



Discrimination and Retaliation Provisions of the Uniformed Services Employment and Reemployment Rights Act Regulations

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With the increased number of deployments of active duty soldiers and the activation of thousands of military reservists following September 11, 2001, it is imperative that employers and attorneys be familiar with the Uniformed Services Employment & Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301-4334. USERRA attempts to mitigate the financial losses an employee may endure as a consequence of service in the uniformed services and his or her return to work.

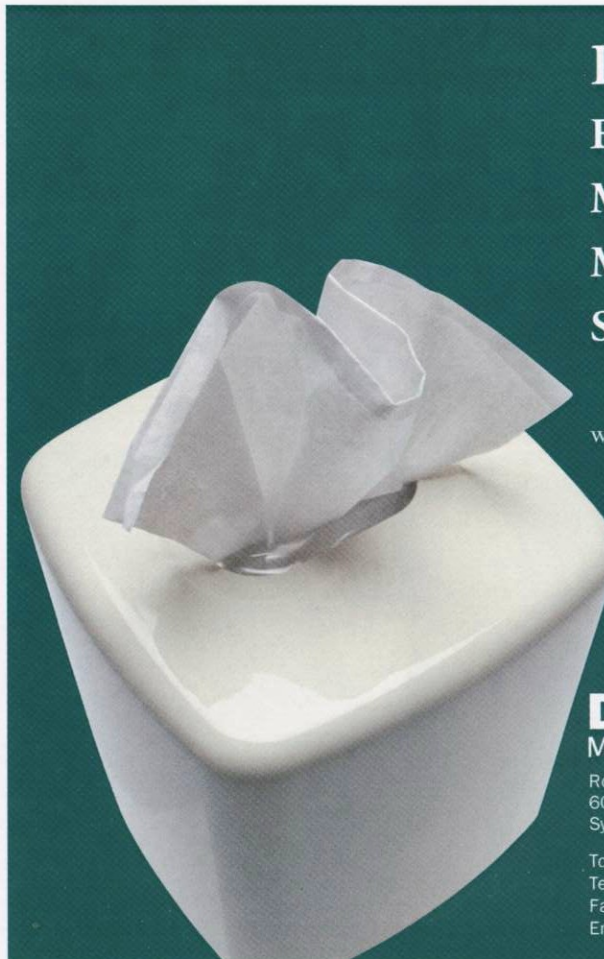
USERRA is enforced and administered by the USDOL Veterans Employment Training Service. Pursuant to 38 U.S.C. § 4331, on December 19, 2005, the United States Department of Labor (USDOL) issued regulations implementing USERRA in an effort to provide guidance to employers and employees regarding their respective rights and obligations under USERRA (the "Regulations"). These regulations became effective January 18, 2006. The Regulations are broken down into six subparts, dealing with the following topics: (A) An introduction to the Regulations; (B) USERRA's anti-discrimination and anti-retaliation provisions; (C) The steps uniformed service members must take to return to a previous position; (D) The rights, benefits and obligations of individuals in the uniformed services, including those related to health plan coverage; (E) Rights, benefits and obligations of returning veterans and service members; and (F) The role of the USDOL in connection with USERRA. This article reviews the anti-discrimination and retaliation regulations set forth in Subpart B of the Regulations.

USERRA provides protection for members of the uniformed services against discrimination and retaliation in employment and

reemployment. According to the Regulations, USERRA protects not only an employee returning to an employment position, but also applicants for employment. Specifically, the Regulations provide that an employer may not deny initial employment, reemployment, retention in employment, promotion or any other benefit to an individual based upon his or her "membership, application for membership, performance of service or obligation for service in the uniformed services." It is also impermissible for an employer to withdraw an employment offer due to the applicant being called into service.


Employers are also prohibited from retaliating against an individual by taking any adverse employment action due to that individual having participated in an action to protect past, present or future members of the uniformed services in an effort to exercise their rights under USERRA. This includes testifying or making a statement in connection with a proceeding under USERRA, taking any part in a USERRA investigation or exercising any right under USERRA. These anti-retaliation protections apply whether or not the individual seeking to protect rights under USERRA has

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actually performed service in the uniformed services. Civilian employees will be protected when seeking to protect the rights of fellow employees who are serving or have served in the uniformed services.

USERRA's prohibitions against discrimination and retaliation apply to all covered employers and all employment positions, regardless of duration. This includes employment positions which are for "a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period." Although USERRA's discrimination and retaliation prohibitions apply to these brief, nonrecurrent positions, there is no right of reemployment associated with these types of positions.

The initial burden of proving discrimination or retaliation in violation of USERRA rests with the individual seeking protection under USERRA. That individual must prove that "a status or activity protected by USERRA was

one of the reasons that the employer took action against him or her." A status or activity is protected if it falls into one of the following categories: (A) Membership or application for membership in a uniformed service; (B) Performance of service, application for service or obligation for service in a uniformed service; (C) Action taken to enforce a protection afforded under USERRA; (D) Testimony or a statement made in or in connection with a USERRA proceeding; (E) Any participation in a USERRA investigation; or (F) Exercise of a right provided by USERRA. To meet its burden, the individual must prove a causal connection between the protected activity or status and the adverse employment action. The individual does not need to prove that the protected status was the sole cause of the employment action, just that it was a motivating factor and was "one of the factors that a 'truthful employer would list if asked for the reasons for its decision.'"

USERRA has become more relevant in re-

cent years. USERRA's coverage is extremely broad, and employers must have an understanding of USERRA and the Regulations in order to be informed about their rights and responsibilities. Due to the comprehensive nature and broad coverage of USERRA and the Regulations, employers would be well-advised to review and update leave and related policies and procedures to ensure compliance.

Mr. Sciotti, a Partner with Hancock & Estabrook, LLP, leads the Labor & Employment Practice Group. He is also a member of the Health Care and Intellectual Property practice groups. Mr. Sciotti's practice includes jury trials, investigations, labor audits, supervisory and employee training and claims under ERISA, Title VII of the Civil Rights Act, Age Discrimination in Employment Act, Americans with Disabilities Act, Fair Labor Standards Act, New York State human rights law, New York State workers' compensation law, New York State labor law and employment agreements. Mr. Sciotti is admitted to practice law in New York State and Washington, DC. He may be reached at (315) 471-3151. ■

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