete notion that Guard and Reserve members are “weekend warriors” who go to “summer camp.”⁶⁴ As a result, more employment conflicts are likely with respect to frequent and lengthy deployments.

A member who is absent for more than 180 days for military duty must submit an application for reemployment within ninety days of the end of the military duty.⁶⁵ Such long-term absences typically may include basic military training followed by technical training, in-residence professional military training, or mobilization in a significant contingency. However, it could include an Active Guard/Reserve (AGR) tour.⁶⁶ It might also include the situation where a person without prior military affiliation decides to enlist or seek an appointment in a Regular component and to return after a term of service.⁶⁷

An employee who is hospitalized for or convalescing from an injury or illness suffered during military duty may report back or apply for reemployment (depending on the length of the original military absence) at the end of the period of hospitalization or convalescence.⁶⁸ However, that period

⁶³ See 38 U.S.C. 4312(e)(3). This means, for example, that if the employer has a regular application process for all employees returning from leaves of absence, the requirements for returning military members should not be more burdensome than that regular process.

⁶⁴ That view of service in the Reserve and Guard “fails to adequately characterize the contributions and sacrifices made by today’s Reservists and Guardsmen and women.” Cragin ROA Speech, *supra* note 14. Mr. Cragin described “a significant and profound paradigm shift” with respect to the employment of the Reserve and Guard. *Id.* He told the audience of Reserve and Guard officers, “You are no longer the force of last resort. You’re not weekend warriors anymore—you’re Total Force warriors! What you do is not part-time—you have a full-time commitment to America and to America’s military.” *Id.* As for the term weekend warrior, Mr. Cragin said, “I am working hard to get people to stop using [it].” *Id.*

⁶⁵ See 38 U.S.C. § 4312(e)(1)(D).

⁶⁶ For an explanation of this term, see *supra* note 44. So-called traditional Reserve and Guard members (that is, those who are not AGRs or technicians) may apply for AGR tours of duty.

⁶⁷ See 38 U.S.C. § 4312(a) (“Any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter.”).

⁶⁸ See *id.* § 4312(e)(2)(A).

cannot exceed two years for the purposes of USERRA.⁶⁹ If the hospitalization or convalescence is, in fact, more than two years, the period may be extended by the minimum time necessary to accommodate circumstances that were beyond the employee's control but which made it impossible or unreasonable to report or apply within the usual statutory period.⁷⁰

It is not clear in the statute when the two-year period is to commence. Does it commence at the end of the military service or does it commence at the end of the period in which the employee otherwise would be required to report or apply? The fact is that most Guard and Reserve members injured on active duty⁷¹ are retained on active duty for some period of convalescence. The answer to the question becomes more significant, however, if the member is injured while performing inactive duty training or when Guard members are injured in Title 32 status.⁷²

Failing to follow the statutory process for reemployment does not mean that the service member automatically loses the right to reemployment.⁷³ However, the member may be subject to the "established policy and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."⁷⁴ In other words, a member who fails to report back at the time required in the statute may be disciplined for missing work in the same manner that a nonmilitary affiliated employee could be. Indeed, a failure to comply with the statute could result in a loss of a job if the employer's established policy, applied in a nondiscriminatory fashion, mandated such a sanction.⁷⁵

Employees who are absent on military duty for more than thirty days may be required by their employers to provide documentation that their application for reemployment was timely.⁷⁶ This apparently requires some form of documentation to show when their period of duty ended. The employer may also require evidence that the employee was separated under

⁶⁹ See *id.*

⁷⁰ See *id.* § 4312(e)(2)(B).

⁷¹ For Guard members, *active duty* in this context means only active duty under the provisions of Title 10, United States Code, and not active duty performed under Title 32, United States Code.

⁷² For a definition of the meaning of Title 32 status (and Title 10 status), see *supra* note 44.

⁷³ See 38 U.S.C. § 4312(e)(3).

⁷⁴ *Id.*

⁷⁵ See *id.* Suppose, for example, that an employer had a rule that an employee absent for five consecutive days is deemed to have resigned. That rule could be applied to a service member who, after a military tour of thirty-five days, failed to submit an application for reemployment until nineteen days after his return from duty.

⁷⁶ See 38 U.S.C. § 4312(f)(1)(A). The secretaries of the military departments are required to establish procedures to provide this documentation. 32 C.F.R. § 104.6(l). It does not appear that as of this writing (November 1999) that the Secretary of the Air Force has established any particular procedure.

honorable conditions,⁷⁷ if there is a separation involved. While many employers who have received advance notice of an absence for military duty will not require documentation, a returning service member/employee should always be prepared to provide it.

A person's voluntary entry onto military duty, as opposed to being involuntarily ordered to duty, generally does not affect the person's right to be re-employed. There is, however, an important limitation that may affect a member's decisions with respect to volunteering for certain duty. The reemployment provisions of the statute do not apply if the cumulative length of an absence for duty and all previous absences for military duty from positions with the same employer exceed five years.⁷⁸ There are several exclusions from the five-year limitation. Any service beyond five years necessary to complete an initial military service obligation is excluded from the five-year limitation.⁷⁹ Perhaps most significant for Guard and Reserve members is that inactive duty training and annual training are excluded from the five-year limitation.⁸⁰ However, full-time National Guard duty in the AGR program is subject to the five-year limitation.⁸¹ Also excluded from the five-year

⁷⁷ See 38 U.S.C. § 4312(f)(1)(C). See also 38 U.S.C. § 4304 (person's entitlements under USERRA terminate if separated under conditions less than honorable). See the discussion *supra* note 23, concerning characterization of discharge.

⁷⁸ See 38 U.S.C. § 4312(a)(2).

⁷⁹ See *id.* § 4312(c)(1).

⁸⁰ See *id.* § 4312(c)(3).

⁸¹ See *id.* The decision of the United States Supreme Court in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), no doubt influenced the drafting of section 4312 to bring AGR tours within the five year limitation. In *King*, the Court was called upon to construe a now-repealed provision of the former Veterans Re-employment Rights Act (VRRA). Petitioner King, a member of the Alabama Army National Guard, was employed by a hospital when he applied for and was selected to be the Command Sergeant Major at the Alabama Army National Guard headquarters. The position was a three-year AGR tour. King advised his employer of the tour and applied for a leave of absence in July 1987. King, 502 U.S. at 216-217. King reported for duty at the Army Guard headquarters in mid-August 1987. Some weeks later, the hospital notified King that his request for a three year leave of absence was "unreasonable" and therefore denied the request. *Id.* at 217. Thereafter, the hospital sued King in federal court, seeking a declaratory judgment to the effect that an employer was not required to re-employ a service member/employee whose absence was unreasonably long. At the time, there was a split among the circuits as to that issue. The Fifth Circuit Court of Appeals had held that the law only protected reasonable requests for military leaves. *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). The Eleventh Circuit Court of Appeals, which had been carved from the old Fifth Circuit and which included Alabama, was bound to follow *Lee*. See *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir 1987). The Third Circuit Court of Appeals had also imputed reasonableness into the reemployment rights statute. *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3rd Cir. 1989). Conversely, the Fourth Circuit Court of Appeals had found no requirement of reasonableness in the statute. *Kolkhorst v. Tilghman*, 897 F.2d 1282, 1286 (4th Cir. 1990) (stating that reasonableness is not the issue). The Supreme Court held that former section 2024(d) placed no limits on the length of an AGR tour after which the service member/employee could

limitation is any duty performed when the member is involuntarily ordered to or retained on active duty;⁸² ordered to or retained on active duty during a war or national emergency declared by Congress or the President;⁸³ ordered to active duty in support of an operational mission for which personnel have been involuntarily called to active duty;⁸⁴ ordered to active duty in support of a “critical mission” or “critical requirement”, as determined by the Service Secretary;⁸⁵ or called into federal service as a member of the National Guard to suppress an insurrection or rebellion, repel an invasion, or execute the laws of the United States.⁸⁶

