Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Inside USERRA's Extensive Requirements For Employers

By **Jeffrey Lorek**
February 13, 2019, 11:19 AM EST


Jeffrey Lorek

The Uniformed Services Employment and Reemployment Rights Act prohibits employers of all types and sizes from discriminating against applicants and employees on the basis of their military status or obligations, and establishes strong re-employment rights and protections for those military veterans returning to their civilian jobs (regardless of whether the military absence was voluntary or involuntary).

USERRA litigation, overall, is alive and well. Just last month, United Airlines was named in White v. United Airlines Inc. et al., a proposed class action in the U.S. District Court for the Northern District of Illinois, where plaintiffs allege that the airlines violated USERRA by not paying regular wages during short-term military absences. That lawsuit followed a win for plaintiffs in the same court in October 2018, when United pilots obtained class certification in a different lawsuit, Moss v. United Airlines Inc. et al., alleging that the airlines violated USERRA by not allowing pilots on military leave to accrue sick time and vacation time.

Running afoul of USERRA can result in costly litigation, as the U.S. Department of Justice pursues civil cases against employers upon referral from the U.S. Department of Labor. In the most recent report to Congress, in fiscal year 2017, the DOL reported that it reviewed 1,098 USERRA complaints (including 944 new cases, which was up from the year before), and referred 54 cases to the attorney general.[1]

In turn, the DOJ filed two complaints in federal court.[2] Most cases resolve privately, some for surprisingly large sums. In addition to having the DOL and DOJ on their side, veterans also are free to pursue private rights of action on their own in U.S. district courts at any time.

Most employers are familiar with the anti-discrimination provisions and reasonable accommodation requirements set forth in Title I of the Americans with Disabilities Act as they relate to individuals with disabilities that substantially limit one or more major life activities. However, employers may not be aware that USERRA contains even stronger protections.

This article addresses the unique reasonable accommodation requirements imposed on employers under USERRA.[3] These requirements exist in addition to and not in lieu of all of the traditional ADA protections.[4] Of all of the DOL's new and unique USERRA cases in fiscal year 2017, almost one-third of

complainants (28 percent of those responding) reported having a service-connected disability.[5] Because such a large number of military veterans have disabilities that can give rise to USERRA discrimination claims, employers should take notice of this issue.

Current Challenge

With America having continuously been at war in some form or another since shortly after the terrorist attacks on September 11, 2001, an entirely new generation of Americans has come of working age and entered the workforce. Many of those workers began their careers in the armed forces in some capacity, either on active duty or in a reserve component such as the traditional Reserve for any given service branch or an individual state's National Guard or Air National Guard.

In addition to that whole new category of workers, our country also observed a large contingent of the then-existing workforce who, for a variety of personal reasons, enlisted or commissioned to serve our Nation in the Armed Forces following 9/11. There is no question that this patriotic "citizen soldier" workforce has grown tremendously in population over the last 18 years.

Unfortunately, the American workforce's service in the military does not come without a price. The toll that war has taken on so many workers sometimes is obvious with respect to physical injuries and disabilities. However, many times that toll is unseen, as veterans return to the workplace with invisible wounds. Such hidden disabilities include post-traumatic stress disorder, anxiety, depression and other mental illnesses.

With multiple tens of thousands of workers temporarily leaving their employers to serve deployments around the world and perform other military duties, employers need to be well-prepared to welcome them back into the workplace. Part of that homecoming process includes understanding the laws that exist to protect veterans' re-employment rights. Informed employers are best situated to avoid unknowingly violating USERRA.

USERRA Covers All Employers and Employees

Unlike the ADA, which only applies to employers with 15 or more employees, USERRA applies to every U.S. private and public employer regardless of its size. USERRA defines "employer" extremely broadly to include "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities."[6] Any successors in interest to these covered employers are also required to comply with USERRA.

