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Florida in Wartime: Rights of Veterans and Soldiers in State and Local Government Employment

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With the extensive activation of troops in the wake of 9/11 and the return of veterans from Iraq, Afghanistan, and other locations, labor and employment law attorneys should be familiar with civilian job rights of servicemembers and veterans. This paper provides an overview those rights in the context of state and local government employment under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301 to 4335, and the Florida Statutes.

Uniformed Services Employment and Reemployment Rights Act

USERRA grants reemployment rights and other benefits to employees who perform military duty and protects them from discrimination and retaliation. Enacted October 13, 1994, USERRA is the latest in a series of federal veterans' reemployment laws dating back to 1940. *See* 20 C.F.R. § 1002.2. Case law under the prior statutes that is consistent with USERRA remains in full force and effect. *Id.*; H.R. REP. NO. 65, 1st Sess. pt. 1, at 19 (1993) (hereinafter H.R. REP. NO. 65); S. REP. NO. 158, 103d Cong., 1st Sess. 40 (1993) (hereinafter S. REP. NO. 158); *United States v. Alabama Dep't of Mental Health and Mental Retardation*, 673 F.3d 1320, 1329 n.6 (11th Cir. 2012).

The Act's purposes are:

> (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
>
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their

communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301(a). Interpretations of USERRA should be consistent with these purposes.

USERRA supersedes agreements, policies and practices that limit or eliminate any rights or benefits provided by the Act or put additional conditions on those rights. 38 U.S.C. § 4302(b). Agreements, policies, and practices providing rights or benefits more generous than or additional to those provided in USERRA are permitted. 38 U.S.C. § 4302(a). Similarly, USERRA preempts state and local laws that reduce, limit or eliminate the rights and benefits it provides but does not supersede laws, whether federal, state or local, conferring greater or additional rights. 38 U.S.C. § 4302(a)-(b).

Employees' rights under USERRA must be broadly construed. *See, e.g., Hill v. Michelin North America*, Inc., 252 F.3d 307, 313-14 (4th Cir. 2001); *Davis v. Advocate Health Center Patient Care Express*, 523 F.3d 681, 683-84 (7th Cir. 2008); *Gordon v. Wawa, Inc.*, 388 F.3d 78, 81 (3d Cir. 2004); *Chance v. Dallas County Hosp. Dist.*, 176 F.3d 294, 297 n.14 (5th Cir. 1999).

The U.S. Department of Labor has adopted regulations implementing the Act's provisions applicable to private employers, states, and local governments. 20 C.F.R. pt. 1002. The Department has expressed an intent that liberal construction in favor of servicemembers apply in construing the regulations. 70 Fed. Reg. 75,246 (Dec. 19, 2005).

I. COVERAGE – STATE AND LOCAL GOVERNMENT EMPLOYMENT

A. Employers

Virtually all civilian U.S. employers are covered by USERRA, regardless of size or number of employees. The Act broadly defines "employer" as "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities." 38 U.S.C. § 4303(4)(A). State and local governments are expressly included within the Act's coverage. 38 U.S.C. § 4303(4)(A)(iii) and (14).

Joint employers. USERRA covers joint employment relationships. The Act's definition of "employer" includes not only persons or entities that pay employees' wages, but, also, those that have control over the employees' employment opportunities or to whom an employer has delegated employment-related responsibilities. 38 U.S.C. § 4303(4)(A)(i). Joint employers share responsibility for compliance with USERRA. 20 C.F.R. § 1002.37.

Supervisors. Supervisors are "employers" under USERRA if they have control over employment opportunities or have been delegated employment-related responsibilities by an employer. *See* 38 U.S.C. § 4303(4)(A) and (4)(A)(i).

Supervisors employed by a local government can be subject to personal liability under USERRA. *See Snyder v. Johnson*, 2013 WL 632084 (D. Kan. 2013); *Baldwin v. City of Greensboro*, 2010 WL 3211055 (M.D.N.C. 2010); *Coulson v. Town of Kearny*, 2010 WL 331347, (D.N.J. 2010); *Brandsasse v. City of Suffolk, Va.*, 72 F. Supp. 2d 608 (E.D. Va. 1999); *Satterfield v. Borough of Schuylkill Haven*, 12 F. Supp. 2d 423 (E.D. Pa. 1998). However, courts differ as to whether supervisors employed by a state can be held individually liable for violating USERRA. The Ninth Circuit has ruled USERRA creates no express or implied cause of action against state supervisors. *Townsend v. University of Alaska*, 543 F.3d 478, 485-87 (9th Cir. 2008). Other courts have held state supervisors can be sued in their individual capacities under USERRA. *See, e.g., Risner v. Ohio Dept. of Rehabilitation and Correction*, 577 F. Supp.2d 953, 966-67 (N.D. Ohio 2008), *dismissed on other grounds*, 2009 WL 4280734 (N.D. Ohio 2009); *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997).

Some courts consider personal liability under USERRA to be limited to individuals with authority to hire and fire. *See, e.g., Satterfield*, 12 F. Supp. 2d at 438 (E.D. Pa. 1998); *Brooks v. Fiore*, 2001 WL 1218448, *9 n.3 (D. Del. 2001), *order aff'd*, 53 Fed. App'x 662 (3d Cir. 2002); *Coulson*, 2010 WL 331347, *7. Others view the reach of personal liability under USERRA to include as well people who influence or are involved in unlawful employment actions. *See, e.g., Carter v. Siemens Business Services, LLC*, 2010 WL 3522949, *9 (N.D. Ill. 2010); *Baldwin*, 2010 WL 3211055, *4.

Successor employers. A successor employer is subject to liability under USERRA if it is a "successor in interest" to its predecessor. 38 U.S.C. § 4303(4)(A)(iv). USERRA requires that the following seven factors be considered in determining whether an entity is a successor in interest to a predecessor: (1) substantial continuity of business operations; (2) use of the same or similar facilities; (3) continuity of work force; (4) similarity of jobs and working conditions; (5) similarity of supervisory personnel; (6) similarity of machinery, equipment, and production methods; and (7) similarity of products or services. 38 U.S.C. § 4303(4)(D)(i). This list is exhaustive—no other criteria may be applied.

There is no requirement that an entity have notice of a USERRA claim at the time of succession. In fact, the Act prohibits consideration of an entity's lack of notice or awareness of a potential or pending claim under USERRA at the time of succession in determining successor-in-interest status. 38 U.S.C.A. § 4303(4)(D)(ii).

B. Employees

An "employee" under USERRA is "any person employed by an employer." 38 U.S.C. § 4303(3). However, as is the case with other employment laws, the Act covers not only current employees, but also former employees, s*ee* 20 C.F.R. § 1002.5(c), and applicants, *see* 38 U.S.C. §§ 4303(4)(A)(v), 4311; 20 C.F.R. § 1002.40.

There is no exemption for executive, managerial, or professional employees. 20 C.F.R. § 1002.43.

Temporary, part-time, probationary, and seasonal employees are covered. 38 U.S.C. § 4311(d); 20 C.F.R. § 1002.41. Nonetheless, as discussed below, an employer is not required to reemploy a person returning from military service if the person's pre-service employment was for a brief, nonrecurrent period that was not expected to continue for a significant length of time.

National Guard civilian technicians are generally treated as state employees under USERRA. 20 C.F.R. § 1002.306. However, if a state adjutant general determines that reemployment of a National Guard technician is impossible or unreasonable, the person must then be treated as a federal employee. 38 U.S.C. § 4314(d).

Independent contractors are not covered employees under USERRA. 20 C.F.R. § 1002.44(a). The following factors are to be considered in determining whether a person is an independent contractor or an employee: (1) the extent of the employer's right to control the manner in which the individual's work is to be performed; (2) the opportunity for profit or loss that depends upon the individual's managerial skill; (3) any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers; (4) whether the service the individual performs requires a special skill; (5) the degree of permanence of the individual's working relationship; and (6) whether the service the individual performs is an integral part of the employer's business. 20 C.F.R. § 1002.44(b).

II. PROTECTION FROM DISCRIMINATION AND REPRISAL

A. Service-Related Discrimination

USERRA bans employment discrimination because of past, current or future military service. 38 U.S.C. § 4311(a). The Act protects the following six categories of persons from service-related discrimination: (1) members of a uniformed service; (2) applicants for membership in a uniformed service; (3) persons who perform service in a uniformed service; (4) persons who have performed service in a uniformed service; (5) applicants for service in a uniformed service; and (6) persons who have an obligation to perform service in a uniformed service. *Id.*

USERRA expresses prohibited adverse actions against such persons in terms of denials. Specifically, the Act prohibits employers from taking any of the following actions on the basis of a person's membership, application for membership, performance of service, application for service, or obligation to perform service in a uniformed service: denying initial employment; denying reemployment; denying retention in employment; denying promotion; and denying any benefit of employment. *Id.*

"Benefit of employment," as used in the last category listed above, is broadly defined as:

> the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement

> or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4303(2).

USERRA's prohibition of service-related discrimination applies to any position of employment, including brief, nonrecurrent positions that are not expected to continue for a significant length of time. 38 U.S.C. § 4311(d). Moreover, actual performance of military service is not required to trigger the Act's protection from discrimination. 20 C.F.R. § 1002.20.

B. Retaliation

Section 4311(b) of USERRA prohibits employers from discriminating in employment or taking any adverse employment action against any person because the person (1) took action to enforce a protection afforded any individual under USERRA; (2) testified or made a statement in or in connection with any proceeding under USERRA; (3) assisted or otherwise participated in an investigation under USERRA; or (4) exercised a right provided for in USERRA. The person is protected regardless of whether the person has performed military service. *Id.*

Like the Act's protection from service-related discrimination, the protection from retaliation applies to all positions of employment. 38 U.S.C. § 4311(d).

The ban on reprisals for taking action to enforce USERRA rights protects not only persons who take formal legal action under USERRA, but also those who lodge internal complaints with an employer. *Gagnon v. Sprint Corp.*, 284 F.3d 839, 853-55 (8th Cir. 2002).

C. Proof of Discrimination and Retaliation

Burdens of proof. USERRA uses the same proof scheme for discrimination and retaliation cases. The plaintiff has the initial burden to show that his or her USERRA-protected status or activity was "a motivating factor" in the employer's adverse employment action. 38 U.S.C. § 4311(c); 20 C.F.R. §§ 1002.22, 1002.23. If the plaintiff makes this showing, the burden shifts to the employer to prove, as an affirmative defense, that the same action would have been taken in the absence of the person's protected activity or status. *Id*. Once a plaintiff has met his or her burden of proving discrimination or retaliation was a motivating factor for the employer's action, the employer can prevail *only if* it successfully establishes this affirmative defense.

