

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

DOL clarifies final USERRA regulations

According to the Department of Defense, 50,000 to 125,000 service members covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA) will be demobilized this year. Many of the members of the National Guard and Reserve have served tours of duty for a year or more. Many of them left jobs to which they now plan to return.

If they meet USERRA's eligibility requirements, they are entitled to return to those jobs or to the jobs they would have held had they not been on military leave. That could mean a job with higher pay and greater benefits or it could also mean that they will return to no job if there has been an intervening layoff or reduction-in-force.

The global war on terror has forced employers who may not have paid much attention to USERRA in the past to take a hard look at the reality of their USERRA obligations. Understanding employees' and employers' rights and obligations under the law has been a priority for most employers over the last few years.

To assist in that effort, the Veterans' Employment and Training Service (VETS) of the U.S. Department of Labor (DOL) has

issued regulations in question and answer format to implement the 10-year-old statute. The preamble to the final rule published in the *Federal Register* on December 19, 2005 [70 FR 75246, 20 CFR §§1002.1-.314] responds to some 80 public comments VETS received after the proposed rule was published on September 20, 2004 [69 FR 56266].

Although employers have operated under USERRA for 10 years without any regulatory guidance, the regulations serve to call employers' attention to USERRA rights and obligations, said management attorney George Wood. "There are still a number of employers of varying sizes that do not understand USERRA obligations. They know that there are military leave obligations, but do not fully appreciate the scope of the law's obligations on them and their employees," he said.

Ambiguities clarified. Wood was pleasantly surprised that DOL made changes that seemed to be for the purpose of helping everyone better understand what USERRA requires. "They provide needed clarification in several areas, which will help employers and employees better understand their rights and obligations under USERRA."

INSIDE

GEORGE R. WOOD, Shareholder, Littler Mendelson, PC, Minneapolis, Minnesota, discusses the final rule implementing the Uniformed Services Employment and Reemployment Rights Act of 1994.

VETS interview. Beginning on page 3, officials of the Veterans' Employment and Training Service of the U.S. Department of Labor respond to questions about the rule and USERRA enforcement.

Where to find it. The text of the final rule appears at ¶1298 of CCH LABOR RELATIONS, vol. 1, and also at Labor Relations ¶1298 of the CCH Internet Research Network (IRN). The text of the Preamble to the final rule appears at ¶9167 of Labor Relations, vol. 6 and also at Labor Relations ¶9167 of the IRN.

See ¶670 of LABOR RELATIONS, vol. 1, for the full text of USERRA. See ¶6700 of vol.5, for an annotated explanation of USERRA, which will be updated to reflect the provisions of the final rule in a future report.

FROM PROPOSED TO FINAL

Prompt reemployment. Returning service members who meet USERRA's eligibility requirements must be promptly reemployed. As a general rule, that means as soon as practicable under the circumstances of each case. Absent unusual circumstances, prompt reemployment means within two weeks of the employee's application for reemployment. [1002.181]

DOL rejected suggestions to extend the reemployment period to 30 days. "[T]wo weeks represents an equitable balance between the interests of employers, who may face some challenges in reemploying an employee in the organizational structure after a lengthy period of absence, and the interests of employees, who have been making the greatest of sacrifices in service to their country," DOL noted.

Escalator position. The employee is entitled to reemployment in the position that he or she would have attained with "reasonable certainty" if he or she had remained continuously employed, otherwise known as the "escalator position." [1002.191]

In response to comments, DOL addressed the escalator position in the context of bidding systems for job assign-

ments; discretionary promotions; reductions in force, layoffs, and disciplinary procedures; bargaining units on strike at the time of reemployment; apprenticeships; and probationary periods.

Bidding systems. As a general rule, DOL said, a reemployed employee should 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.

Strikes. Returning service members whose bargaining unit has been or is on strike when the service member returns is considered an employee for purposes of reemployment rights [1002.42], however, DOL noted that reemployment rights may be affected by federal labor law.

