

by Patricia M. Sabalis, Esq.

## Protecting Those Who Serve: The Uniformed Services Employment and Reemployment Rights Act and Vermont's Employment Rights Law for Reserve and National Guard Members

Over the last seven decades, the United States Congress and state legislatures, including Vermont, have enacted numerous statutes to protect the jobs of individuals who serve in the military. The Selective Training and Service Act of 1940 (STSA) was the first federal statute designed to provide reemployment rights to service members. Although the STSA's reemployment provisions originally were limited to people who had been drafted into the service, the Service Extension Act of 1941 extended the reemployment rights to those who left civilian jobs for voluntary military service. During the sixties, Congress amended the law to include service for National Guard and Reserve training. To clarify and expand the reemployment rights of military personnel, Congress enacted the Vietnam Era Veterans' Readjustment Assistance Act of 1974, commonly known as the Veterans' Reemployment Rights Act (VRRRA).

After the Persian Gulf War, Congress passed the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA or the "Act"), 38 U.S.C. §§ 4301-4334, which expanded and re-codified the VRRRA. The central purposes of USERRA are:

1. to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment opportunities which can result from such service;
2. to minimize the disruption to the lives of persons performing service in the uniformed services, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
3. to prohibit discrimination against persons because of their service in the uniformed services.<sup>1</sup>

USERRA reflects the public policy that individuals who serve the country through

voluntary or involuntary service in the uniformed services should not have to risk their civilian employment. USERRA provides significant employment protections, including guaranteed leave, broad reemployment rights, preservation of benefits, and prohibition of discrimination and retaliation.<sup>2</sup>

When construing USERRA and prior laws relating to the reemployment rights of service members, courts have followed the United States Supreme Court's admonition that these laws are to be "liberally construed for the benefit of those who left private life to serve their country."<sup>3</sup> Thus, courts generally will interpret these statutes in a way that most benefits the service member. The United States Department of Labor (DOL) has promulgated regulations pursuant to USERRA. The DOL regulations became effective January 18, 2006.

### USERRA

#### USERRA Coverage

##### A. Covered Employers

Unlike many anti-discrimination statutes and employment leave laws, which apply only to employers with a minimum number of employees, USERRA applies to all employers, regardless of size. The statute defines the term "employer" broadly; it includes "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities."<sup>4</sup> The term "employer" specifically includes "successor[s] in interest" to an employer, and federal and state governments.<sup>5</sup> Generally, an employer is a successor in interest when there is "a substantial continuity in operations, facilities, and workforce from the former employer."<sup>6</sup> To be an "employer" under USERRA, the entity need not actually employ the individual; an entity is an employer if it has denied employment "because of the

individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services."<sup>7</sup>

##### B. Covered Individuals

The coverage of particular individuals is quite broad, and depends upon the specific statutory provision at issue. The anti-discrimination provisions apply to "a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services."<sup>8</sup> This provision applies to current employees, applicants for initial employment, and applicants for reemployment.<sup>9</sup> The anti-retaliation provisions protect "any person," including non-military employees.<sup>10</sup> The reemployment provisions apply to "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services."<sup>11</sup> Most covered individuals are members of the "uniformed services," which include the Army, Navy, Marine Corps, Air Force, Coast Guard, Reserves, Public Health Service Commissioned Corps, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty for training, or full-time National Guard duty, and any other category that the president designates in time of war or national emergency.<sup>12</sup>

Covered individuals are entitled to USERRA's protections regardless of the length of time they have worked for a particular employer. Even temporary, part-time, probationary, or seasonal employees are covered, unless the employment was for "a brief, nonrecurrent period" with "no reasonable expectation that the employment would have continued indefinitely or for a significant period."<sup>13</sup>

A laid-off employee is an employee for purposes of USERRA.<sup>14</sup> If the employee was on layoff before or during

uniformed service, he may be entitled to reemployment if the employer would have recalled him to employment during the period of service.<sup>15</sup> However, if the employee was laid off before or during uniformed service, and the employer would not have recalled him during that period of service, the employee is not entitled to reemployment following the uniformed service; USERRA reemployment rights cannot put the employee in a better position than if he had remained in the civilian employment.<sup>16</sup>

USERRA does not protect independent contractors.<sup>17</sup> However, Congress intended that the definition of "employee" be interpreted in the same expansive manner as the term is defined under the Fair Labor Standards Act (FLSA).<sup>18</sup> Thus, to determine whether an individual is an independent contractor, the DOL regulations essentially restate the test used under the FLSA to determine independent contractor status—that is, the right of control, the risk of loss or profit, the investment, the required skill, the length of the employment relationship, and whether the service performed is an integral part of the business.<sup>19</sup>

