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Uniformed Services Employment and Reemployment Rights Act (USERRA)

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Texas school districts often see employees leave and return due to military service. State and federal laws extend certain rights to these employees. This article provides an overview of military leave rights.

Q: What laws govern military leave?

A. The primary source of federal military leave rights is the Uniformed Services Employment and Reemployment Rights Act (USERRA), which was adopted in 1994 and updated in 1996, 1998, and 2004. H.R. 995, 103d Cong. (1994) (codified at 38 U.S.C. §§ 4301-4333). In 2005, the Veterans Employment and Training Service (VETS), a division of the Department of Labor (DOL), adopted rules implementing USERRA. 20 C.F.R. part 1002.

The primary source of state military leave rights is Texas Government Code section 437.213, adopted in 2003. Section 437.213 extends USERRA to members of state military forces who are called to active state duty by the governor or other proper authority under state law. Tex. Gov't Code § 437.213. Chapter 613, Texas Government Code, contains similar provisions, but applies only to public employees. The major components of these federal and state laws are set forth at TASB policy DEC(LEGAL).

Q: Which employers are covered by the military leave laws?

A. All private and public employers in Texas are subject to USERRA and Section 437.213, including school districts. 20 C.F.R. § 1002.39. Chapter 613 applies only to state and local government employers. Tex. Gov't Code § 613.001(3). None of these laws requires that an employer have a specific number of employees for coverage.

An employee may have more than one employer under USERRA. *Employer* includes any person or entity to whom the employer has delegated employment-related responsibilities, unless the delegated functions are purely ministerial. 20 C.F.R. § 1002.5(d)(1)(i). Thus, individual supervisors and managers who perform employment-related responsibilities may be liable under USERRA and, by extension, Section 437.213. 20 C.F.R. § 1002.37.

If two or more entities functions as joint employers with respect to a particular employee, both or all employing entities are considered employers for USERRA purposes. For example, if a contractor assigns one of its employees to work at a district—e.g., a school resource officer is employed by the city but assigned to the district—the contractor and the district share responsibility for compliance with USERRA. 20 C.F.R. § 1002.37.

Q: Who is protected by the military leave laws?

A. USERRA protects persons in the federal uniformed services. Most people think of the uniformed services as just the armed services—Army, Navy, Air Force, and Marines. However, uniformed services also include:

- Army and Air National Guards, when engaged in active duty training, inactive duty training, or full-time duty;
- Commissioned Corps of the Public Health Service;
- Intermittent disaster response appointees of the National Disaster Medical System, when federally activated or attending authorized training; and
- Any other category of persons designated by the President in time of war or national emergency.

20 C.F.R. § 1002.5(o).

Members of the uniformed services are protected when called to voluntary or involuntary duty, when they attend training or fitness examinations, or when they provide service at military honors funerals. 20 C.F.R. § 1002.5(l).

Section 437.213 protects members of the state military forces when called to active state duty. The state military forces include:

- The Texas National Guard,
- The Texas State Guard, and
- Any other active militia or military force organized under state law.

Tex. Gov't Code § 431.001(3).

Chapter 613 protects any public employee who enters active military service. Military service, for purposes of Chapter 613, means service as a member of:

- The United States Armed Forces,
- The Texas National Guard,

- The Texas State Guard, or
- The reserve component of the United States' armed forces.

Tex. Gov't Code § 613.001.

Q: What are the rights guaranteed by USERRA?

A. First, USERRA prohibits employment discrimination and retaliation. A district may not deny employment, reemployment, retention, promotion, or any benefit of employment based on membership, or application for membership, in the uniformed services. 20 C.F.R. § 1002.18. USERRA also prohibits retaliation against a person who exercises rights under USERRA. A district may not take adverse employment action against a person because the person exercised USERRA rights or assisted another person with the exercise of USERRA rights. 20 C.F.R. § 1002.19. This protection extends to persons who are in the uniformed services and to those who are not in the uniformed services but have engaged in protected activities. 20 C.F.R. § 1002.20.

Second, USERRA requires a district to place eligible employees on leave of absence or furlough during military service and to reinstate them upon discharge from service. 38 U.S.C. § 4312(a). Military leave may be paid or unpaid, and the district must continue the employee's benefits for a period of time during the leave. 20 C.F.R. § 1002.149.

