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OBLIGATIONS OF NORTH CAROLINA PUBLIC EMPLOYERS DURING A MILITARY MOBILIZATION

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This edition of the Public Personnel Law Bulletin summarizes the obligations of North Carolina public employers when employees leave to serve in the United States Armed Forces during a military mobilization. North Carolina public employers are now facing the first large-scale call-up of members of the various Armed Forces Reserves since the Gulf War. In the last decade, Congress has enhanced the protections granted those who leave their employment in order to serve in the armed forces by enacting the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), codified at 39 U.S.C. §§ 4301–4333.¹ The purposes of USERRA are two-fold: to allow Americans to serve in the United States armed forces with minimum disruption to their civilian careers and to prohibit discrimination against those who have served in the uniformed services. Under USERRA, employees who leave to serve in the armed forces are, in most instances, entitled to return to their former jobs when their military service is over.

North Carolina law also prohibits discrimination against military personnel by both public and private entities² and gives preference to veterans for state positions.³ But with the exception of a small number of provisions applicable only to state employees governed by the State Personnel Act (SPA) and noted below, neither the North Carolina General Statutes nor the North Carolina Administrative Code provide returning reservists with greater rights in employment than does USERRA.⁴ USERRA, therefore, governs virtually all aspects of

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1. USERRA clarifies and strengthens the protections afforded employees under the Vietnam-era Veterans Reemployment Rights Act, which USERRA replaces.

2. N.C. Gen. Stat. §§ 127B-10 through 127B-15 (hereinafter G.S.). North Carolina makes such discrimination a criminal offense. G.S. 127B-15.

3. G.S. 126-80.

4. USERRA supersedes any state or local law that grants employees on military leave more limited rights in employment. 38 U.S.C.A. § 4302(b) (West 2001).

military leave from civilian employment, although employers are always free to grant their employees additional rights and benefits beyond those mandated by law.

Employers Covered by USERRA

All employers are covered by USERRA. USERRA governs, by its terms, any person, institution, organization, or other entity that pays a salary or wages for work and expressly includes states, their agencies, and their political subdivisions.⁵ Thus, all units of North Carolina state and local government must comply with USERRA's provisions.

Forms of Military Duty Covered

USERRA applies to any employee serving in the United States Army, Navy, Air Force, Marine Corps, and Coast Guard. It also applies to employees serving in the Army National Guard and Air National Guard and the commissioned corps of the Public Health Service, as well as to "any other category of persons designated by the President in time of war or national emergency," whether such persons are serving on a voluntary or involuntary basis.⁶ As of the date of this bulletin, most affected employees will likely have been called up for active duty, but employers should note that USERRA applies equally to active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and to any period during which an employee is absent either for a medical examination to determine fitness for duty or to perform funeral honors duty.⁷

Employer Duties during a Military Leave

Salary

USERRA *does not require* employers to continue paying an employee's regular wages or salary while the employee is on leave or to make up the difference between the employee's military pay and

his or her regular wages or salary.⁸ On the other hand, USERRA does not prohibit employers from paying employees on military leave their salaries, in whole or in part, if the employer chooses to do so. A number of North Carolina local government employers have expressed interest in supplementing their employees' military pay. Public employers should be careful to follow their current policies for paying employees on military leave: if an employer decides to enact a new policy or revise an existing one, it should consider whether it intends the policy to apply to all future military call-ups, or to be limited in time, and further, whether such pay supplements will continue throughout the length of the call-up or only for a defined period. Public employers should also consult with their respective city or county attorneys for an opinion as to whether the policy and the particular method chosen for supplementing employees' military pay would violate the public purpose doctrine as set forth in the North Carolina Constitution.⁹

8. Although state employees subject to the State Personnel Act who are members of the Armed Forces Reserves are entitled to military leave *with pay* for up to 120 hours per fiscal year for active duty *training*, military leave for *extended* active duty is leave without pay. Note that the military leave provisions of the State Personnel Act do not apply to those local government employees subject to the SPA.