Apprenticeships and probationary periods. An employee who was in a probationary period or an apprenticeship program when leave commenced, which required actual training and/or observation in the positions rather than merely time served, should be allowed to complete the apprenticeship or probationary period following reemployment.

DOL revised the final rule to provide that no fixed time will be deemed a reasonable amount of time to adjust prior to taking a missed skills-based promotional exam. Factors to consider in determining what is reasonable include: the length of leave, the level of difficulty of the test, the time it typically takes to prepare to take the test, the duties and responsibilities of the reemployment and promotional positions, and the nature and responsibilities of the service member while serving in the military. [1002.193]

Discretionary promotions. In response to the suggestion that the escalator position not include discretionary promotions, DOL noted that the final rule promotes the application of a case-by-case analysis rather than a rule that could result in the unwarranted denial of promotions to returning service members based on how the promotion was labeled rather than whether or not it was “reasonably certain.” DOL noted case law and its longstanding policy that if the promotion depends on an exercise of discretion, the returning service member may not be entitled to the promotion.

Whether the final rule makes it any easier to determine the reemployment position is up for debate. Probably not, Wood said, for employers who do not have strict seniority-based advancement rules. “The ‘reasonable certainty’ language was added to help everyone understand that there must be some certainty but not absolute certainty when determining the reemployment position in a non-seniority-based workplace,” he said. “It provides some clarification, but, ultimately, the employer has to rely on subjective factors rather than the objective factor of seniority.”

To illustrate, Wood noted that an employer may have five people in assistant vice-president positions, one of whom is on military leave when the vice-president position opens up. “Unless the person on leave is clearly head and shoulders above everyone else, trying to decide whether it is reasonably certain that the service member would have gotten the promotion will be a difficult decision for any employer to make. This

is particularly true where employers are forced to analyze the issue months or years after the promotion occurred.” If the employer sought outside candidates the issue will be even more complex, he added.

“In my opinion, this is the area that will lead to the most disputes between employers and employees. My sense is that the Department of Labor and the Armed Forces take a broader view of the ‘reasonable certainty’ test than employers take. To the extent that there is USERRA litigation, I expect we will see litigation over whether someone in a non-seniority-based system should have been advanced to a higher position.”

Reductions in force, layoffs, discipline. DOL has interpreted USERRA to prohibit employers from denying reemployment rights on the basis that the employee would have been discharged had he or she not left for military service. As explained by DOL, where a returning service member was subject to a disciplinary review at the onset of service, or where the employer discovers conduct prior to reemployment that may subject the service member to discipline upon reemployment, the employer is still obligated to reemploy the individual. However, the employer may resume or initiate disciplinary review upon reemployment.

Further, USERRA’s protection from discharge except for cause for up to one year following reemployment, depending on the length of service [1002.247-.248], ensures that any post-service discipline or discharge will be justifiable, legitimate, and not pretextual, DOL noted.

Other legitimate nondiscriminatory reasons. Under the revised final rule, employees may not be discharged except for cause based either on conduct or other legitimate nondiscriminatory reasons. The “other legitimate nondiscriminatory reasons” language was substituted for “application of the escalator principle” in the proposed rule in response to the suggestion that the proposed rule was too narrow. In a discharge for conduct, the employer must prove that the discharge was reasonable and that the employee had notice that the conduct would constitute cause for discharge. The final rule added that the notice may be express or implied.

My sense is that the Department of Labor and the Armed Forces take a broader view of the “reasonable certainty” test than employers take.

GEORGE WOOD

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Labor Law Reports *Insight*

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VETS officials discuss USERRA final rule

The final regulations implementing the Uniformed Services Employment and Reemployment Rights Act (USERRA) took effect on January 18. “The feedback we’ve received so far from the public at large has been overwhelmingly positive,” said an official of the Veterans’ Employment and Training Service of the U.S. Department of Labor. The agency has received many congratulatory messages since the final regs were released, he added. CCH recently spoke with VETS officials about the final rule.

Employees and employers have operated under USERRA for 10 years without any regulations. How will the regulations help?

