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Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights

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**CITIZEN SOLDIERS FIGHTING TERRORISM:
RESERVISTS' REEMPLOYMENT RIGHTS**

The Uniformed Services Employment and Reemployment Rights
Act and Minnesota's Military Leave Laws

Ryan Wedlund[†]

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I. INTRODUCTION

*“From time to time, the tree of liberty must be watered
with the blood of tyrants and patriots.”*

—Thomas Jefferson

The National Guard aphorism, “Citizen Soldiers, Always Ready,” held true on September 11, 2001. Within minutes of the horrific events, the National Guard led America’s first military response to the attack on the United States.¹ Two Massachusetts Air Guard F-15 Eagle fighter jets were the first to arrive at the World Trade Center, just minutes after the United Airlines flight sliced into the second tower.² In the days after September 11, President George W. Bush declared a national emergency, ordering the Ready Reserve of the Armed Forces to active duty, in response to the continuing threat of further attacks on the United States.³ In addition, the president asked the states’ governors to call up National Guard troops to provide airport security and to generate confidence, given post-September 11 sagging air travel numbers.⁴ Citizen soldiers adorned in camouflaged uniforms and carrying military assault rifles and tactical combat pistols were placed at our nation’s 420 commercial airports to increase

1. Lt. Gen. Russell C. Davis, Chief, National Guard Bureau, remarks to the Senate Judiciary Committee Hearing, Panel on Homeland Defense (Oct. 17, 2001) (on file with the author).

2. *Id.*

3. Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 14, 2001).

4. *More Guard Troops for Airports*, CBS NEWS (Nov. 9, 2001), at <http://www.cbsnews.com/stories/2001/11/09/archive/main317458.shtml> (last visited March 20, 2004).

security.⁵ In the year following September 11, approximately 130,000 reservists served on active duty at one time or another,⁶ with a peak number of 82,500 reservists on active duty during the spring of 2002.⁷ By January 2003, mobilized reserve numbers were reduced to 50,000; however, their numbers quickly began to rise again in anticipation of a war with Iraq. By March 19, 2003, the beginning of the war against Iraq, there were 212,617 reservists mobilized,⁸ and by the end of the combat phase of the war there were 224,528 reserve troops mobilized.⁹ As of mid-December 2003, 178,514 National Guard and Reserve personnel remained on active duty around the world.¹⁰ The post-September 11 call-ups are the largest mobilization of the reserve force since military operations Desert Shield and Desert Storm of the 1990-91 Persian Gulf War.¹¹

With a reserve forces mobilization of the current magnitude comes the most significant test of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), enacted in 1994.¹² USERRA requires all employers¹³ to provide employees

5. *Id.*

6. June Kronholz, *For Reservists, Tales of Interrupted Lives*, WALL ST. J., Sept. 11, 2002, at A4 ("About 130,000 of the nation's 1,250,000 reserve forces have served at one time or another during the past year, with 76,658 currently on active duty.")

7. *U.S. to Demobilize 14,500 Reservists*, CBS NEWS (Apr. 30, 2002), at <http://www.cbsnews.com/stories/2002/04/30/attack/main507576.shtml> (last visited March 20, 2004).

8. Press Release, Office of the Press Secretary, Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq (Oct. 2, 2002), at <http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html>; Press Release, National Guard and Reserve, National Guard and Reserve Mobilized as of March 19, 2003 (Mar. 19, 2003), at http://www.first.army.mil/pao/2003_Articles/no_mobilized_ng_19mar03.htm (last visited March 20, 2004).

9. Press Release, National Guard and Reserve, National Guard and Reserve Mobilized as of April 30, 2003 (Apr. 30, 2003), at http://www.first.army.mil/pao/2003_Articles/no_mobilized_ng_resv.htm (last visited March 20, 2004). President Bush declared an end to combat operations in Iraq on May 1, 2003 while aboard the U.S. Navy aircraft carrier, USS Abraham Lincoln. Patrick Olson & Michael Morgan, *Bush to Tell U.S. Major Iraq Combat Over*, CHI. TRIB. REDEYE EDITION, May 1, 2003, at 8.

10. Press Release, National Guard and Reserve, National Guard and Reserve Mobilized as of December 17, 2003 (Dec 17, 2003), at http://www.first.army.mil/pao/2003_Articles/no_mobilized_ng_resv.htm.

11. Stephen M. Duncan, Assistant Secretary of Defense for Reserve Affairs, *War Confirms Total Force Policy, Performance of Guard, Reserve Forces A-One*, THE OFFICER 80 (July 1991) (THE OFFICER is the official magazine of the Reserve Officer Association) (on file with the author); Honorable Charles L. Cragin, Acting Assistant Secretary of Defense for Reserve Affairs, *The Demise of the Weekend Warrior*, BANGOR DAILY NEWS, May 27, 1999, at 1.

12. 38 U.S.C. §§ 4301-4333 (2003).

time off to perform military duty.¹⁴ Furthermore, USERRA entitles employees to reemployment rights and other benefits from their employer upon completion of military service.¹⁵

This article begins by addressing the increased use of reserve component forces in the day-to-day operation of the United States military.¹⁶ Then, after a brief comment on the history of military reemployment laws, the article analyzes USERRA violation questions and complaint frequency statistics.¹⁷ Focusing on the frequency statistics, the article discusses how USERRA applies to the most common questions and complaints regarding reemployment law.¹⁸ The article also analyzes Minnesota's military reemployment rights statute and the fifteen-day paid military leave statute for public employees.¹⁹ Finally, the article points to gaps in protections provided for those called to the colors from their civilian lives in order to defend and protect our great nation.²⁰

II. MILITARY DEPENDENCY ON GUARD AND RESERVE FORCES

"We make war that we may live in peace."

—Aristotle

Following the Desert Storm cease-fire,²¹ the 1990s realized a thirteen-fold increase in the use of reserve troops, resulting in a sustained level of over 12 million duty-days per annum.²² Today,

13. *Id.* § 4303(4)(A), (B), (C).

14. *Id.* § 4303(13), (16) ("The term 'uniformed services' means 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 national emergency.").

15. *Id.* § 4312.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part III.

19. *See infra* Part IV, V.C.

20. *See infra* Part VI.

21. *See* Jeffrey T. Richardson, *Ten Years After: A National Security Archive Electronic Briefing Book*, Jan. 17, 2001, at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB39> (last visited March 20, 2004) (recounting the events leading up to the cease-fire).

22. Donald H. Rumsfeld, Secretary of Defense, *Sizing and Selectively Modernizing Forces for an Era of Uncertainty*, ANN. REP. TO THE PRESIDENT AND THE CONGRESS 2002, at 64 ("The use of Guard and Reserve troops to support operational requirements has steadily grown from around 900,000 duty-days annually in the early 1990s to a sustained annual level of over 12 million duty-days

the idea of the “weekend warrior,” who spent one weekend a month and two weeks each summer fulfilling military reserve commitment, is a fleeting glimpse of the past because the reserve components serve as an essential element to the defense strategy and day-to-day operations of the U.S. military.²³ During 2002, Secretary of Defense Donald H. Rumsfeld reported to the president and Congress that:

Today’s Reserve Components, comprised of the National Guard and Reserve forces, are an integral part of the defense strategy and day-to-day operations of the U.S. military. They have been assigned missions that are among the first needed during a national emergency or war. Since 1990 there have been six occasions on which the President has initiated an involuntary call-up of Reserve Component members to active duty, including the call-up after the events of September 11. Within minutes of the September 11 attacks, National Guard and Reservists responded to the call to duty. They flew combat patrols, patrolled the streets, and provided medical assistance, communications, and security at numerous critical sites across the country. Perhaps the National Guard’s most visible support to civil authorities was to provide security at America’s airports until additional security measures could be established. When the bombing of Afghanistan started October 7, more than 30,000 reservists supported operations Noble Eagle and Enduring Freedom—the most Guard and Reserve personnel on active duty since Operation Desert Storm.²⁴

It is unlikely that the high operations tempo of the reserve forces will cease for three reasons. First, the cost-effectiveness of the Guard and Reserve as a military force; second, a continuing reliance on the reserve force by way of Total Force integration; and third, an ever-changing world where the United States uses its military force in a variety of circumstances.

A. *Citizen Soldiers in the U.S. Military*

Since this country’s inception, citizen soldiers have played a role in fighting for freedom, liberty, and national security. In fact,

since 1995.”).

23. *See id.* at 63.

24. *Id.*

the National Guard is the oldest component of the Armed Forces of the United States, beginning as the militia of the Massachusetts Bay Colony in 1636.²⁵ To begin to understand the need for reemployment rights law, one needs to understand the structure of today's active duty and reserve components military. Our nation's full-time or standing active duty military consists of the Army, Navy, Air Force, Marines, and Coast Guard. Our nation's part-time military reserve components include citizen soldiers who, when called to active duty, integrate with our nation's standing active duty force. As citizen soldiers, reservists serve in the Army National Guard, Air National Guard, Army Reserve, Air Force Reserve, Naval Reserve, Marine Corps Reserve, and Coast Guard Reserve.²⁶ After basic military training and subsequent military occupational specialty training, reserve component personnel serve a minimum of one weekend a month and an additional two weeks per year to stay proficient in their military specialty.

Reservists are in thousands of communities in every state, territory, and the District of Columbia.²⁷ Citizen soldiers may pursue civilian careers while serving their country part time in the military. Due to the events of September 11, hundreds of thousands of reservists left their employers for active duty, leaving many employers and employees with questions regarding what employment and reemployment rights and obligations are provided for by military leave and reemployment laws.

B. Total Force Integration

One driving force behind the 1990s thirteen-fold increase in the use of reserve components is the military's organizational

25. See S. Con. Res. 93, 107th Cong. (2001) (a concurrent resolution on the 365th anniversary of the National Guard, honoring "the commitment and sacrifices made by the 458,400 citizen soldiers and airmen of the National Guard, their families, their employers and their communities," recognizing "the critical importance of the National Guard, at home and abroad, to the national security of the United States," and saluting "the citizen soldiers and airmen of the National Guard for their service on September 11, 2001, and their continuing role in homeland defense and military operations . . .").

26. 10 U.S.C. § 10101 (2003) (naming the seven reserve components of the armed forces).

27. Army National Guard Recruiting Web Site, *at* <http://www.1800goguard.com/index.asp> (last visited March 20, 2004) ("The Guard has more than 3,200 units located in more than 2,700 communities across the 54 States and Territories. Each state has a unique force structure and a varying number of units, personnel, armories and training sites.").

scheme, known as Total Force structure. Total Force is a concept that was originally announced by Secretary of Defense Melvin Laird in August of 1970, which subsequently became military Total Force policy during 1973.²⁸ Under Total Force, the military's initial source of augmentation of the active-duty force is the reserve components, rather than the draft. Total Force creates an all-volunteer military, seamlessly integrating active duty, National Guard and Reserve forces.²⁹ Prior to Total Force policy, Congress and the president used the draft to fill the military's need for large numbers of soldiers.³⁰ The last draft ended in 1973, toward the end of the Vietnam War. The Persian Gulf War, 1990-91, was the first major activation of the Reserve under the Total Force concept, with more than 225,000 reservists called to active duty during the war.³¹ Subsequent presidential call-ups of the reserves in the 1990s included Haiti for humanitarian operations during 1994, Bosnia peacekeeping operations during 1995, Iraq enforcement of no-fly zones during 1998, and support for the North Atlantic Treaty Organization ("NATO") operations in the former Yugoslavia during 1999.³² Today's 1.4 million men and women of the reserve components represent nearly one-half of our nation's total force.³³

28. Margaret MacMackin, *History of the Reserve*, CITIZEN AIRMAN MAG., Oct. 1997 (on file with the author). Total Force policy integrated "the active duty, guard and reserve into a homogenous whole." *Id.*

29. *Id.*

30. Deanna Zammit, *Right Now, No Draft*, Newsday.com, at <http://www.newsday.com> (on file with the author).

The draft is a way that Congress and the president can require able-bodied young men to join the U.S. military. There was no general draft until the Civil War, when both the Union and Confederacy passed draft laws. A formal system was put in place in 1940, when President Franklin D. Roosevelt created the Selective Service System to register 18-to-26-year-old men available to fill the ranks in emergencies. Congress instituted a draft during World War II, the Korean War and the Vietnam War. No men were drafted to fight the Persian Gulf War.

Id.

31. Duncan, *supra* note 11, at 84.

32. See Cragin, *supra* note 11, at 1.

33. *Id.* See also OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS, TOTAL RESERVE MANPOWER DATA (Sept. 30, 1999); DEPARTMENT OF DEFENSE, DIRECTORATE FOR INFORMATION OPERATIONS AND REPORTS, ACTIVE DUTY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (table 309A) (Sept. 30, 2001).

