

PREFACE

The Uniform Services Employment and Reemployment Rights Act (USERRA or the Act) is a federal statute granting employees rights with respect to leaves of absence from employment to serve in the United States armed forces. In consideration of the sacrifices made by those Americans who serve in the military, Congress made USERRA intentionally broad in its coverage. Unlike the Family and Medical Leave Act, USERRA provides no limits on its coverage based on the size of employer's workforce. The significance of this breadth cannot be understated. USERRA effectively applies to all companies within the United States who have employees, whether one or thousands.

Beginning in 1940, the federal government enacted a series of laws governing leaves of absences from employment to serve in the military. Starting with the Selective Training and Service Act of 1940, Congress sought to provide employees with, among other things, the right to take leave from employment to serve in the military. Over time, these various legislative enactments became confusing and difficult to interpret and apply. In enacting USERRA, Congress addressed the concern that existing veteran's rights statutes were overly complex and ambitious, leaving veterans and employers confused as to their rights and responsibilities. It enacted USERRA in large part to clarify, simplify and where necessary, strengthen existing laws governing veterans' rights.

Thus, while not the first such statute of its kind, USERRA as enacted in 1994 is Congress's most recent at-

tempt to provide rights to those Americans serving in our armed services. USERRA is comprehensive in its application. Like most statutes, however, it cannot and does not contemplate every situation employers and employees face with respect to military leave. Understanding USERRA's inner-workings is important to both employers and employees in order to facilitate the intent of the law.

Congress made clear that USERRA's provisions supersede any state laws providing fewer rights to employees. In essence, USERRA establishes a "floor" of rights below which no state—or employer—may go. While states may grant employees more rights than those under USERRA, they cannot take away any of USERRA's provisions. Any attempt to do so is specifically preempted by the Act. Practitioners thus need to keep in mind that examination of USERRA's provisions may only be half the necessary analysis. Relevant state statutes and laws need to be analyzed to determine the full rights and obligations of employers and employees for military leave purposes.

BASIC PROVISIONS

USERRA seeks to protect employee reinstatement rights based on the concept of maintaining an employee's "seniority" while on leave for military service. Known as the "escalator provision," this aspect of USERRA allows an employee to return from military service to the position the employee would have attained had he or she remained "continuously employed" during the leave period. USERRA—and the regulations that the United States Department of Labor have adopted to implement USERRA—make clear that this escalator may go up, stay at the same level the employee had at the start of the leave, or go down. Thus, employees subject to a layoff or termination due to a reduction in force during a period of military leave are not

granted greater rights than those employees not on USERRA leave.

Reinstatement, however, is not the only seniority right protected. Where employers grant other rights to employees based on seniority, an employee on military leave has these rights protected. The seniority rights at issue are not simply those granted by a union collective bargaining agreement or strict seniority-based system of employment. Seniority rights are defined as those rights the employee accrues due to the passage of time. While determining and applying these rights may be easier where a collective bargaining agreement or strict seniority system of employment is in place, the protections granted under USERRA for seniority rights is not limited to these settings.

In addition to protecting employment rights based on seniority, USERRA requires employers to grant employees on military leave those *non-seniority* rights provided to employees taking a comparable leave of absence who are of similar seniority, status and pay to the employee on military leave. In effect, the employee taking military leave is to be given the equivalent of “most-favored-nation” status, i.e., the best of any non-seniority based rights granted to similar employees taking similar leaves of absence.

Finally, USERRA provides certain protections to protected employees’ pension benefit rights, both during a leave of absence and upon re-hire. Employees on a leave of absence under USERRA are entitled to be treated as having no break in service while on leave and are granted the right to obtain or make up missed contributions to their pension benefit plan.

Significantly, Congress limited USERRA’s application to those employees who effectively receive an honorable discharge (or an equivalent discharge). While employers may still employ persons who are dishonorably discharged, those persons are not entitled to most of USERRA’s protections.

USERRA imposes obligations on employees as well as employers. An employee taking a leave of absence for military service, and thereafter seeking a return to work, must meet requirements such as proper notice for the leave and proper notice for returning to work.

Like most federal statutes protecting certain employee rights, USERRA contains provisions protecting employees against discrimination, harassment, and retaliation due to an employee's attempt to seek military service, military status, actual employee's military service, complaint about discrimination based on military status, and/or participation in an investigation regarding an of the same.

STRUCTURE OF THE BOOK

This treatise is an attempt by various practitioners (both those representing employers and those representing employees) to provide a balanced view of USERRA and its rights/obligations. This approach allows for greater education, since practitioners from 'both sides of the aisle' are providing their views of the Act and its implementation.

Chapter 1 of the treatise provides a history of USERRA and its predecessors. It briefly reviews the prior statutes in this area on a federal level and how those statutes (and the cases that interpret them) are to be squared with USERRA.

Chapter 2 discusses which employers and employees are covered by USERRA. While USERRA's application is broad, it is clear that USERRA is not without boundaries with respect to its coverage: there are situations where employers will not be required to cover certain persons taking military leave. Issues such as "successor-in-interest" employers are also discussed.

Chapter 3 outlines the entitlements employees have to take leave under USERRA. The requirements placed on both employers and employees regarding leave requests are discussed in detail.

Chapter 4 analyzes the issues of scheduling leaves and the notice requirements USERRA imposes.

Chapter 5 discusses the issue of the pay and benefits to which an employee is entitled to when taking a leave of absence under USERRA. Although leave under USERRA is unpaid, circumstances exist under which persons taking leave under USERRA are entitled to paid leave. In addition, a number of employers, particularly larger employers, provide certain amounts of paid leave for persons taking military leave. The treatise discusses these options for employers.

Chapter 6 analyzes the issue of reinstatement following an employee's release from military service. The obligations of employees and employers with respect to reinstatement are discussed, along with the position to which a returning employee is to be returned under various circumstances.

Chapters 7 and 8 review the issue of healthcare and non-healthcare benefits to which an employee properly requesting and returning from military leave are entitled to receive.

Chapter 9 discusses how USERRA interrelates with other statutes, both those on the federal level and those enacted by various states. Understanding how these statutes interrelate is important to fully understanding an employer's obligations to its employees who take military leave.

Chapter 10 discusses the discrimination, harassment, and retaliation protections USERRA provides to employees. A full understanding of these protections is critical to fully understand an employee's rights under USERRA.

Finally, Chapter 11 reviews the remedies provided under USERRA and enforcement mechanisms USERRA provides to enforce these rights.

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We hope that this treatise allows readers to better understand USERRA and its requirements. We will continue to cover developments as case law with respect to USERRA emerges and, possibly, amendments to the statute are made; we hope that through such developments requirements under the law will become ever clearer.

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