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Everything You Always Wanted to Know About USERRA But Were Afraid to Ask

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ORIGIN AND HISTORY The Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted (signed into law by President Clinton) on 13 October 1994, but this law is really 63 years old, not just nine years old. USERRA was a complete rewrite, with major improvements, of the Veterans' Reemployment Rights (VRR) law, which can be traced back to August 1940, when Congress enacted legislation providing for the voluntary or involuntary recall to active duty of retired Regular Army personnel. That legislation accorded reemployment rights to those who left civilian jobs when recalled.

The very next month, September 1940, Congress enacted the Selective Training and Service Act (STSA), our nation's first peacetime draft law. World War II had already been underway in Europe for more than a year, but our nation did not get in with both feet until 7 December 1941, the date that will live in infamy (Pearl Harbor, for those of you too young to remember). The STSA included a chapter giving reemployment rights to those who were drafted.

When Congress established the right to reemployment in 1940, the "Bonus March" of 1932 was fresh in their minds. During the depth of the Great Depression, tens of thousands of unemployed World War I veterans marched on Washington and set up a tent city on the National Mall. General Douglas MacArthur, then the Army Chief of Staff, led the U.S. Army in chasing the veterans out of town. Congress was intent that those called to the colors for the next Great War, if there were to be one, would not suffer unemployment as a result of their service.

The STSA, as originally enacted in September 1940, had a one-year sunset clause. Conscription and other military preparedness measures were enormously controversial, as millions of Americans joined "Lucky Lindy" Lindbergh and his "America First" movement to "keep us out of war." All those who had been drafted would have been sent home in September 1941, just weeks prior to Pearl Harbor, but for the enactment of the Service Extension Act, on the eve of the expiration of the STSA.

The Service Extension Act passed the House of Representatives by one vote. If it had not passed, the Pearl Harbor attack would have found our country even more woefully unprepared. Perhaps you have seen posters about the important things in history that happened because of one vote. The enactment of the Service Extension Act is often listed on such posters.

The STSA accorded reemployment rights only to those who had been

drafted, but the Service Extension Act extended reemployment rights to all who had left or would leave their civilian jobs for voluntary or involuntary military service, after 8 May 1940. Although the reemployment statute was part of the Selective Service (draft) law until 1973, when it was moved to title 38 of the United States Code, this law has applied to voluntary as well as involuntary service, almost from the very beginning. Don't let anyone tell you that you do not have reemployment rights if you volunteer.

The law was amended during the 1960s to provide protection to National Guard and Reserve personnel performing training duty. In recent years, the law has most often come into play with respect to Reserve component training and mobilizations, but the law also applies to persons who serve in the Active components.

In the mid 1980s, the Department of Defense (DOD) and the Department of Labor (DOL) appointed an interagency task force to study the VRR law and propose improvements. At its second meeting, the task force decided that part of the problem with the VRR law was that it had been amended so many times that it had become confusing and cumbersome. Accordingly, two DOL attorneys, Susan M. Webman and Samuel F. Wright, drafted a complete rewrite of the VRR law, and the task force proposed that draft to the administration of President Bush, the elder.

The Office of Management and Budget (OMB) transmitted the task force draft to every conceivable Federal agency, for their comments. Many of the comments were negative, because those agencies saw the reemployment statute as a burden on employers (including Federal agencies), rather than a necessary protection for those who serve in our nation's armed forces. Many of the comments proposed amendments that would have taken away rights granted by the VRR law.

The task force work product seemed destined to gather dust on an obscure bookshelf, like so many task force reports, until August 1990, when Iraq invaded Kuwait. For the first time since the Korean War, the President ordered a large-scale call-up of the Reserve components, and the issue of job protections and reemployment rights became an important national priority. In February 1991, just as the first Gulf War was underway, the Bush Administration presented the task force draft to Congress as a presidential proposal.

During the 102nd Congress (1991-92), both the House and Senate passed differing versions of USERRA, but the differences could not be resolved before the 102nd Congress ended. Finally, at the end of the 103rd Congress, both houses passed exactly the same language, and President Clinton signed the bill into law on 13 October 1994.

ENACTMENT OF USERRA

USERRA applies to "reemployments initiated" on or after 12 December 1994, the 60th day following the date of enactment. The transition rules preserve vested rights under the prior law, which applies to anyone who completed a period of uniformed service and applied for reemployment on or before 12 December 1994. We will still be applying the VRR law well into the 21st Century, especially for pension claims. If Johnny Smith returned from the Army and sought reemployment at the XYZ Corporation on 11 December 1994, the VRR law (not USERRA) governs his claims, including a claim for pension credit that he does not raise until 2024, when he is ready to retire.

USERRA is about three times as long as the VRR law, in terms of the number of words and number of sections, but that actually makes the new law easier to understand and apply. Those who drafted USERRA (primarily Susan M. Webman and Samuel F. Wright) made a special effort to be explicit about what the employer is required to do. You can read this new law and pretty much understand what the veteran is entitled to and what the employer is required to do. To understand the VRR law, you had to read often-conflicting court decisions. Many of those court decisions have been incorporated into the text of USERRA.

