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Proposals to Improve USERRA

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I invite the readers' attention to an Associated Press article published in the *Washington Post* on March 18, 2011, on page B4. The article is titled "2010 jobless rate for young war veterans at 20.9%." The article (by Kimberly Hefling) reports that the unemployment rate for Iraq and Afghanistan veterans in the 18-24 age group was 20.9% in 2010, while the unemployment rate for non-veterans in the same age group was only 17.3%. Ms. Hefling attributes this elevated unemployment rate to "concerns that Guard and Reserve members will be gone for long stretches and that veterans might have mental health issues or lack civilian work skills."

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

[2] Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

My concern is that the elevated unemployment rate among young veterans indicates systematic employer flouting of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940, when Congress enacted it as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men (including my late father) for World War II.

In 1941, as part of the Service Extension Act, Congress expanded the reemployment provision to include voluntary enlistees as well as draftees. Today, of course, all military service is essentially voluntary, since our government has not drafted anyone since 1973.

Under USERRA, a person who leaves a civilian job for voluntary or involuntary service, in the Regular military or the National Guard or Reserve, is entitled to reemployment in the civilian job upon release from service, provided he or she meets the five USERRA conditions.[3] Moreover, section 4311 of USERRA makes it unlawful for an employer to deny a person initial employment, retention in employment, or a promotion or benefit of employment based on membership in a uniformed service, performance of service, or application or obligation to perform service.

Almost all veterans under the age of 26 are members of the National Guard or Reserve, at least in the Individual Ready Reserve (IRR). The standard enlistment contract for all service branches establishes an eight-year obligation. Let us say that Joe Smith joined the Army (with parental permission) at age 17.5 in June 2007. He reported to boot camp in August 2009 and remained on active duty for four years, until August 2013. After leaving active duty, Smith chooses not to affiliate with the National Guard or Reserve. Nonetheless, Smith is a member of the IRR until June 2017, eight years after his enlistment.

Prior to the terrorist attacks of September 11, 2011, IRR members did not need to worry too much about being called back to active duty, since the chance of call-back was largely theoretical. That chance is not theoretical now. Tens of thousands of IRR members have been called to the colors in recent years, especially in the Army and the Marine Corps. Employers are well aware of these IRR call-ups. Employers believe that young veterans are subject to call-up, even if they have not actively affiliated with Guard or Reserve units.

[3] The person must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA. The person must have given his or her civilian employer prior oral or written notice. The person's cumulative period or periods of uniformed service, related to the employer relationship for which the person seeks reemployment, must not have exceeded five years. There are nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 201 for a definitive summary of the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment. Please see Law Review 1281 for a detailed discussion of USERRA's eligibility criteria.

If an employer fires or refuses to hire a veteran because of the employer's perception (accurate or otherwise) that the veteran is likely to be called to active duty or because of the employer's stereotypical perceptions (accurate or not) about "mental health issues" among recently separated veterans, the employer has violated 38 U.S.C. 4311(a). Even if the employer may have had other, lawful reasons for the firing or the refusal to hire, the employer's decision was unlawful if the individual's service or obligation to perform service was *a motivating factor* (not necessarily the only reason) in the employer's decision.

Improving USERRA and its enforcement mechanism will have a most beneficial effect on the employment prospects of recently separated young veterans and National Guard and Reserve members of all ages. Here are our proposals to improve USERRA. You will find our specific suggestions for statutory language to be added or repealed, a brief explanation of the rationale, and a reference to published Reserve Officers Association (ROA) "Law Reviews" with more information about each proposal. We start with the procedural proposals to improve USERRA's enforcement mechanism, since we believe these proposals to be the most important.

A. Improve USERRA's enforcement mechanism

1. Make unenforceable agreements to submit future USERRA disputes to binding arbitration.

Existing law

"This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of such right or the receipt of any such benefit." 38 U.S.C. 4302(b).

