CHAPTER 1
INTRODUCTION

This book serves as a guide to veterans' rights to employment, reemployment, and a discrimination-free workplace in the federal sector, as defined by the Uniformed Services Employment and Reemployment Rights Act ("USERRA") and the Veterans Employment Opportunities Act ("VEOA"). Rights applicable to the private sector are not covered in this guide.

I. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)—PL 103-353

A. LEGISLATIVE HISTORY

1. Vietnam Era Veterans' Readjustment Assistance Act of 1974

USERRA was enacted to expand the scope and coverage of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), Pub. L. 93-508, 88 Stat. 1578. Chapter 43 of VEVRAA is commonly referred to as the Veterans' Reemployment Rights Act (VRRA), first codified at 38 USC § 2021-2027, and subsequently codified at 38 USC § 4301-4307 after being renumbered by the Veterans' Benefits Act of 1992, PL 102-568. *See Williams v. Dept of Army*, 83 MSPR 109, 111–112 (1999).

VEVRAA barred employment discrimination based only on an individual's obligations as a reservist. Congress enacted USERRA as a response to the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981). There, the Court held that VEVRAA was limited to protecting the employee-reservist against discrimination based solely on military status. *Id.* at 559. The 1994 enactment broadened the statute by providing that military service only has to be a "motivating factor," not the sole factor, in the discriminatory action. *See* 38 USC § 4311(c)(1). The statute also confirmed that the burden of proof is the "but-for" test, and it shifts to the employer once the employee's case is established. H.R. Rep. No. 103-65 at 24 (1994); S. Rep. No. 103-158 at 45 (1994).

Congress intended that the anti-discrimination provisions be "broadly construed and strictly enforced." H.R. 103-65 at 23 (1993). Congress did not discuss or provide for a discrimination claim under USERRA that does not involve intentional acts, such as disparate impact. H. R. 103-65(I) (1993).

Congress prohibited the limitation of USERRA rights by union contracts and collective bargaining agreements, but courts have not construed these limitations to curb the right to waive USERRA procedural and substantive benefits under certain conditions. H.R. 103-65 at 20 (1993).

2. Veterans' Reemployment Rights Act and USERRA

USERRA also clarified the Veterans' Reemployment Rights Act (VRRA), codified at Chapter 43 of Title 38, United States Code. 140 Cong. Rec S 13626, 103rd Congress, 2nd Session, vol. 140, no. 138. It amended VRRA to restate past amendments in a clear manner and to incorporate case law and applies to active-duty service and to training periods served by reservists and members of the National Guard. *See* 38 USC § 4311(a). As stated in *Smith v. USPS*, 540 F.3d 1364, 1366 (Fed. Cir. 2008), *citing* S. Rep. No. 102-203 at 27 (1991):

> USERRA represents Congress's most recent effort to create a comprehensive statutory scheme to provide civilian reemployment rights for those who serve in the armed forces in order "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a). The Act also aims "to minimize the disruption to the lives of persons performing service," and "to prohibit discrimination against persons because of their service." *Id.* USERRA was enacted specifically to "restructure, clarify, and improve" the prior reemployment benefits statutes. S.Rep. No. 102-203, at 27 (1991). While Congress intended to expand and clarify the prior statutes, the legislative history stated that the "extensive body of case law" under the predecessor statutes "would remain in full force and effect to the extent consistent" with USERRA. *Id.* at 31.

The law allows service members to hold civilian jobs by minimizing the costs incurred by businesses from having a military employee absent. For example, a departing service member is to be placed on a military leave of absence while away from work instead of being terminated or forced to resign. H. Rep. No. 103-65 at 33 (1994). However, Senate did express concern that a service member employee's benefits not exceed those accorded to employees who are not veterans. S. Rep. No. 103-158, at 58–9 (1993).

Congress also limited jurisdiction of the Board's adjudication of a USERRA claim only to USERRA issues. The remedies of USERRA available to federal employees are limited "to orders that the federal employer comply with the provisions…and to an award of lost wages and other benefits." H.Rep. 103-65, at 39 (1994).

3. USERRA Amendments

In 1996, Congress passed the Veterans Benefits Improvements Act (VBIA), PL 104-275, which amended USERRA to expand eligibility to veterans that were not discharged under honorable conditions, revised provisions relating to employer discrimination, and made other technical changes concerning transition rules and effective dates. However, this Act did not change what is now 38 USC § 4304 which states that entitlement to USERRA benefits requires an honorable discharge. As a result, an honorable discharge is still required for USERRA protection, and this law did not expand eligibility for USERRA to those with less than honorable discharges.