9. Article I, Section 32 of the North Carolina Constitution provides, "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." The public policy doctrine is discussed in *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995) (proposed severance payment to county manager was compensation beyond that due for services rendered and thus unconstitutional); *Motley v. State Bd. of Barber Examiners*, 228 N.C. 337, 45 S.E.2d 550 (1947) (exemption for veterans with military barbering experience from certain licensing requirements did not constitute violation of prohibition against emoluments or privileges except for public services); *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281 (1945) (although military service constitutes "public services" within meaning of public purpose doctrine, proposed conveyance of city property for construction of veterans' recreation center was beyond the power of the city); *Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669 (1927) (act providing for loans to veterans constitutional as military service is public purpose).

5. 38 U.S.C.A. §§ 4303(4)(A)(iii), (14) (West 2001).

6. 38 U.S.C.A. §§ 4303(13), (16) (West 2001).

7. 38 U.S.C.A. § 4303(13) (West 2001).

Other Terms and Conditions of Employment

The primary purpose of USERRA is to put employees in the same employment situation with respect to seniority and benefits that they would have been in had they not taken time off to serve in the military. Although USERRA does not contain any provisions related to income maintenance, there are four areas in which USERRA does impose duties on employers who have employees absent on military leave: seniority and associated rights and benefits, health benefits, retirement benefits, and job security.

Seniority and Associated Benefits

USERRA directs employers to deem employees who are engaged in military service as taking a furlough or leave of absence.¹⁰ Although employers are free to hire replacements for employees on military leave, they must re-employ an employee returning from a military leave of absence in the same position and with the same seniority and other rights and benefits that the employee had on his or her last day of work and must also grant any additional seniority, rights, and/or benefits to which the employee would have been entitled had he or she not been on leave.¹¹ For example, if the employer has granted an across-the-board pay increase to all its employees, or to all of the members of a particular department, or to all employees of a certain rank, an employee who would otherwise have been entitled to the increase but for being absent on leave must also be given the increase. Similarly, if the time for an employee's regularly scheduled performance review comes around while the employee is on military leave, supervisors should either (1) conduct a performance evaluation at the regularly scheduled time and grant the employee any raise or promotion to which he or she is entitled or (2) if the employer's procedures call for employee participation in the performance review, conduct the evaluation immediately upon the employee's return, making any raise or promotion effective as of the day on which it would otherwise have taken effect had the performance review been conducted at the regularly scheduled time. Again, if the employee would have earned the right to some additional seniority-based benefit (for example, a greater number of vacation days, or parking rights) had he or she been continuously employed instead of on military leave, the employer must grant those

10. 38 U.S.C.A. § 4316(b)(1)(A) (West 2001).

11. 38 U.S.C.A. § 4316(a) (West 2001).

benefits or rights despite the fact that the employee was not actually working for the employer during this period.¹² Other rights and benefits that are not based on seniority must be extended to an employee on military leave only to the extent that the employer would extend such a benefit to that employee were he or she on a nonmilitary leave of absence.¹³

Use of Accrued Vacation, Sick, or Other Leave Time

Employers must allow an employee to use any *paid* vacation, sick, or other leave that has accrued prior to the start of a military leave of absence if the employee so requests. An employer may not, however, require an employee to use accrued leave.¹⁴ Employers should note that, generally, an employee away on military service does not accrue additional vacation or sick leave during the period of military leave, although the period of military absence does count toward total state service for SPA state employees.¹⁵

Health Insurance Benefits

Employees who maintain health insurance coverage on themselves or their dependents through their employers must be given the option of continuing that coverage, *at the employee's own cost*, for (1) the duration of their military leave or (2) eighteen months, whichever is shorter.¹⁶ As is the case with COBRA continuation coverage,¹⁷ the employee may not be required to pay more than 102 percent of the full premium under the employer's plan. Where an employee's military leave is for thirty days or fewer, however, the employer may only require the

12. 38 U.S.C.A. § 4316(a) (West 2001). For state employees subject to the State Personnel Act, annual longevity payments are to be computed on a pro-rated basis and paid as if the employee is separating from employment, with the balance being paid after the employee returns to work and completes an additional, full year of service. *See* 25 NCAC 1D.1127(g).

13. 38 U.S.C.A. § 4316(b)(1)(B) (West 2001).

14. 38 U.S.C.A. § 4316(d) (West 2001).

15. *See* 25 NCAC 1E.0204(b)(2).

