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Protecting

Uniformed Service Members Return to Work

Since 2001, many military reservists have volunteered for or have been called to duty. In doing so, those service members left their civilian employment to do what they swore to do: protect the freedoms and liberty that each of us enjoy. However, many have returned to find they no longer have their civilian employment or that the terms and conditions of their employment have changed. This is why the Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted: to provide protection to service members in the retention of their civilian jobs.

Because your clients—or even you—may employ service members, it is useful to understand this law.

USERRA was enacted in 1994, replacing the Veteran's Reemployment Rights Law. The purpose of USERRA is threefold:

1. to encourage noncareer service in the National Guard and Reserve.[1]
2. to minimize disruption to service members and employers.
3. to prohibit discrimination because of military status.[2]

All uniformed service members are covered under the act in both peacetime and wartime.[3] It does not matter if a service member's call to federal service is voluntary or involuntary, whether it is for inactive duty training or initial duty, or if they are full-time National Guard.[4]

Conditions of Protection

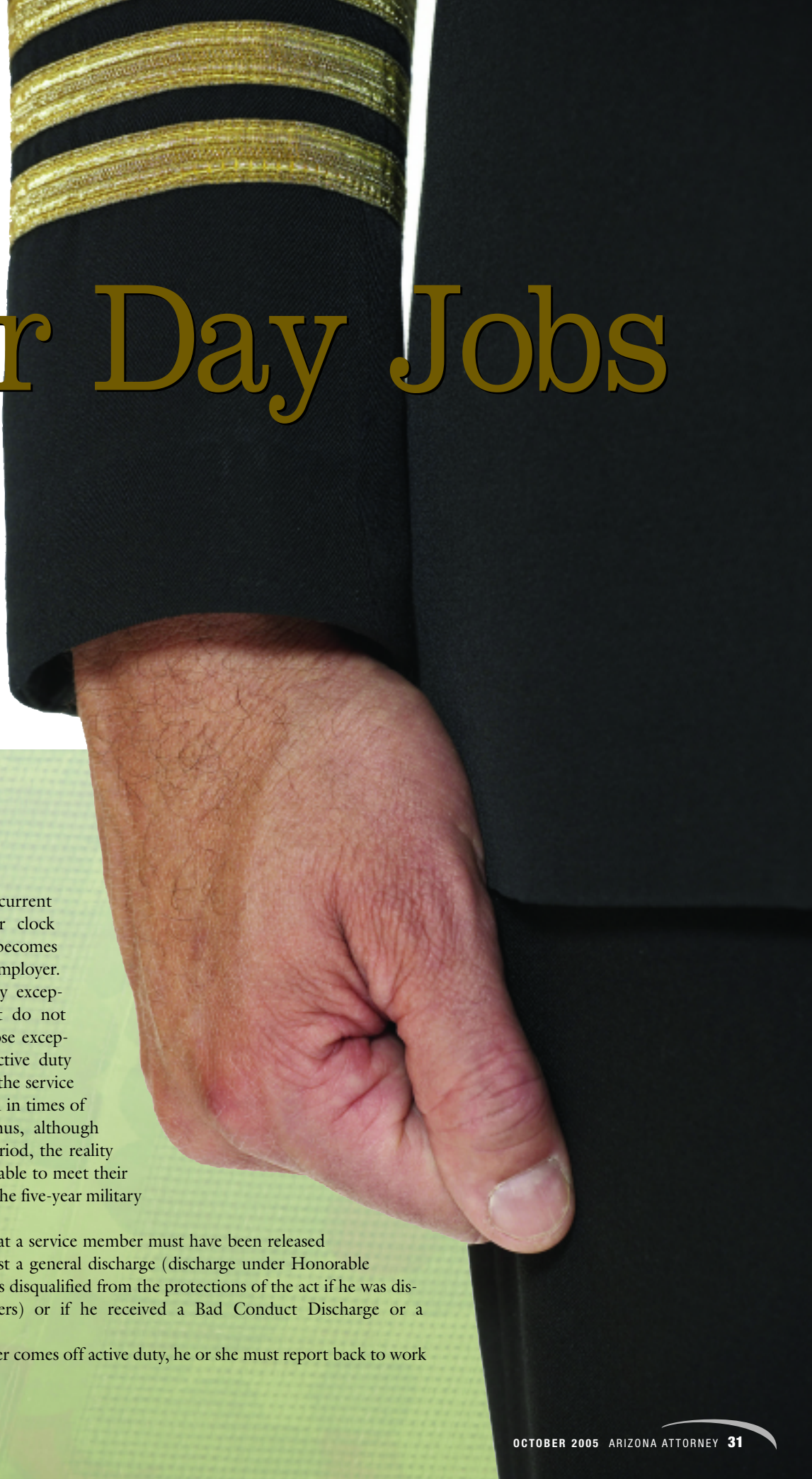
For a service member to have the protections of USERRA, he must meet five conditions.