C. *Cost Benefit of the Reserve Components*

In addition to having a highly trained reserve, ready to integrate with the active duty military component short notice, Total Force policy saves money by maintaining as small an active-duty force as possible, considering military needs and commitments. In 1968, there were more than 3.5 million personnel on active duty, nearly two and one-half times more than today's 1.4 million personnel on active duty.³⁴ Although reserve component personnel account for nearly half of today's fighting force, funding for the reserve components is only 8.4% of the total defense budget.³⁵ "Because reserve components can provide substantial capability within a smaller defense budget, they have been called upon increasingly to contribute within the Total Force."³⁶ Declining defense budgets leading to a smaller active-duty military component coupled with the inherent dangers facing today's world community make using the reserve forces on a recurring basis a necessity.³⁷

III. COMPLAINT FREQUENCY RATES

*"These are the times that try men's souls. The summer soldier and
sunshine patriot will, in this crisis, shrink from the service of his country;
but he that stands it now, deserves the love and thanks of man and
woman."*

— Thomas Paine

USERRA grants the Secretary of Labor the power to investigate claims of that statute's violations.³⁸ USERRA also states that the Secretary of Labor shall provide Congress with a report for fiscal

34. DoD *Active Duty Military Personnel Strength Levels, Fiscal Years 1950-2000*, Office of the Secretary of Defense, at <http://web1.whs.osd.mil/mmid/military/ms9.pdf> (last visited March 20, 2004).

35. *See id.*

36. William S. Cohen, Secretary of Defense, ANN. REP. TO THE PRESIDENT AND THE CONGRESS 2000, ANN. DEFENSE REPORT, TOTAL FORCE INTEGRATION, Chap. 9 at 140, at <http://www.defenselink.mil/execsec/adr2000/chap9.html> (last visited March 20, 2004) ("The integrated capabilities of the Total Force are essential for the U.S. defense strategy to succeed.").

37. CHARLES E. HELLER, TOTAL FORCE: FEDERAL RESERVES AND STATE NATIONAL GUARDS 3 (1994).

38. 38 U.S.C. § 4326 (2003) (providing the Secretary of Labor the authority to conduct investigations and issue subpoenas for attendance and testimony of witnesses and production of documents).

years 1995 through 1999 containing case information, the number of complaints, and any apparent patterns of USERRA violations.³⁹ The yearly reports to Congress provide a substantial volume of information on USERRA that is distinct from the published USERRA case law.⁴⁰

If an individual's complaint is not successfully resolved through the Secretary of Labor, the individual may request that his complaint be submitted to the Attorney General for possible court action.⁴¹ If the Attorney General is satisfied that the complaint is meritorious, the Attorney General may file a court action on the complainant's behalf. It is rare for the Attorney General to pursue a case because the Department of Labor's Veteran's Employment and Training Service ("DOL-VETS") has a high success rate in resolving complaints. They average 85% or higher in case closure within 120 days of the complaint being filed.⁴² Complainants also have the option to privately file a court action,⁴³ but the litigation costs are normally prohibitive in comparison to the low monetary value of many USERRA violations, except for cases where an employer fired or failed to reemploy a service member.

Each yearly report has little variation in the overall number of complaints and the type of complaints filed. In the past, there was an increasing trend of complaints from employees within the federal government, but this trend was reversed during the 1999 fiscal year.⁴⁴ Each reporting year the Department of Labor opened more than 1000 new cases. Many involved multiple USERRA complaints so the number of complaint types was higher than the number of cases filed. Private employers received the most complaints, followed by state and political subdivisions, and finally

39. *Id.* § 4332.

40. As of November 2002, there were fewer than sixty published federal USERRA cases. The majority of the cases deal with firing or failure to reinstate and many are advanced under multiple employment law theories to include USERRA. There are also numerous Merit Systems Protection Board cases within the federal government. *See generally* Courtney B. Wheeler, Esq., United States Postal Service, *Successfully Litigating Cases Under the Uniform Services Employment and Reemployment Rights Act* (on file with the author).

41. 38 U.S.C. § 4323(a)(1).

42. *See* DEPARTMENT OF LABOR, NUMBERS AND STATISTICS FROM DEPARTMENT OF LABOR, VETERANS EMPLOYMENT AND TRAINING SERVICE AND EMPLOYER SUPPORT OF THE GUARD AND RESERVE, app. A (1995-1999) (on file with the author).

43. 38 U.S.C. § 4323(a)(2).

44. The 1999 fiscal year covers the period from October 1, 1998 through September 30, 1999.

the federal government as an employer.

Complaints arose in the largest numbers on behalf of reservists, followed by veterans, and then new recruits. Most of the complaints involved hiring and firing, which includes claims of discrimination, refusal to hire or reemploy, layoffs, and discharge due to military service obligations. Cases involving issues other than hiring and firing come in a wide range of areas including loss of seniority; failure to provide non-seniority fringe benefits; failure to promote; vacation benefits; accommodation, retraining, or otherwise failing to qualify a returning disabled veteran for work; accommodation, retraining, or otherwise failing to qualify a returning non-disabled veteran for work; pay rate; status in employment; pension benefits; and health benefits.⁴⁵

Since September 11, 2001, there has been approximately a 30% rise in the number of cases filed with the Department of Labor.⁴⁶ This is a particularly significant increase in light of the steady decline in case openings that the Department of Labor had been experiencing before September 11, 2001.⁴⁷ The National Committee for Employer Support of the Guard and Reserve (“ESGR”),⁴⁸ an agency within the Office of the Assistant Secretary of Defense for Reserve Affairs, reported a 42% increase in questions and complaints during the year following September 11.⁴⁹ The ESGR information request and complaint frequency numbers are also important because of their sheer quantity. From

45. See DEPARTMENT OF LABOR, *supra* note 42, at app. A.

46. E-mail Interview with Charles Dawson, USERRA Representative, Department of Labor, Veterans’ Employment and Training Service, Office of Operations and Programs, Investigations and Compliance Division (Sept. 16, 2002) (on file with author).

47. *Id.*

48. See ESGR Factsheet, at <http://www.esgr.com/employers/aboutESGR.asp?c=factusera.html> (last visited March 20, 2004). “[ESGR] was established in 1972 to promote cooperation and understanding between Reserve component members and their civilian employers and to assist in the resolution of conflicts arising from an employee’s military commitment. Today ESGR operates through a network of more than 4,500 volunteers throughout 54 committees located in each state, the District of Columbia, Guam, Puerto Rico and the Virgin Islands.” *Id.*

49. See DEPARTMENT OF LABOR, *supra* note 42, at app. A. The Department of Defense tasks ESGR to “promote both public and private understanding of the National Guard and Reserve in order to gain U.S. employer and community support through programs and personnel policies and practices that shall encourage employee and citizen participation in National Guard and Reserve programs.” DEPARTMENT OF DEFENSE DIRECTIVE 1250.1 at 3 (Aug. 17, 1999), at <http://usmilitary.about.com/gi/dynamic/offsite.htm?site=http://www.dtic.mil/whs/directives/corres/html/12501.htm> (last visited March 20, 2004).

October 1, 2001 through September 30, 2002, ESGR volunteers throughout the United States handled 16,717 questions and complaints regarding USERRA.⁵⁰

IV. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

“A young man who does not have what it takes to perform military service is not likely to have what it takes to make a living.”

— John F. Kennedy

The USERRA covers all private employers and the federal and state governments.⁵¹ Unlike many other federal employment

50. See DEPARTMENT OF LABOR, *supra* note 42, at app. A.

51. 38 U.S.C. § 4303 (2003). The decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), provides that Congress may abrogate the states' Eleventh Amendment immunity only when Congress acts under section 5 of the Fourteenth Amendment. In making its decision, the Court relied on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976) and overruled its decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The Eleventh Amendment presupposes that each state is a sovereign entity in our federal system and that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a state’s] consent.” *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). Captain Samuel F. Wright, who helped draft USERRA while employed as an attorney for the Department of Labor, notes that the inter-agency task force that produced the work product that became USERRA believed that Congress could abrogate the states' Eleventh Amendment rights based on *Reopell v. Massachusetts*, 936 F.2d 12 (1st Cir. 1991). Capt. Samuel F. Wright, *Enforcing USERRA against a State*, 89 RES. OFFICERS ASS'N L. REV. (2003), at http://www.roa.org/home/law_review_archive.asp (last visited March 20, 2004). Capt. Wright goes on to state, “USERRA and the Veterans' Reemployment Rights law are based on the ‘war powers’ clauses of Article 1, Section 8. Accordingly, USERRA is unconstitutional insofar as it authorizes an individual to sue a state in federal court.” *Id.* (citing *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1989) (citing *Seminole*, 517 U.S. 44)). Yet Capt. Wright asserts:

There is a solution to this dilemma under a 1998 USERRA amendment: “In the case of such an action [to enforce USERRA] against a state (as an employer), the action shall be brought [by the Attorney General of the United States] in the name of the United States as plaintiff in the action.” 38 U.S.C. 4323(a)(1) (final sentence, added in 1998). In January of this year, Mr. Jayson Spiegel (then executive director of ROA) sent a letter to Attorney General Ashcroft, asking the Department of Justice (“DOJ”) to act diligently to enforce USERRA (Law Review 65). Mr. Spiegel’s letter included this sentence: “It is particularly important that DOJ act as attorney in those cases where the defendant (employer) is a state, because in those cases there is literally no remedy if your department does not get involved.”

Id. Capt. Wright is currently working for the National Committee for Employer Support of the Guard & Reserve and he continues to publish articles on the

statutes that provide exceptions for small businesses with a limited number of employees, the USERRA covers all employers without limitation.⁵² This measure can be very strenuous on a small employer who may lose a considerable segment of its workforce to a reserve forces call-up. Large employers tend to have more flexibility during times of employee leave for military duty, but even large employers feel the burden of going without or temporarily filling the void left by employees called to active duty.

USERRA significantly strengthens and expands the employment and reemployment rights of all uniformed service members. USERRA, effective December 12, 1994, was passed in response to modern employment conditions as well as the Total Force policy and the increasing use of the reserve forces.⁵³ USERRA is a complete rewrite of and replacement for Veterans' Reemployment Rights (VRR or VRRRA) laws. A primary goal in replacing VRR laws with USERRA was to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions."⁵⁴ Another purpose of USERRA is "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment . . . to minimize the disruption to the lives of persons performing service . . . [and] their employers . . . by providing prompt reemployment . . . and to prohibit discrimination against persons because of their service."⁵⁵

A. *Veterans' Reemployment Rights Laws*

Reemployment laws for veterans have been national policy for more than sixty years, with the first veteran reemployment measures passed during 1940, just before the onset of World War II.⁵⁶ As the years passed, VRR laws were modified on numerous occasions through a variety of formats.⁵⁷ *Fishgold v. Sullivan Drydock*

Reserve Officer Association website. *Id.*

52. 38 U.S.C. § 4303(4)(A).

53. 140 CONG. REC. H9133 (daily ed. Sept. 13, 1994) (statement of Rep. Montgomery).

54. H.R. REP. NO. 103-65, at 18 (1993).

55. *Id.* § 4301(a)(1-3).

56. 50 U.S.C. § 308, Acts of Sept. 16, 1940, c. 720, § 8, 54 Stat. 890; July 28, 1942, c. 529, § 2, 56 Stat. 724; Dec. 8, 1944, c. 548, § 1, 58 Stat. 798; June 29, 1946, c. 522, § 1, 60 Stat. 341, which related to service certificates and reemployment rights, expired on Mar. 31, 1947.

57. Lt. Col. H. Craig Manson, *The Uniformed Services Employment and*

and Repair Corp., a 1946 U.S. Supreme Court case, provides the constant that reemployment legislation is to be liberally construed for the benefit of the military service member.⁵⁸ In analyzing USERRA, it is imperative that statutory analysis start with this “liberal construction” principle in mind.⁵⁹

In *Fishgold*, the Court laid out a touchstone of reemployment law now known as the “escalator principle.”⁶⁰ Employers are to treat employees who are absent from the workplace to perform military duty as if the employee had remained continuously employed.⁶¹ Employers and employees both struggle with the escalator principle due to the myriad of employment benefits affected by seniority, including promotions, probationary periods, tenure, vacation, and vesting in health benefit or retirement plans. The employer, in determining what position the service person would have attained, should use a reasonable certainty standard: but for the absence for military service, what position would the returning service member hold had he or she not been absent for military service?⁶² A factor in determining reasonable certainty is the high probability of an event occurring.⁶³

B. *The Congressional Record*

The congressional record further defines the intent of USERRA, stating that it is to be expansively interpreted: “incidents or advantages of employment . . . [are] intentionally framed in general terms to encompass the potential[] limitless variation in benefits of employment that are conferred by an untold number

Reemployment Rights Act of 1994, 47 A.F. L. REV. 55, 57 nn.7 & 9 (1999).

