First Wednesday — A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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Leaves of Absence Due to Military Service

Federal law determines an employer's obligations to re-employ workers returning to civilian employment after taking leave for military service. In 1994, Congress passed the Uniformed Services Employment and Re-employment Rights Act (USERRA), which supersedes state law and any less-beneficial policy an employer may have in place. USERRA applies to all employers in the public and private sectors, and essentially requires job protection and additional employment benefits for individuals leaving employment to serve in the United States military. With few exceptions, an employer cannot refuse military leave.

This article summarizes USERRA and highlights the main issues. (USERRA is found at 38 U.S.C. § 4301, *et seq.*)

Who Is Eligible For Military Service Leave?

USERRA applies to anyone who misses work due to "service" in the uniformed services, which are defined to include the Army, Navy, Air Force, Marines, Coast Guard (including reserve units for each of these branches), Army National Guard, Air National Guard, commissioned Corps of the Public Health Service, and any other category designated by the President in time of war or emergency.

"Service" is defined as duty on a voluntary or involuntary basis, including active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and absences for examinations to determine fitness for duty.

An employee’s leave rights are typically triggered by the employee’s giving advance notice, unless notice is impossible, unreasonable or prevented by military necessity. The employer must then allow military leave, and be prepared to re-employ the person upon returning from military service, despite any resulting inconvenience to the employer.

Exemptions

Exemptions from the re-employment obligation may apply in the following limited circumstances:

1. The employer’s circumstances have so changed as to make the re-employment impossible or unreasonable;
2. Retraining or accommodating a disabled individual would pose an undue hardship for the employer; or
3. The employment prior to the military leave was for a brief, non-recurrent period with no reasonable expectation that the employment would continue indefinitely or for a significant period.

In these exemption cases, it is the employer’s burden to prove impossibility, unreasonableness, undue hardship, or the brief non-recurring nature of the employment prior to military leave.

What Is The Duration of Protected Military Leave?

The maximum length of leave time for any individual is five years. This five-year period is the cumulative length of all absences due to military service. There are certain exceptions that may extend the five-year period; generally, in cases where the military service is extended for reasons beyond the individual’s control. These should be checked if anyone is approaching the five-year limit.

Leave may be further extended for up to an additional two years if the individual is hospitalized for, or recovering from, an illness or injury incurred or aggravated during military service. If reporting or reapplying to work after the two-year period is impossible or unreasonable due to circumstances beyond the person’s control, the two-year period must then be extended.

Furthermore, as military leave is not a paid leave, upon the employee’s request, the employer must allow the employee to use any accrued paid vacation or similar paid time

off. An employee covered by group health insurance may elect to continue coverage for up to 18 months while on military leave in a manner similar to COBRA continuation coverage, but with some limits on the premium to be charged.

Rights of Returning Employees

Employees returning from military service are entitled to all the rights and benefits they would have had if they had remained continuously employed. They should be treated the same as other employees on non-military leaves of absence. For purposes of pension rights, they should be treated as not having taken any break in employment tenure.

Assuming that the individual gives timely notice of his or her intent to return to work after serving in the military, and no exemption applies (see above), that person must be re-employed. There are two key issues concerning the re-employment obligation: (1) the timeliness of the individual's notice seeking re-employment, and (2) the employer's specific obligations to re-employ that person.

Timeliness of Notice Seeking Re-employment

The time frame in which the individual must give notice depends on the length of time served in the military, as follows:

1. Fewer than 31 days of military service or fitness for duty exam: The individual must report back to work no later than the beginning of the first full regularly-scheduled work period on the first full calendar day following completion of service, plus time for safe transportation back to the person's residence, plus eight hours. If reporting at that time is impossible or unreasonable through no fault of the individual, then he or she must report to work as soon as possible.

2. More than 30 days but less than 181 days of military service: The individual must submit an application for re-employment no later than 14 days after the completion of service. If submitting an application within that time is impossible or unreasonable, again through no fault of the individual, then he or she must submit the application on the next full calendar day when it becomes possible.

3. More than 180 days of military service: The individual must submit an application for re-employment no later than 90 days after completion of service.

As to all the above categories, if there is any question about the timeliness of the individual's notice seeking re-employment, or reapplication for work, the employer should

apply its conduct rules, established policy and general practice governing explanations and discipline. The employer should not simply assume that a technical failure in the notice requirement will justify a refusal to re-employ that person under USERRA.

Employer's Re-employment Obligations

The specific re-employment obligations similarly depend on the amount of time served in the military. Returning employees are categorized as follows:

1. Fewer than 91 days of military service: The individual is entitled to be re-employed in the position in which he or she would have been employed had there been no interruption for military service, if the person is qualified to perform that job. If the person is not qualified, the employer must make reasonable efforts to qualify the individual. If those reasonable efforts fail, the person must be reinstated to the position he or she held before taking military leave. This means that if the person would have been promoted had he or she not been on military leave, the person is entitled to the position to which he or she would have been promoted unless unqualified to perform in that position even after reasonable efforts at training.

2. More than 90 days of military service: The individual is entitled to be re-employed in the position in which he or she would have been employed had there been no interruption for military service, or a position of like seniority, status, and pay, if the person is qualified to perform one of those jobs. If the person is not qualified to perform one of those jobs, reasonable efforts must be made to qualify the individual. If those reasonable efforts fail, the person must be re-employed in the position he or she held at the time he or she began military leave, or a position of like seniority, status, and pay.

3. Person with military-related disability: The individual with a disability incurred in or aggravated during military service must be reasonably accommodated. The person should be placed in the position he or she would have held had there been no interruption for military service. If performance of that job is impossible even with reasonable accommodation, the person must be given a job of equivalent seniority, pay, and status for which the individual is qualified, or for which he or she could become qualified with reasonable effort. If neither of these options is possible due to the disability, the person must be given another position of lesser status and pay, but with full seniority.

4. Two or more persons entitled to the same position: If two or more individuals are entitled to the same position and report for work, the person who left the position first has the right to that position.

Prohibitions on Discharge from Employment

An employee who has returned from military leave cannot be discharged, except for cause, within the following timelines:

1. Within one year of returning if the military service is more than 180 days; or
2. Within 180 days of returning if the military service is more than 30 days, but less than 181 days.

Documentation Requirements

For all individuals returning from military leave, employers may require documentation establishing that the person's application is timely, the person has not exceeded the cumulative five years of service, and the person has not lost his or her right to protection under USERRA due to dishonorable discharge or other factors listed in the statute.

Conclusion

USERRA is administered by the United States Department of Labor (DOL) through the Veterans' Employment and Training Service. Additional information can be found on the DOL website at www.dol.gov/elaws/userra0.htm. Obviously, in these times, USERRA should be checked frequently for updates, amendments and practice guidelines. Please contact me if you have any questions about USERRA or any of the employment issues regarding non-career military service personnel.

Note: In California, Attorney General Bill Lockyer has decided that an employee who is a member of the National Guard and is called to temporary active duty is entitled to receive his or her salary for a period not to exceed thirty (30) calendar days. Under this ruling, 30 calendar days consists of the number of working hours the employee would ordinarily work during the 30 calendar days. For example, for a person who works 40 hours per week, 30 calendar days is 21.5 working days or 172 working hours.

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