USERRA provides an employer with three affirmative defenses in an action to enforce a service member/employee’s reemployment rights: they include, changed circumstances, undue hardship, and the temporary nature of the prior employment.⁸⁷ An employer has the burden of proof as to these defenses, and if the employer is successful, the service member employee will be unable to return to that job.⁸⁸ The defense of changed circumstances requires that the employer show that reemployment has become impossible or unreasonable.⁸⁹ The defense of undue hardship applies in the special

enforce his reemployment rights. King, 502 U.S. at 222. The decision was unanimous, though Justice Thomas had been confirmed just prior to oral argument and did not participate in the matter.

⁸² See 38 U.S.C. § 4312(c)(4)(A); *see also* 10 U.S.C. §§ 672(a), 672 (g), 673, 673b, 673c, 688 (1998).

⁸³ See 38 U.S.C. § 4312(c)(4)(B).

⁸⁴ See *id.* § 4312(c)(4)(C); *see also* 10 U.S.C. § 673b (1998).

⁸⁵ 38 U.S.C. § 4312(c)(4)(D). A *critical mission* is “[a]n operational mission that requires the skills or resources available” in the Reserve or Guard. 32 C.F.R. § 104.3. A *critical requirement* is (1)

[a] requirement in which the incumbent possesses unique knowledge, extensive experience, and specialty skill training to successfully fulfill the duties or responsibilities in support of the mission, operation or exercise, [or (2)] a requirement in which the incumbent must gain the necessary experience to qualify for key senior leadership positions within his or her Reserve component.

Id.

⁸⁶ See 38 U.S.C. § 4312(c)(4)(E); *see also* 10 U.S.C. §§ 331-335, 12406 (1998). It should be noted that the section 4312(c)(4)(E) of USERRA originally cited sections 3500 and 8500 of Title 10. Sections 3500 and 8500 were repealed and replaced by section 12406 of Title 10 eight days before USERRA became law. See Pub. L. No. 103-337, div. A, tit. XVI, § 1662(f)(1), 108 Stat. 2994 (1998). Note that this refers to federal use of the National Guard as the militia for federal purposes. This is distinct from *state* use of the National Guard for state emergencies or law enforcement. State military duty is completely excluded from coverage under USERRA.

⁸⁷ See 38 U.S.C. § 4312(d)(1).

⁸⁸ See *id.* § 4312(d)(2).

⁸⁹ See *id.* § 4312(d)(1)(A).

situations where the employee incurred or aggravated a disability while on military duty⁹⁰ or where two or more individuals may have reemployment rights to the same position and one has incurred or aggravated a disability while on military duty.⁹¹ The defense concerning the temporary nature of the prior employment requires the employer to show that the position the employee left was for a “brief, nonrecurrent period and there [was] no reasonable expectation that such employment [would] continue indefinitely or for a significant period.”⁹²

D. Nature and Extent of Reemployment Rights Under USERRA

USERRA requires that a returning service member who is entitled to the protections of the statute “shall be promptly re-employed in a position of employment . . .”⁹³ But the nature and extent of reemployment rights remains, as has been the case for more than half a century, a fertile ground for conflict and, ultimately, litigation between employers and returning service members. However, the basic principles of the law have been the same through the various iterations of the statutory enactment. In the first case concerning veterans’ reemployment rights decided by the United States Supreme Court after World War II, *Fishgold v. Sullivan Drydock & Repair Corp.*,⁹⁴ Justice Douglas, writing for the Court, observed:

The [Selective Training and Service Act of 1940] was designed to protect the veteran in several ways. 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 from 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 position continuously during the war.⁹⁵

The *Fishgold* “escalator” became an enduring metaphor for the scheme Congress had established. It remains apt under USERRA. The statute distinguishes between those employees absent for less than ninety-one days

⁹⁰ See *id.* § 4312(d)(1)(B); 38 U.S.C. § 4313(a)(3)-(4) (1998).

⁹¹ See 38 U.S.C. § 4312(d)(1)(B); 38 U.S.C. § 4313(b)(2)(B) (1998). For a comprehensive discussion of this defense, see *infra* notes 118-123 and accompanying text.

⁹² 38 U.S.C. § 4312(d)(1)(C).

⁹³ *Id.* § 4313.

⁹⁴ 328 U.S. 275 (1946).

⁹⁵ *Id.* at 284-85 (discussing the reemployment provisions of the Selective Training and Service Act). See Selective Training and Service Act, Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 885 (formerly codified at 50 U.S.C. app. § 308, *repealed*, Pub. L. No. 759, § 17, 88th Cong., 2d Sess., 62 Stat. 625 (1948)).

and those absent for more than ninety-one days, but in both situations, the escalator principle is applicable.

Those service members returning after an absence of less than ninety-one days must be reinstated to “the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform.”⁹⁶ This might be the same position the person left, but the statute is not so narrow. Depending on the employer’s personnel policies, the position to which the returning person may have rights may be a position with a different title, different responsibilities and different pay, if that’s where the person would have landed had he or she not been absent for military duty.⁹⁷ Thus, for example, if the employee was scheduled to be promoted while absent and would have been promoted but for the absence, the person is entitled to the promotion upon return as long as they are qualified for the new position. The escalator principle dictates that result. Likewise, if the person was scheduled to be rotated laterally while absent and would have but for the absence, then upon return, the person may be placed in the new lateral position if otherwise qualified. The escalator did not go up, but the moving walkway advanced. The principle is the same. Of course, escalators sometimes move in retrograde. If the employee would have been demoted but for the military absence, the employee may be returned to the lesser position.⁹⁸

There is a considerable amount of case law concerning the escalator principle in the context of promotions, accrued benefits, and seniority.⁹⁹ The Supreme Court has said, in essence, that longevity is the engine of the escalator.¹⁰⁰ Thus, the escalator moves for the returning service member to the point where it is reasonably certain the member would have ended up if the member had been continuously employed.¹⁰¹

Thus, on application for re-employment, a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other

⁹⁶ 38 U.S.C. § 4313(a)(1)(A).

⁹⁷ See, e.g., *Smith v. Industrial Emp. & Dist. Ass’n*, 546 F.2d 314 (9th Cir. 1974).

