The Service Members Civil Relief Act (SCRA)

South Carolina Bar Convention January 2014



<u>DISCLAIMER</u>

- The lecture and power-point presentation were prepared and presented in my personal capacity.
- The opinions expressed herein are my own, and do not reflect the views of the Department of Defense, South Carolina National Guard, or any other agency or department of either the South Carolina or the United States government.

SCRA Briefing Outline

- Background
- Who receives the protections?
- When do the protections begin and end?
- Protections and Benefits
 - > Procedural Protections
 - > Financial Protections
 - ➤ Leases, Evictions, Installment Contracts, & Mortgages
 - ➤ Residence for Tax Purposes and Voting Rights

SCRA Background Information

- 1918: Soldier's & Sailor's Civil Relief Act (SSCRA) Enacted
- 1940-2003: Amended SSCRA
- 2003: Servicemember's Civil Relief Act (SCRA)
- SCRA Amendments: 2004, 2008, 2009, 2010, and 2012

SCRA Background Information

- In general, the SCRA provides various legal and financial protections to qualified Servicemembers during their military service
- The SCRA enables Servicemembers to devote their entire energies to the Nation's defense
- Liberally construed in favor of Servicemember

Basic SCRA Protections

- Stay of Proceedings
- Default Judgments
- Suspension of Statutes of Limitations
- 6% interest cap
- Lease terminations
- Cell Phone contract termination
- Eviction Protection, Mortgage Foreclosure Protection, Installment Contracts Repossession Protection
- Taxation provisions
- Voting rights

Who Receives the Protections?

- Narrow group
- Servicemember = "members of the Uniformed services"

- Reserve When on Active Duty
 - Includes Annual Duty Training
 - NOT inactive duty training (weekend)
- <u>National Guard</u> No, unless in Federal Service (Title 10)
 & Title 32 over 30 days for National Emergency (32 USC § 502f)

Who Receives the Protections?

- Active Army Generally
 - For example, 6% interest rate protection only applies to purchases made prior to active duty
- <u>Family Members</u> Sometimes
 - Spouse, child, individual for which SM provided more than ½ of the individual's support for 180 days immediately preceding use of act
- Section 581 prevents fraudulent property transfers in attempt to evoke Act

Military Status

- Reserves vs. National Guard
- Title 10
- Title 32
- "M-Day"
- Active Guard Reserve
- Federal Technician
- State Active Duty (SAD)

National Guard SCRA Applicability

Examples:

- Overseas deployments in Title 10 active duty status
- Title 32 (30 days or more + National Emergency)
 - Airport Security after 9/11
 - Hurricane Katrina

When Do Protections Begin?

Entry on Active Duty

Reserve Components: Receipt of active duty orders

When Do Protections End?

- Normally, on date of release from Active Duty
- Exceptions:
 - ➤ Stay of civil proceeding: File application within 90 days after release from Active Duty (REFRAD)
 - ➤ Default Judgments: File application to set aside the judgment no later than 90 days after REFRAD
 - ➤ 6% interest rate, for mortgages only, continues one year after REFRAD
 - Court order required for foreclose (pre-service mortgage) & opportunity to request a foreclosure stay: 1 year after REFRAD

APPLICABLE

- Applicable in any and every United States territory.
- Its procedural protections apply in all civil and administrative proceedings.
- US Attorney General opinion
 - SSCRA applicable to all Federal agencies
- Courts applied older laws to federal, state and municipal governments

Enforcing SCRA Rights

 Private right of action – may personally bring civil action for damages, equitable or declaratory relief

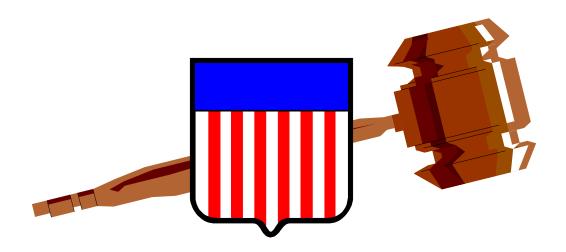
 Court <u>may</u> award attorneys fees to person harmed by SCRA violation

Enforcing SCRA Rights

 The US Attorney General may sue a person engaging in a pattern or practice of violating the SCRA

 The US Attorney General also may sue a person who violates the act in a manner that raises an issue of significant public importance

Procedural Protections



Stay of Proceedings:

- Who?
 - > Servicemembers with notice of proceedings
- What Proceedings?
 - Civil Court & Administrative Hearings? Yes.
 - Including child custody proceedings
 - Welfare Reform Act pushed DoD policy:
 - riordinary leave shall be granted unless . . . [t]he member is serving in or with a unit deployed in a contingency operation; or . . . [e]xigencies of military service require a denial of such request."
 - Criminal Proceedings? No!
- When?
 - > Servicemember is <u>unavailable</u> and <u>material effect</u> (on ability to appear)
 - Can request up to 90 days after release from duty

