



LEAVIN' LIKE A HR ROCKSTAR

USERRA, FMLA, Extended and Limited Duty leaves



DOL/TWC/EEOC

- EEOC - federal agency charged with enforcement of federal anti-discrimination laws.
- FEPA (includes TWC)- Overlapping authority
 - Under Title VII, employees have 300 days to bring an EEOC/THRA complaint.
 - Both agencies implemented electronic filing several years ago which dramatically lengthened the response time.
- DOL -investigate and prosecute wage claims.

“EVERYBODY WANTS TO RULE THE WORLD”

A person wearing a dark jacket and a beanie is hiking on a rocky mountain trail. They are holding a wooden walking stick in their right hand. The background features a vast, hazy mountain range under a clear blue sky with light clouds. The terrain is rugged with some patches of dry grass and small rocks.

**“LEAVING THIS
WORLD
BEHIND”**

Mental Health Leave

§ 614.015 TX.GOV'T. CODE MENTAL HEALTH LEAVE

Includes emergency medical technicians,
firefighters & telecommunications officers

- Definitions
- Paid Admin Leave

- Triggered by traumatic event
within course & scope of
employment
- Up to 3 Working Days



“CAN'T STAND UP FOR FALLING DOWN:”

LINE OF DUTY ILLNESS OR INJURY LEAVE

Tex. Loc. Gov't. Code - § 177A Non-Civil Service

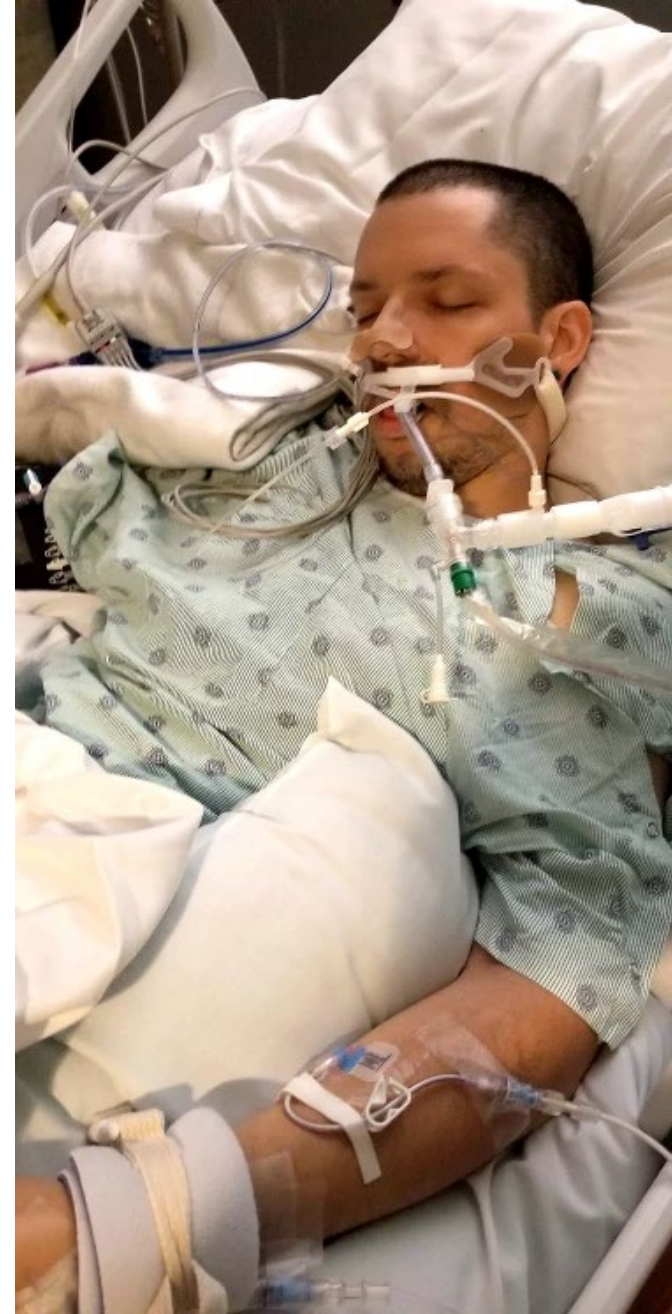
- First Responders: permanent firefighters, EMS/EMT, and full-time licensed police (includes Chiefs)
- For illness/injury related to LOD
- PAID leave “for a period commensurate with the nature of the line of duty illness or injury” – up to one year
 - “Full” Pay (not base pay, but not OT either)
 - Offset benefits from Workers’ Comp



