I. INTRODUCTION

State and federal law provide certain protections to employees who are serving in the uniformed service. This includes the right to military leave, continued insurance coverage, accrual of seniority, and reemployment rights. Additionally, veterans have additional protections under Minnesota relating to their discharge from employment. This presentation will provide an overview of the legal framework for military leave issues under State and Federal law, and outline the process that school districts must follow when considering discharge of a veteran.

II. LEGAL FRAMEWORK FOR MILITARY LEAVE UNDER FEDERAL LAW

A. Uniformed Services Employment and Re-Employment Act (“USERRA”).

In 1994, Congress enacted USERRA, which prohibits employers from denying initial employment, reemployment, retention in employment, promotion, or
any benefit of employment to an individual on the basis of his or her military service.

1. **Important Definitions under USERRA.**

   a. **Employer.** Any person, institution, organization or other entity that pays salary or wages for work performed or that has control over employment opportunities. 38 U.S.C. § 4303(4). USERRA applies to all employers, public and private, regardless of their size. 20 C.F.R. § 1002.34.

   b. **Service in the Uniformed Services.** The performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. This definition:

      1. Active duty;
      2. Active duty for training;
      3. Initial active duty for training;
      4. Inactive duty training;
      5. Full-time National Guard duty;
      6. Time spent for disaster relief assistance; and
      7. Funeral honors duty.

   c. **Uniformed Service.** The Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and any other category of persons designated by the President in time of war or national emergency. 38 U.S.C. § 4303(16).

2. **USERRA Purposes.** Congress enacted USERRA for the following three statutory purposes:
1. 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;

2. To minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

3. To prohibit discrimination against persons because of their service in the uniformed services.

Court have found that to give full effect to Congress’s intent, USERRA should be “liberally construed for the benefit” of service members. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 66 S. Ct. 1105, 1111 (1946), Lisdahl v. Mayo Foudnation, 633 F.3d 712, 718 (8th Cir. 2011); see also 20 C.F.R. § 1002.2.

3. **Interplay between USERRA and State military leave laws.** USERRA sets the floor for military employee leave protections. USERRA expressly provides that its minimum requirements cannot be ignored or reduced by any law or other agreement. 38 U.S.C. § 4302(b). Conversely, USERRA does not supersede any state law or contract that provides benefits beyond USERRA’s requirements. 38 U.S.C. § 4302(a). As discussed in greater detail later, Minnesota law provides additional protections beyond USERRA, including paid military leave.

**B. Leave and reemployment under USERRA.** The biggest benefit of USERRA, and the one that most often raises questions for school districts, is an employee’s right to military leave and reemployment upon return from that leave.

Under USERRA, an employee is entitled to reinstatement to their position with seniority, status, and pay that the employee would ordinarily have attained in that position given their job history. See 20 CFR §§ 1002.180; 1002.193; 1002.210.

1. **Scope of who is considered an “employee.”** The term “employee” is construed broadly. Under USERRA, “even temporary, probationary, and seasonal employees enjoy USERRA protections.” Mace v. Willis, 897 F.3d 926, 928 (8th Cir. 2018) (citing 20 C.F.R. § 1002.41).
2. **Type and amount of leave.** USERRA provides that employers must provide military leave for up to five cumulative years of active duty service. Employees do not receive pay for their leave, unless they elect to use their accrued paid leave. Note that there are a number of exceptions to this five-year limit which allow employees to serve longer than five years while still receiving USERRA protections.

3. **Pay during leave.** Employees are not entitled to any paid military leave under USERRA. Instead, Minnesota law provides for a certain amount of paid military leave, as discussed in greater detail in Section III.

