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Employers Must Be Aware of Their Legal Obligations Under the USERRA, Which Provides Job and Benefit Protection to Employees Who Have Temporarily Departed the Workplace to Serve in the Uniformed Services.

MILITARY LEAVE RIGHTS AND THE OBLIGATIONS OF THE NATION'S EMPLOYERS

By Jason M. Branciforte and Sue Marie King

The National Guard and Reserve have activated the largest number of troops since September 11, 2001, for the war in Iraq. Although many employees have already departed from work, additional service members may be activated at a later date or individuals may voluntarily enlist in the armed services. This discussion seeks to inform employers of the federal and state laws governing employee rights and job protections for these individuals.

The primary federal law that applies to employees who undertake military service is the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Act provides job and benefit protection for members of the uniformed services, and generally allows employees to take up to five years of leave for military service. The Act applies to all employers, regardless of size, and includes federal and state governments and their political subdivisions. Additionally, in 1989 Congress amended USERRA to cover United States citizens and permanent resident aliens working in foreign countries for companies that are incorporated or organized in the U.S., or controlled by an entity organized in this country.

PURPOSE OF THE ACT

USERRA prohibits employers from discriminating against individuals who are members of, apply to be members of, perform, apply to perform, or have service obligations in a uniformed service. The Act also precludes retaliation against in-

dividuals because they have exercised their right to perform military service, testified or made a statement in connection with any proceeding under the Act, or participated in an investigation under the Act.

For example, an employer generally may not refuse to hire an employee because he or she is a reservist. Similarly, an employer may not terminate an employee because he or she is called to active duty, or enlists, in the military.

EMPLOYEES COVERED UNDER USERRA

In order to qualify for coverage under USERRA, an individual must be absent from work because of "service in the uniformed services." This means that the employee is engaged in voluntary or involuntary duty in a uniformed service, and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and absence from work for an examination to determine an individual's fitness to perform these duties.

Congress also defined "uniformed services" broadly to include the Army, Navy, Air Force, Marines, Coast Guard, Army National Guard and 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 of the United States as such in time of war or national emergency.

NOTICE REQUIREMENTS FOR IMPENDING SERVICE

An employee is required to provide his or her employer with advance written or oral notice of their service obligations in order to be entitled to USERRA's reemployment rights and benefits. This notice obligation is waived when military necessity precludes providing it, or if giving the notice is impossible or unreasonable. Written notice may consist of a copy of an employee's military orders, training notices or induction information. However, many employers may choose to be more flexible with these requirements, and provide their employees with more time to let them know they have been called to active duty.

COMPENSATION DURING LEAVE

Employers are not required to compensate employees for absences due to military service. However, some companies have adopted more flexible policies for compensating employees in the service. For example, some employers pay their employees the difference between their military pay, and their regular company salaries if the military pay is less. Others continue full payment of wages for at least a limited period of time.

Employees on qualifying military leave are entitled to the same benefits provided to employees on other forms of leave. For example, if an employer provides employees on other types of unpaid leave with continued health insurance, life insurance, disability insurance, or other benefits, then these same benefits must be provided to employees on military leave.

THE RIGHT TO REINSTATEMENT

USERRA provides that, after an employee's service is completed, he or she has the right to reinstatement. However, as a preliminary matter, an employee has a certain amount of time within which he

or she must notify their employer that they are ready to return to work. This amount of time varies based upon the length of the employee's service, and may be extended for up to two years if the individual is hospitalized for or convalescing from a service-related illness or injury. If the employee does not comply with these rules, they will not lose any reinstatement rights, but will instead become subject to the employer's regular absenteeism policy.

Employees Who Served Less than Ninety-One Days. For employees who served less than ninety-one days in the military, they must be reemployed in the position that he or she would have attained if they had been continuously employed, so long as the individual is qualified for the job or can become qualified after reasonable efforts. If the individual is not qualified for that position, the individual must be reemployed in the position he or she left prior to military service or in a position that is the nearest approximation of that position. An employer may not offer "other jobs" of equivalent status.

Employees Who Served Ninety-One or More Days. An employer's reemployment obligations are similar for those employees who served ninety-one or more days in the military. For those employees, the Act requires that they be reemployed in a position that they would have attained if continuously employed, so long as they are qualified or can become qualified for the job. If the individual cannot become qualified, the employer is obligated to reemploy that employee in his or her former position, or in a position of equivalent seniority, status, and pay. Those individuals who served more than ninety-one days who cannot qualify for the position they would have attained, their former positions, or a position of equivalent seniority, status and pay must be placed in a position of "like status" for which they are qualified.

Employees returning from military leave are entitled to the seniority and other rights and benefits determined by seniority that they would have attained had they not gone on leave. A right or benefit is seniority-based if it is determined by or accrues with length of service. Thus, returning employees are entitled to accrue vacation upon their return at the rate they otherwise would have attained if they had continued working. Additionally, employees returning from military leave are entitled to non-seniority-based rights and benefits established by contract, practice, policy, or agreement in effect at the beginning of their military service or implemented during the leave.

Employers must also provide the option of COBRA-like health plan coverage for employees on military leave, as well as for their eligible dependents. Unlike COBRA, USERRA requires all qualifying employers that provide health plans to offer this continuation of coverage. Coverage must be continued for the lesser of the eighteen-month period starting from the date the employee's absence begins, or the day after the date on which the employee fails to apply for or return to work.

Finally, among its other additional benefits for employees, USERRA provides that any employee who is reinstated pursuant to the Act only may be discharged for cause during a defined period of time after they return to work. The length of the protected employment term depends on the amount of time the employee spent in the service.

ENFORCEMENT AND REMEDIES

Under USERRA, employers can be sued by the federal government or by employees. Remedies for violating the Act may include compensation for lost wages and benefits, and in the case of willful violations, an equal amount as liquidated damages. Additionally, a court may

award attorney's fees, expert witness fees, and other litigation expenses to the prevailing employee.

STATE LAW AND HELP FOR
SMALL BUSINESSES

All states impose additional obligations on employers with respect to military leave. USERRA is merely a "floor" of benefits for employees, and states are free to increase the benefits and rights employers must provide. Therefore, employers must refer to all applicable state statutes when determining their obligations.

Additionally, small businesses employing National Guard and Reserve members may be eligible for assistance from the U.S. Small Business Administration (SBA).

CONCLUSION

As U.S. service members are engaged in active duty at various U.S. military bases at home and abroad, employers of all sizes will undoubtedly confront additional issues related to employees taking and returning from military leave. A clear understanding of rights and obligations in this area is critically important to both those individuals who provide important service to our nation, and to the businesses that remain behind, seeking to maintain successful operations in a very challenging economic climate.

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