⁹⁸ There seem to be no cases in which a returning service member was legitimately demoted; however, this outcome is the clear implication of the escalator principle.

⁹⁹ *Foster v. Dravo Corp.*, 420 U.S. 92 (1975); *Accardi v. Pennsylvania R.R. Co.*, 383 U.S. 225 (1966); *Brooks v. Missouri Pacific R.R. Co.*, 376 U.S. 182 (1964); *Waltermeyer v. Aluminum Co. of America*, 804 F.2d 821 (3rd Cir. 1986); *Aiello v. Detroit Free Press, Inc.* 570 F.2d 145 (6th Cir. 1978); *Austin v. Sears, Roebuck & Co.*, 504 F.2d 1033 (9th Cir. 1974).

¹⁰⁰ See *Fishgold*, 328 U.S. 275.

¹⁰¹ *Alabama Power Co. v. Davis*, 431 U.S. 581, 589 (1977) (concluding seniority to which returning veteran is entitled is that which it is reasonably certain he would have had if continuously employed).

form of automatic progression, but on the exercise of discretion on the part of the employer.¹⁰²

Additionally, if the right to a promotion or benefit was, at the time the employee left for military, subject to some “significant contingency,” then USERRA does not require that the returning employee be given that promotion or benefit.¹⁰³

If the person is not qualified to perform the duties of the position in which he or she would have been employed (even if it was the same position the person occupied before they left), then the employer must make reasonable efforts to qualify the person for the new position.¹⁰⁴ This means that the employer must provide retraining or upgrade training if the skills or technology are different when the person returns from military duty. If those qualification efforts fail, then the employee must be returned to the position held on the date the military service commenced.¹⁰⁵

A service member returning from a military absence of more than ninety days also generally must be reemployed in “the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service . . . the duties of which the person is qualified to perform.”¹⁰⁶ However, the employer may satisfy the obligation by placing the employee in “a position of like seniority, status and pay.”¹⁰⁷ The escalator/moving walkway principle applies in this situation as well. Again, if the person is not qualified to perform the duties of the position in which he or she would have been employed (even if it was the same position the person occupied before they left), then the employer must make reasonable efforts to qualify the person for the new position.¹⁰⁸ If those efforts fail, then the employee must be returned to the position held on the date the military service commenced, or “a position of like seniority, status and pay.”¹⁰⁹

Not infrequently, an employee returns to a civilian job having incurred or aggravated a disability in the course of military duty. In that case,

¹⁰² *McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265, 272 (1958).

¹⁰³ *Alabama Power Co.*, 431 U.S. at 589.

¹⁰⁴ *See* 38 U.S.C. § 4313(a)(1)(B).

¹⁰⁵ *See id.* § 4313(a)(2)(B).

¹⁰⁶ *Id.* § 4313(a)(2)(A).

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* § 4313(a)(2)(B).

¹⁰⁹ *Id.* Prior versions of the veterans’ reemployment law used the phrase “position of like seniority, status, and pay,” resulting in a considerable amount of case law construing the phrase in the context of the escalator principle. *See* *Smith v. Industrial Emp. & Dist. Ass’n*, 546 F.2d 314 (9th Cir. 1977) (seniority to be broadly construed); *Boone v. Ft. Worth & Denver Ry. Co.*, 223 F.2d 766 (5th Cir. 1955) (same position, different hours approved); *Meehan v. National Supply Co.*, 160 F.2d 346 (10th Cir. 1947) (title of position not controlling).

provisions of both USERRA and the Americans with Disabilities Act (ADA)¹¹⁰ apply. The ADA prohibits discrimination against a “qualified individual with a disability”¹¹¹ who is capable of performing the “essential functions” of a job with or without “reasonable accommodation.”¹¹² A person has a disability if the person has a physical or mental impairment that substantially limits one or more major life activities.¹¹³ A person without such an impairment is entitled to the protections of the ADA if the person has a record of such impairment or is regarded as having such an impairment.¹¹⁴

USERRA is compatible with the ADA. If an employee returns from military duty having incurred or aggravated a disability during that duty, the employer is obligated to make “reasonable efforts” to accommodate that disability in reemploying the person as described above.¹¹⁵ If, after such reasonable efforts, the person remains unqualified for the position to which he or she otherwise would be entitled under the statute, then the person is entitled to “any other position which is equivalent in seniority, status, or pay” which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer.¹¹⁶ If for some reason the person cannot be employed in the equivalent position, then the person must be offered “a position which is the nearest approximation . . . in terms of seniority, status, and pay consistent with” the person’s circumstances.¹¹⁷

¹¹⁰ 42 U.S.C. § 12101-12213 (1998).

¹¹¹ *Id.* § 12111(8).

¹¹² *Id.* § 12111(9).

¹¹³ *See id.* § 12102(2)(A).

¹¹⁴ *See id.* § 12102(2)(B)&(C).

¹¹⁵ 38 U.S.C. § 4313(a)(3).

¹¹⁶ *Id.* § 4313(a)(3)(A).

¹¹⁷ *Id.* § 4313(a)(3)(B). An example may be helpful to explicate the nature and extent of reemployment rights. Suppose Jones is employed as a telephone maintenance team member by Mega Telephone Corp. (MTC). He is also a pararescue crewmember with the 129th Rescue Wing (ANG). Staff Sergeant Jones volunteers for a 179-day deployment to Europe in support of a NATO operation. During the operation, Staff Sergeant Jones injures his back while successfully recovering a downed F-117A pilot under hostile fire. At the conclusion of the deployment, Jones returns to work at MTC, but not before he and the other members of his aircrew receive the Air Medal. Consider the following scenarios:

1. A few weeks after Jones left for overseas, his maintenance team supervisor was shifted to another position. Under MTC’s established personnel policies, Jones would have been selected to fill the supervisor’s position had he not been absent. Under section 4313 of USERRA, he must be reemployed in the supervisor’s job, if he is qualified for it.

2. Since Jones was absent, MTC assigned another employee as supervisor of Jones’ maintenance team. That person has held the position for five months and MTC does not want to reassign him. MTC offers Jones a position as supervisor of a different maintenance team whose work is performed about thirty to sixty miles away from Jones’s home. His prior job took him only fifteen to thirty miles from home. MTC has satisfied its USERRA obligations.

3. After his return home, Jones’ doctor tells him that due to his back injury, he can no longer climb telephone poles. Team supervisors are required to climb telephone poles. MTC offers Jones a position as the maintenance team scheduler. The incumbent of this

E. Employer's "Undue Hardship" Defense When Service Member Returns Unqualified or With a Disability

The employer generally must make reasonable efforts to accommodate the disability or to qualify the employee for the relevant position, if a service member/employee returns from military duty with a disability or is otherwise unqualified for the job the employee left or the one he is entitled to upon return.¹¹⁸ However, an employer is not required to reemploy a person or to accommodate or qualify the person if doing so would impose an "undue hardship" on the employer.¹¹⁹ This is a concept borrowed from federal disability law.¹²⁰ USERRA defines *undue hardship* in the same manner as the ADA defines the concept: that is, "actions requiring significant difficulty or expense."¹²¹ Both statutes list as factors to be considered when determining undue hardship, the nature and cost of the action required, the overall financial resources of the facility involved and those of the entire business, and the type of operations of the employer.¹²² The employer has the burden of proving undue hardship under both statutes.¹²³

position schedules all teams in the region and holds the same grade and is paid the same as a team supervisor. MTC has satisfied its USERRA obligations.