Section 4301 of USERRA (38 U.S.C. 4301) sets forth the purposes that Congress had in mind when it enacted this law: to encourage service in the uniformed services, to minimize disruption by providing for the prompt reemployment of those who have served, and to prohibit discrimination against those who serve or have served. Section 4301 also sets forth "the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b).

Section 4302 makes it clear that USERRA is a floor and not a ceiling on your rights as a person who is serving or has served. USERRA does not supersede or nullify any other law, policy, agreement, practice, or other matter that gives you greater or additional rights. 38 U.S.C. 4302(a). USERRA does supersede state laws, contracts, policies, agreements, etc. that reduce, limit, or eliminate USERRA rights or that impose additional eligibility criteria on your exercise of those rights. 38 U.S.C. 4302(b). In its first case construing the VRR law, the Supreme Court stated, "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946).

The VRR law did not define any of the terms that it used, but section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law. Whenever you see a word or phrase used in USERRA, check to see if it is one of the defined terms. If so, the USERRA definition will control for USERRA purposes, even if the same word or phrase is defined in another way elsewhere in the United States Code. For example, please turn to section 4303(16) in the copy of USERRA that you have in front of you. This is the definition of "uniformed services." The definition includes the Armed Forces plus the commissioned

corps of the Public Health Service (PHS). The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is not included, so NOAA officers do not have reemployment rights under USERRA. The term "uniformed services" is also defined in 10 U.S.C. 101, but the USERRA definition controls for USERRA purposes.

If a word or phrase is not defined in USERRA, you must look elsewhere in the United States Code. For example, the term "Armed Forces" is not defined in USERRA, but it is defined in 10 U.S.C. 101, and that term includes the Army, Navy, Air Force, Marine Corps, and Coast Guard. Persons who leave civilian jobs for voluntary or involuntary service in any one of those services, or in the PHS commissioned corps, have reemployment rights under USERRA, provided they meet this law's eligibility criteria.

If a word or phrase is not defined in USERRA or elsewhere in the United States Code, the commonly understood definition applies. Courts generally refer to dictionaries when determining the meaning of words used in statutes, including USERRA. The courts also apply what are known as "rules of statutory construction." For example, the courts generally construe a statute in such a way as to give meaning to every section, sentence, and word.

If the meaning of a statute's words is ambiguous, the courts look to the legislative history in determining the intent of Congress. When an important statute is enacted, an excerpt of the legislative history is published in massive volumes called United States Code Congressional and Administrative News (USCCAN). The 1994 volume of USCCAN has 66 pages about USERRA, starting on page 2449 and running through page 2515. A condensed version of the report of the House Committee on Veterans' Affairs makes up most of those 66 pages. Congress amended USERRA in 1996, 1998, and 2000, and there is some published legislative history for each of those amendments.

Samuel F. Wright, one of the drafters of USERRA, writes a "Law Review" column for The Officer, monthly magazine of the Reserve Officers Association (ROA). You can find all the back issues on ROA's web site, and there is a link from our ESGR web site: www.esgr.com. Sam quotes at length from USERRA's legislative history in many of his "Law Review" articles.

One must also look to prior court decisions, referred to as precedents, in determining the meaning of USERRA or any statute. There have been well over a thousand published court decisions, including 16 Supreme Court decisions, since the VRR law was enacted in 1940. Pre-1994 decisions are still valid in most cases but must be read with a grain of salt. A court decision will generally quote from the language of the statute it is construing. Compare that language with the current language of USERRA. If the language has changed in a significant way, that case may no longer be considered to be a useful precedent.

Turn to section 4303(13) in your copy of the statute. That is the definition of "service in the uniformed services." Please note that the definition is very broad. It includes active duty, active duty for training, inactive duty training (drills), and initial active duty training. It also includes funeral honors duty performed by National Guard and Reserve personnel, and it even includes "a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty."

In other words, if Johnny Jones is trying to join the Army, or the Army Reserve, and if the recruiter schedules him for an examination at the Military Examination and Processing Station (MEPS) on Wednesday, Johnny has the right to time off from his civilian job for that examination, including travel time in both directions. Of course, Johnny or the recruiter must give prior notice to Johnny's civilian employer. After the completion of the examination, regardless of the outcome, Johnny has the right to reemployment in his civilian job.

USERRA's definition of "service in the uniformed services" also includes "full-time National Guard duty." That phrase is not defined in USERRA, but it is defined in 10 U.S.C. 101. It refers to what is called "Federally funded state active duty." An example would be the airport security duty performed by National Guard members in the months following the September 11 atrocities. If the orders cite one of several enumerated sections of title 32, United States Code, then the duty qualifies as "full-time National Guard duty" and the individual has reemployment rights under USERRA.

On the other hand, USERRA does not apply to "pure" state duty, ordered by the Governor without Federal involvement or reimbursement. Most states have laws protecting National Guard members performing such state active duty. This issue is discussed in detail in Law Review 45, entitled "USERRA and SSCRA Coverage for National Guard Members."

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Secretary of Labor rulemaking authority under USERRA. DOL has promised to publish the draft regulations, for notice and comment, by the end of calendar year 2003. We look forward, with great interest, to reading and applying the regulations.