A: The USERRA regulations offer a clear and consistent explanation of the requirements of the USERRA statute. It’s important to understand that when USERRA was enacted in 1994, the number of complaints nationwide was down sharply to approximately 1200 from an all-time high of 2500 during Operation Desert Storm/Desert Shield.

Following the terrorist attacks of September 11, 2001, nearly 532,000 members of the Reserve and National Guard have been mobilized. Employment-related issues are inevitable. We experienced a fairly sharp increase to a high of nearly 1500 cases in fiscal year 2004 and, as a result, the Secretary saw an immediate need to promulgate regulations.

Proposed regulations were issued in September 2004. We received 80 timely comments in response, some of which we incorporated into the final regulations or at least addressed in the preamble. We’ve found that most employers want to comply with the law. Often the disputes we see are the result of a misunderstanding or a lack of awareness of what the law provides.

Since 9/11, we have responded to more than 37,000 requests for technical assistance, and have provided briefings to over 270,000 service members and others on USERRA. Those numbers increase steadily as more individuals become aware of the law.

The final regulations are written in plain English, in question and answer format, and are designed not only to implement the statute but also to provide instruction and guidance to employers and employees regarding their rights and obligations under USERRA. We’re optimistic that the regulations will clear up a lot of the misunderstanding that employees and employers have regarding the statute.

How would you characterize the changes made from the proposed to the final rule?

A: There were some significant changes and others were relatively minor. Some changes simply re-phrased the language used in the proposed rule. It’s important to understand that the regulations can not go beyond the parameters of the USERRA statute itself. They are there to implement the statutory provisions.

What were some of the more significant changes made from the proposed to the final rule?

A: One significant change was to allow employee benefit plan administrators to establish reasonable procedures for handling employees’ failure to provide notice of upcoming service and/or failure to elect continuation of health plan coverage. That was done in response to comments received from different groups including the Society of Professional Benefit Administrators. The final rule also addresses how the continuation of health plan benefits are administered under multiemployer health plans.

In addition, there are a lot of provisions that further explain how to determine the escalator position, particularly with respect to merit performance increases and promotions.

We also received several questions about the requirement that employers provide notice to their employees of their USERRA rights. The requirement was added to USERRA by the Veterans Benefits Improvement Act of 2004. That law required employers to provide the text of the DOL-provided notice of USERRA rights, benefits and obligations to employees by March 10, 2005. The Department published the text of that notice as an interim final rule and it is included as an appendix to the final rule. The notice may be downloaded from the Department’s website and must be posted or otherwise provided to employees.

Another addition is the clarification of the status of employees of the National Disaster Medical System (NDMS), which is part of FEMA. Their inclusion became more apparent in the wake of Hurricane Katrina. They are covered by USERRA when they are called up in response to a national disaster although they are otherwise not generally considered to be members of the uniformed services. Many employees and employers were unaware of that.

Another change was to extend the maximum period of employer-sponsored health plan coverage from 18 to 24 months to reflect the corresponding change in the statute made by the VBIA.

In the final rule’s definition of “third-party administrator,” those TPAs performing solely “ministerial” acts are excluded from coverage under USERRA. What are some examples of TPA functions that DOL would view as ministerial?

A: Ministerial acts are purely administrative tasks as opposed to substantive tasks. Entities to whom employers or plan sponsors have delegated purely ministerial functions regarding the administration of employee benefits plans are not intended to be covered by USERRA’s definition of “employer.” For instance, firms whose activities are strictly limited to the preparation and maintenance of plan benefit forms, or maintaining personnel files, without engaging in substantive decisions regarding plan benefits, would not be considered employers for the purposes of USERRA.

May employers currently governed by COBRA's election procedures apply their COBRA election procedures to employees seeking continuation coverage under USERRA?

A: Yes, as long as they comply with USERRA requirements. This is explained in section 1002.167 of the final USERRA rule.

What factors led the DOL to retain the "reasonable requirements" standard for employee election of continued health plan coverage instead of establishing specific deadlines for making such elections?