The "*McDonnell Douglas*" mode of proof does not apply to USERRA discrimination claims. *See Velázquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 17 (1st Cir. 2007); *Gagnon v. Sprint Corp.*, 284 F. 3d 839, 853–54 (8th Cir. 2002); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 899 n.2 (9th Cir. 2002); *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

Motivating factor. The discriminatory or retaliatory animus to establish a violation of USERRA, by the very language of the statute, need only be "a motivating factor" in the challenged employment action. No showing is required that such animus was the only reason for the action. *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238-39 (11th Cir. 2005).

An employee's USERRA-protected status or activity is a motivating factor "if the defendant relied on, took into account, considered, or conditioned its decision on that consideration." *Id.* at 1238.

Circumstantial evidence of discriminatory motive. Circumstantial evidence may be used to show an employer's discriminatory motive in a USERRA discrimination or retaliation case. As the Eleventh Circuit observed in *Coffman*, "[c]ircumstantial evidence plays a critical part in [USERRA discrimination] cases, 'for discrimination is seldom open and notorious.'" *Id.* at 411 F.3d at 1238 (quoting *Sheehan*, 240 F.3d at 1014). The court noted the following examples of circumstantial evidence of discriminatory motive:

proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.

Id. (quoting *Sheehan*, 240 F.3d at 1014).

Employment decisions influenced by biased subordinates ("cat's paw" liability). Liability for discrimination under USERRA can be imposed on an employer in some instances where a biased subordinate has caused or influenced an unbiased ultimate decisionmaker to take an adverse employment action against an employee. In the first USERRA case decided by the Supreme Court, the Court held: "[I]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1194 (2011) (footnotes omitted; emphasis in original).

A supervisor's intent to cause an adverse employment action would exist not only if the supervisor desired his or her act to cause the adverse employment action, but also if the supervisor believed that such a consequence were substantially certain to result from the act. *Id.* at n.3.

Principles of agency law also come into play. Specifically, the supervisor must have acted within the scope of his or her employment, or under circumstances sufficient to impute liability to the employer if the supervisor acted outside the scope of the supervisor's employment. *Id.* at n.4 (citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758 (1998)). The Court noted that "[a] 'reprimand ... for workplace failings' constitutes conduct within the scope of an agent's employment." *Id.* at 1194 (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 798-99 (1998)).

Regarding proximate cause under the *Staub* test, a biased supervisor's act need not be the exclusive cause of an adverse employment action. So long as the supervisor's act is "a causal factor" of the adverse employment action, proximate causation would be satisfied. *Id.* at 1193. Consequently, an employer cannot avoid liability merely by showing that an unbiased final decisionmaker exercised independent judgment or conducted an independent investigation. *Id.* at 1192-93. "The employer [still] is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision," said the Court. *Id.* at 1193.

However, the Court noted that "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable." *Id.* at 1193. *Cf. Bobo v. United Parcel Service, Inc.*, 665 F.3d 741, 755 (6th Cir. 2012) (unbiased official's admission that he may have decided differently had he known of antimilitary animus of manager who recommended employee's termination drew into question whether employer could prove employee would have been discharged anyway for a valid reason).

The Supreme Court in *Staub* declined to decide whether an employer would be liable if a biased supervisor intended to cause a particular adverse action but a different adverse action resulted. *Staub*, 131 S.Ct. at 1192 n.2. The Court also declined to decide whether an employer would be liable if a nonsupervisory employee committed a discriminatory act that influenced an ultimate employment decision. *Id.* at 1194 n.4.

Constructive discharge. Quitting a job because of discriminatory treatment or failure of an employer to meet its reemployment obligations can be actionable in some circumstances as a "constructive discharge" under USERRA.

In constructive discharge cases under USERRA, the courts use, in varying iterations, a "reasonable person" objective standard for determining whether working conditions were sufficiently intolerable to cause an employee to quit. *See*, *e.g.*, *Serricchio v. Wachovia Securities LLC*, 658 F.3d 169, 185 (2d Cir. 2011) ("Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign"); *Lisdahl v. Mayo Foundation*, 633 F.3d 712, 718 ("[C]onditions are considered intolerable if a reasonable employee would find them as such.") (8th Cir. 2011) (internal quotation marks omitted); *Wallace v. City of San Diego,* 479 F.3d 616 (9th Cir. 2007) (holding that constructive discharge occurs when, looking at the totality of the circumstances, a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions).

Two federal appeals courts, the Second and Eighth Circuits, take the view that an employer's intent to create the complained-of intolerable working conditions is a necessary ingredient of a constructive discharge claim under USERRA, although they have adopted different standards in this regard. According to the Second Circuit, "[c]onstructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit

involuntarily." *Serricchio*, 658 F.3d at 185. Such intent may be shown by circumstantial evidence, the court said. *See id.* at 186-67. However, the Eighth Circuit requires a showing not only that an employer deliberately rendered an employee's working conditions intolerable, but also that the employer did so "with the intent to force the employee to leave employment." *Lisdahl*, 633 F.3d at 718. The Eighth Circuit said this intent requirement can be met "by demonstrating that the resignation was a reasonably foreseeable consequence of the employer's actions." *Id.*

A further requirement of the Eighth Circuit is that the employee must give the employer "a reasonable opportunity to correct the intolerable condition before the employee quits." *Id.* at 719. That court rejected a former employee's claim that he was constructively discharged in violation of USERRA because, among other reasons, he never filed any grievances or voiced any concerns before quitting. *Id.*

Harassment. USERRA's prohibition of denying "any benefit of employment" protects against military-related harassing conduct in the workplace. USERRA's definition of benefit of employment at § 4303(2) was expanded in 2011 to expressly include "the terms, conditions, or privileges of employment." Pub. L. 112-56, Title II, § 251, 125 Stat. 729 (Nov. 21, 2011).The purpose of the amendment was to clarify that USERRA-protected benefits include the right not to suffer harassment or a hostile work environment on the basis of military service or status. *See* 157 Cong. Rec. H7652, H7657 (daily ed. Nov. 16, 2011) (statement of Rep. Stutzman and joint explanation of compromise agreement on amendment of § 4303(2)); H.R. REP. NO. 112-242, pt. 1, at 15-16 (2011). The amendment effectively overruled the Fifth Circuit's decision in *Carder v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011), which held that hostile environment claims are not actionable under USERRA.

The Seventh Circuit has held that a hostile environment claim under USERRA should be supported by evidence that an employer's conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. *Miller v. City of Indianapolis*, 281 F.3d 648, 653 (7th Cir. 2002). Relevant factors include frequency of the alleged conduct, severity of the conduct, whether the conduct was physically threatening or humiliating, and whether the conduct unreasonably interfered with the employee's work performance. *Id.* (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)). Also, the conduct must be objectively hostile from the standpoint of a reasonable person. *Id.*

Due to the unavailability under the Act of compensatory damages other than lost wages and benefits, an employee who is a victim of military-related harassment may have no remedy. In *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 368 Fed. App'x 49, 2010 WL 675714 (11th Cir. 2010), the Eleventh Circuit held that a plaintiff lacked standing to pursue a USERRA harassment claim because no remedy was available to him. The plaintiff suffered no wage or benefit loss, and injunctive relief prohibiting further harassment was inappropriate because he no longer worked for the employer. The absence of a remedy in turn might result in a denial of fees for the plaintiff's attorney. *See, e.g., Fannin v. United Space Alliance, L.L.C.*, 2009 WL 928302, *9–10 (M.D. Fla. 2009) (denying fees to plaintiff's counsel despite plaintiff's success on USERRA claim because plaintiff suffered no wage or benefit loss, and defendant corrected violation before plaintiff filed suit).

III. RIGHTS AND BENEFITS DURING MILITARY SERVICE

A. Participation in Nonseniority Rights and Benefits

Employees who leave civilian employment to serve in the military are deemed to be on a furlough or leave of absence while serving in the military. 38 U.S.C. § 4316(b)(1)(A). As such, they are entitled to participate in any rights and benefits, whether paid or unpaid, not based on seniority that are available to their coworkers with similar seniority, status and pay who are on furlough or leave of absence. 38 U.S.C. § 4316(b)(1)(B). Such entitlement includes not only furlough and leave-of-absence rights and benefits available when an employee's military service starts but, also, any that may become effective during the employee's military service. *Id*. It does not include furlough or leave-of-absence benefits rights and benefits greater than those to which the employee would have been entitled had the employee remained at work. 38 U.S.C. § 4316(b)(3).

An employer cannot trump an employee's right to nonseniority rights and benefits during military service by characterizing the employee's status differently than the statute. *See* 20 C.F.R. § 1002.149. For instance, characterizing the employee as "terminated" will not cut off the employee's rights to nonseniority rights and benefits. *Id.*

If nonseniority rights and benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the most generous treatment accorded to any comparable form of leave must be provided to the servicemember. *See* 20 C.F.R. § 1002.150(b); *Waltermyer v. Aluminum Company of America*, 804 F.2d 821 (3d Cir. 1986) (two-week annual training compared to jury duty for purposes of holiday pay) (*cited with approval in* H.R. REP. NO. 65 at 33-34). The duration of the leave may be the most important factor for comparison, with possible other factors being the purpose of the leave and the ability of the employee to choose when to take leave. *See* 20 C.F.R. § 1002.150(b).

Servicemembers can be required to pay for benefits, such as insurance, but only to the extent that employees on nonmilitary leaves of absence would be required to pay. 38 U.S.C. § 4316(b)(4).

B. Pay

Generally, USERRA does not require payment of wages for time spent performing military service. However, an employee who is absent from work because of military service may still be entitled under USERRA to receive paid nonseniority leave-of-absence benefits, such as holiday pay, that are available to employees of similar seniority, status, and pay who are on nonmilitary leaves of absence. *See* 38 U.S.C. 4316(b)(1)(B) (discussed above). Furthermore, as discussed below, employees have the right to use accrued vacation or similar accrued paid leave time when they are away for military service.