58. 328 U.S. 275, 285 (1946) (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943)).

59. “[T]he Committee wishes to stress that the extensive body of [Veterans’ Reemployment Rights] case law that has evolved over that [fifty-year] period, to the extent that it is consistent with the provisions of [USERRA], remains in full force and effect in interpreting these provisions.” H.R. REP. NO. 103-65, at 19 (1993).

60. *Fishgold*, 328 U.S. at 284-85.

61. See *infra* text accompanying note 108.

62. *Tilton v. Missouri Pac. R.R. Co.*, 376 U.S. 169, 180-81 (1964).

63. See *Schilz v. City of Taylor*, 825 F.2d 944, 946 (6th Cir. 1987); *Pomrening v. United Air Lines, Inc.*, 448 F.2d 609, 615 (7th Cir. 1971) (86% pass rate of training class meets reasonable certainty test); *Montgomery v. S. Elec. Steel Co.*, 410 F.2d 611, 613 (5th Cir. 1969) (90% success of probationary employees becoming permanent meets reasonable certainty test).

and variety of business concerns.”⁶⁴ From the congressional record:

[R]estoring the citizen-soldier to the position he or she would have obtained had he or she remained continuously employed is the principle which undergirds the veteran’s reemployment law. In the words of the law, the veteran is to be restored “without loss of seniority.” Although there are certain benefits “that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute,” *McKinney v. Missouri-K-T. R. Co.*, 357 U.S. 265, 271 (1958), the Supreme Court has determined that if “the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a ‘perquisite of seniority’ ” protected by the law. *Alabama Power Co. v. Davis*, 431 U.S. 581, 589 (1977).⁶⁵

In addition, the congressional record notes, “[t]o deny such rights to employees who serve in the military undermines the fundamental principle that the employee should not be disadvantaged by military service.”⁶⁶

The necessity for a strong national defense and the existence of veterans’ reemployment laws impose justifiable burdens on employers—justified by providing for and contributing to the common defense of this country.⁶⁷ “Domestic tranquility, our individual freedoms and liberty, and the general welfare would be unattainable objectives if we did not have a strong common defense.”⁶⁸ The negative impact on businesses and the economy became clear when domestic tranquility was shattered by terrorists on September 11, 2001. Congress recognized the effect of military strength on the economy while enacting USERRA, stating:

Today, much of our national policy is focused on efforts to strengthen our national economic base on plans to enable the engine of the national economy to run smoother and stronger, ever more powerful. In a fast-changing world, it too often goes unremarked that the

64. 103 CONG. REC. H9133 (daily ed. Sept. 13, 1994) (statement of Rep. Montgomery) (quoting *Monroe v. Standard Oil Co.*, 613 F.2d. 641, 645 (6th Cir. 1980), *aff’d*, 452 U.S. 549 (1981)).

65. 103 CONG. REC. H9134 (daily ed. Sept. 13, 1994) (statement of Rep. Montgomery).

66. *Id.* at H9135.

67. *Id.* at H9134.

68. *Id.*

U.S. military strength serves as a deterrent to aggressive leaders throughout the world, thus making it possible for the Nation to do business abroad. Clearly, the perception of a nation willing to respond to aggressive actions harmful to its national interests protects and provides an advantage to American companies operating in a global market.⁶⁹

Questions often arise at this juncture for employers. What if the employee was a few months into a one-year probationary period when the employee left for military duty? When is the employee's one-year probation complete? When does the employee receive her raise for one year of service to the employer? Should there be back pay if the raise is delayed until the end of the prerequisite period and then the raise is subsequently granted?

The Court in *Tilton v. Missouri Pac. R.R. Co.* provided direction on these questions.⁷⁰ The employer may wait to have the employee on the job for the entire prerequisite period before promotion or benefit or seniority status is granted.⁷¹ However, the employer must backdate the promotion, benefit, or seniority status to a time when it would have accrued "but for" the absence for military duty. Often commensurate with a retroactive promotion is the necessity of back pay in order to minimize the disadvantage of absence from employment because of the military obligations of the employee.⁷² In *Alabama Power Co. v. Davis*, the Court defined a two-axis analysis for deciding when a benefit "is a right of seniority secured to a veteran by [statute]. If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a 'perquisite of seniority.'"⁷³

With the exception of other federal laws, the USERRA supersedes any state laws or ordinances, contracts, agreements, policies, or other matters that eliminate any right or benefit

69. *Id.*

70. 376 U.S. 169 (1964).

71. "This does not mean that . . . the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job. A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period." *Id.* at 181. *See also* 103 CONG. REC. H9133 (daily ed. Sept. 13, 1994) (statement of Rep. Montgomery).

72. 38 U.S.C. § 4301(a)(1) (2003).

73. 431 U.S. 581, 589 (1977).

provided for by USERRA.⁷⁴ In addition, veterans may benefit from federal and state laws, contracts, agreements, and employer policies or other matters that are more beneficial to the military member.⁷⁵ It is also important to consider that USERRA serves as a floor and not a ceiling; USERRA is the minimum that must be accorded to the military member and employers are encouraged to do more.

C. Discrimination

The prohibition against discrimination and reprisal provided by USERRA is broad.⁷⁶ Discrimination cases in other areas of law, for example Title VII,⁷⁷ typically follow the shifting burden analysis articulated by the Court in *McDonnell Douglas Corp. v. Green*.⁷⁸ Under *McDonnell Douglas*, the shifting burden analysis has three prongs: initially, the plaintiff must meet the burden of showing a prima facie case of discrimination; next, the employer must articulate a nondiscriminatory reason for the adverse employment action; and finally, for the plaintiff to prevail, the plaintiff must prove that the employer's proffered reason for the adverse employment action was merely a pretext for discrimination.⁷⁹

USERRA also uses a shifting burden framework, but places a unique twist on the analysis. Unlike the shifting burden analysis in *McDonnell Douglas*, where the plaintiff always bears the burden of proving that discrimination has occurred,⁸⁰ USERRA provides that the employer bears the burden of proving that discrimination did not occur. After showing a prima facie case of a USERRA violation, the evidentiary burden of proof shifts to the employer to show that she did not discriminate against an employee due to his military membership.⁸¹ The employer then has the burden of persuasion, as well as the burden of production,⁸² to prove that the employer's

74. 38 U.S.C. § 4302(b).

75. *Id.* § 4302(a).

76. *Id.* § 4311.

77. 42 U.S.C. § 2000e (2003) (prohibiting employment discrimination based on race, color, religion, sex, and national origin).

78. 411 U.S. 792 (1973).

79. *Id.* at 802-04.

80. *Id.* at 802.

81. 38 U.S.C. § 4311(c) (2003).

82. *Gagnon v. Sprint Corp.*, 284 F.3d 839, 854 (8th Cir. 2002) ("Unlike the *McDonnell Douglas* framework . . . the procedural framework and evidentiary burdens set out in [38 U.S.C.] section 4311 shift the burden of persuasion, as well as production, to the employer.").

adverse action was not motivated by an employee's military activity.⁸³ In addition, the military activity of the employee need only be a substantial or motivating factor⁸⁴ in the adverse employment decision and need not be the sole factor motivating the employer's adverse action.⁸⁵

In addition to the anti-discrimination protection provisions of USERRA, employers are prohibited from retaliating against anyone⁸⁶ who files a complaint under the law, who testifies or otherwise participates in an investigation or proceeding under the law, or who exercises any right provided by USERRA.⁸⁷ Here again, upon establishing a prima facie case of reprisal, the burden of proof is on the employer to "prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right" under USERRA.⁸⁸

D. Eligibility for Reemployment Rights

There are several criteria that must be met in order for an employee to be entitled to the benefits of USERRA. First, the person must be an employee or an applicant for employment of a

83. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1013-14 (Fed. Cir. 2001). The burden shifts from an employee asserting a discrimination claim under USERRA to the agency:

[The burden shift] applies to both so-called "dual motive" cases (in which the agency defends on the ground that, even if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason) and so-called "pretext" cases (in which the agency defends on the ground that it acted only for a valid reason).

Id. at 1014.

84. *Id.* at 1013; *see also* 38 U.S.C. § 4311(c) (stating that military status cannot be a motivating factor in an employer's employment decision).

85. The evidentiary burdens set out in USERRA shift the burden of persuasion, as well as production, to the employer. *Gagnon*, 284 F.3d at 854; *see also Sheehan*, 240 F.3d at 1013 (stating that in USERRA actions, there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, by a preponderance of evidence, that the action would have been taken despite the protected status).

86. 38 U.S.C. § 4311(b) (stating that reprisal is prohibited against "any person," whether or not the person has performed military service).

87. *Id.*

88. *Id.* § 4311(c)(2).

private or governmental employer.⁸⁹ Second, the employee must be a member of, apply to be a member of, perform, or have performed, apply to perform, or have an obligation to perform service in a uniformed service.⁹⁰ Finally, if the employee has been separated from the military, the character of service for the separation must be under “general” or “honorable” conditions.⁹¹ There is a rebuttable presumption that the military service was satisfactory and the employer is required to reemploy the returning service member promptly.⁹²

E. Leave for Military Duty

Performance of duty in the uniformed services on a voluntary⁹³

89. *Id.* § 4303(3).

90. *Id.* § 4311(a).

91. When a military service member is on active duty for ninety days or more, the service member will receive a “Certificate of Release or Discharge from Active Duty,” commonly called by its Department of Defense form number, a “DD214.” Block 24 of the DD214, “Character of Service,” will list one of six discharge characterizations: Honorable, Under Honorable Conditions (General), Under Other Than Honorable Conditions, Bad Conduct, Dishonorable, or Uncharacterized. Army Reg. 635-5, Ch. 2-4(24) (Sept. 15, 2000). *See also* 38 U.S.C. § 4304:

A person’s entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events: (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge. (2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned. (3) A dismissal of such person permitted under section 1161(a) of title 10. (4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

Id. Title 10 U.S.C. sections 1161(a) and (b) referenced in section 4304(3) and (4) define the limitations on dismissal of commissioned officers.

92. 38 U.S.C. § 4313(a) (2003).

93. Although USERRA explicitly states it applies to “voluntary” duty, military reemployment laws have always applied to service members who volunteer for duty. In *Foster v. Dravo Corp.* the Court stated, “[t]he re-employment provisions of the Act apply not only to those drafted under the provisions of the Act, but also to men and women who enlist voluntarily in the Armed Forces, as long as the period of service does not exceed four, or in certain cases, five years.” 420 U.S. 92, 96 n.6 (1975) (citing 50 U.S.C. App. § 459 (g)(1)).

The 1940 Act was essentially re-enacted in the Selective Service Act of 1948, 62 Stat. 604. The name of the Act was changed in 1951 to the Universal Military Training and Service Act, 65 Stat. 75. In 1967 it was renamed the Military Selective Service Act of 1967, 81 Stat. 100. It was given its present name, the Military Selective Service Act, in 1971, 85

or involuntary basis includes active duty, active duty for training, initial active duty for training, inactive duty for training, full-time National Guard duty,⁹⁴ absence from work for an examination to determine a person's fitness to perform any of the preceding types of duty, and funeral honors duty performed by National Guard or Reserve members.⁹⁵

USERRA requires that the employee or an appropriate officer of the uniformed service give advance written or verbal notice of the military service obligation to the employer.⁹⁶ An employee no longer requests permission to be absent for military leave but rather provides notification of pending military service. In addition, no notice is required if the giving of notice to the employer is precluded by military necessity or the giving of such notice is otherwise impossible or unreasonable.⁹⁷ Frequently, employer-military-leave policies contravene the notice provision in USERRA by requiring copies of military orders or other formal documentation from an employee prior to granting military leave.

Stat. 348. The present §§ 9(b) and 9(c)(1) have remained largely unchanged since 1940, and § 9(c)(2) has been preserved in its current form since the re-enactment of 1948.

Id.

94. Full-time National Guard duty is Active Guard Reserve (AGR) duty as defined by 32 U.S.C. § 502(f) (2004). Active Guard Reserve must be differentiated from full-time National Guard "technician" duty, which is defined by 32 U.S.C. § 709. National Guard technicians are full-time, excepted-service federal employees who wear the military uniform during the workweek and are under the direction of the respective state's adjutant general. *See also* National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 775 (codified as amended at 32 U.S.C. § 709 (2003)).