16. 38 U.S.C.A. § 4317(a)(1) (West 2001).

17. COBRA, or the Consolidated Omnibus Budget Reconciliation Act of 1985, requires employers of twenty or more persons to offer employees who have lost or are leaving their jobs the opportunity to continue coverage on themselves or their dependents through the employer's group health plan at the employee's own cost.

employee to pay the employee's share of such coverage; the employer must continue to pay its share.¹⁸ Just as an employer may choose to supplement its employees' military pay, so too may it elect to continue to pay its share of employee health insurance premiums for all or part of the leave. Any decisions to supplement military pay and/or to continue paying for all or part of an employee's health insurance premium are separate and independent of one another.

USERRA does not contain express notice requirements, and arguably, employers do not have an affirmative obligation to inform employees of their rights to continuation coverage but may rely on the armed forces to do so instead. The United States Department of Labor, however, considers a military leave to be a COBRA-qualifying event as well,¹⁹ and employers covered by COBRA (that is, those with twenty or more employees) must advise employees of their COBRA-continuation rights, just as they would in the case of any other qualifying event. Employers should therefore consider modifying their COBRA letters to include reference to USERRA. Offering health insurance continuation coverage under USERRA and under COBRA are separate and distinct employer obligations, and the eighteen-month continuation coverage periods provided for by each statute may run concurrently.

Pension Benefits

For the purposes of determining eligibility for and calculating pension benefits, an employee who returns to work after a military absence is not to be treated as having incurred a break in service.²⁰ Rather, under USERRA, the period of time spent in military service is to be considered service with the employer itself, both for the purpose of determining when the employee qualifies for a pension and for determining the amount of the employee's monthly pension benefit²¹—provided, of course, that the employee returns to work after completing his or her service. In other words, no employee may be forced to lose accrued benefits and to requalify for participation in a pension benefit plan by reason of military

service. Similarly, if an employee would have become eligible for participation in a retirement plan but for the period of military service, the employee should become a participant upon his or her return from service, with an effective date retroactive to the date on which he or she would have qualified had employment been continuous. For those employees participating in a defined benefit plan, the calculation of benefits upon retirement is to be made as if the employee had worked continuously during the period of military leave.

USERRA requires that an employer allocate the employer's contribution to a retirement plan for employees on military leave for the period of military service once an employee on military leave has returned to work.²² This holds true despite the fact that the employee was not actually working and may not have received a paycheck from the employer during the period of military leave.

Employers who "match" or otherwise supplement employee contributions to defined contribution or elective salary deferral plans must fund the employer contribution only to the extent that the employee has contributed to the plan for the period of military service.²³ Since USERRA does not require employers to pay employees their regular salary or wages during their military leave, most employees will not be able to participate in the automatic deduction feature of such plans. USERRA therefore provides that employees may (but are not required to) make "make-up" contributions to the plan upon their return to work, provided that any such make-up payment does not exceed the amount the employee could have contributed had he or she been continuously employed during the period of military leave.²⁴ Both the employer contribution and the permissible employee contribution to a pension benefit plan for the period of military leave are to be computed based on the rate of pay the employee would have otherwise received during the period of leave or, where the rate cannot be determined with reasonable certainty, on the employee's average rate of pay during the twelve-month period immediately preceding the leave period.²⁵

USERRA's pension contribution provisions apply to the North Carolina Teachers and State Employees' Retirement System, the Local Governmental

18. 38 U.S.C.A. § 4317(a)(2) (West 2001).

19. Pursuant to 29 U.S.C. § 1163(2), which defines a COBRA-qualifying event as including "the termination, . . . or reduction of hours, of the covered employee's employment" (emphasis added). See, e.g., the U.S. Dept. of Labor Web page at <http://askpwba.dol.gov/091101faq.html#section3>.

20. 38 U.S.C.A. § 4318(a)(2)(A) (West 2001).

21. 38 U.S.C.A. § 4318(a)(2)(B) (West 2001).

22. 38 U.S.C.A. § 4318(b)(1) (West 2001).

23. 38 U.S.C.A. § 4318(b)(2) (West 2001).

24. 38 U.S.C.A. § 4318(b)(2) (West 2001). The employee has three times the period of his or her service (not to exceed five years) to make the "make-up" contributions.