4. **Use of accrued vacation or sick leave.** Upon request by an employee, they must be allowed to use any accrued vacation or other paid leave during the period of service to continue their pay. 20 C.F.R. § 1002.153(a). That said, an employee is not entitled to use sick leave unless the employer allows other employees to use sick leave for any reason or allows similarly situated employees on comparable leave of absence to use accrued paid sick leave. An employer cannot require that the employee use any vacation or other paid leave during the employee’s leave. *Id.*

5. **Insurance Coverage.** School districts must provide continuation of insurance coverage for employees on leave under employer-sponsored health plans. 20 C.F.R. § 1002.164.

   a. **Time.** A school district must allow for the employee to elect to continue coverage for the lesser of twenty-four months from the beginning of the employee’s military leave or the date by which the employee applies or fails to apply to return to employment under USERRA. *Id.*

   b. **Cost of coverage.** If the employee performs uniformed service for fewer than 31 days, they cannot be required to pay more than their regular employee share, if any, for the coverage. 20 C.F.R. § 1002.166.

   If the employee performs uniformed service for 31 or more days, they can be required to pay up to 102% of the full premium under the plan, which represents the employer’s share plus the employee’s share, and 2% in administrative costs. *Id.* When employees are on military leave for 31 or more days, the employee and their dependents will typically receive health insurance through the military.
c. **Reinstatement of coverage upon reemployment.** If health plan coverage for the employee or their dependents was terminated by reason of the military leave, that coverage must be reinstated upon reemployment without any exclusion or waiting period. 20 C.F.R. § 1002.168. If an employee requests to delay reinstatement until a date after when they are reemployed, “USERRA permits but does not require the employer” to do so. 20 C.F.R. § 1002.169.

6. **Pension plans.** USERRA provides that all pension plans in which benefits are earned for length of service are protected. 38 U.S.C. § 4318(a). Upon reemployment, the employee is treated as not having a break in service with the employer maintaining the pension plan. 20 C.F.R. § 1002.259. According to guidance from Minnesota Public Employees Retirement Association, a public employee on military leave for less than five years has the option to purchase service credit for the years missed due to the leave.

7. **An employee’s eligibility for USERRA reemployment.** In general, an employee is eligible for reemployment following USERRA military leave if the following criteria are met:

a. **Notice.** The employer had advance notice of the employee’s service;

   1. The notice may be either verbal or written. The notice may be informal and does not need to follow any particular format. 20 C.F.R. § 1002.85(c).

   2. There is no specific date by which the employee must give advance notice. Rather, it must be “reasonable under the circumstances.” 20 C.F.R. § 1002.85(d). That said, the Department of Defense strongly recommends that employees provide their employees with at least 30 days’ notice prior to departure for uniformed service when it is reasonably feasible to do so.

b. **Time of Service.** The employee had five years or less of cumulative service in the uniformed services with that particular employer;

c. **Application for reemployment or return to employment.** The employee timely returns to work or applies for employment; and
1. When an employee must report back to work or apply for reemployment depends on the length of time they were on leave for military service:

   a. **For periods of less than 31 days**: The “employee must report back to their employer not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee’s residence.” 20 C.F.R. § 1002.115(a).

   b. **For periods of more than 30 days but less than 181 days**: The employee “must submit an application for reemployment (written or verbal) with the employer not later than 14 days after completing service.” 20 C.F.R. § 1002.115(b).

   c. **For periods of more than 180 days**: The employee “must submit an application for reemployment (written or verbal) not later than 90 days after completing service.” 20 C.F.R. § 1002.115(c).

2. Note that an employee is allowed to work for other employers while still retaining their right to reemployment from their pre-service employer.

   a. For example, if a school district employee served on active duty for one year, upon completion of active duty they would have 90 days to apply for reemployment. During those 90 days, the employee is allowed to work for someone else while still being guaranteed reemployment with the district.

3. For leaves for uniformed service in excess of 30 days, an employer is permitted to request certain documentation from the returning employee. 20 C.F.R. § 1002.121. The employer may request documentation establishing that:

   a. The application for employment is timely;
b. The employee has not exceed the five-year limit on duration of service; and

c. The employee’s separation or dismissal from service was not disqualifying.