An employer might run afoul of USERRA's discrimination ban if it fails to follow its own policy of providing pay to employees who miss work for military duty. *See Koehler v.*

PepsiAmericas, 2006 WL 2035650 (S.D. Ohio July 18, 2006), *aff'd*, 268 F.App'x 396 (6th Cir. 2008). However, USERRA would not preclude an employer from discontinuing a paid military leave policy. *Crews v. City of Mt. Vernon*, 567 F.3d 860, 865-66 (7th Cir. 2009). Moreover, an employer's interpretation of its paid military leave policy generally is not subject to challenge under USERRA. *See, e.g., Gross v. PPG Industries, Inc.*, 636 F.3d 884, 892 (7th Cir. 2011) (employer's refusal to compute differential pay as employee wished was not adverse employment action); *Welshans v. United States Postal Service*, 550 F.3d 1100, 1104 (Fed. Cir. 2008) (employer acted lawfully in charging as military leave days on which employee was on reserve duty but which were not employee's scheduled workdays).

Laws other than USERRA may impose pay requirements during employees' military service. For instance, docking of exempt employees' salary for temporary military absences during a workweek is prohibited by regulations under the Fair Labor Standards Act, subject to an offset for wages earned for that particular week in the military. 29 C.F.R. § 541.602(b)(3). Moreover, as discussed below, the Florida Statutes require pay for certain periods of military service of public employees.

C. Vacations and other accrued paid leave time

Employees who are away for military service have a right to use any accrued vacation, annual or similar paid leave time while in the service. 38 U.S.C. § 4316(d). Forced use of accrued vacation, annual, or similar leave time during an employee's absence for military service violates USERRA. *Id.* Whether or not an employee uses accrued vacation or similar leave time during military service is at the employee's, not the employer's, option. *Id.*

Sick leave would not be subject to the automatic entitlement of a servicemember to use vacation and similar accrued paid leave during military service. 20 C.F.R. § 1002.153(a). Nonetheless, an employee on military leave would be entitled to use accrued sick leave if the employer permits employees to use sick leave for any reason, or allows similarly situated employees on layoff or leave of absence to use accrued sick leave. *Id.*

D. Health Insurance

USERRA provides a right to COBRA-like health benefit continuation for up to 24 months during military service. 38 U.S.C. § 4317(a)(1).

If an employee's military service is for 30 or fewer days, the employee cannot be required to pay more than the normal employee share of the premium. 38 U.S.C. § 4317(a)(2). The employee cannot be required to pay more than 102 percent of the premium if the service lasts more than 30 days. *Id.*

Waiting periods or exclusions cannot be imposed on reemployed persons or their dependents. 38 U.S.C. § 4317(b)(1). An exception to this prohibition applies with respect to coverage of service-connected injuries or illnesses. 38 U.S.C. § 4317(b)(2).

E. Waivers

USERRA allows for a waiver of leave-of-absence rights and benefits that is called a "notice of intent not to return to a position of employment after service in the uniformed service." 38 U.S.C. § 4316(b)(2).

However, for such a waiver to be effective, the requirements are strict. The burden of proof is on the employer. Specifically, the employer must show that: (1) the employee knowingly provided clear notice in writing of an intent not to return to a position of employment after military service; and (2) In so doing, the employee was aware of the specific rights and benefits to be lost.
38 U.S.C. § 4316(b)(2)(B).

If valid, and despite its name, such a notice waives only entitlement to leave-of-absence rights and benefits during military service. It will not affect entitlement to other rights under the Act, including the right to reemployment. 38 U.S.C. § 4301 note; 20 C.F.R. §1002.152.

IV. ELIGIBILITY FOR REEMPLOYMENT

Five eligibility requirements. Generally, an employee returning from military service is entitled to reemployment with the employee's preservice employer if the following five criteria are met:

1. The employee left employment with the employer in order to perform service in a uniformed service.

2. The employee gave the employer written or verbal advance notice of the service, unless giving of notice was precluded by military necessity or was otherwise impossible or unreasonable.

3. The combined length of the employee's periods of uniformed service during his or her employment relationship with the employer does not exceed five years, excluding any periods of service exempt under USERRA from this five-year cap.

4. After his or her release from the service, the employee timely reported to the employer or applied for reemployment.

5. The employee was separated from the service under other than dishonorable conditions.

See 38 U.S.C. §§ 4303(16); 4304; 4312(a)–(c), (e); 20 C.F.R. § 1002.32(a).

Prohibition on further requirements. An employer cannot impose reemployment prerequisites that are additional to those required under USERRA. 38 U.S.C. § 4302(b). *See, e.g., Petty v. Metropolitan Gov't of Nashville-Davidson Cty.,* 538 F.3d 431, 441-42 (6th Cir. 2008)

(return-to-work screening process as applied to returning servicemember was unlawful because process was not prerequisite authorized by USERRA), *cert. denied,* 129 S.Ct. 1933 (2009).

A. Covered Military Service

Most types of federal military service qualify as service in a uniformed service under USERRA.

Uniformed services. The "uniformed services" include the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, and the reserve components thereof; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty for training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. 38 U.S.C. § 4303(16).

Service. "Service" in a uniformed service means the performance of duty on a voluntary or involuntary basis under competent authority in a uniformed service. 38 U.S.C. § 4303(13). It includes active duty; active duty for training; initial active duty for training; inactive duty for training; full-time National Guard duty; a period during which an employee is absent for a fitness-for-service examination; and a period during which an employee who is a reservist or National Guard member is absent for the purpose of performing funeral honors duty. *Id.*

Attending a military service academy also is uniformed service under USERRA. 20 C.F.R. § 1002.60. Moreover, service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or as a participant in an authorized training program is deemed "service in the uniformed services" for purposes of USERRA. 42 U.S.C. § 300hh-11(d)(3).

B. Character of Service

A returning employee will be ineligible for reemployment rights under USERRA if his or her separation from military service falls into a dishonorable category specified in § 4304 of USERRA. 38 U.S.C. § 4312(a). The employee's service is dishonorable for purposes of USERRA only if the employee is

(a) Separated from service with a dishonorable or bad conduct discharge;

(b) Separated from service under other than honorable conditions, as characterized by regulations of the uniformed service;

(c) A commissioned officer dismissed by sentence of a general court-martial, in commutation of a sentence of a general court-martial, or by order of the President in time of war; or

(d) A commissioned officer dropped from the rolls due to unauthorized absence for at least three months, a sentence to confinement by a court-martial, or a sentence to confinement in a federal or state prison.

38 U.S.C. 4304; 20 C.F.R. § 1002.135. *See Petty*, 538 F.3d at 441 (concerns about employee's behavior during military service did not disqualify him from reemployment because his separation from service was "under honorable conditions").

C. Length of Service

USERRA places a five-year cap on the cumulative length of military service that has caused an employee's absence from employment with an employer with whom the employee seeks reemployment. 38 U.S.C. § 4312(a)(2) and (c).

However, the following kinds of service do not count against the five-year limit:

(1) Service that is required beyond five years to complete an initial period of obligated service;

(2) If the employee was unable to obtain orders releasing him or her from service before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and,

(ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

(ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);

(iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);

(iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);

(v) 10 U.S.C. 12304 (involuntary active duty for a named operational mission for up to 365 consecutive days);

(vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);

(vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);

(viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);

(ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

(x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);

(xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and

(xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned;

(8) Service performed as a member of the National Guard if called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, or insurrection, or to execute the laws of the United States;

(9) Full-time National Guard duty (other than for training) under orders issued pursuant to 32 U.S.C. 502(f)(2)(A) when authorized by the President or Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by federal funds, as determined by the Secretary concerned; and

(10) Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.

38 U.S.C. § 4312(c); Pub. L. No. 112-81, Title V, § 575, 125 Stat. 1298 (Dec. 31, 2011) (adding 38 U.S.C. § 4312(c)(4)(F)); 20 C.F.R. § 1002.103.

Pre-USERRA military service. Military service performed before December 12, 1994, that counted towards the prior reemployment statute's service limitation counts toward USERRA's five-year limit. *See* 38 U.S.C. § 4301 note; 20 C.F.R. § 1002.103.

D. Return-to-Work Time Limits

An employee returning from military service must report to the employer or apply for reemployment within time limits specified by USERRA. 38 U.S.C. § 4312(a)(3) and (e)(1)–(2). However, failure to timely report to the employer or apply for reemployment does not automatically result in loss of reemployment rights. 38 U.S.C. § 4312(e)(3). Instead, the employee will be subject to the employer's rules governing absences. *Id.*

The time limits for returning to work are as follows:

Service of fewer than 31 days, or absence for a fitness-for-service examination. The employee must report to the employer by the beginning of the first regularly-scheduled work period on the first full calendar day after completing military service, *plus* allowance for time to safely travel from the place of service to the employee's residence *and* eight hours after arriving home. 38 U.S.C. § 4312(e)(1)(A)(i), (B). However, if timely reporting to the employer is impossible or unreasonable due to no fault of the employee, the employee must report to the employer as soon as possible after the expiration of the eight-hour period. 38 U.S.C. § 4312(e)(1)(A)(ii), (B).

Service for more than 30 but less than 181 days. The employee must apply for reemployment no later than 14 days after completion of the period of service. 38 U.S.C. § 4312(e)(1)(C). If timely application is impossible or unreasonable through no fault of the employee, the employee must apply by the next full calendar day when application becomes possible. *Id.*

Service of more than 180 days. The employee must apply for reemployment no later than 90 days after completing the period of service. 38 U.S.C. § 4312(e)(1)(D). This time limit is not extended if the employee fails to timely apply through no fault of the employee.

Service-related injury or illness. The above deadlines are extended for up to two years for employees who are hospitalized or convalescing because of an injury or illness incurred in or aggravated during the performance of military service. 38 U.S.C. § 4312(e)(2)(A). If meeting the extended deadline is impossible or unreasonable due to circumstances beyond such an employee's control, the period will be extended by the minimum time required to accommodate those circumstances. 38 U.S.C. § 4312(e)(2)(B).

Funeral honors duty. If an employee takes an authorized leave of absence from a position of employment to perform funeral honors duty, the Act deems the employee to have

notified the employer of an intent to return to the employee's position of employment. 38 U.S.C. § 4312(e).

E. Employer Request for Documentary Proof of Eligibility for Reemployment

An employee who seeks reemployment after completing more than 30 days of military service must, if so requested by his or her employer, provide documentation showing that the employee timely applied for reemployment; that the employee has not exceeded USERRA's five-year service limit; and that the employee's separation from military service was under other than dishonorable conditions. 38 U.S.C. § 4312(f)(1); 20 C.F.R. § 1002.121.

