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**APARTMENT FIRM OBLIGATIONS UNDER THE
UNIFORMED SERVICES EMPLOYMENT AND
REEMPLOYMENT RIGHTS ACT OF 1994**

By James H. Kizziar, Jr., Esq.

- \$ President Bush's military call-up has raised questions about the obligations that private employers owe to employees who are in military service. This memorandum reviews the requirements that the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) imposes on all private employers.
- \$ The analysis addresses applications for reemployment, accrual of seniority, health and pension plan benefits, and related topics.
- \$ Recommended distribution of this White Paper:
 - " Human Resources Officers
 - " General Counsels

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The Council was established in 1978 as a national association to advocate for rental housing and to provide vital information to the leadership of the multifamily housing industry. Over the years, NMHC has evolved into the industry's leading national voice. The association concentrates on public policies of strategic importance to the industry, particularly in the areas of finance, taxation, property management, technology, the environment, and building codes. NMHC benefits from a focused agenda and a membership that includes the principal officers of the most distinguished real estate organizations in the United States. For those readers interested in joining the multifamily housing industry's leadership, NMHC welcomes inquiries to its Washington offices at 202/974-2300, or you can visit our Web site at www.nmhc.org.

The NMHC Lawyers' Forum was created in 1998 to provide a forum for our attorney members to discuss emerging real estate issues. This monograph is part of a series of White Papers the Forum publishes on the most critical legal issues affecting the apartment industry. We hope that through this series we will be able to leverage the expertise of our attorney members in order to better help the busy apartment developers, owners and operators navigate in today's highly complex regulatory environment. Additional papers on a variety of topics will be produced over the course of the year. We hope you find them valuable, and we welcome your feedback.

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TABLE OF CONTENTS

Introduction	1
Discrimination Against Persons Who Serve in the Uniformed Services	1
Individuals Covered and Positions With Rights Under USERRA	1
Individuals Covered	1
Positions With Rights Under USERRA	2
Conditions for Reemployment	2
Application for Reemployment.....	4
Documentation Showing Eligibility for Reemployment	5
Changes in Employer’s Circumstances	6
Position Into Which a Veteran Must Be Reinstated.....	6
Service of Less than Ninety-One Days	6
Service of More than Ninety Days	6
Veteran With a Service-Connected Disability.....	7
Unqualified Veteran	7
Employment Rights, Benefits, and Obligations of Veterans.....	7
Use of Vacation During Military Leave.....	8
Health Plans.....	8
Employee Pension Benefit Plans.....	8
Enforcement of Employment or Reemployment Rights	9

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INTRODUCTION

On October 13, 1994, the President signed into law the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C.A. § 4301, *et seq.* (West Supp. 2001). This statute comprehensively overhauled prior legislation and case law regarding military leaves of absence. Set forth below is an analysis of USERRA and the requirements it imposes upon private employers.

DISCRIMINATION AGAINST PERSONS WHO SERVE IN THE UNIFORMED SERVICES AND ACTS OF REPRISAL PROHIBITED

USERRA prohibits an employer from (i) discharging, (ii) denying initial employment, reemployment, or promotion, or (iii) refusing to provide any benefit of employment to a person because of his or her membership, application for membership, performance of service, application for service, or obligation to perform service in a uniformed service. See *id.* at § 4311(a). An employer may not discriminate against or take any adverse employment action against a person because the person has taken action to enforce his/her rights under USERRA, or testified in a USERRA proceeding, or participated in an investigation under the statute. See *id.* at § 4311(c).

INDIVIDUALS COVERED AND POSITIONS WITH RIGHTS UNDER USERRA

Individuals Covered

USERRA applies to a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform "service" in a uniformed service of the United States. "Service" includes the performance of duty on a voluntary or involuntary basis and includes:

- Active duty;
- Initial active duty for training;
- Active duty for training;
- Inactive duty training;
- Full-time National Guard duty;
- Any period of absence from work to undergo a uniformed services fitness examination; and
- A period for which a person is absent from employment for the purpose of performing funeral honors duty.

See *id.* at § 4303(13).