95. 38 U.S.C. § 4303(13).

96. *Id.* § 4312(a)(1). Notice must be clearly adequate and understood by the employer. *See Sawyer v. Swift & Co.*, 836 F.2d 1257, 1260-61 (10th Cir. 1988). *See also* *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (6th Cir. 1988). In *Burkart*, a reservist provided his employer with fifteen minutes of notice before taking a three-week absence for National Guard duty. *Id.* at 1046. The employer terminated him. *Id.* The district court found that the reservist's notice to his employer of pending military duty was inadequate and granted summary judgment to the employer. *Id.* at 1247. The court of appeals affirmed, holding that adequate notice was required. *Id.* The court noted that the purpose of the act was to shield a reservist from discrimination, "not to arm him with a sword to punish his employer." *Id.* at 1250.

97. 38 U.S.C. § 4312(b). "Military necessity" under USERRA is determined "pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review." *Id.* Failure to provide advance notice to the employer, under the "otherwise impossible or unreasonable" exception, may be judicially determined. *See id.*

At a minimum, USERRA requires an employee to provide only verbal notice of military service to the employer. The employer may only ask the employee to meet the notice requirements contained in USERRA; the employer is not allowed to graft additional requirements onto the statutory language. Furthermore, the employer may not refuse to grant an employee a leave of absence, so long as the employee has not already exceeded the five years of cumulative service provided for in USERRA.⁹⁸

Upon the employee's return to the employer and the employer's request for documentation, service members need to provide documentation⁹⁹ for military leaves of absence of thirty-one days or greater.¹⁰⁰ For leaves of absence of less than thirty-one days, the employer may contact the service member's military unit to verify military duty. If a service member fails to provide documentation upon return from a leave of absence of thirty-one days or more, the employer may not deny reemployment "if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer."¹⁰¹ However, if after reemploying the person, the documentation becomes available and shows that the person does not meet one or more of the reemployment requirements, the employer may terminate that person.¹⁰²

98. *Id.* § 4312(a)(2), (c). *See also* *King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991). In *King*, the employer denied a request for a military leave of absence arguing that a requested three-year leave of absence was unreasonable and thus beyond the Veterans' Reemployment Rights Act's (VRRRA) guarantee. *Id.* at 216-17. The Court held that the VRRRA does not implicitly limit the length of military leave of absence to which the employee retains a right to civilian reemployment. *Id.* at 222. The VRRRA, USERRA's predecessor, did not contain the five-year cumulative limit provided for in USERRA. In light of the decision in *King* and being that USERRA is silent on an employer's right to refuse to grant military leave of absence, an employer cannot refuse to grant a leave of absence because of poor timing, duration, or excessive or frequent military leave that the employer believes to be unreasonable.

99. Documentation is usually in the form of a military order or DD214 that shows the inclusive dates of military service.

100. 38 U.S.C. § 4312(f)(1) (referencing 38 U.S.C. § 4312(e)(1)(C) and (D) regarding notifying the employer of intent to return upon completion of military duty "more than 30 days but less than 181 days" and "more than 180 days" respectively).

101. *Id.* § 4312(f)(3)(A). *See also id.* § 4312(f)(4) (stating "[a]n employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available").

102. *Id.* § 4312(f)(3)(A).

F. Duration of Military Service

Employees are allowed to be on leave from the employer for up to a cumulative total of five years of military service.¹⁰³ Additionally, there are multiple exceptions to what is counted toward the five-year cumulative total.¹⁰⁴ The most prominent of the exceptions is the required training for National Guard and Reserve members.¹⁰⁵ Excluded from the cumulative total of service is the once-a-month drill weekend, two-week annual training period, initial active duty for training, professional development, retraining, and any other additional training requirements determined by the service secretary.¹⁰⁶ The majority of military service performed by reserve members falls within the exception, placing no dent in the five-year cumulative total absence from employment. Another primary area of exception not counted toward the cumulative total is service during domestic emergency, national emergency, national security situation, and war.¹⁰⁷ The overwhelming majority of reserve personnel who have been voluntarily or involuntarily ordered to active duty following September 11 fall within one of the aforementioned employee-absence exception categories. Due to the numerous exceptions in calculating the five-year total cumulative absence from employment, it is only in a rare circumstance that a reserve member of the armed forces actually exceeds the five-year cumulative total absence for service limitation.

G. The Escalator Principle

While absent from the workplace for military leave, employers are to treat employees as if the employee had remained continuously employed. This concept, known as the escalator principle, is the touchstone of USERRA reemployment law. The

103. *Id.* § 4312(c).

104. *Id.* § 4312(c)(1)-(4).

105. *Id.* § 4312(c)(3). Exempt from the five-year cumulative total are reservists and National Guard member weekend drills, known as Unit Training Assemblies ("UTA"), and the annual two-week training sessions, pursuant to 10 U.S.C. section 10147 (2003) and 32 U.S.C. sections 502(a) and 503 (2003). In addition, individual professional development courses or skill training or retraining, certified in writing by the service Secretary concerned, are excluded from the service total.

106. 38 U.S.C. § 4312(c)(3).

107. *Id.* § 4312(c)(4).

Court in *Fishgold* originally announced the escalator principle when the Court stated:

Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.¹⁰⁸

The escalator principle is codified in USERRA stating,

A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.¹⁰⁹

Although many rights and benefits of employment accrue or continue during a leave of absence for military service, there are a few major exceptions. For instance, employers are not required to compensate an employee during a military leave of absence.¹¹⁰ However, many employers do have compensation programs for employees absent from the workplace for military duty.¹¹¹ The employee's status while on a leave of absence often leads to many employer and employee questions. For example, can the employer adjust an employee's schedule due to an upcoming weekend drill when the employer had the employee scheduled to work the same weekend? The answer here is "no" for two reasons.

The first reason applies a "but for" test: but for the military duty, would the employer have rescheduled the employee? Clearly the employer is rescheduling the employee only because of her military duty. But what if the employer has a policy of rescheduling

108. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

109. 38 U.S.C. § 4316(a).

110. *Id.* § 4312(a) (providing that persons absent for "service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of [USERRA] . . . "); *see also id.* § 4303(2) (defining "rights and benefits" and expressly excluding "wages or salary for work performed").

111. *See Employers Make Extra Efforts in Support of Guard, Reserve Employees* (listing 297 employers that have expanded their pay differential and medical coverage policies for Reserve and National Guard members called to active duty) *available at* <http://www.esgr.org/employers/outstandingEmployers.asp> (last visited March 20, 2004).

not just those absent for military duty, but rescheduling all employees who need to miss scheduled weekend workdays? The second reason is that a person absent from employment for military service “shall be deemed to be on furlough or leave of absence while performing such service.”¹¹² USERRA provides for a leave of absence, but it does not provide an option for the employer to reschedule the employee. The employer and employee may mutually agree to reschedule so the employee may receive the additional pay and the employer receives the employee’s services, but the employer cannot act unilaterally when rescheduling.

An alternative option for the employee, notwithstanding the non-compensation provision, is that she may use vacation or similar leave with pay that accrued before commencement of military service.¹¹³ However, an employer is not allowed to require a person to use vacation or similar leave during a military leave of absence.¹¹⁴

Employees on military leave are entitled to the same non-seniority based rights and benefits that are available to employees on non-military leaves of absence.¹¹⁵ For example, if the employer provides other employees on an unpaid leave of absence with continuing medical, dental, disability, or life insurance, then the benefit must also be made available to an employee on military leave.¹¹⁶ Additionally, if there is a variation between the different

112. 38 U.S.C. § 4316(b)(1)(A).

113. *Id.* § 4316(d).

114. *Id.* See *Graham v. Hall-McMillen Co., Inc.*, 925 F. Supp. 437, 442 (N.D. Miss. 1996); see also H.R. REP. NO. 103-65, at 35 (1993) (stating USERRA “would allow an employee leaving for military service to use, at his or her choice, accrued vacation leave during the military absence . . . [C]urrent law prohibits an employer from forcing a reservist or National Guardsman to use paid vacation leave . . .”) (citing *Hilliard v. New Jersey Army Nat’l Guard*, 527 F. Supp. 405, 412 (D.N.J. 1981)).

115. See 38 U.S.C. § 4316(b)(1)(B). This section states:

[A] person who is absent from a position of employment by reason of service in the uniformed services shall be entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

Id.

116. *Lapine v. Town of Wellesley*, 167 F. Supp. 2d 132 (D. Mass. 2001). A military member, returning to a police position after a three-year period of military service, was entitled to vacation benefits as if he had been serving in the police department during the period in question. *Id.* Vacation time in the police

types of rights and benefits for non-military leaves of absence, the employer must provide the most favorable treatment to the employee on military leave.¹¹⁷

The Minnesota ESGR committee was recently faced with a question regarding a variation in employee rights for different types of leaves of absence. The service member is a doctor with Fairview Health Services in Minnesota. The doctor was on active duty from June through October 2003. The issue involves the doctor's pay, in which he receives approximately 60% from a base pay scale and another 40% of his pay is based on production. The production pay is calculated looking back at the previous six months of production. Because of the doctor's five-month military leave of absence, his patient load did not reach the required levels to receive production pay; therefore, Fairview did not provide production pay.¹¹⁸ However, Fairview has a policy to grant "production credit" to other doctors who are absent for illness or disability. Under a most favorable leave concept, Fairview should grant similar production credit rights to the doctor returning from five months of military leave.¹¹⁹

The leading VRR case on the "furlough or leave of absence" clause is *Waltermeyer v. Aluminum Company of America*.¹²⁰ In *Waltermeyer*, the plaintiff was seeking a paid holiday while he was on leave for military duty. The plaintiff prevailed because the collective bargaining agreement provided multiple leave categories where employees would receive the holiday pay, although military leave was not included in the leave categories that provided the paid benefit. The *Waltermeyer* court stated that "employees who are

department, under the circumstances, was "a reward for length of service not short-term compensation for work performed." *Id.* at 143.

117. 38 U.S.C. § 4316(b)(1)(B). Also note that the right or benefit must be applied to an employee on military leave, even if the policy or practice is established after commencement of the military leave and during the period of time the employee is performing military service. *Id.* See also *id.* § 4316(b)(3) where a military member's rights while on leave of absence under USERRA shall not be any greater than the rights or benefits to which the employee would have been entitled had the employee remained continuously employed.

118. The production pay is scaled based on seeing a certain number of patients above a minimum number of patients to be seen. The doctor had increased his production each year for the previous seven years prior to military deployment.

119. The paid-leave policy should be of similar length. For example, if Fairview would provide production credit to a doctor on disability for five months, then Fairview should provide production credit to a five-month military leave.

120. 804 F.2d 821 (3d Cir. 1986).

absent without pay because of defined illness or layoff” also receive the holiday pay.¹²¹ The court noted that “the common thread [among the leave categories receiving the paid benefit] is the lack of choice [for their absence] by the employees.”¹²² Similar to *Waltermeyer*, Fairview’s policy to provide production credit to employees who are absent due to illness or disability is to help ensure that employees are not put at a disadvantage because of an absence that is beyond the employee’s control. Hence, an employee called to military duty also creates an absence beyond the employee’s control and the employee should not be disadvantaged by the absence for military duty.¹²³

If an employee does not intend to return to the employer after military service, the employer must obtain from the employee a written letter of intent not to return.¹²⁴ Because the burden of proving the employee knowingly waived her USERRA rights is on the employer, it is imperative that the employer is able to show that the employee was made aware of her specific USERRA rights and benefits to be lost.¹²⁵

121. *Id.* at 825.

122. *Id.*

123. As of January 2004, the doctor’s issue with Fairview remains unresolved. The legislative history of USERRA clearly indicates that Congress intended to adopt and reaffirm *Waltermeyer*: “The [House Committee on Veterans’ Affairs] intends to affirm the decision in *Waltermeyer* . . . that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid.” H. REP. NO. 103-65, at 33-34 (1993).

124. 38 U.S.C. § 4316(b)(2)(A)(ii) (2003).

