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UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

Employers face many challenges in the current employment landscape. Current events and the present political climate counsel that employers must stand ready to meet their employment-related obligations in the event of national military action or emergency. In particular, employers must be mindful that employees' present or prospective military commitments may require action and/or accommodation. For example, on January 10, 2003, Secretary of Labor Elaine L. Chao said in a news release that "[m]ilitary reservists should have confidence that while serving their country in active duty, their job pension and health benefits will continue for their families."

We have received many inquiries from employers about their legal obligations when employees are called into military service. The purpose of this newsletter is to provide general guidance and information about military leave and related employee rights and responsibilities under the Uniformed Services Employment and Reemployment Rights Act (USERRA).¹

INTRODUCTION

In the aftermath of the Gulf War, Congress passed the Uniformed Services Employment and Reemployment Rights Act (USERRA). Enacted in 1994, this federal law provides increased protection for employees who engage in military service. USERRA applies to all employers regardless of size. USERRA is a broad statute that guarantees certain rights for employees who engage in active military service and imposes corresponding obligations on employers. Its implications range from job reinstatement to benefit eligibility to disability accommodations.

While USERRA protects employees' seniority-related rights and employee benefits, the Act does not require that employers continue to pay employees for the time they spend in military service. Although USERRA does not mandate continued compensation, employers

should examine their own military leave policies or Collective bargaining agreements that may potentially provide compensation above and beyond USERRA's requirements and/or may provide for other benefits not mandated by USERRA. For example, although not required by USERRA, some employers have policies providing that an employee on a military leave of absence will be paid the difference between his or her military pay and civilian pay for all or part of the term of service.

RIGHTS GUARANTEED BY USERRA

Prohibition Against Discrimination

USERRA prohibits employers from discriminating against an employee on the basis of his or her past, current, or future military obligations. Put a different way, USERRA's protections extend to past members, present members, or individuals who apply to be members of the uniformed services. This prohibition extends to hiring, promotion, reemployment, termination, or the provision of any employment benefit.

Employers are prohibited from retaliating against employees engaged in activities protected by USERRA such as filing a complaint, participating in an investigation or proceeding, and/or exercising any other right provided by the statute. The prohibition against retaliation applies regardless of whether the employee has an affiliation with the uniformed services.

If an employee's military status is a motivating factor in an adverse employment action by the employer against an employee, the employer will be found liable for discrimination under USERRA unless it can demonstrate that it would have taken the same action regardless of the employee's military status.

Right to Reemployment

Eligibility for Reemployment

As specified below, USERRA requires employers to reemploy an eligible employee in a civilian position following military service. Reemployment rights under USERRA are triggered provided the following conditions are met:

- a. the employee must have given notice to the employer that he or she was leaving uniformed service, unless such notice was impossible, unreasonable, or precluded by military necessity;
- b. the employee must have separated from the service under honorable conditions;
- c. the employee's cumulative length of uniformed service must not have exceeded five years, subject to certain limited exceptions;
- d. the employee must have applied for reemployment in a timely manner as determined by length of service.

The statute provides reemployment rights to individuals who have been absent from a position of employment due to "service in the uniformed services." The statute defines "service in the uniformed services" to mean the performance of duty on a voluntary or involuntary basis in a uniformed service including: "active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness" of the individual for any of the preceding

types of duty. The term “uniformed services” means “the Armed Forces, the Armed National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.”

Reemployment – The “Escalator Principle”

Employers must reemploy an employee who engaged in a military leave for 90 days or less pursuant to the “escalator principle”. This means that the employee is reemployed into the position that he or she would have attained with reasonable certainty had there been continuous employment. Depending on the employment circumstances, this may mean that the employee is reemployed in the same position, a promoted position or, conversely, that the employee’s reemployment position is in layoff status. If the employee is not qualified for the escalated position, or if there is not an escalated position, the employer must offer the employee his or her old position. In addition the employer must make reasonable efforts to train an employee for the escalated position unless to do so would create an undue hardship. Employees who engaged in a military leave for 91 or more days are entitled to the same rights as set forth above, except that employers may elect to place qualified employees in a position of like seniority, pay, and status.

Disabled Employees & Reasonable Accommodation

If an employee becomes disabled during service or aggravates an existing disability during service, and thus is not qualified to perform his or her position, an employer must offer a reasonable accommodation to that employee. In the event that the employee cannot meet the requirements of the position with a reasonable accommodation, the employer must

reemploy the employee in any other position that is equivalent in seniority, status, and pay for which he or she is qualified or could become qualified to perform with reasonable efforts by the employer; or in the nearest approximate position in terms of seniority, status, and pay consistent with the employee’s circumstances.