Despite section 4302(b), both the 5th Circuit and the 6th Circuit have held that USERRA does not override employer-employee agreements that purport to bind employees to submit future disputes about USERRA rights to binding arbitration, in lieu of filing suit or filing a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). *See Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672 (5th Cir. 2006) and *Landis v. Pinnacle Eye Care LLC,* 537 F.3d 559 (6th Cir. 2008).

Proposed change

We propose to add a new section 4328 to USERRA, as follows:

`(a) Protection of Employee Rights- Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under this chapter shall not be enforceable.
`(b) Exceptions-
`(1) WAIVER OR AGREEMENT AFTER DISPUTE ARISES- Subsection (a) shall not apply with respect to any dispute if, after such dispute arises, the parties involved knowingly and voluntarily agree to submit such dispute to arbitration.
`(2) COLLECTIVE BARGAINING AGREEMENTS- Subsection (a) shall not preclude the enforcement of any of the rights or terms of a valid collective bargaining agreement.
`(c) Validity and Enforcement- Any issue as to whether this section applies to an arbitration clause shall be determined by Federal law. Except as otherwise provided in chapter 1 of title 9, the validity or enforceability of an agreement to arbitrate referred to in subsection (a) or (b)(1) shall be determined by a court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the agreement to arbitrate specifically or in conjunction with other terms of the agreement.
`(d) Application- This section shall apply with respect to all contracts and agreements between an employer and an employee in force before, on, or after the date of the enactment of this section.'.
(b) Clerical Amendment- The table of sections for such chapter is amended by inserting after the item relating to section 4327 the following new item:
`4328. Unenforceability of agreements to arbitrate disputes.'.
(c) Application- The provisions of section 4328 of title 38, United States Code, as added by subsection (a), shall apply to--
(1) any failure to comply with a provision of or any violation of chapter 43 of title 38, United States Code, that occurs before, on, or after the date of the enactment of this Act; and
(2) to all actions or complaints filed under such chapter 43 that are pending on or after the date of the enactment of this Act.

Note: This language comes directly from section 3 of H.R. 7178 in the 110th Congress. That bill was introduced by Representative Artur Davis of Alabama on September 27, 2008. In H.R. 7178, this language was proposed to be section 4327 of USERRA. I have changed that to section 4328, because Congress has since enacted a new section 4327.

Rationale for Change

Employers can make a mockery of USERRA by demanding that individuals agree to binding arbitration as a condition of initial employment or continued employment. This change is necessary to ensure effective enforcement of USERRA.

References

Please see Law Reviews 149, 149 Update, 0619, and 0639.

2. Require states to waive 11th Amendment immunity to suit in federal court, under USERRA, as a condition for the receipt of federal assistance.

Existing law

"(b) Jurisdiction-(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action. (2) In the case of an action against a State by a person, the action may proceed in a State court of competent jurisdiction in accordance with the laws of the State. (3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action." 38 U.S.C. 4323(b).

"(i) Definition—In this section, the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(i).

Note: As originally enacted in 1994, USERRA authorized an individual to sue a State in federal court, for alleged USERRA violations. The 7th Circuit declared this provision unconstitutional under the 11th Amendment of the United States Constitution. *See Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998). Later in 1998, Congress amended section 4323 into its present form, in response to *Velasquez.*

Proposed change

(a) In General- Section 4323 of title 38, United States Code, is amended--

(1) in subsection (b) by striking paragraph (2) and inserting the following new paragraph:

`(2) In the case of an action against a State (as an employer) by a person, the action may be brought in the appropriate district court of the United States or State court of competent jurisdiction.';

(2) by redesignating subsection (j) as subsection (k); and

(3) by inserting after subsection (i) the following new subsection:

`(j) Waiver of State Sovereign Immunity- (1) A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by--

`(A) a person who is or was an employee in that program or activity for the rights or benefits authorized the person by this chapter;

`(B) a person applying to be such an employee in that program or activity for the rights or benefits authorized the person by this chapter; or

`(C) a person seeking reemployment as an employee in that program or activity for the rights or benefits authorized the person by this chapter.