A: The final USERRA rule permits health benefits plan administrators and fiduciaries to develop reasonable requirements and operating procedures for the election of continuation coverage, consistent with the Act and the terms of the plan. The Department noted that it is generally averse to imposing on employers covered by USERRA relatively inflexible rules such as those established under COBRA. Such rules may unduly burden many smaller employers that are covered by USERRA but are not covered by COBRA. The individual plan is best qualified to determine what election rules are reasonable based on its own unique set of characteristics.

The final rule extends the timeframe within which employers must make pension plan contributions attributable to a period of military service from 30 days to the later of 90 days after reemployment or the date plan contributions are normally due for the applicable time frame. What factors led the DOL to provide a longer window?

A: A number of plan administrators commented on the proposed rule and suggested a range of timeframes in which to make the required contributions. Our intention was to give employers the flexibility to make the contributions within 90 days following reemployment or at the same time that they are made for other employees for the year in which the military service was performed.

Why did DOL remove the requirement that an employee who is unable to make up missed contributions as an elective deferral because he is no longer employed be given an "equivalent opportunity" to receive the maximum employer matching contributions through a match of after-tax contributions?

A: The "equivalent opportunity" requirement for persons no longer employed by the post-service employer was removed from the final rule based on the Department's reading of section 4318(b)(2) of the Act, and policy considerations. As explained in the preamble, in construing the statute liberally in favor of service members, the Department's original view was that service members should be permitted the entire period established by the statute for missed contributions, regardless of whether the service member remained reemployed during that period.

This view was supported by the fact that neither the face of section 4318(b)(2), nor the legislative history, contains a limitation on the statutory period that requires a

service member to remain reemployed in order to make up contributions. After considering the comments, the Department ultimately views section 4318(b)(2) as unclear on this point, in particular, because of its references to "a person reemployed." Thus, this provision of the Act is better viewed as establishing a right to make up missed contributions that is conditioned upon continued employment following reemployment.

This interpretation of section 4318(b)(2) is consistent with the statute as a whole, which generally establishes no rights or benefits that extend beyond the termination of employment or reemployment. Notwithstanding, if a reemployed employee leaves and then returns to employment with his or her post-service employer, the employee may resume repayments at his or her discretion regardless of the break in employment, so long as time remains in the statutory period (three times the length of the employee's immediate past period of military service, not to exceed five years).

What were the policy considerations?

A: VETS recognizes that the proposed section would have benefited a relatively small number of returning service members who were reemployed, sought to make up missed contributions, left employment with the post-service employer, and still wanted the opportunity to make up missed contributions. Comments from industry experts indicated that the costs to pension plans associated with the provision would be significant. In addition, industry experts noted that those plan costs were likely to be allocated to the plan, so that other plan participants, including other uniformed service members, may suffer some detriment to their pension entitlements.

What have been the most troublesome aspects of USERRA compliance for employers since the President's declaration of a national emergency following 9/11?

A: During FY 2004 and 2005, most cases involved discrimination allegations involving hiring and firing. Cases involving proper reinstatement under the escalator position were a close second. The remaining cases ran the gamut. A few involved health and pension benefits and vacation accrual, but many of those could be rolled into the escalator position category as well.

How are USERRA complaints handled?

A: Complaints may be submitted electronically to VETS. Upon receipt of a complaint we open a formal investigation.

Both the Department of Justice and the Office of Special Counsel have taken an increasingly aggressive stance on enforcing USERRA.

VETS OFFICIAL

The investigator will obtain any relevant evidence and interview witnesses. We have subpoena power but don't often have to use it.

During the investigative process it is important to point out that VETS is the advocate for the law, not the claimant or the employer. VETS does not take sides. If the investigator decides that USERRA was violated, the investigator becomes an advocate for the complainant and will seek to resolve the case. This entire process is free of charge to the claimant.

If VETS is unable to resolve a complaint, a claimant who is a state, public or private sector employee has the right to have the case referred to the Department of Justice. If the claimant is a federal executive agency employee, the case is referred to the Office of Special Counsel. DOJ and OSC have sole authority to determine whether or not to provide representation in cases referred to them by the Department. If representation is declined, a claimant may proceed with private counsel.