To remain eligible for USERRA benefits and rights based on service in the uniformed services, the individual must remain in good standing and retain an acceptable character of service.<sup>20</sup> Thus, even if a particular individual is otherwise covered by USERRA, that person's rights may terminate if she is separated from the service with "a dishonorable or bad conduct discharge" or "under other than honorable conditions."<sup>21</sup> If a military review board retroactively upgrades a disqualifying discharge or separation, it restores the employee's reemployment rights providing the employee otherwise meets the Act's eligibility criteria.<sup>22</sup> The employer is not liable for back pay and other benefits, such as pension plan credits for the period between discharge and the retroactive upgrade.<sup>23</sup>

### C. Covered Leave

The military leave provisions apply to "service" in the uniformed services, which is broadly defined as the performance of duty—on a "voluntary or involuntary basis"—in a uniformed service, and includes: (a) active duty; (b) active duty for training; (c) initial active duty for training; (d) inactive duty training; (e) full-time National Guard duty under federal authority; (f) fitness for duty examinations; (g) authorized funeral honors duty; (h) service in the

commissioned corps of the Public Health Service; and (i) service performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System, even if the individual is not a member of the uniformed services.<sup>24</sup>

An employee is not required to accommodate her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service.<sup>25</sup> Similarly, the employer may not refuse to reemploy the employee because it considers the timing, frequency or duration of the service to be unreasonable.<sup>26</sup>

### Pay and Benefits During Leave

Military leave under USERRA is unpaid. However, if an employee requests to use accrued paid time during the military leave, the employer must allow the employee to do so.<sup>27</sup> However, the employer may not require the employee to use accrued paid time.<sup>28</sup> The employee is not entitled to use accrued paid sick leave during a military leave unless the employer allows employees to use sick leave for any reason.<sup>29</sup>

If the military leave is for fewer than thirty-one days, the employee cannot be required to pay more than the regular employee share, if any, for health plan coverage.<sup>30</sup> If the leave is for longer than thirty-one days, USERRA specifically addresses health plans and provides for a limited continuation of coverage, similar to COBRA. Unlike COBRA, USERRA's continuation of coverage applies to all employers regardless of size. An employee on military leave has the option to continue coverage under a health plan for the lesser of (1) twenty-four months from the beginning of absence for military service, or (2) the day after the date an employee fails to apply for or return to the position the employee left to enter military service.<sup>31</sup> An employee who wants to continue health coverage while on military leave may not be required to pay more than 102 percent of the full premium under the plan.<sup>32</sup> However, if the employee's military service lasts less than thirty-one days, he or she may not be required to pay more than the employee share, if any.<sup>33</sup>

An employee on military leave is considered to be on "furlough or leave of absence" and is entitled to non-seniority rights and benefits that the employer generally provides to other employees who are on similar leaves of absence and who have similar seniority, status, and

pay.<sup>34</sup> Generally, vacation is considered to be a non-seniority benefit.<sup>35</sup> However, if an employer provides vacation benefits that accrue automatically purely as a function of length of employment, these benefits continue to accrue even while the employee is on leave.

An employee preparing to enter uniformed service is entitled to a period of time to prepare for service, organize his affairs, and travel safely to report to duty.<sup>36</sup> At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Thus, an employee's leave from employment may begin substantially earlier than actual military service begins.

### Anti-Discrimination Provisions

A person who performs, has performed, or applies to perform military service, is a member of the protected class established by USERRA, and "shall not be denied employment, reemployment, retention in employment, promotion, or any benefit of employment" on the basis of protected military service or status.<sup>37</sup> USERRA specifically provides that an employer violates the anti-discrimination provision if the military service of an employee or applicant "is a motivating factor in the employer's action."<sup>38</sup> Uniformed service does not have to be the sole reason for the employment action; an employer discriminates if uniformed service is one of any number of factors as long as it is a motivating factor. An employer may avoid liability if it can prove that it would have taken the same action in the absence of an employee's protected service or status.<sup>39</sup>

### Anti-Retaliation Provisions

Under USERRA's anti-retaliation provision, an employer may not take adverse action against any person because that person has (a) tried to enforce a USERRA right, (b) testified or provided a statement in a proceeding to enforce a USERRA right, (c) assisted or participated in an investigation, or (d) exercised a right under USERRA.<sup>40</sup>