125. *Id.* § 4316(b)(2)(B). In *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1131-32 (W.D. Mich. 2000), the court considered, *inter alia*, the issue of when and whether a resignation waives a right of re-employment under USERRA. (citing *Sykes v. Columbus & Greenville Ry.*, 117 F.3d 287 (5th Cir. 1997); *Paisley v. City of Minneapolis*, 79 F.3d 722, 725 (8th Cir. 1996); *Ryan v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 15 F.3d 697, 699 (7th Cir. 1994); *Trulson v. Trane Co.*, 738 F.2d 770 (7th Cir. 1984); *O’Mara v. Petersen Sand & Gravel Co. Inc.*, 498 F.2d 896, 897 (7th Cir. 1974); *Smith v. Missouri Pac. Transp. Co.*, 313 F.2d 676, 680 (8th Cir. 1963); *Loeb v. Kivo*, 169 F.2d 346 (2nd Cir. 1948); *Bottger v. Doss Aeronautical Servs., Inc.*, 609 F. Supp. 583, 587 (D. Ala. 1985); *Green v. Oktibbeha County Hosp.*, 526 F. Supp. 49 (N.D. Miss. 1981)). The *Wrigglesworth* court stated:

[A]t a minimum . . . a waiver of re-employment rights under USERRA (as well as its predecessor statutes) must be clearly expressed to be effective. They differ, however, in the extent to which they require clarity as to the waiver of the statutory rights. Eighth Circuit cases such as *Paisley* and *Smith* regard a general statement of resignation (i.e., “I resign”) as sufficient to waive the statutory right of re-employment.

H. Reemployment

The time limits for reporting back to work under USERRA depend on the duration of a person's military service. If the employee's military service is from one to thirty days in length, the employee is allowed a period of time for safe transportation from the military duty station to home.¹²⁶ In addition, the employee is allowed an eight-hour period of rest upon arriving home.¹²⁷ Finally, the employee is to report back to work at the beginning of the next full regularly scheduled work period.¹²⁸ If reporting back to work within the time limits is impossible or unreasonable, through no fault of the employee, the employee may report back to work as soon as possible after arriving home and the expiration of an eight-hour rest period.¹²⁹ An employee absent from work in order to take a fitness-for-service examination is held to the same standard as those absent for military service of one to thirty days. However, the provision for travel time plus eight hours of rest applies regardless of the actual length of the employee's absence.¹³⁰

If the military service was for more than thirty days but less than 181 days, the employee must submit an application for reemployment no later than fourteen days after completion of a person's service.¹³¹ If the military service is for 181 days or more, the employee must submit an application for reemployment with

However, the other cases and especially the *Sykes* and *Loeb* decisions do not treat a general statement of resignation as effective in waiving the statutory right of re-employment. Rather, those cases indicate that a waiver of statutory rights requires at least an awareness of the statutory right and an expressed intent to waive the right (i.e., "I understand my right to re-employment under USERRA and I voluntarily waive that right").

Wrigglesworth, 121 F. Supp. 2d at 1132 (citing *Loeb*, 169 F.2d at 349).

126. 38 U.S.C. § 4312(e)(1)(A)(i).

127. *Id.*

128. *Id.* See also *Jordan v. Air Prods. & Chems., Inc.*, 225 F. Supp. 2d 1206, 1209 (C.D. Cal. 2002) (holding that the "USERRA right to reemployment contained in § 4312 does not require a showing of discriminatory intent.").

129. 38 U.S.C. § 4312(e)(1)(A)(ii).

130. See *id.* § 4312(e)(1)(B) (stating "in the case of a person who is absent from a position of employment for a *period of any length* for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in [38 U.S.C. § 4312(e)(1)(A)].") (emphasis added).

131. *Id.* § 4312(e)(1)(C) (providing that, if the fourteenth day falls on a day when the employer is closed, the time extends to the next business day).

the employer within ninety days of the completion of service.¹³² USERRA does not further define what is necessary when “submitting an application for reemployment with the employer.” In *McGuire v. United Parcel Service*,¹³³ a USERRA case, the court applied the VRR standard articulated in *Shadle v. Superwood Corp.*, where the court stated the following:

No bright-line test has been fashioned to resolve this issue [of what it means to submit an application for reemployment]. Rather, a case-by-case determination focusing on the intent and reasonable expectations of both the former employee and employer, in light of all the circumstances, has been held to best serve the goals of [USERRA].¹³⁴

In *McGuire*, an Army Reserve member returned from extended active duty and contacted his old supervisor, asking his supervisor what he was required to do in order to return to United Parcel Service (UPS).¹³⁵ The supervisor contacted human resources and obtained the name and phone number of an individual the reserve member was to contact in order to return to UPS,¹³⁶ and then the supervisor wrote to the reserve member stating he should contact the named human resources employee. However, the Army Reserve member did not contact UPS human resources.¹³⁷ The court held that in order to be entitled to reemployment under USERRA, where the employer is a large employer, merely contacting a previous supervisor is not enough to be considered submitting an application for reemployment.¹³⁸

I. *Applying for Reemployment*

“Applying for employment or reemployment”¹³⁹ or “submitting an application for reemployment”¹⁴⁰ must not be construed to connote that the employer can wait for a job opening before

132. *Id.* § 4312(e)(1)(D) (providing that, if the nineteenth day falls on a day when the employer is closed, the time extends to the next business day).

133. 152 F.3d 673, 676-77 (7th Cir. 1998).

134. 858 F.2d 437, 439 (8th Cir. 1988).

135. 152 F.3d 673, 675 (7th Cir. 1998).

136. *Id.*

137. *Id.*

138. *Id.* at 677.

139. 38 U.S.C. § 4312(e)(3) (2003).

140. *Id.* § 4312(c), (d).

reemployment of the returning service member.¹⁴¹ USERRA entitles service members to prompt reemployment in accordance with certain priorities depending on the length of military service.¹⁴² A definition for the amount of time denoted by “promptly reemployed” is not contained within the statute. It is likely that a standard of “reasonableness” would be applied in defining prompt reemployment on a case-by-case basis. For instance, reemployment after a weekend drill period would generally be the next regularly scheduled workday. Conversely, reemployment following a two-year call-up might require the employer to take several steps and more time in order to reinstate the employee.

J. Reemployment Position

As stated previously, the escalator principle plays a key role in defining the position to which an employee is reinstated after returning from military service. An employer is to consider the returning military member as if she had remained continuously employed. The reemployment position may be the same job. Or, if the employee would have been promoted with reasonable certainty had she not been absent for military duty, she would be entitled to the promotion upon reinstatement. However, it must be noted that the escalator does have an “up” and “down” characteristic. For example, when an employer lays off a number of employees during the military member’s absence, if the military member would have been laid off had she remained continuously employed, then her reemployment would be in a layoff status.

K. Three-Part Format

The employer’s flexibility in placing a returning service member into a job is also limited by the length of the employee’s military service.¹⁴³ Generally, there is a three-part format for the employer to place the returning military member into a job. The employer must make reasonable efforts to train and update employee skills in order to qualify the employee for the job at each step of the process. The first tier of the format involves placing the

141. See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 703-04 (8th Cir. 1983).

142. 38 U.S.C. § 4313(a).

143. *Id.* § 4313(a)(1)-(2).

employee in the job she would have attained had she remained continuously employed. The second tier places the employee in the job she had prior to commencement of her military service. Finally, the third tier is used if the employee is unable to qualify for either of the first two tiers. At this point, the employee is to be placed in a position that most nearly approximates the position she held prior to military duty.

Depending on length of service, there are slight distinctions in applying the three-part format and yet another variation if the employee incurs or aggravates a disability while on military duty. For service of ninety days or less the employee is to be placed “in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service.”¹⁴⁴ However, the returning employee must be qualified to perform the duties of the position.¹⁴⁵ If the employer makes reasonable efforts to qualify the employee for the position she would have held had she remained continuously employed, but the qualification efforts fail, the employee is to be returned to the position of employment she held prior to commencement of service.¹⁴⁶

When the military service period is greater than ninety days, the employee is to be placed in the position the person would have attained had the person remained continuously employed, “or a position of like seniority, status and pay, the duties of which the person is qualified to perform.”¹⁴⁷ Here again, if qualification efforts fail, the employee is to be returned to the position of employment she held prior to commencement of service.¹⁴⁸

144. *Id.* § 4313(a)(1)(A).

145. *Id.*

146. *Id.* § 4313(a)(1)(B).

147. *Id.* § 4313(a)(2)(A). “Status” is construed to include being reemployed in the same commuting area following military service. *See* *Armstrong v. Cleaner Servs., Inc.*, 1972 WL 756, at *2 (M.D. Tenn. 1972). “Giving the Act the liberal construction required, the court concludes that defendant did not satisfy its statutory obligation to the plaintiff by offering to employ him in Fort Oglethorpe and Dalton, Georgia. The offered position was of a “status” inferior to that of his pre-induction position in Murfreesboro [Tennessee].” *Id.* *See also* *Ryan v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 15 F.3d 697, 699 (7th Cir. 1994), where the court ruled that summary judgment was inappropriate because the assistant nurse manager position, which the employee was given after returning from duty during Operation Desert Storm, was not of like “status” to the pre-call-up position of nurse manager.

148. 38 U.S.C. § 4313(a)(2)(B).

Additionally, if reasonable efforts fail to qualify the returning service member for the position she would have attained had she remained continuously employed, or the position she held upon commencement of service, she is to be placed in a position that is the nearest approximation in terms of seniority, status, and pay.¹⁴⁹

L. Service Connected Disability

Unlike the Americans with Disabilities Act (ADA), which applies only to employers with fifteen or more employees, USERRA applies to all employers, regardless of size.¹⁵⁰ The three-part format continues to apply to employees who incur or aggravate a disability while on military duty.

The employer must make reasonable efforts to accommodate the employee's disability so that the employee may be placed in the position the person would have attained had she remained continuously employed.¹⁵¹ If reasonable accommodation efforts fail to qualify the person for the position she would have attained through continuous employment, the employer shall place her "in any other position which is *equivalent* in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer."¹⁵² Finally, if not employed in the continuous employment or other equivalent position, the person must be employed "in a position which is the nearest approximation to [an *equivalent* position] in terms of seniority, status, and pay consistent with circumstances of such person's case."¹⁵³

M. Protection From Discharge

Under USERRA, an employee returning from military duty is protected from discharge without cause if the employee's period of military service was for greater than thirty days. If the military service was for a period of thirty-one to 180 days, the "no discharge without cause" protection is for a period of six months.¹⁵⁴ If the period of service is greater than 180 days, the protection is for a

149. *Id.* § 4313(a)(4).

150. *Id.* § 4303(4).

151. *Id.* § 4313(a)(3).

152. *Id.* § 4313(a)(3)(A) (emphasis added).

153. *Id.* § 4313(a)(3)(B).

154. *Id.* § 4316(c)(2).

period of one year after the date of reemployment.¹⁵⁵

N. Pension Plans

USERRA also provides pension benefit rights for employees on military leave. Basically, USERRA covers any plan that provides income to an employee at the end of employment or later, including defined benefit plans, defined contribution plans, and profit-sharing plans that serve as retirement plans.¹⁵⁶ An employee reinstated after a military leave of absence shall be treated as not having incurred a break in service for the employer's pension plan.¹⁵⁷ Again, applying the escalator principle, USERRA provides that the period of absence from the employer for military service must be counted toward vesting and for the purpose of determining the accrual of benefits under the pension plan.¹⁵⁸ When an employee returns from a military leave of absence, the employer is required to allocate the amount it would have paid but for the absence into the employee's pension account.¹⁵⁹ In the case of matching, contributory, or deferral plans, the employer is liable only to the extent the returning employee makes payment to the plan.¹⁶⁰ Upon return, the employee may not pay into the plan any amount in excess of what the employee would have been permitted or required to pay had the employee remained continuously employed.¹⁶¹ For example, an employee on military leave for one year who before her departure for military duty was making \$50,000 per year and deferring 10% of her annual income into her retirement account, is allowed to pay \$5000 into her account upon

155. *Id.* § 4316(c)(1).

156. Pension benefit plans include those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974) as amended. *See also* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. N. 96-364, 94 Stat. 1208 (1980); Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, 100 Stat. 82 (1986); Pension Protection Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987); Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, 103 Stat. 2106 (1989); Retirement Protection Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809.

157. 38 U.S.C. § 4318(a)(2)(A). Includes "the employer or employers maintaining" the pension plan. *Id.*

158. *Id.* § 4318(a)(2)(B).

159. *Id.* § 4318(b)(1). "For the purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included." *Id.*

160. *Id.* § 4318(b)(2).

