

USERRA and Military Leave

William R. Hanna, Esq.

I. WHY IS MILITARY LEAVE A HOT TOPIC?

A. Since 9/11, close to 500,000 Reservists and Guardsmen have been called to active duty.

B. As of early 2004, almost 50% of armed forces personnel in Iraq are Reservists or in the National Guard.

C. Recent deployments have averaged 12 to 18 months, meaning that many employers have had to hire replacement workers.

D. Current limit on active duty tour for Guard & Reserve is 24 months, but Pentagon is considering increasing it.

II. USERRA

A. The Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits discrimination in employment on basis of military service.

1. USERRA was enacted by Congress in 1994 in response to the return of thousands of Persian Gulf War veterans.

(a) Codified and expanded rights and protections existing under prior statutory law (VRA - Veterans' Reemployment Rights Act) and federal court decisions for employees who take tempor-

ary leave of absence for uniformed service.

(b) Amended in 1996, 1998, 2000 and 2004.

2. Covered military service includes:

(a) All branches of the Armed Forces;

(b) The Army National Guard and Air National Guard when engaged in active duty for training, inactive duty training or full-time National Guard duty;

(c) The commissioned corps of the Public Health Service;

(d) Other categories designated by the President in time of war/emergency.

B. Purpose: to encourage qualified citizens to serve non-career positions in the uniformed services.

1. Clarifies employee rights, employer obligations and strengthens enforcement mechanisms;

2. Minimizes disadvantages to an individual temporarily absent from his or her civilian employment in connection with military service.

(a) USERRA no longer differentiates between voluntary and involuntary duty.

3. Prohibits employment discrimination against past and present members of uniformed services, as well as applicants to the uniformed services.

(a) Also prohibits retaliation against anyone assisting in the enforcement of USERRA rights (even if that person has never served or tried to).

C. Applies to all employers in the public and private sectors.

1. Employers are those who pay wages or salaries for work.

2. Unlike FMLA or other statutes, no minimum number of employees required to be within scope.

D. Applies to full and part-time employees.

1. Generally does not apply to temporary employees, independent contractors or self-employed individuals.

E. USERRA is limited to federally authorized deployments (doesn't apply to activations under state law.)

1. However, State National Guard or Militia forces may have other state rights of reemployment, as well as imputing USERRA rights into state law for all individuals serving in uniformed service.

F. Provides enhanced protection for disabled veterans, requiring employers to make

reasonable efforts to accommodate the disability.

G. Also requires in some instances to train or retrain employees to refresh or upgrade skills.

H. Administered by the U.S. Department of Labor through the Veterans' Employment and Training Service ("VETS").

I. Beginning March 10, 2005, Employers must provide a notice of USERRA rights and obligations to employees.

(a) DOL/VETS poster

III. MILITARY LEAVE OF ABSENCE

A. Employees cannot be required to apply for military leave; they are entitled to it. However, unless military necessity makes it impossible, an employee must give advance notice (oral or written) to ensure USERRA benefits.

B. Employees are not required to find their own replacement while on leave.

C. Employees may not be required to reschedule drills, training or other military duty obligation. An employer may, however, contact the employee's unit and request that the commander reschedule the employee's obligation. But, if the employer's request cannot be accommodated, the employer cannot prevent the leave or retaliate against the employee for performing his military duties.

D. Pay/Wages

1. Employers are not required by USERRA to pay an employee who is on military leave of absence. But, USERRA expressly permits state and local law to provide greater or additional protections for employees than provided in USERRA.

2. For public employees, at least, Ohio law does provide additional benefits.

(a) Permanent public employees ("employees") who are members of the Ohio organized militia, Ohio national guard or reserve components of the United States armed forces are *entitled to a leave of absence of up to 1 month per calendar year without loss of pay* (R.C. 5923.05(A)(1)).

(b) Employees entitled to leave under R.C. 5923.05(A), but who are called to service for longer than 1 month per calendar year due to an executive order or act of Congress, are *entitled to be paid the lesser of \$500 per month or the difference between his or her gross monthly wage or salary as a public employee and his or her gross monthly uniformed pay or allowances.* (R.C. 5923.05(B)). Note: R.C. 5923.05(D) provides that this pay obligation does not apply if the employee's gross monthly uniformed pay and allowances exceed the employee's gross salary or wage as a public employee.