In FY 2004, 55 cases were referred to DOJ and 14 to OSC. Figures for last year will not be available until the FY2005 USERRA report is released.

Typically, how does an individual show that the protected military status or activity was a substantial or motivating factor for an employer's adverse action?

A: That can be a difficult burden sometimes. VETS investigators are trained to look for evidence that suggests that kind of motivation. Typically we review the claimant's employment records and any other relevant data and compare those with other similarly situated employees to see how they have been treated.

For example, it would be a matter of concern if only service member employees who are on military leave suffer some form of adverse action while others on comparable forms of leave did not. Other ways of showing the employer's motivation include statements of witnesses who have overheard comments that the individual can't be relied upon because he is frequently called to duty, but sometimes the cases are more circumstantial. Although we don't exercise the subpoena power often, it is still a powerful tool that we can employ to ferret out the relevant information.

How are most of the complaints VETS receives resolved?

A: Eighty to 90 percent are resolved within 90 days of their filing. In FY 2004, about 31 percent of the complaints VETS received were resolved through informal mediation efforts and recovered more than \$1.7 million in lost wages and benefits. Approximately 9 percent of the cases were withdrawn by the claimants during the investigation. Approximately 34 percent of the cases investigated were found to lack merit. Of the remaining non-referred cases, 18 percent were closed either because the claimant was found to be ineligible for USERRA coverage or because he or she did not cooperate in the investigation.

Occasionally complaints come to the Department from the ESGR—The National Committee for Employer Support of the

Guard and Reserve—which is an agency in the Office of the Assistant Secretary of Defense for Reserve Affairs. It maintains a nationwide volunteer network of trained ombudsmen who attempt to resolve USERRA complaints before a complainant files a formal complaint with VETS. ESGR handles many more complaints than VETS does, and is often able to successfully resolve USERRA issues at an early stage.

How did DOL address the statute of limitations issue?

A: We attempted to clarify that USERRA has no state statute of limitations associated with it and generally relies on the doctrine of laches to determine the reasonableness of the length of time taken to bring suit under USERRA. The regulation cautions, however, that at least one federal district court has held that the federal four-year statute of limitations does apply, and so potential claimants are advised to act with all due diligence and promptness to preserve their USERRA rights.

What impact do you expect the projected demobilization of 50,000 to 125,000 service members covered by USERRA to have on the level of USERRA-related activity at VETS?

A: That's a tough question to answer. Since 9/11, nearly 532,000 members of the Guard and Reserve have been mobilized. As of January 10, more than 404,000 of them have been demobilized. Currently, about 127,500 remain on active duty.

As you might expect, the number of USERRA complaints increased after 9/11 from less than 1000 in FY 2001 to 1465 in FY 2004. But more recently there has been a 15 percent decrease in new cases opened in FY 2005. It may still be too early to determine if there is a downward trend in cases.

Can you put the numbers into perspective?

A: It is important to point out that this is the largest mobilization since WW II, so obviously the raw numbers of complaints went up since 9/11. What is important is the rate of complaints to the numbers mobilized. Desert Storm, which occurred before USERRA was enacted, was the first test of the total voluntary force instituted in 1973, which consists of a small all-voluntary full time force supplemented in times of war by the Guard and Reserve. At the time of Desert Storm, there was one complaint under USERRA's predecessor law for every 54 demobilized. Now we receive one complaint for every 80 demobilized, so the rate of complaints—which we attribute to an improved law and pro-active educational efforts by the ESGR and DOL, as well as employers' desire to do the right thing—has actually decreased by more than 30 percent.

Remember too that Desert Storm was a relatively short war so deployments were shorter. The tours of duty for Guard and Reserve members in this war are a year or more. Some have had multiple tours. This is more of a test of the system than Desert Storm was.

As long as the global war on terror continues, USERRA will be in the forefront and it is impossible to predict how many cases we will see. Both DOJ and OSC have taken an increasingly aggressive stance on enforcing USERRA. We

hope the downward trend continues but the sheer numbers of people involved may cause the numbers to go up.