The first of these requirements is that he must have civilian employment. This requirement is extremely broad: Regardless of the number of people employed by an employer, the USERRA applies to federal executive agencies, state and local governments, and private employers.[5]

The second requirement is that the service member must give his employer notice prior to military service. Although written notice is preferred, oral notice is sufficient. However, if it would be unreasonable or impossible for a service member to give notice, then the notice requirement does not have to be met.[6]

The third requirement is that the service member's cumulative length of service that causes his absence from employment cannot have exceeded five years. However, the five years allotted applies

Their Day Jobs



only to a service member's current employer, and a new five-year clock begins when a service member becomes reemployed with a new civilian employer.

USERRA also contains many exceptions to the five-year rule that do not count against an employee. Those exceptions include annual tours, inactive duty training, involuntary call, and if the service member was ordered or retained in times of war or national emergency. Thus, although there is a five-year maximum period, the reality is most service members will be able to meet their requirement of having less than the five-year military service period.[7]

The fourth requirement is that a service member must have been released from military service with at least a general discharge (discharge under Honorable Conditions). A service member is disqualified from the protections of the act if he was dismissed from the service (officers) or if he received a Bad Conduct Discharge or a Dishonorable Discharge.[8]

Finally, when a service member comes off active duty, he or she must report back to work

within a certain amount of time.[9] This is perhaps the most important requirement a service member must fulfill.

- If a service member's service period is 30 days or fewer, that service member must report back to work at the beginning of the first regularly scheduled work period after the member's safe return home plus an additional eight hours.[10]
- If the service period is from 31 to 180 days, the service member must submit an application for reemployment within 14 days and be prepared to provide documentation demonstrating military service.[11]
- If the service period is 181 or more days, then the service member must submit an application within 90 days and be prepared to provide documentation demonstrating military service.

Finally, service members who are recovering from disabilities must follow these requirements upon their recovery. However, service members recovering from service-connected injuries are given a two-year extension to submit an application.[12]