(c) A public employer may elect to pay its employees entitled to leave under R.C. 5923.05 more than required by this section. (R.C. 5923.05(E)).

(d) An employee entitled to leave under R.C. 5923.05 must

submit to the appointing authority the published order or call to service, or written documentation from the appropriate military commander, prior to being credited with such leave. (R.C. 5923.05(F)).

(e) Permanent public employees whose employment is governed by a collective bargaining agreement that addresses uniformed service shall abide by the terms of that agreement, but no such agreement may provide fewer rights and benefits than R.C. 5923.05. (R.C. 5923.05(G)).

IV. HEALTH COVERAGE

A. The employer's health plan must provide that persons in uniformed service may elect to continue their coverage for themselves and their dependents.

1. As of December 10, 2004 the maximum period of continuation is 24 months from the date on which the person's absence due to service begins.

(a) This right to continued coverage ends on the earlier of the expiration of the 24 month period, or the completion of uniform service.

2. An employee may elect continuation coverage at 102% of the cost of coverage.

(a) But if the period of military service is less than 31 days, the employer cannot require the employee to pay more than the employee share for the coverage.

See USERRA on page 10

Clean Energy is Good Business

If you're considering investing in a project that increases energy efficiency or uses cleaner energy sources, the **Ohio Air Quality Development Authority** can help you save money.

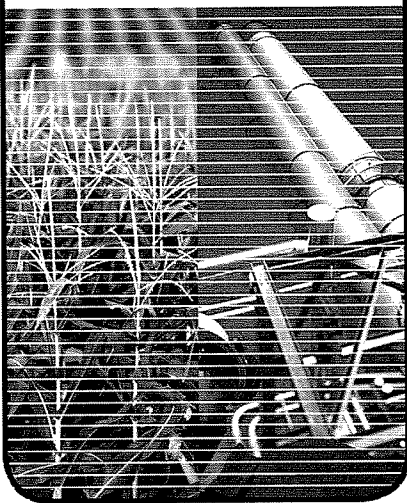
We offer tax incentives to companies of all sizes and types.

To learn more, call 614-224-3383 or visit us at www.ohioairquality.org.

Calculate your savings online! Just click on the tax calculator link at www.ohioairquality.org.



CLEAN AIR & CLEAN ENERGY
OHIO'S BEST INVESTMENT



USERRA from page 9

3. Employee can never be required to pay more than 102% of the full premium.

4. If employee fails to elect continuation of coverage during military service, employer must still reinstate coverage without any waiting periods or exclusions, (e.g., pre-existing conditions upon return).

(a) An exception exists concerning coverage of an illness or injury determined by the Secretary of Veteran's Affairs to have been caused or aggravated by military service.

B. Ohio Revised Code Provisions Regarding Group Insurance Plans and Military Service

1. Public employers must permit employees who are reservists called to active duty to continue health insurance coverage for 18 months. (R.C. 3923.381(B); R.C. 3923.382(B)). This continued coverage may be extended by the employee to 36 months under certain circumstances, such as the death or divorce of a reservist during military leave and a child losing dependent status during the policy term. (R.C. 3923.381(C)(1); R.C. 3923.382(C)(1))

2. Employees must file a written election of continuation of coverage and pay an employee contribution. (R.C. 3923.381(D)(4)&(5); R.C. 3923.382 (D)(4)&(5)).

V. REEMPLOYMENT RIGHTS

A. A reemployed person is entitled to the rights and benefits that he or she would have attained if continuously employed (the "escalator principle").

B. Person absent due to unformed service may be required to pay employee costs for any funded benefit? but only to the same extent that employees on other leaves of absence are required to pay.

C. To receive reemployment rights:

1. A person must have held or applied for a civilian job;

2. Must have given advance written or verbal notice of service to the employer, unless notice is not possible due to military necessity;

(a) Note that notice requirement is not an application requirement, an employee is entitled to military leave and is not required to apply for it.

(b) Employer can request documentation of service for absence of more than 30 days due to service. But even if not provided, must promptly reinstate pending confirmation.

(c) After employee reinstated, if documentation shows employee failed to satisfy re-employment criteria, may terminate.

3. The cumulative length of voluntary absence(s) because of service may not exceed 5 years;

(a) Involuntary duty not included in 5 year period.

(b) The 5 year period also

