A Primer On Employment And Reemployment Rights Of Employees Entering The Armed Services

It is time for employers and employees to reacquaint themselves with their obligations and rights regarding military duty

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Note: The first version of this primer was prepared a few days after the attacks of September 11, 2001. This new version is updated to cover several issues and some additional guidance that has been issued since that time.

Since September 11, 2001, many Americans have had to leave civilian life to serve in the armed forces, a number of them members of the National Guard and Reserves. These individuals have extensive employment and benefits rights under Federal law, which are primarily found in the Uniformed Services Employment and Reemployment Rights Act of 1994, commonly known as "USERRA", at 38 U.S. Code section 4301, et seq. This summary of those rights is to assist employers and their employees in the transition to military service and back. The law is intended to encourage noncareer uniformed service so that America can enjoy the protection of those military services, staffed by qualified people, while maintaining a balance with the needs of private and public employers who also depend on these same individuals.

Overview

The process of leaving employment to serve in the military begins with a notice by the employee to the employer of his or her intent or obligation to perform service in the uniformed services. Such a person cannot be discriminated against or punished by an employer for seeking to serve in or serving in the uniformed services. The law also prescribes how the employee's benefits are to be affected while on duty. When a former employee returns from duty, he or she has a specified time period to reapply for his or her old job, and must in almost all cases be rehired. The pension rights of the rehired employee for the period of service are also prescribed,

and the individual is protected for a period after rehire against termination without cause.

> Note to employers: USERRA sets out the minimum rights that service members are entitled to. Employers can and often do provide additional benefits, such as partial pay on military leave, or paid dependent health coverage.

When the call-up comes

What notice must the employee give?

The employee must give the employer advance notice that he or she will be serving in the uniformed services. This is a prerequisite to employment rights, but it can be verbal as well as in writing, there is no prescribed period for how far in advance it must be given, it may be given by an officer in the uniformed services, and it can be excused if the giving of notice is impossible or unreasonable.

> Practical note: Though the notice rule is somewhat lenient, employees should be encouraged to give notice as soon as they know of their service obligation, and not to wait until all details are known. This will give the employer more time to prepare and may help prevent ill will when the employee returns to the job. The employee should also be encouraged to give the notice in writing or by e-mail to show that it was given and when.

Who is covered by USERRA rights?

All members of the armed forces (Army, Navy, Air Force, Marines, and Coast Guard), including the Reserves, the Army and Air National Guards and the commissioned corps of the Public Health Service, and any other persons designated by the President are given protection by USERRA. It covers all forms of active duty, plus inactive training duty and National Guard training duty. It does not matter whether the duty is voluntary or involuntary, how long the person has been an employee, or how long the duty is for (though it normally cannot exceed five years). Typically, employees become covered because they voluntarily enlist or are current reservists who are called to active duty or go on training duty.

Are any employers exempt from having to provide these rights?

No. These rules also apply to the Federal government and State and local governments, though Federal employees have some special rules. The obligations of an employer will also carry over to any successor to that employer. Bona fide independent contractors are not covered because they do not have an employer. For this purpose, it is the definition of employee under the Fair Labor Standards Act that applies.

Does an employer have to let the person serve?

Yes. The law prohibits any discrimination in employment or any adverse employment action against someone for serving in the uniformed services, or even applying to serve in the uniformed services (and even if the person does not subsequently perform uniformed service). That prohibition includes denial of initial employment, reemployment, retention in employment, promotion, or any benefit of employment, if the person's service or application for service is a motivating factor. (Note to employers: it need not even be the main factor.) Employers should also be aware that, in addition to USERRA, many state laws also prohibit discrimination of this sort.

Does USERRA require that the employer continue to pay wages while the employee is on military leave?

No. As noted above, USERRA establishes minimum rights an employee has if the employee enters military service and subsequently returns to employment. USERRA does not require that the employer continue to pay wages to an employee who enters military service. Voluntarily, however, a number of employers, particularly large employers, have adopted policies to pay all or a portion of the difference, if any, between the wages the employee was receiving and his or her military pay. Because any such payments are purely voluntary, the employer has substantial leeway in putting conditions and limits on them. Conditions such as continuing pay only for a limited time, and limiting the maximum amount of such pay, are common. Presumably, such pay differentials are treated as wages for tax purposes and may result in additional benefit accruals and continuation of participation in various benefit plans to the extent of such pay, even if the employee does not return to work after completing military service. Continued participation in such plans on account of continued pay may also affect when other benefit rights may commence, such as COBRA rights for continued group health coverage.

What happens to the person's benefits when they go out on service?

This depends on the type of benefit, whether a welfare benefit (e.g., health, life insurance), or a pension benefit.

