Webcast: Workplace & War – The Ramifications Of The New USERRA Regulations
Date and Time: Wednesday, June 14, 2006
Presented by ACC's Employment & Labor Law Committee and the law firm of Ogletree Deakins
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Moderator: Jeffrey Frost, Risk Services Counsel, Sutter Health

ASSOCIATION OF CORPORATE COUNSEL

Moderator: Jeffrey Frost
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Operator: Please go ahead, (Jeff).

(Jeff): I'd like to welcome everyone to the ACC conference call, workplace and war, the ramifications of the new USERRA regs. This is sponsored by the ACC Labor and Employment Law Committee, and (Oglo Tree) and (Dinkens). My name is (Jeff Frost) and I'll be your moderator today. I am in house employment lawyer with (Sutter Health) a not for profit healthcare system in Northern California.

Our speakers today are (Hal Coxson), a shareholder at (Oglo Tree Dinkens) with 30 years experience in all aspects of workplace law. He represents business clients before the NLRB and other federal administrative agencies. And he's litigated numerous labor employment cases in federal courts, and he has extensive knowledge of USERRA.

We're also joined with (Rocco Mafae). (Rocco) is General Counsel of the Lockheed Martin Maritime system sensor's division. And he's also a 33 year reservist and has written extensively on USERRA.

Some housekeeping before we get started. If you would like the materials that go along with this, which are papers, including the slide show itself, you can see the links box in the right hand side and you can click on that. If you have any questions as we go, you can go ahead and type them into the text, into the questions box. And this can be done at any time during the presentation, and we'll try – and then click on the send box and we'll try to save those questions, and time permitting answer them at the end of the presentation. If not, we will get to those and answer them and they will be archived, the answers and the questions, on the ACC Web site.

And finally, we've asked everyone to click on the Web site eval. form, drag down to the workplace and war presentation and fill out the Webcast evaluation for us.

I think that takes care of all of the housekeeping, and I will turn it over to you, (Hal).

(Hal Coxson): Thanks, (Jeff). Happy Flag Day everyone. Since the fateful attack on 9/11/2001, nearly 550,000 civilian members of the national guard and reserve have been mobilized. About 445,000 of them have returned while some 104,000 remain on active duty. Many have been deployed and redeployed or deployed for longer periods than anticipated, putting their civilian careers on hold while in service to their country.

The basic federal law governing employee and employer rights and obligations, related to military service, leaves of absence, protection of job benefits, rights to reemployment and non discrimination based on military service is USERRA which stands for the Uniform Services Employment and Reemployment Rights Act of 1994. The law was passed by Congress and signed by President Clinton in 1994, as the complete rewrite and replacement for the earlier Veterans Reemployment Rights Act. It was amended by Congress and signed by President Bush in 2004 which modified employer obligations and complaint procedures.

And since 9/11 USERRA has been the source of an increasing number of complaints filed with the U.S. Department of Laborers Veterans Employment and Training Service, DOL Vets. For example, in fiscal year '04, 1465 complaints were filed under USERRA, that is one in every 81 service members demobilized filed a USERRA complaint in fiscal year 2004.

There have been two recent developments. Effective March 10, 2005, all employers are required to notify their employees of rights under USERRA as they notify employees of other employment statutes principally by posting a USERRA notice in the workplace. There's a sample USERRA poster online at www.dol.gov/vets. Also, effective January 18, 2006 the Department of Labor promulgated the first ever federal regulations interpreting USERRA. Those regulations are also found at www.dol.gov/vets.

(Rocco) from his 33 year service in the United States Air Force Reserves, and I from my experience in representing employers in USERRA and testifying before the house armed services committee on USERRA will discuss a basic outline of USERRA and then examples of common USERRA related issues.

First of all the purpose, or the purposes of USERRA as you can see, are several fold. First to encourage non career service, and uniform services. To provide for prompt reemployment of persons returning to civilian jobs from military service. To minimize the disruption to their lives and to the lives and businesses of employers, fellow employees and communities, and to prohibit discrimination against persons because of their service and uniform services.

That includes, by the way, military service includes past, present and future military service. The guiding principals throughout our discussions today for the courts has been the Supreme Court's admonition in a case called (Fish Gold v. Sullivan Dry Dock and Repair) from 1946 that the legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. Even though that's a 1946 decision, the USERRA regulations say that that admonition applies with full force and effect to USERRA which was enacted in 1994.

