

### Losing Employees to the Military: Employers' Obligations When Employees Leave to Serve in the Armed Forces

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On September 14, 2001, President Bush signed an order calling 50,000 reservists to active duty. As a result, many employers are quickly trying to brush up on their legal obligations to these workers. For your convenience, we provide below a brief outline of the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA"). 38 U.S.C. §§ 4301 et seq.

Generally, USERRA prohibits discrimination against employees because of the employee's past, present, or future application for or membership in uniformed service. In addition, USERRA requires employers to provide leaves of absence to employees serving in the uniformed services and grants specific reinstatement and job protection rights to these employees. Under the Act, "service in the uniformed service" is defined to include the performance of duty on a voluntary or involuntary basis in the Armed Forces, the Army National Guard, the Air National Guard, the Public Health Service, or any other category of persons designated by the President in time of war or emergency.

#### Reemployment Rights

Under the law, employees who take a leave of absence to serve in the uniformed services are entitled to reemployment if they: (1) give proper advance verbal or written notice of such service to their employer; (2) are not absent for a period in excess of five years; and (3) apply for reemployment within the period prescribed by law. While there are a few exceptions, employees returning from service must generally report for work or submit an application for reemployment within the following time periods:

Service of less than 31 days: If an employee serves in the uniformed services for less than 31 days, the individual must report to work by the beginning of the first full regularly scheduled work period on the first calendar day following the completion of the service and the expiration of eight hours after a time for the safe transportation back to the individual's residence.

Service of 31-180 days: If an employee's service in the uniformed services is between 31 and 180 days, the individual must submit an application to the employer within 14 days following completion of such service.

Service in excess of 180 days : If an employee's service in the uniformed services is in excess of 180 days, the individual must submit an application for reemployment within 90 days after the completion of such service.

If the individual is hospitalized or convalescing from an injury caused or aggravated by active duty, the time limits specified above will be extended for the time the individual is incapacitated, up to a maximum of two years.

When an employee returns from military service, the individual must be placed in the position he or she would have attained had the service not occurred. If the employee is not qualified for this position upon return, the employer must make reasonable efforts to qualify the person for the position. If the employee is still unqualified for the position after such efforts have been made, the employee may be placed in the same position he/she occupied before the leave began.

## Employment Benefits

An employee's leave for uniformed service may not be deemed a break in service for seniority and other employment rights and benefits. Additionally, when an employee returns from uniformed service, the employee is entitled to the additional seniority and longevity that the employee would have attained if the person had remained continuously employed. For example, an employee's leave for military service must be included for purposes of vesting rights under a pension benefit plan.

Employees absent due to uniformed service should be deemed to be on furlough or leave of absence and must be provided the same benefits as provided to employees on furlough or taking a leave of absence for other reasons. It is unclear whether an employer is required to continue health insurance benefits for an employee on military leave or furlough for more than 30 days, even though the employer provides continued health insurance benefits to employees taking other types of leave. Where an employer does have a policy or practice of providing continued health insurance to employees taking other types of leave, the conservative approach would be to provide the same continued coverage to employees on military leave. An employee who loses health insurance coverage due to an absence for uniformed service must be given the option to continue health insurance coverage at his/her own expense. Typical COBRA continuation procedures may be followed. When an employee returns to work, group health benefits must immediately reactivate. No exclusion or waiting period may be imposed.

Under the Act, an employee may request to use any previously accrued vacation or other type of leave during the military service. An employer may not require an employee to use such accrued time off during the leave of absence.

## Job Protection

USERRA also specifically provides job protection rights to employees returning from uniformed service.

Service in excess of 180 days: If an employee's service in the uniformed services is in excess of 180 days, the individual may not be discharged from employment, except for cause, for one year after the date of reemployment.

Service of 31-180 days: If an employee's service in the uniformed services is between 31 and 180 days, the individual may not be discharged from employment, except for cause, for 180 days after the date of reemployment.

## Exceptions

An individual's entitlement to protection under USERRA will terminate if the employee is separated from uniform service with a dishonorable discharge, with a bad conduct discharge, or under other than honorable conditions.

Additionally, an employer is not required to reemploy an individual if (1) the employer has experienced a change in its circumstances that makes reemployment impossible or unreasonable; (2) reemployment would impose an undue hardship on the employer; or (3) the individual's employment prior to military service was for a brief, nonrecurrent period and there was no reasonable expectation that it would continue indefinitely or for a significant period. Significantly, any employer who relies upon one of these defenses to reemployment must carry the burden of proving that the defense is available.

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Employers are encouraged to review their policies and benefit plan documents to confirm compliance with the requirements of USERRA. Managers should also be reminded of the non-discrimination provisions in USERRA, as well as the rights of employees to volunteer for, and serve in, military service. At this crucial time, we applaud employers' efforts to support the men and women of our Armed Forces.

The provisions of USERRA are very technical and cannot be fully discussed in a short summary. The above information is not intended as legal advice. Employers should consult legal counsel regarding specific questions of application of USERRA.

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## Practice Areas

Labor and Employment