Nonetheless, an employer cannot delay or attempt to defeat its reemployment obligation by demanding documentation that does not then exist or is not then readily available. 38 U.S.C. § 4312(f)(4). Nor is the employer excused from reemploying an employee who fails to provide satisfactory documentation due to the nonexistence or unavailability of such documentation. 38 U.S.C. § 4312(f)(3)(A). However, if after reemployment documentation becomes available showing that such an employee did not meet USERRA reemployment-eligibility requirements, the employer may, but is not required to, discharge the employee. 38 U.S.C. § 4312(f)(3)(A).

Although USERRA prohibits an employer from delaying reemployment of an employee who cannot produce satisfactory eligibility documentation due to the nonexistence or unavailability of such documentation, the Act permits the employer to delay making retroactive pension contributions for a reemployed employee who was absent for more than 90 days until the employee furnishes such documentation. 38 U.S.C. § 4312(f)(3)(B).

Servicemembers and veterans may obtain reemployment-eligibility documentation by submitting a request for the documentation to the Secretary of the military department concerned or, if applicable, the Commandant of the Coast Guard. A regulation of the Department of Defense directs the Secretaries of the Army, Navy, and Air Force and the Commandant of the Coast Guard to furnish reemployment-eligibility documentation to a current or former servicemember upon request. *See* 32 C.F.R. § 104.6(l). Veterans may obtain copies of their DD Form 214 and official military personnel file from the National Personnel Records Center of the U.S. National Archives. *See* http://1.usa.gov/BFA8J.

F. Burdens of Proof

Employee's burden. The employee bears the burden of proving that the Act's reemployment-eligibility requirements are met. *See McGuire v. UPS*, 152 F.3d 673, 676 (7th Cir. 1998).

A plaintiff claiming to have been denied reemployment in violation of § 4312 is not required to prove discriminatory intent. 20 C.F.R. § 1002.33; *Petty*, 538 F.3d at 442–43; *Jordan v. Air Products and Chem.*, 225 F. Supp. 2d 1206, 1207–09 (C.D. Cal. 2002); *Wrigglesworth v. Brumbaugh,* 121 F. Supp. 2d 1126, 1132–37 (W.D. Mich. 2000).

Affirmative defenses. If an employee satisfies the Act's reemployment eligibility requirements, the employer is obliged to reemploy the employee, unless it can establish one or more of three possible affirmative defenses. 38 U.S.C. § 4312(d).

The three affirmative defenses are as follows:

> (1) Impossibility or unreasonableness of reemployment due to changed circumstances of the employer.
>
> (2) Undue hardship in assisting the person to become qualified for employment through training or accommodation of the person's service-related disability.
>
> (3) The person's preservice employment was for a brief, nonrecurrent period, and there was no reasonable expectation that such employment would continue indefinitely or for a significant period.

38 U.S.C. § 4312(d)(1); 20 C.F.R. § 1002.139(a)–(c).

V. RIGHTS OF REEMPLOYMENT-ELIGIBLE PERSONS

A. Prompt Reemployment

Employers must promptly reemploy returning employees who meet USERRA's eligibility requirements. 38 U.S.C. § 4313(a). Undue delay in reemploying an eligible employee gives rise to a claim for back pay. *See Fryer v. A.S.A.P. Fire & Safety Corp., Inc.*, 658 F.3d 85, 93 (1st Cir. 2011) (unlawfully delayed start date of returning servicemember's reemployment entitled veteran to back pay for period of delay); H.R. REP. NO. 65 at 32 ("The Committee intends that any undue delay in reinstatement would be subject to a claim for lost wages."); S. Rep. No. 158 at 54 (same).

The Department of Labor regulations define "prompt reemployment" as follows:

> "Prompt reemployment" means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

20 C.F.R. § 1002.181.

B. Reemployment Positions

The Act specifies the positions into which reemployment-eligible employees must be promptly placed. *See* 38 U.S.C. §§ 4313, 4314. In all cases, the starting point for determining the proper reemployment position is the "escalator position"—the position that an employee would have attained with reasonable certainty if not for the employee's absence due to uniformed service. 20 C.F.R. §§ 1002.191, 1002.192. "Reasonable certainty" is a high probability; no showing of absolute certainty is required. 20 C.F.R. § 1002.213. *See Serricchio*, 658 F.3d at 190. The escalator position could be the same position that the employee held prior to military service, a promotion, a lateral transfer, a demotion, layoff status, or severance. 20 C.F.R. § 1002.194.

The reemployment position includes the seniority, status and pay that an employee ordinarily would have attained in that position given the employee's job history had the employee remained continuously employed. 20 C.F.R. § 1002.193(a). The pay of the position includes any form of compensation that the employee would have received. *See Serricchio*, 658 F.3d at 183-85. The status of the position includes such factors as opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location. 20 C.F.R. §§ 1002.193(a), 1002.194.

Factors affecting determination of the appropriate reemployment position include the length of a returning employee's most recent period of military service, the employee's qualifications, and whether the employee has a disability incurred in or aggravated during the period military service. 20 C.F.R. § 1002.195.

Service of 1 to 90 days. After a period of military service lasting fewer than 91 days, a reemployment-eligible employee must be promptly reemployed in accordance with the following order of priority:

> 1. The escalator position, so long as the employee is qualified for the position or can become qualified with reasonable efforts by the employee's employer. 38 U.S.C. § 4313(a)(1)(A); 20 C.F.R. § 1002.196(a).
>
> 2. If the employee is not qualified for the escalator position after reasonable efforts by the employer to qualify the employee, the employee must be placed in his or her preservice position, so long as the employee is qualified for the preservice position or can become qualified for such position after reasonable efforts by the employer. 38 U.S.C. § 4313(a)(1)(B), (4); 20 C.F.R. § 1002.196(b).
>
> 3. If the employee cannot become qualified for the escalator position or the preservice position after reasonable efforts by the employer to qualify the employee, the employee must be placed in any other job that he or she is qualified to perform and that most nearly approximates in terms of pay and status the escalator position or, if no such position is available, the employee's preservice position, with full seniority. 38 U.S.C. § 4313(a)(4); 20 C.F.R. § 1002.196(c). The

employer must make reasonable efforts to qualify the employee for this position as well. 20 C.F.R. § 1002.196(c).

Service of more than 90 days. A reemployment-eligible employee returning from military service lasting more than 90 days must be promptly reemployed according to the following order of priority:

1. The escalator position, or a position of equivalent seniority, status and pay, so long as the employee is qualified for the position or can become qualified after reasonable efforts by the employer to qualify the employee. 38 U.S.C. § 4313(a)(2)(A); 20 C.F.R. § 1002.197(a).

2. If the employee cannot become qualified for the escalator position or a like position after reasonable efforts by the employer, the employee must be placed in his or her preservice position, or a position of equivalent seniority, status and pay, so long as the employee is qualified for the preservice or equivalent position or can become qualified for the preservice or equivalent position with reasonable efforts by the employer. 38 U.S.C. § 4313(a)(2)(B); 20 C.F.R. § 1002.197(b).

3. If the employee cannot become qualified for the escalator position, the preservice position or a like position after reasonable efforts by the employer, the employee must be placed in a position that the employee is qualified to perform and that most nearly approximates in terms of pay and status the "escalator" position or, if no such position is available, the employee's preservice position, with full seniority. 38 U.S.C. § 4313(a)(4); 20 C.F.R. § 1002.197(c). The employer must make reasonable efforts to help the employee become qualified for this position. 20 C.F.R. § 1002.197(c).

Service-related disability. If a reemployment-eligible employee with a disability incurred in or aggravated during the employee's most recent period of service is not qualified for the escalator position due to such disability, the employee must be promptly reemployed in a position in the following order of priority:

1. The escalator position, so long as reasonable efforts to accommodate the employee's disability can qualify the employee to perform this position. 38 U.S.C. § 4313(a)(3).

2. If the employee is not qualified for the escalator position because of the disability after reasonable efforts by the employer to accommodate the disability and help the employee become qualified, the employee must be employed in a position equivalent in seniority, status and pay to the escalator position, so long as the employee is qualified to perform the duties of the position or can become qualified to perform them with reasonable efforts by the employer. 38 U.S.C. § 4313(a)(3)(A); 20 C.F.R. § 1002.225(a).

3. If the employee does not become qualified for the escalator position or an equivalent position after reasonable efforts by the employer to accommodate the employee's disability and help the employee become qualified, the employee must be employed in a position that, consistent with the circumstances of the employee's case, most nearly approximates the equivalent position in terms of seniority, status and pay. 38 U.S.C. § 4313(a)(3)(B). Depending on the circumstances, a position that is the nearest approximation to the equivalent position may be a higher or lower position. 20 C.F.R. § 1002.225(b).

USERRA does not incorporate the Americans with Disabilities Act's definition of "disability." A USERRA-covered disability is simply a physical or mental condition incurred in or aggravated during an employee's period of military service immediately preceding reemployment that renders the employee unqualified to perform the otherwise applicable reemployment position.

Conflicting claims to same position. If an employee's reemployment position is occupied by another person, USERRA generally entitles the employee to "bump" the incumbent. *See* 20 C.F.R. § 1002.139(a) (noting that "[t]he employer may not . . . refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee").

However, if two or more employees are entitled to reemployment in the same position, the employee who first left the position has the superior right to it. 38 U.S.C. § 4313(b)(1). The employees without the superior right to the position are then entitled to reemployment, with full seniority, in any other position that provides similar status and pay in the order of priority under the reemployment scheme applicable to them. 38 U.S.C. § 4313(b)(2).

C. Employer's Duty to Make Qualification and Accommodation Efforts

If a reemployment-eligible employee is unqualified for a reemployment position due to deficient skills or a disability incurred in or aggravated during the employee's most recent military service, the employer must make reasonable efforts to qualify the employee for a reemployment position specified in USERRA by providing training or accommodating the disability. *See* 38 U.S.C. §§ 4303(9)–(10); 4313(a)(1)(B), (2)(B), (3)(A), (4); 20 C.F.R. §§1002.198, 1002.226.

However, qualification and accommodation efforts are excused if they would cause undue hardship to the employer. 38 U.S.C. §§ 4303(10), (15); 4312(d)(1)(B).

Essential tasks. An employee is "qualified" for a position if the employee has the ability to perform the essential tasks of the position. 38 U.S.C. § 4303(9). Among factors relevant in determining whether a task is essential are the following:

- The employer's judgment as to which functions are essential

- Written job descriptions developed before the hiring process begins
- The amount of time on the job spent performing the function
- The consequences of not requiring the individual to perform the function
- The terms of a collective bargaining agreement
- The work experience of past incumbents in the job
- The current work experience of incumbents in similar jobs

20 C.F.R. § 1002.198(a)(2).

Undue hardship. "Undue hardship" means actions that would require significant difficulty or expense, when considered in light of factors such as size of an employer, available resources, and the nature of the operation. 38 U.S.C. § 4303(15). Undue hardship is an affirmative defense, which the employer bears the burden of proving. 38 U.S.C. § 4312(d)(2).