(Rocco Mafae): (Hal), I just wanted to add too that, you know, it's a (for) and not a feeling. And one other point too is that in the purposes for USERRA really go back to 1940 when Congress passed the selective service training and service act. And at that time, Congress was trying to red or correct a wrong that surfaced at the end of World War I. There were a lot of veterans who came back at the end of World War I who had served their country. They came back expecting to get their jobs back and they weren't able to do that. And as a result in 1932, many of these veterans picketed and camped out on the White House grounds and in Washington and as a result, President Hoover had to call out the army to remove them. And it was kind of an embarrassment, the fact that you had all of these World War I veterans who the army had to remove off of the capital.

So Congress, again, in 1940 passed the Selected Service Training Act to remember that position. It included rights to reemployment. And that kind of is the genesis of where USERRA comes from.

(Hal Coxson): Right. And (Rocco), these are the first ever regulations promulgated under USERRA. And they're deigned to be easy to understand. They're in question-and-answer format. And as I indicated, they're on the DOL Web site. But I think as we've experienced, and as perhaps our attendees have experienced, there are no easy questions and no simple answers any longer with respect to USERRA.

As far as coverage is concerned, basic coverage, all of the armed forces, active, reserve and national guard are covered. You should also be aware that the U.S. public health service, the commission core for the public health service are covered. The national disaster medical system which is federally activated by FEMA and the Department of Homeland Security for interim disaster response. Those individuals are covered. And basically, any other category of persons designated by the president in time of war, or emergency are covered.

(Rocco Mafae): I might add too that a lot of people, you notice the coast guard, a lot of people don't think that the coast guard is a part of the military but they are. And so I just wanted to emphasize the fact that they are covered under the USERRA regulations, particularly since they have a (son) that's in the coast guard.

(Hal Coxson): Uniform services means the performance, both service and training, military duty on a voluntary or involuntary basis. Sometimes people –employers question that, whether their

employees are covered where they volunteer, as opposed to involuntary call up. And also, the active components of the armed forces.

(Rocco Mafae): Yes, I just wanted to add too that that is a big issue, because a lot of people think that well if they volunteer to do this, how can they be covered, because (Joe) goes off and volunteers and does six months of reserve duty, and comes back for a couple of three months, and then goes and volunteers again to go off and what's the deal here? How come they – do they have the right to keep going off and doing this stuff? And we have to keep bringing them back or hold their position open, and that's the case. I mean that's what the whole purpose of USERRA is, and that's what the whole purpose of the guard and reserve is, is to have those resources available.

And it covers a wide variety of time periods too. It's active duty, active duty for training. In active duty for training and physical exams and stuff like that. And then I also wanted to point out too that a lot of folks don't understand that there are two sites of reserve forces, or actually three, the national guard, which when they are mobilized for federal duties are under title 10 status. And then there are category A service, who we have the perception as we do with the guard that they're the weekend warriors. They do their two weeks in the summer, and one weekend a month, which needless to say in today's times is not necessarily the case any more. It's much more time consuming than that.

And then there is another category called category D reservists who are actually assigned to active duty basis, and they perform their reserve duty during the week days, during active duty times when the report to an active duty installation. So to the extent that you have an employee who is in the guard, or the category A reserve, which is the vast majority of

reservists, they are more likely to be doing their duty on weekends, and to be – and not impacting the work week whereas, the category B reservist will be impacting the work week because they may be gone one to two days a month during work hours.

(Hal Coxson): And just briefly, because we have a lot of ground to cover, as far as covered employers are concerned, basically all provide sector employers and all state and federal government employers are covered. The definition is there, basically any entity that pays a salary or wages for work performed or controls employment opportunities, that's about as broad as you can get. There are no employee numerical thresholds, no gross revenue thresholds required for coverage. And successors and interest are covered, and we're going to talk about successors and interest in a few minutes.

As far as covered employees, again, extremely broad – perhaps the broadest definition, any person employed by employer, and that includes foreign nationals, interestingly though independent contractors are not covered. And the regulations, use the economic realities test for determining independent contractor status and the common law factors. So independent contractors are not covered but virtually all other employees are including temporary, part time, probationary or seasonal employees who are covered, except with regard to reemployment rights, where their employment was for a brief non recurrent period, and there was no reasonable expectation that employment would have continued indefinitely or for a significant period. Also employees on layoff with recall rights are on strike, or on a leave of absence are also covered.

(Rocco Mafae): And this applies to people that may be in the union, and belong to a union hall and they may work for different employers depending upon when they're called up to work at a different location. And so they're also covered.

