The USERRA Escalator Principle: Will It Take You Down?

Over the next five years, an estimated 300,000 service members, including members of the National Guard and Reserves, will annually leave the military. Many will be rejoining your workforce, and federal law says they’re entitled to be given their jobs back. One court recently clarified that military employees may also be entitled to a discretionary promotion that they may have earned while they were away serving our country ...

**Case in Point:** Luis Rivera-Meléndez, a Navy reservist, worked for a pharmaceutical company for 14 years before he left for military duty in Iraq. While he was away for 10 months, the company went through a reorganization and his position was eliminated. Instead, seven newly created “team leader” positions became open. Six positions were filled by other employees who held the same position as Rivera-Meléndez. The seventh position was filled by an employee who was lower in the hierarchy.

When Rivera-Meléndez returned from his Navy assignment, he asked to be reinstated to work. The company obliged. He was returned to the same salary and even his previous position that had, in effect, been eliminated. But Rivera-Meléndez voiced concern that that his new assignments were “reduced job responsibilities.” He argued that had he not been in the military, he would have applied for an open team leader slot for advancement.

Rivera-Meléndez sued, saying the company violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The law protects civilian job rights and benefits for veterans and reservists. USERRA’s “escalator principle” says that returning service-members must be promptly reemployed in the same position that they would have attained had they not been absent for military service, with the same seniority, status and pay, as well as other rights and benefits determined by seniority.

The employer defended the lawsuit by arguing that the new team leader position was not subject to the “escalator principle” because it was a discretionary promotion. Thus, it was not an automatic promotion that would have moved him up within the company even if he was absent.
**The ruling:** A lower court sided with the company and tossed his USERRA claim out of court. But an appellate court reversed and sided with Rivera-Meléndez, ruling that the Department of Labor (DOL) USERRA regulations allow for claims based on the “reasonable certainty” of promotions, even as they apply to discretionary promotions. Those rules say that, “assessments of discretionary and non-discretionary promotions could both be subject to the same ‘reasonable certainty’ test of whether promotion would have occurred in the absence of military service.” *(Rivera-Meléndez v. Pfizer Pharm., LLC, 1st Cir., 9/20/13)*

### 3 Lessons Learned...Without Going to Court

1. **Don't go down the up.** The court noted that Rivera-Meléndez’s responsibilities went down while his peers’ responsibilities went up. Giving him back his original title while changing his responsibilities was not in the spirit of the law.
2. **Hold on for the ride.** When employees leave for military service, hold on to their jobs. That means giving them a discretionary promotion when they return if they would have gotten one when they were away.
3. **Step off carefully.** Recently, in only one year, the DOL briefed more than 72,000 individuals on their job rights under USERRA. Therefore, employers need to make sure they don’t make a legal misstep or they will fall flat into a courtroom.