Typical documentation to support these factors include:

a. Department of Defense 214 Certificate of Release or Discharge from Active Duty;

b. Copy of duty orders;

c. Letter from commanding officers of a Personnel Support Activity or someone of comparable authority;

d. Certificate of completion from military training school;

e. Discharge certificate showing character of service; or

f. Copy of extracts from payroll documents showing periods of service.

A school district cannot delay reemployment if the above documentation is not readily available. 20 C.F.R. § 1002.122. The employee should be conditionally reemployed while this documentation is obtained.

4. Absent special circumstances, upon receiving an application from reemployment, an employer must allow the employee to return to reemployment within two weeks of receiving the application. A type of special circumstance that would allow for a longer time to reemploy may be if the employee is on active duty for several years and the employee needs to reassign or give notices to other employees who occupied the returning employee’s position.

5. Note that a school district cannot require that the employee provide it notice when the employees goes on leave of whether they intend to return to employment. In fact, USERRA provides that even if an employee voluntarily provides written notice to their employer that they do not
intend to seek reemployment, the employee is still entitled to reemployment upon completion of their uniformed service. 20 C.F.R. § 1002.152. If an employee did provide this type of written waiver, they would only be waiving non-seniority rights and benefits. They would still be entitled to all other benefits under USERRA.

d. **Character of Service.** The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.

8. **Change in employer’s circumstances.** While an employee is entitled to reinstatement in the position they had before their leave, “an employer is not required to reemploy a person . . . if the employer’s circumstances have so changed as to make such reemployment impossible or unreasonable.” *Milhauser v. Minco Products, Inc.*, 855 F. Supp. 2d 885, 892 (D. Minn. 2012) (quoting 38 U.S.C. § 4312(d)(1)(A). This exception is narrowly construed and the burden is always on the employer to prove that it applies.

   a. An example of a change in circumstance would be “where there has been an intervening reduction in force that would have included that employee.” 20 C.F.R. § 1002.139.

   b. The hiring of replacement employee to cover the employee on USERRA leave is not a valid reason to deny reemployment, even if it requires terminating the replacement employee. *Id.*

9. **The type of position the employee is entitled to upon return to employment.** As a general rule, the employee is entitled to reemployment in the job position that they would have attained with reasonable certainty if not for the absence due to uniformed service. This is known as the “escalator position.” 20 C.F.R. § 1002.191.

   a. Federal regulations require the employer to first determine the employee’s escalator position based on the job position that the employee had before leaving for uniformed service and would have attained absent that service.

   b. Once that position has been determined, the employer may consider the employee’s length of service, qualifications, and disability, if any, to determine whether that position is appropriate for the particular case.
c. According to the United States Supreme Court, a returning service member “does not step back on the seniority escalator at the point he stepped off. He steps back on at the price point he would have occupied had he kept his position continuously.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

d. The test to determine whether the returning service member is in the appropriate position is whether “it was reasonably certain that the returning service member would have attained the higher position but for his absence due to military service.” *Rivera-Melendez v. Pfizer Pharm., LLC*, 730 F.3d 49, 57 (1st Cir. 2013); see also *Huhmann v. Fed. Express Corp.*, 874 F.3d 1102, 1105-06 (9th Cir. 2017) (describing the escalator principle and reasonable-certainty test as “two intersecting doctrines” used together “to guarantee that progress in the returning service member’s overall career trajectory has not been set back by his service”).

10. **Seniority, status, and rate of pay.** The reemployment position includes the seniority, status, and rate of pay that an employee would have ordinarily attained in that position given their job history. This includes those rights established or changed by a collective bargaining agreement, employer policy, or employer practice. 20 C.F.R. § 1002.236.

   a. The rate of pay must be determined by taking into account pay increases, step increases, or periodic increases that the employee would have attained with reasonable certainty had they been continuously employed during that time period.