Several stay provisions under Title 50

Section 522: General Stay:

At any stage prior to final judgment:

- Court may on its own motion shall, upon application by SM, stay action for period of not less than 90 days
 - Requires letter from commander
 - Can apply for additional stays,
 - When not granted, court SHALL appoint counsel
- SM can be plaintiff or defendant
- Does not constitute appearance or waive jurisdiction defense
- Not available to dependents and others
 - Case by case analysis if SM party

Other Stay of Proceedings

- Several stay provisions under Title 50
 - > 521: Default judgments
 - > 522: General
 - > 523: Execution of judgments, vacate attachment or garnishment
 - > 531(b): Evictions and distress proceedings
 - > 532(c)(2): Repossession actions under installment contracts
 - > 533(b): Mortgage foreclosures
 - > 591: Contract enforcement

See also SC State Law

- **SECTION 25-1-2260.** Continuance of court case when party or attorney on active duty.
 - It is the duty of a judge...to continue a case in the court on or without motion when a party to it or his leading attorney is absent from court when the case is reached by reason of his attendance on active duty as a member of the National Guard or reserves

Must give oath cant continue safely to trial

Stay requests and the "Material Effect" Provisions

- "Material Effect" is a recurring concept throughout much of the SCRA
- The person's military service must materially affect the person's ability to meet the obligation
 - > Stated otherwise, the person's military service must **prejudice** the person's ability to meet the obligation
- Material Effect is a CENTRAL issue to the SCRA stay provision analysis
 - SM not entitled to relief under the SCRA as a consequence of his membership in armed services, but, rather, because his defense is materially affected by his military service.
 - SM must request leave!

Stay Requests: SM With Notice

- Extremely important to follow the steps required for a stay request!
- Stay request <u>must</u> be by letter or other communication and include:
 - 1. Facts establishing there is a material effect
 - 2. Date when Servicemember can appear
 - 3. Letter (or other communication) from **commander** stating no leave authorized

Default Judgments

- 50 U.S.C. app. § 521
 - Applies only if the Servicemember has not appeared
- Basic Rule: Before a judgment is entered against any person not appearing, the plaintiff must submit an affidavit stating:
 - Whether or not defendant is in military; or
 - ➤ That plaintiff cannot determine whether defendant is in military
 - > Fine/1 year prison for false affidavit

Default Judgments 50 U.S.C. app. § 521

- If Defendant MAY be in miltary:
 - Court must appoint attorney to find SM and request stay if he can't
 - WHO PAYS???? Court?
- What should appointed attorney do? Probably this:
 - contact the defendant, assure he has actual notice of the lawsuit,
 - Advise defendant of SCRA protections
 - Advise possibility of entry of default judgment and the consequences
 - Ascertain whether defendant's ability to appear and defend his or her legal interests is affected in any way by defendant's military status, and
 - if the defendant wishes, move for a stay of the proceedings
- Until authorized, actions by the attorney shall not waive any defense or otherwise bind SM
 - Does not amount to an "appearance"

Stay of proceedings: SM without notice 50 U.S.C. app. § 521 (d)

- Stay of proceedings.
 - court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that----
 - (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or
 - (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.
- Different than § 522 stay
 - If SM received notice, use § 522

Reopening Default Judgments

- SM must not have made an appearance in case!!!
 - Does requesting SCRA stay equal appearance?
 - NO! But can't use default provisions.
- Upon application by Servicemember, the court SHALL:
 - Reopen any default judgment entered while the Servicemember was on active duty or w/in 60 days of REFRAD
 - This provision applies to child custody proceedings.
- Servicemember's application must:
 - ➤ Be made while applicant is still on active military duty or within 90 days thereafter
 - Show material effect on ability to mount defense
 - Stationed oversees prima facie proof?
 - > Assert a meritorious defense to all or part of the action

Statutes of Limitation Section 526

- SCRA tolls running of civil statutes of limitations
 - Civil and administrative proceedings
 - Except for internal revenue laws!
- No requirement of "materially affected"
 - But doctrine of laches?
- Applies whether the SM is plaintiff or defendant
 - Claims against SM tolled!
- Does not apply to Criminal proceedings

Financial Protections



6% Interest Cap

Basic Rule:

- > Limits interest to 6% on pre-service obligations
- Pre-service means pre-active duty
- ➤ Lender <u>must</u> forgive interest above 6%
- > Lender cannot accelerate payment of principal

6% Interest Cap Requirements

- Servicemember must write a letter to creditor
- Must provide a copy of orders and any extensions
- Must give notice only
 - ➤ NO initial requirement for Servicemember to show "material effect"
 - Creditor must reduce rate after SM's notice
- Creditor may avoid reducing the interest rate only through COURT FINDING of no "material effect"