LINE OF DUTY ILLNESS OR INJURY LEAVE

Tex. Gov't. Code - Non-Civil Service

- If leave + any extension expired, Employee requiring additional leave *shall* be placed on “temporary leave.”
 - Temporarily disabled
 - “Temporary leave” is undefined – BUT
 - Up to 1 year
 - Carries job restoration rights
 - May place on Light Duty, if eligible
 - Pay = “Full” Pay (not base pay, but doesn't include OT either)



LINE OF DUTY ILLNESS OR INJURY LEAVE

Tex. Gov't. Code - Non-Civil Service

“Temporary” Leave (cont.)

- has exhausted leave of absence and any extension
- “May use” accumulated sick, vacation, and other accrued benefits before being placed on temporary leave.
 - FMLA leave?
- Council MAY extend full/reduced pay IF unable to return after one year
- “Trumps” any Chap. 142 M&C or 174 CBA having lesser benefits/protections



“SIX FEET APART”

SUBTITLE HERE

- Any political subdivision employer
- Firefighters, Peace & Detention Officers & EMTs
- When Health Authority or Supervisor orders, based on known/possible workplace exposure
- May not deduct from available leave balances
- Must pay all benefits, & compensation + related lodging, medical, and transportation

HR ROCKSTAR - LEAVE

TEX. LOC. GOV'T. CODE §



FAMILY MEDICAL LEAVE ACT

Leavin' on a Jet Plane



“If you leave me now”

THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

- ❖ **Federal law - and reflected in **most** employer’s policies.**
- ❖ **12** workweeks of **unpaid job-protected** leave over a 12-month period for medical and family reasons.
- ❖ **26** workweeks of **unpaid job-protected** leave in a 12 month period to care for a Covered Service member, limited to a combined total of 26 workweeks for all types of FMLA leave.

Note: Although FMLA itself is an unpaid leave, **most employers run paid leave concurrent with FMLA**