11. **Reemployment of disabled veterans.** If an employee becomes disabled due to their military service while on leave, there are additional reemployment obligations on the school district.

   a. **Position.** Similar to non-disabled service members, a disabled service member is entitled to the same escalator position they would have attained but for their uniformed service. 20 C.F.R. § 1002.225.

   b. **Accommodations.** If the employee has a disability incurred in, or aggravated during, the period of uniformed service, a school district must:

      1. make reasonable efforts to accommodate the disability; and
2. Help the employee become qualified to perform the duties of their reemployment position.

Note that this obligation is higher than obligations under the ADA. Not only must the school district accommodate the disability, but it must also make reasonable efforts to help the employee become qualified for the position. 20 C.F.R. § 1002.226.

c. Inability to perform position. If the employee is unable to perform the position, even with accommodations and efforts to qualify them for the position, a school district must place him in one of the follow positions:

1. A position that is equivalent in seniority, status, and pay to the escalator position; or

2. A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee’s case. A position that is the nearest approximation may be a higher or lower position, depending on the circumstances.

C. Discrimination Protections under USERRA. USERRA also prohibits discrimination against veterans with respect to any benefit of employment on the basis of their membership, application for membership, performance of service, application for service, or obligation to perform service in the uniformed services. 38 U.S.C. § 4311(a).

1. A benefit is defined broadly as “any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice.” 38 U.S.C. § 4303(2).

2. The anti-discrimination protections apply at initial hiring stages, even if the employee is ultimately never selected for employment. For example, if a school district withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.” 20 C.F.R. § 1002.40.

3. To bring a successful discrimination claim, an employee must show that their military status was a “substantial or motivating factor in the adverse employment action.” Sheehan v. Dep’t of Navy, 240 F.3d 1009, 1013 (Fed.
Cir. 2001); 20 C.F.R. § 1002.22. An employee’s military status is a motivating factor if the employer “relied on, took into account, considered, or conditioned its decision on that consideration.” Coffman v. Chugach Support Servs. Inc., 411 F.3d 1231, 1238 (11th Cir. 2005).

a. If an employee makes that initial showing, the employer must then show that the adverse action would have been taken in the absence of the employee’s membership in the military.

b. Factors that courts may consider in determining if there was a discriminatory motivation under USERRA include proximity in time between the employee’s military activity and the adverse action, inconsistencies between the proffered reason and other actions of the employer, an employer’s express hostility towards the member, and disparate treatment of members in service. See Sheehan, 240 F.3d at 1014.

D. Recent Minnesota Court of Appeals Case Addressing Reemployment and Discrimination. There is a limited body of Minnesota case law addressing USERRA rights. That said, in April 2019, the Minnesota Court of Appeal provided a detailed analysis regarding allegations that an employer failed to reemploy an employee and also discriminated against that employee in violation of USERRA.

In Breaker v. Bemidji State University, the Minnesota Court of Appeals addressed the scope of an employee’s right to reinstatement and issues that arise when a position is removed while the employee is on USERRA leave.

1. Facts. Between 1997 and 2005, Martin Breaker taught in the Business Administration Department for Bemidji State University (“BSU”). For each school year, he entered into a fixed-term, nine-month contract that expressly stated that there was no implication of future employment. While he had only annual contracts, after his initial hiring, he never had to apply again and was still brought back to BSU each year.

Throughout his pre-service employment, Breaker taught undergraduate classes from his home, principally via Interactive Television (“ITV”). Additionally, Breaker served as the business program director, which involved coordinating ITV courses, advising students, and promoting the business program. Breaker earned additional compensation for serving as the business program director.
In August 2005, Breaker was called to active duty in Iraq. At the time of his deployment, both Breaker and BSU thought that he would be released from service the following year. Instead, Breaker’s deployment was extended until 2008. Breaker kept BSU apprised of his extension, and upon release from active duty, notified BSU about his intent to return.