In 1998, Congress amended USERRA by enacting the Veterans Program Enhancement Act of 1998 (VPEA), which authorizes the MSPB to adjudicate complaints that

occurred prior to October 13, 1994. *See* 38 USC § 4324(c); PL 105-368, § 213 (1998). (The Federal Circuit has subsequently affirmed the Board's holding that the 1998 amendment gives the Board authority to adjudicate claims under VRRA, but does not authorize the Board to adjudicate claims of discrimination that were not prohibited prior to the 1994 enactment of USERRA. *Fernandez v. Dept. of Army*, 234 F.3d 553, 557 (Fed. Cir. 2000).)

In 2002, the Veterans Benefits & Health Care Improvement Act, PL 106-419, adds funeral honors duty as "uniformed service" covered by USERRA.

In 2004, the Veterans Benefits Improvement Act (VBIA) amended 5 USC § 3330A (a)(1) to add subsection (a)(1)(B) which extends Board appeals to "right to compete" claims filed pursuant to 5 USC § 3304(f)(1) by veterans who are not preference eligibles, but who were separated from service after three or more years of active service with an honorable discharge. It also requires that employers notify persons entitled to USERRA rights and benefits a notice of same. 38 USC § 4334. VBIA extended from 18 months to 24 months the maximum period an employee may elect to continue his or her employer's health plan when deployed for active duty. 38 USC § 4317(a)(1)(A). It also established a demonstration project vesting the Office of Special Counsel with exclusive authority to investigate federal sector USERRA claims brought from February 8, 2005 through September 30, 2007 by persons whose social security numbers end in an odd number or who allege a related prohibited personnel practice (mixed claim). PL108-454, section 204. VBIA also reinstated the requirement that DOL submit an annual USERRA report to Congress. 38 USC § 4332.

In 2010, the Veterans Benefits Act of 2010, clarified that USERRA prohibits wage discrimination against service members. PL 111-275, section 701. It also renewed for three years the demonstration project charging the Office of Special Counsel with investigating certain USERRA claims and related prohibited personnel practices against federal agencies. PL111-275, section 105(b)(1).

In 2011, the VOW to Hire Heroes Act of 2011, PL 112-56, expanded USERRA to include statutory protection against hostile work environments created by federal agencies based on an employee's military service. With this amendment, Congress effectively overturned a Fifth Circuit decision denying a hostile work environment claim based on military service on the grounds that the statutory definition of "benefit" and "benefit of employment" did not refer to a hostile environment claim. *See Carder v. Continental Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011).

B. PURPOSE

1. USERRA

The purpose of USERRA is to encourage non-career military service by making it easy for participants to enter the civilian workforce, and by prohibiting discrimination based on service in the uniformed services. 38 USC § 4301. The effect is to enable the returning veteran to be treated as if he or she never left civilian employment, for purposes of seniority, wages and benefits. USERRA accomplishes that purpose by providing rights in two kinds of cases: discrimination based on military service

and denial of an employment benefit on account of military service. Congress explained that in passing USERRA, it wanted to "clarify, simplify, and where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. 103-65(I) (1993).

2. Statutory Structure

In a discrimination case pursuant to 38 USC § 4311, the appellant alleges that the agency has committed a prohibited action if motivated by a prohibited reason; that is, if the agency denies

> initial employment, reemployment, retention in employment, promotion, or any benefits of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation…or discriminate[s] in employment against or take[s] any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter….

38 USC § 4311; *Clavin v. USPS*, 99 MSPR 619, 622–23 (2005). USERRA does not support a disparate impact claim of discrimination, just disparate treatment. *Harellson v. USPS*, 115 MSPR 378, 385 (2011), *citing Sheehan v. Dept. of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). But, evidence showing disparate impact caused by an agency's policies can be used to help prove a disparate treatment claim pursuant to 38 USC § 4311. *Id.*

In a denial of an employment benefit case pursuant to 38 USC § 4313, the appellant must allege that he or she was denied reemployment, retention in employment, or promotion on account of prior military service. 38 USC § 4312–4318, 4322(a); *Bodus v. Dept. of Air Force*, 82 MSPR 508, 513 (1999); *Butterbaugh v. Dept. of Justice*, 336 F.3d 1332, 1336 (Fed. Cir. 2003). Congress stated that the purpose was "to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services." H.R. 103-65, at 17 (1994). The Board has held that USERRA reemployment rights include the right to apply and compete for positions which were advertised during the service member's absence, but not filled until after the service member's return. *Grandberry v. DHS*, 108 MSPR 309, 315 (2008). In reemployment cases, the appellant does not have to show any discriminatory motivation on the part of the agency. *Clavin v. USPS*, 99 MSPR 619, 623 (2005).