4. The maintenance team scheduler is required to have knowledge of the company's computer systems. Jones fails the computer training course to which MTC has sent him. MTC then offers Jones a position as a maintenance instructor, training maintenance team members. This position is one grade lower than the scheduler position. Has MTC satisfied its USERRA obligations to Jones?

This scenario raises several issues. The first is whether MTC has made "reasonable efforts" to qualify Jones in the job of scheduler. The second issue is whether the job Jones has been offered is "the nearest approximation" to the job to which he would have been entitled had he qualified. If for some reason Jones is not qualified for the supervisor job or, for a reason other than disability, not qualified for his previous job, then MTC legally could offer him any other position of lesser status and pay for which he is qualified. See 38 U.S.C. § 4313(a)(4).

¹¹⁸ See *supra* notes 106-117 and accompanying text.

¹¹⁹ 38 U.S.C. § 4312(d)(1)(B).

¹²⁰ See 42 U.S.C. § 12112(b)(5)(A) (1998) (unlawful discrimination under Americans with Disabilities Act includes failure to make reasonable accommodation unless undue hardship shown).

¹²¹ Compare 38 U.S.C. § 4303(15) with 42 U.S.C. § 12111(10).

¹²² See 38 U.S.C. § 4303(15); 42 U.S.C. § 12111(10).

¹²³ See 38 U.S.C. § 4312(d)(2) (1998); 42 U.S.C. § 12112(b)(5)(A).

F. Scheduling of Military Leave¹²⁴

Legal assistance attorneys are frequently asked questions that involve issues of scheduling an employee's military leave with regular shifts, overtime, and vacation. These issues routinely cause conflicts between employers and employees because of misunderstandings on both sides.

One recurring question that has a simple, obvious answer is whether an employer is required to offer the employee a paid leave for military duty. The simple answer is no. As the statute clearly states, an employee absent for military duty is considered to be on furlough or leave of absence.¹²⁵ The statute does not require that the employee be paid during that furlough or leave of absence. Confusion sometimes arises because some employers do offer paid military leave of limited duration. This is an act of grace on the employer's part.

Another related issue concerns the employee's use of accrued vacation for military leave. Sometimes employers have required the use of accrued vacation; other employers have prohibited the use of vacation time for military leave. Both policies are violations of USERRA. Since an employee is considered to be on furlough or leave of absence while on military duty, the employee cannot be required to use vacation time. That would be unlawful discrimination with respect to a benefit of employment. On the other hand, if an employee desires to use vacation for military leave, the statute specifically permits them to do so.¹²⁶

Whether an employer can be required to permit an employee to make up work missed during military duty is another issue that came before the United States Supreme Court in *Monroe v. Standard Oil Co.*¹²⁷ Monroe worked at an oil refinery and was a member of the Ohio Army National Guard. The refinery, owned by Standard Oil Company of Ohio (Sohio) operated twenty-four hours a day, seven days a week. Monroe worked a five day week, but his work days were different every week. Consequently, a number of times during the year, Monroe's civilian work schedule conflicted with his scheduled military duties. To resolve those conflicts, Monroe was occasionally able to trade shifts with other employees, which was then allowed under the collective bargaining agreement. Sohio did not object. On many occasions, however, Monroe was apparently unable to find another employee to trade shifts to accommodate his military unit's schedule. On those occasions, Sohio, as it was required to do, permitted Monroe to take a leave of absence. Sohio filled Monroe's job with other employees, frequently paying

¹²⁴ The term *military leave* as it is used in this article refers to an employee's time off from a civilian job taken to perform military duty.

¹²⁵ 38 U.S.C. § 4316(b)(1)(A).

¹²⁶ *Id.* § 4316(d).

¹²⁷ 452 U.S. 549 (1981).

overtime to the substitute. Sohio did not pay Monroe for the time he was on military duty and did not permit him to make up those hours by working outside his usual schedule.¹²⁸

Monroe sued, alleging that the failure to allow him to work a forty-hour week violated a provision of the veterans' reemployment rights law then in effect.¹²⁹ Monroe contended he had been denied "an incident or advantage of employment" because of his military affiliation.¹³⁰ In a 5 to 4 decision, the Supreme Court held that Sohio had not discriminated against Monroe by not allowing him to make up the hours he lost to military duty.¹³¹ Justice Stewart, writing for the majority, observed that Monroe had been assigned the same burden of weekend and shift work as had other employees and he was allowed to exchange shifts just as other employees.¹³² Chief Justice Burger, writing in dissent, cast the issue as whether Monroe had been given "the same meaningful chance as other employees without military commitments to work full time in order to earn a living wage."¹³³ Working a forty-hour week was a benefit conferred by the employer and which could not be denied an employee with military obligations, in the view of the Chief Justice.¹³⁴

The majority opinion in *Monroe* remains the law, despite the enactment of the new statute. The relevant provisions of USERRA are substantively the same as the veterans' reemployment rights provisions construed in *Monroe*.¹³⁵ The issue turns on whether working a forty-hour week is a benefit of employment. There is not an obvious answer to this, and with only two Justices who participated in the *Monroe* decision remaining on the Court, the outcome, should this issue be revisited, cannot be predicted.

G. Preservation of Benefits During Military Leave

1. Generally

USERRA provides that reemployed service members are "entitled to the seniority and other rights and benefits" they had when they left for duty "plus the additional seniority and rights and benefits" they would have attained if continuously employed.¹³⁶ This is a clear statutory expression of the

¹²⁸ See *id.* at 551-52.

¹²⁹ See *id.* at 552. The Court was construing the 1974 version of the reemployment legislation. See Vietnam Veterans Readjustment Act, *supra* note 7.

¹³⁰ *Monroe*, 452 U.S. at 553.

¹³¹ See *id.* at 565-66.

¹³² See *id.*

¹³³ See *id.* at 566 (Burger, C.J., dissenting). Justices Brennan, Balckmun, and Powell joined the Chief Justice's dissent.

¹³⁴ *Id.* at 571.

¹³⁵ See 38 U.S.C. § 4316(a)-(b); Vietnam Veterans Readjustment Act, *supra* note 7.

