

Client Alert

A report
for clients
and friends
of the firm September 2001

Job Protections for Employees in Military Service

What does federal law provide?

The Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301, et seq., prohibits employment discrimination on the basis of military service and governs the treatment of employees who return from a leave of absence after serving in the armed forces or the national guard. Its purpose is "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; [and] to minimize the disruption to the lives of persons performing service in the uniformed services . . . by providing for the prompt reemployment of such persons upon their completion of such service." 38 U.S.C. § 4301(a).

The non-discrimination clause in USERRA specifically provides that persons serving in the uniformed services "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of their membership in the uniformed services. 38 U.S.C. § 4311(a).

Who is covered under USERRA?

USERRA's scope is very broad, applying to any person, institution, organization or other entity that pays a salary or wages for work performed by or that "has control over employment opportunities" of an individual. There is no requirement that an employer be engaged in interstate commerce or that it employ a minimum number of persons to be covered.

Similarly, any person working for an employer is covered by USERRA, as well as applicants for employment. There is also no minimum service requirement; USERRA applies to service for any period of time in the United States Army, Navy, Air Force, Marines, Coast Guard, National Guard, Reserves or Public Health Service. However, no reemployment rights are provided under USERRA for veterans who were employed in temporary positions prior to their military service. A position is considered temporary if it is for a brief, nonrecurring period and there is no reasonable expectation that it will continue indefinitely or for a significant period.

How does an employee qualify for the benefits and rights guaranteed under USERRA?

An employee absent from work due to military service must satisfy four requirements to be entitled to the benefits and reemployment rights guaranteed by USERRA. First, the employee is required to give advance notice (orally or in writing) to the employer that he or she will be absent from the job due to military service or training, unless such notice is precluded by military necessity or is otherwise impossible or unreasonable. Second, the military leave of absence may not exceed five years (except in certain circumstances including a declared war or national emergency). Third, the employee must receive an honorable or general discharge from military service or active duty. Fourth, the employee must apply for reemployment within a reasonable period after discharge from the service or return from active duty.

What rights and benefits do employees enjoy while on military leave?

Same Benefits

An employee on leave may elect to use accrued paid vacation time or any other similar paid leave as part of

We wish to extend our deepest sympathy to all of the victims of the terrorist attacks and their families and to all of our friends, clients and neighbors who have been touched by this tragedy. As we work to renew our spirit and rebuild our communities, we will be here to support those efforts.

his or her military leave. Employers, however, are prohibited from requiring employees to use such time or leave.

USERRA also provides that, while on leave, employees are entitled to the same benefits that are given to other similarly situated employees who take a leave of absence for non-military reasons. If an employee "knowingly" provides written notice of an intent not to return to employment following the military service, this requirement does not apply after the notice is given.

Medical

Employees on military leave may elect to continue coverage under a group medical plan, at their own expense, for up to 18 months. Employees on leave for less than 31 days who make this election cannot be required to pay more than the employee share, if any, for such coverage. Employees on leave for more than 30 days cannot be required to pay more than 102 percent of the full premium under the plan if they wish to continue coverage under their employer's plan.

Pension

Employees also receive pension benefit plan protection. Defined benefit and defined contribution plans must specifically provide that their time in the uniformed service be considered service with the employer for both vesting and benefit accrual purposes, provided that the veteran is reemployed within the time period allowed by USERRA.

How does an employee apply for reinstatement once he or she returns from military leave?

When an employee returns from military leave, he or she must submit an application for reemployment or report to the place of employment within a specified time. An employee whose military leave was for more than thirty days may be required by the employer to submit documentation that the application for reemployment is timely and that the discharge from the service or active duty was honorable or general.

The length of a returning veteran's period of service determines how soon reemployment must be sought after the service ends. If the military service was for less than 31 days, an employee satisfies the requirement by applying no later than the "beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation" back to his or her residence. If the length of service was more than 30 days but less than 181 days, an employee must submit an application for reemployment no later than 14 days following the end of military service. If submission of such application within this period is "impossible or unreasonable through no fault of the person," the application

for reemployment must be submitted on the next calendar day when submission becomes possible. For military service that lasts longer than 180 days, an application for reemployment must be submitted to the employer not later than 90 days after the conclusion of service.

These deadlines for reapplication may be extended for up to two years for a veteran who is hospitalized or recovering from an injury that occurred during the military service. Also, an employee who fails to apply for reemployment within the specified time period does not necessarily lose all reemployment rights. Rather, the employee is subject to the employer's "rules, established policy, and general practices . . . pertaining to explanations and discipline with respect to absence from scheduled work."

Does an employer have the right to deny reinstatement?

An employer may deny reemployment rights only under certain narrowly defined circumstances: (i) when changed circumstances make reemployment "impossible" or "unreasonable;" or (ii) in the case of a veteran who is not qualified to perform the position he or she would have had but for the leave or the position he or she had before the leave (due to a service-related disability or for other reasons), when placement of the veteran in another position would impose an "undue hardship" on the employer.

The "changed circumstances" proviso is narrowly construed and is generally to be applied only where reinstatement would require creation of a useless job or where there has been a reduction in work force that would have included the veteran if he or she had not been on leave. Mere replacement of the veteran does not constitute a sufficient change in an employer's circumstances; nor is a reorganization alone of the employer's business a change justifying denial of reinstatement.

What rights and benefits are employees entitled to once they return from military leave?

If the leave of absence was for less than 91 days, the returning employee (if qualified) must be reemployed in the position that he or she would have had if the employment had not been interrupted by military service. This means the position that the employee had prior to the military leave or, in certain circumstances, the position to which the employee would have advanced but for the leave. If the leave of absence was for 91 days or more, the returning employee must be reinstated to the position he or she would have had but for the leave or "a position of like seniority, status and pay" that the employee is qualified to perform. In both circumstances, an employer is obligat-

ed to make reasonable efforts to train an employee who is not initially qualified for such a position. Reservists sustaining disabilities during their stint with the military that prevent them from being qualified for their former position are still entitled to reemployment in some other available position for which they are qualified and which provides like seniority, status, and pay or the nearest approximation thereof, based on each individual's circumstances.

The employee is also entitled to the same salary, seniority, rights and benefits that he or she had on the date of the commencement of the leave, plus additional seniority and other rights and benefits determined by seniority that the employee would have had if he or she had remained continuously employed.

In addition, for an employee who was on military leave for more than 30 days and then subsequently reemployed, USERRA prohibits the discharge of the employee following reemployment except for "cause" (which depends on reasonableness and whether employees knew certain misconduct could be the basis for termination). The protection against discharge without cause extends for six months after reemployment if the military service was for 180 days or less and for one year if the employee served for over 180 days.

How is USERRA enforced?

Complaints of USERRA violations are handled by the U.S. Department of Labor Veterans' Employment and Training Service (VETS), which will be briefing Reserve and National Guard units called to duty. Lawsuits may be initiated by individuals or the U.S. Attorney's office after referral by VETS. Prevailing employees are entitled to attorneys fees, expert witness fees, and costs. If a court determines violations were willful, it can award liquidated damages.

Are there any similar state statutes?

Many states have statutes similar to USERRA. Such state laws may provide greater protection for veterans than USERRA. For example, New York, California and Florida law require that public employers pay employees their regular salary for up to 30 working days during a leave of absence for military duty.

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Please let us know if your mailing address needs to be updated. Contact Deborah Chernoff with the correct information, either via email: dchernoff@proskauer.com, or fax: 212.969.2900.

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