`(2) In this subsection, the term `program or activity' has the meaning given that term in section 309 of the Age Discrimination Act of 1975 (42 U.S.C. 6107).'.

(b) Application- The amendments made by subsection (a) shall apply to--

(1) any failure to comply with a provision of or any violation of chapter 43 of title 38, United States Code, that occurs before, on, or after the date of the enactment of this Act; and

(2) to all actions or complaints filed under such chapter 43 that are commenced after the date of the enactment of this Act.

Note: This language comes directly from section 2 of H.R. 7178 (110th Congress).

Rationale for change

Employees, former employees, and prospective employees of a State should have the same USERRA rights as employees of local governments and private employers. Approximately 10 percent of serving Reserve Component (RC) members have civilian jobs for state governments.[4] This should include the right to prosecute their lawsuits in federal court, in their own names and with their own counsel. States that receive federal financial assistance (and they all receive such assistance) should not be permitted to flout USERRA and hide behind the 11th Amendment, while continuing to receive such assistance.

References

Please see Law Reviews 89, 89-Clarification, 0848, 0912, 0912-Update, 0918, 0930, 0931, 0936, 1011, 1015, 1029, 1037, 1051, and 1119.

3. Provide for court to use equity powers to enjoin threatened or imminent USERRA violations.

Existing law

(e) Equity Powers.— The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

38 U.S.C. 4323(e).

[4] Dr. Susan M. Gates, "Too Much To Ask?", *The Officer,* November-December 2013.

Proposed change

Rewrite section 4323(e) to read as follows:

"If the court finds that a violation of this chapter is threatened or is imminent, the court shall use its full equity powers to enjoin the violation. If the court finds that the plaintiff has a likelihood of success on the merits in proving a violation, the court shall order the employer to come into compliance with this chapter and to refrain from violating this chapter. Congress finds that the public interest requires that violations be enjoined or be promptly corrected. The possibility of collecting back pay later, at the conclusion of the litigation, shall not be a valid reason for denying preliminary injunctive relief."

Rationale for change

Injunctions to prevent firings or to require employers to reemploy promptly are not normally available under current law. The elements for preliminary injunctive relief are a likelihood of success on the merits (when the case finally goes to trial) and *irreparable* injury, if preliminary injunctive relief is denied. The argument goes that a firing is not an *irreparable* injury. If the court eventually finds that the firing was unlawful, the court can repair the injury by ordering the employer to reinstate the unlawfully fired person and to pay back pay.

USERRA was enacted not only to ensure fairness for the individual service member or veteran but also to *provide for the national defense.* If the services are to be able to recruit and retain personnel, the recruits and potential recruits must be given reasonable assurance that their USERRA rights will be respected and enforced. Telling them that they may eventually collect back pay is not a sufficient reassurance.

References

Please see Law Reviews 200, 200-Update, 0754, 0847, and 1049.

4. Improve upon USERRA's provision for liquidated damages for willful violations.

Existing law

"In any action under this section, the court may award relief as follows: (A) The court may require the employer to comply with the provisions of this chapter. (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter. (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful."

38 U.S.C. 4323(d)(1).

Proposed change

> `(d) Remedies- (1) A State or private employer who violates the provisions of this chapter shall be liable to any person affected--
>
> `(A) for damages in the amount of--
>
> `(i) any wages, salary, benefits, or other compensation denied or lost by such person by reason of the violation; and
>
> `(ii) any actual monetary losses sustained by the person as a result of the violation; and
>
> (iii) reasonable compensation (as determined by the jury) for noneconomic damages, such as damages caused by harassment or intentional infliction of emotional distress.
>
> `(B) the interest on the amount described in subparagraph (A) calculated at the prevailing interest rates over the period of time for which the damages are due; and
>
> `(C) an additional amount as liquidated damages equal to the sum of the amount described in subparagraph (A) and the interest described in subparagraph (B), or $50,000, whichever is greater except that, if the employer proves to the satisfaction of the court that the act or omission giving rise to the person's action was in good faith and that the employer had reasonable grounds for believing the act or omission was not a violation of the provisions of this chapter, the court may award, in its discretion, no liquidated damages or award any amount of liquidated damages not to exceed 100 percent of the compensation or damages awarded under subparagraph (A) and the interest described in subparagraph (B).
>
> `(2) In any action under this section, the court may require the employer to comply with the provisions of this chapter.'.