What has the typical period of absence been?

A: Depending on their military occupational specialties, some people have been called up for just a few months to serve in an administrative capacity, but others have been called up for one or two years. As previously mentioned, the VBIA amended USERRA in 2004 to extend the maximum period of health plan coverage from 18 to 24 months, which reflected some of the ongoing deployments at that time. Some employees also elect to remain on active duty, which they are allowed to do.

Do you expect any new issues to arise as returning service members seek reemployment?

A: That is hard to predict. New issues come up all the time, especially when there is new legislation affecting employment benefits that sometimes produces unintended consequences. A good example of that is an issue we've seen with increasing frequency over the past year involving DOD-sponsored TRICARE health plan coverage for service members.

Under recently adopted rules, service members can elect to continue their TRICARE coverage for up to six months follow-

ing discharge. USERRA requires employers to promptly reinstate lapsed health care coverage upon the employee's reemployment, but some service members may elect to defer reinstatement of employer-sponsored coverage to take advantage of the extended six-month TRICARE benefit.

There is currently no provision under USERRA that addresses whether the employer is required to reinstate the employee's health care coverage at that time. As explained in section 1002.169 of the final regulations, USERRA permits but does not require the employer to allow the employee to delay reinstatement of health plan coverage until a date that is later than the date of reemployment.

If an employee elects to extend TRICARE coverage beyond the date of reemployment, the employer could require the employee to wait until the next open season to re-enroll in the employer's health plan resulting in a period of no coverage. The insurance company could then consider any illness or injury incurred by the employee or the employee's dependent during that time a pre-existing condition and coverage could be denied or delayed. Benefits administrators are aware of this issue and we want to make sure that service members are aware of it too.

[See the following websites for more information: www.dol.gov/vets; www.ESGR.org.] ■

USERRA

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The modified definition of "cause" is significant, Wood pointed out, because it tracks the "legitimate, non-discriminatory reasons" language utilized under many other state and federal discrimination statutes such as Title VII. "The Preamble also makes clear that 'cause' for termination is not the traditionally higher 'just cause' standard used in the labor law context, but rather the standard normally applied to discrimination claims. Employers are now better able to understand their obligations in this area, since for many years 'cause' was undefined under USERRA," he observed.

Wood also finds it helpful that the definition of "cause" now expressly includes a layoff or reduction-in-force. "That has been another unclear area for many employers," he said.

Qualifications. Reemployed individuals must be qualified for the reemployment position, and employers must make reasonable efforts to help the employee become qualified. "Qualified" means that they must be able to perform the "essential tasks" of the position. In response to comments, DOL adopted the regulatory definition of "essential functions" under the Americans with Disabilities Act (ADA) to provide regulatory consistency. [1002.198]

Wood thinks this was another helpful change. "Employers have become used to that definition and either have developed or are developing job descriptions that include essential functions. Now they will be able to use those job descriptions for USERRA as well as ADA purposes," he said.

Retraining hasn't been a significant issue for most employers yet, but it depends on how long the employee has been

gone, Woods noted. "Employers train people all the time and it shouldn't be too hard to get a person back up to speed. The real issue will be what training is required for a person who is advanced to a higher position," he suggested.

Rate of pay

The final rule adds factors employers may consider when determining whether merit or performance increases would have been attained with reasonable certainty, including the employees' work history and history of merit increases, and the work and pay history of employees in the same or similar position. The factors to consider in determining what is a reasonable period of time to adjust to the reemployment position before giving a skills-based test are the same as those added for making the same determination with respect to skills-based promotional exams. [1002.236]

Work during reemployment period

DOL also added language to the final rule that provides that a service member's alternative employment during the application period must not constitute cause for discipline or discharge following reemployment [1002.120].

This is a significant change, Wood pointed out, particularly in the case of someone who has been gone for more than 180 days and has 90 days to apply for reemployment. "The modified language still permits a returning service member to moonlight during the 90-day application period, but now makes clear that moonlighting does not include work that would violate an employer's specific policies."