The term “uniformed services” or “military service” means:

- The armed forces--Army, Navy, Marine Corps, Air Force, or Coast Guard (including the reserve branch of each of the armed forces);
- The Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty;
- The commissioned corps of the Public Health Service; and
- Any other category of persons designated by the President in time of war or emergency.

See *id.* at § 4303(16).

Positions With Rights Under USERRA

The predecessor statute governing military leaves of absence, the Veterans' Reemployment Rights Act, protected individuals who were employed in “other than a temporary position” at the time they ceased work to enter military service. USERRA does not use the “other than a temporary position” description; instead, it exempts from coverage those positions which are “brief or non-recurrent and that cannot reasonably be expected to continue indefinitely or for a significant period.” See *id.* at § 4312(d)(1)(C).

This change was made because some employers were classifying employees as “temporary” to avoid the requirements under the prior law. USERRA's terminology makes clear that the job title of the position will not be controlling as to whether it is protected under the statute.

Positions giving rise to rights under USERRA would include probationary positions, apprentice and trainee positions, part-time positions, seasonal and contract employment (if the employment would be recurrent or expected to continue for a significant period), and governmental positions - federal, state and local. The statute also protects job applicants from discrimination or other adverse action based on military service.

Conditions for Reemployment and Factors Affecting Reemployment Rights

Notice of Leave

USERRA requires that *all* employees provide their employers with advance notice of military service. See *id.* at § 4312(a)(1). The required notice may be *either* written or oral; it may be provided to the employer by either the employee or an appropriate officer of the military service in which the employee will be serving.

Failure to give notice may deprive the employee of reemployment rights. However, an employee will not be required to give notice if military necessity prevents the giving of notice, or if the giving of notice is otherwise impossible or unreasonable.

Duration of Military Service

USERRA provides that the cumulative length of a person's absences from employment for military service may not exceed five (5) years. See *id.* at § 4312(a)(2). Most types of service will be cumulatively counted in the computation of the five (5)-year period. However, USERRA sets forth several categories of service that are exempt from the five (5)-year limitation:

- Service required beyond five years to complete an initial period of obligated service.
- Service from which a person, through no fault of the person, is unable to obtain a release within the five (5)-year limit.
- Required training for Reservists and National Guard members.
- Service, or retention in service, under an involuntary order for active duty during a domestic emergency or national security-related situations.
- Service, or retention in service, under an order for active duty (other than for training) during a war or national emergency declared by the President or Congress.
- Active duty (other than for training) in support of an “operational mission” for which selected Reservists have been ordered to active duty without their consent.
- Service by persons who are ordered to active duty in support of a “critical mission or requirement” as determined by the Secretary of the concerned uniformed service.
- Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.

See *id.* at § 4312(c).

These exceptions to the service limitations are in effect at the present time. By a letter to Congress and an attached proclamation dated September 14, 2001, President Bush declared that “the national emergency has existed since September 11, 2001, and, pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.), I intend to utilize the following statutes: sections 123, 123a, 527, 2201(c), 12006, and 12302 of title 10, United States Code, and sections 331, 359, and 367 of title 14, United States Code.” *Declaration of National Emergency by Reason of Certain Terrorist Attacks*, (Sept. 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html>. Explaining his proclamation to the Congress, the President noted that his Proclamation “authorized, pursuant to section 12302 of title 10, United States Code, the Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service within the Department of the Navy, to order to active duty units and individual members not assigned to units of the Ready Reserve to perform such missions the Secretary of Defense may determine necessary.” *Letter to the Congress of the United States* (Sept. 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-6.html>.

A national emergency for the purposes of USERRA has therefore existed since September 11, 2001. Therefore, military service conducted during the pendency of the national emergency is not limited to five years. Such military service, moreover, may not be counted as part of the cumulative five year period of service. The President’s declaration of a national emergency therefore makes the USERRA five year limitation on military service inapplicable for the current national emergency.

Character of Military Service

To be entitled to reemployment rights under USERRA, a veteran's separation from military service must be under "honorable conditions." See 38 U.S.C.A. § 4304. The "honorable conditions" requirement applies to all types of service.