Health benefits: Uniformed service members who were participating in a health plan and would otherwise lose coverage are permitted to elect COBRA-like coverage for themselves and their dependents, for a period ending on the earlier of (1) 18 months, or (2) the day after the employee fails to return to employment within the term allowed by USERRA (which depends upon the length of uniformed service - see below). The service member pays 102% of the full premium in the same manner as COBRA. Note that this right applies even if the plan is not subject to COBRA (e.g., plans with fewer than 20 employees and non-ERISA plans such as church plans). It applies to any plan under which health services for individuals are provided or the expenses of such services are paid, so it may apply to other types of employer health plans such as flexible spending accounts. This right does not override any COBRA rights that may (and in most cases, will) apply. There is also a special rule if duty is for less than 31 days. In that event, the employer cannot charge any more than the share charged to similarly situated employees for the month. No special notice of USERRA continuation rights is required from the employer (but a COBRA notice may still be required).

> Note to employers: though military service carries health benefits, known as Tricare (a portion of which was previously known as, and is sometimes still referred to as, CHAMPUS), employees who can afford to continue to pay for coverage may wish to do so, particularly if desired to provide a higher level of benefits to dependents. In addition, reservists are not covered by Tricare unless they are on active duty for at least 30 days. If the service member elects to continue private coverage, the private coverage is primary for dependents, and secondary for the service member.

Pension Plans: An individual entering uniformed service becomes an inactive participant in pension plans, whether defined benefit or defined contribution, if he or she is no longer receiving pay (see the discussion of voluntary differential pay above), but if the individual is reemployed, additional pension obligations will arise at that time. These are discussed in greater detail below. Loans under pension plans may be, but are not required to be, suspended while on military leave. If a plan loan is suspended, interest continues to

accrue, but the rate cannot exceed the 6% limit under the Soldiers' and Sailors' Civil Relief Act of 1940.

> Practical note: Before entering service, an employee should be encouraged to review and update any beneficiary designations under plans. The employee should be reminded that designations made on the plan form (subject to spouse's pension rights, if the employee is married) and which are properly filed with the plan administrator will normally be followed regardless of intervening events such as marriage, birth or adoption of a child, separation or divorce, or what they may have put in their will.

Other benefits: Normally, this will include life insurance and disability, cafeteria plans, bonus programs, and some other fringe benefits. Continued coverage under these plans is not required, except that an employer must treat the service member as on leave and must not treat the uniformed service member any worse than any other person on leave of absence to avoid impermissible discrimination. Thus, if coverage of a particular type is extended any employees on leave of absence, it must be extended to service members on leave under the same terms. Note that in many cases, life insurance and disability policies do not pay benefits for war-related injuries, so coverage is often not an issue. Presumably, in most cases, military leave will be treated as a change in status permitting a change in cafeteria plan election, and normally a departing employee will cease participation unless they are on partial pay while on military leave.

Return from service

When must a returning service member come back to work?

The cumulative length of service generally must not have exceeded five years. The service member must also apply for reemployment within the following time period after the end of the service:

- for service less than 31 days, the next day, plus at least 8 hours since return to his or her residence;
- for service from 31 days to 180 days, within 14 days; and
- for service of more than 180 days, within 90 days.

A longer period, but not more than 2 years, can apply if the person becomes ill or is injured while in service and needs a period to recover.

It is the obligation of the service member to provide documentation of the period of service (usually, this will be a DD-214), but reemployment cannot be immediately denied merely because the documentation is not readily available.

What job is the returning service member entitled to?

That depends upon the length of the person's service. If the service was for less than 91 days, the person is entitled to (A) a position in which the person would have been employed had the person's employment not been interrupted by service, the duties of which the employee is qualified for, or (B) in the position the person was employed in on the date of the commencement of service, if the person is not qualified to perform the duties referred to in (A) after reasonable efforts by the employer to make the person qualified.

If the person's service was more than 90 days, the person is entitled to (A) a position in which the person would have been employed had the person's employment not been interrupted by service *or a position of like seniority, status and pay*, the duties of which the employee is qualified for, or (B) in the position the person was employed in on the date of the commencement of service *or a position of like seniority, status and pay*, if the person is not qualified to perform the duties referred to in (A) after reasonable efforts by the employer to make the person qualified.

If the person is not qualified for such a job due to a disability incurred in or aggravated during service, then the person is generally entitled to another position which is equivalent in seniority, status and pay or the nearest approximation to such a position.

These rules reflect what is often described as the "escalator principle", that a returning service member steps back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.

What employee benefits is the returning service member entitled to?

Again, this depends upon the type of benefit.

Health benefits: The returning service member is entitled to reinstated health coverage with no waiting periods (with certain exceptions for certain service-related injuries).

Pension benefits:

Service. If the employee returns to employment, the period of military service counts for all purposes under the plans: vesting, participation and benefit accrual. A returning employee is treated as not having had a break in service; therefore, there is no waiting period to begin participating again.

Make-up contributions. If employee elective contributions were required or permitted under a plan, the returning employee has a period of three times the period of service to make up missed employee contributions, not to exceed five years. The returning employee is also entitled to a make-up of employer contribution allocations under a defined contribution plan for the period while on service; the employer also has a period of three times the period of service to make up missed employer contributions, not to exceed five years. If employer contributions were contingent on the employee making elective contributions (for example, a match in a 401(k) plan) and the employee makes up the missed contributions, the employer must make up its contributions over the same period. The returning employee is not entitled to missed allocations of forfeitures or earnings on the made-up contributions, and cannot be charged interest on make-up contributions.