(Hal Coxson): Let's talk about the – one of the first basic rights under USERRA, and that's the right to non discrimination. And individuals past, present or future duty or obligation in military service must not be a negative factor in any hiring or any other employment related decision. The standard of proof is whether or not the military service was a motivating factor in the employer's action. It doesn't have to be the sole reason or a principal reason or an important reason as long as it's a motivating factor. And employees bear the initial burden of proof which shifts to employers for the affirmative defense that they would have taken the same action, even absent military service.

It's not a defense that failure to assign, for example, or failure to promote someone due to their inability to perform the job assignment as a result of military service. That's not a defense.

The non discrimination principles apply to initial employment, retention employment, promotion and any benefit of employment. It applies to all covered employees including applicants, all covered employers, including hiring halls and joint employers. And all employment positions including those which were for a brief non recurrent period. So for purposes of non discrimination the brief non recurrent period exception for reemployment does not apply to the non discrimination obligations.

(Rocco Mafae): I just wanted to add too from personal experience that these are tough issues. And when, you know, somebody is applying for a position, I know I was interviewing for a slot after 9/11 and one of the questions came is are you going to get recalled to active duty, because I can't have a general counsel be gone if I'm going to hire somebody right now. Now clearly, that was an improper question to ask, but what does one due in that type of situation? You know, do you say that well I'm going to file a complaint against you and then force that corporation to bring you in as – into that position, and that presents a really difficult situation to be working for somebody who you've all ready filed a lawsuit against.

So, you know, while one has to really look at all of these different factors that are involved in all of this stuff, and it's – while the regulations are there, it's not something that people go out and willy-nilly file actions on. They really do give it considered through.

(Hal Coxson): Let's turn to the second basic right under USERRA, and that's reemployment rights. And eligibility for reemployment rights require five eligibility criteria in order for an individual to qualify. First, the person must have held a civilian job with the employer, that's fairly obvious.

Second, the employee must have given advanced notice to the employer that he or she was leaving the job for service in uniform services. We're going to talk in just a minute about what advanced notice actually means but that's the second requirement.

Third, the period of military service must not have exceeded five years, and that's a cumulative number, and that's with the same employer. If someone has served five years and reached the limit for purposes of reemployment rights with one employer, but then goes to a

new employer, that employee receives the fresh five year entitlement. There are numerous types of duty that don't count against this five year limit, numerous exceptions. But basically it's a five year cumulative period. And in a current situation with respect to deployment and redeployment that five year limit is becoming more of a factor than perhaps it has been in the past.

(Rocco Mafae): I just wanted to point out how the annual training and the weekend drills and all of that, aren't covered in that five years. And going to other training or other schools. So if somebody says I have to go to a tech school to be trained, and it's an eight week school or a 12 week school, and they're gone for that period of time that doesn't count against the five years.

(Hal Coxson): And the fourth requirement is that the person must have been released from service under honorable conditions, or not released under less than honorable conditions. There are various forms of discharge and – but the discharge must not be under less than honorable conditions.

And the person, then must have reported back to the civilian job in a timely manner, or have submitted a timely application for reemployment. We're going to talk about that in a little more detail in a second.

As far as the initial notice of – by departing employees, or deploying employees. Advanced notice is not defined either in the statute or in the regulations. The advanced notice to the employer may be written or verbal. It may be by the employee or an appropriate military

officer, unless it's impossible, unreasonable, or precluded by military necessity. And I submit that that's probably a rare exception. Wouldn't you agree, (Rocco)?

(Rocco Mafae): Right. I would. And this is where, really, the biggest problem comes is that the communication between the reservist and their employer. And I've always recommended the people that came in and asked for legal advice on what to do, where they had a problem to make sure that they tell their employers ahead of time when they're going to be performing a drill. So you can give your unit training assembly schedule and usually those are printed up a year ahead of time, so that you know when you're going to be doing your weekend drills, or when you're going to be doing your drilling. And normally, you know when you're going to do your annual tour. Usually, the units will have set that up for, you know, the security police folks are going to drill at such and such a time, they know when they're going to do that. And so providing that notice ahead of time, through the employer, really makes for a much smoother situation.

What happens, and where a lot of the problems develop is where somebody comes in on Friday and says by the way I'm not going to be here for the next two months because I'm going off to do some drill, or I'm going to school or I'm not going to be here for the next two weeks. And then the employer is stuck saying well how am I going to fill that spot? What am I going to do? You know, they don't have really, any time to make any contingency plans. Whereas, if they had known, you know, two or three months ahead of time that was going to happen, then they could have avoided that.

So again, you know, the – it's a – there is somewhat of a two way street here where the reservist needs to keep their employers and supervisors posted and be fair with them and let

them know as far in advance as possible when the training is scheduled. And while there really isn't any specific requirement to do that, that is really the best way to proceed.

