OOC BROWN BAG LUNCH SERIES
VETERANS' RIGHTS AND PROTECTIONS
SEPTEMBER 21, 2016

I. Introduction

Section 206 of the Congressional Accountability Act of 1995 ("CAA") incorporates rights and protections relating to veterans' employment and reemployment. 2 U.S.C. § 1316. These rights are derived from the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Additionally, section 4(c) of the CAA applies certain provisions of the Veterans Employment Opportunities Act of 1998 ("VEOA") to legislative branch employees and employing offices. 2 U.S.C. § 1316a.

The primary goal of the VEOA is to provide hiring preferences to veterans seeking federal employment. USERRA provides reemployment rights to service members who leave their jobs for military service and to protect covered individuals from discrimination and retaliation based on their military service.

This outline provides an overview of salient features of USERRA and the VEOA as applied to the legislative branch through the CAA and related noteworthy case law. The outline also discusses the military-specific provisions of the Family and Medical Leave Act ("FMLA") and the Servicemembers Civil Relief Act ("SCRA") provisions applicable to Office of Compliance ("OOC") proceedings.

II. Veterans Employment Opportunities Act of 1998 in the Legislative Branch

The CAA applies several VEOA rights and protections to the legislative branch. 2. U.S.C. § 1316a. Specifically, the VEOA rights in sections 2108, 3309 through 3312, and 3501 through 3504 of title 5 of the United States Code apply to certain covered employees within the legislative branch.

The VEOA was enacted to provide that consideration may not be denied to "preference eligibles" applying for certain positions in the competitive service. The VEOA grants certain preferences to veterans who seek federal employment; in addition, the legislative history of the VEOA makes clear that there was a need for a uniform redress provision through which veterans could seek adjudication of alleged violations of veterans' preferences. Thus, the VEOA provides

preference-eligible veterans with a method for seeking redress where their veterans' preference rights have been violated in hiring decisions made by the federal government.

The Office of Compliance Board of Directors ("Board"), in accordance with the rulemaking procedure set forth in section 304 of the CAA (2 U.S.C. § 1384), promulgated VEOA regulations specific to legislative branch employing office and employees in an effort to accommodate the distinct human resource systems existing in the legislative branch. The Board has acknowledged the fact that it does not possess the statutory and Executive Order based government-wide policy making authority as the Executive branch. Indeed, OPM's regulations are designed for the competitive service (defined in 5 U.S.C. § 2102(a)(2)), which does not exist in the employing offices subject to the Board's regulations. Therefore, following the OPM regulations would create detailed and complex rules and procedures for a workforce category that does not exist in the Legislative branch, while providing no VEOA procedures for the covered legislative branch employees. The Board therefore chose to propose specially tailored regulations, rather than simply to adopt those promulgated by OPM, so that the Board would effectuate Congress's intent in extending the principles of the veterans' preference laws to the legislative branch through the VEOA. A detailed description of the Board's regulations follows.

A. Key Definitions

Preference eligible – certain veterans; disabled veterans; the unmarried widow or widower of a veteran; the wife or husband of a service-connected disabled veteran, if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia; the mother of an individual who lost his life under honorable conditions while serving in the armed forces during a specified period, if her husband is totally and permanently disabled, she is widowed, divorced, or separated from the father and has not remarried, or she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed; the mother of a service-connected permanently and totally disabled veteran, if her husband is totally and permanently disabled, she is widowed, divorced, or separated from the father and has not remarried, or she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed; and a veteran who was discharged or released from a period of active duty by reason of a sole survivorship discharge. The term "preference eligible" does not generally include a retired member of the armed forces unless the individual is a disabled veteran or the individual retired below the rank of major or its equivalent. (OOC Reg. § 1.102(p); 5 U.S.C. § 2108(3)(A)-(G))

Qualified applicant – an applicant for a covered position whom an employing office deems to satisfy the requisite minimum job-related requirements of the position. Where the employing office uses an entrance examination or evaluation for a covered position that is numerically scored, the term "qualified applicant" shall mean that the applicant has received a passing score on the examination or evaluation. (OOC Reg. § 1.102(q).