The relationship between rights during leave and reinstatement rights can be confusing. The two sets of rights are not necessarily related or interdependent. An employee may exercise one set of rights without exercising the other set, or may waive one set of rights while retaining the other set.

Q: Is military leave paid leave?

A. USERRA does not provide for paid leave, but state law provides for short-term, paid military leave. In addition, the employee may be able to access accrued state and local leave. A district must grant up to 15 workdays of paid leave each fiscal year to members of the state military forces, a reserve component of the United States Armed Forces, or a state or federally authorized Urban Search and Rescue team, for authorized training or duty ordered or authorized by proper authority. Tex. Gov't Code § 437.202.

In addition, under the USERRA rules, an employee is entitled to use accrued vacation, annual, or similar leave with pay during service. However, a district cannot require the employee to use paid leave. 20 C.F.R. § 1002.153. The Texas Education Code echoes this provision: "A school district employee with available personal leave . . . is entitled to use the leave for compensation during a term of active military service." Tex. Educ. Code § 22.003(d).

The Texas Education Code also permits a district to adopt a policy providing paid leave for active military service as part of the consideration for employment. Tex. Educ. Code § 22.003(e). The Texas Constitution requires that the policy be in place before a contract employee begins work under the contract—any such policy must be prospective only in application. Tex. Const. art. III, § 53; *Lee v. El Paso Co.*, 965 S.W.2d 668 (Tex. App.—El Paso 1998, pet. denied); Op. Tex. Att'y Gen. LO-98-099 (1998). If your district has such a policy, it is probably located at TASB policy DEC(LOCAL).

Q: Can the employee continue health insurance coverage during leave?

A. An employee on military leave is entitled to continuation of health insurance coverage. The employee may continue coverage until he is discharged from the military (if the employee fails to apply for reemployment) or for 24 months, whichever is less. 20 C.F.R. § 1002.164. For the first 30 days of leave, the district and the employee must pay their respective regular contributions toward coverage. After 30 days, the district may require the employee to pay up to 102% of the full premium. 20 C.F.R. § 1002.166.

For districts that participate in TRS-ActiveCare, full-time and part-time employees who are placed on leave-without-pay status may continue participation in TRS-ActiveCare. 34 Tex. Admin. Code § 41.40. If the employee does not elect continuation, the employee's coverage will end on the last calendar day of the month in which the employee enters active, full-time service. 34 Tex. Admin. Code § 41.38.

The plan administrator may adopt reasonable procedures for employees to elect continuation coverage and to pay for their coverage. The USERRA rules specify how continuation coverage should be handled under various scenarios and in some cases require retroactive reinstatement of lapsed coverage. 20 C.F.R. § 1002.167. If an employee does not elect continuation coverage, or makes a late election, the employee is nonetheless entitled to reinstatement of coverage upon reemployment. 20 C.F.R. § 1002.169.

Q: Is the employee entitled to any other benefits during leave?

A. The employee is entitled to those non-seniority rights and benefits that the district provides to similarly situated employees on furlough or leave of absence. 38 U.S.C. § 4316(b)(1)(B). For example, if a district offers continued life insurance coverage, holiday pay, or bonuses to employees on furlough or leave of absence, the district must offer these benefits to employees on military leave. If rights and benefits vary according to the type of leave, the district must give the employee the most favorable treatment accorded to any comparable form of leave. Further, the employee is entitled to those rights and benefits in place when the employee began leave *and* to those implemented during the employee's leave. 20 C.F.R. § 1002.150. A district must provide these benefits even if the district provides full or partial pay during the leave. 20 C.F.R. § 1002.151.

A district is not required to provide nonseniority rights and benefits to an employee who knowingly provides written notice of intent not to return after completion of service. This is a very limited exception and, paradoxically, an employee who provides written notice of intent not to return retains the right to reinstatement. 20 C.F.R. § 1002.152.

Q: Can the employee withdraw funds from his flexible spending account while on military leave?

A. Yes, if the district permits such withdrawals. Under the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act), an employer may allow a service member who is ordered or called to active duty to withdraw funds in a flexible spending account, notwithstanding the normal "use it or lose it" rule. There are two qualifications: (1) the service member must be called up for 180 days or more; and (2) the withdrawal must be made by the last day that reimbursements could otherwise be made under the plan for that plan year. 26 U.S.C. § 125(h). This change applies to distributions made after the enactment of the HEART Act, June 18, 2008.

