

## LAW REVIEW 1263

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### Bill Introduced To Narrow One of USERRA's Affirmative Defenses

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1.3.1.4—USERRA-Affirmative Defenses

1.3.2.9—Accommodations for Disabled Veterans

1.8—Relationship between USERRA and other Laws/Policies

*(d)*

*(1) An employer is not required to reemploy a person under this chapter if—*

*(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;*

*(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section [4313](#), such employment would impose an undue hardship on the employer; or*

*(C) 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 period.*

*(2) In any proceeding involving an issue of whether—*

*(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,*

*(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section [4313](#) would impose an undue hardship on the employer, or*

*(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,*

*the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.*

Title 38, United States Code, section 4312(d) [38 U.S.C. 4312(d)].

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), an individual who left a civilian position of employment (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services, who gave the employer prior

oral or written notice, who has not exceeded the cumulative five-year limit on the duration of the periods of service related to that employer relationship, who was released from the period of service without a disqualifying bad discharge, and who made a timely application for reemployment after release from service is entitled to reemployment as a matter of federal law. Under section 4312(d) of USERRA, there are three affirmative defenses. If the employer raises and proves the applicability of the affirmative defense, the individual is not entitled to reemployment, although he or she meets the five eligibility criteria.

The second affirmative defense is as follows:

*"in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer."* 38 U.S.C. 4312(d)(1)(B).

It is important to note that the "undue hardship" defense only applies to a small minority of reemployment claims. In all other reemployment claims, this affirmative defense is simply not available.

Subsection (a)(3) of section 4313 applies to "the case of a person who has a disability incurred in, or aggravated during, such [uniformed] service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service."

Subsection (b)(2)(B) applies to the returning disabled veteran who (because of the service-connected disability) is not and cannot become qualified for the position that he or she would have attained but for service and who is reemployed in another position for which he or she is or can become qualified.

Subsection (a)(4) applies to the person who, for reasons other than service-connected disability is not qualified for the position that the person would have attained if continuously employed or for the position that the person left for service, and who cannot become qualified with reasonable employer efforts.

These three situations (taken together) account for a small minority of reemployment cases. In all other cases, the "undue hardship" affirmative defense does not apply.

On February 1, 2012, Representative John Garamendi (California) and Representative Bobby Rush (Illinois) introduced H.R. 3860, called the "Help Veterans Return to Work Act." If enacted, this bill would amend section 4312(d)(1)(B) of USERRA to read as follows:

*"in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer if such an employer is a small business concern."*

The italicized language is the language that H.R. 3860 would add. If this amendment were enacted, only "small business concerns" would be able to take advantage of this affirmative defense.

Section 4303 of USERRA defines 16 terms that are used in this statute. H.R. 3860 would add a 17<sup>th</sup> defined term, by adding a subsection (17) to section 4303, as follows: "The term 'small business concern' has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632)."

Section 632 of title 15 of the United States Code defines the term "small business concern." The definition is complicated and depends in part on determinations made by the Administrator of the Small Business Administration (SBA). The general idea is that only qualified small businesses, recognized as such by the SBA, would have access to this USERRA affirmative defense, which is already very limited in its application. I support this proposed USERRA amendment.