The VRR law made no provision for rulemaking, but DOL published a VRR Handbook. Several courts, including the Supreme Court, accorded a "measure of weight" to the Handbook's interpretations. See Monroe v. Standard Oil Co., 452 U.S. 549, 563 n. 14 (1981); Dyer v. Hinky Dinky, Inc., 710 F.2d 1348, 1352 (8th Cir. 1983); Smith v. Industrial Employers & Distributors Association, 546 F.2d 314, 319 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977); Helton v. Mercury Freight Lines, Inc., 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

In 2002, Congress amended title 42 of the United States Code to accord

reemployment rights under USERRA to Intermittent Disaster Response Appointees (IDRAs). These are civilians who are appointed by the Secretary of Health and Human Services and who serve on Disaster Medical Assistance Teams, responding to major incidents involving weapons of mass destruction or the like. They now have rights when they engage in sanctioned training and also when (God forbid) they respond to real-world emergencies. See Law Review 100.

ELIGIBILITY CRITERIA

A person who leaves a civilian job to perform service in the uniformed services (defined above) has the right to reemployment, provided he or she meets the eligibility criteria. Let me mention the criteria, and then I will go into detail:

1. You must have left your job for the purpose of performing service in the uniformed services.
2. You must have given prior notice to your civilian employer.
3. Your cumulative period or periods of service, relating to that particular civilian employer, must not have exceeded the five-year limit.
4. You must have been released from the period of service without receiving a disqualifying discharge.
5. You must make a timely application for reemployment.

For the purpose of service

You must have left a position of employment for the purpose of performing service in the uniformed services, whether for five hours or five years, or anything in between. If you left your job for another reason and only later decided to perform service, you will not have reemployment rights under USERRA. Please see section 4312(a) of USERRA.

You must establish that you left your job for the purpose of performing uniformed service, but the existence of additional or subsidiary motives is irrelevant. It does not matter why you chose to enlist in a uniformed service or to volunteer to go on active duty. You may have chosen to enlist in the Army because you were bored with your civilian job and because you hated your supervisor's guts. None of that matters, so long as you can establish that you left for the purpose of performing service.

The concept is the same here, regardless of the projected duration of the period of service. We may be talking about a drill weekend, or we may be talking about enlisting in the Army, with a five-year active duty commitment. In either case, you are absenting yourself from your civilian job for the purpose of performing service, and you are returning to the job after you complete the period of service.

Prior notice to the civilian employer

USERRA requires you to give prior notice to your civilian employer, regardless of the category or expected duration of the period of service. Please see section 4312(a)(1) of USERRA.

The prior notice can be "written or verbal." Written notice is better, because it avoids misunderstandings and facilitates proof. Giving the notice in writing, and retaining a copy for yourself, keeps you out of the "swearing contest" trap, where you insist that you gave prior notice and the employer insists that you did not. You have the burden of proof on the eligibility criteria, including establishing that you gave prior notice.

You may give oral notice to your direct supervisor, Mr. Smith. When you come back, five years later, you may find that Mr. Smith has been dead for three years and that nobody working there even remembers you, much less that you gave prior notice. This illustrates the need for written notice.

The notice can be given either by the individual who is to perform the uniformed service or by "an appropriate officer of the uniformed service in which such service is performed." Section 4312(a)(1). The Commanding Officer of a Reserve or National Guard unit can send letters to the civilian employers of unit members, and that is a practice that we want to encourage. Law Review 84 contains a sample employer notification letter for unit Commanding Officers to use.

Prior notice to the employer is not required if such notice is "precluded by military necessity" or "otherwise impossible or unreasonable." Section 4312(b). These exceptions will be very rare, even in a mobilization scenario.

You are not required to "request a military leave of absence." It is sufficient that you give prior notice. Nonetheless, as a matter of courtesy to your employer, we suggest that you phrase your notice in terms of a request for permission. "Mr. Smith, you will recall that I have told you that I am a member of the Naval Reserve. Here is a list of my training weekends over the next 12 months. I will be away from work on these weekends. Is that ok?" If Mr. Smith says no, then you should request assistance in explaining USERRA to your employer. But let’s not make a problem if there does not have to be a problem. Phrase your notice as a request for permission.

USERRA does not require any specific period of advance notice, only that the notice must come before you absent yourself from work. Certainly, our practical advice is that you give as much advance notice as possible. A lot of problems would be avoided if Reserve component members would give their employers more notice. If you are the Commanding Officer of a unit, you should establish a training schedule, reduce it to writing, distribute a copy to each unit member, and send a letter (with the training schedule attached) to the employer of each unit member. Then, try to stick to the published schedule. If changes are necessary, remind unit members to notify their

civilian employers, or better yet send your own letter to notify the employers.

Requiring that you give prior notice does not mean that you must decide, when you leave for service, that you will definitely seek reemployment upon completion of service. You should give prior notice even if you think that it is most unlikely that you will ever seek reemployment.

We recommend that you avoid using words like "quit" or "resign" when you give your employer notice of an impending period of service, but you can have reemployment rights even if you do use such words. Please see Law Review 63, entitled "Effect of Resignation."

USERRA's notice requirement is discussed in detail in Law Reviews 5, 39, 63, 84, and 91. Even if you have been laid off or furloughed, you can have reemployment rights, if you give prior notice and otherwise meet the eligibility criteria. Please see Law Review 39, entitled "Possibility of Layoff Before or During Service."

