



**USERRA: 38 U.S.C. § 4301 ET SEQ.**

... PROTECTS THE CIVILIAN  
**EMPLOYMENT AND REEMPLOYMENT**  
RIGHTS OF PERSONS WHO ARE OR  
HAVE BEEN MEMBERS OF A  
**"UNIFORMED SERVICE."**

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## OVERVIEW

- ❑ PROHIBITS EMPLOYMENT DISCRIMINATION ON BASIS OF PAST MILITARY SERVICE OR CURRENT OR FUTURE MILITARY OBLIGATIONS
- ❑ PROTECTS REEMPLOYMENT RIGHTS FOR INDIVIDUALS WHO LEAVE THEIR CIVILIAN EMPLOYMENT TO PERFORM MILITARY SERVICE
- ❑ PROVIDES RIGHT TO FILE A COMPLAINT WITH THE DEPARTMENT OF LABOR AND POTENTIAL FOR REPRESENTATION BY THE DEPARTMENT OF JUSTICE

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## USERRA COVERAGE AND APPLICABILITY



*... Whether voluntary or involuntary*

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## NOT COVERED BY USERRA



**OLD NAVY**



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## COVERAGE AND APPLICABILITY (CONT.)

- ❑ RESERVISTS AND GUARD MEMBERS
  - ❑ 1.1 MILLION MEMBERS - 45% OF THE TOTAL US MILITARY FORCE
  - ❑ 895,630 ACTIVATIONS FOR NOBLE EAGLE/ENDURING FREEDOM SINCE 9/11, WITH 39,923 RESERVISTS AND GUARDSMEN STILL ON ACTIVE DUTY
  - ❑ 855,000 RETURNING GUARD AND RESERVISTS



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## APPLIES TO FEDERAL AGENCIES

"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)

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## BASIC PROTECTIONS

- ▶ PROHIBITS DISCRIMINATION AND HARASSMENT
- ▶ PROHIBITS RETALIATION
- ▶ PROVIDES FOR PROMPT REEMPLOYMENT FOLLOWING UNIFORMED SERVICE
- ▶ ENSURES CERTAIN CONTINUED BENEFITS DURING MILITARY SERVICE



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## BASIC PROTECTIONS: STAGES OF PROTECTION

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).
6. ONGOING PROTECTIONS

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## HIRING DECISIONS AND USERRA

- ▶ 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)
- ▶ 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)

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## EMPLOYMENT RIGHTS

- ▶ 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 INCLUDES "THE TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT," WHICH MEANS A HOSTILE WORK ENVIRONMENT CLAIM IS RECOGNIZED

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## REEMPLOYMENT ELIGIBILITY

TO BE ELIGIBLE FOR REEMPLOYMENT, THE EMPLOYEE MUST

- ☐ HAVE LEFT HIS/HER JOB TO PERFORM UNIFORMED SERVICE
- ☐ PROVIDE AGENCY ADVANCE NOTICE OF SERVICE
- ☐ SERVE LESS THAN 5 CUMULATIVE YEARS OF NON-EXEMPT DUTY



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## REEMPLOYMENT ELIGIBILITY (CONT.)

- ❑ BE RELEASED FROM THE MILITARY UNDER HONORABLE CONDITIONS
- ❑ APPLY FOR REEMPLOYMENT WITHIN APPROPRIATE TIME LIMITS



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## EMPLOYER OBLIGATIONS

- ❑ ACCEPT NOTIFICATION OF UPCOMING UNIFORMED SERVICE AND APPROVE THE REQUEST
- ❑ PROMPTLY REEMPLOY
- ❑ PLACE RETURNING EMPLOYEE IN THE POSITION HE/SHE WOULD HAVE HELD IF CONTINUOUSLY EMPLOYED — ESCALATOR POSITION
- ❑ *Sericchio v. Wachovia Sec. LLC*, 658 F.3d 169, 193-94 (2d Cir.2011)

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## ESCALATOR POSITION

### EMPLOYEES WITH > 90 DAYS OF UNIFORMED SERVICE:

- RESTORED TO THE POSITION THEY WOULD HAVE ATTAINED IF THEIR EMPLOYMENT NOT BEEN INTERRUPTED BY MILITARY SERVICE, OR A POSITION OF LIKE SENIORITY, STATUS AND PAY, OR
- TO THE PRE-SERVICE POSITION, OR A POSITION OF LIKE SENIORITY, STATUS AND PAY, BUT ONLY IF UNQUALIFIED TO PERFORM THE DUTIES OF THE NEW 'ESCALATOR' POSITION AFTER REASONABLE EFFORTS