Veteran – an individual who:

(a) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955;
(b) served on active duty at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred after January 31, 1955, and before October 15, 1976, not including service pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve;
(c) served on active duty as defined by section 101(21) of title 38 in the armed forces during the period beginning on August 2, 1990, and ending on January 2, 1992; or
(d) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred during the period beginning on September 11, 2001, and ending on the date prescribed by Presidential proclamation or by law as the last date of Operation Iraqi Freedom;
and, except as provided under section 2108a, who has been discharged or released from active duty in the armed forces under honorable conditions. (OOC Reg. § 1.102(u); 5 U.S.C. § 2108(1))

Disabled veteran – an individual who has served on active duty in the armed forces, has been separated therefrom under honorable conditions, and has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department. (OOC Reg. § 1.102(i))

B. Who is Covered?

Covered employee - The VEOA applies to any employee of any legislative branch employing office and includes an applicant for employment in a covered position and a former covered employee. The term "covered employee" does not include an employee:

(a) whose appointment is made by the President with the advice and consent of the Senate;

(b) whose appointment is made or directed by a Member of Congress;

(c) whose appointment is made by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate;

(d) who is appointed pursuant to section 105(a) of the Second Supplemental Appropriations Act, 1978; or

(e) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of 5 U.S.C § 3132(a)(2)).

C. VEOA Rights: Veterans' Preference in Hiring and Veterans' Preference for Reduction in Force

Veterans' Preference in Hiring

Appointments to non-restricted covered positions

Where an employing office has duly adopted a policy requiring the numerical scoring or rating of applicants for covered positions, the employing office shall add points to the earned ratings of those preference eligible applicants who receive passing scores in an entrance examination, in a manner that is proportionately comparable to the points prescribed in 5 U.S.C. § 3309. For example, five preference points shall be granted to preference eligible applicants in a 100-point system, one point shall be granted in a 20- point system, and so on.

In all other situations involving appointment to a covered position, employing offices shall consider veterans' preference eligibility as an affirmative factor in the employing office's determination of who will be appointed from among qualified applicants.

Crediting experience in appointments to covered positions

When considering applicants for covered positions in which experience is an element of qualification, employing offices shall provide preference eligible applicants with credit: for time spent in the military service (1) as an extension of time spent in the position in which the applicant was employed immediately before his/her entrance into the military service, or (2) on the basis of actual duties performed in the military service, or (3) as a combination of both methods. Employing offices shall credit time spent in the military service according to the method that will be of most benefit to the preference eligible applicant and for all experience material to the position for which the applicant is being considered, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether he/she received pay therefor.

Waiver of physical requirements in appointments to covered positions

In determining qualifications of a preference eligible for appointment, an employing office shall waive: (1) with respect to a preference eligible applicant, requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and (2) with respect to a preference eligible applicant to whom it has made a conditional offer of employment, physical requirements if, in the opinion of the employing office, on the basis of evidence before it, including any recommendation of an accredited physician submitted by the

preference eligible applicant, the preference eligible applicant is physically able to perform efficiently the duties of the position.

If an employing office determines, on the basis of evidence before it, including any recommendation of an accredited physician submitted by the preference eligible applicant, that an applicant to whom it has made a conditional offer of employment is preference eligible as a disabled veteran as described in 5 U.S.C. § 2108(3)(C) and who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of the covered position, the employing office shall notify the preference eligible applicant of the reasons for the determination and of the right to respond and to submit additional information to the employing office, within 15 days of the date of the notification. The head of the employing office may, by providing written notice to the preference eligible applicant, shorten the period for submitting a response with respect to an appointment to a particular covered position, if necessary because of a need to fill the covered position immediately. Should the preference eligible applicant make a timely response, the highest ranking individual or group of individuals with authority to make employment decisions on behalf of the employing office shall render a final determination of the physical ability of the preference eligible applicant to perform the duties of the position, taking into account the response and any additional information provided by the preference eligible applicant. When the employing office has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the preference eligible applicant. Nothing in this section shall relieve an employing office of any obligations it may have pursuant to the ADA.

Veterans' Preference for Reduction in Force

Application of preference in reductions in force

Prior to carrying out a reduction in force that will affect covered employees, employing offices shall determine which, if any, covered employees within a particular group of competing covered employees are entitled to veterans' preference eligibility status. In determining which covered employees will be retained, employing offices will treat veterans' preference as the controlling factor in retention decisions among such competing covered employees, regardless of length of service or performance, provided that the preference eligible employee's performance has not been determined to be unacceptable. Provided, a preference eligible employee who is a "disabled veteran" who has a compensable service connected disability of 30 percent or more and whose performance has not been determined to be unacceptable by an employing office is entitled to be retained in preference to other preference eligible employees. Provided, this section does not relieve an employing office of any greater obligation it may be subject to pursuant to the Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.).