D. Seniority and Seniority-Based Rights and Benefits

Reemployed persons are entitled to the seniority and all rights and benefits based on seniority that they had on the date their military service began, plus any seniority and additional rights and benefits they would have attained had they remained continuously employed. 38 U.S.C. § 4316(a); 20 C.F.R. § 1002.210. A right or benefit is based on seniority if it is determined by or accrues with longevity in employment. 38 U.S.C. § 4303(12); 20 C.F.R. § 1002.212. Traditionally called "perquisites of seniority," seniority-based rights and benefits can include pensions and other fringe benefits, status, privileges, wage rates, vacations, etc. *See* 38 U.S.C. § 4303(2).

E. Missed Promotion Opportunity During Military Service

Consistent with the "escalator" principle, an employee must receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted. *See* 20 C.F.R. § 1002.193(a).

In the event promotions are based on the results of a test, determining the escalator position will require permitting the employee to take a makeup promotional exam. 20 C.F.R. § 1002.193(b). If the employee passes the makeup exam and, based on the test results, there is a reasonable certainty that the employee would have been promoted, or made eligible for promotion, during the time that the employee served in the military, the employee must be promoted or granted eligibility for promotion as of the date it would have occurred had the employment not been interrupted by military service. *Id.*

Prior to scheduling a makeup examination, an employer should give the employee a reasonable amount of time to adjust to reemployment. *Id.* Factors that may be relevant in

determining a reasonable amount of readjustment time include, but are not limited to, the length of time the employee was absent from work; the level of difficulty of the test; the typical time necessary to prepare or study for the test; the duties and responsibilities of the reemployment position and the promotional position; and the nature and responsibilities of the employee while serving in the military. *Id.*

Failure to allow a reemployed employee to take a promotion examination that the employee missed during military service can also violate USERRA's ban on discrimination. *See Fink v. City of New York,* 129 F.Supp.2d 511, 520–23 (E.D.N.Y. 2001) (reasonable jury could conclude that employer intentionally discriminated against veteran because of his military service in failing to offer him make-up promotional exam upon his return from military service).

F. Pensions

USERRA provides special requirements for pension plans. 38 U.S.C. § 4318. A covered pension plan is any employee pension benefit plan (except for the federal government's Thrift Savings Plan) that provides retirement income to employees or that defers income to employees until or after termination of employment. *See* 38 U.S.C. § 4318(a)(1)(A).

With respect to pension rights of an employee who is reemployed after a period of military service, USERRA requires that

- the employee be treated as not having had a break in service with the employer or employers maintaining the pension plan. 38 U.S.C. § 4318(a)(2)(A).

- the employee's period of military service be deemed as service with the employer or employers maintaining the plan. 38 U.S.C. § 4318(a)(2)(B).

- the employee's employer be liable for funding any resulting obligation. 38 U.S.C. § 4318(b)(1).

- the employee be entitled to any accrued benefits from employee contributions only to the extent that employee repays employee contributions. 38 U.S.C. § 4318(b)(2).

Employee contributions can be repaid over a period that is three times the duration of a reemployed employee's military service, but no longer than five years, with the repayment period starting on the date of reemployment. 38 U.S.C. § 4318(b)(2).

The employee's reconstructed compensation during a period of military service is based on the rate(s) of pay the employee would have received had he or she not been absent for military service. 38 U.S.C. § 4318(b)(3)(A). If the employee's compensation was not based on a fixed rate, the reconstructed compensation is based on the employee's average rate of pay during the 12-month period immediately preceding the employee's entry into military service, or, if shorter, the period of employment immediately preceding the employee's entry into military service. 38 U.S.C. § 4318(b)(3)(B).

If the employee's absence for military service exceeded 90 days, the employer may delay making retroactive pension contributions until the employee submits satisfactory documentation showing eligibility for reemployment. 38 U.S.C. § 4312(f)(3)(B).

G. FMLA Rights

USERRA operates to protect the FMLA-eligibility rights of employees who take military leave. Because USERRA treats a reemployed employee's period of military service as time on the job for purposes of rights and benefits that accrue with longevity in employment, the time the employee spent in the military is included in determining whether the employee has met the FMLA's requirements of being employed with the employer for at least 12 months and working for at least 1,250 hours in the 12-month period preceding FMLA leave. 20 C.F.R. § 1002.210. Consequently, in calculating whether the employee has met the months-employed and hours-of-service eligibility requirements, the hours and months the employee worked for the employer before leaving for military service must be combined with the months and hours the employee would have worked had he or she remained continuously employed. 20 C.F.R. § 1002.210; 29 C.F.R. §§ 825.102 (definition of "eligible employee"), 825.110(b)(2)(i) and (c)(2), 825.702(g).

With respect to enforcement in the event an employer fails to count a reemployed employee's military leave of absence toward the employee's FMLA eligibility, the USERRA regulations state that the employee "may have a cause of action under USERRA but not under the FMLA." 20 C.F.R. § 1002.210. The FMLA regulations (29 C.F.R. pt. 825) are silent on this issue.

H. Protection from Discharge Without Cause

USERRA temporarily removes the otherwise at-will status of reemployment-eligible employees who are reemployed after returning from a period of military service lasting over 30 days. Section 4316(c) of the Act protects such employees from discharge without cause for either a year or six months, depending on the length of their military service.

1. Job-Protected Periods

The job-protected period is one year after reemployment if the period of military service lasted more than 180 days. 38 U.S.C. § 4316(c)(1).

For employees returning from a period service lasting more than 30 days but less than 181 days, the job-protected period is 180 days after reemployment. 38 U.S.C. § 4316(c)(2).

The period of military service that immediately precedes a returning employee's reemployment is the relevant "period of service." *See* 20 C.F.R. § 1002.247. Multiple periods of military service cannot be combined to attain the number of service days necessary to trigger job protection under § 4316(c). *See Warren v. International Business Machines Corp.*, 358 F. Supp. 2d 301, 313-16 (S.D.N.Y. 2005).

If an employee were fired after being reemployed following a period of service lasting 30 or fewer days, the employee could not challenge the discharge under § 4316(c), unless the

employee were still within a job-protected period triggered by a prior longer period of service. However, regardless of the length of the employee's military service, the employee would not be foreclosed from bringing a discriminatory-discharge or retaliatory-discharge claim under § 4311 if the circumstances of the discharge so warranted.

2. Start of the Job-Protected Period

The protected period begins on the date when a returning employee is reemployed in full compliance with USERRA's reemployment requirements. *See* 70 Fed. Reg. 75,246, 75,279 (Dec. 19, 2005) ("[T]he time period for special protection does not start until the service member has been fully reemployed and any benefits to which the employee is entitled have been restored."); H.R. REP. NO. 103-65 at 35 ("[T]he protection would begin only upon proper and complete reinstatement.") (citing *O'Mara v. Petersen Sand & Gravel Co., Inc.*, 498 F.2d 896, 898 (7th Cir. 1974)), *as reprinted in* 1994 U.S.C.C.A.N. 2449, 2468; S. REP. NO. 103-158 at 63 ("The six-month and one-year periods of protection from removal without cause would begin only after the servicemember has been reemployed in full compliance with chapter 43.") (citing *O'Mara*).

Consequently, if the employer places the employee in the wrong position or denies the employee the requisite seniority, status, pay, or benefits, commencement of the protection period will be delayed until the employer corrects all deficiencies.

Attorneys representing plaintiffs on claims alleging noncompliance with USERRA's reemployment requirements should seek as part of requested relief not only an order directing compliance with the reemployment requirements but, also, a directive that the plaintiff be protected from discharge for the full duration of the applicable protection period. Such an order would be consistent with the mandate contained in § 4323(e) of USERRA—that "[t]he court shall use . . . its full equity powers . . . to vindicate fully the rights or benefits of persons under [USERRA]."

3. Meaning of "Discharge"

USERRA's protection from discharge extends not only to terminations but also other situations that result in an employee's loss of his or her reemployment position. For example, a layoff or demotion would be a "discharge" under § 4316(c). *See* 20 C.F.R. § 1002.248(b) (layoffs); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286 (1946) ("The guarantee against discharge . . . is broad enough to cover demotions."). Even a resignation during the job-protected period could so qualify. *See Serricchio v. Wachovia Securities, LLC*, 556 F. Supp. 2d 99, 108-09 (D. Conn. 2008) (denying employer's motion for summary judgment on former employee's unjust-discharge claim under § 4316(c) where alleged conditions under which employee was offered reemployment were so intolerable that reasonable person in his position would have felt compelled to resign), *denying employer's post-trial motion*, 706 F.Supp.2d 237 (D. Conn. 2010), *aff'd,* 658 F.3d 169, 174 (2d Cir. 2011).

4. Employee's Burden of Proof

What the employee must prove. An employee who seeks to bring a discharge claim under § 4316(c) should be prepared to plead and prove the following:

- The employee's period of military service exceeded 30 days.
- The employee satisfied USERRA's reemployment-eligibility requirements.
- The employee was reemployed after returning from military service.
- The employee was discharged

  —within one year after reemployment (if the service period was over 180 days).

  or

  —within 180 days after reemployment (if the service period was more than 30 but under 181 days).

Intent not an element. No showing of discriminatory intent, much less any intent, is necessary to establish a violation of § 4316(c).

No burden to prove absence of cause. Nor is the employee required to plead or prove that the discharge was unjust or otherwise without cause. Rather, as discussed below, the employer has the burden of proof on the issue of cause. Nonetheless, as a practical matter and litigation strategy, prudent counsel for the employee will marshal evidence to defeat the employer's attempt to prove cause.

5. Employer's Burden of Proof

Affirmative defense. If the employee proves that he or she was "discharged" during the job-protected period, the employer is liable for violating § 4316(c), unless it can prove, as an affirmative defense, that the discharge was "for cause."

This can be a tough burden for an employer to meet in a motion for summary judgment. As a court observed, "[b]ecause employers have the burden of proving that the discharge was reasonable, it is difficult for employers to achieve summary judgment on claims under § 4316(c)." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 308 (4th Cir. 2006).