6% Rule for Mortgages

- Expansion of the 6% interest cap time period for mortgages:
 - Interest rate on mortgages may be reduced to 6% during AD and for ONE YEAR after AD

6% Examples

- Active Army Soldier financed an automobile at 9% prior to entering active duty
- National Guard SFC Jones took out \$50,000 in business loans at 8% in 2008; mobilizes to active duty at Ft. Riley in 2010
- Army Reserve Soldier purchased home at 7.5% in 2001; was mobilized for active duty to Afghanistan in 2009

Non-Discrimination Protection

- Basic Rule: Claiming rights under SCRA cannot serve as basis for –
 - ➤ Adverse credit report
 - Denial/revocation of credit
 - ➤ Denial of insurance coverage
 - Change in terms of existing credit/insurance
 - Annotation identifying SM as member of Guard or Reserve

Leases, Evictions, Installment Contracts & Mortgages



Residential Lease Terminations

- Servicemember may terminate <u>residential</u>* leases as follows:
 - ➤ All pre-service leases (leases executed prior to active duty service)
 - Leases executed while on active duty IF:
 - Soldier receives PCS orders; or
 - Soldier will deploy for more than 90 days
 - Requires written notice with orders
- * This lease termination provision includes other types of leases, such as professional, business, agricultural and similar leases

Residential Lease Terminations Joint Leases

 Dependent's lease obligation terminates along with Servicemember's

Landlords cannot hold dependents liable on a joint lease

Automobile Lease Terminations

- Servicemember may terminate an auto lease as follows:
 - > Pre-service lease (lease signed before active duty service)
 - Can terminate if entering AD for 180 days or more
 - > Leases executed while on active duty IF:
 - PCS from CONUS to OCONUS
 - PCS from Alaska or Hawaii to anywhere
 - Deployment for 180 days or more
 - ➤ Requires written notice w/orders and return of the vehicle w/in 15 days of notice

Cell Phone Contract Terminations

- Termination authorized when SM receives orders to relocate for 90 days or more to a location not supported by the contract
- Servicemember must provide written or electronic notice to the carrier
- Servicemember may keep phone number if relocation for 3 years or less
- Family members relocating with the SM also may terminate service

Evictions

- Basic Rule: Landlord can evict SM (or dependents)
 only with court order no self help (landlord cannot
 do it on his own)
- For 2013, this section applies to rentals not exceeding \$ 3,139.35 per month
 - The amount increases <u>yearly</u> based on housing price inflation adjustment
- Servicemember must show material effect to receive judicial stay

Installment Contracts

- Prohibits <u>self-help repossession</u> of items purchased on installment contract
- Pre-service (pre active-duty) obligations only
- Common examples: Appliances, furniture, motor vehicles
- Requires court order before
 - Termination for breach of contract
 - > Repossession
- Must show <u>material effect</u> to receive judicial stay of repossession

Mortgages

- Prohibits foreclosure without a court order
- Applies to <u>pre-service</u> (pre active-duty) obligations secured by a mortgage
- Must show material effect
- Court may stay the proceedings or adjust the obligation as equity requires

Residence for Tax Purposes and Voting Rights



Residence for Tax Purposes

General Rule: A Servicemember neither acquires nor loses domicile based on the presence in a state due to military orders

Residence for Tax Purposes

- <u>Military Income</u>: Deemed earned in the state of domicile
- <u>Personal Property</u>: Deemed located in the state of domicile
- A SM's nonmilitary income earned outside the state of domicile is not protected by the SCRA

Spouse Tax Rules

Military Spouses Residency Relief Act (MSRRA)

 SCRA now protects spouse's income from taxation if domicile is <u>same as SM's</u>

 Beware: Does not mean spouse can merely "pick" the SM's domicile. Spouse must establish domicile under normal domicile analysis!

Servicemember Voting Rights

- A Servicemember's home state (domicile) voter registration remains valid despite presence in another state due to military orders
- Be cautious about changing voter registration to the new (host) state

Spouse Voting Rights

- As of November 2009, a spouse's home state (domicile) voter registration remains valid despite presence in another state due to Servicemember's military orders IF:
 - Spouse is living with SM in the duty state, AND
 - Spouse has the same domicile as the SM

Warning Regarding Domicile

If Soldier (or Spouse under MSRRA) loses "contacts" with state of domicile, the "new" state might pursue domicile status (and attempt to tax the Soldier!)

