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The Department of Labor has issued final regulations implementing the Uniformed Services Employment and Reemployment Rights Act of (USERRA). The new regulations, effective January 18, 2006, discuss employer's obligations and responsibilities to employees returning from military service leave.

## DOL Finalizes USERRA Regulations Detailing The Reemployment Rights Of Military Service Members

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On December 19, 2005, the United States Department of Labor (DOL) issued final regulations implementing the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"). The regulations respond to a number of comments made to the draft regulations initially issued by the DOL in September 2004. The final regulations become effective on January 18, 2006. The DOL has also published a final version of the notice that employers must post to inform employees of their rights, benefits, and obligations under USERRA to return to their jobs at the same pay, benefits, and status following military service. A copy of the poster is available at [http://www.dol.gov/vets/programs/userra/USERRA\\_Private.pdf#Non-Federal](http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal).

The USERRA regulations, written in question and answer format, discuss an employer's obligations and responsibilities regarding reemployment of employees returning to work after military service. The full text of the final regulations can be obtained at [www.dol.gov/vets/regs/fedreg/final/USERRA\\_Final\\_Rule.pdf](http://www.dol.gov/vets/regs/fedreg/final/USERRA_Final_Rule.pdf). The following are among the most significant matters addressed in the final regulations.

### Definition of "Employer"

The final regulations retain a definition of "employer" that is broader than that found in other federal statutes such as the Americans with Disabilities Act, the Age Discrimination in Employment Act,

and Title VII of the Civil Rights Act of 1964. Under the USERRA regulations, individual supervisors and managers who have control over employment opportunities, and to whom the employer has delegated the performance of such responsibilities, may be personally liable as an "employer" under the Act. However, entities to whom an employer or plan sponsor have delegated purely ministerial functions regarding the administration of employee benefits plans are not intended to be covered by USERRA's definition of "employer."

### Reemployment into the "Escalator Position"

Utilizing a concept known as the "escalator" principle, the USERRA regulations require that a service member who properly returns from a qualified leave be reemployed in a position known as an "escalator position." That position must permit an employee to step back into the position the employee would have occupied had he or she remained employed continuously during the period of military leave.

USERRA itself contains the escalator principle, and defines the employer's reemployment obligations to be three-fold:

1. reemployment into the position the person would have attained had he or she remained employed with the company;
2. if no escalation would have occurred

(or if the person is not qualified to perform the duties of the escalated position after reasonable efforts by the employer to train the person upon return from leave) re-employment into the position the person held at the time he or she left for military service; or

3. if the military service period is more than 90 days, reemployment into a position of like seniority, status and pay if the old position no longer exists. The regulations do not discuss each of these options, but instead focus on the idea of the escalator principle, presumably because the escalator principle encompasses all three options.

The regulations address the use of the escalator principle in six particular circumstances: (1) an employer who uses a seniority or bidding systems for job assignments; (2) promotions that are based on an employer's discretion rather than purely on seniority; (3) reductions in force ("RIFs"), layoffs, and disciplinary procedures; (4) bargaining units on strike at the time of reemployment; (5) apprenticeships; and (6) probationary periods. Each of these is discussed below.

Many employers use seniority-based bidding systems to award jobs and other prerequisites of employment to employees. The regulations require, generally without exception, that a returning service member be awarded a job or other prerequisite of employment if it is reasonably certain that the service member would have received it but for the interruption due to military service. As a general matter, an employee returning from military leave may not be required to wait for the next regularly occurring opportunity to bid in order to seek promotions and other benefits tied to the escalator position. If the employee would have been able to bid into that position had he or she remained employed, they must be given the ability to have that position upon returning from military leave.

Because many promotions are based on

demonstrated ability and experience, rather than length of service, employers who commented on the DOL's draft regulations expressed concern that the escalator principle for reemployment is appropriate only in workforces where pay increases and promotions occur automatically or as the result of a seniority-based system. In response, the DOL incorporated into the regulations a "reasonable certainty" test that is to be applied to discretionary and nondiscretionary promotions. A returning service member may not be entitled to a promotion, if the promotion depends not simply on seniority or some other form of automatic progression, but on the employer's discretion. The final rule promotes the application of a case-by-case analysis in order to make this determination.