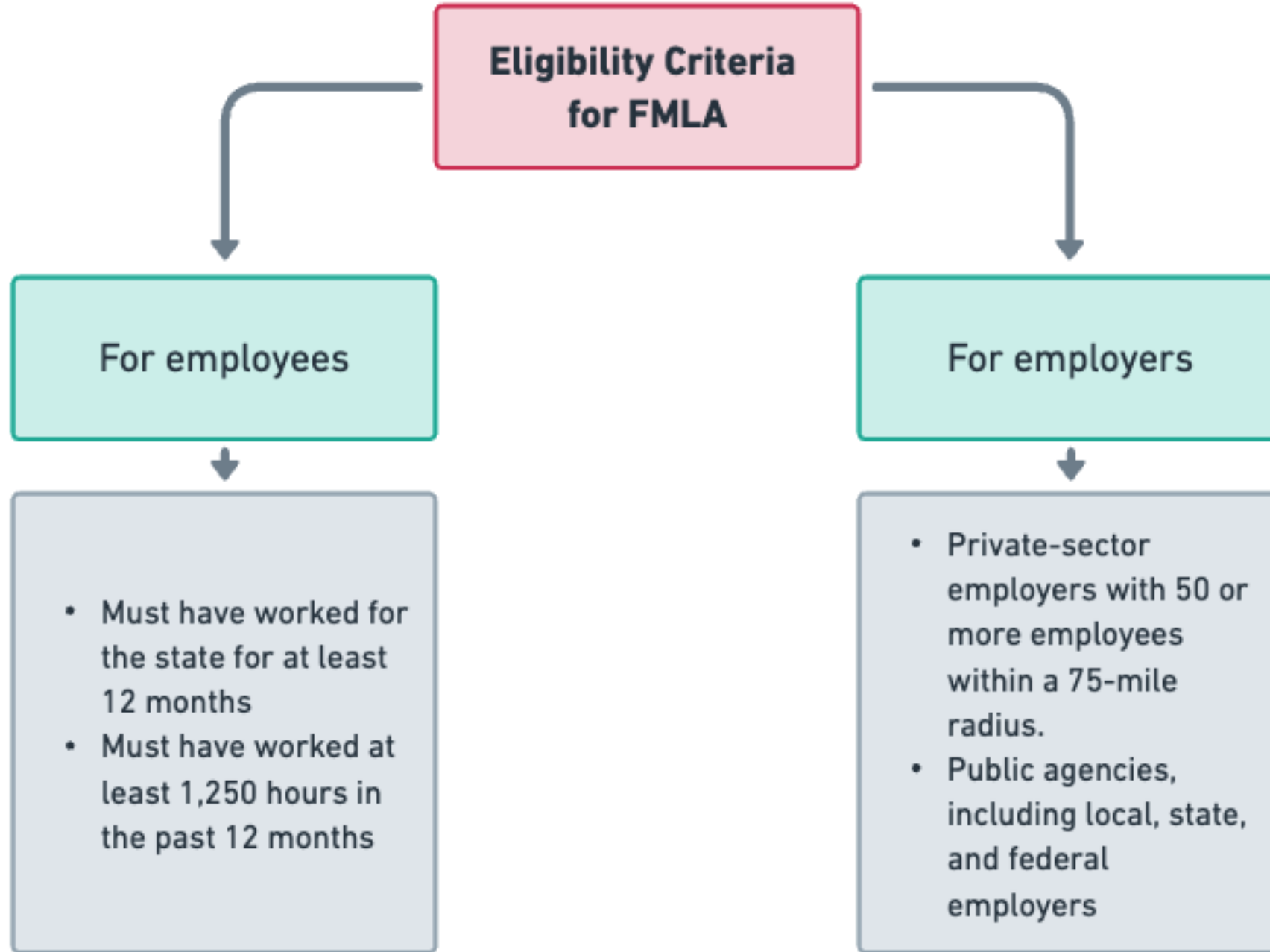
FMLA

- **Holds job/pay/benefits for employee**
- **Continues certain benefits through leave**
- **Can't discipline for FMLA absences**

“Breakaway”

- **What it does NOT do:**
- **Provide pay**
- **Allow disregard for call-in procedure**





“FAMILY BUSINESS” - FMLA

WHO IS ELIGIBLE FOR FMLA?

An Employee must:

- ❖ Have been **employed** for at least 12 months (consecutively or non-consecutively within the prior seven years).
- ❖ Have **worked** at least 1,250 hours during the 12-month period preceding the date that FMLA leave would begin.
- ❖ Have **NOT exhausted** FMLA allotment during the 12-month period preceding the date that the leave would begin

