

## NEW MILITARY LEAVE REGULATIONS CLARIFY NATIONAL GUARD AND RESERVE OBLIGATIONS

In response to the mobilization of over 500,000 National Guard and Reserve members to support the military operations in Iraq and Afghanistan, the U.S. Department of Labor (DOL) recently issued a comprehensive set of regulations explaining and clarifying the Uniformed Services Employment and Reemployment Rights Act (USERRA).

USERRA provides reemployment protection, protection from discrimination, and other benefits for employees who take leave to perform military service. The regulations took effect January 18, 2006. (A complete copy of the regulations may be found on the DOL's website at [www.dol.gov/vets.](http://www.dol.gov/vets.))

Following is a summary of the main provisions of the regulations.

### Covered Employers

The regulations state that USERRA applies to all U.S. employers, regardless of size, including foreign employers doing business in the U.S., and U.S. companies operating in foreign countries.

### Covered Employees

The regulations also provide that USERRA's protections apply to all employees, even if they are temporary, part-time, probationary, seasonal, executive, managerial, or professional. However, they do not apply to independent contractors.

### Reemployment and Seniority

The regulations emphasize USERRA's "escalator principle." This principle requires returning a veteran to the position (with commensurate seniority, pay, and benefits) that he or she "would have attained with reasonable certainty" during the employee's military leave (i.e., the "escalator position").

Under the escalator principle, if similarly situated employees receive a pay raise or promotion during a service member's absence, the returning veteran will likely be entitled to the same pay raise or promotion.

The regulations clarify the application of the escalator principle in specific situations. These include circumstances in which:

- Promotions are based on an employer's discretion rather than purely on seniority;
- The service member may have been included in a reduction in force had he or she stayed on the job;
- The employer discovers conduct, prior to reemployment, that may subject the returning employee to disciplinary action; and
- The service member was in his or her probationary period at the time of departure for military leave.

## Accommodating Disabled Veterans

Under the regulations, employers must go beyond the requirements of the Americans with Disabilities Act when accommodating a returning employee who has a disability incurred in, or aggravated during, the period of military service. For example, employers may need to train or retrain an employee to qualify him or her for the duties of a position that is equivalent in seniority, pay, and status to the employee's escalator position, or a position that is the "nearest approximation" to such equivalent position.

## Prompt Reemployment

USERRA requires "prompt" reemployment of an employee returning from military leave. According to the regulations, depending on the circumstances, in most cases "reemployment must occur within two weeks of the employee's application for reemployment."

## Non-Seniority Rights and Benefits

Employees on military leave are entitled to receive all non-seniority rights and benefits their employer pays to other individuals who take non-military leave. Under the regulations, vacation accrual is considered a non-seniority benefit.

## Health Care Benefits

The USERRA regulations incorporate the requirements of the Veterans Benefits Improvement Act, which are broader than those of COBRA, the Consolidated Omnibus Budget Reconciliation Act. Under the regulations, mobilized employees may continue their employer-sponsored health insurance coverage for up to 24 months. Unlike COBRA, USERRA's continuation coverage is available without regard to the size of the employer's workforce.

## Employee Notice Obligations

USERRA generally requires that an employee or an appropriate military officer notify the employer of the need for military leave. The regulations clarify the notice obligations by providing that:

- The departing "employee should provide notice as far in advance as is reasonable under the circumstances";
- The notice "may be either verbal or written" and "does not need to follow any particular format";
- The employee "is not required to ask or get his or her employer's permission to leave to perform service"; and
- The employee need not announce his or her intention to seek reemployment at the time of deployment; in fact, even if the employee states that he or she does not intend to return to work, the employee does not forfeit the right to reemployment under USERRA.

Final Version of Required Poster

At the same time that it issued the USERRA regulations, DOL also published a final version of the notice that employers must post informing employees or their rights and benefits under USERRA. The new poster may also be found on DOL's website at [www.dol.gov/vets](http://www.dol.gov/vets).

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In light of the new regulations, employers should review their policies, procedures, and benefit plan documents relating to employees engaged in military service to ensure compliance with USERRA.

For additional information about USERRA and the Veterans Benefits Improvement Act, please see the online versions of Nexsen Pruet's September 2004 and March 2005 Employment Law Updates, which may be found at the following websites:

<http://www.nexsenpruet.com/assets/attachments/111.pdf>

<http://www.nexsenpruet.com/assets/attachments/107.pdf>

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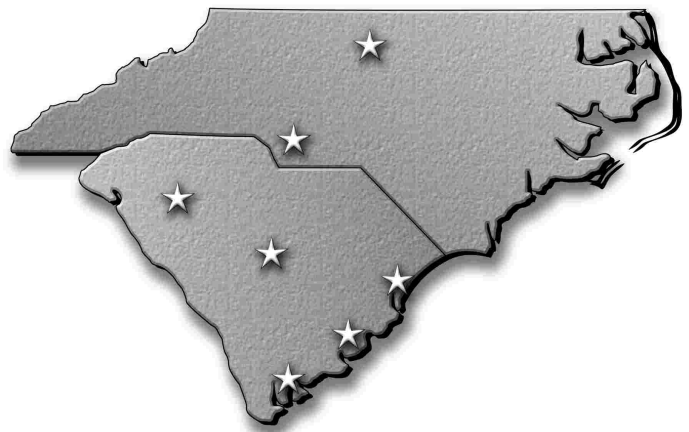
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