In analyzing claims, it is important to consider both the discrimination and reemployment provisions of USERRA to determine whether the actions complained of violated one or both. The two sections have significant differences. In an appeal of discrimination under 38 USC § 4311, the appellant has the burden of proving that his or her uniformed service was a substantial factor in the challenged agency action. Then the agency has the burden of showing that it would have taken the action absent the appellant's uniformed service. *Wyatt v. USPS*, 101 MSPR 28 (2006).

In a reemployment case pursuant to 38 USC § 4313, the agency has the burden of proving that it met its obligation to reemploy the appellant in compliance with law and regulation after the completion of his or her uniformed service. *Id.*

All USERRA claims are either discrimination under § 4311, or reemployment under § 4313. Many claims involve both. Failure to analyze claims properly in the case of an experienced appellant's representative could result in a malpractice claim. Failure to defend a claim under the appropriate statute could result in loss of the case for the agency. Failure to analyze appellant's claims properly under one or both statutes for an Administrative Judge could result in a remand for an order giving the parties explicit notice of the elements of the two types of USERRA cases. *Clavin v. USPS*, 99 MSPR 619, 624 (2005).

USERRA does not change other federal, state, or local laws, ordinances, contracts, or other agreements that establish rights or benefits that are more beneficial. It does supersede federal, state, or local laws, ordinances, contracts, or other agreements that reduce or eliminate benefits provided by USERRA. 38 USC § 4302.

Regulations explaining USERRA provisions were promulgated both by the Department of Labor (DOL) at 20 CFR §§ 1002 *et seq.,* and by the Department of Defense at 32 CFR Part 104.

II. THE VETERANS EMPLOYMENT OPPORTUNITIES ACT OF 1998 (VEOA)—PL 105-339

A. LEGISLATIVE HISTORY

Since the end of the Civil War, veterans have received a certain amount of preference in federal employment, initially through a series of Executive Orders and statutes. In 1944, Congress enacted the first law that granted preference to veterans who were disabled or who served during military campaigns during certain specified periods of time. 153 Cong. Rec. S. 345, 348 (2007). The Veterans Preference Act of 1944 was enacted to aid in the reentrance of veterans into the civilian, federal job force. Congress believed that veterans, whose lives had been disrupted by military service, were entitled to reemployment and rehabilitation aids to enable them to resume normal lives. *Deems v. Dept. of Treasury*, 100 MSPR 161, 164 (2005), *citing* PL 359, ch. 287, 58 Stat. 390, as amended. Veterans' preference rights were created by statute to protect the rights of returning veterans. *Deems v. Dept. of Treasury*, 100 MSPR 161, 164 (2005), *citing* 5 USC § 3304. "Preference eligible" veterans would have priority in hiring over non-preference eligibles, and non-veterans. 153 Cong. Rec. S. 345, 348.

Congress subsequently had concerns that veterans' preference rights were being circumvented by federal agencies. In 1998, Congress passed the Veterans Employment Opportunities Act, PL 105-339. *Deems v. Dept. of Treasury*, 100 MSPR 161, 165 (2005), *quoting* S. Rep. No. 105-340 at 15, 16 (1998). Senate Report No. 105-340 explained that a need existed for veterans to have the right to seek adjudication of alleged violations of veterans' preferences. The Senate stated that the redress provisions enacted were modeled after the procedures established in USERRA. S. Rep. 105-340 at 16 1998). The House echoed the Senate's concern about

the circumvention by federal agencies of veterans' preference rights. H.R. Rep. 104-675 at 6, 9, 14 (1996).

VEOA provides employment opportunities to preference eligibles as defined in 5 USC § 2108, and to veterans who have served for three years or more on active duty and were separated under honorable conditions. 5 USC § 3304(f)(1). Congress wanted to give non-preference eligible veterans (NPE's) the opportunity to compete for positions against candidates who are eligible by means of their status, usually those who are already federal employees, or who are already employed by the specific agency. *See* H. R. Rep. 105-40(I) (1997).

