

## Blog Post

# A Reminder of Employer Obligations to Service Members

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A recent U.S. Supreme Court decision serves as a reminder that employers must not overlook their obligations to reemploy returning service members and accommodate service-related disabilities.

The decision concerned whether a state could invoke sovereign immunity, a legal doctrine which prohibits a government from being sued without its consent, to avoid liability under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). In short, the Supreme Court said “No.”

Unlike other employment related laws, USERRA applies to all employers. This includes public and private employers, federal, state, and local governments, and employers of all sizes, as there is no minimum number of employees required for coverage. In fact, USERRA’s definition of “employer” is so comprehensive that some courts have even recognized individual liability under certain circumstances, such as a police chief who had the personal authority to hire and fire individuals.

Essentially, USERRA prohibits employment discrimination based on past, present, or prospective military service and generally requires employers to reemploy servicemembers upon their return from uniformed service.

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While most people would agree it is a noble goal for a servicemember's job to be waiting for them when they get back from active service, it is not always an easy task for employers to simply reinstate an employee, especially if circumstances with the employer or employee have since changed.

Therefore, it is integral for employers to continuously be aware of their obligations under USERRA to ensure compliance with the many protections it affords active-duty and veteran employees.

## USERRA and Its Purpose

The main purpose of USERRA is to protect the civilian jobs of servicemembers who take a leave absence from their employment in order to serve in the uniformed services, which includes the armed forces, national guard, commissioned corps of the public health service, and any other category of persons designated by the President in time of war or national emergency.

However, in order to be eligible for USERRA protections, service members must:

- Provide advance written or verbal notice of their military service to their employer;
- Have no more than five (5) years of cumulative service in the uniformed services during their employment with the particular employer;
- Return to work or apply for reemployment in a timely manner after conclusion of service; and
- Not have been separated from service for a disqualifying reason, such as a dishonorable discharge.

Upon their return from military service, servicemembers are entitled to prompt reemployment in the position they would have attained, with the same seniority, status, pay, rights, and benefits they would have achieved had they not been absent from work for military service.

USERRA also prohibits employment discrimination and retaliation based on a servicemember's military service. USERRA likewise requires employers to make reasonable efforts to accommodate disabilities that were incurred or aggravated by the employee during military service.

### *Torres v. Texas Department of Public Safety*

In the Supreme Court case decided this summer, the plaintiff, Le Roy Torres, a member of the Army Reserves, was employed as a Texas state trooper for the Texas Department of Public Safety, when he was called to active duty and was deployed to Iraq. While serving, Torres was exposed to toxic burn pits and returned home with constrictive bronchitis, a respiratory condition that narrowed his airways and made breathing difficult. This condition left him unable to work his old job as a state trooper. When Torres asked his former employer to accommodate his condition by reemploying him in a different role, it refused. Thereafter, Torres filed suit in Texas state court alleging his former employer (the State of Texas) discriminated against him for failing to accommodate his service-related disability.

Torres's former employer immediately invoked the defense of sovereign immunity, which would have prevented the suit outright, as courts generally may not hear private suits against nonconsenting states. However, the case eventually made its way to the Supreme Court, which held that sovereign immunity did not bar USERRA claims against states.

Although sovereign immunity is usually only waived in limited circumstances, the *Torres* decision shows the broad protections USERRA affords to employees and means employees may now bring USERRA lawsuits against individual states.

For public employers, *Torres* provides a clear answer that they must comply with USERRA. For private employers, this opinion is a reminder that protecting the jobs of returning active-duty

employees and accommodating service-related disabilities are obligations to be taken very seriously.

## Employer Obligations

As *Torres* reminds us, when servicemembers become disabled and unable to do their previous job following military service, the employer is still legally bound to find a role for the employee “that provides a similar status and pay” to his or her previous job, with very limited exceptions.

Reemployment of a person is excused if an employer’s circumstances have changed so that reemployment would be impossible or unreasonable, such as a significant reduction in force affecting employees in his/her position.

Employers also are not required to reemploy a person if the pre-service position was for a brief or non-current position and there was no reasonable expectation that the position would continue longer term. Finally, employers do not have to accommodate returning service members with service-connected disabilities or return them to position if doing so would cause such difficulty or expense that it would create an undue hardship.

The *Torres* decision only concerned whether the case could proceed against the State of Texas; whether there was a reasonable accommodation that would not have created an undue hardship was not addressed.

Employers must remember that USERRA uses the “escalator” principle, which requires that a returning service member be reemployed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority. It may not be the same position the person previously held; if s/he would have been promoted, s/he would be entitled to the promotion on reinstatement. On the other hand, if there was a corporate reorganization or layoff, s/he might be returned to a lower-level position, or even laid off. The escalator can move up or down.

If an employee incurs a disability like *Torres* did, or if an existing disability is aggravated during service, the employer must make reasonable efforts to accommodate the disability and to help the employee become qualified to perform the duties of the reemployment position. This means an employer may need to provide training to update the skills of a returning service member. If, despite those efforts, the employee cannot perform the essential functions of the job, then the employer is obligated to try to place the employee in: (a) a position that is equivalent in seniority, status, and pay to the escalator position, or, if it cannot, (b) a position that is the nearest approximation to that position.

Employers have additional obligations with respect to employee benefits.

## The Takeaway for Public and Private Employers

For public and private employers, the requirements of USERRA and related state laws can be confusing and intimidating. Now is the time to do the following:

- Review your company's handbook and ensure all policies on uniformed services leave comply with USERRA. Depending on your state, you may need to address state specific laws. Florida, for example, has laws designed to help veterans obtain and maintain employment by giving preference in employment and promotions after being deployed.
- Review your company's current census and determine whether there are employees currently out on military leave. If there are, ensure there is an open line of communication and a plan in place for when the employee returns. Also, make sure the employee's leave is coded or classified correctly as service-related leave in your payroll system.
- Determine whether there are current employees that have returned to their jobs after deployment

and ensure their “similar pay and status” was restored where possible in accordance with USERRA.

The laws and regulations are complex and, given the fact that the workplace is rapidly changing, it may be difficult to determine where and how to put an employee back on the escalator after an absence – whether short or long. Regardless, as veterans return to the workforce after service, the law makes it clear that employers should make every reasonable effort to welcome them back to the lives they left behind.

For further information or specific guidance regarding your Company’s obligations under USERRA, contact your Akerman labor and employment attorney.

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