Note: This language comes from section 4 of H.R. 7178 (110th Congress), but I have changed some of the language.

Rationale for change

Under current law, if it is established that an employer (State, local, or private sector) has *willfully* violated USERRA, the court can award liquidated damages in the amount of the actual damages, thus effectively doubling the damages. In some cases, the actual damages may be very small, if the fired employee or the former employee unlawfully denied reemployment has quickly found another job, with another employer, paying just as much or more.

In order to promote USERRA compliance, an employer found to have violated USERRA willfully should be required to pay a substantial penalty, even if the plaintiff's diligence in quickly finding other employment has limited the damages to a small amount. Under this proposal, the amount of the liquidated damages would be *the greater of* the amount of the actual damages or $50,000.

For example, let us assume that Joe Smith works for Grapevine County as a deputy sheriff. After giving proper notice to the Sheriff, Smith leaves his job for voluntary or involuntary service in the uniformed services. Smith serves on active duty and is released, without having exceeded the five-year limit and without having received a disqualifying bad discharge from the military. After release from service, Smith makes a timely application for reemployment with the Sheriff.

Sheriff Nathan Bedford Forrest says, "I don't care what federal law says. I am the Sheriff of this county, and federal law does not apply to me. You can't work here and play soldier at the same time. No, I will not reemploy you." After just one week of unemployment, Smith finds a job as a deputy sheriff in the neighboring county, and that job pays a little more than the Grapevine County job. Smith's damages, for one week of unemployment, are $600.

Under current law, Smith can collect $600 in actual damages and $600 in liquidated damages. Under our proposal, Smith could collect $600 in actual damages and $50,000 in liquidated damages.

5. Provide for the Merit Systems Protection Board (MSPB) to require federal agencies to pay liquidated damages for willful violations.

Existing law

"If the [Merit Systems Protection] Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance."

38 U.S.C. 4324(c)(2).

Proposed change

Add to section 4324(c)(2):

"If the Board determines that such person has suffered noneconomic damages by reason of a violation of this chapter by such agency or Office, the Board shall order the agency or Office to

pay those damages, in an amount the Board shall find reasonable. If the Board determines that the agency or Office has violated this chapter willfully, the Board shall order the agency or Office to pay liquidated damages in an amount equal to the greater of the amount of the actual damages (including noneconomic damages) or $50,000."

Rationale for change

Federal employees, former federal employees, and prospective federal employees who were unlawfully denied hiring should have the same rights and remedies as are available against a private employer. Indeed, they should receive greater rights, because USERRA's very first section expresses 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). Under current law, there is no provision for requiring a federal agency to pay liquidated damages for willful violations. This proposal would close that loophole.

6. **Provide for awarding nonpecuniary compensatory damages and punitive damages, as well as pecuniary compensatory damages, in USERRA cases.**

Existing law

Under current section 4323(d)(1)(B) of USERRA,[5] only *pecuniary* damages can be awarded to the successful USERRA plaintiff.

Proposed change and rationale

We propose that Congress amend section 4323 to provide for the awarding on nonpecuniary compensatory damages and punitive damages against employers that violate USERRA willfully.

Reference

Please see Law Review 15088 (October 2015).

7. **Make the award of attorney fees to the prevailing USERRA plaintiff mandatory rather than discretionary—federal sector.**

Existing law

"If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board *may, in its discretion,*

[5] 38 U.S.C. 4323(d)(1)(B).

award such person reasonable attorney fees, expert witness fees, and other litigation expenses."

38 U.S.C. 4324(c)(4) (emphasis supplied).

Proposed change

Delete "may, in its discretion" and substitute "shall."