This provision protects a person "regardless of whether that person has performed service in the uniformed services."<sup>41</sup> For example, an employer cannot take adverse action against an employee who is not in the uniformed service who offers a statement in support of a USERRA investigation if the employer's action is based on the

employee's participation. Like claims under the anti-discrimination provision, a person can show retaliation by proving that protected conduct was "a motivating factor" in the employer's action.<sup>42</sup>

## Reemployment

A central right afforded to service men and women under USERRA is the right to be reinstated to employment when the military leave ends. Any person whose leave "is necessitated by reason of service in the uniformed services" is entitled to reemployment if he satisfies three criteria: (1) he has given the employer advance notice of the service obligation, (2) the cumulative length of absence and all prior absences from the same employer due to qualifying service does not exceed five years, and (c) he seeks reemployment in a timely manner.<sup>43</sup>

### A. Advance Notice

An employee who seeks reemployment after returning from leave must have provided advance written or verbal notice to the employer that military service would require a leave of absence; the notice may be verbal.<sup>44</sup> The notice may be informal and does not need to follow any particular format.<sup>45</sup> USERRA does not specify how far in advance the notice must be given; the DOL recommends that an employee should provide notice as far in advance as is reasonable under the circumstances.<sup>46</sup> In Department of Defense regulations promulgated under USERRA, the Defense Department "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."<sup>47</sup> No advance notice is required if notice is precluded by "military necessity" or if, under the circumstances, such notice is "impossible or unreasonable."<sup>48</sup>

The advance notice required by USERRA is simply notice that the employee needs leave from work to fulfill a service obligation; the employee is not required to decide in advance whether she will seek reemployment after completing uniformed service.<sup>49</sup> Indeed, even if the employee tells the employer before entering or completing uniformed service that she does not intend to seek reemployment, the employee does not forfeit the right to reemployment after completing service.<sup>50</sup> However, if the employee knowingly provides written notice of her intent not to return to employment after uniformed service, she is not entitled to non-seniority rights

and benefits upon reemployment.<sup>51</sup>

### B. Five-Year Period Of Service

The USERRA reemployment rights apply only if the individual's cumulative period of uniformed service does not exceed five years. The five-year period includes only the time the employee spends actually performing service in the uniformed services.<sup>52</sup> Absence from employment before or after performing service in the uniformed services does not count against the five-year limit.<sup>53</sup> For example, depending upon the length of service, the employee has a period of time after service to report to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.<sup>54</sup> Additionally, an employee is entitled to a leave of absence for uniformed service for up to five years with each employer for whom she works; when the employee takes a position with a new employer, the five-year period begins again.<sup>55</sup>

This five-year period does not include: (a) service beyond five years that is required to complete an initial military obligation; (b) time during which the employee, through no fault of his or her own, was unable to obtain discharge orders within five years; (c) a combined absence, for more than five years, to serve periodic duty in the Ready Reserve or National Guard, or to fulfill additional training requirements determined to be necessary by the secretary concerned for professional development or to complete skill training; (d) service ordered in a time of war or national emergency, or extended in the interests of national security; (e) time in captivity during war and active duty in captive status; (f) active duty in support of a special operational or critical mission, or requirement of the uniformed services ordered by the secretary concerned; (g) federal service as a member of the National Guard because of invasion, rebellion, insurrection, or to assist the President in executing the laws of the United States.<sup>56</sup>

### C. Timely Request For Reemployment

To retain reemployment rights, an employee must notify the employer of her intent to seek reemployment in a timely manner upon completion of the military service.<sup>57</sup> Application for reemployment does not have to be in any particular format; the employee may apply verbally or in writing.<sup>58</sup> The required notice depends on the length of

the employee's absence. If the leave was less than thirty-one days, the employee must report to work beginning the first regularly scheduled work day following the completion of service, allowing for at least an eight-hour rest period after safe transportation home.<sup>59</sup> If the leave was between 30 and 181 days, the employee must submit an application for re-employment within 14 days of completion of service, or, if that is impossible or unreasonable, on the next full calendar day when application becomes possible.<sup>60</sup> If the leave was for more than 180 days, the employee must submit an application for re-employment not later than 90 days after completion of service.<sup>61</sup>

These time limits may be extended for periods during which the employee is hospitalized or convalescing from an illness or injury that was incurred or aggravated during military service.<sup>62</sup> This period may not exceed two years from the date of the completion of service, except that it may be extended by the minimum time necessary to accommodate circumstances beyond the employee's control.<sup>63</sup>

A person who fails to seek reemployment or reapply within these time limits is not automatically disqualified from reemployment. Any reemployment right then will depend on whatever employer policies, practices, or conduct rules apply concerning explanations and discipline for absence from scheduled work.<sup>64</sup> An employer may request appropriate documentation to establish that the employee is entitled to reemployment rights under USERRA.<sup>65</sup>

### Position Upon Reemployment

If the employee meets the eligibility criteria (gave advance notice, served less than five years, timely returned to work, and not been separated with a disqualifying discharge), the employer must promptly reemploy the employee when he returns from leave.<sup>66</sup> "Prompt reemployment" means "as soon as practicable under the circumstances of each case."<sup>67</sup> Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment.<sup>68</sup> For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, reinstatement after several years of active duty may require more than two weeks because the employer may have to reassign employees or give notice

to an employee who has the returning employee's job.

