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“Solving Employee Problems Before They Happen”

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UNIFORM SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

With the Iraq War in full swing, I have received numerous requests for information on the Uniform Services Employment and Reemployment Rights Act (USERRA). Here is a detailed look at what employers are required to do for their employees called away on military duty.

Coverage

Beginning October 13, 1994, the Uniform Services Employment and Reemployment Rights Act (USERRA) of 1994 (38 U.S.C. § 4301, *et seq.*), made it illegal for all employers to discriminate against anyone due to their participation in or application to join any “uniformed service,” which includes discriminating against a person’s initial employment, reemployment, retention, promotions, or any other aspects of employment. USERRA defines “uniformed services” to include all branches of the military, the Commissioned Corps of Public Health and anyone else designated by the President of the United States in time of war or national emergency.

USERRA does not apply to state military duty or governor call-ups of National Guard members. However, protection for such duty is generally provided by state statutes and in most instances is comparable to protections provided under the USERRA.

Reemployment Rights

Section 4313 of USERRA states that if a covered individual is called away or volunteers for duty and is absent from work for less than 91 days, the employer must reinstate the individual into **his same position upon his return from service**. However, if the individual is absent from work **for more than 90 days**, then the employer must give the individual the same or a similar position with similar seniority, status and pay upon his return.

In order to obtain these reemployment rights, § 4312 of the Act says that the employee must meet the following criteria:

1. The employee must hold a position that has a reasonable expectation of continuation indefinitely or for a significant period. Temporary positions and positions with “pre-determined not-to-exceed dates” fall outside this criterion.
2. The employee must give notice to the employer that he/she will be leaving for military service. However, this notice does not have to be in writing. There is also no requirement that employees provide published orders to their employers, since employees are not always given such written orders. The law does not specify that advance notice required; it cannot because, in some cases, employees will get only a few days notice or less.
3. The employee must not exceed the five-year statutory limit on cumulative periods of service. (The statutory limit applies to the employee for each employer; there is no limit on the employee across two or more employers during his/her work life.) The five-year period begins with military service after December 12, 1994. Of course, there are exceptions, too. For example, annual training and monthly drills are not counted against the cumulative total. Further, the five-year limit itself does not apply under certain conditions or to certain covered persons. For example, it may be exceeded for service performed during war and it does not apply to some pilots.
4. The employee must be released from service under “honorable conditions.”
5. Section 4312 states that the employee must report back to the civilian job in a timely manner or submit a timely application for reemployment according to the following timelines:
 - a) Less than 31 days of service, the employee must reapply for employment on the first “regularly scheduled work period” following the completion of his service **and** after returning home. (The employee is also given at least eight hours after returning home before he is required to reapply.)
 - b) More than 30 days but less than 181 of service, the employee has 14 days after completing his service in which to reapply.
 - c) More than 180 days of service, the employee must reapply within 90 days of completing his service period.

USERRA gives returning employees the right to “bump” replacement workers hired to fill their jobs during the period of absence for military service.

Unless meeting these deadlines is unreasonable or impossible, the employee will lose his reemployment rights under the USERRA if he does not act within these time frames. If the individual is recovering from an illness or injury resulting from or aggravated by his service, two additional years may be added to these reemployment deadlines.

However, if after such a period of time has passed and it is unreasonable or impossible for the individual to reapply for employment due to a service-related or service-aggravated injury or illness, then the period of time allotted for application may be extended.

Health Insurance Benefits

For leaves lasting 31 days or less, employers must allow the employee to continue his health insurance at his own cost just like as if the employee was still working. The employee may be charged no more than the employee share of the premium.

However, if a leave lasts longer than 31 days, § 4317 states that employers must allow the employee to continue his health insurance at his own cost, which may also include up to an additional charge of two percent for the administrative costs incurred by the employer, for up to 18 months.

This extended coverage is similar to the COBRA law, although USERRA does not limit the application of this provision by employer size. USERRA eliminates the explicit exclusion for service-connected conditions, deferring instead to the language of the employer's health plan. Thus employers' plans may be liable for these injuries or illnesses incurred during military service unless the insurance plan has clear and unambiguous language excluding coverage in these instances.

When the employee returns to his/her civilian job, the employer must immediately reinstate the employee's health insurance coverage. There is no waiting period and there may be no exclusion of preexisting conditions other than those determined to be military service-connected. This right applies whether or not the employee elected to continue coverage during military service.

Other Benefits

While the employee is on leave, both his vesting and accrual of benefits for pension purposes must continue as if he had not been absent.

Section 4316 states that employees covered by the Act retain and continue to accrue all of their seniority and the benefit rights associated with such seniority while on covered leave (i.e., vacation accrual, seniority rights, etc.). Covered employees must also be permitted to use their accrued time off with their employer during their period of service if requested.

USERRA requires employers to make up contributions to a defined contribution plan if the employee makes the employee contribution or elective deferral. Employees may make up the contributions over a period of three times the time of the military service (not to exceed five years). Employers do not have to make up earnings or allocations of forfeitures (amounts of money that become available when employees leave the workplace prior to becoming vested in their pension benefits).

When the employer offers other non-seniority-based benefits, such as life insurance, to employees on other types of leaves of absence, the employer is required to provide the same benefits to the employee during absence for military service. However, the employer may rightly consider the lengths of periods of absence when comparing benefits provided during other-than-military absences to identify the proper benefit for absence for military service.

A returning employee is entitled to all pay increases, promotions and other benefits that he/she **would have been awarded** or earned had the employee not been away for military service.

Seniority

Covered employees on military leave must accrue seniority just as if they had been on the job during their military service. This protection extends to all rights and benefits that are by seniority.

Temporary Workers

USERRA states that employees who are employed on a temporary basis are not covered by the law.

Right to Training, Retraining and Accommodation

Employers are required to make “reasonable efforts” to help returning employees qualify for their old jobs. Specifically, USERRA calls for refresher training to renew prior skills and additional training to gain new skills required by new technology.

USERRA also requires employers to make reasonable efforts to accommodate a returning employee with a military service-related permanent disability or temporary injury. For temporary injuries, such as a broken leg, the employer would have an obligation to reasonably accommodate the employee until the leg healed.

Employer Defenses

An employer may be released from its obligations under the Act if:

1. The employer’s circumstances have changed so much that reemploying the individual is impossible or unreasonable,
2. It would place an undue hardship on the employer to retrain or rehire the employee, or
3. The employee’s job was only temporary.

Of course, the employer bears the burden of proving any of these defenses.

Special Protection Against Termination, Except “For Cause”

Section 4316 also states that if an employee was on covered military leave for more than 180 days, that employee may not be terminated for any reason other than “for cause” for the period of one year after reemployment. If the employee’s covered leave was more than 32 but less than 181 days, the returning employee may only be terminated “for cause” for 180 days after reemployment. In other words, an employer’s employment-at-will policy is invalid during these periods of time for these covered employees.

NOTE: In December 2004, the Veterans Benefits Improvement Act, or VBIA, was enacted by Congress. VBIA extended the time frame under which active service men and women could continue their health benefits while not actively at work from 18 months to 24 months.

The USERRA/VBIA poster is now available at www.dol.gov/vets/programs/userra/poster.pdf. Employers can obtain detailed information about USERRA by calling 1-866-4-USA-DOL or by visiting www.dol.gov/vets/programs/userra/.

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