Upon receiving notice of his intent to return, Breaker and BSU exchanged four different written offers of reemployment, each of which was rejected by Breaker. In the first offer, BSU offered Breaker an on-campus, one-year fixed term teaching agreement to teach four business administration classes. According to BSU, ITV courses were no longer offered. Additionally, only tenured faculty were allowed to teach online courses. Because Breaker was not tenured and there were no ITV courses, BSU informed Breaker that he would be required to teach on campus.

In the second offer, BSU offered Breaker an on-campus, one-year fixed teaching agreement at a Step 13 salary schedule, which equated to a higher salary and seniority than when he left. Because the business program direction position was eliminated by BSU, BSU’s second offer stated that he would be eligible for “overload assignments” as a way to earn additional salary. BSU also included language in the second offer relating to Breaker’s eligibility for sabbatical leave, though BSU did not take into account the time he was on military leave when determining the amount of sabbatical he was entitled to.

In the third offer of reemployment, BSU repeated most of the terms of the second offer, except that it now stated he would be teaching three statistics courses and two economics courses. The offer included overload assignments and also stated that the business administration department was reviewing its policies about only tenured faculty being allowed to teach online courses, which Breaker wanted.

In the fourth and final offer, BSU offered many of the same terms of the third offer, but added that Breaker would be guaranteed additional work opportunities to earn at least $15,000 and would count Breaker’s military leave toward his eligibility for sabbatical leave. Following his rejection of the fourth offer, Breaker sued BSU and the Minnesota State Colleges and University system (“MnSCU”).

2. **Breaker’s Claims.** Breaker asserted two claims against BSU and MnSCU relevant to the lawsuit before the Court of Appeals. First, he asserted that BSU violated USERRA by failing to reemploy him following his USERRA-eligible military leave. Second, he argued that BSU violated
USERRA by discriminating against him based on his military service. The
district court ultimately granted summary judgment to BSU on both claims.
Breaker appealed to the Court of Appeals.

3. **The Court of Appeals Decision.** The Court of Appeals ruled in favor of
BSU on both claims.

   a. **USERRA reemployment claim.** Neither party disputed the fact
      that Breaker satisfied the statutory prerequisites for reemployment,
      i.e. that he provided notice, had used less than five years of leave,
      and was not dishonorably discharged.

      1. *Changed circumstances affirmative defense.* BSU asserted as
         an affirmative defense that there had been changed
         circumstances that made reemployment impossible or
         unreasonable.

         In addressing this argument, the Court first noted that the
         changed circumstances defense is meant to be a “very limited
         exception” and only applied “where reinstatement would
         require creation of a useless job or where there has been a
         reduction in the work force that would reasonably have
         included the veteran.” *Id.* at *8. The burden is always on the
         employer to prove the existence of an affirmative defense.

         Here, the parties did not dispute that the ITV courses and
         business program coordinator position no longer existed due
         in large part to conditions beyond BSU’s control. Breaker
         argue, instead, that there was a shift from offering ITV
         courses to online courses, and that he therefore should have
         been permitted to teach online courses at BSU.

         The Court disagreed. It noted that BSU’s employment
         policies precluded non-tenured faculty from teaching online
         courses. Multiple professors in the business department were
         unable to teach online courses because they were not tenured
         or on tenure track.

         Additionally, the Court found that teaching an online course
         was not the same as teaching an ITV course because online
         courses did not yield higher pay per credit under the union
         contract, whereas ITV courses did. For those reasons, the
         Court rejected Breaker’s argument that the online courses
were essentially the same as ITV courses and that he should be permitted to teach them.

Breaker next argued that the business program coordinator position was not eliminated, but rather restructured into an online business advisor position. He therefore asserted that he should have been reemployed in that online business advisor position.

The Court again disagreed, noting that the two positions had separate and distinct job duties. Additionally, the business program coordinator position did not require any additional training, whereas the online business advisor position required additional training and a vote by faculty to obtain the position. Moreover, there was no evidence that BSU restructured the coordinator position into the advisor position. Thus, Breaker’s argument that he was entitled to that position failed.

