



Electronic Dispatch

Labor and Employment Law Information Memo

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U.S. DEPARTMENT OF LABOR ISSUES FINAL RULES IMPLEMENTING THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

Fifteen months after releasing proposed rules regarding the implementation of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the United States Department of Labor ("DOL") issued its final rules on December 19, 2005. These final regulations took effect on January 18, 2006.

USERRA was originally enacted in October 1994 to facilitate the transition of uniformed service members back to civilian employment and to protect their reemployment rights after their service. USERRA was also intended to prohibit discrimination against uniformed service members with respect to employment decisions. The final USERRA regulations do not provide any additional rights for eligible employees, nor do they impose new obligations on employers. Instead, their purpose is to explain the statutory rights and benefits afforded to eligible employees and to clarify employers' obligations under USERRA.

This information memo summarizes the major provisions of USERRA and the DOL's implementing regulations, and provides some advice for employers to ensure continued compliance with USERRA.

Employers Covered By USERRA

The final regulations confirm that, unlike many of the federal employment discrimination statutes, USERRA's statutory language does not contain a minimum employer size requirement. In addition, USERRA applies not only to private employers, but also to federal and state government employers. Consequently, USERRA applies to nearly all public and private employers in the United States, regardless of size or number of employees.

Reemployment Rights For Uniformed Service Members

In general, if an employee has been absent from work due to service in the uniformed services, he or she is eligible for reemployment if: (1) the employer had advance notice of the individual's service obligation (at least 30 days prior to departure for service when feasible, but no advance notice is required when giving such notice is precluded by "military necessity" or is "otherwise impossible or unreasonable"); (2) the individual has no more than five years of cumulative service in the uniformed services away from the employer (unless one of the specific statutory exemptions to the five-year cap applies); (3) the individual applies for reemployment in a timely manner; and (4) the individual's service in the uniformed services has not ended with a disqualifying discharge or with anything less than an honorable separation from service.

There are several statutory exemptions to the five-year cap on cumulative service away from an employer. For example, if an employee was unable to obtain release orders before the expiration of the five-year period, and the inability was not the employee's fault, the five-year cap will not apply and the employee will remain eligible for reemployment. In addition, time spent in certain military specialty units to complete required training is not counted toward the five-year cap. Involuntary active duty in wartime, during a national emergency, and under several other specific circumstances is also not counted toward the five-year cap.

With respect to an individual's obligation to apply for reemployment in a timely manner, the regulations provide as follows: (1) if an individual's military service is less than 31 days, the individual must report back to the employer no later than the beginning of the first "regularly scheduled work period on the first full calendar day following completion of the period of service," provided that the individual has had an 8-hour rest period after he or she has arrived home; (2) if an individual has served between 31 and 180 days,



the individual must make an oral or written request for reemployment “no more than 14 days after completing service,” unless it is impossible or unreasonable for the individual to do so; and (3) if an individual has served more than 180 days, the individual must make an oral or written request for reemployment no more than 90 days after completing service. If a service member has suffered a service-related injury or illness, the service member may be entitled to a two-year recuperation period after his or her service is complete, and may request reemployment any time within that two-year period.

The regulations confirm that an employer need not provide reemployment to a returning uniformed service member under USERRA if: (1) the employer has experienced changed circumstances that would render reemployment impossible or unreasonable; (2) reemployment would place an undue burden on the employer; or (3) the employment which the individual held prior to military service was for a brief, non-recurrent period, and there was no reasonable expectation that this employment would continue in the future.

USERRA provides that employees who return from service in the uniformed services are entitled to the same seniority, status, and pay rate upon reemployment that they would have received had they remained continuously employed. The DOL’s regulations provide several examples of how this requirement should be applied. For example, if an employer uses a seniority-based bidding system for promotions, a returning uniformed service member should be awarded a promotion upon return “if it is reasonably certain that the individual would have received it but for the interruption due to military service.” Thus, the DOL’s regulations provide that a returning uniformed service member should not be made to wait until the next available bidding opportunity in order to receive a promotion that the individual otherwise would have received had the individual not left employment for military service.

