

# Employment Law Corner

## Monthly Report



FOLEY & FOLEY<sup>PC</sup>  
ATTORNEYS AT LAW

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### November Updates

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3. [Tesla: Modern Technology, Old School Racism?](#)
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6. [New EEOC Guidance on Religious Accommodation and Vaccine Mandates, Unpacked](#)
7. [Quitting Over a Filthy Office is Not Constructive Discharge](#)
8. [Vaccine Mandate Updates: Anti-vaxxers Pay the Price \(for Tests\)](#)
9. [THEY'RE HERE... The Federal Emergency Rules for Mandatory Vaccines](#)

### USERRA, ARE WE DONE YET? – Nope!

With the conflicts in Iraq and Afghanistan coming to a close, many Americans and many employers think the wars are over and with it, the ever-dreadful implications of USERRA law. But, is war ever really over? Like your childhood Magic 8 ball says, "Outlook, not so good!" With very real threats in Syria, continued humanitarian efforts in Africa, and the continued expansion of Chinese and Russian capabilities, employers need to prepare: employees may be asked to don their uniform again, and probably sooner than you think.

### USERRA: A Simple Synopsis

Under the Uniformed Services Employment and Reemployment Act ("USERRA" or "the Act"), Soldiers, Sailors, Airmen, Marines, and Coast Guard personnel comprise less than 1% of the United States Citizenry, yet they give of themselves in profound ways that protect the American way of life that over 99.5% of the population enjoy. In light of the sacrifices and long-term commitments required of these brave men and women, the United States government implemented USERRA in 1994. The intent of the act was to protect the employment rights of individuals called away for service in the armed forces on a voluntary or involuntary basis.

### USERRA - It's not like other leave laws!

USERRA applies indiscriminately to both public and private employers regardless of the size or location of their respective organization. It protects all full-time, part-time, temporary / seasonal employees and yes, even job applicants. USERRA is not limited to war-time and applies during peacetime too. The Act allows eligible employees to take military leave for periods of national guard / reserve duty, and periods of training, to include attendance at a service academy. Because the protection is so broad, it often leaves Employers asking, "What now?"

### "CLEAR AS MUD!" – What Employers need to know

COVID19 blindsided employers in so many ways even as the requirements of many other leave laws never changed. While USERRA has been around for decades now, it is often overlooked by employers. Do so at your peril: USERRA may be less used than FMLA but its obligations are broader and the duty to comply just as imperative. The down and dirty of USERRA, like the faces of so many service members after crawling through the mud on a STX (Situational Training Exercise) Lane is below:

Employers are prohibited from discriminating or retaliating against servicemembers who are required to fulfill military service obligations. The Act also mandates that employers accommodate those who must take leave for a qualifying reason and to re-employ the individual after the completion of their duties, provided they meet the following requirements:

1. USERRA Leave was for a qualifying reason;
2. Provided advance notice, 30 days when practicable, orally or written of the need for USERRA leave;
3. Return within a five (5) year limit (exceptions apply);
4. Submit timely application for reinstatement:
  - a. Leave is less than 30 days: No documentation needed; Employee must report to first regularly scheduled workday after duty ends.
  - b. 31-180 days of USERRA leave: Employee must submit an application or reemployment no later than 14 days after completion of service.
    - i. CANNOT BE TERMINATED FROM EMPLOYMENT FOR 180 DAYS FOLLOWING RETURN UNLESS FOR CAUSE;**
  - c. 181 or more days of USERRA leave: Employee must submit an application for reemployment no later than 90 days after completion of service.
    - i. CANNOT BE TERMINATED FROM EMPLOYMENT FOR 1 YEAR FOLLOWING RETURN UNLESS FOR CAUSE;**
5. Receive an Honorable Discharge from service, if applicable.

Employers are also required to continue health care coverage during the period of USERRA leave should the employee wish. Unlike other leave acts, the USERRA leave employee must receive all seniority-based benefits upon their return from service including the right to promotions or preference in transfer requests, if the employee would have accrued such benefits but for their service obligation.

Requesting that an employee to exhaust their PTO or other discretionary leave before allowing the employee to take unpaid USERRA leave might be tempting, but is not allowed under the law. Employers can allow the employee the option to take PTO to augment their military wage, but they cannot be forced to do so.

### **Validating An Employee's Request**

Being unfamiliar with USERRA law and the military can leave employers scrambling to figure out how to handle requests for military leave, but like the servicemembers on your team; have no fear! **After all, Foley & Foley, PC is here!**

As an employer you are permitted to request verification of the need for USERRA leave and it will most often be provided in one of the following forms:

1. Military Orders;
2. Training Schedule signed by the unit Commander; or
3. Induction information

Please note that if a service member is unable to provide verification prior to leave you cannot deny the request, as doing so could be considered retaliation. Instead, the employer should validate that the need for leave was

for a qualifying USERRA reason upon the employees return to work and as part of their reapplication for employment.

### **The Bottom Line \$**

So, what does all this mean to an employer who has a business to run? The answer...you may need to hire additional employees to offset the workload of the employee on USERRA authorized leave. And, while you are not required to compensate individuals who take leave under USERRA, you will need to compensate the employees you are required to hire to replace them, albeit perhaps on a temporary basis. The burden on employers is arguably very high, but in light of the sacrifices that servicemen and women make on behalf of our country, it is likely worth the cost.

### **COURTNEY RICHARDS**

Meet Foley & Foley's Attorney Courtney Richards, who is an 11-year veteran of the armed forces, having served both in the active-duty Army and in the United States Army Reserves. She now enjoys a career at Foley & Foley, PC, where she puts her experience in multi-echelon management and problem solving to use handling HR related compliance issues on the Federal, State and Local levels. In this article, she sheds light on USERRA and the protections it affords to her and servicemen and women like her. She is a consummate professional who praises employers like her own, for making room in the workforce for those who believe in service to country above all else.



\*\*The views expressed are those of the author and do not reflect the official policy of the United States Army, Department of Defense or the United States Government.

#### **Contact Us**



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