Conduct alleged as cause. If the employer relies on alleged conduct of the employee as cause for the discharge, the employer bears the burden of proving that (1) it is reasonable to fire an employee for the conduct in question; and (2) the employee had notice, which was express or fairly implied, that the conduct would be grounds for discharge. 20 C.F.R. §1002.248(a).

Layoff or job elimination alleged as cause. If the employer alleges that a layoff or elimination of the plaintiff's position was cause for the plaintiff's discharge, the employer has the burden of proving that (1) the layoff/position elimination was for a legitimate nondiscriminatory reason; and (2) the layoff/position elimination would have affected anybody in the plaintiff's position. *See* 20 C.F.R. § 1002.248(b); 70 Fed. Reg. 75,246, 75,279 (Dec. 19, 2005) (noting that the employer must prove that the discharge was for a "legitimate nondiscriminatory reason that would have affected any employee in the reemployed service member's position, regardless of his or her protected status or activity"); H.R. REP. No. 103-65

at 35 (noting that "good cause exists if the 'escalator' principle would have eliminated a person's job or placed that person on layoff in the normal course").

Do not confuse the employer's burden to prove a legitimate nondiscriminatory reason in a layoff or position-elimination case under § 4316(c) with the familiar *McDonnell Douglas* "articulation" used in disparate treatment cases under Title VII and other employment law statutes. The employer in a layoff or position-elimination case under § 4316(c) bears the burden not only of production but also persuasion on this issue.

VI. ENFORCEMENT AND REMEDIES UNDER USERRA

A. Veterans Employment and Training Service

Persons who believe their rights under USERRA have been violated have the option of filing a complaint with the Department of Labor's Veterans Employment and Training Service ("VETS"). 38 U.S.C. § 4322(a). If a person opts to file a complaint with VETS, the person must await completion of VETS' processing of the complaint before filing suit. *See* 38 U.S.C. § 4323(a)(3). A complaint may be filed in writing, or electronically using VETS Form e1010. 20 C.F.R. § 1002.288. The form and instructions are available at http://1.usa.gov/19oebCJ.

VETS is required to investigate USERRA complaints filed with it and to make a reasonable effort to resolve complaints if it finds that a violation occurred. 38 U.S.C. § 4322(d). VETS has a right of reasonable access to examine and copy employer or employee documents; a right to interview witnesses; and may subpoena attendance of witness and production of documents. 38 U.S.C. § 4326(a)–(c).

VETS must complete processing of the complaint within 90 days. 38 U.S.C. § 4322(f). The deadline can be exceeded if the complainant agrees to an extension. 38 U.S.C. § 4327(a)(2). If VETS fails to comply with the 90-day or agreed deadline, such failure will not affect the complainant's enforcement rights under the Act. 38 U.S.C. § 4327(a)(1).

If VETS' efforts to resolve a complaint fail, VETS will notify the complainant in writing of the results of the investigation and of the complainant's right to file a lawsuit. 38 U.S.C. § 4322(e); 20 C.F.R. § 1002.290.

VETS is available to provide technical assistance with respect to USERRA when requested to do so. 38 U.S.C. § 4322(c)(2); 20 C.F.R. § 1002.277.

B. Government-Represented Suits Against States and Local Governments

A person who receives notice from VETS of an unsuccessful effort to resolve the person's complaint against a state or local government may request that the complaint be submitted to the Attorney General for possible court action. 38 U.S.C. § 4323(a)(1). The Attorney General may, but is not required to, file a lawsuit on the person's behalf in a federal district court. 38 U.S.C. § 4323(a)(1).

If the person requests VETS to refer a complaint to the Attorney General, VETS must refer the complaint within 60 days of receiving the request. 38 U.S.C. § 4323(a)(1). The Attorney General must make a decision whether to represent the person and notify the person of the decision within 60 days of receiving the referral. 38 U.S.C. § 4323(a)(2). These deadlines can be extended if the person so agrees. 38 U.S.C. § 4327(a)(2). Noncompliance with the deadlines cannot be raised as a defense and will result in no impairment of the person's right to enforce his or her USERRA rights or the authority of the Attorney General to represent the person. 38 U.S.C. § 4327(a)(1).

If the Attorney General files suit against a state, the complaint must be brought in the name of the United States, rather than the person's name. 38 U.S.C. § 4323(a)(1). States are not entitled to sovereign immunity from such suits. *United States v. Alabama Dep't of Mental Health and Mental Retardation*, 673 F.3d at 1325-28.

If the Attorney General files a lawsuit under USERRA against a local government, the suit may be brought in any district in which the employer maintains a place of business. 38 U.S.C. § 4323(c)(2), (i). If the Attorney General sues a state, the action may be brought in any district in which the state exercises authority or carries out any function. 38 U.S.C. § 4323(c)(1).

C. Private Suits Against States and Local Governments

A person can file a lawsuit under USERRA against a state or local government if: the person opted not to file a complaint with VETS; after receiving notice from VETS notice that VETS was unable to resolve the person's complaint, the person did not ask VETS to refer the case to the Attorney General; or the Attorney General declined to represent the person. *See* 38 U.S.C. § 4323(a)(2).

Where to file suit. An individual may file an action under USERRA against a local government in the federal district court for any district in which the employer maintains a place of business. 38 U.S.C. § 4323(b)(3), (c)(2), (i).

However, jurisdiction over private suits against states under USERRA lies with the state courts. *See* 38 U.S.C. § 4323(b)(2). Federal appeals courts have ruled that the Act completely divests the federal courts of jurisdiction over private USERRA suits against states. *See Velasquez v. Frapwell*, 165 F.3d 593, 593-94 (7th Cir. 1999); *Townsend v. University of Alaska*, 543 F.3d 478, 484-85 (9th Cir. 2008); *McIntosh v. Partridge*, 540 F.3d 315, 320-21(5th Cir. 2008).

USERRA originally gave the federal courts jurisdiction over private suits against states. Two years after USERRA's enactment, the Supreme Court held in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that Congress cannot use its commerce powers under Article I of the Constitution to abrogate states' immunity under the Eleventh Amendment from private suits for damages. Out of concern that *Seminole Tribe* would be extended to USERRA, which was enacted pursuant to Congress's war powers under Article I, Congress amended USERRA in 1998 with the intent to avoid that possibility by granting the state courts jurisdiction over privately brought USERRA suits against states. However, in 1999, the Supreme Court in *Alden v. Maine,* 527 U.S. 706 (1999), held that Congress's powers under Article I do not include the

power to subject nonconsenting states to private suits for damages in state courts. *Alden* was brought under the Fair Labor Standards Act, which is a commerce powers enactment.

In the wake of *Alden*, state courts have looked to whether or not a state has consented to suit under USERRA as a test for determining whether a state defendant enjoys immunity from a privately brought USERRA action against the defendant. State courts have held Alabama, Delaware, Georgia, and Tennessee are nonconsenting states. *Smith v. Tennessee Nat. Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012), *cert. denied*, 133 S.Ct. 1471 (2013); *Anstadt v. Board of Regents of Univ. System of Ga.*, 693 S.E.2d 868 (Ga. Ct. App. 2010); *Janowski v. Division of State Police, Dept. of Safety and Homeland Sec.,* 981 A. 2d 1166 (Del. 2009); *Larkins v. Department of Mental Health and Mental Retardation*, 806 So. 2d 358 (Ala. 2001). Rhode Island and Wisconsin are consenting states, according to those states' courts. *Scocos v. State Dept. of Veteran Affairs*, 819 N.W.2d 360 (Wis. Ct. App. 2012); *Panarello v. State*, 2009 WL 301888 (R.I. Super. Ct. 2009).

Florida is a consenting state through legislation. Section 250.82, Florida Statutes, grants the state courts concurrent jurisdiction over USERRA claims and authorizes the state courts to award the remedies provided under USERRA.

An open question remains whether Congress can subject nonconsenting states to private USERRA suits under its war powers.

Parties. Only a person claiming rights under USERRA can file a lawsuit under the statute. 38 U.S.C. § 4323(f).

Moreover, only an employer or potential employer can be a necessary party respondent in a USERRA suit. 38 U.S.C. § 4323(g). As a result, a person's suit against an employer under USERRA cannot be dismissed because of the absence of other parties.

Timeliness. USERRA has no statute of limitations. On October 10, 2008, USERRA was amended to expressly prohibit application of any time limit to USERRA claims. 38 U.S.C. § 4327(b).

Prior to enactment of the no-time-limit provision, there was debate over whether the four-year catchall statute of limitations provided in 28 U.S.C. § 1658 applied to USERRA claims. This debate has continued with respect to USERRA claims that accrued prior to the enactment of the 2008 amendment. In *Middleton v. City of Chicago*, 578 F.3d 655, (7th Cir. 2009), the Seventh Circuit held that § 1658 applied to USERRA before § 4327(b) was enacted, and that § 4327(b) did not apply retroactively to revive a USERRA claim that was filed in court more than four years before enactment of § 4327(b). The Fourth Circuit similarly ruled in *Baldwin v. City of Greensboro*, 714 F.3d 828 (4th Cir. 2013).

What about USERRA claims that accrued within the four-years preceding USERRA's enactment? Courts considering the issue have held that § 4327(b), rather than 28 U.S.C. § 1658, applies to such claims. *See, e.g., Brill v. AK Steel Corp.*, 2012 WL 893902, *11 (S.D. Ohio

2012); *Goodman v. City of New York*, 2011 WL 4469513, *6–8 (S.D. N.Y. 2011); *Andritzky v. Concordia Univ. Chicago*, 2010 WL 1474582, *4–5 (N.D. Ill. 2010).

In light of the current case law, the following can be said with respect to timeliness of a pre-October 10, 2008, USERRA claim:

- The risk of dismissal is high if the claim accrued before October 10, 2004, and was not filed within four years of accrual, even if filed after enactment of § 4327(b).
- The risk is low if the claim accrued after October 10, 2004.

However, take care in determining the accrual date of the claim of someone whose USERRA rights were violated before October 10, 2004. Should a person's claim be one to recover pension credits lost while absent from employment for military service, there is authority for the proposition that the claim would not accrue until the claimant retires. *See Leonard v. United Airlines, Inc*., 972 F.2d 155, 157-58 (7th Cir. 1992) (and cases cited therein). Moreover, if the person filed a USERRA complaint with VETS or another administrative agency, the person's claim arguably would not have accrued at the time of the violation but, rather, when the agency proceedings ended. *See Potts v. Howard University Hosp.*, 623 F. Supp. 2d 68, 72-73 (D.D.C. 2009) (holding that latest possible date that plaintiff's action accrued was date on which District of Columbia Office of Human Rights concluded an investigation and issued him a right to sue letter). *But see Moore v. United Air Lines, Inc.*, 2011 WL 2144629, *6–7 (D. Colo. 2011).