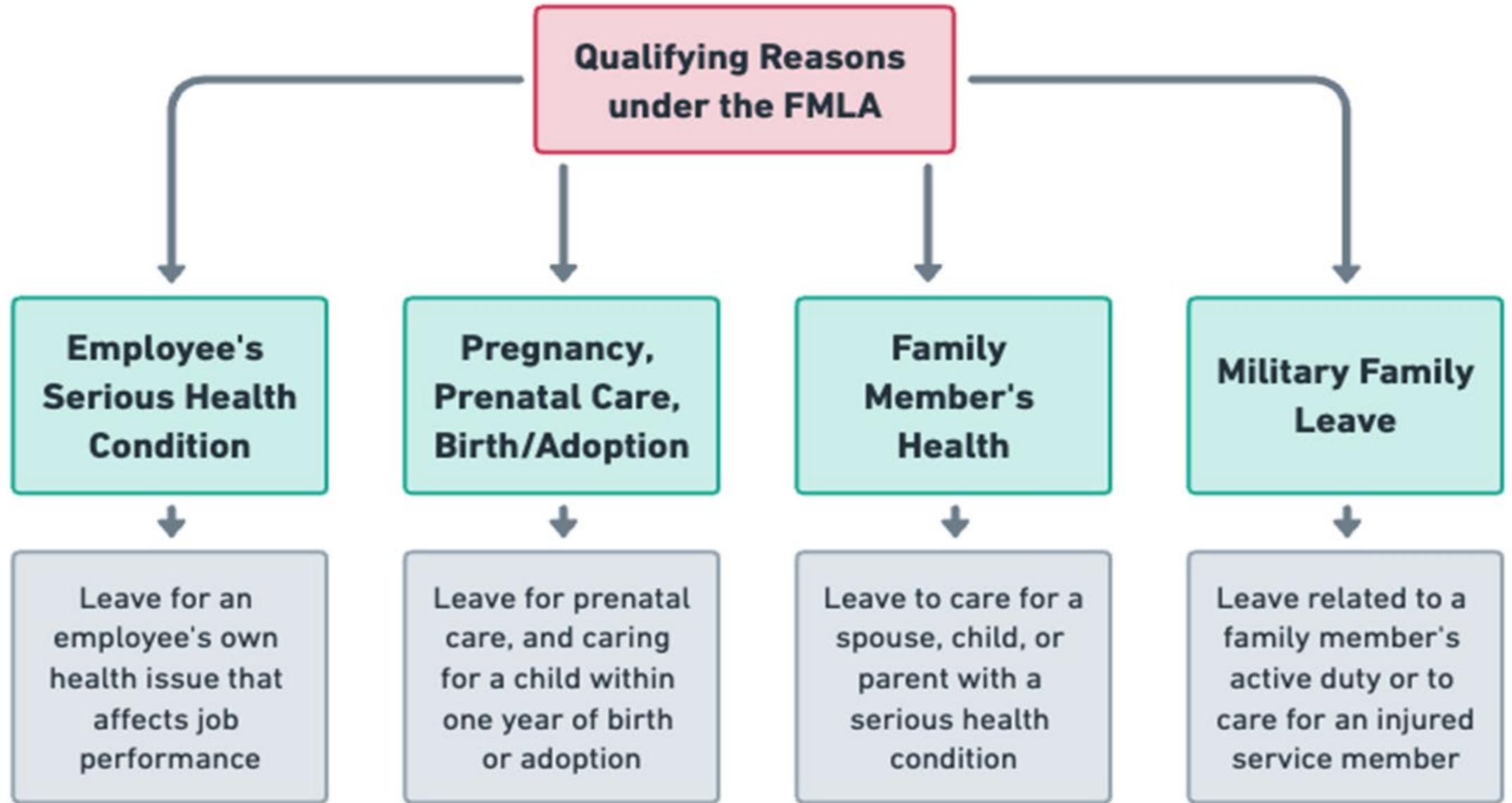
Note: The 12-months preceding the leave is a *rolling* 12-month period/calendar

FMLA ELIGIBILITY

Employer: Private-sector employers with 50 or + employees w/ a 75-mile radius, for 20 workweeks in the current/preceding calendar year. All public entities, regardless of the number of employees.



Employee: Worked for a covered employer for at least 12 months (not necessarily consecutive). They must have worked a minimum of 1,250 hours during the 12 months prior to the start of the FMLA leave. The employee should be working at a location where the employer has at least 50 employees within a 75-mile radius.



“WE ARE FAMILY” FMLA ELIGIBILITY

QUALIFYING REASONS FOR LEAVE

- ❖ **BIRTH AND CARE OF NEWBORN CHILD**
- ❖ **ADOPTION/FOSTER CARE PLACEMENT**
- ❖ **SERIOUS HEALTH CONDITION
EMPLOYEE UNABLE TO WORK
CARE FOR FAMILY MEMBER**
- ❖ **QUALIFYING MILITARY EXIGENCY
MAKE FINANCIAL, CHILDCARE/OTHER
ARRANGEMENTS**
- ❖ **MILITARY CAREGIVER**



WHAT SITUATIONS QUALIFY AS FMLA?