Crediting experience in reductions in force

In computing length of service in connection with a reduction in force, the employing office shall provide credit to preference eligible covered employees as follows:

(a) a preference eligible covered employee who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

(b) a preference eligible covered employee who is a retired member of a uniformed service is entitled to credit for:

> (1) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or
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> (2) the total length of time in active service in the armed forces if he is included under 5 U.S.C. § 3501(a)(3)(A), (B), or (C); and

(c) a preference eligible covered employee is entitled to credit for:

> (1) service rendered as an employee of a county committee established pursuant to section 8(b) of the Soil Conservation and Domestic Allotment Act or of a committee or association of producers described in section 10(b) of the Agricultural Adjustment Act, reenacted with amendments by the Agricultural Marketing Agreement Act of 1937; and
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> (2) service rendered as an employee described in 5 U.S.C. § 2105(c) if such employee moves or has moved, on or after January 1, 1966, without a break in service of more than 3 days, from a position in a non-appropriated fund instrumentality of the Department of Defense or the Coast Guard to a position in the Department of Defense or the Coast Guard, respectively, that is not described in 5 U.S.C. § 2105(c).

Waiver of physical requirements in reductions in force

If an employing office determines, on the basis of evidence before it, that a covered employee is preference eligible, the employing office shall waive, in determining the covered employee's retention status in a reduction in force:

> (1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and
>
> (2) physical requirements if, in the opinion of the employing office, on the basis of evidence before it, including any recommendation of an accredited physician submitted by the employee, the preference eligible covered employee is physically able to perform efficiently the duties of the position.

If an employing office determines that a covered employee who is a preference eligible as a disabled veteran as described in 5 U.S.C. § 2108(3)(C) and has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of the covered position, the employing office shall notify the preference eligible covered employee of the reasons for the determination and of the right to respond and to submit additional information to the employing office within 15 days of the date of the notification. Should the preference eligible covered employee make a timely response, the highest ranking individual or group of individuals with authority to make employment decisions on behalf of the employing office, shall render a final 15 determination of the physical ability of the preference eligible covered employee to perform the duties of the covered position, taking into account the evidence before it, including the response and any additional information provided by the preference eligible. When the employing office has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the preference eligible covered employee.

D. Employing Office Policies

Each employing office that employs one or more covered employees or that seeks applicants for a covered position shall adopt its written policy specifying how it has integrated the veterans' preference requirements of the VEOA and the Board's regulations into its employment and retention processes. Each such employing office will make its policies available to applicants for appointment to a covered position and to covered employees in accordance with the Board's regulations. The act of adopting a veterans' preference policy shall not relieve any employing office of any other responsibility or requirement of the VEOA or the Board's regulations. An employing office may amend or replace its veterans' preference policies as it deems necessary or appropriate, so long as the resulting policies are consistent with the VEOA and the Board's regulations.

Information regarding veterans' preference determinations in appointments

Upon written request by an applicant for a covered position, the employing office shall promptly provide a written explanation of the manner in which veterans' preference was applied in the employing office's appointment decision regarding that applicant. Such explanation shall include at a minimum: (a) the employing office's veterans' preference policy or a summary description of the employing office's veterans' preference policy as it relates to appointments to covered positions; and (b) a statement as to whether the applicant is preference eligible and, if not, a brief statement of the reasons for the employing office's determination that the applicant is not preference eligible.

Dissemination of veterans' preference policies to covered employees

If an employing office that employs one or more covered employees provides any written guidance to such employees concerning employee rights generally or reductions in force more specifically, such as in a written employee policy, manual or handbook, such guidance must

include information concerning veterans' preference under the VEOA. Written guidance shall include, at a minimum: (1) the VEOA definition of "preference eligible" as set forth in 5 U.S.C. § 2108; and (2) the employing office's veterans' preference policy or a summary description of the employing office's veterans' preference policy as it relates to reductions in force. The employing office may provide other information in its guidance regarding its veterans' preference policies and practices, but is not required to do so by the Board's regulations. Employing offices are also expected to answer questions from covered employees that are relevant and non-confidential concerning the employing office's veterans' preference policies and practices

Written notice prior to a reduction in force

A covered employee may not be released due to a reduction in force, unless the covered employee and the covered employee's exclusive representative for collective-bargaining purposes (if any) are given written notice, at least 60 days before the covered employee is so released. Any notice shall include - (1) the personnel action to be taken with respect to the covered employee involved; (2) the effective date of the action; (3) a description of the procedures applicable in identifying employees for release; (4) the covered employee's competitive area; (5) the covered employee's eligibility for veterans' preference in retention and how that preference eligibility was determined; (6) the retention status and preference eligibility of the other employees in the affected position classifications or job classifications within the covered employee's competitive area, by providing: (A) a list of all covered employee(s) in the covered employee's position classification or job classification and competitive area who will be retained by the employing office, identifying those employees by job title only and stating whether each such employee is preference eligible, and (B) a list of all covered employee(s) in the covered employee's position classification or job classification and competitive area who will not be retained by the employing office, identifying those employees by job title only and stating whether each such employee is preference eligible; and (7) a description of any appeal or other rights which may be available. The head of the employing office may, in writing, shorten the period of advance notice required, with respect to a particular reduction in force, if necessary because of circumstances not reasonably foreseeable. However, no notice period may be shortened to less than 30 days under this subsection.

