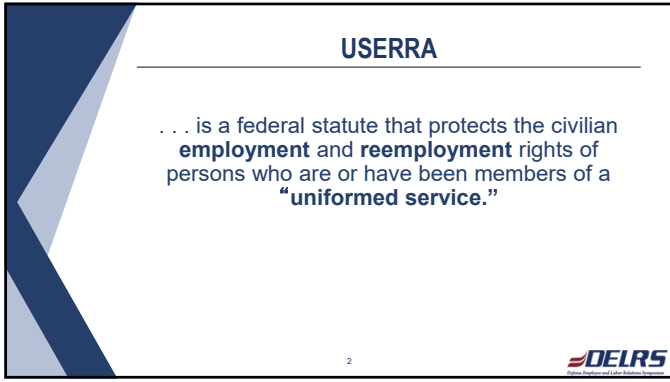
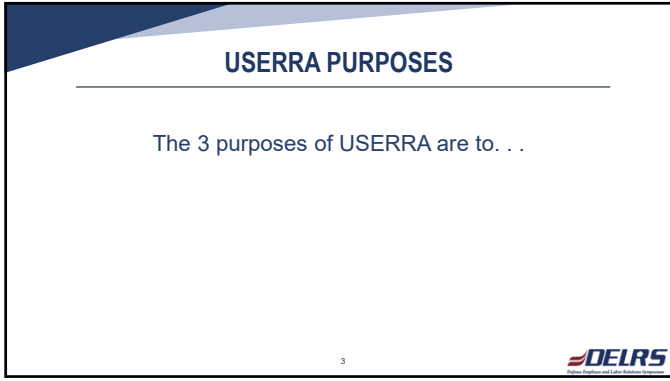




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2



3

USERRA PURPOSES (cont.)


Encourage non-career military service
by reducing the disadvantages to civilian
careers that result from such service.



4

USERRA PURPOSES (cont.)


Minimize disruption
to service members' civilian lives via
prompt reemployment.



5

USERRA PURPOSES (cont.)

Prohibit employment discrimination
because of past, present, or future military
service.




6

USERRA PURPOSES (cont.)

“It is the sense of Congress that the Federal Government should be a **model employer** in carrying out the provisions of [USERRA].”

38 U.S.C. § 4301(b)




7

USERRA COVERAGE

“Uniformed Services” are:

- Armed Forces Active & Reserve Components
- Army & Air National Guard
- National Disaster Medical System (NDMS), Urban Search and Rescue (USAR), Public Health Service Commissioned Corps (PHS), and Federal Emergency Management Agency (FEMA) Reservists




8

USERRA COVERAGE

“Uniformed Service” includes:

- Active duty, including for training and special work
- Weekend or Weekday Drill
- Annual Training
- Funeral honors
- Fitness for duty examination
- Some state active duty*

*14 days or more, or in response to a national emergency or major disaster declared by the President.




9

USERRA COVERAGE

Does it matter whether service is "voluntary", or
service member was "called up"?

NO!

USERRA protects *both* "voluntary" and
"involuntary" service




10

USERRA DISCRIMINATION

- USERRA' s anti-discrimination provision also states that an agency shall not deny
 - Initial employment;
 - Retention in employment;
 - Promotion; or
 - Any benefit of employment
- Due to past, present, or future military service


See 38 U.S.C. § 4311(a)



11

VIOLATION OR NOT?

- Candidate is not further considered for a vacancy because they might not be able to report on agency's desired start date due to military service obligations.
- Candidate not selected for Security Guard position because they are unable to work one weekend a month due to Reserve duty. Security Guards are required to be available to work weekends on a rotating basis.




12

USERRA DISCRIMINATION (cont.)

- To prove discrimination, claimant must show that uniformed service was a “substantial or motivating factor” in the adverse employment action. This can be determined by direct and/or circumstantial evidence such as:
 - Proximity in time between service and adverse action
 - Inconsistencies between proffered reason and other employer actions
 - Expressed hostility toward service and/or service members
 - Disparate treatment of service members vs. others

- See 38 U.S.C. § 4311(c); *Sheehan v. Dept of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001)




13

USERRA DISCRIMINATION (cont.)

Employer Defense:

- To disprove a violation, employer must show it **would have taken the same action** even in the absence of the person's uniformed service.


- See 38 U.S.C. § 4311(c); *Sheehan v. Dept of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001)



14

VIOLATION OR NOT?

- Employee is not detailed to acting supervisory position, because he is expected to be absent at some point during the detail due to future military service.




15

USERRA DISCRIMINATION (cont.)

