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Obligations To Employees Called To Military Service

Should employees returning to the workplace from active military service expect to pick up where they left off? Yes, according to federal law under the Federal Uniform Services Employment and Reemployment Rights Act. In the following article, Bennett Pine provides details on the federal act that every employer should be aware of.

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Against the backdrop of the escalation of war in the Middle East and reports of President Bush authorizing the call-up of several hundred thousand military reservists to active duty, employers should be increasingly concerned with their military leave obligations under the Federal Uniform Services Employment and Reemployment Rights Act ("USERRA"). The 1994 law prohibits discrimination toward returning service members, reservists, and National Guard Members based on their active military duty or training obligations. This prohibition covers past, present, and future military service and extends to most areas of employment, including hiring, promotion, reemployment, and employee benefits.

By Bennett Pine

Coverage/Eligibility

USERRA is an extremely broad statute that covers all employers regardless of size, and applies to all veterans who perform voluntary or involuntary service in the uniformed services, including active duty, active duty for training, inactive duty, inactive duty for training, and full-time National Guard duty. As a result, small employers must be especially cognizant of their USERRA obligations.

Compensation

Employers are not required by USERRA to provide paid leave during military service unless the employer regularly does so for other types of leaves of absence. In addition, the employee may elect, but is not required, to use any available paid leave benefits that have been accrued.

Benefit Continuation

For military service of less than 31 days, employers are required to maintain health care coverage on the same basis as if the employee in military service had remained employed. Individuals who perform military service for more than 30 days may continue their employer-sponsored healthcare coverage for up to 18 months. The employer is not, however, required by USERRA to pay for such coverage; employees may be required to pay up to 102 percent of the full premium, as under COBRA.

Five-Year Service Protection

USERRA entitles veterans to serve a total of five years on active military duty without forfeiting their rights to return to their civilian jobs with full seniority and attendant benefits. There are a number of conditions under which the five-year period may be extended. »

Applying For Reinstatement

Length of military service determines when a veteran must report back to work or apply for reemployment. If length of service is 30 days or less, a veteran must return to work by the next regularly scheduled working day. If length of service is between 31 days and 180 days, a veteran must apply for reemployment within 14 days of completing military service. If length of service is 181 days or more, a veteran must reapply for employment within 90 days of completing military service.

Veterans hospitalized for illness or injury incurred or aggravated during military service have up to two years to seek reemployment.

Reemployment Position

The position to which a returning veteran must be reinstated depends upon the duration of the military service.

Veterans returning to work after one day to 90 days must be promptly reemployed in the following order of priority:

- ◆ In jobs they would have attained had their employment continued uninterrupted, if qualified
- ◆ In positions they would have attained if qualified after reasonable efforts by employers to train and qualify veterans
- ◆ In jobs held prior to military service, if not qualified for positions described above

Veterans returning to work after 91 days or more must be promptly reemployed in the following order of priority:

- ◆ In jobs they would have attained had their employment continued uninterrupted or those of like seniority, status, and pay, if qualified
- ◆ In positions they would have attained, if qualified, after reasonable efforts by employers to train and qualify veterans, or in those of like seniority, status, and pay
- ◆ In jobs of lesser status and pay that most nearly approximate the above positions (in that order) that employees are qualified to perform with full seniority.

When a returning employee has been injured while performing military service, employers will be expected to provide "reasonable accommodations" consistent with those required under the Americans With Disabilities Act.

Returning Status: The "Escalator"

USERRA incorporates the "escalator" principle, which requires that qualified veterans returning to work be — with some exceptions — reemployed at the "precise point" they would have attained had their employment not been interrupted by military service. This escalator principle seeks to ensure that veterans receive the "perquisites of seniority" — changes and

advancements in job status that necessarily occur "simply by virtue of continued employment." The escalator principle starts from the premise that, but for serving in the military, a veteran would have remained employed with the employer, performed satisfactorily, and taken all steps necessary to assure his or her good standing at work. Under this premise, returning veterans are entitled to receive any "reward[s] for the length of service" they would

have earned but for their absence. Such perquisites of seniority typically include pensions, severance pay, health benefits, employee stock option plans, and bonuses.

It is essential that all employers fully understand their legal obligations to their employees.

Restrictions On Termination Following Reinstatement

An employee who has been reemployed after service exceeding 30 days may not be terminated without "cause," regardless of an employer's at-will policy. If an employee's service lasted between 30 and 180 days, he is entitled to at least six months of employment under USERRA's statutory "cause" scheme. During this six-month period, the employee may not be terminated without cause. If an employee's service exceeded 180 days, he is entitled to at least a year of employment under the "cause" provision. While the Act is silent on what standard of "cause" is to be applied, the traditional definition of "just cause" employed by labor arbitrators would generally be expected to apply.

Waiver Of Reemployment Rights

Veterans who fail to report or apply for reemployment within the prescribed period do not automatically waive reemployment rights, but are subject to employers' policies concerning absence from work. Veterans can waive protections under USERRA. However, the waiver must be "clear and unequivocal." Veterans waive their reemployment »

rights when, prior to leaving for military service, they knowingly provide clear, written notice of their intent not to return to work.

USERRA protections end if a veteran separates from military service with a dishonorable or bad-conduct discharge, under other than honorable conditions, or by sentence of a general court-martial. USERRA protection also ends if a veteran is dropped from the rolls by the President for unauthorized absences of three months or more or is sentenced by a court to prison.

Enforcement And Remedies

The Veterans Employment and Training Service must assist any veteran entitled to reemployment under USERRA. Valid claims by private employees that cannot be resolved by the agency may be referred to the attorney general for a court action. Relief that can be sought and granted under USERRA include compliance, damages in the amount of pay or benefits wrongfully denied, and when the violation of USERRA is willful, liquidated damages.

Conclusion

Given the large number of reservists who have been or will be called to active service in the current climate, it is essential that all employers fully understand their legal obligations to their employees in military service. ☞

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