161. *Id.*

returning to work. Additionally, the employee has three times the period of military service, not to exceed five years, to make payments into the pension plan.¹⁶² Continuing with the example, the returning service member would have three times her military absence, or three years, to pay the \$5000 into her account. A number of problems may arise if an employee is returning from an extended period of military service, which spans more than one tax year. If an employee, in an attempt to make up contributions, requests to contribute more than the Internal Revenue Service elective deferral limit,¹⁶³ the employee should seek professional tax advice due to the possible tax implications.¹⁶⁴

O. Health Plans

The employer may require an employee on military leave to pay the employee cost of any funded benefit “to the extent other employees on furlough or leave of absence are so required.”¹⁶⁵ With rapidly increasing health care costs, employees and employers alike often inquire about continuing health care coverage when an employee goes on military leave. For a leave of absence for less than thirty-one days, health benefits continue as if the employee has not been absent.¹⁶⁶ The employer may require the employee to pay the employee share of the premium for health coverage; however, the employer is obligated to pay the employer portion of the health benefit.¹⁶⁷ For military leaves of absence for thirty-one days or greater, the employee may elect coverage similar to COBRA¹⁶⁸ for up to eighteen months, where the employer can

162. *Id.*

163. The limit on elective deferrals for 2001, 2002, and 2003 are \$10,500, \$11,000, and \$12,000 respectively. *See* 26 U.S.C. § 402(g) (2003).

164. DEPARTMENT OF TREASURY: INTERNAL REVENUE SERVICE 2003 *INSTRUCTIONS FOR FORMS W-2 and W-3*, available at http://www.irs.gov/pub/irs-pdf/iw2w3_03.pdf (last visited March 20, 2004).

165. 38 U.S.C. § 4316(b)(4).

166. *Id.* § 4317(a)(2).

167. *Id.*

168. COBRA stands for the Consolidated Omnibus Budget Reconciliation Act of 1985. COBRA is a federal law that requires certain group health plans to allow participating employees and their dependents to extend their insurance coverage for up to thirty-six months when benefits would otherwise end. Private-sector COBRA statutes include 29 U.S.C. § 1162 (2003), which is section 602 of the Employee Retirement Income Security Act of 1974; and 26 U.S.C. § 4980B (2003) of the Internal Revenue Code of 1986. The public-sector COBRA statute is 42 U.S.C. §§ 300bb-1 to -8 (2003) or title XXII of the Public Health Service Act,

require payment of up to 102% of the full premium under the plan, with the extra 2% covering the employer's administrative expenses.¹⁶⁹ Unlike COBRA health care continuation coverage, which has an exception for employers with fewer than twenty employees, the USERRA health care continuation benefit, again, applies to all employers. However, due to the often-high cost of continuing health care coverage at 102% of the premium, the employee often opts to be covered by the military's medical program named TRICARE.¹⁷⁰ For military members with orders for thirty-one days or longer, TRICARE begins for the military member and her family on day one of the military duty period.

In the case of a multi-employer health plan, the employer liability portion of the health benefit is allocated in a manner as provided by the plan sponsor.¹⁷¹ If the plan sponsor does not provide a method to pay the employer portion of the health benefit, the last employer employing the person prior to the period of military service shall pay the employer contribution under the plan.¹⁷² If the last employer is no longer in business, the plan must cover the liability.¹⁷³

After an extended absence for military duty, when an employee returns to work for the employer, many human resources offices make the mistake of requiring a waiting period prior to reinstating employee health coverage. If an employee had health care coverage prior to a military leave of absence, and the coverage is subsequently terminated due to a military leave of absence thirty-one days or greater, an exclusion or waiting period may not be

sections 2201-08.

169. 38 U.S.C. § 4317(a)(2). This is "determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986." *Id.*

170. "In response to the challenge of maintaining medical combat readiness while providing the best health-care for all eligible personnel, the Department of Defense introduced TRICARE. TRICARE is a regionally managed health-care program for active duty and retired members of the uniformed services, their families, and survivors. TRICARE brings together the health-care resources of the Army, Navy and Air Force and supplements them with networks of civilian health-care professionals to provide better access and high quality service while maintaining the capability to support military operations." *An Introduction to TRICARE*, at <http://www.tricare.osd.mil/whatistricare>. cfm (last visited March 20, 2004).

171. 38 U.S.C. § 4317(a)(3)(A).

172. *Id.* § 4317(a)(3)(B)(i).

173. *Id.* § 4317(a)(3)(B)(ii).

imposed when the employee returns to work.¹⁷⁴ The health plan is not required to cover injuries or illness that occur or are aggravated while on military duty.¹⁷⁵

P. Affirmative Defenses

An employer is not required to reemploy a person under USERRA if the employer's circumstances have so changed as to make reemployment "impossible or unreasonable."¹⁷⁶ Impossible or unreasonable applies to circumstances akin in severity to a reduction in force, but does not include circumstances where the employer may have to lay off or move an employee who has served in place of the service member during her absence.¹⁷⁷ In addition, an employer may be excused from making efforts to accommodate individuals with service-connected disabilities or from qualifying returning service members if doing so would be of such magnitude as to cause an undue hardship.¹⁷⁸ Finally, if the employment held prior to the individual's service in the military was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period, the employer need not reemploy the person.¹⁷⁹ In any proceeding where the noted affirmative defenses are raised, "the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period."¹⁸⁰

V. MINNESOTA'S MILITARY LEAVE LAWS

*"The battle, sir, is not to the strong alone;
it is to the vigilant, the active, the brave."*

— Patrick Henry

174. *Id.* § 4317(b)(1).

175. *Id.* § 4317(b)(2). These are injuries or illness as "determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, the performance of service in the uniformed services." *Id.*

176. *Id.* § 4312(d)(1)(A).

177. *Id.*

178. *Id.* § 4312(d)(1)(B). Undue hardship applies under USERRA to §§ 4313(a)(3), 4313(a)(4), and 4313(b)(2)(B).

179. *Id.* § 4312(d)(1)(C).

180. *Id.* § 4312(d)(2).

Individual states and territories also provide USERRA-type protections that either replicate or often enhance reemployment rights of military members. The state statutes frequently serve a bifurcated purpose, providing protection and benefits to active-duty as well as the reserve forces,¹⁸¹ but specifically providing coverage for the state's National Guard troops when they are called upon for State Active Duty (SAD).¹⁸² States must provide reemployment protections when ordering their National Guards to SAD because USERRA provides protections only for military members while performing service in federal military duty status.¹⁸³

A. *The National Guard*

In contrast to the singular role of each military branch's reserve force, the Army National Guard and Air National Guard each have two distinct roles. First, similar to all reserve components, the National Guard serves as a reserve to their active duty component. In addition to its reserve role, the National Guard also serves their respective states and territories for emergency response to natural disasters, civil disturbances, and

181. The United States Constitution article I, section 8 provides the federal government with the power to build, use and maintain the military, stating:

The Congress shall have Power to . . . provide for the common defense . . . To declare war . . . To raise and support Armies . . . To provide and maintain a Navy . . . To make rules for the Government and Regulation of the land and naval Forces . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . And . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof.

182. The National Guard of the United States fulfills both federal and state missions. The states retain the power to maintain militias as noted in the Constitution, stating, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Each state's National Guard mission is generally derived from the state's constitution and subsequently further defined by statute. For example, Minnesota's Constitution states, "The legislature shall pass laws necessary for the organization, discipline and service of the militia of the state." MINN. CONST. art. XIII, § 9.

183. See 38 U.S.C. § 4303(13) (2003).

community support missions.¹⁸⁴ The National Guard can be called by Congress or the president to Federal Active Duty¹⁸⁵ or called by the governor for State Active Duty.¹⁸⁶

When National Guard troops are not mobilized or under federal control, they report to the governor of their state or territory.¹⁸⁷ The Adjutant General supervises each of the fifty-four

184. Regarding civil disturbance, the Posse Comitatus Act of 1878 restricts the use of the Army, Navy, Air Force, and Marines from participating in arrests, searches, seizures of evidence, and other police-type activity within the United States. See 18 U.S.C. § 1385 (2003); 10 U.S.C. § 375 (2003). Unlike active-duty and other reserve forces, the National Guard, when not federalized, is under control of the state's governor and is not restricted by the Posse Comitatus. See Major Craig T. Trebilcock, *The Myth of Posse Comitatus* (2000), available at <http://www.homelandsecurity.org/journal/articles/Trebilcock.htm> (last visited March 20, 2004); *United States v. Chaparro-Almeida*, 679 F.2d 423, 425-26 (5th Cir. 1982). The Coast Guard transferred from the Department of Transportation to the Department of Homeland Security on March 1, 2003. Act of Nov. 25, 2002, Pub. L. No. 107-296 § 1704(a), 116 Stat. 2314 (2002) (codified as amended at 14 U.S.C. § 1 (2003)).

185. "Full Mobilization" requires passage by the Congress of a public law or joint resolution declaring war or a national emergency. It involves the mobilization of all Reserve Component units in the existing approved force structure, all individual reservists, and the material resources needed for the expanded force structure. The maximum term of service is the duration of the conflict plus six months. "Total Mobilization" involves expansion of the Active Armed Forces by organizing and/or activating additional units beyond the existing approved troop basis and the mobilization of all additional resources needed, including production facilities to round out and sustain such forces. Forces are brought on to active duty indefinitely. 10 U.S.C. §§ 12301, 12306 (2003). "Partial Mobilization" is to meet the requirements of war or a national emergency involving an external threat to national security, where Congress or the president may order augmentation of the Active Armed forces, short of Full Mobilization, by mobilization of up to 1 million personnel of the Ready Reserve for up to twenty-four months. Congress can increase the numbers and duration by separate action. *Id.* § 12302. Under a "Selective Mobilization," the president may augment the Active Armed Forces by a call-up of units and Individual Mobilization Augmentees (IMAs) of the Selected Reserve up to 200,000 for up to 270 days to meet the requirements of an operational mission. The president must notify Congress and state the reasons for the action. *Id.* § 12304. For a domestic emergency, the president or Congress, upon special action, may order expansion of the Active Armed Forces by mobilization of Reserve Component units and/or individual reservists to deal with a situation where the armed forces may be required to protect life, federal property and functions, or to prevent disruption of federal activities. A Selective Mobilization normally would not be associated with a requirement for contingency plans involving external threats to national security. *Id.* §§ 331-33, 12302, 12406.

186. See, e.g., MINN. STAT. § 191.05 (2003) (providing the Governor with the power to call-up the state's militia "[whenever] . . . necessary for any purpose authorized by the state constitution or by law.>").

187. The National Guards of the fifty states operate under both federal and

National Guard organizations.¹⁸⁸ The National Guard provides protection of life and property and preserves peace, order, and public safety.¹⁸⁹ These protections are accomplished through (1) emergency relief support during natural disasters such as floods, earthquakes, and forest fires; (2) search-and-rescue operations; (3) support to civil defense authorities; (4) maintenance of vital public services; and (5) counter-drug operations.¹⁹⁰

B. State Military Leave Laws

State law protections for members of the military, although often similar to USERRA, vary widely in their express terms and application. For example, under Minnesota law, the leave of absence for military duty provision is for a term “not to extend beyond four years plus such additional time . . . [that] may be required to serve pursuant to law,”¹⁹¹ whereas USERRA delimits its protection to the cumulative total of all military absences, with a single employer, not to exceed five years.¹⁹² When advising or handling USERRA claims, it is imperative to remember that a state’s reemployment rights law may be distinct from the benefits accorded under USERRA, providing greater or additional rights, but never fewer rights.¹⁹³

state jurisdiction. *National Guard Fact Sheet*, at http://www.ngb.army.mil/downloads/fact_sheets/doc/militias_word.doc (last visited March 20, 2004). The District of Columbia National Guard has no local jurisdiction; however, the president of the United States as commander-in-chief of the military may call upon the D.C. National Guard for local natural disasters and civil disturbances as well as to support the U.S. Army and U.S. Air Force. Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of “In Federal Service,”* ARMY LAWYER 35, 36 n.6 (June 1994).

188. The fifty-four National Guards are composed of the fifty states, Guam, Puerto Rico, Virgin Islands, and Washington, D.C. U.S. ARMY TRAINING BD., TRAINING AND ORGANIZATION OF THE U.S. ARMY RESERVE COMPONENTS: A REFERENCE TEXT FOR TOTAL FORCE TRAINERS, 1987-88, 7 (1988).

189. *Id.* at 9.

190. See J. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 226 (1983); 32 § U.S.C. 112 (2003).

191. MINN. STAT. § 192.261 subd. 1 (2003).

192. 38 U.S.C. § 4312(a)(2) (2003). The exceptions to the five-year cumulative total of military leave of absence with an employer are substantial. See *id.* § 4312(c)(1)-(4).

