

LAWYERS JOURNAL

Employer Guide to Military Leave

By Jo-Anne M. Mineweaser, Esq.

For The Lawyers Journal

With United States military units being deployed to Iraq and other global hot spots, employers in the United States are facing personnel shortages caused by reservists being called to active duty. Employees may be absent from their jobs for weeks, months or even years. However, under the federal Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA, 38 U.S.C. §§4301 - 4333), management has certain duties to employee reservists. Employers should also be aware of the state military leave laws that are applicable to their returning employees. See, e.g., 51 Pa.C.S. §7309 (Pennsylvania); Military and Veterans Code §394 (California); and Military Law §§317-18 (New York). USERRA is designed to mitigate financial losses to the employee on military leave by requiring the employer to put the returning employee in the same or similar position he or she would have been in had the employee not taken military leave. In addition, USERRA provides rights to continued health insurance and rights to continued pension coverage.

Employees Covered Under USERRA

An employee is protected under USERRA if the employee has given the employer advance notice of the military leave, when that is possible; has taken no more than five years of military leave while working with that employer (with some exceptions); and applies for "re-employment" with the employer within the length of time prescribed by the statute. §4312(a). Generally, the longer the employee has been on military leave, the more time he or she has to apply for re-employment with the employer. §4312(e). USERRA also lists circumstances in which the employee would not be covered, i.e. dishonorable discharge from the military. §4304.

Employers Covered Under USERRA

All employers, both public and private, are covered by USERRA. There is no size exemptions or threshold number of employees necessary to be subject to the requirements of the Act. §4303(4)(A). Successors in interest to employers who have employees on military leave are also covered by USERRA. §4303(4)(A)(iv).

Employer's Re-employment Responsibilities

Although the employer's main responsibility is to put the returning employee in the same or similar level position that

the employee would have been in if the employee had remained constantly employed, the position need not be the same job the person previously held, and it may even be a lower position if that position would have been assigned if the employee had not taken military leave.

Just as the employee must be given a period of time to apply for re-employment commensurate with the leave period, an employee's re-employment rights are generally based on the length of time the employee was on leave. USERRA describes a hierarchy of jobs into which the employer must try to place the returning employee, depending on whether the employee's leave was greater or less than 90 days. §4313.

In the event the employee was on leave for 90 days or less, he or she must be placed in the position he or she would have been in had there been no leave taken. If the employee is not qualified to perform the duties of that position after reasonable efforts by the employer to qualify the person, then the employee must be placed in the position they held immediately prior to the leave. §4313(a)(1).

If the employee was on leave for more than 90 days, then he or she must be placed in the position he or she would have been in had there been no leave taken, or in a position of like seniority, status and pay. An employee not qualified to perform the duties of either of those positions after reasonable efforts by the employer to qualify the person, must be placed in the position held immediately prior to the leave, or in a position of like seniority, status and pay. §4313(a)(2). There are additional requirements for placing a returning employee in a position if the employee incurred or aggravated a disability while on leave. See §4313(a)(3).

Employers may be required to bump someone else from a position if it is necessary to place the returning employee in the proper job. The employer is also required to provide refresher training, and any other training necessary to update the employee's skills where the employee is no longer qualified due to technological advances which developed during the time of leave. §4313.

An employer is not required to re-employ the employee if the employer's circumstances have changed so much that re-employment of the person would be impossible or unreasonable. An employer is also excused from making efforts to qualify a returning employee or from accommodating employees with service-connected disabilities if doing so would cause undue hardship on the employer. §4312(d).

Re-employed employees are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed. §4316(a).