For a Personal Sick Leave:

- ❖ A serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's job, as certified by his or her health care provider
(ex: in-patient care, continuing treatment by a health care provider)
(continuously, intermittently or reduced schedule)
- ❖ The birth of employee's child

Note: When both spouses are employed with Employer, those employees must share 12 weeks of FMLA eligibility for birth/adoption/placement/bonding. (Federal Regulation.)

DISABILITY ISSUES

PRIORITY OF REEMPLOYMENT POSITIONS FOR EMPLOYEES WITH DISABILITIES INCURRED OR AGGRAVATED DURING UNIFORMED SERVICE:

- Reasonable efforts accommodation - allow employee to perform the escalator position
- Reasonable efforts to make employee qualified to perform a position equivalent to the escalator position
- Placement in the position that is the “nearest approximation” to the escalator position in terms of seniority, status, and pay, consistent with the particular employee’s circumstances

FOR A SICK FAMILY MEMBER:

- ❖ Placement of a child by adoption or foster care (including related court appearances, consultations with attorneys, and counseling sessions)**
- ❖ Care of one's child during the first 12 months following birth or placement**
- ❖ Care of a spouse, same sex domestic partner, child under the age of 18, or parent with a serious health condition, as certified by the family member's healthcare provider**
- ❖ Care of one's adult child (18 or over) who is incapable of self-care due to a mental or physical disability (defined by ADA).**

FOR A MILITARY LEAVE:



- ❖ Any qualifying exigency arising from employee's spouse, same sex domestic partner, son, daughter, or parent is a covered military member on covered active duty (or has been notified of impending deployment/orders to covered active duty) with the US Armed Forces in a foreign country
- ❖ Care of a covered servicemember with a serious injury or illness if employee is the spouse, same sex domestic partner, son, daughter, parent or next of kin of the covered servicemember



USERRA

THESE COLORS DON'T RUN:
UNIFORMED SERVICES EMPLOYMENT
AND REEMPLOYMENT RIGHTS ACT 38
U.S.C. § 4301

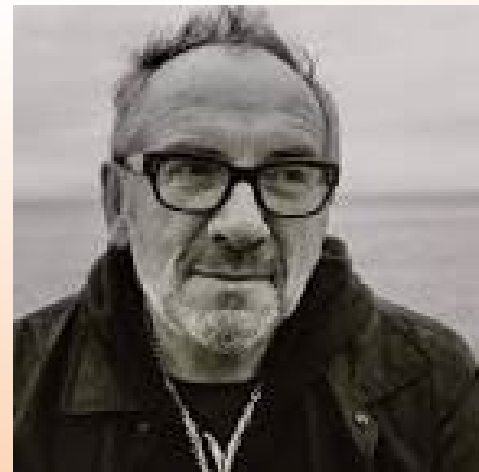
USERRA COVERAGE AND APPLICABILITY



...Whether voluntary or involuntary

NOT COVERED BY USERRA

It's Not Me, It's You



USERRA

“Brother, Brother”

- PROHIBITS DISCRIMINATION AND HARASSMENT
- PROHIBITS RETALIATION
- PROVIDES FOR PROMPT REEMPLOYMENT FOLLOWING UNIFORMED SERVICE
- ENSURES CERTAIN CONTINUED BENEFITS DURING MILITARY SERVICE



“Working Class Hero”