As a general rule, the employee is entitled to reemployment in the job position that she "would have attained with reasonable certainty if not for the absence due to uniformed service."<sup>69</sup> This position is known as the "escalator position," and is based on the principle that, except for the period of uniformed service, the employee could have been promoted (or demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employer reemploy the employee "in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service."<sup>70</sup> The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the military leave.<sup>71</sup> If the employee missed an opportunity for promotion during military leave that was based on a skills test or examination, the employer should give her a reasonable amount of time to become adjusted to the new position before administering the skills test or examination.<sup>72</sup>

Depending on the circumstances, the escalator principle may result in reemployment in a higher or lower position, a lay-off, or even a termination.<sup>73</sup> For example, if there was a layoff during the period of service, and the layoff continued after the date of reemployment, "reemployment" would reinstate the employee only to layoff status.<sup>74</sup>

The position to which the employee is entitled depends upon the length of military service, the escalator principle, employee qualifications, and whether the employee has a disability. The employee must be qualified for the reemployment position, and the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.<sup>75</sup> The employer is not required to reemploy the employee on his return from service if he cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position. "Qualified" means that the employee "has the ability to perform the essential tasks of the position."<sup>76</sup> The employee's inability to perform one or more non-essential tasks of a position does not make him unqualified.<sup>77</sup>

Following a period of service in the uniformed services of less than ninety-one days, the employee must be

reemployed according to the following priority: (1) in the escalator position if qualified to perform the duties of this position; (2) if not qualified to perform the duties of the escalator position after the employer's reasonable efforts, in the position in which she was employed on the date the leave began if the employee is qualified to perform the duties of that position; (3) if not qualified to perform the duties of the escalator position or the pre-service position after the employer's reasonable efforts, in any other position that is the nearest approximation first to the escalator position and then to the pre-service position that the employee is qualified to perform.<sup>78</sup>

Following a period of service of more than ninety days, the employee must be reemployed according to the following priority: (1) in the escalator position or a position of like seniority, status, and pay if qualified; (2) if not qualified for the escalator position or a like position after the employer's reasonable efforts, in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay; (3) if not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by the employer, in any other position that is the nearest approximation first to the escalator position and then to the pre-service position.<sup>79</sup> The employee must be qualified to perform the duties of this position.

If an employee incurred a disability or aggravated a disability during uniformed service, she is entitled to the escalator position and the employer must make reasonable efforts to accommodate the disability and help the employee become qualified to perform the reemployment position.<sup>80</sup> If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts to accommodate and help the employee to become qualified, the employer must reemploy the employee: (1) in a position that is equivalent in seniority, status, and pay to the escalator position; or (2) in a position that is the nearest approximation to the equivalent position, "consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances."<sup>81</sup> USERRA requires that the employee be qualified for the reemployment position regardless of

any disability. Although the employer must make reasonable efforts to help the disabled employee to become qualified, the employer is not required to reemploy the employee if she cannot, after the employer's reasonable efforts, qualify for the appropriate reemployment position.<sup>82</sup>

For purposes of these reinstatement provisions, "reasonable efforts" are defined as actions, including training provided by an employer, that do not place an "undue hardship" on the employer.<sup>83</sup> "Undue hardship" is defined as action requiring significant difficulty or expense, taking into account the employer's financial resources, cost of the action, and type of operation.<sup>84</sup>

## Benefits and Rights Upon Reemployment

### A. Seniority and Seniority Based Benefits

USERRA provides that an individual who is reemployed "is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if such person had remained continuously employed."<sup>85</sup> This provision reflects the so-called "escalator principal," which makes clear that the employee "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously."<sup>86</sup> Thus, the period of military leave is not considered a break in employment.<sup>87</sup>

A "seniority-based right or benefit" means a benefit that "accrues with, or is determined by, longevity in employment."<sup>88</sup> The DOL identified three factors to consider: (a) is the benefit "a reward for length of service rather than a form of short-term compensation for work performed"; (b) is it reasonably certain or highly probable that the employee would have received the benefit if she remained continuously employed during the military leave; and, (c) is it the employer's "actual custom or practice to provide or withhold the right or benefit as a reward for length of service."<sup>89</sup>