¹³⁶ 38 U.S.C. § 4316(a).

escalator principle that has existed in veterans' reemployment law for nearly six decades.¹³⁷ A person absent from employment for military service is "deemed to be on furlough or leave of absence" during military service and is entitled to the same nonseniority based rights and benefits available to other employees who are on furlough or leave of absence.¹³⁸ This includes not only benefits available at the time the person commenced service, but any benefits made available to other employees on a leave of absence of any sort during the time of the person's military service.¹³⁹ A service member/employee may be required to pay for benefits continued during military service if other employees on leaves of absence are required to pay for the same benefits.¹⁴⁰

2. Health Benefits

A service member/employee's health benefits may be terminated upon the person's commencement of military service, subject to the obligation not to discriminate against the service member compared to other employees on leaves of absence.¹⁴¹ However, employer-sponsored health plans are required to permit a service member/employee to continue coverage during military leave for up to eighteen months from the day military service begins or until the day after the person was required to report back or apply for reemployment, whichever is sooner.¹⁴² The service member/employee may be required to pay up to 102 percent of the full premium for the coverage,¹⁴³ except that an employee serving on military duty for less than thirty-one days cannot be required to pay more than the employee share of the premium.¹⁴⁴ If health coverage is terminated because the employee has commenced military duty, no waiting period or exclusion can be imposed upon the employee's return if such waiting period or exclusion would not have been imposed in other circumstances.¹⁴⁵ However, this prohibition is inapplicable with respect to any illness or injury incurred during or aggravated by the person's military service.¹⁴⁶ In other words, an injury that is incurred or aggravated by an employee's military service need not be covered by his or her employer's health plan when the person returns to the civilian job.

3. Pension Benefits

¹³⁷ See *supra* notes 93-117 and accompanying text.

¹³⁸ 38 U.S.C. § 4316(b)(1).

¹³⁹ See *id.* § 4316(b)(1)(B).

¹⁴⁰ See *id.* § 4316(b)(3).

¹⁴¹ See *id.* § 4317.

¹⁴² See *id.* § 4317(a)(1)(A).

¹⁴³ See *id.* § 4317(a)(1)(B).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* § 4317(b)(1).

¹⁴⁶ See *id.* § 4317(b)(2).

For pension benefits based on service credits, an employer is required to credit the reemployed military member with time spent on military duty as if the person had not been absent.¹⁴⁷ If the pension plan involves employee contributions, the service member/employee must be allowed to make up any contributions missed during military service.¹⁴⁸ The employee must be allowed a period of up to three times the length of the military service, but not more than five years, to make up the contributions.¹⁴⁹

4. *Special Protection Against Discharge*

A bedrock principle of American employment law is the so-called employment at will doctrine. This is the rule that an employee may be discharged at any time, for any reason, or even for no stated reason.¹⁵⁰ During the last half of the twentieth century, the employment at will doctrine has been subjected to a number of statutory and judicial exceptions.¹⁵¹ USERRA provides a limited exception for reemployed service members.

A person who has been reemployed after a period of military service cannot be discharged from that employment except for cause for a period of one year if the military service was more than 180 days.¹⁵² If the term of military service was more than thirty days, but less than 180 days, the period of special protection is reduced from one year to 180 days.¹⁵³ These periods run from the date of reemployment. Thus, it would appear that a new period commences every time the member is reemployed after an absence of the requisite length. The special protection logically should apply to demotions as well as discharges.¹⁵⁴

There is, however, no special protection if the military service was less than thirty-one days. In the current age of high operations tempo, this aspect of the statute is most unfortunate. It is easy to find any number of Reserve and Guard members whose unit missions require their skills for numerous periods of time amounting to far more than thirty days over the course of a year or less. But, if no single period amounts to more than thirty days alone, the member

¹⁴⁷ See *id.* § 4318(a)(2).

¹⁴⁸ See *id.* § 4318(b)(2).

¹⁴⁹ See *id.*

¹⁵⁰ MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 9 (4th ed. 1998).

¹⁵¹ A detailed explanation or recitation of those exceptions is beyond the scope of this article. For a discussion of the employment at will doctrine and its attendant exceptions, see generally *id.* at 912-962.

¹⁵² 38 U.S.C. § 4316(c)(1).

¹⁵³ See *id.* § 4316(c)(2).

¹⁵⁴ There appear to be no cases precisely on point concerning demotions under USERRA; however, given the broad construction to be given the statute, it would not be sensible for a court to allow a service member/employee to be demoted during the special protection period.

does not receive the special protection from discharge. Guard and Reserve members know that the frequency of absence is just as much an irritant to their employers as the length of their absences. Yet, the statute as written leads to anomalous results in view of its stated purpose to prohibit discrimination against persons because of their military service. In its formulation of the special discharge protection, the statute not only fails adequately to protect some service member/employees from discrimination, it irrationally discriminates among service member/employees.¹⁵⁵

H. Enforcement and Remedies

The Secretary of Labor is primarily responsible for enforcing and executing the provisions of USERRA.¹⁵⁶ This responsibility is carried out through the Department of Labor's Veterans Employment and Training Service (VETS).¹⁵⁷ A person who is aggrieved by an employer's actions in violation of USERRA may file a complaint with the Secretary through VETS.¹⁵⁸ The Secretary is obligated to investigate each complaint of unlawful actions under USERRA.¹⁵⁹ The Secretary has subpoena power in any such investigation¹⁶⁰. If the investigation reveals that there was a violation, the Secretary is required to make "reasonable efforts to ensure" that the employer

¹⁵⁵ Consider the following scenario: Joe and Mary are both employed by Falcon Airlines in its maintenance department. Joe is also a crew chief with the 940th Air Refueling Wing (AFRC). Likewise, Mary is an avionics technician in the 940th.

In 1998, Staff Sergeant Joe performs the following duty, for which he is absent from Falcon Airlines: January 5-19 - annual training, Beale AFB, for fifteen days; February 23-28 - prepare for operational readiness exercise, Beale AFB, for six days; March 14-19 - operational readiness exercise, Mountain Home AFB, for seven days; May 10-24 - temporary duty in support of Operation Northern Watch, RAF Mildenhall, for fifteen days; July 7-16 - temporary duty to McConnell AFB (to backfill temporary shortage), for nine days; August 7-18 - support embassy recovery mission in Kenya and Tanzania for twelve days; September 22-25 - Central America hurricane relief mission for four days; November 3-12 - classified mission in a classified location for ten days. As a result, his total days absent for military duty is seventy-eight days. In December, Joe is demoted from shift leader by Falcon Airlines with no reason given. USERRA provides him no recourse.

On the other hand, in 1999, Staff Sergeant Mary performs the following duty: March 10-May 8 - support Operation Allied Force for sixty days; May 11-25 - annual training, Beale AFB, for fifteen days. As a result, her total days absent for military duty is seventy-five days. Mary cannot be discharged or demoted by Falcon Airlines except for cause for a period of six months because one of her tours was more than thirty days and less than 180 days.

¹⁵⁶ 38 U.S.C. §§ 4303(11), 4321 (1998).

¹⁵⁷ *Id.* § 4321. VETS informs and educates employees and employers about the provisions of USERRA. It also investigates and mediates USERRA issues. Legal assistance attorneys should refer to the VETS "USERRA Advisor" available at <http://www.dol.gov/elaws/userra0.htm>.

¹⁵⁸ *See* 38 U.S.C. § 4322.

¹⁵⁹ *See id.* § 4322(d).

