Westlaw Today
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Ten reasons employers should pay more attention to USERRA

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JANUARY 26, 2024

- The Uniformed Services Employment and Reemployment Rights Act (USERRA) differs in many respects from other employment protection and antidiscrimination statutes.
- This Insight discusses 10 key aspects of USERRA.

This year, the Uniformed Services Employment and Reemployment Rights Act (USERRA) turns 30 years old. Although this law, prohibiting employers from discriminating and retaliating against employees or applicants because of their military status or obligations, has been on the books for three decades, one would be mistaken to think USERRA has mellowed with the years.

If anything, recent history, including a 2022 Supreme Court decision finding that USERRA waives state sovereign immunity,[1] and pending high-stakes litigation regarding whether employers must provide paid short-term military leave in certain cases, shows that the efforts of employers to comply with USERRA may be more critical today than at any previous point in the law's lifespan.

In honor of its 30-year milestone, we offer this top-ten list of the reasons employers should pay more attention to USERRA and its expansive protections for service members and veterans.

1. USERRA has no statute of limitations.

Most federal employment discrimination statutes are subject to relatively short statutes of limitations. An employee intending to pursue a claim under Title VII, for instance, must act quickly by filing a charge with the U.S. Equal Opportunity Commission (EEOC) within 180 days of the offending conduct (300 days, if a state or local agency enforces a comparable antidiscrimination law) and then must file suit within 90 days of the EEOC's notice of right to sue.

USERRA has no statute of limitations and expressly prohibits courts from applying a state statutory limitations period. As such, plaintiffs can initiate a lawsuit years after the alleged discrimination, exposing employers to outsized backpay awards and the practical difficulties inherent in defending against long-past allegations, including unavailability of documents and fading memories of witnesses.

While courts have occasionally applied the equitable doctrine of laches against stale USERRA claims, laches is often difficult to establish because employers must show that the plaintiff's delay in filing suit was both inexcusable and prejudicial to the employer's defense.

2. USERRA has no requirement to exhaust administrative remedies.

The U.S. Department of Labor's (DOL) Veterans' Employment and Training Service (VETS) is authorized to investigate USERRA complaints and refer cases to the U.S. Department of Justice for litigation. Unlike Title VII and most related laws, however, USERRA does not require an aggrieved employee to go through VETS or any other gatekeeper agency before filing suit.

When implementing new employment policies or reviewing and updating old ones, employers should consider how their policies affect the rights of their military and veteran employees to ensure those policies do not run afoul of this employee-friendly statute.

Readier access to the court system allows USERRA claims to move at a faster pace than other federal discrimination claims and may encourage litigation of complaints that otherwise might have stopped at the administrative phase.

3. USERRA covers virtually all public and private employers.

In contrast to Title VII and the Americans with Disabilities Act (ADA), which generally apply to employers with 15 or more employees, USERRA covers all public and private employers, regardless of size. USERRA's definition of an employer also includes any successor-in-interest employer, even if that employer lacked notice of a potential reemployment claim at the time of the merger, acquisition, or other form of succession.

Finally, DOL's implementing regulations provide for wide-ranging joint employer liability, meaning that multiple employers (*e.g.*, the

entity that pays the employee's wages and a separate entity that has control over employment opportunities despite not paying the employee's wages) may both be liable for a single USERRA violation.

4. USERRA covers all employees who serve in the uniformed services.

USERRA covers all employees who serve or have served in the uniformed services, including those who have applied for membership, regardless of whether the service is voluntary or involuntary. Virtually all employees, including those who are part-time, temporary, seasonal, and on probationary status, fall under the statute's umbrella.

And the law touches every phase of the employment life cycle: hiring, retention, promotion, reemployment, and other benefits associated with employment. Unlike some other employment statutes such as the Fair Labor Standards Act, USERRA does not exclude executive, managerial, or professional employees.

5. USERRA must be construed in favor of its protected class and has a broad remedial scheme.

The Supreme Court broadly construes USERRA in favor of its military beneficiaries.[2] This thumb on the scale for service members and veterans can give USERRA a pro-plaintiff bent. Accordingly, when implementing new employment policies or reviewing and updating old ones, employers should consider how their policies affect the rights of their military and veteran employees to ensure those policies do not run afoul of this employee-friendly statute.