“Benefit of Employment”


- Any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of the employment relationship (e.g., employer policy, plan, or practice)



16

VIOLATION OR NOT?

- Employees are required to report to work on a Saturday to do inventory
- Two employees fail to report - one due to a family trip and another due to weekend military drill duty
- Both employees are disciplined




17

USERRA DISCRIMINATION

“An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of his absence when that absence was for military service.”

Erickson v. U.S.P.S., 571 F.3d 1364, 1368 (Fed. Cir. 2009)



18

USERRA RETALIATION

USERRA also **prohibits retaliation** for exercising, or assisting others in exercising, USERRA complaint rights.

See 38 U.S.C. § 4311(b)




19

USERRA ABSENCES

Agency's Obligations Include:

- Providing notice of USERRA rights and obligations
- Maintaining personnel records during absence

See 5 CFR § 353.104-105




20

USERRA ABSENCES (cont.)

- Deemed to be on leave of absence or furlough (but may use paid leave)
- Entitled to benefits generally provided to employees having similar seniority, status, and pay who are on furlough or leave of absence

See 38 U.S.C. § 4316(b)(1)(A)




21

USERRA ABSENCES (cont.)

Protected against Reduction-In-Force (RIF)

- If the employee's position is abolished during absence, agency must reassign them to another position of like status and pay

See 5 CFR §353.209(a)




22

USERRA ABSENCES (CONT.)

Promotions

- Agency promotion plans **must** provide a mechanism by which employees who are absent because of military service obligations can be considered


See 5 CFR § 353.106(c)



23

VIOLATION OR NOT?

- A \$1,000 award for successfully completing a 6-month project is given to all team members except one who was absent for 3 months during the project due to military service. He receives only \$500.




24

USERRA ABSENCES

- “[A]gencies have an obligation to consider employees absent on military duty for **any incident or advantage** of employment that they may have been entitled to had they not been absent.
- This is determined by:
 - 1) Considering whether the “incident or advantage” is one generally granted to all employees in that workplace and whether it was **denied solely because of absence for military service**;
 - 2) Considering whether the person absent on military duty was **treated the same as if the person had remained at work**; and
 - 3) Considering whether it was **reasonably certain** that the benefit would have accrued to the employee but for the absence for military service.”


See 5 CFR §353.106(c)



25

USERRA REEMPLOYMENT


A service member has
reemployment rights when . . .



26

USERRA REEMPLOYMENT (cont.)


- Gives **Advance Notice** of Service;
- Performs **Qualifying Service**; and
- Timely **Reports** for Duty or **Requests** Reemployment (and no affirmative defense applies)



27

USERRA REEMPLOYMENT (cont.)


What kind and how much **advance notice** need the employee provide?



28

USERRA NOTICE REQUIREMENTS


- FORM
 - Written **or** Verbal
- CONTENT
 - Notification of military service or intent to perform such service
 - **No special words**
- TIMING
 - "In advance of military service"
 - **No specific time limit**



29

USERRA NOTICE REQUIREMENTS


Must the employee **provide copies** of his or her military orders?



30

USERRA NOTICE REQUIREMENTS

- **NO! Verbal Notice is Sufficient**
- An employer may **not** demand a copy of military orders when employee gives notice
- **BUT**, if the period of military service is **more than 30 days**, the agency may request orders when the employee requests reemployment




31

USERRA QUALIFYING SERVICE

Qualifying Service:

- "Service in the uniformed services"
- Discharge not dishonorable, "bad conduct," or under "other than honorable conditions"
 - See 38 U.S.C. § 4304
- Does not exceed 5 years* (many exceptions)




32

USERRA QUALIFYING SERVICE (cont.)

Five-Year Rule:


- A service member can be absent for **up to 5 years** and still have reemployment rights
 - The 5 years is a **cumulative** total that includes all periods of military service
 - Five years **per employer**
 - Many **exceptions*** (See 38 U.S.C. § 4312(c))



33

REQUESTING REEMPLOYMENT

The time period for requesting reemployment depends on the **length** of military service.




34

REQUESTING REEMPLOYMENT (cont.)

- **1-30 days:** Next scheduled workday (after time for travel plus 8 hrs. rest)
- **31-180 days:** 14 days to request reemployment
- **> 180 days:** 90 days to request reemployment
- **NOTE:** Time period extended if convalescing from service-incurred injury


See 38 U.S.C. § 4312(e)



35

UNTIMELY REQUEST FOR REEMPLOYMENT

What if the employee does not return or request reemployment in a **timely manner**?




36

UNTIMELY REQUEST FOR REEMPLOYMENT

The employee must still be promptly reemployed.

However . . .