Ways to Help Establish or Maintain Domicile

- Purchase a home or land
- Register to vote
- Register vehicles
- Physical presence
- Driver's license
- Membership in organizations
- Own bank accounts or investments

Motor Vehicle Registration & Fees

- If Soldier registers with home state, host state cannot require vehicle registration
- Otherwise, Soldier must comply with host state
 - > But host state cannot apply property tax to the vehicle ("ad valorem" tax)

"Waiver" of SCRA Protections

Waiver of SCRA protections is allowed (See Sec. 517) but the waiver must be:

- In writing and at least in 12 point type
- Executed separate from the original obligation to which it applies
- Executed during or after the period of active duty
- Re-negotiation, after entry on AD, may change whatever rights and protections the SM had

Other SCRA Protections

 Reinstatement of Private Health Insurance Upon Return to Civilian Life

 Suspension of Professional Liability Insurance During Active Duty

Stays of Execution of Judgments or Attachments

Conclusions

- The SCRA provides numerous protections and benefits to Servicemembers in both the Active and Reserve Components
- SCRA protections may apply in both deployment and nondeployment situations

USEFUL SOURCES

- The Judge Advocate General's Legal Center & School, U.S. Army, JA 260, Servicemembers Civil Relief Act, March 2006
- Servicemembers' Civil Relief Act Provides Umbrella of Protection" Department of Defense article, Armed Forces Information Service: http://www.dod.mil/specials/Relief Act Revision/
- US Coast Guard article on SCRA: http://www.uscg.mil/legal/la/topics/sscra/about the sscra.htm
- Coast Guard Fact Sheet on SCRA: http://www.uscg.mil/legal/la/topics/sscra/SSCRA Factsheet.htm
- Air Force Academy article on SCRA: http://www.usafa.af.mil/10ja/ssra.htm
- Article by Carreon and Associates, Cypress, CA, on SCRA: http://www.carreonandassociates.com/soldiersact.html
- Office of Child Support Enforcement's "A Caseworker's Guide to Child Support Enforcement and Military Personnel" section on SCRA: http://www.acf.dhhs.gov/programs/cse/fct/militaryguide2000.htm
- Legal Services, http://www.jagcnet.army.mil/legal, the Army Judge Advocate General's Corps public preventive legal information site. (Servicemembers' Civil Relief Act information center.)

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QUESTIONS?

UNIFORMED
SERVICES
EMPLOYMENT AND
REEMPLOYMENT
RIGHTS ACT
(USERRA)

South Carolina Bar Convention January 2014



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Birds-eye view only!

Outline:

- 1. Brief Background
- 2. USSERA Protections:
 - Section 4311: Anti-Discrimination and Anti-Retaliation
 - Section 4312: Reemployment
- 3. South Carolina State Law
- Other Relevant Federal Laws
- 5. Helpful References and Points of Contact

- Enacted 1994
 - Public Law 103-353, signed 10/13/1994.
 - 38 U.S.C. 4301-4335.
 - Amended 1996, 1998, 2000, 2004, 2008, 2011.
- Roots date to the 1940s
 - Replaced VRRA, originally enacted in 1940.
 - GET THIS SLIDE OFF OF MILITARY COMPUTER BRIEF VERSION

Needed now more than ever

 700,000 National Guard and Reserve members called to active duty since terrorist attacks of 9/11/2001.

Many called multiple times.

- Extremely far reaching!!!
 - Much broader than other employment laws!
 - Applies to virtually every U.S. Employer
 - Including federal and state governments, and all private employers, with no size based exceptions.
 - U.S. employers overseas
 - foreign employers in the U.S.
 - joint employers and hiring halls
 - successors in interest
- You only need one employee to be covered—Cole v. Swint, 961 F.2d 58 (5th Cir. 1992).

- USERRA Statute of Limitations
 - No Federal or State statute of limitations applies
 - 38 U.S.C. 4323(i), 4327 (enacted Oct. 2008)
 - For claims arising after October 10, 2008 courts are split
 - Equitable doctrine of laches may apply

- USERRA is floor, not ceiling
 - "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946)
- Does not supersede state law, employer policy, contract, collective bargaining agreement (CBA), etc. if greater or additional rights—38 U.S.C. 4302(a)
- Supersedes state laws, employer policies, practices, contracts, CBAs, etc. that limit USERRA rights or impose additional prerequisites—38 U.S.C. 4302(b)

- USERRA matters can sometimes be resolved via a Veterans' Employment and Training Service complaint.
- Private agreements to arbitrate may also operate to keep plaintiff from pursuing a USERRA action in court
- Unclear if 38 U.S.C. 4302(b) overrides agreements to submit future USERRA disputes to binding arbitration

- Office of Personnel Management promulgate regulations applying USERRA to Federal agencies
 - 38 U.S.C. 4331(b)
 - OPM USERRA Regulations in Title 5, Code of Federal Regulations (CFR), Part 353
- Secretary of Labor promulgates regulations applying USERRA to state, local governments and private employers
 - 38 U.S.C. 4331(a)
 - DOL USERRA Regulations in 20 CFR Part 1002
 - DOL prescribed regulations implementing USERRA in Dec 2005

- Remember act is pro-servicemember!
 - Reemployment statute should be "liberally construed for he who has laid aside his private concerns to serve his country in its hour of great need." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946).