¹⁶⁰ *See id.* § 4326.

complies with the law.¹⁶¹ If these efforts fail to rectify the situation, the complaining employee will be notified by the Department of Labor and informed of the right to proceed with enforcement action.¹⁶²

An employee who has been notified of unsuccessful resolution efforts has two options to enforce USERRA against a private employer. The employee, at his or her own expense, may commence an action against the employer in the United States District Court.¹⁶³ The employee instead may request that the complaint be referred to the United States Department of Justice, which is authorized to act as counsel for the employee in a civil action against the employer in the appropriate federal district court.¹⁶⁴ If the Justice Department refuses representation, then the employee may commence his or her own action against the employer in federal court.¹⁶⁵

1. Procedure in the District Court

USERRA provides that no fees or court costs may be charged against a person filing suit to enforce the statute.¹⁶⁶ No state statute of limitations applies to USERRA actions,¹⁶⁷ and the statute itself appears to have no time limit for filing suit against a private employer. Only an employer or potential employer is a necessary party respondent in a USERRA suit.¹⁶⁸ Finally, employers may not seek judicial relief under the statute.¹⁶⁹

2. Remedies Against Private Employers

The district court may award compensatory damages for lost wages or benefits in a USERRA suit.¹⁷⁰ If the court finds that the violation was willful, the court may order the employer to pay an additional amount, equal to the compensatory damages, as liquidated damages.¹⁷¹ Additionally, “[t]he court may use its full equity powers . . . to vindicate fully the rights or benefits”

¹⁶¹ *Id.* § 4322(d).

¹⁶² *See id.* § 4322(e).

¹⁶³ *See id.* § 4323(a)(2)(B). In fact, unlike the Title VII procedure, filing a complaint with the Secretary of Labor is not a prerequisite to an employee’s suit against a private employer. *See id.* § 4323(a)(2)(A).

¹⁶⁴ *See id.* § 4323(a)(1).

¹⁶⁵ *See id.* § 4323(a)(2)(C).

¹⁶⁶ *See id.* § 4323(c)(2)(A).

¹⁶⁷ *See id.* § 4323(c)(6).

¹⁶⁸ *See id.* § 4323(c)(5). This is an exception to the usual rules of joinder. *See* FED. R. CIV. P. 19.

¹⁶⁹ 38 U.S.C. § 4323(c)(4). This provision would prevent an employer from seeking declaratory relief as did the employer in *King v. St. Vincent’s Hospital*, 502 U.S. 215 (1991). *See supra* note 81 and accompanying text.

¹⁷⁰ *See* 38 U.S.C. § 4323(c)(1)(A).

¹⁷¹ *See id.* § 4323(c)(1)(A)(iii).

guaranteed by USERRA.¹⁷² The court may award attorney fees, expert witness fees, and other litigation costs to a prevailing employee.¹⁷³

3. Enforcement Against State Governments

USERRA purportedly applies to state governments as employers.¹⁷⁴ That has always been a constitutionally disputable notion. Whatever its validity, the ability to enforce USERRA against the states was almost certainly laid to rest by the recent United States Supreme Court decision in *Alden v. Maine*.¹⁷⁵

Following the decision of the Supreme Court in *Seminole Tribe of Florida v. Florida*,¹⁷⁶ that Congress lacks power under Article I of the Constitution¹⁷⁷ to abrogate the states' sovereign immunity in federal court, this Eleventh Amendment¹⁷⁸ argument began to show up, and succeed, in USERRA suits.¹⁷⁹ In response, Congress limited USERRA suits against states to state court.¹⁸⁰ Seven months later, the Supreme Court decided *Alden v. Maine*.

In *Alden*, several employees of the state of Maine sued for overtime pay and other relief under the Fair Labor Standards Act (FLSA).¹⁸¹ The FLSA, like USERRA, purports to apply to the states.¹⁸² *Alden's* action was brought in a state court in Maine.¹⁸³ The Supreme Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages

¹⁷² *Id.* § 4323(c)(3).

¹⁷³ *See id.* § 4323(c)(2)(B).

¹⁷⁴ *See id.* § 4303(4)(A)(iii) (*employer* defined to include a state); *id.* § 4323(c)(7) (noting that states subject to same remedies as private employers).

¹⁷⁵ ___ U.S. ___, 119 S.Ct. 2240, 144 L.Ed. 636 (1999).

¹⁷⁶ 517 U. S. 44 (1996).

¹⁷⁷ U.S. CONST. art. I.

¹⁷⁸ U.S. CONST. amend XI.

¹⁷⁹ *See, e.g., Velasquez vs. 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 593 (7th Cir. 1999).

¹⁸⁰ Pub. L.No. 105-368, § 211, 112 Stat. 3315 (1998) (amending 38 U.S.C. § 4323).

¹⁸¹ 29 U.S.C. § 201-219 (1998).

¹⁸² *Id.* § 203. In 1976, the Supreme Court decided that the application of FLSA to the states was a violation of the Tenth Amendment. *See National League of Cities v. Usery*, 426 U.S. 833 (1976). By 1985, however, the Court was of the opposite opinion. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

¹⁸³ *Alden's* suit was first brought in the federal district court and dismissed based on the Supreme Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1997). *See Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997). The case was then filed in the state court. *Alden*, ___ U.S. at ___, 119 S.Ct. at 2246, 144 L.Ed. at 652. The FLSA purportedly confers jurisdiction on state courts to hear certain FLSA suits. *See* 29 U.S.C. § 216(b).

in state courts.”¹⁸⁴ This decision almost certainly applies to USERRA because USERRA, like the FLSA, purportedly authorizes suits against states in state courts.

However, service members who are state employees may not be completely without a USERRA remedy in either state or federal court. Eleventh Amendment immunity does not apply to state officials sued in their official capacities if the remedy sought is prospective injunctive relief, nor does it apply to state officials sued for damages in their individual capacities.¹⁸⁵ This is important because in many cases, injunctive relief may be the most important remedy to the plaintiff. The question in a USERRA suit against a state official will be whether the official individually (as opposed to the state itself) is an employer within the meaning of the statute. There seem to be no cases on this point. However, that the term *employer* in USERRA is defined to include “a person . . . to whom the employer has delegated the performance of employment-related responsibilities.”¹⁸⁶

4. Enforcement Against Federal Agencies

The federal government is subject to USERRA.¹⁸⁷ About 73,000 federal employees serve in the Ready Reserve.¹⁸⁸ In USERRA, Congress declares that “the Federal Government should be a model employer in carrying out the provisions of this chapter.”¹⁸⁹ The Secretary of Defense and the Secretary of Labor sent a joint memorandum in 1998 to their Cabinet colleagues to spur the federal government to be in fact a model employer.¹⁹⁰ Unfortunately, the sense of Congress and the efforts of the Cabinet sometimes fall short. In 1998, while complaints against private employers and state

¹⁸⁴ Alden, ___ U.S. at ___, 119 S.Ct. at 2246, 144 L.Ed. at 652.

¹⁸⁵ See *Alabama v. Pugh*, 438 U.S. 781 (1978) (finding that Eleventh Amendment applied in context of 42 U.S.C. § 1983).