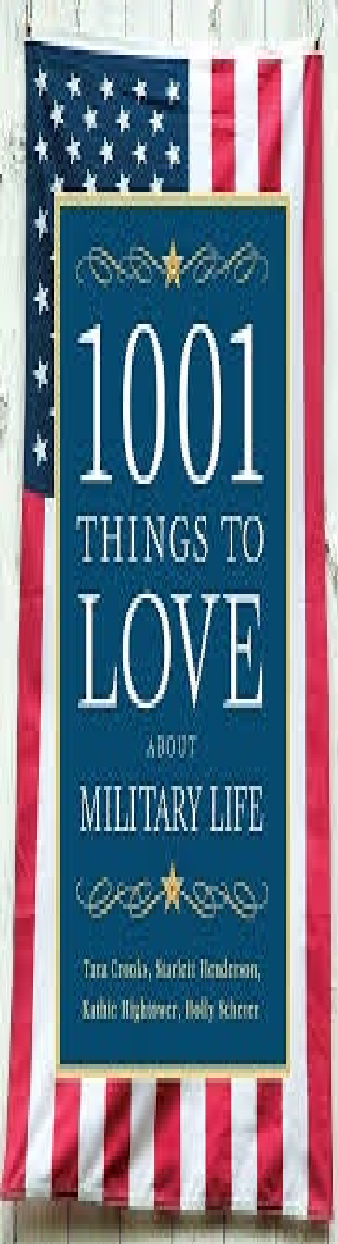
USERRA HIRING DECISIONS

- USERRA’s anti-discrimination provision - shall not deny initial employment because of past, present, or future military service. 38 U.S.C. § 4311(a)
- No violation where the evidence shows would have taken the same action in the absence of candidate’s past, present, or future military service. 38 U.S.C. § 4311(c)(1)

RE-EMPLOYMENT ELIGIBILITY

To be eligible for reemployment, the employee must:

- **HAVE LEFT HIS/HER JOB TO PERFORM UNIFORMED SERVICE**
- **PROVIDE EMPLOYER ADVANCE NOTICE OF SERVICE**
- **SERVE LESS THAN 5 CUMULATIVE YEARS OF NON-EXEMPT DUTY**



RE-EMPLOYMENT ELIGIBILITY



▶ **'BE RELEASED FROM THE
MILITARY UNDER
HONORABLE CONDITIONS**

▶ **APPLY FOR REEMPLOYMENT
WITHIN APPROPRIATE
TIME LIMITS**



USERRA'S ANTI-DISCRIMINATION PROVISION

“STAY IN MY CORNER”

EMPLOYER MAY NOT DENY RETENTION IN EMPLOYMENT, PROMOTION, OR ANY BENEFIT OF EMPLOYMENT BECAUSE OF PAST, PRESENT, OR FUTURE MILITARY SERVICE. 38 U.S.C. § 4311(A)

BENEFIT INCLUDES “THE TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT,” ... But not a hostile work environment claim - *Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172, 174 (5th Cir. Mar. 2011).

EMPLOYER OBLIGATIONS

“You And Whose Army?”

➤ **ACCEPT NOTIFICATION OF UPCOMING UNIFORMED SERVICE AND APPROVE THE REQUEST**

PROMPTLY REEMPLOY

PLACE RETURNING EMPLOYEE IN THE POSITION HE/SHE WOULD HAVE HELD IF CONTINUOUSLY EMPLOYED – ESCALATOR POSITION

Serricchio v. Wachovia Sec. LLC, 658 F.3d 169, 193– 94 (2d Cir.2011)

ESCALATOR POSITION

EMPLOYEES WITH > 90 DAYS OF UNIFORMED SERVICE:

Restored to the position THEY WOULD HAVE ATTAINED BUT FOR their service OR a position of like seniority, status and pay

OR

To the pre-service position, or a position of like seniority, status and pay, BUT ONLY IF UNQUALIFIED TO PERFORM THE DUTIES OF THE NEW 'ESCALATOR' POSITION AFTER REASONABLE EFFORTS

NON-SENIORITY BENEFITS

Employee covered by USERRA entitled to Non-Seniority rights & benefits would have been reasonably certain to obtain if not absent:

- The rights are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service. 38 U.S.