The rights and benefits protected by USERRA include not only those provided by the employer, but also those required by statute. The DOL regulations require that an employer count the number of months and the

number of hours of work that the service member would have worked during the period of uniformed service towards the eligibility requirements under the Family and Medical Leave Act.<sup>90</sup>

#### A. Non-seniority Based Benefits

For benefits not based on seniority, USERRA provides:

a person who is absent from a position of employment by reason of service in the uniformed services shall be ... entitled to such other rights and benefits not determined by seniority as 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 or plan in effect at the commencement of such service or established while such person performs such service.<sup>91</sup>

This is the "most favored status" clause, and requires that an employee reinstated after uniformed service is entitled to the most advantageous benefits given by the employer to employees on furlough or other comparable leave of absence. To determine whether leaves are comparable, the duration of the leave may be the most significant factor (a two-day funeral leave will not be comparable to an extended leave for service in the uniformed service); other factors include the purpose of the leave and of the employee's ability to choose when to take the leave.

In a recent case, the Federal Circuit Court of Appeals held that an employee who was on active duty military leave from October 1995 through April 1998 was not entitled to receive holiday pay under USERRA even though other employees who took leaves of absence to attend judicial proceedings as jurors or witnesses received holiday pay during the leave.<sup>92</sup> The court reasoned that the long-term military leave was not sufficiently similar to the jury duty leave in length and circumstance.

#### C. Pension and Retirement Plans

A returning service member's right to benefits under a pension plan provided by a private employer is to be decided under USERRA, rather than other federal or state laws governing employee pension plans if there is a conflict between the laws.<sup>93</sup> As with other benefits, both the non-forfeitability and accrual of pension benefits continues during an employee's military service, and a person who is reemployed must be treated as if there was no break in service with the employer.<sup>94</sup>

Upon re-employment, an employer is required to make contributions to a pension plan. Contributions shall be to the same extent as for other employees during the same period of service, except that earnings and forfeitures are not to be included.<sup>95</sup> The employer must make these contributions "no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later."<sup>96</sup> If it is "impossible or unreasonable" to make the contribution within ninety days, the employer must make the contribution "as soon as practicable."<sup>97</sup> An employee cannot collect any pension benefits that are contingent upon employee contributions unless he makes the contributions.<sup>98</sup> Makeup contributions or elective deferrals must be made by the employee during the time period that begins with the reemployment date and continues for up to three times the length of the employee's immediate past period of uniformed service; the repayment period can not exceed five years.<sup>99</sup>

If the employee received a distribution of some or all of the accrued benefit from a defined benefit plan due to his uniformed service before reemployment, he must be allowed to repay the withdrawn amounts when reemployed, including any interest that would have accrued had the monies not been withdrawn.<sup>100</sup> The time period for repayment is the same as for make up contributions or elective deferrals.

#### D. Health Benefits

Upon an employee's return from military service, the employer or the health plan cannot impose exclusion or waiting periods because of military service before coverage is resumed.<sup>101</sup> However, coverage of illnesses or injuries incurred in or aggravated during military service can be excluded.<sup>102</sup>

#### E. Immunity from Discharge Without Cause

USERRA specifically alters the at-will employment status for those who are reemployed under USERRA. For reemployed employees whose service was more than 180 days, the employer may not discharge the employee except for cause within a year of reemployment. If the length of service was more than 30 days, but less than 181 days, the employer may not discharge the employee except for cause for a period of 180 days.<sup>103</sup> These periods of immunity from discharge without cause

are intended to afford a returning service member a period of time to readjust to civilian work.

A "for cause" discharge may be due to conduct or to other legitimate nondiscriminatory reasons. If the discharge is based on conduct, the employer must prove that "it is reasonable to discharge the employee for the conduct in question, and that he ... had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge."<sup>104</sup> Other legitimate nondiscriminatory reasons include elimination of the employee's job or placing the employee on layoff status.<sup>105</sup>

### Enforcement

#### A. VETS Investigation

If an individual claims that an employer failed to comply with the Act, the individual may file a complaint with the Veterans' Employment and Training Service (VETS).<sup>106</sup> When a complaint is filed, VETS has the right to interview people with relevant information as well as the right to examine and copy documents that it considers relevant.<sup>107</sup> VETS also may subpoena witnesses and documents relating to the investigation.<sup>108</sup> If VETS determines that the complaint is meritorious, VETS can attempt to resolve the complaint.<sup>109</sup> VETS does not have authority to order compliance with USERRA. If VETS is unable to resolve the complaint, it will notify the complainant of the results of the investigation and the person's right to proceed under the enforcement of rights provisions.<sup>110</sup> Upon request by the complainant, VETS may refer the complaint to the United States Attorney General, who may initiate a legal action to obtain appropriate relief.<sup>111</sup>