Duration of service

You do not have the right to reemployment if your cumulative period or periods of service, with respect to the employment relationship for which you seek reemployment, exceeds five years. See 38 U.S.C. 4312(c). It is the duration of the period or periods of service, not duration of the absence from the civilian job, that controls.

For example, let us assume that you left your job at XYZ Corporation on 15 October 2003, after giving proper notice that you were leaving to go on active duty in the Army. You entered active duty on 1 November 2003 and served continuously until 31 October 2008, exactly five years later. You applied for reemployment on 15 January 2009 and returned to work on 1 February 2009. You have the right to reemployment, because your period of service is within the five-year limit. This assumes, of course, that you did not have any earlier periods of service, while employed by XYZ Corporation, that are not exempt from the five-year limit, and that you meet USERRA's other eligibility criteria.

Even while employed by the same civilian employer, not everything counts toward USERRA's five-year limit. USERRA exempts eight specific categories of service from this computation. See 38 U.S.C. 4312(c).

Service that is necessary, beyond five years, to complete your initial period of obligated service does not count toward your five-year limit. See 38 U.S.C. 4312(c)(1). For example, let us assume that you leave your job at the XYZ Corporation to enlist in the Navy's nuclear power program, which requires an initial obligated period of six years of active duty. You leave active duty, under honorable conditions, at the end of that six-year period, and you make

a timely application for reemployment. You have the right to reemployment because the additional year was necessary to complete your initial obligation.

If you expect to leave active duty before the five-year limit expires, but you are unable through no fault of your own to obtain orders releasing you, you will have the right to reemployment. See 38 U.S.C. 4312(c)(2). For example, let us assume that your five-year limit expires on 30 November 2003, and you expect to leave active duty just prior to that date. On 25 November, your commander discovers that a classified document has been compromised, and you are suspected of dereliction of duty, or worse. The commander retains you on active duty while contemplating a possible court martial. The investigation takes three months, but you are cleared of all charges of wrongdoing. The commander apologizes for having retained you for an additional three months, beyond the date when you expected to leave, and beyond the expiration of your five-year limit. You have the right to reemployment because the extension was through no fault of your own.

Reserve and National Guard training periods do not count toward your five-year limit. See 38 U.S.C. 4312(c)(3). If you are involuntarily called to active duty, or involuntarily retained on active duty, such involuntary period of service does not count toward your limit. See 38 U.S.C. 4312(c)(4)(A) and (B). If you volunteer to serve on active duty for an operational mission for which other Reserve component personnel have been involuntarily called, and if you service secretary so determines and certifies in writing, your voluntary service is exempt from the five-year limit. See 38 U.S.C. 4312(c)(4)(C). Even if nobody has been called involuntarily, your voluntary service can be exempted from your five-year limit if your service secretary determines and certifies that your service was "in support … of a critical mission or requirement." 38 U.S.C. 4312(c)(4)(D).

Release under honorable conditions

You do not have the right to reemployment if you have received a punitive or other-than-honorable discharge or if you are "dropped from the rolls" of your service. See 38 U.S.C. 4304.

Timely application for reemployment

Upon release from a period of uniformed service, there is a deadline for you to report back to work or submit your application for reemployment. The deadline depends upon the duration of period of service from which you are returning.

If the period of service was for fewer than 31 days, you must report for work at the start of the first full calendar day following completion of the period of service and the time required for safe transportation from the place of service to your residence, plus eight hours (for rest). See 38 U.S.C. 4312(e)(1)(A)(i). If your return is delayed by factors beyond your control,

like a vehicle accident on the return trip, you must report for work as soon as possible thereafter. See 38 U.S.C. 4312(e)(1)(A)(ii).

If your period of service was 31-180 days, you have 14 days to submit your application for reemployment. See 38 U.S.C. 4312(e)(1)(C). If your period of service was 181 days or more, you have 90 days to submit your application for reemployment. See 38 U.S.C. 4312(e)(1)(D). The deadline to apply for reemployment can be extended by up to two years if you are hospitalized or convalescing from a service-connected injury or illness. See 38 U.S.C. 4312(e)(2)(A).

Do not be put off by the requirement to "apply for reemployment." Applying for reemployment is not the same thing as applying for a job. No special form is required to apply for reemployment, but you can find a sample application as an attachment to Law Review 77. Your application for reemployment can be very simple: "My name is Brarry Cox. I used to work here, and I left when I was recalled to active duty [or volunteered]. Now, I am back from the Army, and I want my job back."

If your period of service was more than 30 days, the employer is permitted to demand that you provide documentation that your application for reemployment is timely, that you are not disqualified by an other-than-honorable discharge, and that you have not exceeded the five-year limit. See 38 U.S.C. 4312(f). You are only required to provide such documentation as is readily available. If the documentation is not yet available, the employer is required to reemploy you promptly, on an interim basis, while awaiting the documentation. See 38 U.S.C. 4312(f)(3)(A).

EMPLOYER AFFIRMATIVE DEFENSES

Brief, nonrecurrent employment

Under the VRR law, you were required to establish, as an eligibility criterion, that your pre-service employment was "other than temporary." Under USERRA, even persons leaving "temporary" jobs can have reemployment rights. However, the employer is not required to reemploy the returning veteran if the employer can establish that "the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant time." 38 U.S.C. 4312(d)(1)(C). The employer bears the burden of proving that the pre-service employment was brief and nonrecurrent and that there was no reasonable expectation that it would continue indefinitely or for a significant time. See 38 U.S.C. 4312(d)(2)(C). This affirmative defense is discussed in detail in Law Review 101.