Remedies. Remedies available under USERRA include:

- Lost wages and benefits. 38 U.S.C. § 4323(d)(1)(B).
- Liquidated damages in an amount equal to lost wages and benefits for "willful" violations. 38 U.S.C. § 4323(d)(1)(C). A violation is "willful" if the employer knew or showed reckless disregard for whether its conduct was prohibited by the Act. 20 C.F.R. § 1002.312.
- Reinstatement and other injunctive relief. 38 U.S.C. § 4323(d)(1)(A), (e).
- Prejudgment interest. 38 U.S.C. § 4323(d)(3).

Front pay may also be awarded. *See Carpenter v. Tyler Indep. School Dist.*, 429 F. Supp. 2d 848 (E.D. Tex. 2006) (front pay in lieu of reinstatement), *aff'd*, 226 Fed. App'x 400 (5th Cir. 2007); *Duarte v. Agilent Technologies, Inc.*, 366 F. Supp. 2d 1039, 1049 (D. Colo. 2005).

Compensatory damages for emotional distress and other non-wage/non-benefit losses are not available under USERRA. Other than liquidated damages for willful violations, USERRA does not authorize awards of punitive damages.

Because USERRA does not preempt laws that provide rights or benefits more generous than USERRA, USERRA would not bar a plaintiff from coupling a USERRA claim with a state law claim under which compensatory and punitive damages could be awarded for the same conduct giving rise to the USERRA claim. *See, e.g.*, *Hamovitz v. Santa Barbara Applied Research, Inc.*, 2010 WL 4117270 (W.D. Pa. 2010); *House v. Metal Transp. Systems, Inc.*, 2010

WL 1068058 (N.D. W. Va. 2010); *Mills v. East Gulf Coal Preparation Co., LLC*, 2010 WL 2509835 (S.D. W. Va. 2010); *Reyes v. Goya of Puerto Rico, Inc.*, 632 F. Supp. 2d 142 (D.P.R. 2009); *Johnson v. Village of Rockton*, 2007 WL 5721337, *2 (N.D. Ill. 2007). Yet, some courts have rejected state law claims on the basis that USERRA provides sufficient relief. *See, e.g., McAlee v. Independence Blue Cross*, 798 F. Supp. 2d 601, 607 (E.D. Pa. 2011; *Schmauch v. Honda of America Mfg., Inc.*, 311 F. Supp. 2d 631, 635 (S.D. Ohio 2003); *Martin v. AutoZone, Inc.*, 411 F. Supp. 2d 872 (S.D. Ohio 2005).

Fees and costs. Attorney's fees, expert witness fees, and other litigation expenses may be awarded to a prevailing USERRA plaintiff, but not to a prevailing defendant. *See* 38 U.S.C. § 4323(h)(2).

Moreover, USERRA plaintiffs cannot be required to pay court fees or costs. 38 U.S.C. § 4323(h)(1). The prohibition apparently applies not just to trial court fees and costs but also to appellate fees and costs. *See Jordan v. Air Products and Chemicals, Inc.,* 124 F.App'x 537(9th Cir. 2005) (veteran's motion for waiver of fees and costs on appeal granted in light of 38 U.S.C. § 4323(h)(1)). However, if a plaintiff brings a USERRA claim with other claims, USERRA would not bar taxing the plaintiff costs for the other claims if completely separate from the USERRA claims. *See Chance v. Dallas County Hosp. Dist.*, 176 F.3d 294 (5th Cir. 1999).

D. Arbitration

Compulsory binding arbitration of USERRA claims appears to conflict with the text of the Act. Section 4302(b) of the Act states that USERRA "supersedes any . . . agreement . . . that reduces or limits, or eliminates in any manner any right or benefit provided by [USERRA]." Moreover, in explaining § 4302(b), a House committee report specifically said that "resort to . . . arbitration is not required," and that "any arbitration decision shall not be binding as a matter of law." H.R. REP. NO. 65 at 20 (internal citations omitted). The report further said that "[a]n express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void." *Id.*

Yet, in *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006), the Fifth Circuit held that § 4302(b) does not prevent enforcement of individual arbitration agreements. The Sixth Circuit has joined the Fifth Circuit in holding that USERRA claims can be subject to mandatory arbitration. *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008).

USERRA claimants are in a better position to avoid mandatory arbitration when arbitration is provided under a collective bargaining agreement. *See McKinney v. Missouri-Kansas-Texas R.R. Co.* 357 U.S. 265 (1958) (pre-USERRA case) (veteran not required before filing a lawsuit to pursue remedies under collective bargaining agreement or before adjustment board), *cited with approval* in H.R. REP. NO. 103-65 at 20, *as reprinted in* 1994 U.S.C.C.A.N. 2449, 2453. Moreover, courts have ruled that arbitral decisions under collective bargaining agreements are not binding in subsequently filed court actions under USERRA. *See Hance v. Norfolk Southern Ry. Co.*, 571 F.3d 511, 519 (6th Cir. 2009); *Brown v. Union Pacific R. Co.*, 2009 WL 1110824, *3–4 (E.D. Ark. 2009).

An arbitration agreement that requires a USERRA claimant to pay arbitral fees may render the agreement unenforceable. *See Birabent v. Hudiburg Auto Group, Inc.*, 2012 WL

28508, *3 (W.D. Okla. 2012). *But see Palmer v. Midland Food Services Inc.*, 2011 WL 4458781 (N.D. Ohio 2011) (mandatory arbitration agreement enforceable against USERRA plaintiff despite requirement that plaintiff pay filing fee to initiate arbitration proceedings).

E. Poster Requirement

Employers must provide persons entitled to USERRA's rights and benefits with notice of the rights, benefits, and obligations under the Act, which may be met by posting such a notice where employers customarily place notices for employees. 38 U.S.C. § 4334(a). The Secretary of Labor must make available to employers the text of the notice. 38 U.S.C. § 4334(b). A printable USERRA poster containing the required text is available at http://1.usa.gov/13Yy4hF.

Rights of Veterans and Soldiers Under Florida Law

Below are summaries of selected sections of the Florida Statutes applicable to civilian employment rights of veterans and servicemembers.

Chapter 115. Leaves of Absence to Officials and Employees

§ 115.01. Leave of absence for military service

Provides for leaves of absence from office for state and county officials authorized by law to appoint deputies to serve in the military when called into active service during war between the U.S. and a foreign government.

§ 115.02. Governor to grant application; proviso

Requires the Governor to grant applications of such officials for leave of absence for military service authorized by Chapter 115. If the military service extends beyond an official's term of office, the office must be filled by election at the expiration of the term.

§ 115.03. Appointment of deputy; bond

Requires that before applying for a military leave of absence, such an official must appoint "a capable and competent" deputy to take over and perform the duties of the office.

The deputy may be required to post a bond in a sum not more than one and a half of the bond of the appointing official.

§ 115.04. Applicability of ss. 115.01–115.06 to certain officers

Limits application of §§ 115.01 to 115.06 to officers who are authorized by law to appoint deputies.

§ 115.05. Duties of deputy

Authorizes deputies to act in such officials' stead during the officials' leave of absence.

§ 115.06. Reassumption of duties

Requires such officials to immediately resume their duties for the remainder of their terms after discharge from military service.

§ 115.07. Officers and employees' leaves of absence for reserve or guard training

Entitles public officers and employees to leaves of absence without loss of vacation leave, pay, time, or efficiency rating on all days during which they are engaged in reserve or National Guard training under U.S. military or naval training regulations for such personnel when assigned to active or inactive duty. Paid leave under this section may not exceed 240 working hours in any one annual period.

Makes it the responsibility of the employing agency of the state, county, municipal, or political subdivision to provide a substitute employee, if necessary, while an employee is on assignment for military training.

§ 115.08. Definitions

Defines "active military service" and "period of active military service" as used in Chapter 115 as follows:

> (1) The term "active military service" as used in this chapter shall signify active duty in the Florida defense force or federal service in training or on active duty with any branch of the Armed Forces or Reservists of the Armed Forces, the Florida National Guard, the Coast Guard of the United States, and service of all officers of the United States Public Health Service detailed by proper authority for duty with the Armed Forces, and shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.
>
> (2) The term "period of active military service" as used in this chapter shall begin with the date of entering upon active military service, and shall terminate with death or a date 30 days immediately next succeeding the date of release or discharge from active military service, or upon return from active military service, whichever shall occur first.

Provides that "servicemember" has the same meaning as provided in Section 250.01, Florida Statutes.

§ 115.09. Leave to public officials for military service

Grants all state, county, and municipal officials, including district school and community college officers, who are also members of the reserves or National Guard a leave of absence to perform active military service. The first 30 days are with full pay.

§ 115.11. Leave not to extend beyond term of office; temporarily unoccupied position

Provides that if an official's term of office expires during a leave to perform active military service, the office shall be filled by election or appointment as may be required by law. However, the official on leave shall have the right to become a candidate.

Further provides that if the official's leave of absence extends beyond 60 days, the position may be temporarily filled by the remaining members of the legislative body of the municipality.

§ 115.12. Rights during leave

Requires that the period of an official's active military service be deemed continuous service in the office for purposes of seniority rights, efficiency ratings, promotional status and retirement privileges.

Prohibits requiring payment of contributions to any retirement fund while absent on leave without pay.

Requires that the employing authority adhere to all provisions of USERRA.

§ 115.13. Resumption of official duties

Requires that upon termination of their active military service, officials resume their elected or appointed position for the remainder of the term, but in accordance with the limits provided under USERRA.

§ 115.14. Employees

Gives public employees the same active-military-service LOA rights as officers, including receipt of pay for the first 30 days of active service.

Also, authorizes public employers to supplement the military pay of employees' and officers' who are absent more than 30 days for active military service in amount that would bring their total wages to the amount they earned at the time they were called to active military duty.

§ 115.15. Adoption of federal law for employees

Provides that USERRA "shall be applicable in this state," and that "the refusal of any state, county, or municipal official to comply therewith shall subject him to removal from office."

Chapter 250. Military Affairs

§ 250.48. Leaves of absence

Provides for LOA without loss of pay, time, or efficiency rating on all days during which a public employee who is a Florida National Guard member is engaged in active state duty. Paid leave may not exceed 30 days for each event in which active state duty is served.

§ 250.481. Reserve components; employment discrimination prohibited

Prohibits employment discrimination against employees and applicants because of any obligation they may have as a member of the reserves.