Rationale for change

Abraham Lincoln famously said, "A man who represents himself has a fool for a client." As the law has become more complex since Lincoln's day, those words are even truer today. USERRA claimants need attorneys to represent them in securing their rights, and attorneys cannot be expected to do this work solely as charity projects. The attorney fee provision was included to give attorneys an incentive to undertake these cases, on behalf of USERRA claimants. The value of the incentive is considerably lessened if there is no assurance that the MSPB will award attorney fees, even if the claimant prevails with the attorney's assistance. It is necessary to make the award of attorney fees mandatory rather than discretionary, in order to provide a meaningful incentive to attorneys to undertake these cases.

8. **In federal sector USERRA cases, amend section 4324 to provide for the awarding of attorney fees for the successful representation of USERRA plaintiffs in the United States Court of Appeals for the Federal Circuit, as well as the MSPB.**

Existing law

USERRA cases involving federal executive agencies as employers are adjudicated by the MSPB, rather than federal district court. The aggrieved veteran or service member can appeal an unfavorable MSPB decision to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court here in our nation's capital. Under section 4324(c)(4) of USERRA,[6] the MSPB is authorized to award attorney's fees to a successful USERRA plaintiff in the MSPB, if the person proceeded with private counsel and prevailed.

In a recent case, the Federal Circuit held that attorney fees cannot be awarded, by the MSPB or the Federal Circuit itself, for the portion of the representation that occurred in the Federal Circuit, rather than the MSPB.[7]

Proposed change

[6] 38 U.S.C. 4324(c)(4).
[7] *See Erickson v. United States Postal Service,* 759 F.3d 1341 (Fed. Cir. 2014), *cert. denied,* 135 S. Ct. 2919 (2015).

Congress should amend section 4324(c)(4) to provide for the awarding of attorney fees in the Federal Circuit, as well as the MSPB.

Rationale

Federal sector USERRA plaintiffs need effective legal representation in the Federal sector, as well as the MSPB. It will be difficult for them to obtain that representation if lawyers must be told that there is no prospect for collecting attorney fees for that portion of the litigation that occurs in the Federal Circuit.

Reference

Law Review 14090 (December 2014).

9. Make the award of attorney fees mandatory rather than discretionary—nonfederal sector.

Existing law

"In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court *may* award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses."

38 U.S.C. 4323(h)(2) (emphasis supplied). Note: This provision applies to actions in federal court against state and local governments and private employers.

Proposed change

Delete "may" and substitute "shall."

Rationale for change

Just as federal sector USERRA claimants need attorneys to represent them, so do USERRA claimants in the private sector and with respect to state and local governments. Making the award of attorney fees mandatory rather than discretionary is necessary to give attorneys a sufficient incentive to undertake these cases.

10. Make federal intelligence agencies, as employers, subject to USERRA and to the USERRA enforcement mechanism, just like other federal agencies.

Existing law

(a) The head of each agency referred to in section 2302 (a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.
(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.
(c)
(1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.
(2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.
(3) A determination pursuant to this subsection shall not be subject to judicial review.
(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.
(d)
(1) Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.
(2) This section may not be construed—
(A) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, alternative employment in the Federal Government under this chapter, or information relating to the rights and obligations of employee and Federal agencies under this chapter; or
(B) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.
(e) The Director of the Office of Personnel Management shall ensure the offer of employment to a person in a position in a Federal executive agency on the basis described in subsection (b) if—

(1) the person was an employee of an agency referred to in section 2302 (a)(2)(C)(ii) of title 5 at the time the person entered the service from which the person seeks reemployment under this section;
(2) the appropriate officer of the agency determines under subsection (c) that reemployment of the person by the agency is impossible or unreasonable; and
(3) the person submits an application to the Director for an offer of employment under this subsection.

