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Employer Obligations to Employees on Military Leave

The tragic events of September 11 will have far-reaching implications. One consequence is that United States' employers increasingly are facing the temporary loss of their employees who must report for military duty for certain or uncertain lengths of time. This Update provides general guidance to employers in handling the military leave of their employees.

Applicable Law -- USERRA

The Federal Uniformed Services Employment and Reemployment Rights Act ("USERRA") is designed to protect the rights and benefits of employees who are in the military and/or who report for military service. 38 U.S.C. § 4301, et seq. Some state laws provide more generous benefits; employers should check the laws in each state where they have employees.

Which Employers Are Covered?

The USERRA applies to all employers that are incorporated or otherwise organized in the United States, and all employers that are controlled by entities organized in the United States, including foreign employers unless a foreign employer's compliance with USERRA would violate the laws applicable in its foreign workplace. It also applies to the United States' operations of foreign employers. 38 U.S.C. §§ 4303(3)-(4), 4319. It applies regardless of the employers' number of employees. 38 U.S.C. § 4303(3).

Who is Protected?

USERRA applies to all United States citizens, nationals or permanent resident aliens who are employed in the United States or in a foreign country by a U.S. employer. 38 U.S.C. § 4304(3).

It applies regardless of how long an employee has been working with an employer. The Act protects covered employees on leave in the "Uniformed Services," which includes the Army, Navy, Marine Corps, Air Force and Coast Guard and their reserve components, the Army and Air National Guards, and the commissioned corps of the Public Health Service. 38 U.S.C. § 4303(16). Protection is afforded to employees who report for active duty, active duty training, initial active duty for training, inactive duty training, full-time National Guard duty, and/or absence to determine fitness to perform service. 38 U.S.C. § 4303(13). (For simplicity, this Update will sometimes refer to leave to perform service in the Uniformed Services as "military leave.")

What Are The Basic Protections?

USERRA protects employees' benefits and rights during and upon return from military leave by:

- prohibiting discrimination and retaliation;
- allowing use of paid time off held by the employee;
- guaranteeing continued health insurance coverage while on leave;
- generally guaranteeing reemployment upon return from leave;
- preserving seniority and pension benefits when reemployed;
- prohibiting discharge without cause for specific periods of time after return from service; and
- providing an enforcement mechanism and remedies, including damages, attorneys fees and costs, if the Act is violated.

Must an Employer Grant Leave to an Employee Who Is Called For Duty?

Yes. The employer must provide a leave of absence for that employee to serve in the Uniformed Services.

Must an Employee Take Military Leave to be Protected?

No. USERRA prohibits discrimination or retaliation against employees and applicants due to past, present or potential future military leave. In addition, employers cannot take adverse action against employees in the Uniformed Services for asserting their rights or participating in investigations of claims. 38 U.S.C. § 4311(b).

Is an Employer Obligated to Pay Wages During Military Leave?

No. The employer need not pay the employee's wages while on military leave, although the employer should continue to abide by the Fair Labor Standards Act. Under the FLSA, exempt employees must be paid for any week in which they perform any work, regardless of the number of hours or days worked in a week; thus, an exempt employee on military leave during a week must be paid for that week if he or she worked any amount of time for the civilian employer. 29 C.F.R. §§ 541.118(a)(1)-(4).

May Employees Use Paid Time Off?

Yes. Employees taking military leave may elect to use paid time off ("PTO") that is otherwise available to them, such as vacation pay, to receive pay during leave. The employer cannot force the employee to use the PTO.

Are Employees' Health Benefits Protected During Leave?

Yes. Employees on military leave are guaranteed continued coverage through the USERRA and/or COBRA, if the latter is applicable. Employers subject to COBRA should review their continuation of coverage plan and insurance contract to determine if military leave terminates the coverage, which would constitute a COBRA "qualifying event." If the leave terminates coverage, then both USERRA and COBRA provide continued coverage for employees and their dependents, and the employer should generally offer the more generous benefits under the two statutes, e.g., no administrative fee for the continued coverage can be charged to the employee on military leave during the first 30 days of such leave. If the leave does not terminate coverage, then such employees are to be treated as though they are on other forms of leave of absence such as Family & Medical Leave, e.g., they can be required to pay whatever premiums they would pay on another form of leave, and the employer would continue its portion, if any, of the premiums. Where an employer pays a portion of the premium for employees on FMLA and other forms of leave, but where an employee is on military leave beyond the length of the other forms of leave, e.g., beyond the 12-week FMLA leave entitlement, the employer may require the employee on military leave to pay the entire premium for him/herself and his or her dependents, plus a 2% administrative fee.

The coverage, duration of coverage and payment requirements under USERRA and COBRA differ, so employers should contact their employee benefits' attorney to discuss the requirements.

Employers not subject to COBRA must comply with USERRA and provide the maximum coverage guaranteed under USERRA -- 18 months -- for employees on leave and their dependents.