37

UNTIMELY REQUEST FOR REEMPLOYMENT

. . . agency may treat the delay as an unauthorized absence and may consider taking appropriate disciplinary action, **if any***


**must be consistent with treatment of other AWOL employees*



38

AFFIRMATIVE DEFENSES TO REEMPLOYMENT

Are there any **affirmative defenses** to the obligation to reemploy?




39

AFFIRMATIVE DEFENSES TO REEMPLOYMENT

- **Change in employer's circumstances** making reemployment impossible or unreasonable
- **"Temporary" employment** for a brief, non-recurrent period **and** no reasonable expectation of continuing indefinitely/for significant period
- **Injured service members** where reemployment would create "undue hardship" on employer


See 38 U.S.C. § 4312(d)



40

AFFIRMATIVE DEFENSES TO REEMPLOYMENT

What if it is
impossible or unreasonable
for the agency to reemploy the service
member?




41

OPM PLACEMENT ASSISTANCE

- The agency must notify OPM, which must provide **placement assistance**
 - i.e., identify a position of like seniority, status, and pay at another agency and ensure an offer is made


See 38 U.S.C. § 4314(b)



42

TIMING OF REEMPLOYMENT

Once service member requests reemployment, **how quickly** must agency reemploy them?




43

TIMING OF REEMPLOYMENT

Federal agencies must reemploy **promptly**: within 30 days of the request.

See 5 CFR § 353.207(a)




44

REEMPLOYMENT RIGHTS

To what position is the person entitled to be reemployed?


See 38 U.S.C. § 4313(a), but generally...



45

REEMPLOYMENT RIGHTS

- When determining the position, the “escalator principle” applies:
 - Employers must look at where employee “would have been” had he or she remained continuously employed (incl. career “ups” and “downs”)




46

REEMPLOYMENT RIGHTS

- If the period of service < 91 days, employer must place the employee where they would have been had they remained **continuously employed** (“escalator position”)
- If the period of service was > 90 days, employer has options:
 - Place employee where they would have been had they remained **continuously employed, or**
 - Place employee in “a position of **like seniority, status and pay**, the duties of which they are qualified to perform.”

See 38 U.S.C. § 4313(a)




47

REEMPLOYMENT RIGHTS

Status


- **Definition:** “The particular attributes of a specific position, [including] the rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority”
- **Examples:** Opportunities for advancement, general working conditions, job location, shift assignment, rank and responsibility, use of specialized skills



48

REEMPLOYMENT RIGHTS

What if employee is **not qualified** for the position?



49

REEMPLOYMENT RIGHTS

- Employer must make “**reasonable efforts**” to qualify person for position (e.g., through training)
- If person still not qualified for position after such “reasonable efforts,” agency may **restore person to pre-service position**


See 38 U.S.C. § 4313(a)



50

REEMPLOYMENT RIGHTS

Other than a job, to what else is the returning employee entitled under USERRA?



51

REEMPLOYMENT RIGHTS

Other Reemployment Rights:

- Seniority
- Benefits based on seniority
- Protection against discharge

See 38 U.S.C. § 4316




52

REEMPLOYMENT RIGHTS

Benefits Based on Seniority:

- Credit toward time in probationary status (not tolled)
- Credit toward leave accrual rate category (but not leave accrual while absent)
- Credit toward time in grade for within-grade increases
- Anything else that is tied to the employee's longevity at the workplace (e.g., office space)




53

REEMPLOYMENT RIGHTS

Protection Against Discharge (except for cause):

- For 6 months if absence was for 31-180 days
- For 12 months if absence was >180 days


See 38 U.S.C. § 4316(c)



54

USERRA ENFORCEMENT

- The U.S. Department of Labor, Veterans Employment and Training Service (VETS) investigates and attempts to resolve USERRA claims.
- If VETS cannot resolve a USERRA claim involving a federal agency, the claimant may request referral to OSC for possible representation before the U.S. Merit Systems Protection Board (MSPB).
- In some circumstances, a USERRA claimant may file a claim directly with the MSPB.



55

USERRA RESOURCES

- **Statute:** 38 U.S.C. § 4301-4335
- **Federal Agency Regulations (OPM)**
5 CFR § 353.101-110 and § 353.201-211
- **Private/State/Local Employer Regulations (DOL):**
20 CFR § 1002.1-1002.314
- **USERRA Rights Poster** (required by law to be posted):
http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf
- **OSC USERRA Webpage:** <https://osc.gov/Services/Pages/USERRA.aspx>



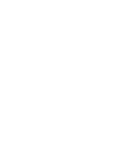
56



ANY QUESTIONS



57



Seven horizontal lines for handwritten notes.

58