Q: Which employees are eligible for reemployment upon return from military leave?

A. An employee on military leave is eligible for reemployment if:

- The district received advance notice of the leave;
- The employee has five years or less of cumulative military service during employment with the district;
- The employee timely returns to work or applies for reemployment; and
- The employee was not discharged from service for disqualifying reasons or under other than honorable conditions.

These general eligibility requirements have important qualifications and exceptions, which are overviewed below. If the employee meets the eligibility criteria, she is eligible for reemployment unless the district establishes one of the exceptions discussed below. 20 C.F.R. § 1002.32.

Q: What constitutes <u>advance notice</u> of leave?

A. The requirements for advance notice are minimal. The employee, or an appropriate officer of the uniformed service, must notify the district that the employee intends to leave for military service. 20 C.F.R. § 1002.85(a). The notice may be verbal or written and may be informal—it need not follow any particular format. The USERRA rules state that notice should be provided

"as far in advance as is reasonable under the circumstances." 20 C.F.R. § 1002.85(c)-(d). The Department of Defense (DOD) "strongly recommends that advance notice be provided at least 30 days prior to departure . . . when it is feasible to do so." 32 C.F.R. § 104.6(a)(2)(i)(B).

An employee is excused from giving advance notice if prevented by military necessity or if it is otherwise impossible or unreasonable under the circumstances. Only a designated authority can make a determination of military necessity and that determination is made under DOD guidelines. In general, the DOD guidelines cover situations "where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge." 20 C.F.R. § 1002.86; 32 C.F.R. § 104.3. Notice may be impossible or unreasonable under a variety of circumstances, such as where the district's representative is not available or the employee is required to report for duty in an extremely short period of time. 20 C.F.R. § 1002.86.

An employee is not required to decide in advance whether he will seek reemployment after completing uniformed service. Moreover, any such statement of intention is not binding on the employee: even if the employee tells the district before leaving that he does not intend to seek reemployment, the employee retains the right to reemployment. 20 C.F.R. § 1002.88.

Q: How is the five-year limit on service calculated?

A. An employee can serve in the military for a cumulative period of up to five years and retain reemployment rights. 20 C.F.R. § 1002.99. The five-year limit includes only periods of active service and not permissible absences before and after active service, such as the reporting times addressed below. 20 C.F.R. § 1002.100. In addition, the five-year limit applies only to the employee's employment relationship with a particular district; it does not include periods of service while the employee worked for a previous employer. 20 C.F.R. § 1002.101.

The five-year limit is subject to a number of exceptions, including required service beyond five years, inability to obtain release orders, additional training requirements, and retention on active duty. 20 C.F.R. § 1002.103. In fact, the exceptions are so numerous as to practically swallow the rule. A district should review the exceptions carefully before invoking the five-year limit as grounds for denying reemployment.

Q: How does an employee seek reemployment?

A. An eligible employee must timely notify the district of her intent to return to work by either reporting to work or applying for reemployment, depending on the length of service. If the employee served for 30 days or less, or was absent for any period of time for a fitness for duty examination, the employee is not required to apply for reemployment. The employee is simply required to report back to work on the next regularly scheduled work day after

completion of service. As with other provisions of USERRA, this deadline is flexible. The "next regularly scheduled work day" begins no earlier than eight hours after the employee returns home. 20 C.F.R. § 1002.115(a).

If the employee served for more than 31 days, the employee must submit an application for reemployment. If the employee was absent for 31 to 180 days, the employee must submit the application within 14 days of completing service. 20 C.F.R. § 1002.115(b). If the employee served for 181 days or more, the employee must submit an application for reemployment within 90 days after completing service. 20 C.F.R. § 1002.115(c). These deadlines can be extended if it is impossible or unreasonable for the employee to report or apply within the specified time period through no fault of his own. 20 C.F.R. §§ 1002.116-.117.

The deadlines can also be extended if the employee is hospitalized for or convalescing from an illness or injury incurred in, or aggravated during, the performance of service. The deadline is extended until the end of the period necessary to recover from the illness or injury, up to two years. Even at the end of two years, the deadline is extended by the minimum time necessary to accommodate circumstances beyond the employee's control. 20 C.F.R. § 1002.116. This means that an employee who sustains an illness or injury during service may retain reemployment rights for more than seven years (five years of cumulative service plus up to two years' recovery time, plus any additional time necessary to accommodate the employee's circumstances, plus any time the employee needed to prepare for uniformed service).

