



Electronic Dispatch

Employee Benefits Law Action Memo

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A USERRA REFRESHER: EMPLOYEE BENEFIT RIGHTS FOR RETURNING VETERANS

Faced with an increasingly large number of returning veterans, employers should be aware of recent guidance issued regarding the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the primary federal law that provides employment and benefits protection for eligible employees who are absent from work because of military service. Employers should review relevant plan documents and procedures to ensure compliance with USERRA.

On September 20, 2004, the United States Department of Labor ("DOL") issued proposed regulations regarding USERRA. This is the first substantive guidance issued since USERRA's passage in 1994. The DOL recognizes that a reasonable transition period may be necessary if the final regulations require adjustments in employer policies and practices. On December 10, 2004, President Bush signed the Veterans Benefits Improvement Act of 2004 ("VBIA"), which extends the period of health continuation coverage available and requires employers to provide notice to employees of their rights under USERRA.

USERRA applies to persons who perform duty, voluntarily or involuntarily, in the "uniformed services." Uniformed services include the United States Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services. Federal training or service in the Army National Guard and Air National Guard as well as certain disaster response work (and authorized training for such work) also gives rise to rights under USERRA.

USERRA covers nearly all employees (including part-time and probationary employees), and applies to virtually all United States employers. USERRA applies to any employee whose employment is interrupted for five years or less, if that employee provides advance written or oral notice of military service. However, USERRA protection does not extend to individuals dishonorably discharged from military service.

USERRA applies to employers regardless of size, and covers multiemployer plans maintained pursuant to collective bargaining agreements.

Employee Rights

USERRA prohibits employment discrimination against a person based on past military service, current military obligations, or intent to serve. Aside from the right to reemployment, health and pension benefits are also protected under USERRA.

Health Benefits

USERRA provides health continuation coverage rights to employees (and their dependents) who would otherwise lose group health coverage because of military service. USERRA requires employers to give eligible employees on leave for military service the option to continue employer-provided health coverage for themselves and their dependents for **up to 18 months**. USERRA coverage is generally considered alternative coverage for COBRA purposes, so the continuation coverage periods run concurrently.

Under VBIA, any eligible employee leaving for military service who elected coverage on or after December 10, 2004, is entitled to **up to 24 months** of health continuation coverage. If this change conflicts with any continuation coverage provided under COBRA, eligible employees are entitled to benefits under the program that provides the greatest coverage.



USERRA continuation coverage rights presumably apply to coverage under health flexible spending arrangements ("FSAs") and health reimbursement arrangements ("HRAs"). It is not clear under present guidance whether FSAs or HRAs can limit the duration of USERRA continuation coverage rights as they can with COBRA. Therefore, employers who sponsor such plans should be careful about limiting the continuation coverage period to less than 18 (or, if applicable, 24) months for participants eligible for USERRA protection.

Cost of Continuation Coverage

If military service is for 30 or fewer days, eligible employees cannot be required to pay more than the regular active employee share for coverage. If the military service is 31 days or longer, however, eligible employees may be required to pay as much as 102% of the full premium.

Waiting Periods

If an individual's participation in a health plan is terminated because of military service, USERRA requires that such individual's coverage be reinstated upon reemployment without regard to any exclusions or waiting periods that would otherwise apply. Such exclusions or waiting periods may nonetheless be applied with respect to coverage of illnesses or injuries incurred or aggravated during military service.

Retirement Benefits

USERRA provides certain protections for pension plan benefits that accrued during military service, regardless of whether the plan is a defined benefit plan or a defined contribution plan. Certain plans excluded from ERISA coverage (for example, church plans or plans established under state or federal law for governmental employees) may be covered by USERRA.

Upon reemployment, employers must give eligible employees certain credit for their military service for purposes of participation, vesting, and accruals. Under the proposed regulations, for retirement plan purposes, a "break in service" may not include the period of military service, the period between military service and reemployment, or up to two years of convalescence from a service-related injury.

Compensation and Contributions

For purposes of calculating pension benefits, compensation during a period of military service must be determined as if the service-related leave had not occurred. Employers should use the rate of pay that would have been received but for the military service. If the rate of pay is uncertain, the average rate of pay during the 12-month period prior to military service is to be used.

Generally, employers must fund any accruals to defined benefit plans, and make any employer contributions to defined contribution plans, which are not contingent on an eligible participant's contributions (such as matching contributions under a 401(k) plan). Under the proposed regulations, these employer contributions must be made within 30 days after reemployment.

Eligible employees are entitled to make up missed elective deferrals. If an eligible employee opts not to make up these amounts, his or her employer will not be obligated to make any matching contributions.

Under the proposed regulations, a defined contribution plan must allow an eligible employee to contribute on an after-tax basis in order to receive the maximum employer match available if that employee is unable to make USERRA catch-up contributions on a pre-tax basis because he or she does not have enough compensation from the employer to defer (for example, if the employee is no longer employed by the plan sponsor). It appears that this requirement applies even if the plan does not otherwise accept after-tax contributions.

USERRA catch-up contributions will not cause a plan to fail any applicable plan nondiscrimination requirements.

Plan Loans

Plan sponsors may allow eligible participants with outstanding plan loans to suspend repayment during the period of military service without violating the otherwise applicable five-year repayment or level amortization requirements of the Internal Revenue Code. Further, if an eligible participant's ability to repay the loan at the original interest rate is "materially affected" by military service, that participant may be able to compel the plan sponsor to reduce the interest rate on a plan loan to six percent for the duration of his or her military service.

Recommended Actions

Employers should review and amend their plan documents, summary plan descriptions and any forms used to administer USERRA health continuation coverage, if necessary, to comply with USERRA and VBIA. In addition, as soon as the DOL releases its model notice, no later than March 10, 2005, employers **must** provide that notice to employees. The model notice is intended to inform employees of their rights, benefits, and obligations under USERRA. Finally, employers should look for the DOL to issue final USERRA regulations later this year.

If you have any questions, please contact any of the following members of our Employee Benefits Law Practice Group:

In Central New York, call 315-218-8000 or e-mail:

Lisa A. Christensen	lchristensen@bsk.com	Stephen C. Daley	sdaley@bsk.com
John C. Godsoe	jgodsoe@bsk.com	Brian K. Haynes	bhaynes@bsk.com
Richard D. Hole	rhole@bsk.com	Ted Lewkowicz	tlewkowicz@bsk.com
Aaron M. Pierce	apierce@bsk.com		

In the Capital District, call 518-533-3000 or e-mail:

Joanmarie M. Dowling	jdowling@bsk.com	Amelia M. Klein	aklein@bsk.com
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In Western New York, call 716-566-2800 or e-mail:

Darcie A. Falsioni	dfalsioni@bsk.com		
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In New York City and on Long Island, please contact any of the following members of our Labor and Employment Law Department:

On Long Island, call 516-267-6300 or e-mail:

Terry O'Neil	toneil@bsk.com
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In New York City, call 646-253-2300 or e-mail:

Louis P. DiLorenzo	ldilorenzo@bsk.com
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