25. 38 U.S.C.A. § 4318(b)(3) (West 2001).

Employees' Retirement System, and to any Supplemental Retirement Income Plan offered in conjunction with them (including, but not limited to, the Supplemental Retirement Income Plan for State Law Enforcement Officers and the Supplemental Retirement Income Plan for Local Governmental Law Enforcement Officers).

Job Security

Re-employment

In most cases, an employer must re-employ an employee returning from a military absence in the position that the employee *would have held* on the date of re-employment had he or she actually been working during the period of military service. If, in the normal course of things, the employee would have been promoted or would have rotated into another job during the period in which he or she was on military leave, then the new position is the one in which the returning employee must be placed.²⁶ The above holds true even if the employer has hired someone to replace the employee during the military absence and there are no vacant positions at the time of the employee's return.²⁷ If, for some reason, the returning employee is not qualified to perform the duties of the position that he or she would have held had the employee been continuously employed, the employer must make a reasonable effort to train the employee for the position.²⁸ "Reasonable effort" is defined as one that does not place undue hardship on the employer.²⁹ If the employee cannot perform the duties of the new position despite the employer's attempt to qualify him or her, the employer must place the employee in the position held on the date the military leave began. If the leave exceeded ninety days, the employer has the option of placing the returning employee in a position of similar seniority, status, and pay, the duties of which the employee is qualified to perform, of course.³⁰ Employers must make special accommodations for employees who

26. 38 U.S.C.A. § 4313(a) (West 2001).

27. *See* Davis v. Halifax City School System, 508 F.Supp. 966, 968 (E.D.N.D. 1981) (Veterans Reemployment Rights Act; Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992) (Veterans Reemployment Rights Act); Kay v. General Cable Corp., 144 F.2d 653, 655 (3d Cir. 1944) (Selective Training and Service Act of 1940).

28. 38 U.S.C.A. § 4313(a)(1), (2) (West 2001).

29. 38 U.S.C.A. § 4303(10) (West 2001).

30. *See* 38 U.S.C.A. § 4313(a)(1), (2) (West 2001).

return from military service with a newly acquired or aggravated disability.³¹

Discharge Only for Cause after Return

In addition to protecting the jobs held by employees on military leave, USERRA gives those who have served in the armed forces limited protection from discharge for a brief period following their return. If an employee is absent on military service for more than 180 days, USERRA prohibits an employer from discharging that employee for a period of one year following the employee's return from service except "for cause."³² An employee whose military service lasts more than 30 days and fewer than 180 days may not be discharged for a period of 180 days following the employee's return from service except "for cause."³³ The statute does not define "for cause." Thus, the statute converts an at-will employee into an employee with time-limited property rights in his or her employment. The affected individual's employment reverts to at-will employment at the end of the applicable period. Employers should note that employees who were only terminable "for cause" at the time that they began a military leave of absence retain that status as it is a condition of their employment.

When USERRA Does Not Apply

First, USERRA does not apply to temporary employees or others who should not reasonably expect that their employment is to continue indefinitely or for a significant period of time.³⁴ Employers should note that neither a probationary employee nor an at-will employee is a temporary employee within the meaning of USERRA.³⁵

Second, and more importantly, an employer is not required to re-employ someone returning from a military leave of absence if circumstances have changed so as to make re-employment unreasonable or impossible.³⁶ Although the statute does not define or provide examples of the kind of circumstances that would make re-employment unreasonable or

31. *See* 38 U.S.C.A. § 4313(a)(3) (West 2001).

32. 38 U.S.C.A. § 4316(c)(1) (West 2001).

33. 38 U.S.C.A. § 4316(c)(2) (West 2001).

34. 38 U.S.C.A. § 4312(d)(1)(C) (West 2001).

35. *See, e.g.,* Davis v. Halifax City School System, 508 F.Supp. at 968 (Veterans Reemployment Rights Act case) and cases cited therein.