An eligible employee does not automatically forfeit reemployment rights, even if she fails to report or apply by the deadlines above. Rather, the employee is subject to the district's general policies and practices regarding leaves and absences. 20 C.F.R. § 1002.117. Moreover, an employee does not forfeit reemployment rights by applying for or accepting employment with another employer, so long as the other employment is not inconsistent with district employment. 20 C.F.R. § 1002.120.

Q: What are the requirements for the reemployment application?

A. The application for reemployment does not have to be in any particular form. It can be written or verbal, formal or informal. It must merely indicate that the person is a former employee returning from military service and seeking reemployment. The employee is not required to identify a particular reemployment position. 20 C.F.R. § 1002.118. The employee can submit the application to any agent or representative of the district with apparent responsibility for receiving applications. Depending on the circumstances, this could be the personnel manager or a first-line supervisor, such as a principal or department manager. 20 C.F.R. § 1002.119.

A district may request certain documentation if the period of service was more than 30 days. Upon request, the employee must provide documentation that:

- The reemployment application is timely;
- The employee has not exceeded the five-year limit on cumulative service;
- The employee's separation or dismissal from service was not for a disqualifying reason.

The types of documents that will suffice vary from case to case. The USERRA rules set forth a detailed list of military documents that satisfy some of these requirements.

A district may not delay reinstatement due to administrative delays in the issuance of military documentation. If, however, documentation received after reemployment shows that the employee was not eligible, the district has grounds to terminate the employment. 20 C.F.R. §§ 1002.121-.123.

Q: What types of separation or discharge will render an employee ineligible for reemployment?

A. Even if an employee is otherwise eligible for reemployment, he will be disqualified if his separation or discharge falls under one of four categories:

- Dishonorable or bad conduct discharge;
- Separation under other than honorable conditions, as characterized by regulations of the uniformed service;
- Dismissal of a commissioned officer by a general court-martial or by order of the President; or
- A commissioned officer dropped from the rolls due to absence without authority for at least three months; separation due to a sentence of confinement adjudged by a court-martial; or a sentence of confinement in a federal or state correctional facility.

20 C.F.R. § 1002.135.

The branch of service in which the employee performs the tour of duty determines the characterization of service. 20 C.F.R. § 1002.136. Reemployment rights can be restored if a military review board prospectively or retroactively upgrades a disqualifying discharge or release, provided the employee otherwise meets the eligibility criteria. 20 C.F.R. § 1002.137.

Q: What are the exceptions or defenses to reemployment?

A. Even if an employee is eligible for reemployment, a district is not required to reemploy her if the district establishes that:

- Its circumstances have so changed as to make reemployment impossible or unreasonable;
- Assisting the employee in becoming qualified for reemployment would impose an *undue hardship* (see below) on the district; or
- The employee's former position was for a brief, noncurrent period and there was no reasonable expectation that employment would continue indefinitely or for a significant period.

For example, a district may be excused from reemploying an employee where the district had a reduction in force that would have included the employee. A district may not, however, refuse to reemploy an employee because the district hired another person to fill the reemployment position during the employee's absence, even if the district would have to terminate the replacement. 20 C.F.R. § 1002.139.

Q: What constitutes an undue hardship?

A. An undue hardship is an action that requires significant difficulty or expense, when considered in light of:

- the nature and cost of the action;
- the overall financial resources of a facility or facilities, the number of persons employed at the facility, and the effect on expenses and resources, or the impact otherwise, on the facility;
- the overall financial resources of a district, the overall size of the district with respect to the number of employees, and the number, types, and locations of a district's facilities; and
- the type of operation or operations of the district, including the composition, structure, and functions of the work force and the geographic separateness, administrative, or financial relationship of the district facilities.

20 C.F.R. § 1002.5(n).

Q: What are the terms and conditions of reinstatement?

A. A district must promptly reemploy a returning employee in the position and at the rate of pay the employee would have attained if he had not taken military leave. The district must also credit the employee with:

- The seniority rights and benefits the employee had when leave began, plus any that the employee would have accrued if he had not taken military leave;
- Protection against discharge for a specified period of time; and
- Funding of pension benefits for the period of service.