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## SENIORITY BASED BENEFITS

- ❑ AN EMPLOYEE COVERED BY USERRA IS ENTITLED TO THE RIGHTS AND BENEFITS BASED ON SENIORITY AND LENGTH OF SERVICE THAT HE OR SHE WOULD HAVE BEEN REASONABLY CERTAIN TO OBTAIN IF NOT ABSENT, INCLUDING:
  - ❑ PROMOTION OPPORTUNITIES
  - ❑ SERVICE TIME BONUSES — *DELEE V PLYMOUTH*
- ❑ PENSION PLAN MUST BE FUNDED
  - ❑ 38 U.S. Code § 4318

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## NON-SENIORITY BASED BENEFITS

- ❑ AN EMPLOYEE COVERED BY USERRA IS ENTITLED TO THE NON-SENIORITY RIGHTS AND BENEFITS THAT HE OR SHE WOULD HAVE BEEN REASONABLY CERTAIN TO OBTAIN IF NOT ABSENT IF:
  - ❑ THE RIGHTS ARE GENERALLY PROVIDED BY THE EMPLOYER OF THE PERSON TO EMPLOYEES HAVING SIMILAR SENIORITY, STATUS, AND PAY WHO ARE ON FURLOUGH OR LEAVE OF ABSENCE UNDER A CONTRACT, AGREEMENT, POLICY, PRACTICE, OR PLAN IN EFFECT AT THE COMMENCEMENT OF SUCH SERVICE OR ESTABLISHED WHILE SUCH PERSON PERFORMS SUCH SERVICE. 38 U.S. Code § 4316
  - ❑ EXAMINE COMPARABLE LEAVES
  - ❑ VACATION ACCRUAL
- ❑ HEALTH PLAN BENEFITS MAY BE CONTINUED
  - ❑ 38 U.S. Code § 4317

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## DISABLED SERVICEMEMBERS

- ❑ USERRA IS NOT THE ADA OR REHAB ACT
  - ❑ UNDER USERRA'S REEMPLOYMENT PROVISIONS, A "DISABILITY" IS ANY INJURY AGGRAVATED OR INCURRED DURING SERVICE
- ❑ LATENT DISABILITIES MUST BE ACCOMMODATED
  - ❑ CONDITIONS THAT ARE AGGRAVATED OR INCURRED DURING SERVICE, BUT MANIFEST THEMSELVES LATER, REQUIRE THE EMPLOYER TO RESTART THE REEMPLOYMENT PROCESS
- ❑ MEDICAL CONDITIONS THAT ARISE DURING SERVICE MUST BE ACCOMMODATED
  - ❑ USERRA DOES NOT REQUIRE THAT A SERVICE-RELATED INCIDENT CAUSED THE MEDICAL CONDITION OR INJURY

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## DISABILITY ISSUES:

### PRIORITY OF REEMPLOYMENT POSITIONS FOR EMPLOYEES WITH DISABILITIES INCURRED OR AGGRAVATED DURING UNIFORMED SERVICE:

- ❑ REASONABLE EFFORTS TO ACCOMMODATE THE DISABILITY TO ALLOW EMPLOYEE TO PERFORM ESCALATOR POSITION
- ❑ REASONABLE EFFORTS TO MAKE EMPLOYEE QUALIFIED TO PERFORM A POSITION EQUIVALENT TO THE ESCALATOR POSITION
- ❑ PLACEMENT IN THE POSITION THAT IS THE "NEAREST APPROXIMATION" TO THE ESCALATOR POSITION IN TERMS OF SENIORITY, STATUS, AND PAY, CONSISTENT WITH THE PARTICULAR EMPLOYEE'S CIRCUMSTANCES

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## COMMON USERRA CLAIMS

- ▶ **REQUIRING LENGTHY RETURN TO WORK PROCESS**
  - USERRA REQUIRES "PROMPT" REEMPLOYMENT
- ▶ **REQUIRING WRITTEN NOTICE**
  - USERRA PERMITS VERBAL OR WRITTEN NOTICE
- ▶ **DENYING MILITARY LEAVE FOR VOLUNTARY SERVICE**
  - USERRA INCLUDES VOLUNTARY DUTY AND INACTIVE DUTY FOR TRAINING
- ▶ **LOOKING ONLY AT OPEN POSITIONS**
  - USERRA REQUIRES REEMPLOYMENT IN ESCALATOR POSITION, EVEN IF THAT MEANS BUMPING SOMEONE

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## COMMON CLAIMS CONT.

- ▶ **NEGATIVE STATEMENTS ABOUT THE LEAVE**
  - REFERENCING THE LEAVE IN PERFORMANCE EVALUATIONS;
  - COMPLAINING ABOUT CONSTANT ABSENCES FROM WORK;
  - COMPLAINING ABOUT THE INCONVENIENCE TO THE ORGANIZATION OF ACCOMMODATING PERIODS OF LEAVE
- ▶ **TERMINATING SERVICEMEMBER WHILE ON LEAVE**
  - MUST FREEZE THE DISCIPLINARY PROCESS WHILE THE SERVICEMEMBER IS ON LEAVE
  - MAY CONTINUE THE DISCIPLINE UPON REEMPLOYMENT

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