Are Other Benefits Protected?

Yes, depending on the benefits offered by the employer. Unless employees taking military leave knowingly provide a written notice of intent that they do not intend to return to work, they are entitled to those "rights and benefits not determined by seniority as are generally provided by the employer . . . 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.C. §§ 4316(a)-(b). Employers should check benefit plans and policies to determine what benefits may continue for employees on non military furloughs or leaves and extend the same treatment to employees on military leave.

Are Employees on Military Leave Entitled to Accrue Vacation While on Leave?

No. Employees on military leave are generally not entitled to accrue vacation time. However, if an employer allows employees on other forms of leave of absence to accrue vacation time, e.g., Family & Medical Leave Act leave, an employee on military leave must be treated

similarly. When an employee returns from leave, he is entitled to the same accrual rate he would have had but for the military leave; for example, if an employee would have been elevated from three weeks to four weeks of vacation had he been actively employed, then he is entitled to four weeks of vacation upon reemployment.

Must the Employer Reemploy Returning Employees?

Yes, with some exceptions. Employers need not reemploy an employee:

a) when the employee fails to meet certain conditions (e.g., an employee who is dishonorably discharged is not entitled to reemployment (see Employee Obligations below));

b) when "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable" (e.g., a plant shutdown);

c) when the employee is disabled during service or is no longer qualified to perform his job and "such employment would impose an undue hardship on the employer"; or

d) when the employee left a brief, nonrecurrent job, such as seasonal employment, and "there is no reasonable expectation that such employment will continue indefinitely or for a significant period." 38 U.S.C. § 4312(d).

What Position Must the Employer Offer to a Returning Employee?

When an employee was on leave for 90 days or less, the returning employee is entitled to any position that he would have been entitled to had he not taken military leave, if he is qualified for that position. For example, the employee would be entitled to a promotion if it was highly likely that the employee would have been given the promotion had he remained actively employed (this is referred to as the "escalator" principle). If there was no promotion in the works, or if he is not qualified for such a promotion upon return, then the employee is entitled to the position that he left.

If an employee was on leave for 91 days or more, he is first entitled to the position he would have had but for the military leave (the promoted position), or a position of like seniority, status and pay, if he is qualified. If such a position does not exist, then he is entitled to the same position he left, or to a position of like seniority, status and pay.

Other rules apply where the employee is not qualified for one of the above positions with or without disability and where the employee has a disability incurred or exacerbated by the military service.

What if the Returning Employee Without a Military Service-Related Disability is No Longer Qualified For a Promoted Position or His Former Position?

The employer must make all reasonable efforts to qualify the employee for the position, for example, by providing necessary training to help the employee learn to perform the essential functions of his position. If certain criteria are met and the employee still does not qualify, the employer may offer the employee any other position for which he is qualified and which is the nearest approximation to the escalated position or former position, with full seniority. 38 U.S.C. § 4313(a).

What if the Returning Employee is No Longer Qualified Due to a Military Service Related Disability?

An employer is not required to reemploy an employee with a military-service related disability if that employer has made reasonable efforts to qualify that employee for the promoted or previous position or a position of nearest approximation to his or her previous position to no avail, and if reemployment would impose an undue hardship on the employer. 38 U.S.C. § 4312(d)(1)(B).

Are Seniority-Based Rights and Benefits Protected Upon Reemployment?

Yes. Employees are entitled to the same seniority and seniority-based benefits, such as promotions, pay raises and severance pay, they would have attained with reasonable certainty if they had remained continuously employed. 38 U.S.C. § 4316(a). Seniority-based rights or benefits are those that are based on or accrue with length of service. In contrast, non-seniority-based rights or benefits are generally those based on compensation for work performed or those subject to a significant contingency, e.g., bonuses would likely be non-seniority based if they are only granted to select employees who have met specific objectives. Reemployed employees are entitled to those non-seniority based rights and benefits provided under USERRA, e.g., reinstatement and job protection upon reemployment, in addition to such rights and benefits granted to employees on FMLA and other forms of leave pursuant to the employer's policies and practices.

Are Returning Employees Entitled to the Same Rate of Pay?

Yes, and possibly a higher rate of pay. As long as the employee meets the required conditions for reemployment, he or she is entitled to at least the same rate of pay received prior to the military leave. As with other benefits, discussed above, a returning employee is entitled to a pay raise: if the returning employee would have received the raise had he or she been continuously employed, e.g., where the raise was based on seniority or, even though purportedly based on merit, where it was provided to most employees across-the-board; or if employees on FMLA and other forms of leave would have received the raise. Where a pay raise is based on merit and seniority, e.g., where all employees receive an annual raise but the amount depends on an employee's performance, the returning employee is entitled to at least the seniority-based part of the raise.

Are Pensions Protected Upon Reemployment?