USERRA Protections

<u>USERRA PROTECTIONS</u>

- In general, USERRA:
 - Section 4311
 - Prohibits employment discrimination based on past, current, or possible future military service and prohibits and protects against retaliation
 - Section 4312
 - Protects reemployment rights for persons absent from employment because of military service and preserves benefits for persons absent from employment because of military service

Section 4311 ANTI-DISCRIMINATION and ANTI-RETALIATION

Section 4311 Anti-Discrimination Provision

"A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service *shall not be denied* <u>initial employment</u>, <u>reemployment</u>, <u>retention in employment</u>, <u>promotion</u>, or <u>any benefit of employment</u> by an employer on the basis of that membership"

Prohibited adverse employment actions:

- 4311 (a): Anti-Discrimination
 - Failure to hire
 - Denial of reemployment
 - Discharge
 - Denial of promotion
 - Denial of "any benefit of employment"
- 4311 (b): Anti-Retaliation
 - an employer "may not discriminate in employment" or "take any adverse employment action" in order to retaliate against a person helping to exercise rights under the Act

§ 4311(a)

- Prohibits discrimination against those:
 - Applying to be...
 - Currently...

A member of a uniformed service

Previously performed as...

- <u>Not</u> Guard service performed under state orders!!
- Not contractors

§ 4311(b)

- Protects from retaliation those who take USERRA action
 - whether or not they themselves are associated with the uniformed services
 - Current and past employees, applicants
- Persons protected include ANYONE who:
 - Took action to enforce USERRA protection afforded any person
 - Testified or made a statement in or in connection with
 - Assisted or otherwise participated in an investigation
 - Exercised a right provided for in the Act

In both § 4311 actions

- Plaintiff must show that military status or USERRA-related activity was "a motivating factor" in employer's decision to take adverse employment action.
- Motivating factor?
 - If employer "relied on, took into account, considered, or conditioned its decision on that consideration."
- Need not be sole cause of employment action

In both § 4311 actions

- Adverse employment action must rise to the level of materiality
 - Must prove military service was "motivating factor"

- Not actionable:
 - Petty snubs or personal conflicts with a supervisor

In both § 4311 actions

After employee establishes prima facie case

 Employer can defeat claim by proving that action would have been taken despite protected status

- BOP on employer!
 - Preponderance of evidence
 - Different than other employment actions

PROMOTIONS FOR MOBILIZED EMPLOYEE

- "[Federal] Agency promotion plans must provide a mechanism by which employees who are absent because of ... uniformed service can be considered for promotion." 5 C.F.R. 353.106(c).
- See Law Review 0855.

Remedies

- Full equitable powers
 - I.E. injunctions and reinstatement of terminated employees
- Compensatory damages
 - back and front pay for the value of lost wages and benefits
 - plaintiff has a duty to mitigate damages by looking for suitable alternative employment
- Reasonable attorney fees, expert witness and other litigation expenses
- "Double damages" for willful violations
- No punitive damages or for compensatory damages for emotional distress or other harms
 - can be awarded under concurrent causes of action
 - state tort claims for wrongful discharge
 - intentional infliction of emotional distress

JURISDICTION AND VENUE

- Actions against private employers and state subdivisions under USERRA may be brought in federal court in any district where the defendant employer maintains a place of business, or in state court as a matter of concurrent jurisdiction
- Actions against states
 - courts of that state if the state has consented to suit,
 - or in federal court if the Attorney General is acting on behalf of the plaintiff
- Actions against federal agencies must be brought before the Merit Systems Protection Board

REEMPLOYMENT RIGHTS

REEMPLOYMENT RIGHTS

 General right to be rehired for persons absent from employment because of military service

Also preserves benefits

Prerequisites for Coverage

- Civilian job
- Absence due to military service
- Advance notice to employer
- Military service cannot exceed 5 years*
- Separation under Honorable conditions
- Report back in a timely manner
- Do not need to prove discrimination

Must have "Civilian Job"

- Claimant must be "employed by someone else"
 - Extremely broad reaching
- Applies to:
 - temporary, probationary, and at-will jobs, executive employee and even laid-off employees

Must have "Civilian Job"

- USERRA does NOT cover persons who are:
 - Self-employed
 - Partners
 - Independent contractors;
 - Different test used than for other employment actions
 - Students
 - Other state and federal protections for students
 - Employed for brief, non-recurrent periods
 - but label is not controlling!!!!