36. 38 U.S.C.A. § 4312(d)(1)(A) (West 2001).

impossible, case law arising under predecessor statutes makes clear that the elimination of an entire department or function, or a significant reduction in force, would likely qualify. In interpreting an earlier veterans' re-employment rights statute, the United States Court of Appeals for the Fourth Circuit—which includes North Carolina—found that the statute's hardship exception was intended for situations in which the employer had implemented a reduction in force that would have reasonably included the returning veteran's position or had discontinued a department or function such that the re-employment of the veteran would amount to the creation of a useless job.³⁷ Employers should keep in mind, however, that the courts have also cautioned that "unreasonable" means more than inconvenient or undesirable, and that the fact that an employer has hired someone to fill the position vacated by the employee on military leave does not excuse the employer from rehiring the returning employee.³⁸ Indeed, this is true even where the substitute employee outperforms (or is for any other reason a more desirable employee than) the returning employee.³⁹

Finally, when it would impose an undue hardship on an employer to provide the training, accommodation, or other effort required to prepare a returning employee (1) for the position that he or she would have held had the employee been continuously employed or (2) for a position of similar seniority, pay, and status, the returning employee does not have to be re-employed.⁴⁰ For the purposes of USERRA, "undue hardship" means actions requiring significant difficulty or expense when considered in light of all of the relevant employer circumstances and resources.⁴¹ In all three of the above circumstances, should an employee challenge the employer's decision not to re-employ him or her, the burden of proof will be on the employer.⁴²

37. See *Meyers v. Barenburg*, 161 F.2d 850, 851 (4th Cir. 1947) (Selective Training and Service Act of 1940), citing *Kay v. General Cable Corp.*, 144 F.2d 653, 655 (3d Cir. 1944). See also *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992); *Davis*, 508 F. Supp. at 968 (fact that school system enrollment had declined during teacher's military enlistment not valid reason to refuse to re-employ teacher since reduction in teacher force occurred through normal attrition and school system had hired new teachers in veteran's area of certification).

38. *Davis*, 508 F. Supp. at 968; *Cole*, 961 F.2d at 60.

39. *Cole*, 961 F.2d at 60; *Kay*, 144 F.2d at 655.

40. 38 U.S.C.A. § 4312(d)(1)(B) (West 2001).

41. 38 U.S.C.A. § 4303(15) (West 2001).

42. 38 U.S.C.A. § 4312(d)(2) (West 2001).

Employee Obligations under USERRA

Before a permanent employee becomes entitled to the job protections that USERRA provides, the employee must give the employer advance notice that the employee will be leaving for military service.⁴³ Such notice may be written or oral.⁴⁴ There is no minimum notice period, and the statute recognizes that in some instances advance notice may not be possible.⁴⁵

Once an employee's period of military service is over, he or she must report back to work within a statutorily defined time period to obtain the benefits of USERRA's employment protections. Those whose service has been for 30 days or fewer must report to work on the next workday following the completion of service and the employee's arrival home.⁴⁶ A person who has served for more than 30 but fewer than 181 days must report back to work no later than 14 days after completing his or her service.⁴⁷ A person who has spent more than 180 days in military service has 90 days in which to return to work.⁴⁸ The statute provides for exceptions in cases where a return to work within the stated time period is impossible or unreasonable through no fault of the employee.⁴⁹ Similarly, an employee who is hospitalized or recovering from an injury or illness that occurred during military service has up to two years—and in special circumstances, even longer—to return to work.⁵⁰

Finally, an employee who is discharged from military service with a dishonorable or bad conduct discharge, or under conditions characterized as "other than honorable" by the regulations of the applicable branch of the uniformed services, ceases to be covered by USERRA.⁵¹

Employers have the right to request documentation that shows that the employee's return to work is timely, that his or her discharge is honorable, and, for employees whose absences have been extensive, that the person's total length of absence from work does not exceed five years.⁵²

43. 38 U.S.C.A. § 4312(a)(1) (West 2001).

44. 38 U.S.C.A. § 4303(8) (West 2001).

45. 38 U.S.C.A. § 4312(b) (West 2001).

46. 38 U.S.C.A. § 4312(e)(1)(A) (West 2001).

47. 38 U.S.C.A. § 4312(e)(1)(C) (West 2001).

48. 38 U.S.C.A. § 4312(e)(1)(D) (West 2001).

49. 38 U.S.C.A. § 4312(e)(1)(A), (C) (West 2001).