Employees that are laid off with recall rights (either prior to taking the leave or during the leave) may be entitled to reemployment upon return if the employer would have recalled the employee but for the military service. In the event that a returning employee was subject to a disciplinary review at the time of the onset of service, or in the event that the employer discovers conduct prior to reemployment that may subject the returning service member to disciplinary review upon reemployment, the regulations state that the employer still has a reemployment obligation. The employer may resume the disciplinary review upon reemployment, or may initiate such review based on conduct discovered prior to reemployment. The regulations prohibit an employer from denying reemployment rights based on the position or argument that the employee would have been discharged had he or she not left for military service. Depending on the length of the leave, the regulations also prohibit an employer from discharging an employee following reemployment for a period of time. Leaves of 31-180 days require a just cause termination for a period of six months. Leaves greater than 180 days require a just

cause termination for a period of one year. Like USERRA itself, the regulations do not define "just cause."

If a returning service member's bargaining unit is or has been on strike, the returning service member still remains an employee for purposes of reemployment rights governed by USERRA. However, employers and employees should be aware that an employee's reemployment rights in this situation may be affected by federal labor law under the National Labor Relations Act (NLRA), which includes decisional law under the NLRA governing reinstatement rights of workers engaged in a work stoppage.

If an apprentice position is bona fide, not a time-in-grade requirement, a returning service member should be restored as an apprentice at a level that reflects both the experience and training he or she received pre-service. Upon completion of the apprenticeship post-service, the employee is entitled to "journeyman" seniority plus any seniority that would have accrued during military service had the journeyman status been attained during the period of service. Similarly, if a probationary period is a bona fide period of observation and evaluation, the returning service member must complete the remaining period of probation upon reemployment. Under the regulations, once the employee completes the apprenticeship or probationary period, the employee's pay and seniority should reflect both the pre- and post-service time in the apprenticeship or probationary period, plus the time served in the military.

## Seniority Rights and Benefits

The escalator principle also entitles the returning service member to the same seniority and other rights and benefits determined by seniority that the service member would have attained if his or her employment had not been interrupted by service in the uniformed service. The regulations preserve seniority benefits

governed by statute, including a returning service member's right to leave under the Family and Medical Leave Act (FMLA). A reemployed service member would be eligible for FMLA leave if the number of months and the number of hours of work for which the service member was employed by the employer, together with the number of months and number of hours of work for which the service member would have been employed by the employer during the period of military service, meet FMLA's eligibility requirements.

## Disabled Employees

The regulations impose additional requirements on employers where a returning service member is disabled (or a disability is aggravated) while a person is on military service leave. Under the regulations, a disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for military service. If the disability is not an impediment to the service member's qualifications for the escalator position, then the disabling condition is irrelevant for USERRA purposes. If the disability limits the service member's ability to perform the job, however, the regulations impose a duty on the employer to make reasonable efforts to accommodate the disability. If, despite the employer's reasonable efforts to accommodate the disability, the returning disabled service member cannot become qualified for his or her escalator position, that person is entitled to be reemployed in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer. If no such position exists, the service member is entitled to reemployment in a position which is the nearest approximation in terms of seniority, status, and pay consistent with the circumstances of such person's case. The regulations set forth the

priority of reemployment positions for which the disabled service member should be considered.

The regulations also implement the statutory requirement for reasonable accommodation of the returning service member's disability. Such accommodations may include placing the reemployed person in an alternate position, or on "light duty" status; modifying technology or equipment used in the job position; revising work practices; or shifting job functions. The position must be one that the person can safely perform without unreasonable risk to the person or fellow employees. A service member who incurs a temporary disability may be entitled to interim reemployment in an alternate position provided he or she is qualified for the position, and the disability will not affect his or her ability to perform the job.

## Rate of Pay

The escalator principle also determines the returning service member's rate of pay after an absence from the workplace due to military service. Depending on the particular position, the rate of pay may include more than the basic salary. The regulation lists various types of compensation that may factor into determining the employee's overall compensation package under the escalator principle. These include pay increases, differentials, step increases, merit increases, periodic increases or performance bonuses.

## Pension Plan Benefits

The regulations define an employee pension benefit plan in the same way that the term is defined under the Employee Retirement Income Security Act (ERISA). The regulations provide that once the service member is reemployed, he or she is treated as not having a break in service with the employer or employers maintaining the plan even though the

service member was away from work performing military service. Although USERRA relies on the ERISA definition of an employee pension benefit plan, some plans excluded from ERISA coverage may be subject to USERRA.