Continuation of Employment Benefits

USERRA provides for the continuation of employment benefits for employees who engage in voluntary or involuntary military service on the same basis as for other employees on other kinds of leaves, in addition to certain specific benefits discussed below. Although an employer is not required to pay an employee during a military leave, the employer must, at the employee’s request, allow the employee to use any vacation, annual, or similar leave with pay accrued by the employee prior to the commencement of leave for military service. An employer, however, may not require an employee to use paid leave time during such period of service.

Health Insurance Benefits

Under USERRA, employees taking a military leave have the right to elect a continuation of health coverage for themselves and their dependents. Generally speaking, an employer must continue health coverage for up to eighteen months regardless of whether the employer is subject to COBRA and/or provides health coverage to employees for non-military leaves.

For military leaves of thirty days or less, the employer may charge only that amount it charges active employees for health care benefits. For military leaves in excess of thirty days, the employer may charge the employee up to 102% of the entire premium cost. If the employee elects to continue his or her health insurance coverage, the right to

coverage ends either eighteen months after the commencement of the leave, or the day after the deadline for him or her to apply for reemployment, whichever time period is shorter in length.

With narrow exceptions, upon reemployment, an employee has the right to immediate reinstatement of health insurance coverage without an exam or waiting period, regardless of whether he or she elected a continuation of coverage during the leave.

Retirement/Employee Pension Plan Benefits

USERRA requires that employees be credited for their time spent in uniformed service under both defined benefit and defined contribution plans. Upon an employee's reemployment, an employer must make any discretionary contributions on behalf of the employee that the employer would have made had the employee not been absent for military leave.

In a defined benefit plan, employees must be credited for their period of military service for the purposes of benefit computations. Practically, this means that when an employee returns to civilian employment, he or she must receive service credits for the time he or she was in uniformed service as if he or she had remained continuously employed.

For defined contribution plans, such as 401ks and Simple IRAs, employees have a period of time (determined by the length of military service) after reemployment in which to make contributions that he or she otherwise would have been allowed to make had he or she not been absent for military leave. The employer is required to match the employee's contributions, if any, to the extent it would have been required to do so had the employee not been absent for military leave and had contributed as otherwise required by the plan. For defined contribution plans that consist only of employer contributions, such as money purchase pension plans, employers must make contributions for the time period during which an

employee was engaged in uniformed service, upon reemployment.

The employee and employer are each allowed a time period equivalent to three times the employee's period of service in which to make these back contributions. This period begins on the date of reemployment and cannot exceed five years. Regardless of whether an employee elects to make back contributions, he or she is entitled to be credited for his or her period of military service for vesting purposes.

USERRA AND THE FAMILY MEDICAL LEAVE ACT

Recent Clarification by the Department of Labor

On July 22, 2002, the Department of Labor issued a memorandum clarifying its position with respect to the interrelation of USERRA and the Family Medical Leave Act (FMLA). The memorandum was issued around the time that many service members returned to their civilian jobs following President Bush's declaration of national emergency following September 11.

The memorandum counseled employers that USERRA requires that employees returning from military service leave receive all employment benefits that they would have received had they been continuously employed, including eligibility for leave under the FMLA. Consequently, when determining whether a veteran employee meets the FMLA eligibility requirements, the employer must include the time the employee would have worked but for the military service during the twelve months prior to the start of the requested FMLA leave.

COMMONLY ASKED QUESTIONS ABOUT USERRA

Is my company covered by USERRA?

All employers, regardless of size, are covered by USERRA.

When are an employee's reemployment rights as set forth in USERRA triggered?

An employee may assert his or her reemployment rights under USERRA provided the following conditions are met:

- 1) the employee must have given notice to the employer that he or she was leaving uniformed service, unless such notice was impossible, unreasonable, or precluded by military necessity;
- 2) the employee must have separated from the service under honorable conditions;
- 3) the employee's cumulative length of uniformed service must not have exceeded five years, subject to certain limited exceptions;
- 4) the employee must have applied for reemployment in a timely manner as determined by length of service.

How can an employer confirm that an employee is eligible for reemployment?

An employer can request documentation from the employee that his or her length of service did not exceed five years; that he or she was discharged from the military under honorable conditions; and that he or she is reporting on a timely basis. It is

important to note, however, that reemployment cannot be denied because such documentation does not exist or is not readily available upon request. If documentation later becomes available and reveals that one or more of the reemployment requirements was not met, the employer may terminate the employee, but the termination would have no retroactive effect.

Does USERRA cover employees who voluntarily perform duty in the uniformed services?

Yes, USERRA applies to employees who perform duty either voluntarily or involuntarily in the uniformed services.

What qualifies as "uniformed services"?

