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ALERT

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Job Rights for Reservists and National Guard Members: What Every Employer Needs to Know

Following the recent attack on the United States, many employees will be temporarily leaving their civilian jobs for military service. This is a brief summary of the obligations of civilian employers with respect to such employees under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA, however, provides a minimum baseline of rights. State law and employer policies and benefit plans may provide more generous benefits. Therefore, employers should carefully review their policies and benefit plans to determine the full extent of their obligations.

What is USERRA?

USERRA is a federal law that was enacted in 1994 to strengthen the employment rights of individuals serving in the military. For example, it prohibits an employer from discriminating against an individual because of his or her past, present or future military service obligations. The prohibition against discrimination is broad. It covers (but is not limited to) hiring, promotion, reemployment, termination and benefits. USERRA also provides additional protections, which are discussed below.

Who is protected?

USERRA protects any individual serving (a "service member") in the Army, Navy, Air Force, Marines, Coast Guard, commissioned corps of the Public Health Service, the reserves of the foregoing, and the Army and Air National Guard (collectively, the "uniformed services"). Service means the performance of duties (whether voluntary or involuntary) for the uniformed services. It includes active duty, active duty for training, initial active duty for training, inactive duty training (e.g., the two-week annual training period and monthly weekend drills required for Reservists and members of the National Guard), full-time National Guard duty, and absence from work for an examination to determine fitness for the foregoing types of duty. Additionally, other individuals may be designated as protected during a time of war or national emergency.

Generally, all jobs for all civilian employers (public and private) are subject to USERRA, although there is an exception for temporary jobs that are not expected to continue while an individual is on military leave.

Who is entitled to reemployment?

A civilian employer must reemploy to any individual who satisfies the following:

(1) The individual held a civilian job with the employer immediately prior to the military leave.

(2) If there is opportunity to do so, the individual must provide advance notice of the military leave to the civilian employer.

(3) The individual's cumulative military leave must not exceed five years (although certain types of service are disregarded or extend the five-year period, such as service during national emergencies and war and the mandatory two-week annual training period and monthly drills for Reservists and members of the National Guard).

(4) The individual must be honorably released from military service.

(5) The individual must timely report back to his or her civilian employer. If the individual's military service was for less than 31 days, the individual must report to work by the beginning of the first regularly scheduled work day that begins 8 hours following the calendar day in which the period of military service was completed. If the individual's military service was for less than 181 days but more than 30 days, the individual must apply for reemployment with the civilian employer within 14 days of the completion of military service. Individuals whose military service is more than 180 days must apply for reemployment within 90 days of the completion of military service. The reporting or application deadline is extended if it is impossible or unreasonable for the individual to timely comply and it is extended for individuals who are recovering from disabilities incurred or aggravated during military service.

(6) For individuals who are absent from employment for a period of military service greater than 30 days, the employer may request that the individual provide documentation that the individual's application is timely, the individual has not exceeded the five-year service limitation, and the individual's separation from military service was honorable. Exceptions apply if such documentation does not exist or is not readily available.

What is an employer's reemployment obligation?

A returning employee must be promptly reinstated in the position that he or she would have held as if his or her employment with the employer had not been interrupted for the military leave (or a position of like seniority, status and pay if the period of military service is greater than 90 days). This is known as the "escalator principle" because it requires that a returning employee receive the benefit of any increase in seniority that the employee would have enjoyed had the employee remained employed during the period of military leave. An employer must make reasonable efforts to qualify a returning employee for the job. If reasonable efforts are not sufficient, then the employer must offer the individual the position that he or she held immediately prior to the military leave (or a position of like seniority, status and pay if the period of military service is greater than 90 days). If the individual is not qualified for this position after reasonable employer efforts, the employer must offer the individual the position in

terms of pay, seniority and status that is closest to the position the employee would have held but for the period of military leave. An employer must also make reasonable accommodations for an individual who has suffered a disability during military leave.

Under a limited exception, employers do not have an obligation to reemploy an individual after military leave if circumstances have changed such that the reemployment would be impossible or unreasonable.

What rules apply to the termination of a reemployed service member?

A service member who returns to employment cannot be terminated (except for cause) for one year if that individual's military service was for more than 180 days. USERRA does not define "cause," but the legislative history of USERRA and case law under a predecessor statute indicate that at a minimum it must be reasonable to terminate employees for the conduct for which the individual is being terminated and that the individual had fair notice, express or fairly implied, that such conduct would be grounds for discharge. The protection from discharge is for 180 days if the military service was for less than 181 days but was for more than 30 days. This protection against termination is in addition to USERRA's general prohibition against discrimination on account of military service.

Are employers required to pay employees during military leave?

USERRA does not require employers to pay employees who are on military leave. However, employee benefits that are not based on seniority (e.g., group life insurance coverage) must be provided to the extent that they are provided to employees on non-military types of leave. There are special rules for health and retirement benefits. An employer may not require an employee on military leave to take paid vacation during such leave, although during military leave, an employee must be permitted to use any vacation the employee had accrued immediately prior to such leave.

What are a service member's rights with respect to health benefit plans?

The service member and/or his or her dependents may elect to continue coverage under the employer's group health plan for up to eighteen months, beginning with the first day of the military leave. The employer can charge the service member and his or her dependents up to 102% of the full premium for the coverage.

If the service member's period of military service is for less than 31 days, the employer must provide any group health care coverage as if the service member had been continuously employed.

Service members who return to employment must be immediately reinstated in the employer's health plan. An employer may not impose any waiting period or pre-existing condition exclusions, unless such an exclusion or waiting period would be applicable had the indi-

vidual not been on military leave, and injuries connected with military service (as determined by the Department of Veterans Affairs) may be excluded or subject to waiting periods.

The foregoing right to continued coverage is independent of any COBRA rights that the individual and his or her dependents may have. Note also that the foregoing right does not contain the small employer exception set forth in COBRA. Therefore, an employer is subject to the continued coverage right even if the employer is not subject to COBRA.

What rules apply to employer retirement plans?

For both defined contribution and defined benefit retirement plans:

- The service member must not be treated as having incurred a break in service.
- The period of military leave must be considered as employer service for purposes of vesting and benefit accrual.
- The employer must make contributions to the plan as if the service member was not on military leave. A service member's compensation for such contributions is based on the compensation that the service member would have earned but for the military leave.

If the retirement plan permits employee contributions, a reemployed service member may make "make-up" contributions to the plan over a period of time equal to three times the period of military service (provided that the make-up period may not extend beyond five years). If employer contributions are based on employee contributions (e.g., matching contributions), the employer does not have to make the employer contribution until the service member makes the make-up contributions.

For plan loans, USERRA permits (although it does not require) a retirement plan to suspend a service member's loan obligations during the period of military service.

If you have any questions regarding your obligations to employees on military leave, please contact one of the following:

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