Employer’s changed circumstances

Your pre-service employer is not required to reemploy you if the employer can establish that "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable." 38 U.S.C. 4312(d)(1)(A). The employer bears the burden of proof on this issue, as on the "brief and nonrecurrent" issue discussed above. See 38 U.S.C. 4312(d)(2)(A). This affirmative defense is discussed in detail in Law Review 81.

The same "impossible or unreasonable" language appeared in the VRR law, and there is a substantial body of case law (court decisions) on the meaning of this provision. It is a very narrow affirmative defense for which the employer bears a heavy burden of proof. The fact that the job has been filled does not make it "impossible or unreasonable" to reemploy you. In some cases, it is necessary for the employer to lay off another employee in order to make room for the returning veteran.

ENTITLEMENTS OF THE RETURNING VETERAN

Let us assume that you have established that you meet the eligibility criteria, and the employer did not raise or was not able to establish an affirmative defense. Accordingly, you are entitled to:

1. Prompt reinstatement
2. Seniority credit
3. Pension credit
4. Status
5. Protection against arbitrary dismissal
6. Training or retraining

Prompt reinstatement

A person who meets the eligibility criteria "shall be promptly reemployed." 38 U.S.C. 4313(a). See also 38 U.S.C. 4301(a)(2). After a drill weekend or a two-week annual training tour, you are required to report for work the next day, after completion of the period of service and safe transportation home. When you report, as required, you are entitled to immediate reinstatement.

After a period of service of 31 days or more, you are required to submit an application for reemployment. The employer is required to act upon your application in a reasonably prompt manner, generally within days, not weeks or months. On its website, the Office of Personnel Management (OPM) has stated that the Federal employee returning from military service should be placed back on the payroll within 30 days after applying for reemployment, and we think that 30 days is a good rule of thumb.

It is unlawful for the employer to make you wait for a vacancy. Your right to reemployment is not contingent on the existence of a vacancy. It may be

necessary for the employer to lay off another employee in order to make room for you when you return from service. See Goggin v. Lincoln St. Louis, 702 F.2d 698, 703-04 (8th Cir. 1983); Fitz v. Board of Education of Port Huron Area Schools, 662 F. Supp. 1011 (E.D. Mich. 1985), affirmed, 802 F.2d 457 (6th Cir. 1986); Anthony v. Basic American Foods, Inc., 600 F. Supp. 352, 357 (N.D. Cal. 1984); Green v. Oktibbeha County Hospital, 526 F. Supp. 49, 55 (N.D. Miss. 1981). If the employer unreasonably delays your reinstatement, the employer must pay you back pay, to compensate you for the harm caused by the employer's delay. See 38 U.S.C. 4323(d)(1)(B).

In these circumstances, you have a duty to mitigate damages. You must diligently seek other employment. Your earnings from the alternative employment will be compared, on a pay-period-by-pay period basis, with what you would have earned from the lawbreaking employer. See Dyer v. Hinky Dinky, Inc., 710 F.2d 1348 (8th Cir. 1983). The comparison should be for comparable hours. If you work overtime in the alternative employment, you, not the lawbreaking employer, should benefit from this extra effort. See Hembree v. Georgia Power Co., 637 F.2d 423, 429-30 (5th Cir. 1981).

The comparison should be with what you would have earned from the lawbreaking employer, not what you were earning before you left for service. If you have been serving for several years, you may be entitled to a substantially greater rate of pay than you were earning before you left for service, because of pay raises based on the rate of inflation or on seniority.

If you receive money in 2005 that you should have received in 2003, inflation has degraded the value of the money, and you have lost the opportunity to invest the money and earn interest. This is what economists call the time value of money. Accordingly, you are normally entitled to prejudgment interest on the back pay award. See Hanna v. American Motors Corp., 724 F.2d 1300, 1310-12 (7th Cir. 1984), cert. denied, 467 U.S. 1241 (1984).

Seniority credit

If you meet the eligibility criteria under USERRA, you are entitled to be treated, for seniority purposes after you return, as if you had been continuously employed during the period of your military-related absence. If you worked for the company for five years, and then you were away for five years for military service, you come back as an employee with ten years of seniority.

We call this the "escalator principle." That name comes from a 1946 Supreme Court case in which the Court wrote: "The returning veteran 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 during [his military service]." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946).

The reemployment statute does not create a system of seniority; it assumes a system of seniority. If there is no system of seniority, there is no escalator. You are still entitled to reemployment, but you cannot claim a better job based on an ascending escalator.

Sometimes, the lack of a system of seniority can be good news for the returning veteran, because the escalator can descend as well as ascend. If the employer can establish that, based upon your seniority, you would have been laid off during the time you were away for service, your "escalated reinstatement position" may be in a layoff status.