The uniformed services include the Army, Navy, Marine Corps, Air Force, Coast Guard, Army Reserve, and their reserve components; the Army National Guard and the Air National Guard; the Commissioned Corps of the Public Health Service; and any other category of persons designated by the President in time of war or emergency.

Is reserve training covered?

Yes, employers must excuse employees from work to attend military training and must reemploy such employees upon return.

Who administers USERRA?

USERRA is administered by the United States Department of Labor, through the Veterans' Employment and Training Service (VETS). Helpful information is available at the VETS website at <http://www.dol.gov/vets/>.

What is the total amount of time that an employee can be gone from work?

Under USERRA, an employee is permitted to accumulate a total absence from employment for military service of five years. For service compounded by injury or illness, additional time of up to two years may be permitted.

Can an employer fire an employee after he or she has returned from military leave?

Employers are restricted in their ability to terminate employees who have returned from military leave. Employees who took a military leave of 30 to 180 days may not be terminated without just cause for six months after reemployment. Employees who took a military leave of 181 or more days may not be terminated without just cause for one year after reemployment.

What employee benefits guaranteed by USERRA are conditioned upon reemployment?

- 1) Immediate reinstatement of civilian health insurance coverage for the employee and previously covered dependents;
- 2) Credit for the period of military service for the purpose of pension vesting rights; and
- 3) Continued service credits under defined benefit pensions and the ability to make back contributions to defined contribution pension plans.

What employee benefits are protected regardless of whether an employee becomes reemployed after military service?

- 1) In most situations, continued health insurance coverage up to a maximum of 18 months; and
- 2) Non-seniority benefits, such as life insurance, to the extent the employer makes these benefits available to other employees who are on furlough or leave of absence.

How long and at what cost may an employee continue his or her health insurance coverage under USERRA?

An employee may continue his or her health insurance coverage through his civilian employer for up to thirty days at the normal cost of his employee share. After thirty days, an employee may continue his coverage by paying up to 102% of the cost of his entire premium. In most situations, this coverage can continue for up to 18 months.

How long does an employee have to make back contributions to a defined contribution pension plan after reemployment?

Beginning on the date of reemployment, an employee may take up to three times the time period of his or her military service to make back contributions. This payment period may not exceed five years.

If an employee is enrolled in a defined contribution plan such as a Simple IRA or 401(k), must an employer submit employer match contributions to the plan for the period the employee is engaged in military service?

Under a plan that provides for matching contributions, an employer must submit matching contributions only if an employee elects to make back contributions to the plan upon reemployment.

Do you count the military leave period when determining if an employee is eligible for leave under the FMLA?

Yes, the Department of Labor recently clarified that when determining whether a veteran employee meets the FMLA eligibility requirements, USERRA requires that the employer include the time the employee would have worked but for the military

service during the twelve months prior to the start of the requested FMLA leave.

Do you have to pay an employee for the time he or she engages in military service?

Although USERRA does not require employers to pay employees for the time they are engaged in military service, some collective bargaining agreements and employer policies do. Employers should consult their own military leave policy or collective bargaining agreements for relevant provisions.

What is the period for reapplication for employment after military service is concluded for an eligible employee?

The period and requirements for reapplication depends upon the length of service and are set forth on the following page:

Any specific questions regarding USERRA or military leave may be directed to Katherine Hesse, Nan O'Neill, Monica Swanson Tesler, or the attorney assigned to your account.



Do you have a colleague who would find this newsletter useful? If so, simply provide the information below and mail the reply card to us. We would be happy to send your colleague future issues of the **MHT&L Employment and Benefits Legal Update.**

Colleague Name

Position / Dept.

Company / Organization

Address

City State Zip

Telephone Email

Your Name

Your Company / Organization

<u>Length of Service</u>	<u>Period for Reapplication</u>	<i>Do states have any special laws governing employees' rights with respect to military leave?</i>
0 - 30 Days	By the beginning of the first regularly scheduled period 8 hours after safe travel home after service.	Yes, many states have their own laws that govern employees' rights with respect to military leave in addition to USERRA. For example, Massachusetts has statutes governing military training leaves and participation in Veterans Day and Memorial Day services. ² For more information on state-specific laws, please consult an attorney.
31-180 Days	14 Days after service.	
181 + Days	90 Days after service.	
Service-connected injury or illness	Reporting or re-application deadlines may be extended up to two years depending on the circumstances.	(Endnotes) ¹ Although this newsletter highlights certain requirements of USERRA, please refer to the statute at 38 U.S.C. §§ 4301 <i>et seq.</i> and/or consult with an attorney for complete USERRA requirements. ² Massachusetts General Laws ch. 149, ss. 52A and 52A½.

Place
Stamp
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