Absence Due to Military Service

- "Service in the uniformed services" includes:
 - Active and Reserve US Armed Forces
 - US only!
 - includes National Guard under Federal authority (Title 10 & 32)
 - Public Health Service;
 - As designated by President in emergencies
 - Intermittent disaster response service/training

Absence Due to Military Service

- Irrelevant if person "volunteers"
- USERRA does NOT cover national guard duty in <u>state</u> status for disaster relief, riots, etc.
- Does NOT apply to military family members,
 - Family Medical Leave Act (FMLA) may

Advance Notice to Employer

- Notice can be either verbal or written
 - Should be in writing to protect all parties
- No time frame specified in USERRA
 - regulations recommend at least 30 days prior
- Exception to notice requirement:
 - "military necessity" or "unreasonableness"
 - Very rare

Military Service Cannot Exceed 5 Years

- USERRA protections do not apply if period of military service exceeds 5 cumulative years
- Many exceptions! DEPEND ON MILITARY STATUS!!!
 - 5 year rule does <u>NOT</u> include: IDT, AT, involuntary recall or retention, partial mobilization, presidential selected reserve call-up, or full mobilization
- Separate 5 year clock exists for each employer

Discharge Characterization

Honorable or General Discharge only

- No USERRA rights if:
 - Dishonorable or Bad Conduct Discharge (enlisted)
 - Dismissal (officers)
 - Under Other Than Honorable Conditions discharge
 - Dropped from rolls

Discharge Characterization

What about a retroactive upgrade?

- USERRA applies, and employee has the right to be reinstated
- Employee does not, however, receive back pay

Timely Reporting

- Depends how long you were away on military duty
 - Up to 30 days: report to work after safe travel + 8 hours
 - 31 180 days: submit reemployment application w/in 14 days
 - 181 days or more: submit reemployment application w/in 90 days
- Failure to meet timelines: Does not mean forfeiture of rights, but normal employer rules will apply

Timely Reporting

Disabled or Impaired due to military service?

- Have up to 2 years to request reinstatement
- Employer must make "reasonable accommodations," unless doing so results in an undue hardship

REINSTATEMENT ENTITLEMENTS

- Prompt reinstatement
- Continuous seniority
- Continuous pension credit
- Maintain Status
 - includes location, supervisor vice supervisee, hours, promotion opportunity, etc.
- Rate of pay upon reinstatement
- Health insurance reinstatement and continuation
- Training after returning to work

Prompt Reemployment

- An employee who meets the criteria "upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment."
- "prompt" left undefined
 - But per DOL "as soon as practicable under the circumstances."
- Absent unusual circumstances, reemployment must occur within two weeks of reapplication for employment.
- For short time periods, prompt reemployment will generally mean the next regularly scheduled working day
- Employer can request documentation, but can't "wait" for it
- Can't "wait" because hiring freeze or because position was "filled"

Prompt Reemployment

- "position of employment" does not necessarily mean actual job Soldier held
 - Period of service up to 90 days
 - Reemployment in the same position the Soldier (employee) would have been in if he had not left, if qualified
 - Period of service over 90 days
 - Reemployment will be in the same position the Soldier would have been in had he not left, if still qualified for the position, or in a position of like seniority, status, or pay, if qualified.
 - If no longer qualified for that position and the employer has made reasonable efforts to qualify him without success, then the Soldier will be given a position of like seniority, status, and pay.

Prompt Reemployment

- If no longer qualified, give Soldier opportunity to train up
- If Disabled through Service:
 - If no longer qualified, then given another position which is nearest equivalent in seniority, status, or pay

ESCALATOR PRINCIPLE

 "The returning veteran 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." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946).

Escalator can descend as well as ascend!

Benefit or Benefit of Employment

"[A]ny advantage, profit privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment."

 BLUF: If employer gives a benefit to nonmilitary employees, Servicemember is also entitled to it.

Health Insurance Coverage

If cancel coverage? No "probationary period" upon return

A Servicemember who has health insurance plan through a civilian employer may continue coverage for the shorter of the following time periods:

- 24-month period beginning on date of service-related absence;
- Period beginning on date of service-related absence and ending on date employee fails to return to employment under USERRA guidelines

Health Insurance Coverage

A Servicemember who elects to continue coverage must pay the following depending on length of military service:

- Service under 31 days: regular employee share of premiums
- Service over 31 days: no more than 102% of the full premium under the plan
 - Employee share
 - Employer share
 - 2% administrative costs

Special Protection From Discharge

Changes SC "at will" employment

Can't be discharged from employment (except for cause)

- < 30 days no grace period
 - BUT may violate anti-discrimination protection?
- 31-180 days 180 day grace period
- >180 days 1 year grace period

 USERRA does not protect Soldier from ordinary layoffs or labor reductions

Employer Defenses

Employer Change in Circumstances [Impossibility Defense]

- Not required to reemploy if employer's changed circumstances make doing so impossible or unreasonable.
- 38 U.S.C. 4312(d)(1)(A).

