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USERRA Rights: Veterans Entitled To More Than â€œThank Youâ€•

One of the rights granted by the Uniformed Services Employment and Reemployment Right Act (USERRA) to veterans who leave their civilian jobs to serve in the military is the right to be reemployed upon the conclusion of military service.

Unlike discrimination, the right to reemployment is a “no-fault” inquiry, meaning that the reason the employer fails to accord the veteran his/her statutory reemployment rights is irrelevant; all that matters is that those reemployment rights were not honored. There is a slight distinction between the reemployment rights of service members whose period of service was 90 days or less and those whose period of service was more than 90 days. This article will discuss the issue in the latter context, since that is the more common situation these days and also presents the most complex scenarios.

An employee who leaves his job for military service and returns to work more than 90 days later is typically entitled, subject to some procedural prerequisites, not merely to get his/her old job back but rather to get the job s/he would have had if employment had not been interrupted by military service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform. This is called the escalator principle and it is the linchpin of veterans' reemployment rights. The image is of a service member standing on a step of a “job escalator.” S/he steps off that escalator when s/he goes into military service. The job escalator does not stop when the service member gets off. It continues moving up. When the service member returns, s/he does not get back on the escalator at the point s/he got off but rather onto the step on which s/he had been when s/he went into military service, which step has moved up during the employee's absence. The idea is that the returning veteran/employee is in the same place s/he would have been if s/he had never left for military service.

Thus, if the employee would have been in line for a raise in pay if s/he had not left on military duty, that raise in pay must be provided upon the service member's return. This has not proved to be a terribly controversial provision and I have not seen many cases in which denial of a lockstep pay increase has been an issue.

Far more complicated are problems pertaining to the position of reemployment. As noted, the position to which the returning veteran is entitled is the escalator position, the position s/he would have occupied had s/he never left for service. The first question that may come to mind is: How is it known what position that would be? By regulation of the U.S. Department of Labor, the escalator position is the job position that the service member would have attained “with reasonable certainty” if not for the absence due to uniformed service. There is reason to question the helpfulness of this standard. What if promotions in a particular company are entirely discretionary with management? Can it ever be said in such situations that the veteran would have attained a promotion “with reasonably certainty?” What does “reasonable certainty” mean, anyway? As can be imagined, the question of what position the returning veteran is entitled to occupy is fertile ground for

veteran-employer conflict and is the primary motivating factor behind much USERRA litigation.

Another oft-confronted problem regarding the escalator position concerns qualifications. What if the escalator position requires training that the employee would have received had he not left on military duty? What if the position requires an examination that the employee was unable to take because s/he was away in service? Can the employer refuse to place the veteran in the escalator position and keep him/her in the job s/he had when s/he left because s/he is not qualified for the escalator position? The answer is if, and only if, the veteran is still not qualified to perform the duties of the escalator position after reasonable efforts are made by the employer to qualify him/her.

There's that word again – "reasonable." The statute defines "reasonable efforts" as actions provided by an employer, including training, that do not place an undue hardship on the employer. The statute defines undue hardship to mean actions requiring significant difficulty or expense. Helpful? Perhaps not so much. An employer's concept of significant difficulty or expense can be expected to differ from that of an employee who perceives s/he is being held back at work because of advantages that were provided to other employees while s/he was in military service. It certainly seems legitimate to observe that Congress replaced one vague term -- reasonable efforts -- with other vague terms – undue hardship and significant difficulty or expense.

At this point, an example might be illuminating. Take the case of an employee of a large railroad. When the employee left for service, he was a conductor. When he returned, most of his peers had been promoted to engineer. It seemed a fair inference that, had our conductor never left for military service, it was reasonably certain that he would have become an engineer. However, there were prerequisites for becoming an engineer, not the least of which were Federal licensing requirements. Candidates were required to take a training course. One such course was scheduled to begin soon after the conductor returned from military service. He asked to be allowed to take the class and was told no, he had to wait for the next one. The railroad's position was essentially one of undue hardship, that the class was already full, that candidates were traveling to the class from out of state, that arrangements had already been made, etc. As it turned out, the next class didn't begin until almost a year later, so the conductor lost out on one year in the escalator position. Under these circumstances, did the railroad undertake reasonable efforts to qualify the returning veteran as an engineer? "Reasonable" minds could differ. The only sure thing is that the vagueness of this standard spawns litigation.

It is worth noting that the only burden USERRA imposes on the returning veteran with regard to his/her right to reemployment is to give timely notice of his/her intention to return to work. Theoretically, it is up to the employer to determine what position the employee would have occupied had s/he not left and, if further qualification is necessary, to make reasonable efforts to qualify the veteran for that position. As a practical matter, however, the heavy lifting on this issue is left to the returning veteran, who must find out who was promoted while s/he was away, what s/he has to do to get promoted and badger the employer to give him/her the opportunity to become qualified for the escalator position. Not surprisingly, these issues are fraught with disagreement.