E. Notable VEOA Case Law

Sujat v. Architect of the Capitol, 2014 WL 7215203, Case No.: 13-AC-60(AG, VT, VP) (OOC Board Dec. 16, 2014) – The complainant applied for a position with the AOC and wrote under "Military Service" in his application "Vietnam Veteran (10 PT)." The complainant further selected "Yes" when the electronic application asked, "Are you a recipient of the Armed Forces Medal?" The application also gave candidates an opportunity to select the degree of their veterans' preference. The complainant, however, left this question blank on his electronic application and did not provide any documentation. The AOC computed a numerical score for each applicant and the complainant was awarded an additional five points because he chose

"yes" in response to the question "Are you a recipient of the Armed Forces Services Medal?" The AOC ultimately did not select the complainant for either the interview or potential interview lists. The complainant argued that he should have been awarded ten points instead of five points. In affirming the AOC's motion for summary judgment, the Board held that the AOC had sufficient procedures in place to comply with the VEOA's requirements and that the complainant failed to make the AOC adequately aware that he was entitled to ten preference points. Specifically, the complainant failed to select the percentage of his disability in compliance with the AOC's requirement for a candidate to receive preference points and failed to provide sufficient documentation. Moreover, the Board aptly noted that the VEOA requires only that the hiring agency provide veterans an opportunity to compete. This requirement does not strip the hiring agency of its discretion in hiring.

Russell v. Dep't of Health and Human Serv., 2014 WL 6435049 (Fed. Cir. Nov. 18, 2014) – Documentation necessary to support disabled veteran's entitlement to ten preference points.

Asatov v. Agency for Int'l Dev., 542 Fed. Appx. 937 (Fed. Cir. 2013) – No VEOA violation where although the preference eligible veteran had five preference points added to his application score and also met the cutoff for proceeding to the second round, the veteran was not interviewed and determined by subject matter experts to not be one of the best qualified applicants and was therefore removed from consideration.

Kirkendall v. Dep't of Army, 479 F.3d 830 (Fed. Cir. 2007) – The purpose of the VEOA is to provide preference eligible veterans with a method for seeking redress where their veterans' preference rights have been violated in hiring decisions made by the federal government.

Joseph v. Fed. Trade Commission, 505 F.3d 1380 (Fed. Cir. 2007) – The plaintiff was a preference-eligible veteran who applied for a paralegal position through both the merit promotion and the competitive processes. Although he was the top-ranked applicant on the competitive list (which reflected his veteran's preference), he was only one of the top four candidates on the merit promotion list. Ultimately, the Commission hired someone who applied only via the merit promotion list. The plaintiff alleged that he was denied his veteran's preference because the Commission used the merit promotion list to make the hire. The Court held that dual announcements do not run afoul of VEOA because "an agency has the discretion to fill a vacant position by any authorized method" and the merit promotion list is such a method.

Abell v. Dep't of Navy, 343 F.3d 1378 (Fed. Cir. 2003) - Preference eligible veteran petitioned for review of the final decision of the MSPB that sustained his non-selection by Navy for general engineer position under merit promotion procedures. The appellate court held that: (1) the Navy did not violate VEOA when it cancelled vacancy announcement for position, rather than fill it with veteran; and (2) the Navy was not required, under VEOA, to notify veteran of its proposed request to pass him over for selection in favor of non-preference eligible applicant.

Smyth v. U.S. Postal Service, 41 Fed. Appx. 475 (Fed. Cir. 2002) – The USPS' decision not to hire applicant did not violate VEOA where the USPS awarded preference points and interviewed the applicant, then disqualified the veteran from consideration for the position after discovering prior disciplinary records associated with another employer.

III. Uniformed Services Employment and Reemployment Rights Act of 1994 in the Legislative Branch

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") establishes certain rights, benefits, and duties concerning the employment of present and future uniformed service members and veterans. As a continuation of a series of laws that emerged beginning in the 1940s geared towards establishing and protecting veterans' rights, USERRA was enacted to clarify and strengthen its immediate legal predecessor, the Veterans' Reemployment Rights Act. USERRA's primary focus is to provide reemployment rights to service members who leave their jobs for military service and to protect covered individuals from discrimination and retaliation based on their military service. USERRA also provides certain health insurance continuation rights similar to benefits provided under the Consolidated Omnibus Budget Reconciliation Act ("COBRA") as well as discharge protection rights following reemployment.