§ 250.482. Troops ordered into state active service; not to be penalized by employers and postsecondary institutions

Prohibits public and private employers from discharging, reprimanding, or in any other way penalizing members of the National Guard because of their absence by reason of state active duty.

Provides reemployment rights similar to USERRA for National Guard members who seek reemployment after completion of state active duty.

Provides National Guard members who are reemployed after completion of state active duty protection from discharge without cause for one year after returning to work.

Provides for enforcement and remedies for violations of § 250.482. Requires that there be a probable-cause finding by the state Adjutant General before a civil action is filed. If a violation is found in a court action, the employer is liable for actual damages or $500, whichever is greater. The prevailing party is entitled to recover attorney's fees and court costs.

§ 250.82. Applicability of federal law

Notes that federal law includes protections, including those provided in USERRA, that are applicable to members of the Armed Forces, Reserve Forces, and National Guard in every state even though not specifically identified under state law.

Provides that "[t]o the extent allowed by federal law, the state courts have concurrent jurisdiction for enforcement over all causes of action arising from federal law and may award a remedy as provided therein."

§ 250.905. Penalty

Provides that in addition to any other relief or penalty provided by state or federal law, a person is liable for a civil penalty of not more than $1,000 per violation if that person violates any provision of Ch. 250, Florida Statutes, or any provision of federal law affording protections to servicemembers over which a state court has concurrent jurisdiction under Fla. Stat. § 250.82.

Chapter 295. Laws Relating to Veterans: General Provisions

§ 295.065. Legislative intent

Expresses the legislature's intent to provide preference and priority in hiring practices as set forth in Chapter 295.

Requires that all written, video, and audio job announcements include a notation that certain veterans and spouses of veterans receive preference and priority in employment by the state and are encouraged to apply.

§ 295.07. Preference in appointment and retention

Requires the state and political subdivisions[1] to give preference in appointment and retention to the following:

> Disabled veterans (1) who served on active duty in any branch of the U.S. Armed Forces, were separated from such service under honorable conditions, and have a service-connected disability that is compensable under the laws administered by the U.S. Department of Veterans' Affairs; or (2) who are receiving compensation, disability retirement benefits, or a pension under laws administered by the VA and the Department of Defense.
>
> A veteran of any war as defined in Fla. Stat. § 1.01(14), so long as the veteran served at least one day during a wartime period. Active duty for training (full-time training duty of reservists and Guard members) does not qualify.
>
> The spouse of any person who has a permanent and total disability resulting from a service-connected disability and cannot qualify for employment because of such disability.

[1] Section 1.01(8), Florida Statutes, defines "political subdivision" to include counties, cities, towns, villages, special tax districts, school districts, special road and bridge districts, bridge districts, and all other districts in the state.

The spouse of any person missing in action, captured in line of duty by a hostile force, or forcibly detained or interned in line of duty by a foreign government or power.

The unremarried widow or widower of a veteran who died of a service-connected disability.

Such persons must be Florida residents to qualify for the preference in employment and retention.

The following positions are exempt from the preference in employment and retention:

d

Positions that are exempt from the state career service system under § 110.205(2), Florida Statutes. (However, the following are expressly included: all positions under the University Support Personnel System of the State University System; and all Career Service Systems positions under the Florida Community College System and the School for the Deaf and Blind, or the equivalent of such positions at state universities, community colleges, or the School for the Deaf and Blind.)

Positions in political subdivisions of the state that are filled by persons elected by popular vote or persons appointed to fill vacancies in such offices, as well as the personal secretary of each such officer.

Members of boards and commissions.

Persons employed on a temporary basis without benefits.

Heads of departments.

Positions that require licensure as a physician, osteopathic physician, or as a chiropractic physician

Positions that require that the employee be a member of the Florida Bar

Formerly, the employment preference was available only once in a lifetime. In 2007, the former section providing for expiration of the employment preference after an eligible person was hired by the state or a political subdivision was repealed. Consequently, an eligible person will be entitled to the preference whenever he or she applies for employment with the state or a political subdivision of the state.

§ 295.08. Positions for which a numerically based selection process is used

Provides that for positions in which tests are used to determine qualifications:

- Ten points are added to the earned ratings of covered disabled veterans and covered spouses of disabled veterans or missing servicemembers.

- Five points are added to the earned ratings of covered war veterans and covered widows and widowers of veterans who died of a service-connected disability.

Requires that disabled veterans eligible for the ten-point preference whose service-connected disabilities are rated 30 percent or more by the VA or Department of Defense be placed at the top of the employment list, in accordance with their augmented ratings. However, this requirement does not apply in the case of classes of positions with federal government designations of professional or technician.

If a disabled veteran is employed by the state as a result of being placed at the top of the employment list pursuant to § 295.08, he or she must be appointed for a probationary period of one year. Fla. Stat. § 110.2135(b). If the veteran's work has been satisfactorily performed during the probationary period, he or she will acquire permanent employment status at the end of such period. *Id.*

§ 295.085. Positions for which a numerically based selection process is not used

In all covered positions in which the appointment or employment of a person is not subject to a written examination, first preference is to be given to covered disabled veterans and covered spouses of disabled veterans or missing servicemembers; and second preference to covered war veterans and widows and widowers of veterans who died of a service-connected disability. Such persons must meet the minimum qualifications for the position.

If a disabled veteran is employed by the state as a result of being placed at the top of the employment list pursuant to § 295.085, he or she must be appointed for a probationary period of one year. Fla. Stat. § 110.2135(b). If the veteran's work has been satisfactorily performed during the probationary period, he or she will acquire permanent employment status at the end of such period. *Id.*

§ 295.09. Reinstatement or reemployment; promotion preference

(This section potentially may conflict with USERRA.)

Provides for reemployment of employees in covered positions of the state or any of its political subdivisions who are honorably discharged from service in the Armed Forces provided they return to the position within one year of the date of separation from the service. Reemployment must be in the same or equivalent position held prior to such service.

Veterans who are recalled to active duty (other than for training) in the Armed Forces and who are separated therefrom with an honorable discharge have the same reemployment right under § 295.09.

Such persons are also entitled to a promotion preference. They are to be promoted over all others who are as well qualified or less qualified for the position. If a promotion exam is used, such

persons are to be awarded preference points as provided in § 295.08; and, provided they successfully pass the test, are to be promoted ahead of all those who appear in an equal or lesser position on the promotion list.

The promotion preference applies only to a veteran's first promotion after reemployment.

§ 295.11. Investigation; administrative hearing for not employing preferred applicant.

Provides for investigation of complaints by the Florida Department of Veterans' Affairs of alleged wrongful denials of the hiring preference. Further and more detailed procedures appear in regulations of the Department of Veterans' Affairs at Chapter 55A-7 of the Florida Administrative Code. Those regulations require, *inter alia*, that an unsuccessful applicant file a complaint within 21 days from the date that the applicant received notice of the hiring decision; five days are added to that period if the applicant first notice of the decision was by mail. Fla. Admin. Code. Ann. § 55A-7.016 (1).

If a complaint is found to be invalid, the complainant may petition PERC for a hearing within 20 days of receipt of notice of the findings. Fla. Admin. Code. Ann. § 55A-7.016 (6). If PERC agrees with the Department's determination that the case lacks merit and finds, in its discretion, that there is a complete lack of justiciable issues of law or fact, PERC must dismiss the complaint without holding a hearing. Fla. Stat. § 295.11(4).

If a complaint is found to be valid, the Department seeks from the employer a statement of proposed resolution of the complaint. Fla. Admin. Code. Ann. § 55A-7.016(7). The employer must send the statement of the proposed action to the complainant within 20 days of the date the findings are issued, and send a copy to the Department. (*Id.*) If dissatisfied with the employer's proposed action, the complainant must notify the Department in writing within 10 days. (*Id.*) The Department must then send the complainant a letter notifying the complainant of his or her right to file a petition for a hearing with PERC within 10 days of the date of the letter. (*Id.*)

In the event that the employer fails to timely send a written statement of proposed resolution of a complaint found to be valid, the complainant is allowed 10 days to notify the Department of such failure. Fla. Admin. Code. Ann. § 55A-7.016(8). The Department must within 10 days of receipt of such notice send a letter to the complainant notifying the complainant of his or her right to file a petition for a hearing with PERC within 20 days from receipt of such letter. (*Id.*)

§ 295.123. Deserters and others; inapplicability of chapter

Provides that the rights under Chapter 295 are inapplicable to persons who have been classified by any branch of the Armed Forces as a deserter or who received a less than honorable discharge upon separation from the Armed Forces.

§ 295.14. Penalties

This section provides for hearings before PERC or civil actions in court for enforcement of the rights under §§ 295.07, 295.08, 295.05, and 295.09.

If PERC finds a violation, it must order the employer to comply with the statute. Further, PERC is authorized to award the veteran back pay, attorney's fees, and litigation costs. However, an award of fees and costs may not exceed $10,000. PERC's finding of a violation is conclusive. Apparently, only prevailing veterans may recover fees and costs.

In *City of Deland v. Landolfi*, 97 So.3d 869 (Fla. 1st DCA 2012), the First District held PERC erred in awarding fees and costs to a veteran based on the city's failure to provide the veteran an interview, in view of PERC's finding that the city ultimately hired someone who was more qualified. The court noted it previously had ruled that "in veterans' preference cases, the complainant has the initial burden to show that he is a preference-eligible veteran who submitted a timely and proper application for a covered position for which he was qualified and that a non-veteran was hired for the position. That showing will be sufficient to establish a violation of the veterans' preference statute *unless* the employer meets its burden to show that the non-veteran hired was more qualified." *Id.* at 873-74 (citing *West Coast Regional Water Supply Auth. v. Harris*, 604 So.2d 892, 893 (Fla. 1st DCA 1992)) (emphasis in original).

When a successful court action is brought, the statute provides that "any agency, employee, or officer of the state or a political subdivision thereof" must, in addition to any order issued by the court, be required to pay damages, attorney's fees and costs. One court held this provision did not apply to a city because the city was not an agency, employer, or officer of the state or any political subdivision thereof. *Sigman v. City of Miami*, 500 So.2d 693 (Fla. 3d DCA 1987) ("The penalties provided by section 295.14, Florida Statutes (1985) apply to an agency, officer, or employee of the state or one of its political subdivisions. Since the City of Miami is neither an agency, officer, or employee, section 295.14 does not apply.").

Provides that any employee or officer found liable pursuant to a second or subsequent violation "shall forfeit his or her position."