2. Comparable Position. The district court determined that because Breaker’s pre-service position was all one-year, fixed-term contract, BSU offered Breaker a comparable position upon his return. Breaker disagreed, arguing that this was incorrect and that BSU failed to properly address the escalator principle in terms of seniority, status, and pay.

a. Seniority. Breaker argued that BSU failed to offer proper seniority primarily because he was not offered appropriate sabbatical leave. The court noted that, in fact, Breaker had some support for his argument. With regards to the second and third offers, BSU stated that sabbatical was not seniority-based, and therefore only used his actual years of service for calculating his sabbatical eligibility. This may have been improper. But Breaker failed to acknowledge that in BSU’s fourth offer, BSU promised to count Breaker’s time on deployment for sabbatical leave. Additionally, the fourth offer included seniority-based pay raises that occurred during his deployment and other seniority-based benefits, such as pension/retirement benefits and sick leave. Thus, the Court concluded that BSU offered Breaker the appropriate seniority level.
b. **Status.** Breaker argued that the one-year teaching position he was offered was not comparable in status to the position he had before deployment. The court noted that when determining a returning employee’s position, courts must assess factors such as “opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location.” *Id.* at *13 (quoting 20 C.F.R. § 1002.194).

Breaker argued that BSU did not offer him comparable status because he was required to teach different courses in a different location from his pre-leave location. The Court noted that other BSU professors could be, and were, assigned to teach classes that they had not taught before and without an opportunity to select their courses. There was no dispute that while he was required to teach different courses, Breaker was still qualified to teach them. Additionally, because BSU had no remote teaching position to offer Breaker, its offer to teach on campus was of comparable status.

c. **Pay.** Breaker argued that BSU’s offers were not comparable to the step salary he would have been entitled to under the escalatory principle. He argued that he should be offered employment at step 14, not step 13. In determining Breaker’s appropriate pay step after his deployment, BSU included pay raises that would have been granted to him had he not been on active duty. In fact, during reemployment negotiations, Breaker and the union both agreed that step 13 was the appropriate step. The Court therefore found that BSU offered Breaker the appropriate step level.

Breaker also argued that BSU did not offer to reemploy him at the proper salary level because prior to his deployment, he earned additional compensation as the business program coordinator. The court noted that an employee is entitled to any compensation in any form that they would have received with reasonable certainty if they had remained continuously employed. Here, BSU’s fourth offer included
additional work opportunities of not less than $15,000. Therefore, BSU offered appropriate pay.

b. **USERRA discrimination claim.** Breaker argued that even though he lacked direct evidence of discrimination, because there was a close temporal proximity between his military deployment and BSU’s discontinuance of the business program coordinator position, there was circumstantial evidence of discrimination. The Court noted that while sometimes temporary proximity alone can be enough for a USERRA discrimination claim, there was a two-year gap between when he left for deployment and the time BSU eliminated the business program coordinator position. Without any additional evidence that his military status was a substantial or motivating factor in the eliminator of the position, the Court upheld the district court’s decision.

### III. MINNESOTA’S MILITARY LEAVE STATUTE

**A. Paid leave.** According to Minnesota law, employees in the military or National Guard are “entitled to leave of absence from public office or employment without loss of pay, seniority status, efficiency rating, vacation, sick leave, or other benefits for all the time when engaged with such organization or component in training or active service ordered or authorized by proper authority pursuant to law, whether for state or federal purposes, but not exceeding a total of 15 days in any calendar year.” Minn. Stat. § 192.26, subd. 1. This generally means that school district employees are entitled to 15 days of paid military leave per calendar year.

a. **Leave requirements.** This 15-day paid leave is allowed when the military service is satisfactorily performed, and the employee returns to the public position immediately on being relieved from such duty. *Id.*

b. **Eligible employees.** The 15-day pay requirement applies to both temporary and regular employees.

c. **What is a “day” for purposes of the statute.** Courts have found that that a “day” is the same as a “shift” of work. Therefore, an employee gets 15 paid shifts of military leave per calendar year.