The statute identifies four circumstances under which a veteran's service would terminate his or her right to benefits:

- Separation from military service with a dishonorable or bad conduct discharge;
- Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war;
- Dropping a commissioned officer from the rolls when the officer has been absent without authority for more than three months or who is imprisoned by a civilian court; and
- Separation from the service under other than honorable conditions as set forth in regulations for each military branch.

See *id.*

APPLICATION FOR REEMPLOYMENT

Under USERRA, the time limits for returning to work depend on the duration of a veteran's military service, except where a fitness for service examination is involved.

- *Service of less than thirty-one (31) days* – the person must report to his/her employer by the beginning of the first regularly-scheduled work day that would fall eight (8) hours after the veteran returns home from service. However, if timely reporting back to work would be impossible or unreasonable, through no fault of the veteran, the veteran must report back to work as soon as possible thereafter.
- *Service from thirty-one (31) to one hundred eighty (180) days* – an application for reemployment must be submitted no later than fourteen (14) days after completion of the veteran's service. However, if submission of a timely application is impossible or unreasonable, through no fault of the veteran, the application must be submitted as soon as possible thereafter.
- *Service of one hundred eighty-one (181) or more days* – an application for reemployment must be submitted no later than ninety (90) days after completion of a veteran's military service.
- *Absence for a fitness-for-service examination* – the veteran must report to his/her employer by the beginning of the first regularly scheduled workday that would fall eight (8) hours after the veteran returns home from the examination.

- *Veteran with a service-connected injury or illness* – the reporting or application deadlines set forth above are extended for up to two (2) additional years for veterans who are hospitalized or convalescing.

See *id.* at § 4312(e).

Despite the time limits set forth in USERRA, reemployment rights are **not** automatically forfeited if the veteran fails to report to work within the required time limits. See *id.* at § 4312(e)(3). Rather, if the veteran fails to report within the statutory deadlines, he or she will be subject to the employer's rules governing unexcused absences. For example, if an employer has a policy under which an employee will be terminated for two (2) consecutive unexcused ("no call-no show") absences, that policy could be applied to a veteran returning from military service who waits two (2) working days after his/her return before reporting to work.

USERRA also requires veterans seeking to return to their former employment to complete an application for reemployment. See *id.* at § 4312(e). Although an application for reemployment need not be in the form of a formal application, it must involve more than a mere inquiry by the veteran. See *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998). Determining whether a communication between the employer and the veteran constitutes an "application for reemployment" requires an examination of the reasonable expectations of the parties. See *id.* Only if the parties reasonably should have expected that the communication was a request for reinstatement will it be viewed as an application for reemployment. See *id.*

This application for reemployment must be submitted to the employer upon the completion of the veteran's military service. See 38 U.S.C.A. § 4312(e). The veteran should generally submit the application for reemployment to the human resources department. See *McGuire*, 152 F.3d at 677. In the case of a large employer, the submission of an application for reemployment with the veteran's former supervisor will generally be invalid. See *id.*

Documentation Showing Eligibility for Reemployment

USERRA provides that an employer has the right to request that a veteran who is absent for a period of service of thirty-one (31) days, or more, provide documentation showing eligibility for reemployment. See 38 U.S.C.A. § 4212(f)(1). The employer may request documentation that shows:

- (1) the veteran's application for reemployment is timely;
- (2) the veteran has not exceeded the five (5)-year service limitation; and
- (3) the veteran's separation from service was under honorable conditions.

See *id.*

Because of the present national emergency, the second of these requirements is not currently applicable. Accordingly, employers may only require at this time documentation that demonstrates that the veteran's application for reemployment is timely and that the veteran's separation from service was under honorable conditions.

If the veteran does not provide satisfactory documentation because it is not readily available or does not exist, the employer must nevertheless promptly reemploy the veteran. See *id.* at

§ 4312(f)(3)(A). However, if, after reemploying the veteran, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer then may terminate the veteran. *See id.* However, if a veteran has been absent for military service for ninety-one (91) or more days, an employer may delay making retroactive pension contributions until the veteran submits satisfactory documentation. *See id.* at § 4312(f)(3)(B). However, contributions must still be made for veterans who are absent for ninety (90) or fewer days.