Undue Hardship on Employer

- Not required to reemploy if employer's changed circumstances make doing so impossible or unreasonable.
 - 38 U.S.C. 4312(d)(1)(A).

Brief and Non-recurrent Employment

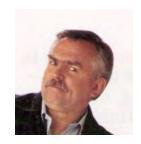
- pre-service employment relationship was brief, non-recurrent, and no reasonable expectation of continuation indefinitely or for a significant period.
- 38 U.S.C. 4312(d)(1)(C)

Burden of Proof:

On employer

Miscellaneous Protections

Some "little known facts."



- Employee can't be forced to use vacation time to perform military service
- Employer, not employee, responsible for covering employee's shift or job (i.e. finding replacement)
- Pension Benefits:
 - Time performing military service counts toward pension "time" requirements;
 - Soldier must make contributions, if part of plan
- Adequate rest, travel, and prep time before and after service

SOUTH CAROLINA STATE LAW

State USERRA?

SECTION 25-1-2190. Interference with employment of or practice of trade by guard member; penalty.

A person who, either by himself or with another, (a) wilfully deprives a member of the National Guard of South Carolina of his employment, (b) prevents such member from being employed, (c) obstructs or annoys a member or his employer in his trade, business or employment because he is such a member or (d) dissuades or attempts to dissuade any person from enlisting in such National Guard by threat of injury to him in his employment, trade or business shall be guilty of a misdemeanor and, on conviction thereof, shall be fined in a sum not exceeding one hundred dollars or imprisoned in the county jail not more than thirty days. HISTORY: 1962 Code Section 44-139; 1952 Code Section 44-140; 1950 (46) 1881; 1964 (53) 2241.

Other Relevant State Statutes

SECTION 25-1-2250. Leaves of absence for public officers and employees.

Officers and employees of the State of South Carolina, and departments and subdivisions thereof, shall be entitled to military leave without loss of pay, seniority or efficiency rating, when attending National Guard encampments or schools for training, under proper authority, and on all other occasions when ordered to active duty, in the service of the State of South Carolina.

HISTORY: 1962 Code Section 44-168; 1952 Code Section 44-142; 1950 (46) 1881; 1964 (53) 2241.

SECTION 25-1-2260. Continuance of court case when party or attorney on active duty.

It is the duty of a judge of a court of this State to continue a case in the court on or without motion when a party to it or his leading attorney is absent from court when the case is reached by reason of his attendance on active duty as a member of the National Guard or reserves. The case may proceed if the party, in the absence of his leading attorney, or the leading attorney, in the absence of the party, announces ready for trial on the call of the case. If counsel is absent, it shall be necessary for his client to make oath that he cannot safely go to trial without the absent attorney and, if a party is absent, his counsel shall state in his place that he cannot safely go to trial without his client." HISTORY: 2001 Act No. 85, Section 2; 2003 Act No. 17, Section 1.

See also:

SECTION 8-7-20. Leaves of absence authorized for public employees serving in armed forces.

SECTION 8-7-90. Leaves of absence for public officers and employees in National Guard or reserve military forces; service in combat zone.

Other Relevant State Statutes

SECTION 25-1-2270 Completion of missed exams and assignments due to military service.

Upon notice from a student required to attend or participate in military service, duty, training, or disaster relief efforts, an institution of higher education which receives state funding, either directly or indirectly, including but not limited to state scholarships or grants, shall excuse the student from attending classes or engaging in other mandatory activities, including tests or examinations, in order for the student to fulfill his military obligations and associated military travel requirements.

Other Relevant State Statutes

- may not be penalized for absence
- must be allowed to complete all missed assignments or tests within reasonable time of return

- liberally construed
- applies to active, reserve, or National Guard

RELEVANT FEDERAL LAW

Other Useful Federal Law

- Family and Medical Leave Act (FMLA)
 - Extends military caregiver leave
 - Qualifying exigency leave
- Veterans Opportunity to Work
 - Amends USERRA to include hostile work environment
 - Gives employers hiring veterans tax credits
- HIGHER EDUCATION OPPORTUNITY ACT (HEOA)
 - Right to return to studies at frozen tuition
 - Right to refresher courses and other assistance at no cost
- Veterans Benefits Act of 2010
 - Created test program where half of USERRA claims against federal executive agencies referred to Office of Special Counsel
 - "Benefit" now includes wages and defined successor in interest
- Veterans Benefits Improvement Act
 - Employers must provide notice of USERRA rights
- American's with Disabilities Act
- Title VII Civil Rights Act
- Age Discrimination in Employment Act

REFERENCES and POINTS OF CONTACT

Excellent Resources

- "Causes of Action for Employment Discrimination Based on Military Service Under the Uniformed Services Employment and Reemployment Rights Act (USERRA)," by Cecily Fuhr, Esq, 47 Causes of Action 2d 1 (Originally published in 2011, updated October 2013)
- "When the Troops Come Marching Home to Work, Will You Be Ready?" By Jennifer K. Dunlap and Kristen M. Baylis, South Carolina Lawyer, May 2012.
- "Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules," Department of Labor, Federal Register, Part II, 20 CFR Part 1002, December 19, 2005.