20 C.F.R. §§ 1002.180-.267.

Prompt reemployment means as soon as possible under the circumstances of each case. For brief periods of service, where the employee is not required to apply for reemployment, prompt reemployment generally means the next regularly scheduled work day. For longer periods of service, reemployment must occur within two weeks of the application for reemployment unless there are unusual circumstances. 20 C.F.R. § 1002.181. Unlike with the Family and Medical Leave Act (FMLA), a district may not adjust the time period for reinstatement at or near the end of the school term.

The reasonableness of any delay depends on a variety of factors including, for example, the length of the employee's absence or intervening changes in the circumstances of the district. However, DOL's view is that exceptions to the two-week requirement should be "narrowly drawn" and will be "relatively rare." A district may not delay or deny reemployment because the district filled the service member's position and no comparable position is vacant, or because a hiring freeze is in effect. Moreover, a district is required to promptly reemploy a service member even in cases in which re-training or re-certification is mandated by law. In such cases, the obligation to reemploy may be met by reemployment to a comparable position while re-training or re-certification is sought. Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 70 Fed. Reg. 75270 (Dec. 19, 2005).

Q: How does a district determine the reemployment position?

A. One of the bedrock concepts of USERRA is the requirement that an employer reemploy a service member in the position the service member would have attained with reasonable certainty if not for the absence due to uniformed service. This is known as the *escalator principle*. 38 U.S.C. § 4313; *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946); 20 C.F.R. § 1002.191. The starting point for determining the proper reemployment position is the escalator position, which is the position the employee would have attained if

her continuous employment had not been interrupted due to uniformed service. Once the escalator position is determined, the district may consider several factors, such as the employee's length of military service, qualifications, and any disability, before determining the particular employee's reemployment position. 20 C.F.R. §§ 1002.192, .195.

If the period of service was 90 days or less, a district must reemploy the employ according to the following priority:

- The escalator position;
- If the employee cannot be qualified for the escalator position, then in the pre-service position (the position the employee held when service began);
- If the employee cannot be qualified for the escalator position or the pre-service position, then in any other position that is the nearest approximation first to the escalator position and then to the pre-service position.

In each case, the employee must be qualified for the reemployment position. The district must make reasonable efforts to help the employee become qualified for a position before considering the next priority level. 20 C.F.R. § 1002.196.

If the period of service was more than 90 days, a district must reemploy the employ according to the following priority:

- The escalator position, or a position of like seniority, status, and pay;
- If the employee cannot be qualified for the escalator or like position, then in the pre-service position or a position of like seniority, status, and pay;
- If the employee cannot be qualified for the escalator position, the pre-service position, or like positions, then in any other position that is the nearest approximation first to the escalator position and then to the pre-service position.

Again, the employee must be qualified for the reemployment position and the district must make reasonable efforts to help the employee become qualified. 20 C.F.R. § 1002.197.

A district is not required to reemploy a service member if he cannot be qualified after reasonable efforts by the district. *Qualified* means the employee has the ability to perform the essential tasks of the position. The reasonable efforts by the district must be at no cost to the employee. 20 C.F.R. § 1002.198.

The escalator principle can result in adverse consequences. USERRA does not prohibit lawful adverse job consequences that result from reemployment to the applicable position. Thus, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. 20 C.F.R. § 1002.194.

Q: What are a district's reemployment obligations regarding disabled employees?

A. USERRA requires a district to reemploy a returning service member who has a disability that was incurred in or aggravated during service. 38 U.S.C. § 4313(a)(3). This obligation is separate from, and in addition to, the employment protections of the Americans with Disabilities Act (ADA) and the Texas Commission on Human Rights Act. Neither USERRA nor its regulations defines *disability*, but both require that the service member be *qualified*. Qualified is defined as having the ability to perform the *essential tasks* of the position. 38 U.S.C. § 4303(9); 20 C.F.R. 1002.198(a)(1). In this regard, the DOL specifically declined to adopt the terminology—such as *essential functions*—and regulatory scheme of the ADA. Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 70 Fed. Reg. 75277 (Dec. 19, 2005).

The DOL commentary to the USERRA rules identifies four significant differences between USERRA's disability protections and those of the ADA. First, USERRA applies to temporary conditions, whereas the ADA does not. 29 C.F.R. § 1630.2(j). A service member with a temporary disability may be entitled to interim reemployment in an alternate position or to reinstatement under sick leave or light duty status until recovery. Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 70 Fed. Reg. 75277 (Dec. 19, 2005).