CHANGES IN EMPLOYER'S CIRCUMSTANCES

Under USERRA, an employer is not required to reemploy a veteran if the employer's circumstances have so changed as to make such reemployment "impossible or unreasonable." *See id.* at § 4312(d)(1)(A). An employer may also be relieved of its duty to reemploy veterans if such an action "would impose an undue hardship on the employer." *Id.* at § 4312(d)(1)(B). This language closely resembles the language of the Americans with Disabilities Act. Compare *id.* with Americans with Disabilities Act of 1991 ("ADA"), 42 U.S.C.A. § 12111 (West 1998). Decisions interpreting the "undue hardship" provisions of the ADA may therefore be helpful in determining the appropriate course of action under USERRA.

POSITION INTO WHICH A VETERAN MUST BE REINSTATED

Generally, the position into which a veteran must be reinstated is based on the length of the veteran's military service. USERRA incorporates the "escalator principle," which was created by the courts under the prior law. *See H.R. REP. NO. 103-65, 30-35 (1994), reprinted in 1994 U.S.C.C.A.N. 2449, 2463-66.* Under the escalator principle adopted in USERRA, the statutory rights of veterans returning from military service are subject to changes in employment conditions which occurred in the regular course of business during the veteran's absence for military service, provided that the changes were not for the purpose of discriminating against the veteran. *See Ford Motor Co. v. Huffman, 345 U.S. 330, 336 (1953).* The escalator principle requires an employer to trace or reconstruct what the veteran's employment history would have been if he or she had remained continuously employed (instead of being absent in military service). This "history" must be used in determining the position, rate of pay, and other benefits to which the returning veteran is entitled.

Service of Less than Ninety-One (91) Days

After military service of less than ninety-one (91) days, a veteran must be placed in the position in which he or she would have been employed without the interruption by military service (*i.e.*, the escalator position), if the veteran is qualified to perform the job duties. *See 38 U.S.C.A. § 4313(a)(1).*

If the veteran is not qualified to perform the duties of the escalator position, *despite reasonable efforts by the employer* to qualify the veteran, then the employer may place the veteran in the position which he or she held on the date the military leave began. *See id.*

Service of More than Ninety (90) Days

After military service of more than ninety (90) days, the veteran must be placed (i) in a position in which the veteran would have been employed if his or her employment had not been interrupted by military service (*i.e.*, the escalator position), or (ii) in a position of like seniority, status and pay, which the veteran is qualified to perform. *See id.* at § 4313(a)(2).

If the veteran is not qualified to perform the duties of either the escalator position or a position of like seniority, status and pay, *despite reasonable efforts by the employer* to qualify the veteran, then the veteran may be placed in the position in which he or she was employed on the date the military leave began, or a position of like seniority, status and pay, which the veteran is qualified to perform. *See id.*

Veteran with a Service-Connected Disability

Where a veteran has a disability incurred in, or aggravated during, his or her military service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to the disability to be employed in the escalator position, the veteran should be placed in any other position which (i) is equivalent in seniority, status and pay, (ii) for which the veteran is qualified or would become qualified to perform *with reasonable efforts by the employer*, or, (iii) placed in a position which is the nearest approximation to such a position. *See id.* at § 4313(a)(3).

Unqualified Veteran

A veteran who (i) is not qualified for employment in the escalator position, or in the position in which he or she was employed on the date the military leave began, and (ii) who cannot become qualified with reasonable efforts by the employer, may be placed in any other position of lesser status and pay which the veteran is qualified to perform, but with full seniority. *See id.* at § 4313(a)(4).

EMPLOYMENT RIGHTS, BENEFITS, AND OBLIGATIONS OF VETERANS

A veteran who is reemployed under USERRA is entitled to seniority and other rights and benefits of employment based on the seniority that the veteran had on the date he or she began military service, plus the additional seniority, rights and benefits that the veteran would have attained if he or she had remained continuously employed. *See id.* at § 4316(a). This is a further application of the escalator principle.

A person who is absent from work for military service will be deemed to be on furlough or leave of absence and entitled to non-seniority-based rights and benefits to the extent they are generally provided by the employer to employees with similar seniority, status, and pay who are on furlough or leave of absence for other reasons. *See id.* at § 4316(b). USERRA defines seniority as “longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity.” *Id.* at § 4303(12). Non-seniority-based benefits would be those benefits which are based on compensation for work performed or are subject to a significant contingency.