If there is no system of seniority, you are probably entitled to reemployment in an active job, even if there were layoffs while you were away. To deny you reinstatement in an active job, the employer would be required to establish via objective facts that you would have been laid off. It is not sufficient to establish that you might have been laid off. But if the company can show that it abolished the whole department where you worked, and that everybody in that department was laid off, you are not exempt from the layoff. USERRA does not protect you from bad things that would have happened anyway, even if you had not been away in service.

If there is a system of seniority, the escalator principle applies to perquisites of seniority. A two-part test determines whether a promotion or other benefit qualifies as a perquisite of seniority to which the returning veteran is entitled. First, the benefit must have been intended to be a reward for length of service, not a form of short-term compensation. For example, the Supreme Court has held that vacation days are not perquisites of seniority. See Foster v. Dravo Corp., 420 U.S. 92 (1975). You cannot say, "I have been gone for five years, and at this company we earn three weeks of vacation per year. I want to be reemployed on Monday, and then I want to take 15 weeks of paid vacation." You were not there, and you did not earn the vacation.

While vacation days are not perquisites of seniority, the rate at which you earn vacation often is a perquisite of seniority. For example, in the Federal civil service, new employees with no seniority earn four hours of annual leave per pay period, employees with 3-15 years of seniority earn six hours of annual leave per pay period, and employees with more than 15 years of seniority earn eight hours of annual leave per pay period. If you meet USERRA’s eligibility criteria, your period of military-related absence counts toward meeting the threshold for earning annual leave at the faster rate.

To qualify as a perquisite of seniority, it must be reasonably certain that you would have attained the promotion or other benefit if you had been continuously employed. You cannot claim a promotion that was a mere possibility, not a reasonable certainty, but you need not establish that it was absolutely certain that you would have received the promotion. It is always possible that you would have been denied the promotion after you showed

up for work drunk and shot the finger at the boss, but such a remote possibility does not defeat the conclusion that you are entitled to the promotion upon your reemployment.

The court will examine the actual practice, not the label in the employee handbook or other document. For example, assume that at your workplace 90% of the employees get a promotion at the two-year point of employment, and the other 10%, those who have manifestly messed up, normally leave soon after missing the promotion. Such a promotion is a perquisite of seniority that the returning veteran is entitled to claim, although the employee handbook may label it a "merit" promotion.

Pension credit

Section 4318 of USERRA (38 U.S.C. 4318) applies the escalator principle to pension entitlements. Upon reemployment, you are entitled to be treated as if you had been continuously employed for purposes of his civilian pension entitlements.

It makes a difference as to whether your pension plan is a defined benefit plan or a defined contribution plan. The "escalator" is less-than-perfect in the case of defined contribution plans, so let me explain the distinction.

In a defined benefit plan, your monthly pension check is determined by a formula—including years of company service, the average of your highest five years of company compensation, etc. In a defined contribution plan, the employer does not try to define your benefit, only the employer's contribution. In a defined contribution plan, but not a defined benefit plan, there is an account in the name of each individual employee. In a defined contribution plan, the amount of money available for your "declining years" depends on how well the investments perform, as well as how much money you and the employer put into your account.

If your employer has a defined benefit plan, you must be treated as if you had been continuously employed, for purposes of determining when you qualify for your pension as well as the monthly pension benefit. For example, assume that you work for the XYZ Corporation from August 2000 to August 2030, but you were called to active duty from October 2001 to October 2003. You met the eligibility criteria for reemployment in October 2003, and you were reemployed. You have 30 years of service (not 28 years) for purposes of the company's defined benefit plan. Your monthly check will be exactly what it would have been if you had not left for 2001-03 service.

In a defined contribution plan, the employer is required to pay into your account what it would have paid if you had been continuously employed. The employer is not required to pay into your account until you return from service and are reemployed. The employer is not required to make you whole for what those payments would have earned (interest, dividends,

appreciation, etc.) during the time that you were away from work.

Most pension plans are contributory, meaning that the employees as well as the employer contribute to funding the plan. A defined contribution plan can be contributory or non-contributory, as can a defined benefit plan. The Civil Service Retirement System, the older of the two Federal employee pension plans, is an example of a contributory defined benefit plan.

If your pension plan is contributory, you will be required to pay into the plan what you would have paid in, but for your military-related absence. You need not pay while you are away from work, and you need not make up all the missed contributions upon reemployment. You must make up the missed employee contributions "during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years." 38 U.S.C. 4318(b)(2).

Pension entitlements under USERRA are discussed in detail in Law Reviews 4, 9, 40, 74, 75, 76, and 82.

Status

If your period of service was for fewer than 91 days, the employer is required to reemploy you in the precise position that you would have attained if you had been continuously employed (usually but not always your pre-service position), assuming that the position still exists and you are qualified to perform it. See 38 U.S.C. 4313(a)(1)(A). If your period of service was 91 days or more, the employer has the option to reemploy you in "another position of like seniority, status, and pay." 38 U.S.C. 4313(a)(2)(A).

The word "status" was also used in the VRR law, and there is a substantial body of case law as to what it means. Being the supervisor rather than the supervisee is an aspect of status. See Ryan v. Rush-Presbyterian-St. Luke's Medical Center, 15 F.3d 697, 699 (7th Cir. 1994). Working during the day, rather than at night, is an aspect of status. Working in a part of the company where you have a better opportunity to be promoted, or to earn commissions, is an aspect of status.