d. **Eligibility for military pay.** Employees qualifying for the 15-day period of paid military leave are entitled to receive both whatever military pay they are entitled to and their regular pay from the school district.
e. **Qualifying periods of military leave.** The 15 days of paid leave applies to qualifying periods of military leave of more than 15 consecutive days, as well as situations where a service member takes military leave at various times throughout the year totaling in excess of 15 days. For example, if an employee took 15 days of military leave in January, they would be eligible for pay for those 15 days, assuming the leave is qualified. Similarly, if the employee took 5 days of military leave in February, April, and June, they would be paid during each of those leaves, assuming the leaves are qualified.

f. **Leave extending over multiple calendar years.** While no court has addressed what happens if a military leave extends over multiple calendar years, guidance provided by the Minnesota Management & Budget Office states that the employee would be entitled to 15 days of paid leave for each calendar year. For example, if an employee went on qualifying military leave in May 2018 and did not return until February 2020, the Management & Budget Office takes the position that the employee would be entitled to 45 total days of paid military leave—15 days for 2018, 15 days for 2019, and 15 days for 2020.

**B. Interplay with USERRA.** All of USERRA’s protections, including the prohibition against discrimination and reemployment rights, continue to apply whether the employee receives paid leave under Section 192.26 or not.

**IV. EMPLOYEES COVERED AND EXEMPT FROM THE VETERANS PREFERENCE ACT (“VPA”)**

**A. Veteran Defined.** A veteran is a citizen of the United States or a resident alien who has been separated under honorable conditions from any branch of the U.S. armed forces:

a. After having served on active duty for 181 consecutive days; or

b. By reason of disability incurred while serving on active duty; or

**c. Who has met the minimum active duty requirement under 38 C.F.R. § 3.12a (minimum active duty is defined as the shorter of the following periods: twenty-four months of continuous active duty or the full period for which a person was called or ordered to active duty); or**

**d. Who has been certified by the United States Secretary of Defense as having active military service and an honorable discharge. See Minn. Stat. § 197.447.**
B. Positions Exempt from the VPA. The VPA does not apply to the following positions:

a. private secretary;

b. superintendent of schools;

c. one chief deputy of any elected official or head of a department;

d. any person holding a strictly confidential relation to the appointing officer;

e. teacher; and

f. department head. See Minn. Stat. § 197.46(d).

C. Probationary Period

a. May Require Initial Hiring Probationary Period. A school district may require veterans to complete an initial hiring probationary period as defined under Minnesota Statutes section 43A.16. See Minn. Stat. §§ 197.455, subd. 1(c); 197.46(a).

b. Probationary Period Defined. The probationary period is defined to be no less than 30 days but no more than two years of full-time equivalent service. See Minn. Stat. 43A.16, subd. 1.

c. Only an Initial Hiring Probationary Period. After serving an initial hiring probationary period for a school district, a veteran would not be subject to additional probationary periods, such as for a transfer or promotion. Therefore, once the initial hiring probationary period ends, a veteran may not be removed unless incompetency or misconduct is shown through a removal hearing. See Minn. Stat. §§ 197.455, subd. 1(c); 197.46(a).

D. Discharge

a. Grounds for Discharge. To discharge a veteran, a school district must be able to show at hearing that the veteran is incompetent or that the veteran has engaged in misconduct (e.g., insubordination).

b. Notice of Proposed Discharge. A school district must give a veteran written notice of its intent to discharge the veteran.
c. **Contents of the notice.** The notice of proposed discharge should contain the following:

i. the grounds (e.g., misconduct or incompetence) for the proposed discharge;

ii. the factual basis for the proposed discharge;

iii. that, pursuant to the VPA, the veteran has the right to request a hearing within thirty days of receipt the notice of proposed discharge;

iv. that the veteran must respond within thirty days of receipt of the notice of proposed discharge and that if the veteran fails to request a hearing within the thirty-day period, the veteran’s right to a hearing and all other available legal remedies for reinstatement will be waived; and

v. that any hearing requested will be before an arbitrator.

