

Employment Discrimination Protection for Veterans

Willamette Valley Inns of Court
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1. HB 3256

- a. Chapter 378, (2009 Laws); Gov signed 6/18/09
- b. Effective date January 1, 2010. (Conduct is actionable if it occurs on or after the effective date.)
- c. Codified at ORS 659A.082. (Unlawful Discrimination against person for service in uniformed service prohibited.)

2. Background and Context

- a. Prior to the 2009 legislative session, Oregon had just two *state* statutes to protect veterans from employment discrimination. They are limited in scope.
 - i. ORS 408.240. (Provides reemployment rights for *public employees*, only.)
 - ii. Former ORS 399.230 (renumbered as ORS 659A.086). Provides certain reemployment rights for members of the *National Guard* who are performing duty in their *state capacities* (e.g., doing fire suppression, as opposed to deploying overseas). It does *not* protect reservists, or guardsmen returning from federal service (e.g., combat).
- b. Other circumstances and assumptions that gave rise to HB 3256 included the following:
 - i. The wars in Iraq and Afghanistan put tremendous demands on members of the Guard and Reserve forces, their families and their employers. In 2009, for example, more than 3,000 Oregon

Guardsmen deployed. Absence for service is a challenge and a disincentive for employers to employ veterans, guard and reservists. These pressures may impact a serviceperson's ability to get and keep a civilian job.

- ii. Most employers support anti-discrimination laws – especially after they are educated about such laws. To the extent that such employers learn of a service member's employment rights, they tend to fix problems that may arise and to find acceptable accommodations. Sometimes this "fix" comes with the assistance of groups like VETS and ESGR (discussed below).
 - iii. Some employers are passively or actively resistant to supporting veterans' reemployment rights, and discriminate against veterans in the workplace.
 - iv. The federal system for protecting employment rights of citizen soldiers is largely voluntary, often successful, but strained with a large volume of cases.
 - v. Oregon vets would benefit by having a private, state right of action to remedy workplace discrimination against veterans.
3. **USERRA:** Uniform Services Employment and Reemployment Rights Act of 1994, (USERRA), 38 U.S.C. §§4301-4344; 20 CFR Part 1002 (2005).
- a. The principal anti-discrimination federal statute that protects service members' employment rights and insurance rights.
 - b. In general terms, USERRA offers federal protection to guardsmen and reservists who are voluntarily *or* involuntarily recalled to active duty (regardless of duration of active duty tour). It requires employers, regardless of size, to reemploy returning veterans on the terms they would have otherwise enjoyed but for their military duty (the so-called "escalator" theory). It prohibits workplace discrimination and retaliation based on military service.
4. **Federal Enforcement of USERRA**
- a. Under federal law, the service member has various hoops to jump through, which don't exist for HB 3256 claims:
 - i. Must provide prior notice of impending military service.
 - ii. Five year limit on military service (cumulative, per employer)

- iii. Does not include national guard “state” service
- iv. Must report back to employer or re-apply in a “timely” manner
 - 1. “Next shift” if service up to 30 days
 - 2. Within 14 days, if service 31-180 days
 - 3. 90 days, if service 181 days or more

b. The federal remedies for USERRA violations are primarily administrative in nature.

i. **ESGR.** Employer Support for the Guard and Reserve (ESGR) program is focused on employers; it emphasizes employer education and incentives for supporting guard and reserve employees. ESGR has a nationwide network of volunteer mediators who handle USERRA complaints. Complaints that are not withdrawn or resolved through mediation are referred to the Department of Labor. See, <http://www.esgr.org>.

ii. **VETS.** Complaints are made to the US Department of Labor (DOL), specifically to its Veterans’ Employment and Training Service (VETS) program. Among other things, VETS takes administrative complaints and attempts to solve USERRA problems through its mediation program.

<http://www.dol.gov/vets>.

- 1. Informal policy of **NOT** taking cases by victims with attorneys
- 2. Unresolved complaints are referred to the US Department of Justice Civil Rights Division for possible enforcement action.

iii. **USDOJ Action in Federal Court**

- 1. United States is the real party in interest in federal court. Individual members do not have a right of action in federal court under USERRA.
- 2. Individual member may file a state court action for USERRA violation.