#### B. Private Cause of Action

An aggrieved individual may also initiate a private legal action in federal court for any district in which a private employer maintains a place of business.<sup>112</sup> Filing a complaint with VETS is not a prerequisite to filing a lawsuit.<sup>113</sup>

#### C. Burden of Proof

To establish discrimination or retaliation in violation of USERRA, an individual has the burden of proving that a status or activity protected by USERRA was one of the reasons for the employer's adverse action.<sup>114</sup> If the individual meets this burden, the burden shifts to the employer to prove the affirmative defense that it would have taken the action absent the USERRA-protected status or activity.<sup>115</sup>

#### D. Affirmative Defenses

There are three affirmative defenses, which the employer must prove by a preponderance of the evidence.<sup>116</sup> First, the employer is not required to reemploy an individual if it establishes that its circumstances have so changed as to make reemployment "impossible or unreasonable."<sup>117</sup> For example, an employer does not have to reemploy an individual when an intervening reduction in force occurred that would have included that employee. However, an employer may not refuse reemployment on the grounds that it hired another employee to fill the position during the employee's absence, even if the employer might have to terminate the replacement employee.<sup>118</sup>

Second, an employer is not required to reemploy an otherwise eligible employee if it establishes that assisting the employee in becoming qualified for reemployment would impose an undue hardship on the employer.<sup>119</sup> An "undue hardship" means an action requiring "significant difficulty or expense," considering: (a) the nature and cost of the required action needed; (b) the overall financial resources of the employer; (c) the number of employees at the facility; (d) the effect on expenses and resources, or other impacts of the action upon the operation of the facility; (e) the employer's overall financial resources; (f) the overall size of the employer's business with respect to the number of its employees, and the number, type, and location of its facilities; and (g) the type of the employer's operation, including "the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer."<sup>120</sup>

Third, an employer is not required to reemploy an otherwise eligible employee if it establishes that the employment position vacated by the employee "was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period."<sup>121</sup>

#### E. Damages and Remedies

In any action in which the aggrieved employee prevails, the court may require the employer to comply with the Act, may award compensation for any lost wages or benefits resulting from the violation, and may award reasonable attorneys fees, expert witness fees, and other litigation expenses.<sup>122</sup> If the court finds that the employer's violation was

willful, it may also award liquidated damages in an amount equal to the lost wages and benefits.<sup>123</sup> The court also may use its full equity powers, including injunctions, temporary restraining orders and contempt orders.<sup>124</sup>

#### F. Statute of Limitations

USERRA specifically provides that "[n]o State statute of limitations shall apply to any proceeding" under the Act.<sup>125</sup> At least one court has held that the four-year general federal statute of limitations (28 U.S.C. 1658) applies to actions under USERRA.<sup>126</sup> The equitable doctrine of laches may apply if there is an unreasonable delay, and the unreasonable delay causes prejudice to the employer.<sup>127</sup>

#### Vermont Military Leave Statute

Since 1955, Vermont has had a statute that applies to members of the reserve components of the armed forces, the ready reserve, and the National Guard.<sup>128</sup> Thus, when a member of the Vermont National Guard is on state active duty, he is protected by the Vermont statute since USERRA does not apply to state duty. Vermont law requires employers to provide a leave of absence, with or without pay, for state active duty or military training with the armed forces.<sup>129</sup> The employee is expected to provide thirty days notice or notice "as soon as practical after being called into state service by the governor."<sup>130</sup>

The employer must reinstate the employee with the "same status, pay, and seniority, including the seniority that accrued during the period of absence" if the employee "provides evidence of satisfactory completion of the training immediately upon return" and is still qualified for the position.<sup>131</sup>

Like USERRA, the Vermont statute contains an anti-discrimination provision and an anti-retaliation provision.<sup>132</sup> These provisions are similar in scope to the analogous USERRA provisions. The statute also provides that a person who takes a military leave for service in the National Guard is entitled to the rights and benefits provided in USERRA.<sup>133</sup>

Additionally, the Vermont statute provides that absence for military training or state active duty shall not affect the employee's right to receive "normal vacation, sick leave, bonus, advancement, and other advantages of employment normally to be anticipated in the employee's particular position."<sup>134</sup> The Civil Rights Unit of the Attorney General's Office has indicated informally

that this provision applies only to leave necessitated by duty under the jurisdiction of the State of Vermont—for example, service to respond to a natural disaster pursuant to a declaration by the governor.