d. **Failure to provide notice of proposed discharge.** A school district’s failure to give written notice prevents the thirty-day clock from running. If the right to a hearing is asserted at a later date, the district may have substantial liability for back-pay.

e. **Payment Pending Outcome of Hearing.** The school district is responsible for paying the veteran during the thirty-day period and hearing process, if one is requested.

i. The school district must continue to pay the veteran until one of the following occurs:

1. the veteran fails to respond by the end of the thirty days after having received written notice of his or her right to request a hearing;

2. the veteran responds to the notice stating that he or she does not want a hearing;

3. a settlement agreement is reached between the school district and the veteran in which the veteran waives his or her right to a hearing; or
4. the veteran requests a hearing to challenge his or her discharge, the hearing is held, and the arbitrator issues a decision upholding the discharge.

ii. Because of the expense involved, avoid any agreements that would delay the hearing.

E. Hearing.

a. Arbitrator or civil service board or commission. Where no civil service board or commission or merit system authority exists, a VPA hearing must be held by an arbitrator. See Minn. Stat. § 197.46(c).

b. Procedure for choosing an arbitrator. Minnesota Statutes section 197.46(c) provides for the following procedure for choosing an arbitrator:

i. The school district must request from the Bureau of Mediation Services (BMS) a list of seven persons to serve as an arbitrator.

ii. After receiving the list from the BMS, the district will strike the first name from the list and the parties will alternately strike names from the list until the name of one arbitrator remains.

iii. After receiving each of the district’s elections to strike a person from the list, the veteran has 48 hours to strike a person from the list.

iv. The person remaining after the striking procedure must be the arbitrator.

v. Upon selection of the arbitrator, the district must notify the designated arbitrator and request available dates to hold the hearing.

F. Payment for the hearing amended.

a. Hearing costs. Minnesota Statutes section 197.46(e) requires the school district to bear all costs associated with the hearing, except for the veteran’s attorney fees.

b. Attorney fees. Section 197.46(e) also states that if the veteran prevails in a dispute heard by an arbitrator and the hearing reverses “the level of the alleged incompetency or misconduct requiring” discharge, the school district must pay the veteran’s reasonable attorney fees.
G. A Veteran Facing Discharge May Choose Either a VPA Hearing or the CBA Grievance Procedures, But Not Both. Minnesota Statutes section 197.455, subdivision 1(c), states that a veteran employed by a school district has the same rights and legal protections that state employees receive under section 197.455, subdivision 1(b). Section 197.455, subdivision 1(b), provides that in matters of dismissal, a veteran has the irrevocable option of using the procedures described in the VPA (sections 197.46 to 197.481), or the procedures provided in an applicable CBA, but not both. See Minn. Stat. § 197.455, subd. 1(b)-(c). If covered by a CBA, a veteran must irrevocably choose between using the union grievance procedures to challenge a proposed discharge or the statutory process outlined in the VPA.

a. If veteran chooses the VPA procedures, not considered a grievance. If a veteran chooses to use the procedures of sections 197.46 to 197.481 of the VPA, the matters governed by those sections will not be considered grievances under a CBA. See id.

b. If veteran appeals through the VPA, may not appeal under CBA. If a veteran elects to appeal the dispute through those sections of the VPA, the veteran is precluded from making an appeal under the grievance procedure of the CBA. See id.

H. APPEAL

a. Appeal to District Court. Either the school district or the veteran may appeal the arbitrator’s decision on the veteran’s discharge to the district court. The appeal must be in writing and state the grounds for the appeal. See Minn. Stat. § 197.46(d).

b. Timing. The notice of appeal must be served upon the other party within fifteen days after notice of the arbitrator’s decision. See id. The original notice of appeal with proof of service must be filed with the district court administrator within ten days after such service. See id.