

Taking Care of the Troops

February 21, 2012 By [Scott T. Silverman](#) and [Andrew M. Loewenstein](#)

On October 21, 2011, President Barack Obama announced the withdrawal of American troops from Iraq, effectively ending the Iraq war. As a result, nearly 40,000 soldiers are returning home, back to their family, friends, and jobs. This resurgence of veterans into American society merits an exploration of the statute that exists to protect their employment rights: the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

USERRA protects individuals in the armed forces who voluntarily or involuntarily leave their employment to serve in the military or who accept certain positions in the National Disaster Medical System. USERRA provides that qualified individuals must be restored to the job and benefits level they would have achieved had they not left their employment for military service (the so-called "escalator" principle), or if this is not possible, the service member must be provided with a comparable job opportunity. The law also provides that qualified individuals have the right to continue their employer's health benefits plan for themselves and their dependents for up to twenty-four (24) months while serving in the military. Additionally, USERRA prohibits discrimination based on past or present military service status in decisions regarding: (1) hiring; (2) reemployment; (3) retention in employment; (4) promotion; or (5) any employment benefit.

Employers must also notify covered individuals of their rights, benefits, and the employer's obligations under USERRA. Importantly, an employer may not retaliate against anyone who assists in the enforcement of USERRA rights, including situations where an employee provides testimony or makes a statement in connection with a USERRA proceeding, even if the individual is not in the military. Employers must also be aware that liability for discrimination under USERRA may occur where a supervisor, based on the military status of an individual, acts in a way that ultimately causes an adverse employment action — even if the decision to take that action is made by someone else. See [Employers Beware of the "Cat's Paw:" Discriminatory Animus Within the Chain of Command](#). "If the supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act [causes] the ultimate employment action, then the employer is liable under USERRA." See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1195. (2011)

On November 21, 2011, President Obama signed into law the VOW to Hire Heroes Act of 2011. Among other provisions, the law's USERRA amendment specifically provides for claims of harassment and hostile work environment based on military status. In this law, Congress explicitly refuted some court decisions, which had held that USERRA, unlike Title VII, did not provide for a hostile work environment claim, because the statute did not include the phrase "the terms, conditions, or privileges of employment" in its definition of benefits of employment. Employers should therefore make sure that employee handbooks or policies include military status as a protected category and create a reporting procedure for those who believe they have witnessed or been subjected to military status harassment or discrimination. Of course, employers must also have compliant USERRA leave policies in place.

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