

Employment Rights of Returning Military

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When U.S. Military personnel arrive home from overseas they may find that their employers have replaced them in their prior civilian positions. Fortunately, our returning troops have the best discrimination statute on the books to protect their rights to their civilian jobs. The Uniformed Services Employment and Reemployment Rights Act (USERRA 38 U.S.C. 4301-4333). USERRA provides that returning service-members are reemployed in the job that they would have attained had they not been absent for military service (the long-standing “escalator” principle), with the same seniority, status and pay, as well as other rights and benefits determined by seniority. However, USERRA also requires that reasonable efforts (such as training or retraining) be made to enable returning service members to refresh or upgrade their skills to help them qualify for reemployment. The law clearly provides for alternative reemployment positions if the service member cannot qualify for the “escalator” position. USERRA discrimination laws, also reaffirms and clarifies that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the non-seniority rights accorded other individuals on non-military leaves of absence.

USERRA potentially covers every individual in the country who serves in or has served in the uniformed services and applies to all employers in the public and private sectors, including Federal employers. The military discrimination laws seeks to ensure that those who serve their country can retain their civilian employment and benefit, and can seek employment free from discrimination because of their service. USERRA discrimination laws provides enhanced protection for disabled veterans, requiring employers to make reasonable efforts to accommodate the disability.

USERRA protects all members of the uniformed services from returning military discrimination law in employment regardless of whether their uniformed service was in the past, present or future. For example, a Vietnam Era veteran remains protected against most discriminatory employment actions even though that person’s uniformed service preceded an employment relationship by many years. If that person is subsequently denied a benefit of employment, motivated even in part by that service in the uniformed services, then that person may have rights under USERRA. The discrimination provisions of USERRA, set forth in section 4311, address problems regarding initial employment, reemployment, retention in employment, promotion, or any other benefit of employment.

To prove a case of USERRA discrimination laws, the claimant must show, by a preponderance of the evidence, that his or her involvement in the uniformed services was a substantial or a motivating factor in the adverse employment action taken by an employer against him or her. To prove a claim of returning military discrimination, a claimant may use direct or indirect evidence. One example of direct evidence would be an employer’s repeated criticisms of an employee based on that person’s

involvement in the uniformed services. Examples of indirect evidence of discrimination include management actions against the claimant that affect the claimant's working conditions, job assignments or use of office equipment. To defend against a claim of discrimination, an employer must be able to show that the same decision would have been made even if the employee had no uniformed service involvement. However, if it can be shown that the employer's reason is only a pretext for discrimination, then the employer's defense will not be valid.

Claimants who are disabled during their military service must be accommodated by the employer and returned to a similar position or other duties within their physical restrictions. Individuals can file claims with federal agencies or they can immediately file suit with no prerequisite for an administrative complaint and there is an exemption from paying court costs and filing fees. Prevailing plaintiff's get reinstatement, back pay, liquidated damages, prejudgment interest and attorney fees. What may be the most incredible previous of USERRA is that NO STATUTE OF LIMITATIONS APPLIES!!! State statutes of limitations are specifically repudiated and I have confirmed that there is no federal statute of limitations. I have reprinted selected sections of USERRA below.M

§ 4323. Enforcement of rights with respect to a State or private employer

(a) ACTION FOR RELIEF-(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is responsibly satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as returning military discrimination attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph .

(b) JURISDICTION-(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) VENUE-(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) REMEDIES-(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be converted into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) EQUITY POWERS- The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights of benefits of persons under this chapter.

(f) STANDING- An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

(g) RESPONDENT- In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) FEES, COURT COSTS- (1) **No fees or court costs may be charged or taxed against any person claiming rights under this chapter.**

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, **the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.**

(i) INAPPLICABILITY OF STATE STATUTE OF LIMITATIONS- No State statute of limitations shall apply to any proceeding under this chapter.

(j) DEFINITION- In this section, the term 'private employer' includes a political subdivision of a State.'