38 U.S.C. 4315.

(a) This section applies to any person who alleges that—
(1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or
(2) the failure of such agency to reemploy the person under such section was otherwise wrongful.
(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.
(c) In prescribing procedures for the investigation and resolution of allegations under subsection (b), the head of an agency shall ensure, to the maximum extent practicable, that the procedures are similar to the procedures for investigating and resolving complaints utilized by the Secretary under section 4322 (d).
(d) This section may not be construed—
(1) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter or information relating to the rights and obligations of employees and Federal agencies under this chapter; or
(2) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

38 U.S.C. 4325.

Proposed change

Repeal section 4315 and section 4325.

Rationale for change

In a July 1991 meeting at the New Executive Office Building, the intelligence agencies asked for and were granted an exemption from the USERRA enforcement mechanism, through the Merit Systems Protection Board (MSPB), but not from USERRA itself. The agencies promised to establish their own internal mechanisms for enforcement of USERRA rights within such agencies, and sections 4315 and 4325 require the agencies to establish these mechanisms. The agencies have failed to establish these mechanisms and have flouted USERRA. It is necessary to repeal sections 4315 and 4325 in order to give intelligence agency employees, former employees, and prospective employees effective USERRA rights.

Reference

Law Review 0852.

11. Establish a consequence for employer failure to post required USERRA notices.

Existing law

"Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees."

38 U.S.C. 4334(a).

Proposed change

Add the following to the end of section 4334(a): "If it is established, in a proceeding under section 4323 or 4324 of this chapter, that an employer has violated the requirements of this chapter, and if it is also established that the employer had failed to comply with the notice requirements of this section, during the time relevant to the violation, the failure to give the required notice shall constitute *prima facie* evidence that the underlying violation was willful."

Rationale for change

A requirement without a penalty for violating the requirement is essentially meaningless. This proposed change would establish a consequence for employer flouting of the notice requirement of section 4334.

12. **Amend the list of Prohibited Personnel Practices to make specific reference to USERRA.**

Existing law

Under section 2302 of title 5 of the United States Code, there are 12 enumerated "Prohibited Personnel Practices" or PPPs. A federal employee can be disciplined by the MSPB, up to and including removal from federal service, for committing a PPP. Number 11 on the PPP list is as follows: "take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement." 5 U.S.C. 2302(b)(11).

Proposed change

We propose to add "or the Uniformed Services Employment and Reemployment Rights Act" to the end of this subsection.

Rationale for change

To promote USERRA compliance within the Federal Government, federal supervisors and personnel officials who willfully violate USERRA must be held personally accountable and must pay a price, from their own pockets, for willfully violating USERRA.

B. Improve the substantive provisions of USERRA.

1. Protect the rights of the service member or veteran with respect to performance evaluations for the period when the individual was away from work for uniformed service.

Existing law

Section 4313 of USERRA provides that the individual who returns from uniformed service (whether for five hours or five years) and who meets the USERRA eligibility criteria must be reemployed in the position of employment that the person would have attained if the person had been continuously employed (usually but not always the position that the person left) or alternatively in another position, for which the person is qualified, that provides like seniority, status, and pay. Neither section 4313 nor any other part of USERRA makes any explicit provision for the individual's imputed job performance in the civilian job for the period of time when the individual was away from work for uniformed service.

Proposed addition

Add a new section 4313(c), as follows:

"*Service, efficiency, and/or performance ratings.* An employee who is absent on military duty shall be credited with the average of the efficiency or performance ratings/evaluations which he received for the three years immediately prior to his absence on military duty but such

rating shall be not less than a passing grade for the period of such absence, nor shall it be less than the rating which he received for the period immediately prior to his absence on military duty. In computing seniority and service requirements for promotion eligibility or any other benefit of employment, such period of military duty shall be counted as civilian service."

Note: This language comes from Section 243(8) of the New York Military Law.

Rationale for change

Employees who are away from work for uniformed service should not suffer in their career progression because of their service. This proposed addition would make explicit what we believe is already implicit.

An employee's evaluation for a period of time, like a year, is based on an expectation that is believed to be reasonable for the entire period. If the employee is away from work for uniformed service, or for travel to and from uniformed service, for part of the evaluation period, the employer must adjust the expectation upon which the performance evaluation is based.