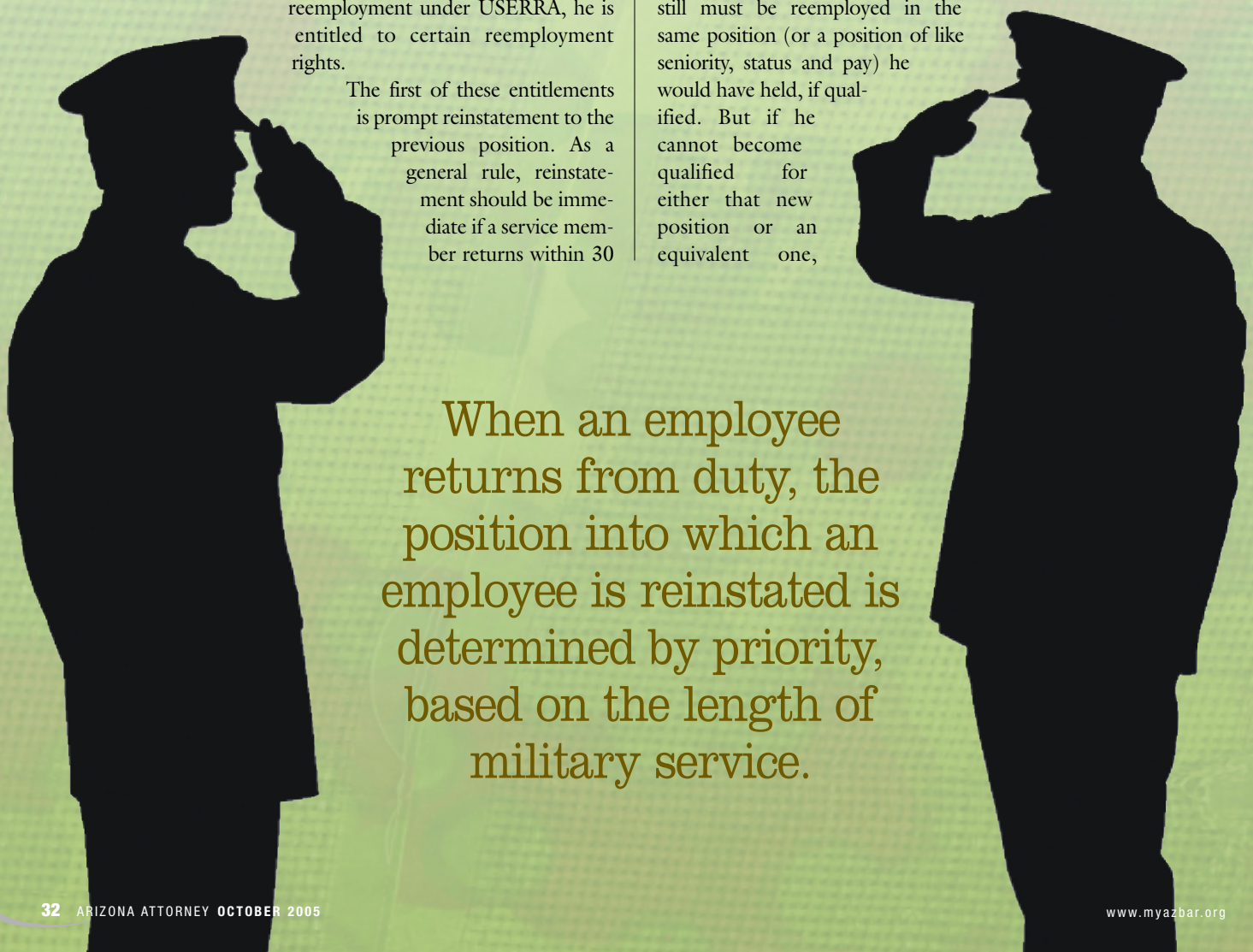
Employment Rights

Once a service member qualifies for reemployment under USERRA, he is entitled to certain reemployment rights.

The first of these entitlements is prompt reinstatement to the previous position. As a general rule, reinstatement should be immediate if a service member returns within 30 days of his service or within days (not weeks) if his service was more than 30 days. For purposes of status and accrued seniority,[13] service members are treated as if they never left for military service; this is known as the "escalator principle."[14]

When an employee returns from duty, the position into which an employee is reinstated is determined by priority, based on the length of military service. For example, if you were the Law Office Manager of a firm, reinstating you as "Assistant Law Office Manager" is not satisfactory, even if the pay is the same, because that is not equivalent status. However, the position to which a person is reinstated is based on how long the service member was away from his employment. If the employee's service was less than 90 days, the service member must be reemployed in the position he would have held had he remained continuously employed (*i.e.,* an upgrade of a position or a promotion), so long as the employee is qualified for the job or can become qualified after reasonable efforts[15] by the employer. However, if the employee cannot become qualified in the position the employee was employed on the date of the commencement of the military service, then he may return to the position he held when his service began.[16]

If the service member's service was 91 or more days, the service member still must be reemployed in the same position (or a position of like seniority, status and pay) he would have held, if qualified. But if he cannot become qualified for either that new position or an equivalent one,



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despite reasonable efforts made by the employer, then he should be placed in the position in which he was employed on the date of the commencement of the military service, or in a position of like seniority, status and pay.[17] It is important to emphasize that employers must be prepared to provide training on new equipment or techniques, provide refresher courses, and be prepared to accommodate any disabilities a service member may have obtained.

Although an employer is required to take reasonable efforts to reemploy a service member, USERRA does not require an employer to do so if it causes undue hardship,[18] is "impossible or unreasonable," or concerns a nonrecurrent or brief employment position.[19]

An example of an impossible situation is where there has been a reduction in force that would include the service member. Nonrecurrent employment is employment in which there would be no reasonable expectation that such employment would continue indefinitely or for a significant period of time.[20]

Regardless of the situation, the burden of proof always remains with the employer to prove why it cannot rehire the service member.[21] This is important because once a service member becomes reemployed, he cannot be released from civilian employment for one year if military service was for 181 days or more, and for 180 days if military service was for 31 to 180 days.[22] However, if the employer has just cause, the employer may discharge an employee.

