

Client *Urgent* Briefing

Urgent Legal News • November 2001

SPECIAL CLIENT BRIEFING: EMPLOYMENT LAW

Uniformed Services and Re-Employment Rights Act of 1994 (USERRA)

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In the wake of the terrorist attacks on New York and Washington, one of the many challenges facing employers is coping with the loss of valued employees to military service, whether through call-ups of Military Reserve units or National Guard units, voluntary enrollment in the Armed Services, or otherwise. It is essential that employers understand the rights of such employees with respect to their employment and military service. Knowing your legal obligations as an employer will facilitate your employees' military service in support of the new war against terrorism as well as their return to civilian employment, and will minimize potential employer liability in connection with employee military service.

Discrimination in employment based upon the military service of employees is prohibited by the Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA), as amended in 1996 and 1998. USERRA, enacted in response to the return of thousands of Persian Gulf War veterans, prohibits employers from denying employment, re-employment, promotion or employment benefits because of an employee's military or National Guard service. A more detailed discussion of USERRA's provisions follows.

Military service has historically disadvantaged soldiers in their pursuit of civilian careers and employment. USERRA was enacted by Congress to codify and expand prior law and federal court decisions prohibiting discrimination by employers that is based, even in part, on an employee's military service and thereby to encourage service in the armed forces. The law applies to employer decisions regarding initial employment, retention in employment, promotions, employment benefits, and re-employment. It includes within its scope all employers who pay salary or wages for work performed, including the federal and state governments, as well as those to whom employers may delegate employment-related responsibilities.

An employee must be given leave from work for active military service or in order to attend initial or subsequent regular military training, such as National Guard and Reserve training. The employee's only duty with regard to such leave is to provide advance written or oral notice — unless military necessity dictates that no notice be given. There is a 5 year cumulative service cap on the amount of military leave an employer must provide. However, the computation of the 5 years does not take

into account periods of time spent due to inactive duty training, annual training, involuntary recall to active duty, involuntary retention on active duty, or active duty in support of a war or national emergency, regardless of whether such duty is voluntary or involuntary.

USERRA does not require employers to pay employees during military leave (nor does it preclude them from doing so). However, USERRA expressly permits state and local law to provide greater or additional protections for employees than USERRA does, which may include pay obligations. In Ohio, for example, public employers may be required by the Revised Code to pay employees during military leave, under certain circumstances.

Employers are required by USERRA to offer employees the opportunity to continue health care coverage for eighteen months during military leave, subject to payment of employee contributions, in a manner very similar to COBRA. Under Ohio insurance law, it is possible in certain situations for group health coverage to be continued for thirty six months.

Employees' pension or retirement benefits, too, are to be made available to the employee upon re-employment as if the employee had never incurred a break in employment. The period of military service is deemed to constitute service with the employer for purposes of vesting and accrual of benefits. And, the employer must continue to make any contributions to the employee's retirement or pension account that it would have made were it not for the military leave absence.

Upon return from military leave, the statute provides that an employee must be "promptly re-employed" by the employer. The employee need only notify an employer of his or her return from military leave and intention to return to employment within the following specified time periods:

- for military service of 1 to 30 days' duration, on the first full day after completion of service and expiration of an 8 hour rest period following return travel home;
- for military service of 31 to 180 days, within 14 days of completion of service;

- for military service of more than 180 days, within 90 days after completion of service.

The statute does not define what is meant by "prompt" re-employment. In practice, an employer should endeavor to reinstate a returning employee as quickly as possible. Individual circumstances may result in the inability to effect immediate re-employment, such as when the position to which an employee is to return has been filled with an incumbent employee who must be given notice.

Failure to report back to work or apply for re-employment within the above-specified time periods does not mean that an employee automatically forfeits the right to re-employment or employment benefits. Rather, such failure simply makes the employee subject to the employer's general policies regarding absences from scheduled work.

There are some very limited exceptions to the re-employment rights of a covered employee returning from military service. The re-employment requirement does not apply:

- if the employer's circumstances have so changed that re-employment is impossible or unreasonable;
- if, in the case of a disabled employee's return, the re-employment of said employee would impose an undue hardship on the employer; or
- if the employment that the returning employee left was only for a brief and nonrecurring period, with no reasonable expectation that it would continue indefinitely or for a significant period of time.

In any proceeding involving an employer's claim that it is not required to re-employ an employee who gave notice upon his or her return and notification, the statute provides that the employer has the burden of proving that one of the exceptions applies.


The essence of the obligation of an employer notified that an employee intends to return to work is to place that employee in the position he or she would hold if he or she had never been on military leave. This means that the employer may be required to place the employee in a position to which he or she would have been promoted if continuously employed, if he or she is qualified or can become qualified. If the period of service exceeds 90 days,

the employee may be placed in either a) the position he or she left or to which he or she would have been promoted, or b) in a position of like seniority, status and pay, if he or she is or can become qualified. If the returning employee cannot become qualified for a position to which he or she would have been promoted but for the military leave, he or she must be placed in the same position held prior to military service or, if the leave exceeded 90 days, either the same position or one that is substantially equivalent. These provisions embody the so-called "escalator principle," that an employee returning from military service is to be placed back on the career escalator in the location he or she would occupy but for the military leave absence.

The statute also provides that if two or more returning employees are entitled to be reinstated to the same position, the employee who left the position first has the right to it. The other returning employee(s), of course, would still be entitled to the protections of USERRA, which might mean placement in another position of like seniority, status and pay. This situation would seem most likely to occur in the case of a lengthy military conflict.

An employee who claims that an employer has or is about to violate USERRA may complain to the Department of Labor for an investigation, or may proceed directly to federal court. If the court finds a violation of USERRA, it may issue injunctive relief that orders the employer to comply with the act, award compensatory damages to the employee and, in the case of a willful violation, award an additional amount equal to the compensatory award as liquidated damages.

USERRA provides broad protections for employees who serve in the military, and places on the employer the burden of showing that any of its very limited exceptions may apply. Further, the protections provided by USERRA are sometimes augmented by state and local law. The touchstone of an employer's obligations under USERRA is that employees must be treated exactly as they would have been treated but for military service. Understanding the breadth and depth of your legal obligations and rights in this regard will be critically important in the coming months and years.

For additional information, please contact Bill Hanna, or your Walter Haverfield attorney at 216-781-1212. 

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