Second, USERRA's protections extend only to those disabilities incurred in or aggravated by uniformed service. The protections are not limited to disabilities incurred during training or combat, so long as they are incurred during the period of service. Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 70 Fed. Reg. 75277 (Dec. 19, 2005).

Third, the regulations place the burden squarely on the employer to identify suitable positions and reasonable accommodations. The DOL specifically declined to place any of this responsibility on the employee, although it noted that "it is customary to assume" that the employee will cooperate with the employer's efforts. The service member is required, however, to provide a district with information regarding her education and experience, the extent of disability, and her present capabilities. The district is then "exclusively responsible" for identifying suitable positions within the service member's capabilities. Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 70 Fed. Reg. 75277 (Dec. 19, 2005).

Fourth, the priority levels for reemployment of a service member with a disability are slightly different from those for a service member without a disability. For one thing, the priority levels for a disabled service member are not determined by length of service. In

addition, the third priority level specifies that the "nearest approximation" to the escalator position may be a position that is higher or lower in grade than the escalator position, depending on the circumstances. 20 C.F.R. § 1002.225(b).

Q: What actions should a district take with respect to a replacement employee?

A. The regulations recognize that an employer may have had to hire an employee to replace a service member or that another employee may be employed in the reemployment position. The fact that the reemployment position is already held by another employee is not a defense to reemployment, even if the district must terminate the replacement employee. 20 C.F.R. § 1002.139(a). If the replacement employee holds an employment contract, the district must follow due process procedures for mid-contract termination.

Q: How does a district determine the escalator position for a teacher who held a probationary contract pre-service?

A. In most cases, the district may return the teacher to probationary status, but must give the teacher credit for the time spent in uniformed service when the time comes to issue a term contract. If a probationary period is a bona fide period of observation and evaluation, a district may require an educator to complete the period of probation upon reemployment. The key is whether the probationary period required actual training and/or observation, rather than merely time served in the position. Once the educator completes the probationary period, the educator's pay and seniority should reflect both the pre-and post-service time in the probationary period, plus the time served in the military. Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 70 Fed. Reg. 75272 (Dec. 19, 2005).

If, for example, a district requires all teachers who are new to the profession to serve a two-year probationary period so that they can be observed and evaluated for term contract status, the district may require a teacher who takes military leave after one year to be employed for a second year under a probationary contract when she returns. If the teacher is offered a term contract at the end of her second probationary contract, and the teacher took two years of military leave, the teacher should be treated as if she had two years of probationary-contract service and two-years of term-contract service.

Q: What about discretionary promotions, such as from classroom teacher to administrator?

A. A returning service member is entitled to a promotion upon reemployment if there is a reasonable certainty that the employee would have been promoted absent military service (i.e., if the promotion depends on seniority or some other form of automatic progression). A service member would not be entitled to a promotion that depends on an exercise of

discretion on the part of the employer. Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 70 Fed. Reg. 75271 (Dec. 19, 2005). Thus, a classroom teacher who asserts a right to reemployment as an administrator must demonstrate with reasonable certainty that she would have received that promotion.

Q: How does a district determine the seniority, status, and rate of pay of the reemployment position?

A. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in the position, given his job history, if the employee had been continuously employed. 20 C.F.R. § 1002.193. The employee is also entitled to any seniority-based rights and benefits that he had on the date his uniformed service began, plus any seniority-based rights and benefits the employee would have attained if he had remained continuously employed. The period of military service is not considered a break in employment for these purposes. 20 C.F.R. § 1002.210.

The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the employee's military service and any changes that may have occurred during the service. The employee's status could include opportunities for advancement, general working conditions, rank, responsibility, and geographical location (such as campus assignment). If the reemployment position is a promotion and eligibility for the promotion is based on a skills test or examination, a district should give the employee a reasonable amount of time to adjust to the reemployment position before administering the skills test or examination. 20 C.F.R. § 1002.193.

Q: What is a seniority-based right or benefit?

A. A seniority-based right or benefit is one that accrues with, or is determined by, longevity of employment. Generally, whether a right or benefit is seniority-based depends on three factors:

- Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
- Whether it is reasonably certain that the employee would have received the right or benefit if he had remained continuously employed during the period of service; and
- Whether it is the district's actual custom or practice to provide or withhold the right or benefit as a reward for length of service.