Benefits

Under USERRA, "A person who is a member of [the military] shall not be denied any benefit of employment by an employer on the basis of that membership, performance of service, or obligation."[23] To show a violation of § 4311(a), service members must establish that they were denied a "benefit of employment." USERRA defines "benefit of employment" as "any advantage, profit, privilege, gain, status, account, or interest … that accrues by reason of an employment contract or agreement."[24]

If other benefits are offered to other employees, not based on seniority, employers must make them available to the employee on military service.[25] An example of this would be pension plans.[26] Employers must maintain and pay employer and employee contributions to members' pension plans. However, service members will likely have to pay back employee contributions made by employers while serving, but service members have a period of time equal to three times their military service period (five-year maximum) to pay back the contributions.[27]

Also, if coworkers received promotions or raises while they were gone, so does the service member. As for vacation and annual leave, the service member retains what he had prior to duty, but it does not continue to accrue.[28] Service members cannot be forced to use vacation or annual leave during military service.[29]

Once a service member is activated, he may receive TriCare Health coverage.[30] However, the member has the option to retain any civilian health care plan. If this is the case, the member may retain the civilian plan for up to 18 months while performing military service. Service members must also inform their employer of this desire. If the service member elects to retain civilian coverage, for the first 30 days, the service member pays the current premium; after 30 days, service members may be required to pay two percent more than the full premium.[31] Once a service member returns from service, employers must reinstate the member's health care coverage.[32]

Finally, USERRA prohibits discrimination based on past, present or future military obligations (such as hiring, retention, promotion, termination and benefits). The protections also cover adverse employment actions against a service member whether or not they assert their rights or take enforcement action under USERRA. An employee making a USERRA claim of discrimination bears the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor" in the adverse employment action; however, if this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that they would have taken the adverse action anyway, for a valid reason.[33]

Enforcement

If an employer fails to provide a service member with reinstatement or any of the benefits of USERRA, and the service member is a state employee or worked for a private employer, the service member may file a complaint in writing to the Department of Labor (DOL). If the DOL does not resolve the complaint, the service member may request that the DOL refer the complaint to the Department of Justice (DOJ). The DOJ may commence action on behalf of the service member if "reasonably satisfied" that the member is entitled to relief. The service member may also submit a complaint directly to a court of proper jurisdiction.[34]

If the court finds that the employer failed to abide by the provisions of USERRA, the court may require the employer to comply, pay compensation for lost wages or benefits, and award the service member reasonable attorneys' fees, expert witness fees, and court costs. If the court finds there was a willful violation, the court may award double damages against a non-federal employer.[35] A federal court may use full equitable powers of temporary restraining order, injunctions, and contempt orders to get employers to comply with USERRA. Finally, there are no statutes of limitations in asserting a USERRA action.

The rules for federal employees are different. Employees may file a complaint with the DOL. If the DOL cannot resolve the complaint, it must refer the complaint to the Office of Special Counsel upon the member's request. The office may commence an action and appear before the Merit Systems Protection Board (MSPB) on behalf of the member if "reasonably satisfied" the member is entitled to relief; employees also may file a complaint directly to the MSPB.[36] If an employee is adversely affected or aggrieved by the final MSPB order, he or she may petition the

U.S. Court of Appeals. In the event that an employee wins his or her case, they are not entitled to double damages or filing deadlines; however, employees may retain private counsel and request fees.[37]

Conclusion

When reservists are serving on the battlefield, returning to their jobs is probably one of the last things on their minds. Yet when they return, it is one of the most important things. USERRA is sweeping legislation designed to expand and clarify the protections afforded to military members when they leave their civilian employment. In a state such as Arizona, which has so many residents being called to active duty either in the reserves or the National Guard, every practicing attorney should have a basic understanding of these broad rights.

