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“Employer’s obligation to provide automatic and discretionary promotions to servicemembers”

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides one of the most wide-reaching employer obligations of any labor law. In the case of a servicemember whose period of service exceeds ninety days, the statute provides the rules applicable to the employer’s determination of the servicemember’s proper reemployment position. Pursuant to USERRA, the servicemember is to be reemployed “in the position of employment in which [he] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.” 38 U.S.C. § 4313(a)(2)(A). This position is known as the “escalator position.”

If, and only if, the returning servicemember is not qualified to perform the position in question, after the employer has made reasonable efforts to qualify him, the employer may reemploy the servicemember “in the position of employment in which [he] was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.” *Id.* § 4313(a)(2)(B).

In other words, under USERRA’s “escalator” principle, employees returning from military leave must be reinstated not only to their previous position, but to a higher one if they can demonstrate that they would likely have been promoted but for their absence. The First Circuit Court of Appeals recently concluded that this escalator requirement applies not only to automatic promotions, but also to those that were within the discretion of the employer.

In *Rivera-Melendez v. Pfizer Pharm.*, the position of a reservist was eliminated while on active service but other employees in the same position were given the opportunity to apply for a limited number of promotions as an alternative to being demoted. The District Court rejected the USERRA claim based on the premise that the escalator requirement only applied to automatic promotions plaintiff would have been moved into but for his military service. The First Circuit reversed the decision and concluded that the escalator principle not only applies to automatic promotions but to positions that the plaintiff would have been moved to with “reasonable certainty” except for his absence. Proving reasonable certainty may be difficult in a discretionary promotion but plaintiffs are now allowed to make the argument and employers need to be aware.