¹⁸⁶ 38 USC § 4303(4)(A)(i).

¹⁸⁷ *Id.* § 4303(4)(A)(ii) (employer defined to include federal government).

¹⁸⁸ Douglas J. Gillert, *Rules Adapted To Protect Reservists' Government Jobs*, AMERICAN FORCES PRESS SERVICE, (Aug. 4, 1999) <<http://www.defenselink.mil:80/news/Aug1999/n08021999-9908026.html>>. American Forces Press Service is part of the DOD-operated American Forces Information Service which supplies news to both civilian media outlets and military base newspapers. The Ready Reserve is made up of National Guard and Reserve units, AGR personnel, and Individual Mobilization Augmentees (IMAs—known in the Air Force as “Category B” Reservists). 10 U.S.C. § 10142 (1998).

¹⁸⁹ 38 U.S.C. § 4301(b). The Office of Personnel Management (OPM) is authorized to promulgate regulations implementing USERRA with respect to federal executive agencies. *Id.* § 4331(b)(1). The OPM has such regulations, though the regulations largely duplicate the statute and are not independently useful. See 5 C.F.R. pt. 353 (1999).

¹⁹⁰ Memorandum from the Honorable William S. Cohen, Secretary of Defense & the Honorable Alexis M. Herman, Secretary of Labor, for Members of the Cabinet, Promoting the Federal Government as a “Model Employer” of National Guard and Reserve Members (July 6, 1998).

governments decreased, complaints against federal agencies were up by 10 percent.¹⁹¹ Surprisingly, the Air Force itself, on occasion, has been identified as less than a “model [civilian] employer” for Air Force Reserve members.¹⁹² It is worth noting that the provisions for enforcing USERRA against federal agencies do not apply to intelligence community agencies.¹⁹³ While these agencies are generally subject to USERRA, these agencies have been given the authority to develop their own rules concerning implementation and enforcement of the statute.¹⁹⁴

A federal civilian employee aggrieved with respect to USERRA rights may file a complaint with the Secretary of Labor through VETS.¹⁹⁵ The Secretary has the same obligation to investigate complaints against federal agencies as against private employers.¹⁹⁶ If an investigation reveals a violation of USERRA by a federal agency, the Secretary is required to make “reasonable efforts to ensure” that the federal agency complies with the law.¹⁹⁷ If these efforts fail to rectify the situation, the complaining employee will be notified by the Department of Labor and informed of the right to proceed with enforcement action.¹⁹⁸ An employee who has been notified of unsuccessful resolution efforts has two options to enforce USERRA against a federal agency. The employee, at his or her own expense, may submit a complaint to the Merit Systems Protection Board (MSPB or Board).¹⁹⁹ Alternatively, the employee may request that the Secretary of Labor refer the complaint to the Office of Special Counsel, which is authorized to act as counsel for the employee in an action on the complaint before the MSPB.²⁰⁰ If the Office of Special Counsel refuses representation, then the employee may commence his or her own action before the MSPB.²⁰¹

5. Remedies Against Federal Agencies

If the MSPB determines that there has been a violation of USERRA by a federal agency, the Board “shall” order the agency to comply with the statute

¹⁹¹ David Castellon, *Reservists' Complaints Against Their Employers Increase*, A.F. TIMES, Aug. 9, 1999, at 22.

¹⁹² *Id.*

¹⁹³ See 38 U.S.C. § 4325. The exempt intelligence agencies are those that are generally exempt from the merit protection provisions of Title 5 of the United States Code. See 5 U.S.C. § 2302(a)(2)(C)(ii) (1999).

¹⁹⁴ See 38 U.S.C. §§ 4315, 4325.

¹⁹⁵ See *id.* § 4322(a)(2)(B).

¹⁹⁶ See *id.*

¹⁹⁷ *Id.* § 4322(d).

¹⁹⁸ See *id.* § 4322(e).

¹⁹⁹ See *id.* § 4324(b).

²⁰⁰ See *id.* § 4324(a).

²⁰¹ See *id.* § 4324(b)(4).

and to compensate the employee for lost wages and benefits.²⁰² If the employee has submitted the complaint directly to the Board and is not represented by the Office of Special Counsel, the Board may award the prevailing employee attorneys' fees, expert witness fees and other litigation costs.²⁰³ If the MSPB issues an adverse order or decision an employee may petition the United States Court of Appeals for the Federal Circuit for review.²⁰⁴ If the employee was represented by the Office of Special Counsel before the Board, then he or she may be represented by that agency in the Federal Circuit.²⁰⁵

III. STATE LAW PROTECTIONS FOR SERVICE MEMBER/EMPLOYEES

Most states have statutes that, to one degree or another, afford protection to military members similar to the USERRA protections.²⁰⁶ The scope of these laws varies from state to state. Some merely afford reemployment protection to state and local government employees.²⁰⁷ Others

²⁰² *Id.* § 4324(c)(2).

²⁰³ *See id.* § 4324(c)(4).

²⁰⁴ *See id.* § 4324(d)(1).

²⁰⁵ *Id.* § 4324(d)(2).

²⁰⁶ *See, e.g.*, ALA. CODE § 31-2-13 (1995); ALASKA STAT. § 39.20.350 (Michie 1992); ARIZONA REV. STAT. §§ 26-167, 26-168 (1991); ARK. CODE ANN. § 21-4-212 (Michie 1992); CAL. MIL. & VET. CODE §§ 394--395.9 (West 1988); COLO. REV. STAT. §§ 24-50-301, 28-3-609 (1998); CONN. GEN. STAT. ANN. § 27-59 (West 1990); FLA. STAT. ANN. §§ 115.09, 295.09 (West 1996); GA. CODE ANN. §§ 38-2-279, 38-2-280 (1995); 10 GUAM CODE ANN. § 63105 (1996); HAW. REV. STAT. § 79-20 (1993); IDAHO CODE § 46-407 (1999); 20 ILL. COMP. STAT. ANN. § 1805/100 (West 1993); IND. CODE ANN. §§ 10-2-4-3, 10-2-4-3.5 (West 1982); IOWA CODE ANN. §§ 29a.28, 29a.43 (West 1995); KAN. STAT. ANN. §§ 44-1125 *et seq.* (1993); KY. REV. STAT. ANN. 38.238 (West 1999); LA. REV. STAT. ANN. §§ 29:38, 29:38.1 (West 1989); ME. REV. STAT. ANN., Tit. 37-B, § 342 (West 1989); MASS. GEN. LAWS ANN. Ch. 33, § 13 (West 1988); MICH. COMP. LAWS ANN. §§ 35.352—35.354 (West 1991); MINN. STAT. ANN. §§ 192.32, 192.34 (West 1992); MISS. CODE ANN. §§ 33-1-19, 33-1-21 (1990); MO. REV. STAT. § 41.730 (1998); MONT. CODE ANN. §§ 10-1-603, 10-1-604 (1998); NEB. REV. STAT. §§ 55-160—55-166 (1998); NEV. REV. STAT. §§ 412.139 *et seq.* (1998); N.H. REV. STAT. ANN. §§ 110B:65, 112:8 (1990); N.J. STAT. ANN. § 38a:4-4 (West 1968); N.M. STAT. ANN. §§ 20-4-6, 20-4-7 (Michie 1989); N.Y. MIL. LAW §§ 242—244, 252 (Mckinney 1990); N.C. GEN. STAT. § 127a-116 (1986); OHIO REV. CODE ANN. § 5903.02 (1993); OKLA. STAT. ANN. TIT. 44, § 209 (West 1996); ORE. REV. STAT. ANN. §§ 408.240—408.270 (Butterworth 1994); 51 PA. CONS. STAT. ANN. § 4101—4102 (West 1976); P.R. LAWS ANN. Tit. 25 § 2089 (1979); R.I. GEN. LAWS §§ 30-11-1—30-11-9 (1994); S.C. Code Ann. §§ 25-1-2250, 25-1-2310—25-1-2340 (Law. Co-Op. 1989); TENN. CODE ANN. § 8-33-101 *et seq.* (1993); TEX. GOV'T CODE ANN. §§ 431.005, 431.006 (West 1998); UTAH CODE ANN. §§ 39-3-1, 39-3-2 (1998); VA. CODE ANN. § 44-98 (Michie 1994); V.I. CODE ANN. Tit. 23, § 1531 (1993); WASH. REV. CODE ANN. §§ 38.40.060, 38.40.110 (West 1991); W.VA. CODE §§ 15-1F-1, 15-1F-8 (1995); Wyo. STAT. ANN. §§ 19-11-104—19-11-114 (Lexis Law Pub. 1999).