(Hal Coxson): Employers are often curious and ask the departing employee whether or not he or she intends to return and that's a perfectly all right to ask that question. However, the employer may not demand a commitment to return. And even if the employer did demand a commitment, the employee is not bound by that commitment, or bound by statements waving reinstatement to a pre service employment position following military service. Basically, the employee may not wave USERRA rights to reemployment.

(Rocco Mafae): And one thing I wanted to add too on the notice. If the unit is going to or if the person is going to be done for more than 30 days, then the employer has the right to request a copy of their orders showing, you know, the fact that they're actually going to be on duty and how long they're going to be gone, unless again, there's a military necessity for not disclosing where the person is going to be going. And for example, if somebody is going to Iraq, or to Afghanistan, it may be that they don't want people to know where that unit is going and when they're going to be deploying for security purposes.

But in any other types of situations, the unit is more than willing to provide a copy of the orders to the employer to let them know what the person is going to be –how long they're going to be on active duty, where are they going to be, that type of thing.

(Hal Coxson): Another commonly confusing area is what benefits and compensation rights do employees have during their leave? Basically the employee is deemed to be on furlough or leave of absence, and therefore entitled to non seniority rights and benefits provided to other

employees with similar senior status and pay. They're entitled to the rights and benefits, both in effect at the time of employment, and those that became effective or become effective during service. An example of a non seniority benefit is continued life insurance coverage or holiday pay or Christmas bonuses or those types of things that employees on furlough or leave of absence are entitled to.

The – as far as leave is concerned. The – if the employer has more than one kind of non military leave of absence, which most employers due, the employee on military leave must be given the most favorable treatment accorded to any comparable form of leave. And duration is the most significant factor. For example, a four day jury leave is not the same as a four year military leave. As far as accrual of vacation leave, generally it's a non seniority benefit that must be provided, but only if it's provided to similarly situated employees on comparable leaves of absence. The Family and Medical Leave Act presented a real complicating factor until the Department of Labor clarified that. Because as you know under FMLA there are hours of service requirements, and other eligibility requirements. And basically the Department of Labor ruled that employees on military leave are given credit for hours of service that would have been performed but for the period of military service.

If the – here is an exception where an employee may wave the right to non seniority benefits during a period of service if that waiver is knowingly voluntary and in writing. In effect, if the employee states that he or she does not intend to return to the pre service job, and wants to waive the right to non seniority benefits, that is permissible. However, the employee may not waive the reemployment rights upon completion of service.

The employee may use accumulated paid leave while in military service. The employees may want to use up their paid leaves, so they continue civilian pay. The employer may not require to use that paid leave while on military leave.

As far as health benefits, and compensation during leave, the continuation coverage, similar to COBRA but for a 24 month period where the service member has more than 30 days service. The employee may elect continuation coverage, but may be required to pay up to 102 percent of the full premium. For less than 30 days it's the healthcare coverage is provided, as if the service member had remained employed.

The USERRA regs go into great detail about common situations. We're not going to discuss those in detail today but with respect to employee notice of election for continuation coverage and employee payment of premiums, there are obviously situations where the employee does not give notice, or gives notice but does not pay the premium. And basically, the regulations provide that employers should come up with a reasonable set of requirements in that regard.

(Rocco Mafae): Currently now, as a result of all of the call up of reservists, Tri Care which is a medical coverage for military members, primarily, who after they've retired, and also for folks – military members families, additional coverage, Tri Care is now available after the 31st day of service. And Tri Care dental is also available now for anybody who is doing reserve duty, so they can opt into that.

Some of your employees who may be recalled may decide to stick with their health benefits with you, because that has been a coverage whatever reason, they don't want to switch

doctors. There's a number of different reasons the way they might want to do that. And to the extent that the HR departments can help them sort through this, that would be – that's a big benefit because this is always one of the biggest issues. When you're deploying you don't want to have to be worrying about the fact that is something happens to your spouse, or to your children, or and they don't have any medical coverage, or how are they going to be able to – you know, who's going to take care of them, that type of thing. And to the extent that those issues can be resolved prior to the first in deploying that's a great benefit to them.

(Hal Coxson): Of course, from an employer's perspective, also, the employer doesn't want to continue with health coverage if the employee is no longer seeks it, no longer wants it, and then is surprised because the employee hasn't notified the employer of that. Which – so for purposes of the employer, also it's important to be able to iron that out at the very beginning.

As far as pension plans or concerns, pension plans cover the gamut of defined benefit, defined contribution profit sharing plans that are retirement plans and both single employer and multiple employer plans. Under USERRA the important factor to remember is that the employer's plan must credit the employees on military leave with continuous service with the employer, that is no break in service for participation, vesting, or benefit accrual purposes.