Although it is hard to predict how the law in this area will develop, USERRA appears poised to become even more protective of employee rights. Currently, in *Muldrow v. City of St. Louis*, the Supreme Court is considering whether to jettison a requirement that Title VII plaintiffs prove a "materially adverse" or "ultimate employment" action. Given that courts often rely on Title VII cases to analyze USERRA claims, the Supreme Court's anticipated decision in *Muldrow*, which many commentators expect to favor plaintiffs, could open the door to even broader liability under USERRA.

Moreover, employees have multiple avenues of recourse for addressing potential USERRA violations. In addition to the VETS complaint process, employees have a private right of action and may bring suit in any federal district where an employer maintains a place of business. The statute authorizes recovery for lost wages and benefits, liquidated damages, and the court's use of its full equity powers.

USERRA also forbids the assessment of fees or costs against any person claiming rights under the statute (so even an unsuccessful claimant will not be required to pay the employer's costs).

6. USERRA grants expansive benefits to employees during their leave.

Under USERRA, an employee is entitled to a maximum of five years of leave per employer to perform military service. The law not only requires employers to allow service members leave without regard for the employer's needs, but it also mandates that the employer provide certain benefits to the employee during their absence.

For instance, during military leave, an employee may use any vacation, annual, or similar leave with pay that the employee accrued prior to their service. Conversely, no employer can require an employee to "use or lose" their accrued leave during their service. USERRA, similar to COBRA, provides employees the option to continue coverage under their employer's health plan during their absence, with certain limitations.

Finally, while USERRA does not generally entitle employees to paid leave, if an employer offers its employees paid leave for a "comparable form of leave"[3] such as for sick leave or jury duty, then the employer must extend that benefit to employees on military leave.

7. USERRA provides far-reaching reemployment protections.

When an employee returns from military leave, they enjoy a number of benefits intended to mitigate the setbacks that come with absences from work. First, an employer owes the returning employee prompt reinstatement into the position they would have attained had they not left for military service. Thus, if it is reasonably certain the employee would have attained a promotion if not for their absence, they must be reemployed into the more senior position, even if it means displacing the position's present occupant. Relatedly, USERRA imposes duties on employers to provide training to qualify reinstated employees into the escalator position, at no cost to the employee.

Second, USERRA guarantees returning employees any "seniority benefits" (*i.e.*, those based on longevity in employment) the employee would have attained absent their military leave.

Third, depending on the length of a returning employee's service, USERRA prevents employers from discharging an employee except for "cause" within one year of reemployment.

8. USERRA may allow for easier class certification.

Because many of USERRA's policies provide common questions of law or fact required for class certification under the Federal Rules of Civil Procedure, the statute is a prime candidate for class action litigation. In recent years, for example, courts have managed USERRA class litigation regarding paid short-term leave and other benefits such as retirement contributions.

9. Other federal agencies have shown greater interest in USERRA.

In recent years, other federal agencies have shown more interest in USERRA, most notably the EEOC. In 2020, the EEOC issued three revised documents that address how the ADA and USERRA apply to veteran employees and those employing them. This heightened interest in USERRA is especially important since a growing number of agencies, including the EEOC, have entered into interagency agreements, which enable coordination, information sharing, joint investigations, training, and public outreach.

10. USERRA violations risk an employer's reputation.

In an age where institutional trust has declined, surveys indicate the military has maintained public confidence and sits atop the list of America's most respected institutions. Thus, employers that violate, or are perceived to have violated, service members' rights may suffer in the court of public opinion, with adverse effects on revenues, recruitment efforts, and business reputation.

Notes

[1] *See Torres v. Tex. Dep't of Pub. Safety*, No. 20-603, 142 S. Ct. 2455 (2022).

[2] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (explaining that the employment protections ensure that the veteran "who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job.").

[3] 20 C.F.R. §1002.150(b).

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This article was published on Westlaw Today on January 26, 2024.