To the extent that there is USERRA litigation, I expect we will see more litigation over whether someone in a non-seniority-based system should have advanced to a higher position.

George Wood

“In light of this change, employers would be wise to adopt written policies for all employees stating what types of outside activities may lead to discipline or termination, particularly with respect to outside employment,” Wood advised. “Prohibiting working for a competitor is an obvious one, but many employers do not specifically address it, even though they should.” He cautioned that employers should make sure that their list of prohibited activities complies with other employment laws as well.

While this has not been a significant issue for employers yet, some individuals do make a career change after serving, Wood noted. Some tell their employers prior to taking leave that they do not intend to return to their jobs.

“What employers must remember is that even if employees state prior to leaving that they will not return, they are still entitled to change their minds and seek reemployment within the period of time allotted if they are otherwise eligible for reemployment, and the employer must reinstate them.”

Health plan coverage

Under the Veterans Benefits Improvement Act of 2004 (VBIA), the maximum period of continued health plan coverage was extended from 18 to 24 months. That change was incorporated in the final rule [1002.164].

Timeframes. The most comments received on the health plan provisions of the proposed rule concerned the provision that allows health plan administrators to establish reasonable rules to govern election of continuation of coverage. DOL declined to establish specific deadlines within which elections must be made, but noted that reasonable rules, depending on the plan’s circumstances, may include COBRA timeframes. [1002.165]

It is now clear that the employer can develop procedures and timeframes for determining when individuals are eligible for the COBRA-type coverage provided under USERRA, said Wood. “It’s helpful that DOL permits employers to adopt the procedures used for purposes of COBRA to the extent that they are consistent with USERRA. That should alleviate the need to have two separate systems,” he added.

He cautioned, however, that employers need to review their COBRA procedures to determine whether they are consistent with USERRA. To the extent that they are not, the procedures may have to be tweaked to make them consistent.

“For example, under COBRA people typically have 60 days to elect coverage and then are covered for the remainder of the month they are in before COBRA coverage kicks in. Under the final USERRA regulations, for the first 30 days of leave, the employee can not be required to pay more than the regular employee share for coverage, but after that, the employee can be required to pay up to 102 percent of the full premium. It is possible for these two to be inconsistent, depending on the procedures adopted for COBRA coverage,” Wood warned.

Continued coverage elections. DOL added a new section to permit an employer to cancel the employee’s health insurance if the employee departs work for military service without giving notice and/or without electing continuing coverage and if timely payment is not made. Where failure to give notice is excused because it was impossible, unreasonable, or precluded by military necessity, however, coverage must be reinstated retroactively upon election of continued coverage and payment of all unpaid amounts due. The rule allows employers to establish reasonable rules for the election of and payment for continuation coverage. [1002.167]

USERRA and the IRC. With respect to concerns expressed over the potential conflict between USERRA and Internal Revenue Code regulations regarding the classification of employees on military leave, DOL noted that the Internal Revenue Service and the Department of the Treasury have indicated that a health plan or pension will be deemed not to be in conflict with IRC requirements because of compliance with USERRA.

“USERRA states that the person is considered to be on leave, but certain IRS regulations classify an individual on military leave as being terminated for tax purposes,” Wood noted. Under the regulations, a person who is properly on military leave is entitled to the rights and benefits of USERRA regardless of how the employer classifies the person while on leave, he explained. “This is helpful to employers because it allows them to comply with IRS regulations without having to worry about whether they may be violating USERRA,” he said.

But this issue can be a trap for the unwary employer. “Employers should institute some method of indicating that even though the individual is classified as terminated, it is because he or she is on military leave and still retains reemployment rights,” he advised.

Pension plan coverage

The final rule increased the period of time an employer has to make contributions to a pension plan that are not dependent on employee contributions from 30 days to the later of 90 days from the date of reemployment or when contributions are normally made for the year in which the military service was performed. [1002.262(a)].