193. This is true only if the state law applies to Federal Active Duty. For example, Minnesota Statutes section 192.261, subd. 1 states that it applies to an employee “who engages in active service in time of war or other emergency declared by proper authority in any of the military or naval forces of the state or of

Another significant distinction between state and federal protection involves payment during a leave of absence. Although USERRA provides only for an unpaid leave of absence,¹⁹⁴ the majority of the states and territories provide a limited amount of paid military leave as an incentive to public employees who participate in the military.¹⁹⁵ Minnesota provides paid leaves of absence for military duty to state and municipal officers and employees, not to exceed a total of fifteen days in any calendar year.¹⁹⁶ As use of National Guard and Reserve troops increases,¹⁹⁷ so does litigation regarding state laws providing paid leave for military duty. A driving force behind disputes over paid military leave is the myriad of variations in the employer and employee relationship that in turn affects how paid military leave is applied; this situation often creates a rift in the employment relationship. Furthermore, statutes governing paid military leave, when applied to diverse and often complex employment relationships, often leave room for statutory interpretation by the employer and employee. These interpretations are seldom in harmony with one another.

C. Minnesota's Paid Military Leave Statute

Minnesota serves as an example regarding litigation due to statutory interpretation of paid military leave statutes, with a few published cases addressing the application of the military leave

the United States" See also 38 U.S.C. § 4302(a) providing that USERRA shall not "supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter." Furthermore, 38 U.S.C. § 4302(b) provides that USERRA:

[S]upersedes 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 any such right or the receipt of any such benefit.

194. 38 U.S.C. § 4316(b)(1)(A).

195. Samuel W. Asbury, *A Survey and Comparative Analysis of State Statutes Entitling Public Employees to Paid Military Leave*, 30 GONZ. L. REV. 67 (1994/1995) (citing forty-five state and territory paid leave laws at n.4).

196. MINN. STAT. § 192.26 (2003).

197. See Rumsfeld, *supra* note 22, at 64 (The use of Guard and Reserve troops to support operational requirements has steadily grown from around 900,000 duty-days annually in the early 1990s to a sustained annual level of more than 12 million duty-days since 1995).

statute.¹⁹⁸ In order to better understand the more recent Minnesota decisions, one must first look to the 1975 Minnesota Supreme Court decision in *Byrne v. Independent School District No. 237*,¹⁹⁹ where the court said, “[u]nderlying statutes preserving employment rights for citizens who serve the military is the basic principle that a person who serves in the armed forces should not be penalized for that service in civilian life.”²⁰⁰ In addition, the statutes “are liberally construed, so as to effectively implement their basic purposes.”²⁰¹ In summary, the Minnesota Supreme Court in *Byrne* adopted the rationale of the United States Supreme Court in *Fishgold* and its progeny that military leave statutes are to be liberally construed.²⁰²

In *Byrne*, the petitioner, a schoolteacher, attended a military training school from August 7, 1972 to December 15, 1972 for a total of 131 days.²⁰³ Although Mr. Byrne requested a military leave of absence from the school board during July 1972, the school board refused to reinstate him upon his return from duty, claiming his absence without permission was a breach of his teaching contract with the school.²⁰⁴ Byrne did not assert reemployment rights under Minnesota Statutes section 192.26; instead he asserted that his reemployment rights were protected by Minnesota Statutes section 192.261, subd. 5(b).²⁰⁵ The sole issue presented on appeal was one of statutory construction, with two threshold questions being posed: (1) “Are petitioner’s rights determined by § 192.26, thus precluding him from the protection of § 192.261, subd. 5(b)”;²⁰⁶ and (2) “Is § 192.261, subd. 5(b), limited to periods of ‘war or other emergency?’”²⁰⁶ The trial court had found that “§ 192.26 is applicable only where the leave does not extend beyond fifteen days and § 192.261 is applicable to military leaves of longer

198. *Howe v. City of St. Cloud*, 515 N.W.2d 77 (Minn. Ct. App. 1994); *Boelter v. City of Coon Rapids*, 67 F. Supp. 2d 1040 (D. Minn. 1999).

199. 305 Minn. 49, 232 N.W.2d 432 (1975).

200. *Id.* at 50-51, 232 N.W.2d at 434 (citing *Tilton v. Missouri Pac. R. Co.*, 376 U.S. 169 (1964); *Morton v. Gulf M. & O.R. Co.*, 405 F.2d 415 (8th Cir. 1969)).

201. *Id.* at 51, 232 N.W.2d at 434 (citing *Rudisill v. Chesapeake & O. Ry. Co.*, 167 F.2d 175 (4th Cir. 1948); *Boston & Maine R.R. v. Hayes*, 160 F.2d 325 (1st Cir. 1947)).

202. *Compare Byrne*, 305 Minn. at 50-51, 232 N.W.2d at 434 *with Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

203. *Byrne*, 305 Minn. at 50, 232 N.W.2d at 433.

204. *Id.*

205. *Id.*

206. *Id.* at 51, 232 N.W.2d at 434.

duration.”²⁰⁷ The court affirmed.²⁰⁸ This statement has generated confusion as to the application of paid military leave in conjunction with unpaid military leave during a military leave of absence greater than fifteen days in length.

Numerous human resource professionals and attorneys contact Minnesota’s ESGR committee believing that Minnesota Statutes section 192.26 cannot apply if the military leave of absence is greater than fifteen days. However, for a number of reasons, section 192.26 can be applied at the outset of military leaves of absence greater than fifteen days in duration.

First, by the express terms of section 192.26, paid leave for military duty “shall not be allowed unless the officer or employee . . . is required by proper authority to continue in such military or naval service beyond the time herein limited for such leave.”²⁰⁹ Clearly, an employee can receive up to fifteen days of paid leave at the beginning of his military leave of absence and subsequently continue in an unpaid leave status, being “required by proper authority to continue in such military or naval service beyond the time herein limited for such leave.”²¹⁰ In evaluating the *Byrne* court’s first threshold question, the petitioner’s rights may be determined under sections 192.26 or 192.261, subd. 5(b), but the paid leave rights provided in section 192.26 do not extend beyond fifteen days. In other words, when applying section 192.26, paid leave beyond fifteen days is not allowed; however, continued military duty beyond the fifteen days of paid leave in a section 192.261 unpaid status is permitted.

A second reason for applying section 192.26 paid leave in conjunction with section 192.261 leave without pay rights is the possibility of an inappropriate application of the law following the *Byrne* decision to affirm the trial court. A cursory reading of *Byrne* can lead to the belief that the court placed a demarcation line at fifteen days of military duty; section 192.26 applies to military leave of fifteen days or less and section 192.261 applies in cases where the leave of absence will be greater than fifteen days. However, this perfunctory reading of *Byrne* leaves a reservist who has exhausted his fifteen days of paid military leave for the year without reemployment rights when he does additional military duty of

207. *Id.* at 52, 232 N.W.2d at 433.

208. *Id.* at 53, 232 N.W.2d at 435.

209. MINN. STAT. § 192.26, subd. 1 (2003).

210. *Id.*

fifteen days or less within the same year. This result is reached for two reasons. First, the *Byrne* court upheld the trial court's pronouncement that section 192.261 rights are applicable only to military leaves of duration greater than fifteen days, which implies in the alternative that section 192.261 rights are not applied to military leave of fifteen days or less. Second, without reemployment rights under section 192.261, the reservist must seek rights under section 192.26, which does not provide reemployment rights. Because a reservist never leaves the employer's payroll under section 192.26, the need to be reemployed does not exist; consequently, the words "reemployment" or "reinstatement" do not appear in section 192.26.²¹¹ If a human resource professional or city attorney reads *Byrne* as limiting paid leave to situations only where the military leave is for fifteen days or less, an employee can be left without reemployment rights. Although the *Byrne* court upheld the trial court decision, clearly the *Byrne* court did not intend to create scenarios where reservists do not have reemployment rights.²¹²

Two additional questions often asked regarding Minnesota's paid leave statute consider the following: first, whether the paid leave is a differential pay between the employee's regular pay and the military service pay; and second, whether the fifteen days allotted per year are counted as "calendar days" or "workdays."

The answer to the first question is that the reservist is entitled to retain his military duty pay in addition to his full pay as a public employee.²¹³ Answering the second question, the paid leave statute is applied only to those days for which the employee is normally paid. If an employee works Monday through Friday, with weekends

211. MINN. STAT. § 192.261 subd. 1 (2003) (stating that leaves of absence during war or emergency "shall not be construed to preclude the allowance of leave with pay for such service to any person entitled thereto under section 192.26).

212. If Minnesota Statutes section 192.261 is applied without considering employee rights under Minnesota Statutes section 192.26, an employee under military orders might be left without reemployment rights if he is absent for more than fifteen days. See MINN. STAT. § 192.261 subd. 1; MINN. STAT. § 192.26 subd. 1.

213. Minn. Atty. Gen. Op. No. 61, 310-H-1A (1954). In contrast, the League of Minnesota Cities (LMC) published an article by Brad Scott titled *City Employees and Military Leave*, in *Minnesota Cities* (Dec. 1999) at 17 (stating that leave without loss of pay under Minn. Stat. § 192.26 "means the city must pay the employee any difference between his or her salary and the military pay."). It is this type of misinformation that engenders questions from public employers and employees regarding paid military leave.

off, and the employee takes two weeks of paid military leave pursuant to the statute, the weekend days are not counted toward the fifteen days of paid leave for the calendar year.²¹⁴

D. *The Firefighter Cases*

The *Howe v. City of St. Cloud* and *Boelter v. City of Coon Rapids* cases reinforce U.S. Supreme Court and Minnesota Supreme Court cases regarding statutory construction of laws concerning rights for citizens who serve in the military. The Minnesota cases demonstrate how statutory language, when applied to a work relationship, can result in employer and employee disagreement on the interpretation and application of paid military leave.²¹⁵ In

214. Contrast Minn. Att'y Gen. Op. 310-H-1A (April 7, 1971) with U.S. Comptroller General Decisions, Matter of Military Leave, 71 Comp. Gen. 513 (1992); *Matter of George McMillian*, B-211249 (Sept. 20, 1983); *To the Attorney General*, B-133674 (Dec. 30, 1957); Leaves of Absence 29 Comp. Gen. 269 (1949); Leaves of Absence 27 Comp. Gen. 245 (1947) (stating generally, "[b]ased on common understanding and usage of the word 'days' and on an extensive review of the legislative history of 5 U.S.C. § 6323, previous Comptroller General and General Accounting Office decisions consistently interpreted the word 'days' to mean calendar days rather than workdays."); Office of Personnel Management, Compensation and Leave Decision, No. S98001924 (Nov. 9, 1998). Congress superseded the Comptroller General Decisions by enacting § 642 of the Treasury and General Government Appropriations Act, 2001, as incorporated in Public Law 106-554 by § 101(a)(3) of that Public Law, amending 5 U.S.C. § 6323(a) (2003) by adding a new paragraph (3). The new section 6323(a)(3) states that the minimum charge for military leave is one hour. The new section also provides that additional charges for military leave are in multiples of the minimum charge. The new section 6323(a)(3) became effective on December 21, 2000. Based on section 6323(a)(3), it is clear that Congress recognizes an eight-hour civilian workday as the basis for accruing one day of military leave and that there is no intent to charge an employee military leave for the hours that he or she would not otherwise work. See Office of Personnel Management, Compensation Policy Memoranda, CPM 2001-2, *Recent Legislative Changes* (Jan. 25, 2001). Prior to December 21, 2000, 5 U.S.C. § 6323(a)(1), provided:

Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty or engaging in field or coast defense training under sections 502-505 of title 32 as a reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

215. 515 N.W.2d 77, 81 (Minn. Ct. App. 1994); 67 F. Supp. 2d 1040, 1045-47

Howe, city firefighters successfully argued that the term “day” in the military leave statute²¹⁶ should be defined “as a 24-hour day because the shift that they miss while on military leave is 24 hours long.”²¹⁷ Fire departments traditionally have scheduled firefighters for one twenty-four hour shift followed by two days off, an average of fifty-four to fifty-six hours per week.²¹⁸ Therefore, the decision in *Howe* provides firefighters with the ability to take up to six weeks, or 360 hours, of paid leave for military duty; this is three times the amount of hours provided for the typical forty-hour-per-week employee.²¹⁹

Similar to Minnesota, Indiana has a fifteen-day paid military leave statute. In *Koppin v. Strobe* the trial court found for the firefighters, granting fifteen paid twenty-four-hour workdays off for military duty.²²⁰ However, in stark contrast to the decision in *Howe*, the Indiana Court of Appeals reversed the trial court, finding that if

(D. Minn. 1999).