²⁰⁷ *See, e.g.*, ALASKA STAT. § 39.20.350.

actually criminalize an employer's refusal to allow time off for military duty.²⁰⁸ Many states have statutes that prohibit a broad range of discrimination against service members.²⁰⁹ The legal assistance attorney advising a client on USERRA issues should not overlook the possibility that greater or additional relief may be had in some cases under state law. Congress recognized as much in USERRA.²¹⁰ A state law that purported to restrict rights under USERRA would be, of course, preempted by USERRA.²¹¹ Given the constitutional obstacles to enforcement of USERRA against the states, having state remedies may be very fortunate in some circumstances.²¹²

The availability of state law remedies is especially important to members of the National Guard who perform state emergency, disaster relief, and law enforcement mission in state active duty status. In addition, National Guard members may be involved in training in state active duty status. State law may also protect National Guard members who are on full-time state active duty status. State law is important in these situations because USERRA has no application to state active duty performed by Guard members.²¹³

IV. LEGAL ASSISTANCE PRACTICUM

USERRA issues are considered to be "mission-related legal assistance" in the Air Force.²¹⁴ Regardless of this nomenclature, USERRA is, as a practical matter, mission-related in all the services because of the increased reliance on reserve component resources. Thus, the legal assistance attorney must be comfortable advising on the legal and practical issues that may arise under USERRA.

²⁰⁸ See, e.g., ME. REV. STAT. ANN. Tit.37-B, § 342.

²⁰⁹ See, e.g., CAL. MIL. & VET. CODE § 394.

²¹⁰ See 38 U.S.C. § 4302(a).

²¹¹ U.S. CONST., art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . ."); see also 38 U.S.C. § 4302(b).

²¹² See *supra* notes 174-186 and accompanying text.

²¹³ In some situations, there are substantial and direct benefits to the federal government provided by National Guard members in state active duty status. An example is found in the fact that the federally owned assets (principally the aircraft) at the four California Air National Guard flying wings are protected 24 hours day by firefighters who are all state active duty personnel. Some of the personnel in California's four security forces squadrons are also state active duty personnel. Without examining personnel records, it would be impossible to distinguish state active duty personnel from the technicians, AGRs, and traditional Guard members working along side them. It seems inequitable not to extend federal protection to state active duty personnel under the circumstances. Fortunately, most state laws are sufficient for that the purpose.

²¹⁴ Air Force Instruction 51-504, Legal Assistance ¶ 1.3.1 (May 1, 1996). The Army also places a great deal of importance on USERRA-related legal assistance. See Army Regulation 27-3, The Army Legal Assistance Program ¶ 3-6e (Sep. 10, 1995).

Practicing preventive law in the USERRA is highly important. Perhaps the most significant advice a legal assistance attorney can give concerning USERRA is a single word: communicate. Early and frequent communication between the service member/employee and the employer will prevent conflict later. It is especially important to avoid conflict at critical junctures, such as just prior to an exercise or real-world mission. The mobility line is not a good place from which to call an employer, unless the situation was unavoidable. Clients should be advised to request leaves of absence in writing at the earliest known date.²¹⁵

Keeping employers informed about Reserve and Guard matters generally is also an excellent way to avoid USERRA issues. Many Reserve and Guard commanders invite local employers to their bases for community briefings and opportunities to see some of the unit activities up close. A personal telephone call from a commander, first sergeant, or supervisor to an employer frequently can head off routine misunderstandings and maintain good relations.

When informal mechanisms fail to resolve USERRA issues, the legal assistance attorney may want to contact the employer directly, subject of course to current guidance concerning the scope of legal assistance.²¹⁶ The Labor Department's Veterans Employment and Training Service will also contact employers. Legal assistance attorneys may desire to refer clients to that Labor Department agency.

Legal assistance attorneys should also be aware of the activities of the National Committee for Employer Support of the Guard and Reserve (NCESGR). The NCESGR publishes fact sheets and other information on USERRA for employers and service members. The committee also has local ombudsmen who will attempt to informally resolve USERRA issues between employers and service members. NCESGR also gives awards to employers friendly to the Guard and Reserve. While it is a DOD sponsored program, NCESGR is run by volunteers, many of whom are business persons.

V. CONCLUSION

For nearly sixty years, Congress has recognized the importance of preserving the ability of those called to service to return to their civilian employment when their service has ended. Legislation concerning veterans' re-employment rights has changed in step with shifts in national defense policy. At the end of the twentieth century, as the United States relies on its reserve forces to an extent never before envisioned, USERRA is essential in

²¹⁵ The Department of Defense has provided a sample notification to employers in the its USERRA regulations. *See* 32 C.F.R. pt. 104, app. B (1999).

²¹⁶ *See* Air Force Instruction 51-504, Legal Assistance, Notary, and Preventive Law Programs (May 1, 1996).

keeping skilled members in the reserve components. The statute protects the jobs of Reserve and National Guard members and prohibits discrimination in employment for all veterans, including those leaving extended active duty. At the same time, the statute provides straightforward rules for employers to follow concerning the re-employment rights of their service member/employees.

Mutual understanding among the services, employers, and service member/employees is a key element in America's defense policy in the twenty-first century. Legal assistance attorneys therefore perform an important role in our "Total Force" expeditionary military by providing accurate advice on USERRA. A force with strong roots in the free and democratic society that it protects is a paramount American value and USERRA is a pillar that supports that value.