An aggrieved employee may file a complaint with the Civil Rights Unit of the Attorney General's Office, which is authorized to conduct a civil investigation or bring an action in superior court for "legal and equitable relief."<sup>135</sup> Alternatively, the employee may bring an action "at law for damages or apply to the superior court for equitable relief."<sup>136</sup> There is no provision for the award of attorney's fees or costs to the employee if she is the prevailing party.

While USERRA and state statutes impose obligations on employers that may cause inconvenience and disruption, they pale in comparison to the disruption caused by service in the uniformed services. Those who serve in the military risk their lives, sacrifice income and lose months, sometimes years, with their families. Thus, we all benefit if the law achieves its goal of encouraging non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment opportunities that can result from such service.

*Patricia M. Sabalis, Esq., is a director in the Burlington, Vermont office of Downs Rachlin Martin PLLC, focusing on labor and employment law and litigation. Prior to joining DRM in 1992, Ms. Sabalis was Labor Counsel at the General Foods Corporation.*

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<sup>1</sup> 38 U.S.C. § 4301(a).

<sup>2</sup> According to the Department of Labor, over 420,000 citizen-soldiers have been called to service since September 11, 2001. More than 260,000 of these service men and women have completed their service and returned to civilian life after serving lengthy tours of duty. Approximately one of every seventy-six of the de-mobilized citizen-soldiers have filed administrative complaints concerning reemployment rights.

<sup>3</sup> See *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977).

<sup>4</sup> 38 U.S.C. § 4303(4).

<sup>5</sup> *Id.*

<sup>6</sup> 20 C.F.R. § 1002.35.

<sup>7</sup> 20 C.F.R. § 1002.4.

<sup>8</sup> 38 U.S.C. § 4311 (a).

<sup>9</sup> *Id.*

<sup>10</sup> 38 U.S.C. § 4311(b).