A. Key Definitions and References

Eligible employee – a covered employee performing service in the uniformed services, within the meaning of 38 U.S.C. 4303(13), whose service has not been terminated upon occurrence of any of the events enumerated in 38 U.S.C. 4304. (2 U.S.C. §1316 (2)(A))

Performing service (38 U.S.C. 4303(13)) – the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32. (38 U.S.C. 4303(13))

***Board Regulations Note**:*

> *Under Section of 1002.5(f) of the pending Board USERRA regulations (senate version), for the purpose of defining who is covered under the discrimination section of these regulations,* ***performing service*** *means an eligible employee 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 the uniformed services. OOC Final USERRA Regulations Adopted by the Board of Directors,* ***http://www.compliance.gov/sites/default/files/rulemaking/userra-s-regulations.pdf.***

Additionally, under Section 1002.5(t)(senate version), ***uniformed services*** *means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the National Disaster Medical System (NDMS) when federally activated or attending authorized training in support of their Federal mission is deemed ''service in the uniformed services,'' although such appointee is not a member of the ''uniformed services'' as defined by USERRA. OOC Final USERRA Regulations Adopted by the Board of Directors,* ***http://www.compliance.gov/sites/default/files/rulemaking/userra-s-regulations.pdf.***

38 U.S.C. § 4304 events –

(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge;

(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned;

(3) A dismissal of such person permitted under section 1161(a) of title 10; or

(4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

B. Who is Covered?

Covered Employees

USERRA, as applied by the CAA provides rights to eligible employees performing uniformed services in the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency. (2 U.S.C. § 1316; 38 USC § 4303 (16) and §4311 (a))

Eligible employees are any employees of the legislative branch, including employees of the Government Accountability Office and the Library of Congress. (2 U.S.C. § 1316 (a) (2) (B); 38 U.S.C § 4303(4) (A) (ii) and 4303(6))

Certain provisions also apply to Veterans and to persons who are applying to be members of the military. (2 U.S.C. §1316 (a) (1) (A); 38 U.S.C. § 4311 (a))

Coverage under USERRA terminates for these persons upon separation from the uniformed service with dishonorable or bad conduct discharge or separation under less than honorable conditions. (2 U.S.C. §1316(a)(2)(A);38 U.S.C. § 4304)

Covered Employers

USERRA applies to both private and government employers. USERRA made its provisions applicable to the legislative branch directly through its own terms. 38 U.S.C § 4303(4)(A)ii and 4303(6). The CAA specifically names the Government Accountability Office and the Library of Congress as covered employers under USERRA. 2 U.S.C. § 1316(a)(2)(C). Unlike other employment laws, USERRA does not limit its applicability to employers of a specific size.

C. USERRA Rights: Reemployment, Anti-Discrimination, Anti-Retaliation, Health Insurance, Protection From Discharge

Reemployment

Under USERRA, covered services members who are absent from their civilian employment due to military service have the right to be reemployed to their position upon their return from military service. They must be reemployed to the job that they would have attained with the same seniority, status, and pay had they not been absent for military service. (2 U.S.C. § 1316(a)(1)(B); 38 U.S.C. § 4312)

Reemployment Criteria

To be reemployed, service members must meet the following criteria:

1) **Advance Notice**- the person (or other appropriate uniformed services representative) gave advance written or verbal notice of such service to such person's employer 38 U.S.C. § 4312 (a)(1)
2) **5 Year Absence Limit**- the cumulative length of absence (including the current absence and any previous absences with that employer due to military service) does not exceed five years 38 U.S.C. §4312 (a)(2)
3) **Timely Application for Reemployment**- the person must submit an application for reemployment in accordance with timelines applicable to their length of absence due to military service. 38 U.S.C. § 4312(a)(3)

Reemployment Exclusions

Under certain limited circumstances, reemployment is not required. These exclusions include:

1) **Impossibility-** the employer's circumstances have changed such that reemployment would be impossible or unreasonable. 38 U.S.C. § 4312 (d)(1)(a)
2) **Undue Hardship**- reemploying the service member will cause undue hardship on the employer because the service member's qualification for the position has changed

based on a disability incurred or exaggerated due to the military service during the absence. 38 U.S.C. § 4312 (d)(1)(b)

3) **Brief, Non-Recurrent Employment**- the employment from which the service member leaves is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period. 38 U.S.C. § 4312 (d)(1)(c)

Anti-Discrimination

USERRA, as applied by the CAA, prohibits employing offices from denying initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

The anti-discrimination rights afforded by USERRA are broader than the reemployment rights to the extent that they prohibit discrimination on the basis of military service for persons in all employment positions, including those positions which may be brief and non-recurrent. (2 U.S.C. § 1316(a)(1)(A); 38 U.S.C. § 4311(a))

Anti- Retaliation

USERRA, as applied by the CAA, prohibits employing offices from retaliating against an employee because he or she has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation; or exercised a right provided for by USERRA. It is important to note that an employee may have rights under the anti-retaliation provisions of the CAA even if that employee has no military service connection. Like the USERRA anti-discrimination provision, USERRA's anti-retaliation provisions apply to employees in positions that may be brief and non-recurrent. (2 U.S.C. § 1316(a)(1)(A); 38 U.S.C. § 4311(b))

Health Insurance

Similar to COBRA provisions that allow an employee to maintain health insurance coverage after employment ends, USERRA provides eligible employees with the option to continue their existing employer-based health plan coverage for up to 24 months while serving in the uniformed service upon leaving a position with an employing office for military service.