(Rocco Mafae): Right. And I think we're going to touch on this later, but the employer must fund any resulting obligation and the reemployed person when they come back, are entitled to any accrued benefits from the employee contributions, only to the extent that they repay their contributions. And we'll – I know there's a …

(Hal Coxson): Yes, I mean we can cover that now. I mean basically the employer has to make up any missed contributions. There's a timeframe for that, the default being as soon as practical. The employee must make up any missed contributions. We're talking about 401 (k) plans, for example, given a period of three times the length of service or capped at five years.

As far as the accrual of future benefits and compensation, the employees in military service accrue credited service and eligibility time for benefits and compensation adjustment upon their return to work.

The next is an important point. That the law does not require that employees on military leave be compensated by their civilian employer. However, many employers, perhaps many people on the – one of the attendees, their employers while they're not required to compensate the employees, they do so voluntarily make up the difference between civilian pay and military pay which is a great benefit to - obviously to the employees and their families while they're on military leave. There's one wrinkle that has developed, and I testified about this before the house armed services committee and it caused quite a stir. There is an old IRS revenue ruling 69-136 which unlike USERRA which provides that employees who are on furlough or leave of absence during military leave, the IRS ruling says that they should be treated as if they were terminated, and that's for purposes of salary or wages versus taxable income. So that employers may not withhold for federal income tax or social security or Medicare purposes while the employee is receiving those benefits or the increased civilian pay during the military leave of absence which obviously confronts the individual at the end of the year with a large tax bill because there's been no withholding.

We tried to get that changed in Congress. We tried to get it changed through the regulations. And basically what the regulation said or provide is that for purposes of IRS, people have to follow the IRS revenue ruling. For purposes of USERRA, they need to follow the USERRA statute and regulations which puts an employer in a catch 22 situation.

(Rocco Mafae): When the person comes back, there's always the question what – and we're going to talk about the escalator principle too is what their compensation should be when they return, and to the extent that – and this is something we based here, because we're on a merit system and if, you know, somebody is not here, how do you give them a merit increase if they haven't worked, if they haven't – it's based on their performance over the past year.

And the way a regulation stock discussed that is if you have historically received any wage increases, then, for example, if you got in the last year before you deployed a two percent or a three percent increase, then you should get that two to three percent increase, whatever it was over the past year, for the time that you were gone.

(Hal Coxson): As far as reemployment rights or eligibility for reemployment rights, you recall is that one of the requirements is the timely application for reemployment. Well that depends on the length of service. So service less than 31 days, the individual must report back not later than the first full regularly scheduled work period on the first full calendar day following completion of service after a period allowing for transportation from the place of service, plus eight hours. And that has been issue in some cases, as to the eight hours and the period for safe transportation from the place of service. But that is the requirement for service of less than 31 days.

For service of more than days, but less than 181 days, it's an application either verbal or written must be submitted within 14 days after completion of service. Service of more than 180 days, an application not later than 90 days after completing service. There's a special rule for disabled employees. There's an extended application for reemployment for periods of recuperation, or hospitalization.

With respect to the timely application, if the employee misses the deadline without adequate cause, does not mean that the employee automatically loses reemployment rights. It then reverts to the employers policies concerning unexcused absences.

(Rocco Mafae): I want to point out there's a case that discuses this eight hour limit, and that's been a real problem, because people that work a second shift, they're ((inaudible)) a third shift, they may get off their drill weekend, say Sunday at 4:30 and then they have to drive home and they don't get home until 10 o'clock at time. And they work for the fire department, or they work for the police department, or they work for, you know, their – they work for your company, but they're on the third shift, and they would start work at midnight or one o'clock in the morning or something like that.

That's where the eight hour rule kicks in. And the question is always then is that required that they – do they have a right to eight hours of rest. And there was a case Wawa, it's Gordon versus Wawa which is out of the – it talks about an employee who got off work, drove home and then this to Wawa which was a convenience store to pick up their check and the manager said you've got to work tonight and he said well I don't have to work, you know, I'm supposed to be able to have some rest and stuffy, and he said no, no, you've got to work or we're going to let you know.

So he ended up staying and work that night, and the next morning on his way home he fell asleep at the wheel and died in an automobile accident. So his estate sued and I think the reason that the court ((inaudible)) that he or the estate was not entitled to any relief was that because the employee had decided to stay at work. if the employee had left and then the company had taken some retaliatory action against him, then their probably would have been a USERRA violation and a case there. But because the employee stayed, the court said there was no substantive right of eight hours of rest.

