



EMPLOYMENT AND LABOR LAW ALERT

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EMPLOYER OBLIGATIONS TO RESERVISTS AND NATIONAL GUARD PERSONNEL

In the aftermath of the September 11 terrorist attacks on the United States, thousands of military reservists and National Guard members are being called up to active duty. Employers are reminded that employees who temporarily leave their civilian jobs as a result of their voluntary or involuntary service in the United States uniformed services have special protections regarding job security and employment discrimination based on the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA").

USERRA clarified and expanded the rights of temporary military personnel under the Veterans Readjustment Assistance Act of 1974. USERRA applies to all employers doing business in the United States regardless of size. It protects all persons serving in the Army, Navy, Marine Corps, Air Force, Coast Guard, Army National Guard, Air Force National Guard, and the Commissioned Corps of the Public Health Service, as well as the reserve components of these services. Following is a brief summary of the main requirements of the statute.

Reemployment and Seniority. As a general rule, an employee returning from active duty must be promptly reemployed in the same or a similar position he would have held if his continuous employment had not been interrupted. If an employee cannot perform such a position upon return to work, the employer must use reasonable efforts to qualify the employee for the position. In addition, the employee must be treated for purposes of seniority, pay, and benefits as if he had remained continuously employed. For example, if similarly situated employees receive a pay raise and/or promotion during a service member's absence, the service member will likely be entitled to the same pay raise and promotion upon his return. The Supreme Court has referred to this obligation as the "escalator principle." The escalator does not always go up, however. It may remain in place or go down. The service member may have been laid off had he or she stayed on the job. In that case, the employee may not be entitled to reinstatement.

Protection From Discharge. Employees who serve in the military for more than six months may not be discharged without cause for one year following the date of reemployment. Employees who serve for between one month and six months may not be discharged without cause for six months following their reemployment. However, if a reduction-in-force becomes necessary and the employee's position is eliminated, this protection does not prevent the employer from laying off the employee.

Nondiscrimination and Anti-retaliation. USERRA prohibits employers from discriminating against service members in employment, reemployment, job retention, promotion, or any other benefit of employment. Discrimination occurs when military service is the "motivating factor" in an employment decision. The statute also contains an anti-retaliation provision, which protects employees who participate in the reporting, investigation, or filing of claims of violations.

Continued Health Insurance Coverage. Service members on active duty for more than 30 days may elect to continue employer-sponsored health insurance coverage for up to 18 months. As under COBRA, the employer may require employees electing coverage to pay up to 102% of the full premium. Upon an employee's return, her employer must provide coverage immediately, even if a waiting period is normally imposed on new or returning employees.

Continued Retirement Benefits. USERRA sets out several requirements and restrictions relating to pension benefits that must be read in conjunction with ERISA. As a general rule, in determining vesting and accrual of pension benefits, USERRA mandates that employees be given years-of-service credit for intervening uniformed service.

Eligibility Criteria. To be entitled to these benefits, employees must generally give their employers advance notice that they will be absent from work for military service; apply for reemployment within a set time after release from active duty; and be released from the military under honorable circumstances. In addition, the employee must return to her job within five years, but service required because of a war or national emergency does not count toward the five-year period.

Enforcement. The Attorney General or individual employees may file a private court action under USERRA. A court may order an employer who violates the statute to pay the employee lost wages and benefits, and may hold the employer liable for double damages if the violation is found to be willful. USERRA also provides for the recovery of attorneys' fees, expert witness fees, and other litigation expenses by a successful plaintiff.

Finally, many states have laws that provide greater protections than USERRA. For example, in South Carolina, public sector employees are entitled to additional rights and benefits on military leave.

While most employers will go out of their way to support employees called to active duty in the war on terrorism, keep in mind that courts can be expected

to resolve doubts under USERRA in favor of employees. Accordingly, employers should consider developing a written policy concerning military leave and training managers regarding USERRA to avoid potential claims.

This **Employment and Labor Law Alert** is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. If you would like to receive more detailed information, please contact David Dubberly at 803-253-8281, or any of the following attorneys.

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