Additionally, even if the employee does not continue the health insurance coverage during his or her military service, the employee maintains the right to be reinstated into that health plan upon returning to employment with the employing office, generally without any waiting periods or exclusions (except for service connected illnesses or injuries) if no waiting periods or exclusions would have applied if the coverage had not been terminated due to military service. (2 U.S.C. § 1316(a)(1)(C); 38 U.S.C. § 4317(a)).

Protection from Discharge

USERRA establishes a discharge for cause requirement for eligible employees once they return to employment from leave. Under this requirement, eligible employees cannot be terminated without case for certain time periods. These time periods vary based on the employee's period of military service before reemployment.

1. **More than 6 Months of Service**- the employee cannot be discharged, except for cause, for 1 year after date of reemployment. (38 U.S.C. § 4316(c)(1))
2. **31 days to 6 Months of Service-** The employee cannot be discharged, except for cause for 6 months after date of reemployment. (38 U.S.C. § 4316(c)(2))
3. **30 Days or Less of Service**- The employee is not protected from discharge without cause. (2 U.S.C. §1316 (1)(c); 38 U.S.C. §4316(c))

D. Exception to CAA Exclusive Procedure Rule

The CAA generally provides that no person may commence an administrative or judicial proceeding to seek a remedy for the rights afforded by the CAA except as provided in the CAA. 2 U.S.C. § 1361 (d)(1) However, the CAA provides a narrow exception to this rule as it relates to covered employees seeking to assert rights under USERRA as incorporated by the CAA. Pursuant to 2 U.S.C. § 1361 (d)(2), a covered employee under § 1316 may also utilize any provisions of 38 U.S.C. § 43 that are applicable to that employee.

This exception is primarily intended to clarify that service members employed by the legislative branch may also seek guidance from the Department of Labor Veterans' Employment and Training Service ("VETS") regarding their rights and benefits under USERRA. Office of Compliance: Notice of Proposed Rulemaking, *New Proposed Regulations Implementing Certain Substantive Employment Rights and Protections for Veterans …*, 154 CONG. REC. S3188-03 (daily ed. April 21, 2008), *http://www.compliance.gov/sites/default/files/rulemaking/041608userrapreamble.pdf.* Based upon Section 1002.303 of the OOC's pending USERRA regulations, this exception does not exempt a CAA eligible employee seeking redress under USERRA from the OOC administrative remedies exhaustion requirement. *OOC Final USERRA Regulations Adopted by the Board of Directors,* ***http://www.compliance.gov/sites/default/files/rulemaking/userra-s-regulations.pdf.***

E. Status of OOC USERRA Regulations

2 U.S.C. §1316(c) authorizes the OOC Board of Directors ("Board") to issue regulations implementing the USERRA protections incorporated by the CAA. These regulations are to be the same as the most relevant substantive regulations promulgated by the Secretary of Labor, but may be modified from the Department of Labor ("DOL") regulations if the Board establishes good cause as to why a modification would be more effective for the application of the protections to the legislative branch.

The Board adopted substantive regulations to implement the USERRA rights incorporated by the CAA for the legislative branch on December 3, 2008. These substantive regulations have not yet been approved by Congress.

The pending Board USERRA regulations feature several notable distinctive features and adoption would aid in the interpretation of the CAA's application of USERRA. Some of these distinctions include:

> **Separate Employing Office Versions**: The Board issued three separate sets of USERRA regulations, for the Senate, House, and other employing offices, respectively. These versions accommodate the variations warranted by specific circumstances applicable to each office. *OOC Final USERRA Regulations Adopted by the Board of Directors,*http://www.compliance.gov/directives/pending-regulations
>
> **Eligible Employee Definition**: The Board regulations employ a broad definition of 'eligible employee'. This broad definition has the effect of including covered employees who have some form of military status (including those who have performed service or who have applied or have an obligation to perform military service, as well as those who are currently members of or who are serving in the uniformed services) within the reaches of the CAA's USERRA protections against discrimination. See *Section 1002.5(f)(senate version), OOC Final USERRA Regulations Adopted by the Board of Directors,* http://www.compliance.gov/sites/default/files/rulemaking/userra-s-regulations.pdf
>
> **Uniformed Services Definition**: The Board regulations include service as an intermittent disaster response appointee of the National Disaster Medical System (NDMS) when federally activated or attending authorized training in support of their Federal mission within the definition of uniformed services. See *Section 1002.5(t) (senate version),* http://www.compliance.gov/sites/default/files/rulemaking/userra-s-regulations.pdf