ESGR Contact Info

✓ Web Site: www.esgr.mil

✓ Phone: 1-800-336-4590

✓ COM: 703-696-1386 / 1171

✓DSN: 426-1386 / 1171

✓ Email: ncesgr-ombud@osd.mil

HEOA Enforcement Assistance

Potential violations of the law can be report to:

- Office of Postsecondary Education, Wendy Macias (202) 502-7526, email: wendy.macias@ed.gov
 - It is the intent of USDE to establish call assistance centers.

Legal Assistance Attorney (JAG)

- Contact legal assistance JAGs for informational purposes only
- AR 27-3, Para. 3-6e(2)(a): legal assistance attorneys cannot take action which could be construed as representation on a USERRA case. DOL and DOJ WILL NOT pursue relief in a USERRA case if the service member is represented by an attorney
- Legal assistance attorneys may assist with redress exclusively in State courts or State agencies

Employer Support of the Guard and Reserve (ESGR)

- Primary initial point of contact
- National Committee for ESGR 1555 Wilson Blvd, Suite 200 Arlington, VA 22209-2405
- Phone: 800-336-4590
- Website: www.esgr.org

Department of Labor – Veterans' Employment and Training Service (DOL-VETS)

- U.S. Department of Labor Frances Perkins Building 200 Constitution Avenue, NW Washington, DC 20210
- 866-4-USA-DOL
- Website: www.dol.gov/vets/welcome.html

Private Lawsuit to Enforce USERRA

A Servicemember who does not to use ESGR, VETS, or Attorney General assistance (or is unsuccessful with these entities) can file a private lawsuit (no exhaustion of administrative remedies required)

- State employee, file suit in state court (DoJ must prosecute the case)
- Private employee, file suit in Federal court
- Federal employee, special rules apply

USERRA ENFORCEMENT

- Cases against state, local, and private employers forum is Federal District Court—38 U.S.C. 4323—1.4
- 11th Amendment problem when suing a STATE (does not include local)—1.1.1.7
- No exhaustion of remedies requirement
- Subject Index 1.4



ENFORCEMENT—CONT.

- Cases against Federal Agencies—forum is the Merit Systems Protection Board (MSPB). 38 U.S.C. 4324
- Appeals to United States Court of Appeals for Federal Circuit
- Fed Cir not shy about reversing MSPB
- Subject Index 1.1.1.8 and 1.4—Law Review 0755 especially.



USERRA ASSISTANCE

- National Committee for Employer Support of the Guard & Reserve (ESGR)
- DoD organization established 1972
- Informal, nonconfrontational, and quick
- www.esgr.mil
- 1-800-336-4590



USERRA ASSISTANCE—CONT.

- U.S. Dept. of Labor, Veterans' Employment & Training Service (DOL-VETS)
- Claimant NOT required to exhaust remedies through DOL-VETS before suing, BUT you must go through DOL-VETS if you want free legal help



DOL-VETS—CONT.

- Required to assist 38 U.S.C. 4321
- Required to investigate claimed violations—38
 U.S.C. 4322
- Has subpoena authority—38 U.S.C. 4326
- Referral to Special Counsel (federal agency) or Attorney General (state, local, or private)—38 U.S.C. 4322(e)
- Time limits enacted Oct. 2008



OPM ROLE IN USERRA

- Office of Personnel Management responsible for finding another job within Executive Branch, if impossible or unreasonable in old agency. Also applies to Legislative Branch, Judicial Branch, Intelligence Agencies, National Guard technicians. 38 U.S.C. 4314, 4315
- Law Review 0763.



SC CONTACT INFO

OMBUDSMAN DIRECTOR:

Dan Cobb <u>decobb@bellsouth.net</u> 803-920-3746 803-771-4014

• STATE COMMITTEE:

Joe Smoak joseph.smoak@us.army.mil 803-878-4792

<u>DISCLAIMER</u>

- The lecture and power-point presentation were prepared and presented in my personal capacity.
- The opinions expressed herein are my own, and do not reflect the views of the Department of Defense, South Carolina National Guard, or any other agency or department of either the South Carolina or the United States government.