The Uniformed Services Employment and Reemployment Rights Act (USERRA)

Presented by:
Patrick H. Boulay
Chief, USERRA Unit
U.S. Office of Special Counsel
USERRA is a federal statute (38 U.S.C. § 4301 et seq.) that protects the civilian employment and reemployment rights of persons who are or have been members of a “uniformed service.”
The 3 purposes of USERRA are to...
Encourage non-career military service by reducing the disadvantages to civilian careers that result from such service.
Minimize disruption to service members’ civilian lives via prompt reemployment.
Prohibit employment discrimination because of past, present, or future military service.
“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)
"Uniformed Services" are:

- Armed Forces Active & Reserve Components
- Army and Air National Guards
- FEMA’s “Disaster Assistance” teams
- Commissioned Corps of the Public Health Service
USERRA Coverage

“Uniformed Service” includes:

- Active duty
- Active duty for training
- Active duty for Special Work
- Weekend or Weekday Drill
  - Funeral honors
- Fitness for duty examination

...Whether voluntary or involuntary
Five Key Periods and Events:

1. Before service member is hired.
2. While service member is employed.
3. When service member gives notice.
4. While service member is absent.
5. When service member returns (i.e., reemployment).
USERRA’s anti-discrimination provision states that an agency shall not deny "initial employment" because of past, present, or future military service.

38 U.S.C. § 4311(a)
Agency Defense

No violation where the evidence shows that the agency would have taken the same action in the absence of candidate’s past, present, or future military service.

38 U.S.C. § 4311(c)(1)
While Employed
While Employed:
Prohibited Activity

USERRA’s anti-discrimination provision also states that an agency shall not deny retention in employment, promotion, or any benefit of employment because of past, present, or future military service.

38 U.S.C. § 4311(a)
“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).
When Service Member Gives Notice
When Service Member Gives Notice

Agency’s Obligations Include:

- Notice of USERRA Rights
- Maintaining Records

See 5 C.F.R. §§ 353.104-105
While Service Member Is Absent
While Service Member Is Absent

- 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.

38 U.S.C. § 4316(b)(1)(A)
While Service Member Is Absent

• Protected against Reduction-In-Force (RIF) (If the employee’s position is abolished during such absence, the agency must reassign the employee to another position of like status and pay).

5 C.F.R. § 353.209(a)
While Service Member Is Absent

Promotions

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

5 C.F.R. § 353.106(c)
While Service Member Is Absent

“Incidents or Advantages”

Agencies have an obligation to consider employees absent due to military service for “any incident or advantage of employment” they may have been entitled to if not absent.

5 C.F.R. § 353.106(c)
When Service Member Returns
A service member has reemployment rights when . . .
When Service Member Returns

1. Gives **Advance Notice** of Service,
2. Performs **Qualifying Service**, and
3. Timely **Reports** for Duty / **Requests** Reemployment

(and no affirmative defense applies).
What kind and how much advance notice need the employee provide?
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)
USERRA Notice Requirements

Must the employee provide copies of his or her military orders?
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.
Qualifying Service =

- “Service in the uniformed services”
- Discharge not dishonorable / ”bad conduct” / under “other than honorable conditions”, etc. (See 38 U.S.C. § 4304)
- Does not exceed 5 years
USERRA
Qualifying Service

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; it includes both past and present military service.
- Five years per employer.
- Many exceptions (See 38 U.S.C. § 4312 (c)).
The time period for requesting reemployment depends on the length of military service.
If the period of service was 1-30 days:

Employee must report to work by the beginning of the first full regularly scheduled work period on the first full calendar day after completion of service, after time for safe transportation home, plus 8 hours.
Requesting Reemployment

Service between 31 and 180 days:

Employee has 14 days to request reemployment
Employee has **90** days to request reemployment
What if the employee does not return or request reemployment in a timely manner?
Untimely Request for Reemployment

The employee must still be promptly reemployed.

However . . .
Untimely Request for Reemployment

... agency may treat the delay as an unauthorized absence and may consider taking appropriate disciplinary action, if any (i.e., must be consistent w/treatment of other AWOL employees)
Affirmative Defenses to Reemployment

Change in Employer’s Circumstances

making reemployment “impossible” or “unreasonable.”
Affirmative Defenses to Reemployment

“Temporary” Employment

“Brief, non-recurrent period” and “no reasonable expectation” that employment will continue indefinitely or for a significant time.
Affirmative Defenses to Reemployment

Injured Service Members

Re-employing injured serviceman would create “undue hardship.”
What if it is **impossible** or **unreasonable** for the agency to reemploy the service member?
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).
Federal agencies must reemploy promptly: within 30 days of the request.

See 5 C.F.R. § 353.207(a)
To what position is the person entitled to be reemployed?

See 38 U.S.C. § 4313 but generally...
Reemployment Rights

When determining the position, the “escalator principle” applies. That means employers must look at where employee “would have been” had he or she remained continuously employed (incl. career “ups” and “downs”).
Other than a job, to what else is the returning employee entitled under USERRA?
Other Reemployment Rights:

- Seniority
- Benefits based on seniority
- Protection against discharge
Reemployment Rights

Benefits Based on Seniority:

- Credit toward time in **probationary status**
- Credit toward leave **accrual rate category** (but **not** leave accrual while absent)
- Credit toward **time in grade** for WIGI
- **Anything else** that is tied to the employee’s longevity at the workplace
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.
The U.S. Department of Labor, Veterans Employment and Training Service (VETS) investigates and attempts to resolve USERRA claims.

If VETS can’t 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.
USERRA Demonstration Project #1

- From 2005-2007, Congress mandated Demonstration Project whereby OSC (instead of VETS) received approx. half of all federal USERRA cases to investigate and resolve (not just prosecute); purpose was to determine any benefit from having single agency (OSC) handle cases from beginning to end.

- OSC investigated and resolved 458 cases during the DP
  - Achieved a very high rate of “corrective action” (relief) for service members -> over 26% of all complaints filed
  - Cases were resolved, on average, in 120 days
The Veterans’ Benefits Act of 2010, Pub. L. No. 111-175 (VBA), established a 36-month USERRA Demonstration Project which began on August 9, 2011.

- OSC receives and investigates all federal complaints
  - filed by individuals whose Social Security Number (SSN) ends in an odd number (“odd cases”) and
  - that include a related Prohibited Personnel Practice (PPP) allegation, regardless of SSN (“mixed cases”).

- GAO evaluation throughout project and at its conclusion
USERRA Resources


Federal Agency Regulations (OPM):
5 C.F.R. §§ 353.101-110 & 353.201-211

USERRA Rights Poster (required by law to be posted):