Almost all types of workers are covered "employees" for purposes of USERRA protection. This includes employees working full-time, part-time, those on probationary status, on a temporary basis, and even seasonal workers.[7] Recently, a federal appeals court affirmed a district court's holding that USERRA protection also attaches to employees who do not have any set or defined shifts or schedules.[8]

Also, unlike other laws — such as the Fair Labor Standards Act, which exempts certain employees from an employer's overtime pay obligations — USERRA equally applies to all employees, to include executive, managerial and professional employees.[9] Despite the broad definition of employees, there are two significant exclusions from coverage: (1) those employees whose employment prior to the military service in question was for a mere brief, nonrecurrent period where there was no reasonable expectation that employment would have continued; and (2) individuals who are independent contractors.[10]

There is a six-part test to help employers determine whether a worker might be construed as an independent contractor, which is similar to other statutory and common law tests for determining independent contractor status.[11]

Qualifying Uniformed Service

Practically all forms of military service will trigger USERRA protection and re-employment rights upon an employee's return to the workplace.

"Service in the uniformed services" includes both the voluntary and involuntary performance of any of the following military duties: active duty; active duty for training (used for training Reserve members); initial active duty training (for new recruits); inactive duty training (training by a Reserve member neither on active duty nor active duty for training); full-time National Guard duty; submitting to an examination for fitness for duty purposes; funeral honors duty by National Guard or Reserve members; disaster response by the Public Health Service; and certain other disaster responses when activated under federal authority or attending training in support of a federal mission.[12]

Reasonable Accommodation Under USERRA Is Broader Than Under the ADA

When a covered employee returns from a qualifying period of military service and suffers from a disability that he or she either incurred, or aggravated, during the military service, USERRA imposes upon employers greater obligations than does the ADA.[13] While the ADA does require an employer to provide a reasonable accommodation that would enable the employee to perform the essential functions of his or her job, USERRA demands more of the employer. Under USERRA, an employer not only must provide a reasonable accommodation, but it also must make "reasonable efforts to assist" a veteran when he or she returns from uniformed service.[14]

First, this means that, if an employee has a disability either incurred in or aggravated by military service, the employer must proactively make reasonable efforts to accommodate the disability and place the veteran back into the position in which he or she would have been employed had the veteran not performed the military service in the first instance. The general requirement under USERRA to re-employ a returning veteran in the position that he or she would have attained at the employer "with reasonable certainty," were it not for the military absence breaking that stream of employment, is known as the "escalator principle."[15]

The escalator principle applies in all USERRA re-employment situations, not only those involving disabled employees. Generally, it requires employers to re-employ returning veterans in the positions they would have attained (with the same seniority, status, pay, rights and other benefits) had they not been absent from work due to military service in the first instance.[16]

Second, unlike the ADA, an employer must take reasonable steps to help the disabled veteran become qualified to perform the duties associated with the re-employment position (i.e. the escalator position which the employee would have had but for the military absence).[17] USERRA prohibits the employer from requiring the returning veteran to cover any expenses associated with the reasonable efforts to qualify the employee for the position.[18] Accordingly, the employer must bear the cost of any training, courses, schooling or other type of instruction that might be necessary to qualify the returning disabled veteran for re-employment in a particular position.[19]

Because a veteran may have been absent from an employer for quite some time, he or she may not possess the current qualifications necessary to perform the escalator position (e.g., the employer has new software or applications that the veteran needs to learn how to use). Thus, anticipating these issues, employers should scrutinize the job requirements for the position in question, compare those requirements against the veteran's existing skill set and capabilities, and determine what, if anything, is needed to be done to help the veteran become qualified upon his or her arrival back in the workplace.

The amount of effort involved and manner in which an employer helps to qualify a disabled veteran for a re-employment position will vary from case to case, and will require the employer to perform an individualized assessment and develop a tailored course of action.

Being "qualified" to perform a job under USERRA — similar to the definition used in the ADA — means that the veteran "has the ability to perform the essential tasks of the position."[20] The inability to perform nonessential functions of a job cannot be held against the employee.[21] Whether a task is "essential" will be analyzed under the following factors:

1. The employer's judgment regarding what are essential functions;
2. The written job descriptions that existed before the employee was hired;
3. The amount of time on the job spent performing the function;
4. The consequences of not requiring the employee to perform the function;
5. The terms of any applicable collective bargaining agreement;
6. The work experience of employees who previously held the job; and/or
7. The current work experience of other employees in similar jobs.[22]

Third, USERRA prescribes an order of priority that employers must follow in determining the ultimate position in which the veteran will be reemployed.