Each period of uniformed service is treated as an uninterrupted period of employment with the employer(s) maintaining the pension plan in determining eligibility for participation in the plan, the non-forfeatability of accrued benefits, and the accrual of service credits, contributions and elective deferrals under the plan. As a result, for purposes of calculating these pension benefits, or for determining the amount of contributions or deferrals to the plan, the reemployed service member is treated as though he or she had remained continuously employed for pension purposes.

Employer contributions to a pension plan that are not dependent on employee contributions must be made within 90 days following reemployment or when contributions are normally made for the year in which the military service was performed, whichever is later. Where pension benefits are derived from employee contributions or elective deferrals, or from a combination of employee contributions or elective deferrals and matching employer contributions, the reemployed service member may make his or her contributions or deferrals during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of military service, with the repayment period not to exceed five years.

## Health Plan Coverage

The regulations follow USERRA's requirement that service members on military leave have the right to continue their existing employer-based health plan coverage. USERRA's health plan provisions

are similar, but not identical, to the coverage continuation provisions added to federal law by the Consolidated Omnibus Budget Reconciliation Act (COBRA). Unlike COBRA, USERRA's continuation coverage is available without regard to either the size of the employer's workforce or to whether the employer is a government entity. The maximum period of continued coverage is the lesser of 24 months or the period of military service (beginning on the date the absence begins and ending on the day after the service member fails to apply for reemployment). USERRA, unlike COBRA, does not specify requirements for electing continuing coverage. The Act views each individual plan as best qualified to determine what relevant rules are reasonable based on its own unique set of characteristics. Plans are permitted to adopt reasonable rules, which may include COBRA timeframes.

For the first 30 days of any military leave, an employee may not be required to pay for health care coverage more than he or she would have paid as a regular employee of the company. For leaves exceeding 31 days, the employee can be required to pay 102% of the cost of the health care coverage, similar to COBRA.

Under the regulations, service members must be provided continuing coverage if their untimely election was excused because it was impossible, unreasonable or precluded by military necessity. The DOL received comments expressing concern that employers may be required, under this provision, to pay premiums for employees who do not want continuation coverage but have failed to advise their employers. In response, the regulations provide that an employer may cancel an employee's health insurance if the employee departs work for military service without electing continuing coverage, with a requirement for retroactive reinstatement under certain circumstances. In addition, the regulations provide that plans may develop reasonable rules to permit

termination of coverage if an employee elects but does not pay for continuation coverage. An employer must reinstate coverage upon the employee's prompt reemployment without the imposition of exclusions or waiting periods.

## Anti-Discrimination and Anti-Retaliation

USERRA prohibits an employer from engaging in acts of discrimination or retaliation against past and present members of the uniformed services, as well as applicants to the uniformed services. In the final regulations, the DOL added clarification to the burdens of proof required to prove employer discrimination and retaliation.

In order to establish a case of employer discrimination, the person's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services must be a "motivating factor" in the employer's actions or conduct. The initial burden of proof of discrimination or retaliation rests with the claimant alleging discrimination. The claimant must first establish that his or her protected activities or status as a past, present or future service member was a motivating factor in the adverse employment action. The claimant must also prove the elements of a violation – i.e., membership in a protected class (such as past, present or future affiliation with the uniformed services); an adverse employment action by the employer or prospective employer; and a causal relationship between the claimant's protected status and the adverse employment action (the "motivating factor"). The claimant is not required to provide direct proof of employer animus; intent to discriminate or retaliate may be established through circumstantial evidence.

After the claimant establishes the elements of an alleged violation, the employer may avoid liability by proving by a preponderance of the evidence that the

claimant's military activities or status was not a motivating factor in the adverse employment action. At this stage, the employer carries the burden to affirmatively prove that it would have taken the action anyway, without regard to the employee's protected status or activity.

The same evidentiary framework is provided for adjudicating allegations of reprisal against any person (including individuals unaffiliated with the military) for engaging in activities to enforce a protected right under the Act; providing testimony or statements in a USERRA proceeding; assisting or participating in a USERRA investigation; or exercising a right provided by the Act.

## Conclusion

While the DOL's final regulations under the USERRA clarify a number of previously uncertain areas, interpretation and application of the USERRA can still be confusing in a number of respects. It is therefore recommended that employers seek the advice of experienced labor counsel as particular circumstances warrant.

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