2. **Amend USERRA's definition of "service in the uniformed services" to include time required to be away from civilian employment for medical treatment necessitated by military service.**

Existing law

Under USERRA, a person who leaves a civilian job to perform "service in the uniformed services" and who meets the USERRA eligibility criteria is entitled to reemployment in the pre-service civilian job, after release from the period of service. USERRA defines "service in the uniformed services" as follows: "The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, 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 for any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32." 38 U.S.C. 4303(13).

Proposed change

After "for any such duty" add: "a period for which a person is absent from a position of employment for the purpose of medical or dental treatment for a condition, illness, or injury sustained or aggravated during a period of service in the uniformed services."

Rationale for change

Here is the scenario, which has recurred hundreds of times. Joe Smith left his job at XYZ Corporation when mobilized. He deployed to Afghanistan and was wounded. He has largely but not fully recovered from his wounds. He has been released from active duty and has returned to work at XYZ. Twice per month, he needs to travel to a military or Department of Veterans Affairs treatment facility for follow-up care. Appointments are available only on regular workdays, not on weekends.

Smith has exhausted his sick leave entitlement at XYZ. He does not have rights under the Family Medical Leave Act (FMLA), because XYZ is too small or because Smith has not worked for the company long enough. Does Smith have the right to time off *without pay* from his XYZ job for these medical appointments?

Under current law, the answer is no. These medical appointments, although necessitated by wounds sustained in the line of duty, do not fall within the USERRA definition of "service in the uniformed services." Our proposal would broaden the definition to cover this kind of situation.

Reference

Law Review 168.

3. Eliminate the word "noncareer" from the first statutory purpose.

Current law

"The purposes of this chapter are—(1) to encourage *noncareer* service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from such service." 38 U.S.C. 4301(a)(1) (emphasis supplied).

Proposed change

We propose that Congress amend section 4301(a)(1) by deleting the word "noncareer."

Rationale for change

The word "noncareer" was intended to be a shorthand for the five-year limit on the duration of the period or periods of uniformed service, relating to a specific employer relationship, but some courts have treated this word as an additional limitation on the duration of permissible absences from civilian work for uniformed service. *See, e.g., Woodman v. Office of Personnel*

Management, 258 F.3d 1372 (Fed. Cir. 2001). We propose to eliminate the word "noncareer" to make clear that there is no such additional limitation.

Reference

Law Review 1033.

4. Amend section 4312(c) of USERRA—add two title 10 sections to the list of sections which are excluded from the computation of USERRA's five-year limit.

Existing law

To have the right to reemployment after a period of uniformed service, the returning veteran or service member must meet five eligibility conditions. One condition is that the person's cumulative period or periods of uniformed service not have exceeded five years of service related to the employer relationship for which the person seeks reemployment. Under section 4312(c), there are nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit.

Under section 4312(c)(4)(A),[8] *involuntary* active duty under sections 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 of the United States Code is excluded from the computation of the individual's five-year limit. These are the title 10 sections that provide for *involuntary* call-up authority.

The problem

In 2011, Congress amended title 10 by adding two new sections that provide for *involuntary* call-up authority for RC members. These are sections 12304a and 12304b of title 10.

Proposed change

Congress should amend section 4312(c) to add sections 12304a and 12304b to the list of title 10 sections that are excluded from the computation of the individual's five-year limit.

Rationale

There are thousands of RC members who have used up most but not all of their five-year limits. Under no circumstances should an individual go over the five-year limit, and thereby lose his or her civilian job, because of an *involuntary* call to active duty.

[8] 38 U.S.C. 4312(c)(4)(A).

Reference

Law Review 14057 and Law Review 14058 (April 2014).

Note

When enacted, the National Defense Authorization Act for Fiscal Year 2016 will probably have a section that makes this necessary amendment.

UPDATE—JANUARY 2017

The final proposal in this article has been enacted. Involuntary active duty under section 12304a or 12304b of title 10 of the United States Code no longer counts in computing the exhaustion of an individual's five-year limit. Please see Law Review 15108 I(November 2015).