Now I'm not sure I really agree with that decision but based on the facts of that case, it wasn't a really good case to test the eight hour rule. But that's always a dilemma particularly for the weekend folks when they return.

(Hal Coxson): The next issue is reemployment by a successor in interest and this is something that, again, is more frequent, than it once was with mergers, acquisitions and the like. The successors in interest are also covered by USERRA. And employees of the successor as well as employees of the prior employer, enjoy reemployment rights.

The case that's cited there, we won't go into detail, is a case that talked about whether or not someone was a successor. And but I would submit that if you go to 29CFR 1002.35 of the regulations, there's a very good discussion of the definition of successor in interest. I had a case involving this, for example, where there were two employers. The first employer had – this was a government contractor, had an employee in a particular decision who went on military leave.

The successor employer who took over the contract, and filled the position, the employee also went on military leave. And wouldn't you know it, they both came back at the same time, and they both claimed the same position. And so you can get anomalous situations like that, which are complicated but with the successor in interest and with the current rate of mergers and acquisitions, this is an important area for people to understand.

There are a number of exceptions to reemployment, where an employer is not required to reinstate a returning service member, and those are basically under the heading of changed circumstances, where it would be impossible or unreasonable. Where it could create an undue hardship. Or where the prior employment was for a brief non recurrent period. These factors depend on the individual facts of the nature of the position and the reasonable expectation with regard to reemployment rights. (Rocco), do you have any examples you want to add there?

(Rocco Mafae): No.

(Hal Coxson): OK. Well let's move on then. Determining the reinstatement position, first of all the reinstatement must be prompt. That's generally two weeks. And here's one of the most – we've mentioned it now for the firs time three quarters of the way into the program, but it's the escalator principle, and in this case, the escalator position which comes form the 1946 case of Sullivan Dry Dock which says that a returning service member doesn't step back on the seniority escalator at the point he stepped off. He steps back at the precise point he would have occupied had he kept his position continuously during the military service. It's basically a but for test. And this applies not only to the reinstatement position, but also with respect to rates of pay and other benefits.

And it applies, for example, where there's a layoff. I mean just as an escalator goes up, it can also go down. And so the position that the returning service member finds upon return may not be the same position it may be a lower position, or a worse position or no position at all if there has been a layoff with no recall rights. But that's a very important concept, the escalator position.

Reinstatement positions, again, depend upon the length of service, less than 91 days the returning service members is entitled to the escalator position or a pre service position if not the escalator position. For service of more than 90 days, the same as the escalator position and the pre service position or another comparable position with like seniority status and pay, for which the employee is qualified. And the employer has the obligation to help qualify the returning employee and for the escalator or a comparable position. If the person fails to qualify, then the employee is still entitled to the next best position or the nearest approximation to the escalator position.

This is another right that is guaranteed under USERRA and that is job protection, post reinstatement job protection and its designed to prevent fraud or sham reemployment where the person has been promptly terminated or disciplined. If the period of service is for more than 30 days, the employee may not be terminated except for cause for 180 days, if the service was for more than 30 days, but less than 181 days. Or the employee may not be terminated except for cause for an entire year, after reinstatement, if the military service was for more than 180 days. Obviously, this is a limitation on another limitation, on the at will doctrine.

(Rocco Mafae): Right. And there was a question that asked us to whether or not what per cause means, and the regulation addresses that by saying that you may be discharged for cause based on either on your conduct, or in some circumstances on the application of the escalator principals, and a discharge action based on your conduct, your employer bears the burden of proving that it is reasonable to discharge you for conduct in question and that you had notice that such conduct would constitute cause for discharge.

And if the application of the escalator principle after your employment results in your job position being eliminated, then that would constitute cause for purposes of USERRA. And again, the employer bears the burden of doing that. Now I have to tell you in a situation we had here, we had an employee who went on reserve duty, came back, they had been gone for more than 180 days. We rehired them. And then there was the downsizing that took place. And because of the fact that we are a defense contractor I advised not to let that person go even though there was a reduction in force. And the way I interpret the for cause, would be that in that particular case, I'm not sure that it would specifically apply to that type of situation, particularly where you brought the person back and then you have a reduction in force after the fact. So if there was one going when you brought the person in, that may apply in that particular situation. But anyway, we ran into that and it's a very difficult situation to be in because you don't want to necessarily have the person go off and complain and say, you know, well I went off and served my country for six months, and then came back to work for this defense contractor, and they let me go.

(Hal Coxson): And so the person who asked the question I would also refer him or her to the regulations, because the regulations are pretty clear here. They give examples of for cause in a question-and-answer format. So I know they devote some time to that.