Under USERRA, an individual may not be treated as having a break in service with the employer during the period of military service for purposes of determining participation, vesting, and accrual rights in an employer’s pension plan. The regulations further clarify that an employee must receive service credit with an employer for the entire period of time that the individual is absent from civilian employment due to service in the uniformed services. For example, time spent by the employee between the end of civilian employment and the date that the individual reports for active duty may be counted as service with the employer for purposes of pension plan rights. In addition, any time taken off by the employee after military service is complete to recuperate from injury or illness (up to 2 years), or to apply for reemployment within the statutory time periods, also counts as service with the employer for purposes of pension plan rights.

If a returning service member’s disability restricts the individual’s ability to perform the position to which he or she would otherwise be reemployed, the employer is obligated to make reasonable efforts to accommodate the individual’s disability. This obligation is similar to the obligation that the employer may otherwise have under the Americans with Disabilities Act (“ADA”) and state disability discrimination laws. However, the DOL’s regulations provide that the reasonable accommodation obligation under USERRA also applies to temporary impairments that may not be considered “disabilities” under the ADA.

Health Care Benefits For Uniformed Service Members

Under USERRA, eligible individuals may elect to continue their employer-based health care coverage while on leave for military service for the lesser of 24 months or the period of actual military service. While these coverage continuation rules are similar in some respects to the coverage afforded to eligible employees under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”), the continuation of health care coverage under USERRA is not dependent upon the size of the employer’s workplace or whether the employer is a government entity.

USERRA does not specify what method must be used for an individual to elect continuation of health insurance coverage. Instead, the DOL’s regulations provide that health plan administrators may develop reasonable requirements regarding how continuing coverage may be elected. If an employee is absent for service in the uniformed services for fewer than 31 days, the employer cannot require the employee to pay more than the regular employee share of the health insurance premium. However, if an employee is absent for service in the uniformed services for 31 or more days, the employer may require the employee to

pay up to 102% of the full health insurance premium under the plan (the employer's share, the employee's share, plus an extra 2% for administrative costs). The plan administrator may develop reasonable procedures for obtaining payments from the uniformed service member, as well as rules regarding termination of health insurance coverage due to the service member's failure to make the required payments.

Prohibition Against Discrimination And Retaliation

USERRA prohibits employers from discriminating against an individual by denying the individual initial employment, reemployment, retention in employment, promotion, or any other employment benefit because of the individual's membership in the uniformed services. USERRA's anti-discrimination provision not only protects current members of the uniformed services, but also former members and those who have applied to the uniformed services for membership.

USERRA also prohibits employers from retaliating against an individual who has taken any action to enforce a protection afforded under USERRA, testified in any enforcement proceeding under USERRA, assisted or participated in a USERRA investigation, or exercised any rights provided by USERRA.

New USERRA Poster

In order to notify employees of the rights and obligations afforded to them under USERRA now that the regulations have been finalized, the DOL has issued a new USERRA poster which employers should post in their workplace. The poster is available at any DOL office or, in the alternative, may be downloaded from: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf.

Ensuring Compliance With USERRA

As explained above, the final USERRA regulations do not alter the existing rights and obligations of employees and employers. Therefore, it is not necessary for employers to significantly alter their current policies and practices with respect to leave for military service and reinstatement to employment upon an employee's completion of military service. However, there are several steps that employers should take to ensure continued compliance with USERRA. First, employers should replace any previous USERRA poster with the current poster published by the DOL. Second, employers should review their existing employment policies, procedures, and handbooks to ensure that employees have accurate information regarding military leaves of absence and reemployment rights. Third, employers should review and amend any applicable benefit plan documents and/or benefit communications to ensure that they are consistent with the DOL's implementing regulations. Finally, employers should confirm with their benefit plan administrators that the administration of any plan benefits are made in accordance with the final USERRA regulations.

If you have any questions or need any advice regarding your obligations under USERRA, please contact:

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