5. **Do Access to Justice Issues Arise from the Federal Model?** Successful record of informal resolutions in the federal system, but data suggests members have limited access to court. In fiscal year 2013, according to Department of Labor’s most recent Annual Report to Congress:

a. ESGR:

- i. Opened 2,544 mediation cases, following 19,938 complaints/contacts relating mainly to reemployment problems

and discriminatory hiring/firing. Small percentage involved workplace retaliation and reprisal.

- ii. Complaints made online at ESGR website, and in writing.
- iii. 1,984 mediation cases resulted in resolution.
- iv. 560 cases not resolved.

b. The Department of Labor (VETS):

- i. Comparable to role BOLI plays in state system
- ii. Took 1,144 new, formal USSERA complaints.
- iii. Referred 83 cases to US DOJ for litigation.

c. USDOJ:

- i. Filed 6 USERRA complaints in US District Court

d. Source:

<http://www.dol.gov/vets/programs/userra/FY2013%20USERRA%20Annual%20Report.pdf>

6. State Enforcement Now Augments Traditional Federal Enforcement Model

- a. HB 3256 is about improving access to state courts for service members.
- b. HB 3256 allows service members in Oregon to proceed as they would with any other employment claim.
- c. Existing voluntary programs, like ESGR, will presumably be even more effective when:
 - i. They are backed by a state law enforcement entity with the statutory tools and willingness to step in where needed – like BOLI or the Oregon Department of Justice; and,
 - ii. Veterans can turn to their local attorneys and local courts for state remedies.

7. Summary of HB 3256's Protections:

- a. Puts workplace discrimination against service members and veterans on par with protections offered to members of other, more traditional protected classes.
- b. Employment law practitioners will feel more familiar with the enforcement model in state court – it will be the same in the state system as it would be if a more traditional discrimination claim were at issue. (*See* paragraph 8, below.)

- c. Provides that it is an unlawful employment practice for an employer to discriminate against a person because the person serves in a uniformed service.
- d. Provides that discrimination takes place if one of the following occurs:
 - i. A *public* employer denies a public employee the status or rights provided in ORS chapter 408 (related to advantages given to veterans in public employment); or,
 - ii. Any employer denies any of the following “because” the person applies for, performs or has performed in uniformed service:
 - 1. initial employment,
 - 2. reemployment following leave taken for service in a uniformed service,
 - 3. retention in employment,
 - 4. promotion, or
 - 5. any other term or condition of employment; or,
 - iii. An employer discharges, expels, disciplines or threatens a person for exercising or attempting to exercise rights to participate in a uniformed service
- e. Does not require the veteran to jump through administrative “hoops” that would apply to USERRA. (See 4a above.)
- f. Establishes an affirmative defense for employers similar to USERRA model. An employer does not commit an unlawful employment practice if:
 - i. The employer acted based on a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business, and,
 - ii. The employer's actions could not be avoided by making a reasonable accommodation of the person's service.

8. Expanding State Anti- Discrimination Enforcement Resources

- a. Veterans’ complaints about reemployment rights, including rights created by HB 3256, should still be directed to the same agencies that traditionally deal with alleged USERRA violations, including the Department of Labor's VETS Service, and ESGR.

- b. BOLI has primary enforcement authority for workplace discrimination, including enforcement for HB 3256
 - i. Administrative rules exist to process complaints for civil rights violations.
 - ii. *See* OAR 839, Division 3 (civil rights complaint procedures) and Division 5 (civil rights general description of discrimination).
- c. Oregon Department of Justice is empowered to initiate civil enforcement action.
 - i. AG may file suit where he or she has reason to believe there is a, “pattern or practice of resistance” to the rights protected under ORS § 659A.855. ORS § 659A.885(7) (2009).
 - ii. AG is also authorized to intervene in suits by private persons where the Attorney General certifies the case, “is one of general public importance”. ORS § 659A.885 (9) (2009).
 - iii. AG’s authority to initiate actions is concurrent with the authority of the Commissioner of the Bureau of Labor and Industry (BOLI). ORS § 659A.885(7). Where the Attorney General or BOLI Commissioner file suit under this section, substantial civil penalties are available in addition to the remedies otherwise available to private litigants.
 - iv. Oregon DOJ’s role in enforcing HB 3256:
 - 1. Will not take the place of BOLI, VETS or ESGR in terms of taking, investigating, or resolving complaints normally handled by those agencies. DOJ will not be taking complaints directly from veterans, in most instances.
 - 2. Will rely, primarily, on referrals from other agencies. These agencies typically will include the Oregon Military Department, BOLI, VETS, or ESGR. The ability to make such a referral may increase employer cooperation with such agencies.
 - 3. Will focus on cases which are particularly egregious and/or have state-wide significance.
- d. Miscellaneous Resources
 - i. 20 CFR Part 1002, Department of Labor, Veterans’ Employment and Training Service rules.