Missed contributions. An employee participating in a contributory plan may make up missed contributions or elective deferrals during the period that begins with the time of

reemployment and continues for up to three times the length of the employee's immediate past period of military service up to five years. Under the final rule, make-up contributions or elective deferrals may only be made while the employee is employed with the post-service employer. This is a change from the proposed rule. [1002.262(b)]

Additional changes to the final rule limit the right to repay amounts withdrawn from a pension plan account balance to defined benefit plans. The right is also limited to withdrawals made in connection with a period of military service, and is conditioned upon employment with the post-service employer. [1002.264]

Multiemployer plans. In the case of a multiemployer plan, the final rule now provides that the 30-day period that the post-service employer has to notify the plan administrator of a service member's reemployment does not begin to run until the employer has knowledge that the reemployment was pursuant to USERRA. The service member is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multiemployer plan. However, the final rule adds that the pre- and post-service employers must be connected by a common job referral plan or practice in order for USERRA's pension obligations to attach to the latter. [1002.266]

Other changes

While DOL refused to specify how much time an employee may take between leaving work and commencing military service, it revised the final rule to reflect that the duration of military service, the amount of notice the service member received, and the location of the service are factors that influence the amount of time an employee may need to rest and/or put his or her affairs in order. [1002.74]

Notice. DOL declined to establish a general 30-day notice requirement but did add that the Department of Defense "strongly recommends" that notice be given employers at least 30 days prior to departure when feasible. An added provision also requires employees who are employed by more than one employer to give notice to each employer. [1002.85]

Reporting back to work. DOL clarified that the extension of time (up to a maximum of two years) within which an employee must report back to work in the case of an employee who is hospitalized or convalescing from a service-related injury or illness does not apply where the injury or illness arises after reemployment. [1002.116]

Vacation. The final rule now expressly states that vacation is considered a non-seniority benefit that must be provided only if the employer provides the benefit to similarly situated employees on comparable leaves of absence. [1002.150(c)]

Comparability of leaves. DOL provided additional guidance for determining whether leaves are comparable for purposes of determining which non-seniority benefits must be provided. In addition to the duration of leave, which may be the most signifi-

cant factor, the purpose of the leave and the employee's ability to choose when to take the leave should be considered. [1002.150(b)]

Sick leave. The final rule allows an employee to request to use sick leave accrued during a period of military service if the employer allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable leave to use accrued paid sick leave. [1002.153]

Covered employers. DOL amended the definition of employer to clarify that third party entities that perform purely ministerial functions at the request of an employer will not be considered "employers" when determining liability for USERRA violations. [1002.5]

NDMS volunteers. The final rule clarifies that volunteer members of the National Disaster Medical System (NDMS), part of the Federal Emergency Management Agency, who are activated are considered to be serving in the uniformed services for USERRA purposes, although they are not considered members of the uniformed services. [1002.5, 1002.6, 1002.56, 1002.86, 1002.123(a)(7)]

Going forward

The regulations took effect on January 18. That should not be a problem for employers who have been following USERRA developments because most are already in compliance, Wood said. It will be a problem for those who have not paid a lot of attention to this statute over the past 10 years because they have not had to.

"Employers do not intend or want to discriminate against individuals who are on military leave. They understand the commitment these employees and their families are making for our country." The most common mistake Wood sees is employers' failure to fully understand their USERRA obligations.

"Unlike many of the other leave statutes, USERRA applies to every employer whether it employs one or 100,000 people. USERRA rights apply irrespective of whether the leave is taken on a voluntary or involuntary basis. I have frequently been asked whether an employer must retain as an employee an individual who has voluntarily decided to enlist. The simple answer is that USERRA requires it," he stressed.

"Employers should review their existing policies to determine how they will impact employees on military leave and how they impact the employer. For example, if the employer voluntarily provides benefits for people on other types of leave such as paid personal leave, it may be obligated to provide those same benefits to people on military leave as well.

"Going forward, I recommend employers consider their policies with respect to individuals potentially involved in activities that would be detrimental to the employer, such as working for a competitor. These policies should be in writing and well-established to justify a refusal to reemploy an individual who engaged in those activities during the reemployment period," he said. ■