Compensation for purpose of defined benefit plan formulas. In the case of defined benefit plans, for the period of service, the rehired employee is deemed to have had compensation at the rate he or she would have received but for the period of service, or if that rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12 month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Multiemployer plans. If the returning service member is a participant in a multiemployer plan (that is, a collectively bargained or union plan), the employer is required to notify the administrator of such plan of the reemployment within 30 days after reemployment. Liability for making funding contributions for the returning employee is determined by the plan sponsor, or, if the plan sponsor does not so determine, falls on the last employer employing the person before the period of service, or if such employer is no longer functional, on the plan itself.

Plan loans. A plan may, but is not required to, suspend the obligation to repay participant loans while the employee is in military service. Presumably, in that case, loan repayments must resume upon rehire in the same manner as required under the terms of the original loan, and the loan must be repaid in full (including the interest that accrued during the period of military service) by the end of the period equal to the original term of the plan plus the period of military service.

Pension plans covered. These rules apply to all employee pension benefit plans, a term which is not defined; it is not limited to qualified plans or plans subject to ERISA. It would appear to exclude bonus plans, severance plans and stock options, though those would be benefits for purposes of other rights – for example, if seniority based, the returning service member would be treated as employed during military service, and if any special rules are afforded employees on leave of absence, those must be afforded the service member as well.

Vacation: An employer may not force employees to draw down vacation during military service, and any unused vacation must be restored upon rehire.

Other benefits: A returning employee is entitled to all benefits he or she would have had if he or she had never left. As a result, life insurance, disability coverage and cafeteria plan eligibility must all be reinstated.

Are there any situations where the service member is not entitled to be reemployed?

A returning service member is not entitled to these rights if:

- The employer's circumstances have so changed as to make such reemployment impossible or unreasonable.

- In the case of a person who has a disability incurred in or exacerbated by military service, such reemployment would impose an undue hardship on the employer.

    Note to employers: the employer has the burden of proving any of these exceptions, and they are likely to be construed by courts narrowly in favor of the returning service member.

- The employment from which the person leaves to serve in the armed forces is for a brief nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

  Note to employers: this exception should also be narrowly applied, and the burden of proof is on the employer. For example, an employee who leaves during an initial probationary employment period is still entitled to reemployment rights if most employees normally complete the probationary period.

Can a returning service member be fired after being rehired?

For a period after rehire, a reemployed service member can only be fired for cause, such as for disobeying a written employer policy. The period is:

- 1 year of protection if the period of service was 181 days or more;
- 180 days of protection if the period of service was for 31 to 180 days; but
- no protection if the period of service was 30 or fewer days.

Can a service member lose reemployment rights for a bad discharge?

Yes. A person is not eligible for the reemployment and other rights under USERRA if he or she receives other than an honorable discharge.

Who enforces these rules?

The U.S. Department of Labor, through the Veterans' Employment and Training Service (VETS), provides assistance to all persons having claims under USERRA, including Federal and Postal Service employees. If resolution is unsuccessful following an investigation by VETS, the service member may have his or her claim referred to the Department of Justice for consideration of representation in the appropriate District Court, at no cost to the claimant. If violations under USERRA are shown to be willful, the court may award liquidated damages. Federal and Postal Service employees may have their claims referred to the Office of Special Counsel for consideration of representation before the Merit Systems Protection Board (MSPB). Individuals who pursue their own claims in court or before the MSPB may be awarded reasonable attorney and expert witness fees if they prevail. Employers should also be aware that the National Committee for Employer Support for the Guard and Reserve (ESGR), a voluntary organization,

vigorously asserts employee's rights under USERRA, as do many private lawyers on both a paid and a pro bono basis.

Additional Resources

Some of the best information is available at the Department of Labor website, at www.dol.gov/vets. Another source for information is the National Committee for Employer Support for the Guard and Reserve at www.esgr.org. Information on the military health system can be found at www.tricare.osd.mil.

Summary

Employees are subject to extensive employment protections regarding their entering military service, and they are generally guaranteed a job and other rights on return. While there are a few exceptions to these protections, employers should use them only where on certain ground, because they will undoubtedly be read by most courts to favor the returning service member.

Some additional practical considerations for employees

Wills: Employees should remember to update their wills. Wills may be prepared by military lawyers, but they and the employee will be busy with many other things prior to deployment. It is often a good idea, particularly if the employee has children or an estate of sufficient size, to have a detailed will prepared by a knowledgeable private attorney as soon as possible if the employee thinks that he or she will be deployed.

Powers of attorney: Once standard military practice before deployment, these are less common in our world of instant global communication, and have occasionally been misused. The employee should consult with their personal lawyer or a military lawyer as to whether he or she may need one of these.

Beneficiary designations: The employee should carefully review the listed beneficiaries under his or her employer, personal and military life insurance and survivor benefits as well as retirement plans and IRAs, particularly if the employee has had a change in family situation, such as marriage, a child or a separation or divorce. The employee should know that these events may or may not invalidate existing designations, and that, subject to spousal pension rights, the designations on file often control regardless of what their will may say.