Another confusing area for many people is the rate of pay that the person must receive upon a return for military service. Basically the escalator principle applies again. And I say this is controversial because any pay increase differential, step increases, merit increases or periodic increases, discretionary, non discretionary bonuses, that a returning service member would have earned with reasonable certainty must be incorporated in the rate of pay for the person who has – who is returning.

We commented on this in the regulations, and basically questioned, whether if there's a skills test, or if there's an examination or actually more commonly, if there's a performance based merit increase, where it's, you know, the employee obviously is not there to perform the duties of the job, how can the employer know with reasonable certainty, whether or not that employee would have received the merit increase, or the discretionary bonus, for example.

And basically the regulations provide that you – the way to determine reasonable certainly is to look at the employee's prior performance with the employer. If the employee performed well and received merit increases, then it's reasonable certain that the employee would have continued to do so. You can also look at fellow employees and whether they receive merit increases. All of that seems to me to be a little iffy, but that's the way the regulations state. And they do so, so as not to provide any detriment for someone who is on military service.

The other areas of confusion, for example, the health plan coverage and pension benefits we've discussed a little bit, the employee is entitled to immediate reinstatement of coverage of health plan upon reemployment with no waiting period, and no exclusion for preexisting

conditions, except where there's a service connected disability or injury and as determined by the Veterans Administration. If there was family coverage, then the same coverage upon reinstatement for purposes of pension benefits, again, we're talking about all types of pensions, where's no break in service for purposes of participation, vesting, and accrual of benefits for 401 (k) plans, we covered this earlier, about the employer matching contributions and the employee contributions and the time within which those contributions must be made to make up any elective or after tax contributions for a 401 (k) plan.

As far as reemployment of disabled employees, and unfortunately there are more and more of those among the returning veterans. They are entitled to ADA like broad reasonable accommodations. Disabled, or disability is not defined in the statute, but there is an extended application for reemployment on the part of those who are disabled, again, two years after completion of military service, and not maybe extended it further.

The reinstatement position for the employee is the disabled employee is the escalator position and the employer is required to make reasonable efforts to accommodate the disability and also to help the employee become qualified to perform the duties of the escalator position or a position of equivalent seniority status and pay or the nearest approximately to the equivalent position.

(Rocco Mafae): Yes, I just want to add too on that post reinstatement job protection, just because I wanted to mention the (Duarte) case versus Agilent Technologies. And the reason I mentioned that is it's a marine reservist who returned from duty, and then was placed into a similar type of job under the escalator principle but not exactly the same job that he had

before. And then subsequently he was terminated from that position and he returned to his civilian job in 2003. And then he was gone for greater than 180 days. And then four months later, he was laid off, so in October 2003. And then within three months, the company advertised for the same exact same position in a local newspaper. And needless to say he was successful in his retaliation claim against Agilent. And he was able to recover his back pay for $114,000 and front pay of $324,000 plus all of his attorneys fees.

So again, those types of cases are not the types of cases that you really want to get involved in. And you need to be very careful to make sure that you're advising the HR folks not to go off and do something that's going to cause a lot of problems for the company.

(Hal Coxson): And this might be a good point to mention (Rocco) that (Rocco) has provided a very thorough detailed paper that is one of the links and it goes into the Duarte case in many other cases with the citations and a fuller discussion. I would encourage you to look at that document.

Another USERRA right is non retaliation. And this is similar to non retaliation in other employment statutes. It's broad based. But it applies to whether or not the individual has performed military service. You can have someone who has no connection with the military and who has not performed military service, but who participates in a USERRA investigation for example, and the employer may not retaliate against that person for participating in enforcing USERRA rights on behalf of someone else.

It covers all employment positions including those that are for a brief non reoccurring period. And basically the retaliation restrictions include where an individual has taken an

action to enforce USERRA, where the person has testified or made a statement in a proceeding to enforce USERRA or assisted or participated in an investigation by DOL vets or exercised a right provided by USERRA.

The relationship to other laws and private contracts. There are 50 state laws that you should be aware of where you're doing business. As (Rocco) mentioned USERRA is a floor, not a ceiling. And so the state laws may establish greater rights, but not lesser rights. The state laws also typically apply to state guard actions where the governor calls out the guard for a particular reason that's not covered by USERRA. USERRA also preempts any state or local laws but also contracts, agreements, or policies that limit, reduce, or eliminate in any matter any right or benefit under USERRA including adding additional prerequisites to exercising USERRA rights. Which leads into the mandatory arbitration policies that many employers have. And I think it's doubtful, I don't know whether it's been resolved, (Rocco) as to whether or not an employee under a mandatory arbitration policy may wave rights to litigate a USERRA requirement.