Yes. 38 U.S.C. § 4318. Employees may not be treated as if they had a break in service because of military leave; for employees who are reemployed, the military service is to be treated as service with the employer for pension vesting and benefit accrual purposes, and employees cannot be required to requalify to participate in their pension plan. Employees also cannot be forced to forfeit benefits already accrued. Where an employee would have become eligible to participate in a pension plan during leave had he or she been actively working, the employer should retroactively place the employee in the plan upon reemployment.

The reemployed employee is entitled to any accrued benefits from employee contributions in a pension plan only to the extent that the employee repays those contributions to the plan; the employer must allow the reemployed employee to make up missed contributions during a period over three times the length of military leave, but no longer than five years. If an employer also contributes to such plan, e.g., provides 401(K) matching contributions, the employer must make up its own contributions after the employee is reemployed and only to the extent the reemployed employee timely contributes his or her own missed contributions.

Employers should contact their employee benefits' attorney to discuss USERRA's specific requirements for pensions.

Can an Employer Discharge an Employee Without Cause Shortly After He Returns From Leave?

No. If the reemployed employee was on military leave for between 31 and 180 days, the employer cannot discharge him without cause within six months of reemployment. If the employee was on military leave for more than 180 days, the employer cannot discharge him without cause within one year of reemployment. 38 U.S.C. § 4316(c).

Do Employees Have Any Obligations?

Yes. To be fully protected, employees (a) should provide advance notice of their leave; (b) generally must not have been on leave more than five years; (c) should timely report to their employer and/or apply for reemployment; and (d) must complete service under honorable conditions.

a) What Notice is Required?

The employee should give as much notice as possible under the circumstances. For example, the employer may have a policy asking employees to provide notice within 72 hours of receipt of military orders. However, if military necessity prevents the employee from providing notice, or if providing notice is unreasonable or impossible under the circumstances, the employee may have an appropriate military officer provide such notice, when practicable.

b) How Long May an Employee be on Military Leave and be Protected?

Generally, five years. This five-year period is extended, however, under numerous circumstances, for example, for employees: whose initial enlistment term is longer than five years (such as those in the Navy's nuclear power program); who through no fault of their own are unable to obtain a release from service within five years; who have annual training sessions and monthly weekend drills mandated by statute (including reservists and National Guard members); who are called to active duty during war or a national emergency as declared by the President or Congress, or who are called to support an operational or critical mission as declared by one of the military Secretaries; and who require additional training. 38 U.S.C. § 4312(c). The military orders received by an employee should explain the type of obligation applicable to that employee, which would suggest whether an exception to the five year limit would apply. Exceptions applied for some personnel called up to serve in Operation Desert Storm, Operation Desert Shield, and in the Bosnia and Haiti missions.

c) When Should Employees Apply for Reemployment or Report to Work?

If service was for 30 days or less, the employee must report to the employer on the first full workday after service and after eight hours to allow for transportation home and rest. If service was for between 31 and 180 days the employee must submit an application within 14 days of completing service. If service was for 181 days or more, the employee must apply no later than 90 days after completion of service. However, if it is impossible or unreasonable for an employee to report within these deadlines, through no fault of the employee, he may report as soon as possible afterward. Also, if an employee is hospitalized from a service-related injury, the deadlines apply after recovery, as long as the recovery does not exceed two years. Note that if an employee does not timely apply, he does not forfeit his employment rights, but can be subject to discipline for absence from scheduled work. 38 U.S.C. §§ 4312(a)-(e).

d) What Discharge Circumstances Would be Grounds for Not Reemploying a Returning Employee?

Returning employees are not entitled to reemployment unless they completed service under honorable conditions. For example, they are not entitled to reemployment if they were dishonorably discharged, discharged due to bad conduct, discharged under other than honorable conditions (as defined under military rules), or if their dismissal results from a court martial. 38 U.S.C. § 4304.

How Does the Employer Determine Whether These Conditions Were Met?

The employer may request certain documentation from the returning employee (e.g., documents showing length of service and whether completion of service was honorable). If documents are not immediately available, the employer must nonetheless reinstate the employee. If later documentation shows the employee was not qualified for reemployment, the employer may discharge the employee.

What Are an Employee's Remedies Upon Violation of the Act?

The Department of Labor through its Veterans' Enforcement and Training Service enforces USERRA. Individuals may file complaints with the Secretary of Labor and, if not resolved, may request referral to the Attorney General or may file suit in a United States District Court. 38 U.S.C. §§ 4322, 4323(a)-(c). The court could require the employer to comply with USERRA, compensate the complainant for lost wages and benefits, pay additional liquidated damages for a willful violation, and/or pay the complainant's attorneys' fees, expert witness fees and other litigation expenses and costs. 38 U.S.C. § 4323(d).

For more information on the issues raised in this article, please contact the following attorneys, or any member of the firm's Labor & Employment group:

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