Moreover, location or commuting area is an aspect of status. See Armstrong v. Cleaner Services, Inc., 79 LRRM 2921, 2923 (M.D. Tenn. 1972); Britton v. Department of Agriculture, 23 MSPR 170 (1984). If you worked for the Sears store in Fairfax, Virginia, offering you reemployment in Fairbanks, Alaska, is not a sufficient compliance with the law, unless the "escalator" has taken you to Alaska. Assume that, while you were away in service, Sears closed the Virginia store, and all the employees had two choices: Go to work at the new Alaska store or lose their jobs. In that case, you cannot complain that the escalator has taken you to Alaska. But if the job still exists in the Washington Metropolitan area, even if it has been filled, you are entitled to that job,

because commuting area is an aspect of status.

The concept of status is discussed in detail in Law Reviews 8 and 79.

Training or retraining

If you return to your civilian job after four or five years of military service, you may find that much has changed. Functions you formerly performed by hand are now performed with the help of a whole new generation of computers. The employer is required to make "reasonable efforts" to qualify you for the position you would have attained if you had remained continuously employed. See 38 U.S.C. 4313(a)(1)(B) and 4313(a)(2)(B). This concept is discussed in detail in Law Reviews 8 and 77.

SPECIAL SITUATIONS

Furlough or leave of absence clause

Section 4316(b)(1) of USERRA [38 U.S.C. 4316(b)(1)] provides as follows: "Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be – (A) deemed to be on furlough or leave of absence while performing such service; and (B) 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, practice, or plan in effect at the commencement of such service or established while such person performs such service."

USERRA's legislative history explains, "The Committee intends to affirm the decision in Waltermyer v. Aluminum Co. of America, 804 F.2d 821 (3rd Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid." House Report No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2466-67.

This "furlough or leave of absence clause" should be read together with section 4316(a), the escalator principle, which I have already discussed, but please recognize that there are significant differences. The escalator principle deals with seniority and perquisites of seniority. The furlough or leave of absence clause deals with benefits not determined by seniority. The escalator principle addresses your rights after you return from service. The furlough or leave of absence clause deals with benefits while you are away from work to perform uniformed service. The furlough or leave of absence clause is discussed in detail in Law Reviews 41 and 58.

Generally speaking, you do not have rights under USERRA until you complete a period of service and make a timely application for reemployment. The furlough or leave of absence clause is one of only two exceptions to this general rule. The other exception is section 4317(a), dealing with your right to continue your civilian health plan coverage while you are away from work performing service. That provision is discussed below.

Health plan coverage

I mentioned that there are two exceptions to the rule that you do not have rights under USERRA until you complete a period of service and apply for reemployment. The furlough or leave of absence clause is one exception, and section 4317(a) is the other exception. That provision gives you the right to continue your civilian health plan coverage, through your civilian job, while you are away from the job performing service in the uniformed services.

If your period of service is for fewer than 31 days, the employer is permitted to charge you only the employee share, if any, of the cost of the coverage. See 38 U.S.C. 4317(a)(2). This does not mean that you get coverage for the first month of an extended active duty period. There has been misunderstanding about this provision, so it merits reiteration.

You have coverage by the military medical system, including for your family, if you are on full-time military duty for at least 31 days. See 10 U.S.C. 1076(a)(2). You are covered from day one if your orders call for 31 days, or 179 days, or 12 months, or indefinite service.

If your orders call for a period of fewer than 31 days (e.g., a 12-day annual training tour), you are not entitled to military medical care for your family. In that case, you will want to make the election of continued coverage through your civilian job. You want to protect yourself from a gap in coverage. It is entirely possible that your child could get sick while you are on two weeks of military training. The legislative history makes clear that section 4317(a) was enacted to protect you from exactly this kind of gap.

If your period of service is for 31 days or more, and if you elect continued coverage under section 4317(a), the employer is permitted (not required) to charge you up to 102% of the entire premium, including the part that the employer normally pays in the case of active employees. Of course, the employer can always charge less, or nothing at all. During the present emergency, many employers have voluntarily undertaken to continue the civilian health plan coverage for the families of recalled employees, at no charge. At ESGR, we give awards to employers who do more than the law requires.

If your period of service is for 31 days or more, and if your civilian employer has not volunteered to continue your health plan coverage for free or at a

reduced price, you will probably not want to continue your health plan coverage. If somebody in your family gets sick, you can utilize the military medical care system.

There are circumstances where you may find it worthwhile to continue your civilian health plan coverage, despite the substantial out-of-pocket expense. For the last three years, a particular civilian physician has been treating your daughter's serious kidney condition. When she learns that you are about to go on active duty, that physician tells you that she is unwilling to participate in the TRICARE system. Maybe you are willing to pay 102% of the entire premium in order to ensure continuity of care for your daughter, but you may get "sticker-shock." What you have been paying, as the employee share, may be only 10% of the full premium.

If you elect to continue your coverage while on active duty, and pay 102% of the full premium, you have the right to continue doing that for up to 18 months. See 38 U.S.C. 4317(a)(1)(A). In some circumstances, your right to continue paying for your own coverage (102%) may run out in less than 18 months, on the day after the deadline to apply for reemployment, if you let that deadline pass. See 38 U.S.C. 4317(a)(1)(B).