(Rocco Mafae): Yes, there are two cases that I found on this, one is the circuit – (Garrett) versus Circuit City stores that just came out on May 11, 2006. And then there's another case which is (Brett Letic) versus (Kathy Inc). And in the (Brett Letic Kathy) case that was January 2006, the court there said that the arbitration provisions did not supersede the USERRA provisions, and therefore your right of action was in federal court. But the court – the fifth circuit, in fact, in the Circuit City case said that no the federal arbitration act supersedes the USERRA claim. So if you agree to arbitration in your employment contract, then that would take precedence over USERRA. So I'm not sure, you know, we've got a little bit of a split there.

(Hal Coxson): It sounds like a split in the circuits. Something that will eventually be resolved in the Supreme Court.

(Rocco Mafae): Right.

(Hal Coxson): As far as enforcement in penalties, much to everyone's chagrin there's no statute of limitations for the filing of an action or a complaint or the initiation of a law suit under USERRA. Instead it's the equitable doctrine of latches. That also is the subject of comment and controversy in the comments. But they decided that since the statute didn't provide for a statute of limitations they could not do so in the regulations. And so they continue to apply the equitable doctrine of latches. The- there's a private right of action in federal court with the assistance of the U.S. attorney, actually the attorney general, but the U.S. attorney for the state where the action is taking place. The damages include reinstatement back pay and back benefits, attorneys fees and costs, and double damages for willful violations. And I would add to this another penalty clearly is the adverse publicly, especially involving returning service members, and the patriotic fervor that has surrounded them in this country.

(Rocco Mafae): I would agree. And just as a point, I gave briefings to the U.S. attorney's office down in Dayton last year as part of my reserve duty and discussed with the U.S. attorney's office in the northern district of Ohio, and both U.S. attorneys have expressed real interest in these types of situations, where they would really like to get involved and handle these types of cases. So you can be sure that, you know, if you get involved in one of these things and

the Department of Justice and the U.S. attorneys office steps in, that again is not the kind of publicity that you would want as a company.

(Hal Coxson): The Department of Labor – U.S. Department of Labor Veterans employment training service, DOL Vets, both administers USERRA and also has an enforcement role in USERRA which is the investigation including subpoena power. And then referrals to the justice department. Of course, there's also, as we indicated, a private right of action which does not require exhaustion of remedies through USERRA – I mean through DOL Vets. And so with the assistance of the U.S. attorney.

As far as technical assistance, and outreach the Department of Labor has been diligent in doing so. They've conducted a number of programs and seminars. For example, the Assistant Secretary for Vets, (Chick Chiccolella) at the Department of Labor spoke at our national client seminar. We've done a number of Webcasts with (Chick) and with the DOL, but also with the Department of Defense's employer support of the guard and reserve. So there is no end to assistance. And I think that it's safe to say that the old adage about I'm here from the federal government, I'm here to help you applies in this case, because I think everyone is on the same page wants the same result, wants the same outcome and that is compliance with USERRA. This outreach, of course, also goes to individual employees but the Department of Defense, ESGR is a very valuable resource. And you can find them online, also www.esgr and I forget whether it's .Gov or .Org.

(Rocco Mafae): I just want to say, I know we're kind of running out of time, but as I said in the beginning it's a communication issue. And I've noticed in some of the questions that have been asked here as to poor performance satisfy the cost standard, and things. Let me tell you

that if they're a poor performer in their civilian job, they're not going to be a good performer in the reserves either. And just because they're doing reserve duty doesn't give them a special free get out of jail card. The fact is that if they don't communicate with you and they're not doing a good job at work, they're probably not going to be the kind of person that's going to stick around.

What you find is that the people that are really good in their civilian jobs, the people that really work hard, they're the ones that also are great performers in the reserve program. And they don't usually have trouble because they're communicating with their employers. And their employers – let me tell you, the vast majority of employers want to do the right thing. And they want to help out the reservists. And the vast majority of reservists they want to make sure they do the right thing by their employers. But there's always going to be a few people that try to take advantage of the system. And so I'll just leave it at that.

(Jeff Frost): On that – this is (Jeff). On that note, I think we're just about out of time. I'd like to thank both (Rocco) and (Hal) for contributing today. I think we got to most questions. There was one question that we will respond to. And again, that will be posted. Thank you for joining us today.

(Hal Coxson): Thank you.

(Rocco Mafae): Thank you very much.

(Jeff Frost): And that concludes our conference. Thank you.

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