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EMPLOYERS' GUIDE TO EMPLOYEE MILITARY LEAVE
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With United States military units being deployed to Iraq and other global hot spots, employers in the U.S. 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 Reemployment Rights Act of 1994 ("USERRA", 38 U.S.C. §§ 4301 - 4333), management has certain duties to employee reservists.¹ 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 (1) has given the employer advance notice of the military leave, when that is possible, (2) has taken no more than five years of military leave while working with that employer (with some exceptions), and (3) applies for "reemployment" 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

¹ 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).

she has to apply for reemployment with the employer. § 4312(e).²

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 Reemployment 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 reemployment commensurate with the leave period, an employee's reemployment 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, 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, 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

² USERRA also lists circumstances in which the employee would not be covered, i.e. dishonorable discharge from the military. § 4304.

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 reemploy the employee if the employer's circumstances have changed so much that reemployment 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).

Reemployed 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).

Health Insurance Required of Employer

USERRA provides health care coverage continuation for employees who go on military leave, even if the employer is not obligated to continue coverage under COBRA (the Consolidated Omnibus Budget Reconciliation Act of 1985³, a statute that provides for continued health care coverage for certain “qualified beneficiaries” who have experienced a “qualifying

³The eligibility, benefits, administrative and penalty provisions of COBRA can be found beginning at § 601 of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq. Parallel provisions of COBRA can also be found at § 4980B of the Internal Revenue Code of 1986, 26 U.S.C. §§ 1 et seq.

event.”). USERRA § 4317. If the employee's health care coverage would normally discontinue due to the person's leave, the employee may elect to continue his or her coverage for up to 18 months after the leave begins, or for the period of military service (plus the time allowed to apply for reemployment), whichever is shorter. § 4317(a)(1).

Similar to COBRA, the employer may charge the employee up to 102% of the full premium for the coverage. However, if the military service was for 30 or fewer days, the employee cannot be required to pay more than what a normal employee pays. § 4317(a)(2).

If the employee chooses not to continue coverage while on military leave, the health plan may not impose any waiting periods or exclusions when the employee returns, if health coverage would have been provided to the person had the person not been absent for military service. § 4317(b).

Pension Rights

The pension requirements in USERRA cover any retirement plans that provide retirement income to employees until the termination of employment or later. This includes defined benefit plans, defined contribution plans, and profit sharing plans that are retirement plans. § 4318.

An employee who has taken military leave and is returning to employment with the employer must be treated as not having incurred a break in service with the employer. § 4318(a)(2). The time taken for military service must be counted for vesting and benefit accrual purposes under the employer's pension plan, and the employer is also liable for funding the resulting obligation. This liability must be calculated based on what the employee's compensation would have been had the employee worked for the employer during the period of military service. If the employee's compensation was not based on a fixed rate, or is not reasonably certain, then the employer's liability may be calculated based on the employee's average rate of compensation during the 12-month period immediately preceding the military leave. § 4318(b).

If the pension plan provides for employee contributions, the reemployed employee is entitled to any accrued benefits from these contributions to the extent he or she actually repays

the employee contributions. Repayment of these contributions by the employee may be made over three times the period of military service, but no longer than five years. § 4318(b)(2).

What Else Do Employers Need to Know?

USERRA also prohibits an employer from discharging a reemployed employee without cause for one year after the date of reemployment if the person's period of military service was for more than 180 days, or for six months after the date of reemployment if the person's period of military service was for 31 to 180 days. Persons who serve for 30 days or less are not protected from discharge without cause. § 4316(c). There are also prohibitions in USERRA from discriminating against employees because of past, current or future military obligations. This covers discrimination in hiring, promotion, reemployment, termination and benefits. § 4311.

Conclusion

With so many employees absent (often indefinitely), it's arguable that USERRA places significant burdens on employers and causes considerable uncertainties. However, employers need to be aware of their responsibilities to employees on military leave and the requirements applicable to them when they return. Company procedures should be reviewed to ensure compliance with federal and state laws regarding military leave, and employers should seek legal counsel to determine what requirements are applicable in a particular situation.

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