Code § 4316

- Examine:

1. comparable leaves
2. Vacation Accrual



3. Health Plan Benefits May be Continued 38 U.S. Code § 4317

USERRA - COMMON COMPLAINTS

NEGATIVE STATEMENTS ABOUT THE LEAVE

- REFERENCING THE LEAVE IN PERFORMANCE EVALUATIONS;
- COMPLAINING ABOUT CONSTANT ABSENCES FROM WORK;
- COMPLAINING ABOUT THE INCONVENIENCE TO THE ORGANIZATION OF ACCOMMODATING PERIODS OF LEAVE



TERMINATING A SERVICEMEMBER WHILE ON LEAVE

- MUST FREEZE THE DISCIPLINARY PROCESS WHILE THE SERVICEMEMBER IS ON LEAVE
- MAY CONTINUE THE DISCIPLINE UPON REEMPLOYMENT

COMMON USERRA COMPLAINTS

REQUIRING LENGTHY RETURN TO WORK PROCESS
(LAW REQUIRES “PROMPT” REEMPLOYMENT)

REQUIRING WRITTEN ORDERS
(LAW PERMITS VERBAL OR WRITTEN NOTICE)

DENYING MILITARY LEAVE FOR VOLUNTARY SERVICE
(LAW INCLUDES VOLUNTARY & IDT)

LOOKING ONLY AT OPEN POSITIONS
**(LAW REQUIRES REEMPLOYMENT IN ESCALATOR POSITION,
EVEN IF THAT MEANS BUMPING SOMEONE)**



TEXAS GOVERNMENT CODE SECTION 437.204

“Amarillo by Morning”

- Same basic protections apply to state military service, under state control (deployment ordered by Governor for of state disaster support or other emergency relief operations)
- Includes Texas State Guard service



PAID MILITARY LEAVE – FED OR STATE

Sec. 437.202. LEAVE OF ABSENCE FOR PUBLIC OFFICERS AND EMPLOYEES. (a) Except as provided by Subsections (b) and (c), a person who is an officer or employee of this state, a municipality, a county, or another political subdivision of this state and who is a member of the Texas military forces, a reserve component of the armed forces, or a member of a state or federally authorized urban search and rescue team is entitled to a paid leave of absence from the person's duties on a day on which the person is engaged in authorized training or duty ordered or authorized by proper authority for not more than 15 workdays in a fiscal year. During a leave of absence, the person may not be subjected to loss of time, efficiency rating, personal time, sick leave, or vacation time.

PAID DISASTER LEAVE - SEC. 437.202

a-1) In addition to the leave provided under Subsection (a), a person described by Subsection (a) called to state active duty by the governor or another appropriate authority in response to a disaster is entitled to a paid leave of absence from the person's duties for each day the person is called to active duty during the disaster, not to exceed seven workdays in a fiscal year. During a leave of absence under this subsection, the person may not be subjected to loss of time, efficiency rating, personal time, sick leave, or vacation time. For purposes of this subsection, "disaster" has the meaning assigned by Section 418.004.

MISCELLANEOUS LEAVES

Jury duty leave - Need not be paid (but watch out for docking exempt employees)

- **Not time worked for FLSA** (does not count toward OT), even if employer has an optional jury duty paid leave policy
- Treat as military leave &/or leave to serve as a subpoenaed witness in a court/admin proceeding (do not count against neutral absence policy limit)
- If Employer pays the leave, they can require the employee to tender the jury fee (but why?)

MISCELLANEOUS LEAVES

VOTING – SECTIONS 276.001(A)(2), 276.004 TEX. ELEC. CODE

- An employee is entitled to take paid time off for voting on election day/early voting, unless the employee has at least two consecutive hours to vote outside of the voter's working hours
- No court cases – but older AG ops



**YOU MAKE ME
WANNA...**



THANKYOU!

**ROBERTA “ROBIN” CROSS
SENIOR ATTORNEY**

HR ROCKSTAR - LEAVE



MESSER ★ FORT

THE MUNICIPAL LAW FIRM

FRISCO | DALLAS | AUSTIN | ABILENE