- ii. ESGR homepage. <http://www.esgr.mil/site>.
- iii. VETS homepage. <http://www.dol.gov/vets>.
- iv. American Bar Association USERRA pamphlet (good tool for reviewing possible USERRA claim).
www.americanbar.org/.../aba/.../userrateachingguide.authcheckdam.pdf
- v. USERRA Rights blog, article, www.userrarightsblog.com/wp-content/uploads/litigating-claims.pdf.
- vi. United States Office of Special Counsel, USERRA Power Point presentation,
www.osc.gov/documents/OSC%20HRB%20USERRA%202011.

ORS Chapter 408

Miscellaneous Benefits for Veterans and Service Personnel

Advantages Given Veterans in Public Employment

408.230 Veterans preference in public employment

(1) A public employer shall grant a preference to a veteran or disabled veteran who applies for a vacant civil service position or seeks promotion to a civil service position with a higher maximum salary rate and who:

(a)(A) Successfully completes an initial application screening or an application examination for the position; or

(B) Successfully completes a civil service test the employer administers to establish eligibility for the position; and

(b) Meets the minimum qualifications and any special qualifications for the position.

(2) The employer shall grant the preference in the following manner:

(a) For an initial application screening used to develop a list of persons for interviews, the employer shall add five preference points to a veterans score and 10 preference points to a disabled veterans score.

(b) For an application examination, given after the initial application screening, that results in a score, the employer shall add preference points to the total combined examination score without allocating the points to any single feature or part of the examination. The employer shall add five preference points to a veterans score and 10 preference points to a disabled veterans score.

(c) For an application examination that consists of an interview, an evaluation of the veterans performance, experience or training, a supervisors rating or any other method of ranking an applicant that does not result in a score, the employer shall give a preference to the veteran or disabled veteran. An employer that uses an application examination of the type described in this paragraph shall devise and apply methods by which the employer gives special consideration in the employers hiring decision to veterans and disabled veterans.

(3) Preferences of the type described in subsection (1) of this section are not a requirement that the public employer appoint a veteran or disabled veteran to a civil service position.

(4) A public employer shall appoint an otherwise qualified veteran or disabled veteran to a vacant civil service position if the results of a veterans or disabled veterans application examination, when combined with the veterans or disabled veterans preference, are equal to or higher than the results of an application examination for an applicant who is not a veteran or disabled veteran.

(5) If a public employer does not appoint a veteran or disabled veteran to a vacant civil service position, upon written request of the veteran or disabled veteran, the employer, in writing, shall provide the employers reasons for the decision not to appoint the veteran or disabled veteran to the position. The employer may base a decision not to appoint the veteran or disabled veteran solely on the veterans or disabled veterans merits or qualifications with respect to the vacant civil service position.

(6) Violation of this section is an unlawful employment practice.

(7) A veteran or disabled veteran claiming to be aggrieved by a violation of this section may file a verified written complaint with the Commissioner of the Bureau of Labor and Industries in accordance with ORS [659A.820 \(Complaints\)](#). [Amended by 1977 c.854 §3; 1989 c.507 §2; 1999 c.792 §1; 2007 c.525 §2; 2011 c.82 §1]

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408.240 Status and rights of public officer and employee during and after military duty

(1) Whenever any public officer or employee leaves a position, whether voluntarily or involuntarily, in order to perform military duty, such office or position may not become vacant, nor shall the officer or employee be subject to removal as a consequence thereof. Unless the officer or employee dies, resigns or is relieved or discharged from such duty under other than honorable conditions, during the term for which the officer or employee was elected, appointed or employed, such officer or employee shall be deemed absent on leave until release from such active service has permitted the officer or employee to resume the duties of the office or position. While so absent on leave, the officer or employee may not receive the pay or other emolument of such office or position, nor become liable, as such officer or employee, on an official bond or otherwise, for the acts or omissions of any other person.

