

Reemployment Rights of Employees Returning from Active Duty in the Armed Forces

Q How are employers affected by the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

David C. Henderson: USERRA issues frequently arise in today's workplace. More than 2.6 million Americans have served in Iraq and Afghanistan. Many of them left behind civilian employment to perform that duty, and many either have returned, or will return, to civilian employment after their military service. USERRA generally protects the job rights of civilian employees who enter the armed forces. It prohibits discrimination against them, and it generally entitles them to return to their civilian employment at the same level of pay, benefits, and status they would have attained had they remained continuously employed, subject to only a few exceptions.

Every employer, regardless of size, is subject to USERRA. Claims against non-compliant employers can include failure to reemploy, failure to apply the "escalator principle," failure to accommodate a disability, wrongful failure to promote, unlawful termination, and unlawful retaliation.



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Employers who violate USERRA can be subject to a variety of remedial measures, including paying lost wages and benefits; reinstating, promoting, or reassigning the employee; paying multiple damages for a willful violation; and covering the employee's litigation costs and attorneys' fees.

Q You just now mentioned the "escalator principle." How is that principle applied to achieve parity in the civilian workforce between service members and their continuously employed civilian counterparts?

DCH: USERRA generally provides that a service member released from the armed forces is entitled to prompt reemployment by his or her civilian employer at the position and with the benefits, pay, and seniority to which he or she would have been entitled if never called to duty. This so-called "escalator principle" thus applies to ensure that the returning service members do not fall behind their counterparts in civilian life while they are away, performing military duty. Instead, benefits, pay, and seniority continue to advance, as if on an "escalator," to the levels they would have reached if the employee had kept the civilian position continuously.

Q Are there any significant limitations on the right to reemployment?

DCH: Yes. Depending on circumstances, this can be a complex issue. The reemployment right can be affected by whether the employer's changed circumstances have made reemployment impossible or unreasonable; whether the service member's former employment was for only a brief, non-recurrent period; whether the military service was below certain basic standards (such as would be the case if a dishonorable discharge was issued); and whether qualifying the returning service member for reemployment would impose undue hardship on the employer.

Q What are the consequences of a USERRA lawsuit?

DCH: The consequences vary, and they can be severe. Violators of USERRA can be subject to remedial measures that include paying lost wages and benefits; reinstating, promoting, or reassigning the employee; paying multiple damages for a willful violation; and covering the employee's litigation costs and attorneys' fees. The magnitude of possible liability can be daunting.

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