endnotes

1. *See Woodman v. Office of Personnel Mgmt.*, 258 F.3d 1372 (Fed. Cir. 2001), in which the court denied petitioner's rights to reemployment because his actions created a *de facto* resignation from the civilian work force and showed an intent to never return to his civilian position by voluntarily accepting appointments of active duty.
2. 38 U.S.C. § 4301.
3. *Id.* § 4303(16).
4. *Id.* § 4303(13).
5. *Id.* § 4304(4).
6. *Id.* § 4312(a)(1) & (b). *See* Department of Defense Instruction 1205.12, E1.1.4, for determining when providing advance notice of uniformed service to an employer is impossible or unreasonable. Intentionally withholding notice to an employer may be viewed unfavorably, especially if the lateness of the notice causes serious problems for an employer. *See also Burkart v. Post-Browning. Inc.*, 859 F.2d 1245 (6th Cir. 1988) (upholding firing of National Guard member who withheld notice until the last moment).
7. 38 U.S.C. § 4312(c).
8. *Id.* § 4304.
9. *McGuire v. United Parcel Service, Inc.*, 1997 WL 543059 (N.D. Ill. 1997).
10. 38 U.S.C. § 4312(e)(1)(A).
11. Employers cannot require this documentation prior to a service member's duty assignment. Documentation should include timely application for reemployment, cumulative service has not exceeded five years, and separation under honorable conditions.
12. *Id.* § 4312(f)(1)(A) to (C).
13. *Id.* § 4312(e)(2)(A).
14. "Accrued Seniority" is seniority on the date reporting to military service plus seniority the member would have attained if continuously employed. § 4303(12). Regardless if an employer has a system of seniority, an employee is entitled to the status he or she would have attained if continuously employed. *See Ryan v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 15 F.3d 697, 699 (7th Cir. 1994).
15. The "escalator principle" requires that a service member receive any change in position or benefits to which he would have been entitled had he remained continuously employed. A service member must receive all other "benefits of seniority" the member was reasonably certain to have achieved including pay raises, promotions, increases in vacation and sick-day accrual rates.
16. 38 U.S.C. § 4303(10). "Reasonable efforts" means actions (including training) that do not cause undue hardship to the employer. If a person can't become qualified in the positions described after reasonable efforts by the employer, and if not disabled, the person must be employed in any other position of lesser status and pay that he or she is qualified to perform, with full seniority.
17. *Id.* § 4313(a)(1).
18. *Id.* § 4313(a)(2)(A) & (B). Much of the same is true for employees who become disabled during their service. If a service member becomes disabled during military service and fails to qualify for the escalator position, the employer must make reasonable efforts to accommodate the disability. If the member is not qualified even after reasonable accommodation by the employer, the employer is to reemploy the person in some other position he or she is qualified to perform and which is the "nearest approximation" of the position to which the person is otherwise entitled, in terms of status and pay, with full seniority.
19. *Id.* § 4303(15).
20. *Id.* § 4312(d). There are some disabilities that cannot be accommodated by reasonable employer efforts. For example, blinded veterans cannot be commercial drivers. If upon your return from service in the uniformed services you are suffering from a disability that cannot be accommodated, thus disqualifying you from returning to your preservice job, the employer is required to reemploy you in some other position that is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status and pay, consistent with the circumstances of your case. *Id.* § 4313(a)(3)(B). *See also Blake v. City of Columbus,* 605 F. Supp. 567 (S.D. Ohio 1984).
21. 38 U.S.C. § 4312(d)(1)(A)(C).
22. *Id.* § 4312(d)(2)(A) to (C).
23. *Id.* § 4316(c).
24. *Id.* § 4311(a).
25. *Id.* § 4303(2); *Schmauch v. Honda of Am. Mfg., Inc.*, 295 F. Supp. 2d 823 (S.D. Ohio 2003).
26. *Wriggelsworth v. Brumbaugh,* 129 F. Supp. 2d 1106, 1110 (W.D. Mich. 2001).
27. For more guidance, *see* <www.irs.gov/retirement/article/0,,id=109878,00.html>.
28. 38 U.S.C. § 4318(a)(2)(A).
29. *Id.* § 4316(d).
30. *Graham v. Hall-McMillen Co., Inc.*, 925 F. Supp. 437 (N.D. Miss. 1996).
31. A service member will receive TriCare only if he is on active duty tours for 31 or more days.
32. 38 U.S.C. § 4317(a)(2).
33. *Id.* § 4317(b)(1).
34. *Id.* § 4311; *Sheehan v. Dep't of the Navy,* 240 F.3d 1009 (Fed. Cir. 2001). Discriminatory motivation may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, and an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity. *Id.* at 1014.
35. 38 U.S.C. § 4323(a) & (b)(1).
36. *Id.* § 4323(d); *Spratt v. Guardian Auto. Prods., Inc.*, WL 125939 (N.D. Ind. Mar. 17, 1998) (court held that because there could be liquidated damages, a jury trial would be appropriate).
37. *Yates v. Merit Sys. Prot. Bd.*, 145 F.3d 1480 (Fed. Cir. 1998).
38. 38 U.S.C. § 4324; *Duncan v. U.S. Postal Service,* 73 M.S.P.R. 86 (1997); *Jasper v. U.S. Postal Service,* 73 M.S.P.R. 367 (1997); *Wright v. Dep't of Veterans Affairs,* 73 M.S.P.R. 453 (1997).