(2) Subsection (1) of this section does not apply unless the officer or employee, upon the termination of such military duty, is qualified to perform the duties of

such position, and makes application within 90 days after the officer or employee is relieved from such military duty, or from hospitalization continuing after discharge for a period of not more than one year. If the officer or employee is not qualified to perform the duties of such position by reason of such service, but is qualified to perform the duties of any other public position, the officer or employee shall be restored to such other position, the duties of which the officer or employee is qualified to perform, as will provide the officer or employee like seniority, status and pay, or the nearest approximation thereof, consistent with the circumstances in the case.

(3) Except as otherwise provided in this subsection, subsection (1) of this section does not apply if the total of such military duty exceeds five years. Subsection (1) of this section is applicable with regard to military duty that exceeds five years if the period of additional duty was imposed by law or resulted from inability of the officer or employee to obtain orders relieving the officer or employee from active duty.

(4) Notwithstanding subsection (1) of this section:

(a) The State of Oregon shall continue coverage under an employer-sponsored health plan to a public officer or employee of the State of Oregon and any other individual provided coverage under the officers or employees plan on the day before the date the officer or employee goes on leave for a period not exceeding a total of 24 months while the public officer or employee is absent on leave.

(b) An employer other than the State of Oregon may provide coverage under an employer-sponsored health plan to an officer or employee and any other individual provided coverage under the officers or employees plan on the day before the date the officer or employee goes on leave for the period during which the officer or employee is absent on leave.

(5)(a) Notwithstanding subsection (1) of this section, the State of Oregon, a county, a municipality or other political subdivision of the state may establish and administer a donated leave program that:

(A) Allows an officer or employee who is absent on leave to receive donated leave; and

(B) Allows an officer or employee to voluntarily donate vacation time to an eligible officer or employee who is absent on leave.

(b) An officer or employee who is absent on leave and who receives donated leave under paragraph (a) of this subsection may receive an amount of donated leave that supplements any compensation received for performing military duty, but may not receive more than the amount of

base salary the officer or employee was earning on the date the officer or employee began the leave of absence.

(c) This subsection does not apply to a leave of absence under ORS [408.290 \(Benefits for public employees on temporary active duty in Armed Forces\)](#). [Amended by 1979 c.468 §13; 2003 c.72 §1; 2003 c.387 §14; 2005 c.38 §3]

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408.270 Restoration of employees seniority and tenure

Upon the termination of any leave granted by ORS [408.240 \(Status and rights of public officer and employee during and after military duty\)](#), every public employee shall be restored to the position without loss of seniority or other benefits. It is the intention of the Legislative Assembly that such employee shall be restored in such manner as to give the employee the status in employment that the employee would have enjoyed if the employee had continued in such employment continuously from the time of entering the Armed Forces until the time of restoration to such employment. Any person so restored to the position shall not be discharged from such position without cause within one year after such restoration. Any employee who has not completed the probationary period in the position at the time of leaving for military duty, shall, upon returning to such position, be required to serve the remainder of such probationary period, notwithstanding the granting of continuous time credit for time served in the Armed Forces.

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408.290 Benefits for public employees on temporary active duty in Armed Forces

(1) Except as provided in subsection (2) of this section, for initial active duty for training and for all periods of annual active duty for training as a member of the National Guard, National Guard Reserve or of any reserve component of the Armed Forces of the United States or of the United States Public Health Service, any officer or employee of the state, or of any county, municipality or other subdivision of the state, is entitled, upon application therefor, to a leave of absence from duties for a period not exceeding 15 days in any one training year, without loss of time, pay or regular leave and without impairment of efficiency rating or other rights or benefits to which the officer or employee is entitled.

(2) Unless the officer or employee has been employed by the state or by any county, municipality or other political subdivision of the state for a period of six

months next preceding application, no officer or employee is entitled to receive pay for any period during which the officer or employee is on military leave.