First, the employer must reemploy the veteran in the escalator position unless the employee is unqualified for the job because of the disability, even after the employer's reasonable efforts.[23] Second, if the escalator position is not possible, the employer must place the disabled veteran in a position "equivalent to the escalator position in seniority, status, and pay" and for which the employee is either qualified, or can become qualified to perform as a result of the employer's reasonable retraining efforts.[24] Finally, the third priority is re-employment in a position that is the "nearest approximation to the equivalent position" in terms of seniority, status and pay, when evaluating the specific employee's circumstances.[25] A nearest approximate position might be a higher or lower position, depending on the particular circumstances.[26]

By planning ahead, the employer can reduce lag time and minimize any business disruption that may result from re-employment of a returning veteran. The potential for disruption is greater in situations where the employer is required to "bump" or displace a current employee from a position to reemploy a returning veteran under the escalator principle.[27] As such, predictive planning also will ease the stress on both the returning veteran and the soon-to-be-displaced employee. Also, depending on the type of employment relationship and applicable law in the employer's jurisdiction, the displaced employee

might be entitled to advance notice before losing his or her position. The earlier the employer can anticipate these issues the better.

Under USERRA, an employer will only be relieved of the obligation to re-employ a disabled veteran if the employee cannot become qualified following the employer's reasonable efforts to help the employee become qualified for the appropriate re-employment position under the prioritization regime set forth in the law.[28] There also exists a traditional undue hardship defense, similar to the ADA, but it is usually difficult for an employer to establish.[29] Employers should be extremely cautious in deciding against re-employing a disabled veteran (or any returning veteran for that matter), because USERRA "must be broadly construed in favor of its military beneficiaries."[30]

Conclusion

Today, perhaps more than ever since the post-World War II economy, employers of all sizes increasingly employ military veteran employees. Many of those employees regularly leave for periods of time to serve in their respective Reserve or Guard units. Those veterans — and, especially, the men and women who have disabilities connected to their military service — enjoy robust protections under USERRA. Employers must be cognizant of both the ADA and USERRA when addressing workplace accommodation issues involving veterans.

While employers may already have existing policies and procedures in place to provide reasonable accommodations to disabled employees, it's likely that many employers haven't yet formulated comprehensive plans for addressing USERRA's unique requirements for helping disabled veterans become qualified for re-employment positions and reintegrated into the workplace.

As this article has shown, there is more involved in accommodating a disabled veteran upon re-employment after military service than in accommodating an employee outside of the USERRA context. Thus, employers should take the time to assess their organizational structure and review all available options well in advance of a veteran's return to the employer. Having a solid grasp of a veteran's disability, the escalator principle as it is applied to a particular veteran, and the employer's re-employment positions available will ensure a smooth transition for the returning employee and help the employer avoid violating this important law.

Jeffrey J. Lorek is special counsel at Orrick Herrington & Sutcliffe LLP. He previously served for a decade in the U.S. Air Force Judge Advocate General's Corps.

[1] Department of Labor, VETS FY 2017 Annual Report to Congress (July 2018), p. 8, available at https://www.dol.gov/vets/programs/userra/USERRA_Annual_FY2017.pdf (hereinafter, "VETS Report").

[2] Id.

[3] A comprehensive discussion of USERRA and the ADA, generally, is outside the scope of this article. This article focuses on USERRA's reasonable accommodation requirements. It does not attempt to

explain the many procedural and substantive obligations of the employee and employer during the three major stages of employment — namely, before an employee's military absence, during his or her absence, and reporting back to the employer following military service.

[4] That is, unless an employer has less than 15 employees, in which case the ADA would not apply. USERRA does, however, cover all employers, regardless of size.

[5] VETS Report, supra. at n. 1.

[6] 38 U.S.C. § 4303(4)(A)).