- 11 38 U.S.C. § 4312 (a).  
 12 38 U.S.C. § 4303(16).  
 13 20 C.F.R. § 1002.41.  
 14 20 C.F.R. § 1002.42(a).  
 15 *Id.*  
 16 20 C.F.R. § 1002.42(c).  
 17 20 C.F.R. § 1002.44.  
 18 H.R. Rep. No. 103-65, Pt. I, at 29 (1993).  
 19 20 C.F.R. § 1002.44.  
 20 38 U.S.C. § 4304.  
 21 *Id.*  
 22 20 C.F.R. § 1002.137.  
 23 20 C.F.R. § 1002.138.  
 24 38 U.S.C. § 4303(13); 20 C.F.R. §§ 1002.54-  
 1002.58.  
 25 20 C.F.R. § 1002.104.  
 26 *Id.*  
 27 38 U.S.C. § 4316(d).  
 28 *Id.*  
 29 20 C.F.R. § 1002.153(a).  
 30 38 U.S.C. § 4317(a)(2).  
 31 38 U.S.C. § 4317(a)(1).  
 32 38 U.S.C. § 4317(a)(2).  
 33 *Id.*  
 34 38 U.S.C. § 4316(b)(1).  
 35 20 C.F.R. § 1002.150(c).  
 36 20 C.F.R. § 1002.74.  
 37 38 U.S.C. § 4311(a).  
 38 38 U.S.C. § 4311(c)(1).  
 39 *Id.*  
 40 38 U.S.C. § 4311(b).  
 41 *Id.*  
 42 38 U.S.C. § 4311(c)(1).  
 43 38 U.S.C. § 4312(a).  
 44 38 U.S.C. § 4312(a)(1).  
 45 20 C.F.R. § 1002.85 (c).  
 46 20 C.F.R. § 1002.85(d).  
 47 32 C.F.R. § 104.6(a)(2)(i)(B).  
 48 38 U.S.C. § 4312(b).  
 49 20 C.F.R. § 1002.88.  
 50 *Id.*  
 51 20 C.F.R. § 1002.152.  
 52 20 C.F.R. § 1002.100.  
 53 *Id.*  
 54 *Id.*  
 55 38 U.S.C. § 4312(c); 20 C.F.R. § 1002.101.  
 56 38 U.S.C. § 4312(c).  
 57 38 U.S.C. § 4312(e)(1).  
 58 20 C.F.R. § 1002.118.  
 59 38 U.S.C. § 4312(e)(1)(A).  
 60 38 U.S.C. § 4312(e)(1)(C).  
 61 38 U.S.C. § 4312(e)(1)(D).  
 62 38 U.S.C. § 4312(e)(2)(A).  
 63 *Id.*; 20 C.F.R. § 1002.116.  
 64 38 U.S.C. § 4312(e)(3).  
 65 38 U.S.C. § 4312(f)(1).  
 66 20 C.F.R. § 1002.180.  
 67 20 C.F.R. § 1002.181.  
 68 *Id.*  
 69 20 C.F.R. § 1002.191.  
 70 *Id.*  
 71 20 C.F.R. § 1002.193(a).  
 72 20 C.F.R. § 1002.193(b).  
 73 20 C.F.R. § 1002.194.  
 74 *Id.*  
 75 20 C.F.R. § 1002.198.  
 76 20 C.F.R. § 1002.198(a)(1).  
 77 *Id.*  
 78 38 U.S.C. §§ 4313(a)(1), 4313(a)(4); 20  
 C.F.R. § 1002.196.  
 79 38 U.S.C. § 4313(a)(2); 20 C.F.R.  
 § 1002.197.  
 80 38 U.S.C. § 4313(a)(3); 20 C.F.R.  
 § 1002.225.  
 81 20 C.F.R. § 1002.225.  
 82 20 C.F.R. § 1002.226.  
 83 38 U.S.C. § 4303(10).  
 84 38 U.S.C. § 4303(15).  
 85 38 U.S.C. § 4316 (a).  
 86 *Fishgold v. Sullivan Drydock & Repair Co.*,  
 328 U.S. 275, 284 (1946).  
 87 20 C.F.R. § 1002.210.  
 88 20 C.F.R. § 1002.212.  
 89 *Id.*; 20 C.F.R. § 1002.213.  
 90 *Id.* ("In the event that a service member is  
 denied FMLA leave for failing to satisfy the  
 FMLA's hours of work requirement due to  
 absence from employment necessitated  
 by uniformed service, the service member  
 may have a cause of action under USERRA  
 but not under the FMLA").  
 91 38 U.S.C. § 4316(b)(1).  
 92 *Tully v. Dept. of Justice*, 481 F.3d 1367  
 (Fed.Cir. 2007).  
 93 38 U.S.C. § 4318(a)(1).  
 94 38 U.S.C. § 4318(a)(2).  
 95 38 U.S.C. § 4318(b)(1).  
 96 20 C.F.R. § 1002.262(a).  
 97 *Id.*  
 98 38 U.S.C. § 4318(b)(2).  
 99 *Id.*; 20 C.F.R. § 1002.262(b).  
 100 20 C.F.R. § 1002.264.  
 101 38 U.S.C. § 4317(b)(1).  
 102 38 U.S.C. § 4317(b)(2).  
 103 38 U.S.C. § 4316.  
 104 20 C.F.R. § 1002.248(a).  
 105 20 C.F.R. § 1002.248(b).  
 106 38 U.S.C. §§ 4322, 4323.  
 107 38 U.S.C. § 4326(a).  
 108 38 U.S.C. § 4326(b).  
 109 38 U.S.C. § 4322(d).  
 110 38 U.S.C. § 4322(e).  
 111 38 U.S.C. § 4323(a)(1).  
 112 38 U.S.C. §§ 4323(a)(2), 4323(c).  
 113 38 U.S.C. §§ 4323(a)(2)(A).  
 114 20 C.F.R. § 1002.22.  
 115 20 C.F.R. § 1002.23(b).  
 116 20 C.F.R. § 1002.139(d).  
 117 20 C.F.R. § 1002.139(a).  
 118 *Id.*  
 119 20 C.F.R. § 1002.139(b).  
 120 20 C.F.R. § 1002.5(n).  
 121 20 C.F.R. § 1002.139(c).  
 122 38 U.S.C. § 4323(d)(1) and 4323(h).  
 123 38 U.S.C. § 4323(d)(1)(C).  
 124 38 U.S.C. § 4323(e).  
 125 38 U.S.C. § 4323(i).  
 126 *Rogers v. City of San Antonio*, 2003 WL  
 1566502 (W.D. Texas), *rev'd on other*  
*grounds*, 392 F.3d 758 (5th Cir. 2004).  
 127 20 C.F.R. § 1002.311.  
 128 21 V.S.A. § 491(a).  
 129 *Id.*  
 130 *Id.*  
 131 *Id.*  
 132 21 V.S.A. § 491(b) and (c).  
 133 21 V.S.A. § 492(b).  
 134 21 V.S.A. § 492(a).  
 135 21 V.S.A. § 493(b).  
 136 21 V.S.A. § 493(a).