A veteran may be required to pay the employee cost, if any, of any funded benefit continued for the employee during his/her absence to the extent other employees on furlough or leave of absence are so required. *See id.* at § 4316(b)(4).

USE OF VACATION DURING MILITARY LEAVE

An employee must be permitted, upon request, to use during a military leave any vacation, annual, or similar leave with pay accrued by the employee before the commencement of the military service. *See id.* at § 4316(d). However, an employee cannot be *required* to use vacation or other accrued leave for military leave.

A veteran who is reemployed under USERRA cannot be discharged from employment except *for cause* within one (1) year after the date of reemployment, if the veteran's period of military service before his or her reemployment was more than one hundred eighty (180) days.

The statutory protection against termination except *for cause* is limited to one hundred eighty (180) days after the date of reemployment, if the veteran's period of military service before his or her reemployment was more than thirty (30) days but less than one hundred eighty-one (181) days. *See id.* at § 4316(c).

HEALTH PLANS

USERRA requires the provision of COBRA-like health benefits to employees who are absent from employment on military service. *See id.* at § 4317. *This provision applies even if the employer is not covered by COBRA.* Where an employee (or the employee's dependents) has coverage under an employer-provided health plan, the plan must allow the employee to elect to continue such coverage. The maximum period of coverage of an employee and the employee's dependents under such an election is the lesser of (i) the eighteen (18)-month period commencing on the date that the employee's absence begins; or (ii) the day after the date on which the employee fails to apply for or return to employment. *See id.* at § 4317(a)(1)(A).

An employee who elects to continue health plan coverage under USERRA may be required to pay up to one hundred two percent (102%) of the full premium paid by the other employees, except that an employee who performs military service for less than thirty-one (31) days may not be required to pay more than the employee's share, if any, for such coverage. *See id.* at § 4317(a)(1)(B). For a veteran whose coverage under a health plan was terminated because of his/her military service, an exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment. *See id.* at § 4317(b)(1). This provision does not apply to coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of military service. *See id.* at § 4317(b)(2).

EMPLOYEE PENSION BENEFIT PLANS

A veteran reemployed under USERRA must be treated as *not* having incurred a break in service because of the military duty with the employer(s) maintaining the pension plan. *See id.* at § 4315(a)(2)(A). Military service must be treated as service with the employer(s) maintaining the plan for purposes of vesting and the accrual of benefits under the plan. *See id.* at § 4318(a)(2)(B). An employer will be liable for (i) funding any resulting obligation of the plan to provide benefits and (ii) allocating employer contributions for the veteran in the same manner and to the same extent the allocation is made for other employees. *See id.* at § 4318(b)(1).

For the purpose of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's reconstructed compensation during the period of his or her

military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of military service. *See id.* at § 4318(b)(3). If the employee's compensation was not based on a fixed rate, the calculation will be based on the employee's average rate of pay during the twelve (12)-month period immediately preceding entry into military service or, if shorter, the period of employment immediately preceding entry into service. *See id.* No earnings or forfeitures are to be credited to a returning veteran's pension account. *See id.* at § 4318(b)(1).

ENFORCEMENT OF EMPLOYMENT OR REEMPLOYMENT RIGHTS

A veteran who claims that his rights under USERRA have been violated may file a complaint with the Secretary of Labor or commence an action in federal court against the employer. *See id.* at §§ 4322, 4323. If the veteran is successful, he or she will be entitled to injunctive relief requiring the employer to comply with the provisions of USERRA. The veteran may also recover lost wages or benefits resulting from the employer's failure to comply with USERRA. *See id.* at § 4323(c)(1)(A). The employee is also entitled to recover attorney's fees, expert witness fees, and other litigation expenses. *See id.* at § 4323(c)(2)(B).

Significantly, the employer may be required to pay the veteran an amount equal to lost wages and benefits as "liquidated damages," if the court determines that the employer's failure to comply with USERRA was willful. *Id.* No state statute of limitations applies to any proceeding under USERRA. *See id.* at § 4323(c)(6).