[7] 20 C.F.R. § 1002.41; Mace v. Willis, 897 F.3d 926, 928 (8th Cir. 2018).

[8] Mace, 897 F.3d at 928.

[9] 20 C.F.R. § 1002.43.

[10] 20 C.F.R. §§ 1002.41, 1002.44.

[11] Id. at § 1002.44(b). While no one factor is controlling, USERRA requires that the following be considered: (1) the extent of the employer's right to control the manner in which work is performed; (2) the opportunity for profit or loss that depends on the worker's individual managerial skill; (3) any investment in equipment or materials required to perform individual tasks, to include employment of helpers; (4) whether the service performed requires special skills; (5) the degree of permanence of the relationship with the worker; and (6) whether the service being performed is an integral part of the employer's business.

[12] See 38 U.S.C. § 4303(13); 20 C.F.R. §§ 1002.5(f), 1002.5(l), and 1002.5(o); 42 U.S.C. § 300hh-11(d)(3).)

[13] U.S. Equal Employment Opportunity Commission, Veterans and the Americans with Disabilities Act (ADA): A Guide for Employers, available at https://www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm.

[14] 38 U.S.C. § 4313(a)(3); 20 C.F.R. §§ 1002.225, 1002.226; Butts v. Prince William Cty. School Bd., 844 F.3d 424 (4th Cir. 2016) (finding school district employer made reasonable efforts to assist veteran become qualified for escalator position teaching fifth grade, stating "the Board implemented two action plans to attempt to resolve the deficiencies in Appellant's performance. Those plans provided Appellant mentors, meetings with specialists, and other similar resources, but Appellant was uncooperative."). See also Kirbyson v. Tesoro Refining and Marketing Co., 795 F. Supp.2d 930, 945 (N.D. Cal. 2011) (denying employer summary judgment where triable issues of fact existed regarding whether employer properly consulted with veteran employee to ascertain his precise job-related limitations and to discuss any possible accommodations).

[15] 38 U.S.C. § 4313(a)(1); 20 C.F.R. § 1002.191.

[16] 20 C.F.R. § 1002.191. Depending on the circumstances at the individual employer, the escalator position in which the employee must be re-employed could be a promotion, a demotion, a layoff, or even a termination if the employer would have otherwise terminated the position without any regard

for the military service (e.g., a business-based downsizing). See Milhauser v. Minco Prods. Inc., 701 F.3d 268, 273 (8th Cir. 2012).

[17] 20 C.F.R. §§ 1002.225, 1002.198

[18] 20 C.F.R. § 1002.198(b).

[19] See id.

[20] Id. at § 1002.198(a).

[21] Id.

[22] Id. at §1002.198(a)(2)(i)-(vii).

[23] 38 U.S.C. § 4313(a)(3); 20 C.F.R. § 1002.225.

[24] Id. at § 4313(a)(3)(A).

[25] Id. at § 4313(a)(3)(B).

[26] 20 C.F.R. § 1002.225(b).

[27] 20 C.F.R. § 1002.139(a) ("The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee ….").

[28] See 20 C.F.R. § 1002.226.

[29] 20 C.F.R. § 1002.139(b). An "undue hardship" in the USERRA context means some action that requires "significant difficulty or expense," and will be examined in light of the following: (1) the nature and cost of the action needed under USERRA and its regulations; (2) the overall financial resources of the employer's particular facility at issue, the number of employees at the facility, the effect of the action on expenses and resources, or the impact otherwise upon the operation of the employer's facility; (3) the overall financial resources of the employer as a whole, its size, number of employees, and number, type and location of its facilities; and (4) the type of operation of the employer, including composition, structure, and functions, and its geographic separateness, administrative, and fiscal relationship to the facility in question. 20 C.F.R. § 1002.5(n)(1)-(4).

[30] Mace, 897 F.3d at 928, citing Maxfield v. Cintas Corp. No. 2, 427 F.3d 544, 551 (8th Cir. 2005) (quoting Hill v. Michelin N. Am., Inc. 252 F.3d 307, 312-13 (4th Cir. 2001).