F. Notable USERRA Case Law

Staub v. Proctor Hosp., 562 U.S. 411 (2011) - A hospital technician sued his employer following his termination for leaving his working station without permission per the requirements of a prior disciplinary action. The plaintiff asserted that he had ultimately been fired because his immediate supervisor disapproved of his military service, as evidenced by this supervisor's comments that the plaintiff's "military duty had been a strain on the department". At trial, the jury found in favor of the plaintiff, but this decision was reversed by the Seventh Circuit Court of Appeals on the basis that another manager, for which there was no evidence of discriminatory animus, had actually made the decision to terminate him. The Supreme Court reversed in a unanimous decision, holding that the employer is liable if a supervisor performs an act motivated by anti-

military animus that is intended by the supervisor to cause an adverse employment action, and that act is a proximate cause of the ultimate employment action.

Erickson v. U.S. Postal Service, 571 F.3d 1364 (Fed. Cir. 2009) - USERRA does not require a showing that military service was the sole motivating factor in an allegedly discriminatory act. An employer may still violate USERRA if military service is one of several "motivating factors" in the denial of "any benefit of employment".

Sheehan v. Dep't of the Navy, 240 F.3d 1009 (Fed. Cir. 2001)- In USERRA discrimination and retaliation cases, the employee bears the initial burden of showing that military service was a motivating factor by a preponderance of the evidence. The burden then shifts to the employer to prove by a preponderance of the evidence that "legitimate reasons, standing alone, would have induced the employer to take the same adverse action."

Tridico v. District of Columbia, 130 F.Supp.3d 17 (D.D.C. 2015) - Objecting to be subjected to a hostile work environment on the basis of one's military service is protected activity under USERRA. Retaliation based on asserting one's right to be free from a hostile work environment is a cognizable claim under USERRA.

Vahey v. General Motors Company, 985 F.Supp.2d 51 (D.D.C. 2013)- The plaintiff alleged that his employer failed to properly reemploy him as required by USERRA when he was laid off two week after returning from a 4 year military leave . The plaintiff demonstrated that there was a genuine issue of material fact regarding whether he would have been reemployed to a transferred status rather than a laid-off status where he was included in the first round of lay-offs within weeks of his return from military leave, not provided with an opportunity to transfer when other colleagues had been provided with an opportunity to transfer, and there was minimal evidence that the employer had considered his actual qualifications for a transfer (rather than his 4 year military leave) in decided to terminate his employment.

Potts v. Howard University Hosp., 843 F.Supp.2d 101 (D.D.C. 2012**) -** To establish a prima facie case of discrimination under USERRA, an employee must demonstrate that his "membership ... or obligation for service in the uniformed services" was a "substantial or motivating factor" in his employer's alleged adverse employment action against him. Military status is a motivating factor if it can be shown through "direct or circumstantial evidence" that the defendant "relied on, took into account, considered, or conditioned its decision to take the adverse employment action on [that] military service".

V. Servicemembers Civil Relief Act

One of the stated purposes of the Servicemembers Civil Relief Act ("SCRA") is "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service." 50 U.S.C. §

3902(2). This statute was previously titled the Soldiers' and Sailors' Civil Relief Act of 1940. The statute was amended and renamed effective December 19, 2003.

A. Key Definitions

servicemember: a member of the uniformed services, as that term is defined in section 101(a)(5) of Title 10." 50 U.S.C. § 3911(1). Importantly, any time "servicemember" is used in the SCRA, "such term shall be treated as including a reference to a legal representative of the servicemember." 50 U.S.C. § 3920(b). "Legal representative" is defined for purposes of the SCRA as either (1) an attorney acting on the behalf of a servicemember, or (2) an individual possessing a power of attorney. 50 U.S.C. § 3920(a).

uniformed services: (A) the armed forces; (B) the commissioned corps of the National Oceanic and Atmospheric Administration; and (C) the commissioned corps of the Public Health Service." 10 U.S.C. § 101(a)(5).

military service: (A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard--

> (i) active duty, as defined in section 101(d)(1) of Title 10, and
>
> (ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of Title 32, for purposes of responding to a national emergency declared by the President and supported by Federal funds;

(B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service; and

(C) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

50 U.S.C. § 3911(2).

period of military service: the period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service. 50 U.S.C. § 3911(3).

The SCRA also applies to individuals in the Reserves who are ordered to report for military service, and persons who are ordered to report for induction under the Military Selective Service Act. 50 U.S.C. § 3917.