20 C.F.R. § 1002.212.

Leave under the FMLA is an example of a seniority-based right. Under the FMLA, an employee must have been employed for at least 12 months, with at least 1,250 hours of service, to be eligible for leave. 29 U.S.C. § 2611(2)(A). A returning service member is

deemed to be eligible for FMLA leave if the number of months and the number of hours the service member was employed, plus the number of months and the number of hours the service member would have been employed but for uniformed service, meet these requirements. 20 C.F.R. § 1002.210.

Q: How does a district determine the rate of pay upon reemployment?

A. The employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position. The district must compensate the employee at the rate of pay associated with the reemployment position, taking into account any pay increases, differentials, step increases, or merit increases the employee would have attained with reasonable certainty if she had remained continuously employed. Any pay adjustment must be made effective as of the date it would have occurred if the employee's employment had not been interrupted by uniformed service. 20 C.F.R. § 1002.236.

In Texas, a district must compensate a classroom teacher according to the state salary schedule, which is a lock-step system tied to years of experience. Tex. Educ. Code § 21.402. Applying USERRA principles, a district must place a reemployed teacher on the state salary schedule at the level she would have attained if there had been no break in service. The employee would also be eligible for any local supplements associated with that step on the salary schedule.

Q: What job protection is extended to employees returning from military leave?

A. USERRA provides protection against discharge to employees who are reemployed after military leave. The duration of protection depends on the duration of service. If an employee served for 31 to 180 days, a district may not discharge the employee, except for cause, for 180 days after the employee's date of reemployment. If an employee served for more than 180 days, a district may not discharge the employee, except for cause, for one year after the employee's date of reemployment. 20 C.F.R. § 1002.247. *Cause*, in this context, can be based on conduct or on job elimination. 20 C.F.R. § 1002.248.

Q: What assistance is available to districts regarding USERRA?

A. One of the stated purposes of USERRA is "to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities . . . ." 38 U.S.C. § 4301(a)(2). To this end, Congress provided resources for employers, as well as service members, regarding USERRA. An employee is not required to accommodate a district's requests regarding the timing,

frequency, or duration of military service. However, the district can bring its concerns to the attention of the appropriate military authority. DOD regulations direct military authorities to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment. 20 C.F.R. § 1002.104; 32 C.F.R. § 104.4.

In addition, VETS provides assistance to any person or entity regarding employment and reemployment rights and benefits under USERRA. VETS will also endeavor to resolve a complaint of USERRA violations by making reasonable efforts to ensure that persons or entities named in the complaint comply with the Act. 20 C.F.R. §§ 1002.277, .290.

Q: What are the penalties for a USERRA violation?

A. The United States Attorney General or the aggrieved service member can bring a lawsuit to enforce USERRA. 20 C.F.R. § 1002.308. There is no statute of limitations under USERRA, although one court has held that the four-year general statute of limitations applies. *Rogers v. City of San Antonio,* No. Civ.A. SA-99-CA-1110, 2003 WL 1566502 (W.D. Tex., Mar. 4, 2003), *aff'd*, 392 F.3d 758 (5th Cir. 2004). *See also* 20 C.F.R. § 1002.311.

If the employee demonstrates a violation, the court may award lost wages and benefits. If the court determines that the violation was willful, the court may award liquidated damages equal to the amount of lost wages and benefits. A violation is considered *willful* if the employer either knew or showed reckless disregard for whether its conduct violated USERRA. 20 C.F.R. § 1002.312. A court may also issue temporary or permanent injunctions, temporary restraining orders, and contempt orders to vindicate the rights or benefits guaranteed by USERRA. 20 C.F.R. § 1002.314.

Q: Are school board members protected by USERRA?

A. USERRA governs only employment relationships, so the Act would not apply to a board member's status. However, the Texas constitution provides that a board member who is called to duty, drafted, or activated into the Armed Forces of the United States does not vacate his office. *Armed Forces of the United States*, for these purposes, include the Army, Navy, Air Force, Marines, Coast Guard, National Guard, and reserves.

If the board member will be on active duty for more than 30 days, the board may appoint a temporary replacement. The temporary board member has all the powers, privileges, and duties of office of the regular board member. The temporary board member serves until the end of the regular board member's active service or term of office, whichever occurs first. Tex. Const. Art. XVI, Sec. 72.

A district with specific application concerns should consult its local counsel. The district can also call TASB Legal Services at 800-580-5345 for assistance.

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Personnel/documents/userra_nov14.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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