> H.R. 240, as amended, strengthens veterans' preference and increases employment opportunities for veterans. It permits preference eligibles and certain other veterans to overcome artificial restrictions on the scope of competition for announced vacancies, establishes an effective redress system for veterans who believe their rights have been violated, makes knowing violations of veterans' preference laws a prohibited personnel practice, provides preference eligibles with increased protections during reductions in force (RIF), requires agencies to establish priority placement programs for employees affected by a RIF and apply veterans' preference when rehiring from the list, extends veterans' preference to certain positions at the White House and in the legislative and judicial branches of government, requires the Federal Aviation Administration to apply veterans' preference in reductions in force, and provides veterans' preference eligibility for service in Bosnia, Croatia, and the Former Yugoslav Republic of Macedonia.

Id. at "Short Summary of Legislation."

Congress amended VEOA to limit the right of appeal to the Merit Systems Protection Board to preference eligibles only. *See* S. Rep. No. 105-340 at 5, 9 (1998); 5 USC § 3330a; *Campion v. MSPB*, 326 F.3d 1210, 1213, 1215 (Fed. Cir. 2003). But effective 2004, Congress amended VEOA by means of the Veterans Benefits Improvement Act ("VBIA") which allowed veterans who have received an honorable discharge after three or more years of service to file a complaint with the Department of Labor. This includes retired members of the military as well as other non-preference eligible veterans, in that retirement is also a separation from service as required by 5 USC § 3304(f)(1) and 3330a(a)(1)(B). *Styslinger v. Dept. of Army*, 105 MSPR 223, 238 (2007).

The Board has held that it has jurisdiction to adjudicate a "right to compete" VEOA claim filed by a non-preference eligible veteran pursuant to 5 USC § 3304(f)(1). *Styslinger v. Dept. of Army*, 105 MSPR 223, 236–38 (2007). The Board noted that the VBIA granted Board jurisdiction based on 5 USC § 3330a(d)(1), which provides that if the Secretary of Labor is unable to resolve a complaint within 60 days, which would include a complaint by a non-preference eligible, then the complainant may file an appeal to the Board. *Id.*

The complainant must show (1) that he or she has exhausted administrative processes before the DOL, and (2) make nonfrivolous allegations concerning three things: (a) that the incident complained of occurred on or after December 10, 2004, the enactment date of the Veterans' Benefits Improvement Act of 2004; (b) that he

or she is a veteran within the meaning of 5 USC § 3304(f)(1); and (c) that he or she was denied the opportunity to compete under merit promotion procedures for a vacancy where applications were solicited from those outside the agency. *Styslinger,* 105 MSPR at 238. VBIA did not require federal agencies to use merit promotion procedures, including issuing a vacancy announcement, where the agency would not otherwise be required. *See* 38 USC § 4214(a)(1) (authorizing VRA appointments); *Morris v. Dept. of Army*, 113 MSPR 304 (2010).

1. VEOA Statutory Structure

VEOA provides rights to veterans or preference eligibles, who make a nonfrivolous claim of a violation of rights by a federal agency under any statute or regulation relating to veterans preference, and who has exhausted his or her administrative remedies before the DOL. The purpose is to prohibit agencies from limiting applications for vacancies to internal candidates or to those with competitive status. *See* H.R. 105-40, Committee on Government Reform & Oversight, 105th Cong., 1st Sess. at 2, 17, 21. The Senate believed that "it is vital that the Federal Government open to veterans as many employment opportunities as possible." S. Rep. 105-340 at 15, 17 (1998).

Veterans' preference in hiring occurs two ways. First, agencies may appoint certain veterans noncompetitively, such as those with service-connected disabilities of 30% or more, or may appoint any veteran to a noncompetitive position that may be converted to a career appointment. Veterans and other preference eligibles receive certain preferences, such as additions to their test scores, for competitive promotions. *Dean v. Dept. of Agric.*, 99 MSPR 533, 540–41 (2005), *stay den'd by* 101 MSPR 347 (2006), *citing* 5 USC § 3112, 3309; 5 CFR § 337.101; 5 USC § 1104(a)(2). Second, veterans' preference is a factor in the competitive examining process, where preference eligibles get extra points for those positions involving numerical score rankings. *Patterson v. Dept. of Interior*, 424 F.3d 1151, 1156 (Fed. Cir. 2005).