B. Applicability to OOC proceedings

The SCRA applies to OOC proceedings, whether administrative or in federal court, because "Court" is defined in the statute as "a court or an administrative agency of the United States or of any State (including any political subdivision of a State), whether or not a court or administrative agency of record." 50 U.S.C. § 3911(5). The SCRA also explicitly applies to "any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this chapter," although not to criminal proceedings. 50 U.S.C. § 3912(b).

The protections most likely to apply in CAA proceedings are the tolling of the statute of limitations and stays of proceedings.

Tolling of Statute of Limitations

"The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns." 50 U.S.C. § 3936(a).

Stay of Proceedings

The court may on its own initiative – and is required to, upon application by a servicemember and if certain conditions are met – stay the proceedings in any civil action or proceeding in which the servicemember is a plaintiff or defendant, for not less than 90 days. If a servicemember applies for a stay, the application must include: (1) a letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear; and (2) a letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter. 50 U.S.C. § 3932.

Another protection that may apply to CAA proceedings is the protection against default judgments. 50 U.S.C. § 3931.

C. Notable SCRA Case Law

Ausmer v. Shinseki, 26 Vet. App. 392 (2013) – The SCRA does not toll only the statute of limitations for filing a claim, but also the time limits for initiating proceedings such as appeals. Moreover, a servicemember is not required to demonstrate that his military service prejudiced his ability to act in order to qualify for the statutory suspension of time. Generally, the Act is to be liberally construed to protect those who have dropped their own affairs to serve the nation.

Bretherick v. Crittenden Cty., Ark., No. 3:05CV00024 JLH, 2007 WL 890200 (E.D. Ark. Mar. 21, 2007) (citing *Conroy v. Aniskoff*, 507 U.S. 511 (1993) (addressing the SCRA's predecessor statute)) – The language of the SCRA regarding tolling is unambiguous, and therefore the servicemember need not make a showing that his military service prejudiced his ability to pursue his rights in order to benefit from the tolling of the statute of limitations. *See also In re Brandt*, 437 B.R. 294 (Bankr. M.D. Tenn. 2010) (the tolling provision of the SCRA is mandatory and the Supreme Court's reasoning in *Conroy v. Aniskoff* still applies despite changes in the language from the SSCRA to the SCRA).

DeTemple v. Leica Geosystems, Inc., 576 F. App'x 889 (11th Cir. 2014) – The tolling period must be counted from the end of the limitation period, not from the date the employee returns from active duty.

Pandolfo v. Labach, 727 F. Supp. 2d 1172 (D.N.M. 2010) – Stays of proceedings are mandatory in any civil action or proceeding in which a servicemember is a plaintiff or a defendant, if the servicemember has received notice of the action and applies for the stay while he is in military service or is within 90 days after termination of or release from military service, as long as he satisfies the requirements of 50 U.S.C. § 3932(b)(2) – namely, information about why his military service prevents him from appearing and when he will be available to appear, and information from his commanding officer stating that the servicemember's current military duty prevents him from appearing and that military leave is not authorized.

Cabrera v. Perceptive Software, LLC, 147 F. Supp. 3d 1247, 1250 (D. Kan. 2015) – "Military service" under the SCRA is not treated as the equivalent of deployment; rather, it is the equivalent of active duty, which is defined more broadly than deployment.

Cronin v. United States, 765 F.3d 1331 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1408 (2015) – "Active duty" does not include a duty to remain in reserve or even to show up for two weeks of training as a member of the National Guard.

Smith v. Sikorsky Aircraft Corp., 623 F. App'x 156 (5th Cir. 2015) – With respect to those serving in the National Guard, the SCRA applies to those serving pursuant to Title 10 but not those serving under Title 32, unless they are responding to a national emergency for more than 30 consecutive days. Full-time National Guard duty does not count as "active duty" under the SCRA.

IV. Family and Medical Leave Act Military Leave Provisions

The Family and Medical Leave Act contains certain military-specific leave provisions: qualifying exigency leave and military caregiver leave.

Qualifying Exigency Leave

Qualifying exigency leave under the FMLA enables eligible employees who are family members of a covered service member in the National Guard or Reserves to take up to 12 weeks of job-protected leave within a 12 month period to address certain common issues that arise when a service member is deployed to active duty. 2 U.S.C. § 1312(a)(1); 29 U.S.C. § 2612 a(1)(e).

Military Caregiver Leave

Military caregiver leave under the FMLA enables eligible employees to take up to 26 weeks of job-protected leave within a 12 month period to care for family members who are covered service members in the Regular Armed Forces, National Guard, or Reserves, with a serious injury or illness incurred in the line of duty on active duty. 2 U.S.C. § 1312(a)(1); 29 U.S.C. § 2612 a(3).