216. *Howe v. City of St. Cloud*, 515 N.W.2d 77, 79-81 (Minn. Ct. App. 1994).

217. *Id.* at 79. The city argued that it had “the inherent managerial authority to define ‘day’ as less than 24 hours for the firefighters.” The court pointed to the fact that the city did define the term “day” for the firefighters by scheduling its firefighters for twenty-four-hour shifts, which was also defined in the collective bargaining agreement. The city also argued that a collective bargaining agreement, limiting military leave to 168 hours per annum, modified the provisions of section 192.26. The court stated that “where a statute and the terms or interpretation of a collective bargaining agreement are in conflict, the statute controls.” *Id.* (citing *Urdahl v. Indep. Sch. Dist. No. 181*, 396 N.W.2d 244, 247 (Minn. Ct. App. 1986) (internal quotations omitted)).

218. Firefighters traditionally work seven days in a three-week, twenty-one-day cycle, or nine days in a four-week, twenty-seven or twenty-eight-day cycle. *Id.*

219. The fifteen days of paid military leave, provided by section 192.26, gives the typical eight-hour per day employee 120 hours of paid leave for military duty versus the 360 hours provided to workers scheduled for twenty-four-hour work shifts. MINN. STAT. § 192.26. On January 25, 2001, the Office of Personnel Management promulgated new guidance and policy under 5 U.S.C. § 6323(a)(3) (2003) in regard to charging federal employees for military leave, stating “[m]ilitary leave under 6323(a) will be prorated for part-time employees and employees on uncommon tours of duty based proportionally on the number of hours in each employee’s regularly scheduled biweekly pay period.” See OFFICE OF PERSONNEL MANAGEMENT, COMPENSATION POLICY MEMORANDA, CPM 2001-2, *Recent Legislative Changes* (Jan. 25, 2001). In the federal government, a firefighter working fifty-six hours per week for a total of 112 hours in a biweek, would receive the ratio of hours in the regularly scheduled pay period to an eighty-hour pay period. *Id.* For example, a 112-hour biweek divided by an eighty-hour biweek, equals 1.4. Then multiply the ratio (1.4) times the 120 hours of leave provided the typical forty-hour per week employee. The equation is $(112 \div 80) \times 120$ or $1.4 \times 120 = 168$ hours of leave for a firefighter scheduled to work fifty-six hours per week.

220. 761 N.E.2d 455, 463-64 (Ind. Ct. App. 2002).

the language in the statute is clear and unambiguous, it is not subject to judicial interpretation; however, when language is susceptible to more than one construction, the court must construe the statute to determine the legislature's intent.²²¹ The court opined that when construing a statute, the court must examine and interpret the statute as a whole while refraining from overemphasizing strict literal or selective reading of individual words.²²² In the opinion, the court stated its purpose was to ascertain and execute legislative intent in a way to prevent absurdity and difficulty and to prefer public convenience, keeping in mind objects and purposes of law as well as effect and repercussions of such construction.²²³ The court felt it was unfair for one city employee to receive 120 hours of leave²²⁴ for military duty versus a firefighter's 360 hours of leave²²⁵ when the statute is equal on its face.²²⁶ The court found that a township's military leave policy does not conflict with the Indiana code, providing fifteen days of paid military leave, when it defines "day" as an eight-hour workday.²²⁷ In a dissenting opinion, the chief judge pointed out the fact that if an eight-hour-a-day employee and a twenty-four-hour-a-day employee both made \$30,000 per year, neither employee would earn more than \$30,000 per year.²²⁸ The dissent also noted that because of the "one day on, two day off"²²⁹ firefighter schedule, on multiple occasions throughout the year a firefighter would need to take a weekend day off for reserve weekend drill days.²³⁰ Furthermore, the fairness argument fails due to the firefighter's higher number of hours of work per month, with the dissent noting the conventional forty-hour-per-week employee works 160 hours per month and the firefighter on the one-day-on, two-day-off schedule works approximately 224 hours per month.²³¹ The Indiana Court of Appeals notes the *Howe* case,²³² and the dissent also notes *Boelter*,²³³

221. *Id.* at 460.

222. *Id.* at 461.

223. *Id.*

224. Fifteen days multiplied by an eight-hour workday.

225. Fifteen days multiplied by a twenty-four-hour workday.

226. *Id.* at 463-64.

227. *Id.* at 464.

228. *Id.* at 465 n.13 (Brook, J., dissenting).

229. One twenty-four-hour workday followed by two days off.

230. *Id.* at 465 n.14 (Brook, J., dissenting).

231. *Id.* at 466 (Brook, J., dissenting).

232. *Id.* at 463.

233. *Id.* at 466 n.17 (Brook, J., dissenting).

but ultimately the Indiana court does not comment on or adopt the “liberal” construction doctrine of the U.S. Supreme Court.

Five years after the decision in *Howe*, an attempt to curb the construction applied to Minnesota’s paid-leave statute failed in *Boelter*.²³⁴ In *Boelter*, the City of Coon Rapids fire chief implemented a policy where the firefighters were not allowed to “take their entire 24-hour shift as military leave, but must proceed directly from their military post to the fire department to be entitled to pay for their military leave.”²³⁵ The fire chief relied upon a provision in the statute that state employees are not allowed paid military leave unless they return “to the public position immediately on being relieved from such military or naval service”²³⁶ The *Boelter* court agreed that the fire chief’s policy complied with the language of Minnesota’s paid-leave statute, but the court went on to find a conflict between the Minnesota Statutes and the return-to-work provisions of USERRA.²³⁷ Under USERRA, upon completion of military service of less than thirty-one days, the employee must report back to work:

[N]ot later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person’s residence.²³⁸

The court said the Minnesota legislature certainly did not intend for the inherent conflict between state and federal law, stating “[t]he drafters of Minnesota’s military code intended Minnesota’s

234. 67 F. Supp. 2d 1040 (D. Minn. 1999).

235. *Id.* at 1043.

236. *Id.* at 1045 (quoting MINN. STAT. § 192.26, subd. 1).

237. *Id.* at 1046 (comparing MINN. STAT. § 192.26 with USERRA).

238. *Id.* (quoting 38 U.S.C. § 4312(e)(1)(A)(i) (1994)). Title 38 U.S.C. section 4312(e)(1)(A)(i) defines the “minimum” amount of time to return to work after military duty of less than thirty-one days. Title 38 U.S.C. section 4312(e)(1)(A)(ii) defines the maximum amount of time to return to work after military duty of less than thirty-one days. The court makes an error by stating, “[f]ederal law thus guarantees, at a minimum, time for the safe transportation home plus an eight-hour rest period before an employee on military leave can be required to return to work.” For example, using the *Boelter* court’s erroneous “minimum” time to return to the employer, if a firefighter on military leave starts his military duty at the same time as he would normally start his twenty-four-hour firefighter shift for the city, he subsequently completes his military duty nine hours later, plus one hour of travel time, plus eight hours of rest, he would still be left with six hours to return to duty at the fire department.

laws to conform with federal military laws.”²³⁹ The court found that the firefighters needed only to return to work after military duty as defined by USERRA and not as defined by the city’s policy.²⁴⁰

In light of the decision in *Howe*, and while the *Boelter* case was pending, a bill titled “Public Employee Military Duty Reimbursement Time Period Redefined” was introduced during the 1999-2000 legislative session to amend Minnesota’s paid-leave statute.²⁴¹ The proposed amendment read in pertinent part, “but not exceeding a total of fifteen days or 120 hours, whichever is less, in any calendar year.”²⁴² The proposed amendment had its first reading to the legislature on March 30, 1999 and was subsequently referred to the Committee on Governmental Operations and Veterans Affairs Policy.²⁴³ The proposed amendment never left committee and ultimately failed to be enacted.²⁴⁴

VI. AREAS LACKING USERRA OR STATE PROTECTIONS

“Wars may be fought with weapons, but they are won by men.”
— General George S. Patton, Jr.

Although USERRA and state law coverage of leave and reemployment rights for military duty is expansive, there still are areas that have little or no coverage. In some cases, individual states have enacted laws to close the gaps in coverage not provided for in USERRA. There are four areas where protections are generally lacking or absent and still need legislative initiatives to close these gaps.

One of the major recruiting tools for the National Guard and Reserve is educational benefits. While serving one weekend a month for reserve duty, citizen soldiers may attend school full time with a monthly cash benefit from the Montgomery G.I. Bill for the Selected Reserve.²⁴⁵ In addition, there may be state tuition

239. *Boelter*, 67 F. Supp. 2d at 1046 (citing MINN. STAT. § 190.03). See also *id.* at 1047 (citing MINN. STAT. § 645.17(1) and noting in parenthesis, “[c]ourts are to presume that legislature does not intend an absurd or unreasonable result.”).

240. *Id.* at 1047.

241. H.F. No. 2320, 81st Leg., Reg. Sess. (Minn. 1999) (Introduced by District 49A (Coon Rapids, Anoka) Representative James Abeler).

242. *Id.* (emphasis in original denotes language to be added).

243. *Id.*

244. *Id.*

245. 10 U.S.C. § 1606 (2001).

reimbursement educational benefits and student loan repayment.²⁴⁶ With various educational incentives, there are many full- and part-time students in the reserves, but protections are not provided under USERRA for lost tuition and fees during reserve mobilizations. Minnesota took the lead in this arena by enacting legislation that entitles students to full refunds from postsecondary institutions when called to Federal or State Active Duty.²⁴⁷ Although enacted in the spring of 2002, the statute applies retroactively to September 11, 2001.²⁴⁸ In addition, on August 18, 2003 Congress passed the Higher Education Relief Opportunities for Students (HEROES) Act of 2003.²⁴⁹ The law authorizes the secretary of education to waive or modify any statutory or regulatory provision that applies to student loans, including repayment, for reservists called to active duty.²⁵⁰ The federal law also encourages, but does not direct, institutions offering postsecondary education to provide full refunds to students affected by military mobilizations.²⁵¹

A second area that is still lacking coverage in Minnesota is health care under a State Active Duty (SAD) call-up by the governor. Although Minnesota's worker's compensation statutes cover the military member called to SAD, coverage does not exist for the military member's family. This is important because the USERRA health care coverage mandate for military duty of fewer than thirty-one days in length does not exist under state law. Because USERRA applies only to federal military duty, a SAD call-up conceivably could leave the National Guard member's family without health care.²⁵²

Those who are self-employed or have a proprietorship still lack any protections. A self-employed dentist, called to active duty for a year or more, may have little or none of his business left when he returns to work. Another issue with high-paying self-employed

246. See MINN. STAT. § 192.501 subd. 2 (2003) (tuition and textbook reimbursement grant program).

247. MINN. STAT. § 192.502 (2003).

248. See Act of Mar. 21, 2002, ch. 284, § 3, 2002 Minn. Laws.

249. Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904.

250. *Id.* § 2(a).

251. *Id.* at 3(a)-(b).

252. No complaints of problems with health care coverage were reported to the Minnesota Committee, Employer Support of the Guard and Reserve during the two-week Minnesota state workers strike October 1-14, 2001. Governor Jesse Ventura mobilized 1000 National Guard troops during the strike.

businesses is the drop in income often encountered when going on active duty. The United States Small Business Association does provide some help in this area through a military reservist economic injury disaster loan program.²⁵³

A final area that lacks express coverage under USERRA is memberships, licenses, and certifications from third-party licensing agencies, bars, and boards. Although the employer must make reasonable efforts to accommodate and retrain a returning service member to qualify her for a job with the employer, the employer often has no control or influence over a third-party licensing agency. For instance, if a stock broker's license to trade lapses while on military leave and upon returning to the employer the employee is unable to regain the license from the licensing agency, she may be out of a job because she is unable to maintain a required license. This result is reached because an affirmative act is not required under USERRA for the third-party licensing agency to help the employee regain the necessary license. With the myriad of agencies regulating today's employee, this issue can arise in many employment settings with continuing education credits, memberships, certifications, and licenses.

VII. CONCLUSION

“And so, my fellow Americans, ask not what your country can do for you, ask what you can do for your country.”

— John F. Kennedy

Seamless Total Force integration, coupled with declining defense budgets, drives an ever-increasing use of National Guard and Reserve forces. The high operations tempo of the Reserve places a great burden on citizen soldiers, their families, and their employers. USERRA and state military leave laws offer much-deserved protections relating to employment and reemployment rights, protections that will continue to see heavy use in the wake of September 11 and beyond.

253. A fact sheet about the U.S. Small Business Administration Military Reservist Economic Injury Disaster Loan Program may be found at <http://www.sba.gov/disaster/mreidlall.html> (last visited March 20, 2004).