In order to exhaust administrative remedies, the complainant has 60 days after the challenged event to file a complaint with the Secretary of Labor. When the complainant has exhausted his administrative remedies with the DOL, he or she may file an appeal with the Merit Systems Protection Board (MSPB) within 15 days after receiving a DOL letter stating the complaint could not be resolved or 61 days or more after filing the complaint with no DOL response. 5 USC § 3330a(d)(1).

For preference eligibles to establish VEOA jurisdiction before the MSPB, the complainant must (1) show that he or she exhausted administrative processes before the DOL, 5 USC § 3330a; and (2) make nonfrivolous allegations concerning three things: (a) that the incident occurred on or after the effective date of VEOA (October 30, 1998), (b) that he or she is preference eligible, and (c) that he or she suffered a violation of rights under a statute or regulation concerning veterans preference. *See Abrahamsen v. VA*, 94 MSPR 377, 379 (2003).

CHAPTER 2
REEMPLOYMENT COVERAGE—USERRA

I. TYPES OF SERVICE

USERRA covers "service in the uniformed services." 38 USC § 4303(13), (16). The term "service in the uniformed services" means the involuntary or voluntary performance of duty in a uniformed service, including active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period of absence from employment for a fitness-of-duty examination to perform such duty, and funeral honors duty as authorized by 10 USC § 12503 or 32 USC § 115. 38 USC § 4303(13).

The term "uniformed service" includes the Armed Forces, active duty, active duty for training, inactive duty training, or full-time duty for the Army National Guard, the Air National Guard, the commissioned corps of the Public Health Service, and any other category designated by the President in times of war or national emergency. 38 USC § 4303(16); *Yates v. MSPB*, 145 F.3d 1480, 1483 (Fed. Cir. 1998).

II. INDIVIDUALS

A. COVERED INDIVIDUALS

USERRA applies to any person "who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform in a uniformed service." 38 USC § 4311(a).

USERRA covers an individual on active duty who applies for a position for which the job announcement has closed, but where the position is still open upon the individual's return from active duty. *Grandberry v. DHS*, 108 MSPR 309 (2008), *citing to* 38 USC § 4313(a)(2), 5 CFR § 353.106(c), 332.312(a) and (b) ("We find, therefore, that the above provisions entitle employees to be considered for positions that are advertised in the employees' absence for military duty, even when they are not actually filled until after the employees return to civilian employment."; remanding for consideration of a violation of appellant's reemployment rights pursuant to 38 USC § 4313).

Probationary employees who lack adverse action appeal rights under 5 USC § 7511(a) are covered individuals entitled to file USERRA appeals. *Jasper v. USPS*, 73 MSPR 367, 368–69 (1997), *overruled on other grounds by Fox v. USPS*, 88 MSPR 381 (2001).

Individuals not appointed in the civil service but formally employed by a government contractor may be eligible to file a USERRA claim against a federal agency if that agency has control over their employment opportunities. *Silva v. DHS*, 112 MSPR 362, 363 (2009). In *Silva*, the appellant was in the Army reserve and employed by a contractor of the Department of Homeland Security (DHS). Upon his return from

military service with an honorable discharge, he was denied reemployment by the contractor on the basis that the DHS, which had a contractual right of approval over appellant's position, disapproved his employment. The Board held that where the federal agency had control over appellant's reemployment, and where appellant met the jurisdictional criteria, he had standing to file a USERRA appeal against DHS. *Id*. However, the Board was not empowered to adjudicate any claim against the contractor. *Id*.

B. EXCLUDED INDIVIDUALS

1. Non-Veteran Preference Eligibles

The Federal Circuit has limited USERRA jurisdiction to those named in 38 USC § 4311(a)—members of or applicants for the armed forces; or those who perform, apply to perform, or who are obligated to perform duties in a uniformed service. Preference eligibles who are not veterans are not covered. *Lourens v. MSPB*, 193 F.3d 1369, 1371 (Fed. Cir. 1999). The court declined to extend jurisdiction to preference-eligible spouses or widows in *Lourens v. MSPB where* a widow of a deceased, disabled veteran, who was not a member or applicant for the armed forces, qualified as a preference eligible but was held to not be covered by USERRA. *Id*. at 1371.