50. 38 U.S.C.A. § 4312(e)(2)(A) (West 2001).

51. 38 U.S.C.A. § 4304 (West 2001).

52. 38 U.S.C.A. § 4312(f)(1) (West 2001). Except in certain narrow circumstances, employers are not required to

Discrimination in Employment Prohibited

USERRA not only protects the current employment status of those undertaking military service; it also prohibits discrimination of any kind in employment against someone who is or shall be performing, has performed, or intends to perform military service.⁵³ Thus, a person's initial employment application cannot be rejected on the ground that he or she is a member of the military reserves and is therefore likely to be absent when called up for duty.⁵⁴ Similarly, an employee cannot be denied consideration for a newly available promotion simply because he or she is not present to apply for it.⁵⁵ Nor can an employee's request for military leave be denied and categorized as an unexcused absence.⁵⁶

As noted earlier, North Carolina law also prohibits discrimination against members of the military by both public and private employers.⁵⁷ Specifically, the General Statutes enjoin an "officer or employee of the State, or of any county, city and county, municipal corporation, school district, water district, or other district" from discriminating against mem-

re-employ employees whose cumulative leave (including all previous absences taken from the employer for military service) exceeds five years. 38 U.S.C.A. § 4312(a)(2), (c)(1)–(4) (West 2001).

53. 38 U.S.C.A. § 4311(a) (West 2001).

54. *See, e.g.,* Martir v. Department of the Navy, 81 MSPB 421 (1999) (allegation that petitioner was a veteran and that employer agency had denied his applications for four positions, while offering them to similarly situated nonveterans was sufficient to state a claim under USERRA's antidiscrimination provisions). *See also* Tindall v. Department of the Army, 84 MSPB 230 (1999) (employee alleging that denial of promotion because of his status as member of the Army reserves stated a cause of action under USERRA).

55. *See* Haskins v. Department of Navy, 86 MSPB 357 (2000) (allegation that agency failed to consider employee for promotion while he was serving in Operation Desert Storm states a claim for which relief may be granted under USERRA).

56. *See* Johnson v. U.S. Postal Service, 85 MSPB 1 (1999) (claim that employee was denied leave, charged with being AWOL, and suspended for periods spent on reserve duty invokes Merit Systems Protection Board's jurisdiction under USERRA).

57. G.S. 127B-12 and 127B-14 (public employers) and 127B-11 (private employers).

bers of the armed forces "with respect to their employment, appointment, position or status" and from denying, disqualifying, or discharging them "from their employment or position by virtue of their membership or service in the military forces of this State or of the United States."⁵⁸

Enforcement

The enforcement provisions of USERRA apply to government and private employers alike. State and local government employees alleging violations of USERRA may seek to enforce their rights by filing a complaint with the Secretary of Labor or by bringing suit against the government employer in either state court or the United States District Court.⁵⁹ The court may require the employer to re-employ the person, pay the person back wages and the amount of lost benefits, or both, and if the court finds the violation to be willful, it may award the plaintiff an amount equal to his or her back wages and/or benefits as liquidated damages.⁶⁰ The court may also award pre-judgment interest, attorney fees, and the costs of litigation to a successful plaintiff.⁶¹

Violations of Sections 127B-12 and 127B-14 of the North Carolina General Statutes, which prohibit state and local government employees from discriminating against those serving in the armed forces, constitute Class 2 misdemeanors.

Conclusion

USERRA imposes significant burdens upon the nation's employers. While large-scale mobilization of the United States Armed Forces and Armed Forces Reserves will present challenges to all employers, the effect on public employers—particularly smaller municipalities and counties—will be especially pronounced. Because the costs of defending a lawsuit alleging a violation of USERRA will be high and the burden of proof in a USERRA case will be on the employer rather than the employee (as is usually the case), North Carolina public employers should review their practices relating to military call-ups carefully for compliance with this statute and with the relevant provisions of North Carolina law.

58. *See* G.S. 127B-12.

59. 38 U.S.C.A. §§ 4322, 4323(a), (b) (West 2001).

60. 38 U.S.C.A. § 4323(d)(1) (West 2001).

61. 38 U.S.C.A. § 4323(d)(3), (h)(2) (West 2001).

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