For example, assume that you perform 179 days of active duty for special work (ADSW), and you consciously choose not to apply for reemployment after completing that period of service. Because your period of service was more than 30 days but less than 181 days, you have 14 days to submit your application for reemployment. See 38 U.S.C. 4312(e)(1)(C). The deadline to apply for reemployment expires on day 193, and your right to continue your coverage under section 4317(a) expires on day 194.

Those of you in the personnel administration business will recognize the 102% part and the 18-month part as resembling the so-called "COBRA" law, from "Consolidated Omnibus Budget Reconciliation Act." Under section 4980B(f)(4) of the Internal Revenue Code, a person who leaves employment (with health plan coverage) for any reason (other than gross employee misconduct) is permitted to continue health plan coverage, through the former employer, for up to 18 months. The language was borrowed from the Internal Revenue Code, and there is a substantial overlap, but the "COBRA" provision only applies to employers with more than 20 employees. As I have explained, USERRA has no threshold based on the number of employees. You only need one employee to be an employer covered by USERRA.

Even if you do not elect to continue your health plan coverage, through your civilian job, while you are away for service, you are entitled to immediate reinstatement of your health plan coverage upon reemployment. 38 U.S.C. 4317(b). There must be no waiting period and no exclusion of pre-existing conditions (except conditions which the Department of Veterans Affairs has determined to be service-connected). For more information about USERRA'S coverage of health plan coverage, see Law Reviews 10, 69, and 85.

Travel and rest time

Many Reserve component personnel travel great distances to perform inactive duty training (weekend drills). You cannot perform your military duties without getting there first, and if you drive all night to get there you will probably be so tired that you will get little out of the training, and you could well be a danger to yourself and others. We do not want you to fly aircraft, or drive vehicles, or operate on human beings without adequate sleep.

DOL has taken the position that USERRA gives you the right to sufficient time off from your civilian job, before the start of a period of training or service, to enable you to arrive at the place of service safely and fit to perform your duties. How much time will depend upon the nature of your civilian job, the nature of the military duties to be performed, the travel time, and other factors. In most cases, this will be more than just travel time. See Law Review 70.

Protection against discharge or discrimination

Upon returning from a period of service in the uniformed services, you are entitled to a special period of protection against discharge, except for cause. See 38 U.S.C. 4316(c). This special protection is intended to protect you from the bad faith or pro forma reinstatement. During the special protection period, you enjoy the kind of protection against arbitrary dismissal that union members typically enjoy under collective bargaining agreements that limit discharge to "just cause." See Carter v. United States, 407 F.2d 1238 (D.C. Cir. 1968).

If your period of service was 181 days or more, the special protection period is one year. See 38 U.S.C. 4316(c)(1). If your period of service was 31-180 days, your period of special protection is 180 days. See 38 U.S.C. 4316(c)(2). The special protection period does not start running until the date that you are properly restored to your civilian job.

There is no special protection period if your period of service was fewer than 31 days, but section 4311(a) applies at all times. That subsection provides: "A person who is a member of, applies to be a member of, performs, has or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

This provision is about as broad as you can imagine, in terms of who is protected and what they are protected from. It prohibits discrimination in hiring as well as discrimination against those who have already been hired.

Under 38 U.S.C. 4311(c)(1), you are only required to prove that one of the protected factors (like your membership in a uniformed service) was a motivating factor in the employer's decision. You need not prove that the protected factor was the reason that you were fired—it is sufficient to prove that the protected factor was a reason that you were fired. If you establish that, the firing was unlawful, unless the employer can prove (not just say) that you would have been fired, for a lawful reason unrelated to your military service.

With regard to USERRA's protection against discrimination, I invite your attention to Law Reviews 11, 35, 36, 61, and 64. With regard to the special protection period, I invite your attention to Law Reviews 8, 29, 56, and 77.

Disabled veterans

Finally, let me discuss USERRA's provisions for disabled veterans. We do not like to think about this, but military service is sometimes hazardous even in peacetime. In Operation Iraqi Freedom, several hundred Reserve and National Guard personnel have been wounded in action, and probably a larger number have suffered serious injuries that were not the direct result of enemy action but were nonetheless in the line of duty. Of the 300,000 Reserve component personnel called to active duty since September 2001, a significant number have returned with fewer arms, legs, and eyes than they had when called to the colors.

Under 38 U.S.C. 4313(a)(3)(A), the employer is required to make "reasonable efforts … to accommodate the disability" of an employee who left for service and is returning with a disability incurred in or aggravated during a period of uniformed service. This concept and the language were borrowed from the Americans With Disabilities Act (ADA), which requires employers to make such accommodations for disabled persons generally, including disabled veterans. There is a substantial but not complete overlap between the two laws. Remember that USERRA applies to very small employers that are exempt from the ADA and other Federal labor-management laws.

Of course, not every service-connected disability can be accommodated. A blinded veteran cannot be a commercial airline pilot. If the returning veteran's disability cannot reasonably be accommodated, he or she is entitled to reemployment "in a position which is the nearest approximation to [the position he or she would otherwise have] … in terms of seniority, status, and pay consistent with the circumstances of such person's case." The blinded airline pilot cannot return to the cockpit, but there must be a job somewhere in the airline that he can perform.

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.