The exception to that rule is for claims of retaliation. A person does not have to be a veteran to file a USERRA claim of retaliation pursuant to 38 USC § 4311(b) if the employee claims that he or she experienced an adverse action because of actions taken to enforce a USERRA protection, testimony or statements made in connection with a USERRA investigation, assistance or participation in a USERRA investigation. *Id*.

2. Individuals to Whom a Benefit Does Not Apply

USERRA does not cover individuals denied benefits not granted by statute. *In Welshans v. USPS*, 107 MSPR 110 (2007), the appellant was, a postal employee and a member of the Army Reserve who claimed that he was improperly charged leave for reserve service. The military leave provisions of 5 USC § 6323, entitling federal employees to leave without loss in pay, time or performance or efficiency rating for active duty, inactive-duty training, and various other service related activities, do not apply to Postal employees. As a result, appellant could not recover for military leave charged for non-work days.

Board USERRA jurisdiction is not limited to enforcement of statutory provisions—the Board has jurisdiction to enforce employee rights granted by agency rules, regulations, procedures, and negotiated collective bargaining agreements. *Id*. at 113. In *Welshans*, the agency policy in effect at the time of the alleged USERRA leave violations did not prohibit the agency conduct. Appellant's claim was dismissed for failure to state a claim upon which relief can be granted. *Id*. at 114.

3. Individuals Who Did Not Receive an Honorable Discharge

USERRA benefits terminate for an individual who receives a dishonorable or bad

conduct discharge; is separated from the armed forces under other than honorable conditions; or dismissed because of court-martial, or dismissed by order of the President. 38 USC § 4304, *incorporating by reference* 10 USC § 1161. Even if an individual meets the elements cited below, he or she lacks standing to bring a USERRA appeal if the discharge was dishonorable or other than honorable. *See* 38 USC § 4304; *Downs v. VA*, 110 MSPR 139, ¶ 16 (2008). In *Downs*, the appellant received an honorable discharge from active duty for training in the Army in 1978 and an honorable discharge from the Army Reserve in 1980, but was discharged from the armed forces under "other than honorable conditions" in 1981. The Board held that appellant's 1981 discharge under other than honorable conditions terminated his USERRA (but not his VEOA) rights. *Id.* at ¶¶ 11, 16; 38 USC § 4304(2).

4. TSA Screeners and Their Supervisors

The Transportation Safety Administration (TSA) is covered by the Federal Aviation Administration's (FAA) personnel management system, codified at 49 USC § 144(n), which applies certain personnel provisions of Title 5. A note to 49 USC § 40122(g) (2002), however, exempts TSA screeners and their supervisors from USERRA coverage. *See* 49 USC § 44935; *Conyers v. MSPB*, 388 F.3d 1380, 1382 (Fed. Cir. 2004); *Spain v. DHS*, 99 MSPR 529, 532 (2005).

5. Individuals Who Have Waived USERRA Coverage

a. Abandonment of Civil Service Career

The Federal Circuit has held that a person covered by the statute may waive his or her rights to USERRA reemployment rights by abandoning civilian service for a military career. *Woodman v. OPM*, 258 F.3d 1372 (Fed. Cir. 2001). Mr. Woodman served on active duty for six years prior to his civilian employment and on active duty with the National Guard for 14 years after his civil service. He subsequently received retirement benefits from the military. He then sought reemployment rights to civilian civil service pursuant to USERRA. The Federal Circuit upheld the Board's finding that Mr. Woodman had abandoned his civilian job in favor of a military career and had waived his eligibility for USERRA reemployment coverage. *Id.* at 1379.

In decisions issued on the same day, the Federal Circuit upheld the Board's rejection, under the waiver doctrine, of two employees' claims that their years of service on active duty with the National Guard should count towards their civil service retirement. *Moravec v. OPM*, 393 F.3d 1263 (Fed. Cir. 2004); *Dowling v. OPM*, 393 F.3d 1260 (Fed. Cir. 2004). Appellants served on active duty for 16 and 12 years, respectively. To support its conclusion that they had abandoned their civil service careers, the court noted that appellants resigned their civilian positions rather than asking for leave-without-pay, and they withdrew their retirement contributions. *Id.*

Title 38 of the United States Code, section 4312(a)(2) provides for reemployment if the individual has not exceeded five years of cumulative military service, excluding exempted periods. Exempted periods are defined as service

> (1) that is required, beyond five years, to complete an initial period of obligated service;