(3) As used in this section, training year means the federal fiscal year for any particular unit of the National Guard or a reserve component. [Amended by 1955 c.104 §1; 1969 c.368 §1; 1993 c.197 §1; 2011 c.18 §2]

Miscellaneous Veterans Benefits

408.495 Employed veteran time off for Veterans Day

(1) An employer shall provide an employee who is a veteran as defined in ORS [408.225 \(Definitions for ORS 408.225 to 408.237\)](#) with paid or unpaid time off for Veterans Day if:

(a) The employee would otherwise be required to work on that day; and

(b) The employee provides the employer with:

(A) At least 21 calendar days notice that the employee intends to take time off for Veterans Day; and

(B) Documents showing that the employee is a veteran as defined in ORS [408.225 \(Definitions for ORS 408.225 to 408.237\)](#).

(2) If the employer determines that providing time off under subsection (1) of this section would cause the employer to experience significant economic or operational disruption, or undue hardship as described in ORS [659A.121 \(Undue hardship\)](#), the employer is not required to comply with subsection (1) of this section.

(3) The employer shall, at least 14 calendar days before Veterans Day, notify the employee whether the employee will be provided time off for Veterans Day and whether the time off will be paid or unpaid.

(4) If the employer determines that the employer cannot provide time off to all of the employees who requested time off under subsection (1) of this section, the employer shall:

(a) Deny time off to all employees who requested time off; or

(b) Deny time off to the minimum number of employees needed by the employer to avoid significant economic or operational disruption, or undue hardship as described in ORS [659A.121 \(Undue hardship\)](#).

(5) An employer shall allow an employee who is a veteran and who does not receive time off for Veterans Day to choose, with the employers approval, a single day off within the year after the Veterans Day on which the employee worked as a replacement for Veterans Day to honor the employees service. [2013 c.28 §1]

Note: [408.495 \(Employed veteran time off for Veterans Day\)](#) was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 408 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

(b) Deny time off to the minimum number of employees needed by the employer to avoid significant economic or operational disruption, or undue hardship as described in ORS [659A.121 \(Undue hardship\)](#).

(5) An employer shall allow an employee who is a veteran and who does not receive time off for Veterans Day to choose, with the employers approval, a single day off within the year after the Veterans Day on which the employee worked as a replacement for Veterans Day to honor the employees service. [2013 c.28 §1]

Note: [408.495 \(Employed veteran time off for Veterans Day\)](#) was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 408 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

408.500 Oregon Veterans Emergency Financial Assistance Program

- **rules**

- (1) The Oregon Veterans Emergency Financial Assistance Program is created.
- (2) The purpose of the program is to provide emergency financial assistance to Oregon veterans and their immediate families for needs that include but are not limited to:
 - (a) Emergency or temporary housing and related housing expenses, such as expenses for utilities, insurance, house repairs, rent assistance or food;
 - (b) Emergency medical or dental expenses;
 - (c) Emergency transportation;
 - (d) Expenses related to starting a business, such as business licenses or occupational licenses;
 - (e) Temporary income after military discharge; and

(f) Legal assistance.

(3) The Department of Veterans Affairs shall administer the program created under subsection (1) of this section and shall adopt rules implementing the program, including but not limited to establishing procedures for applying for emergency financial assistance and criteria for determining eligibility to receive emergency financial assistance.

(4) As used in this section:

(a) Immediate family means a spouse, unremarried surviving spouse, child or stepchild.

(b) Veteran means:

(A) A veteran as defined in ORS [408.225 \(Definitions for ORS 408.225 to 408.237\)](#);

(B) A person who is a member of the Oregon National Guard who has been demobilized after serving on federal active duty for more than 30 days; or

(C) A person who is an Oregon resident, is a member of the Reserves and has been demobilized after serving on federal active duty for more than 30 days. [2005 c.831 §6; 2007 c.42 §1]

Note: [408.500 \(Oregon Veterans Emergency Financial Assistance Program\)](#) was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 408 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

Information and Reintegration Services for Veterans

408.503 Department website relating to benefits

- **reports to Legislative Assembly**

(1) The Department of Veterans Affairs shall establish a website that allows members of the public to request information about veterans benefits and services and enter contact information.

(2) The department shall coordinate outreach to individuals who request information through the website established under subsection (1) of this section or in any other manner.

(3) On or before October 1 of each even-numbered year, the department shall report to the appropriate interim committees of the Legislative Assembly on the departments outreach to veterans. [2009 c.851 §1]

Note: [408.503 \(Department website relating to benefits\)](#) to [408.505 \(Agencies to make available and provide information to veterans\)](#) were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 408 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.