November 2012: Honor Returning Service Members and USERRA Mandates

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Since the attacks of Sept. 11, 2001, hundreds of thousands of American women and men have been through active service in the U.S. armed forces. Troops serving in Iraq were welcomed home by President Barack Obama more than a year ago, and combat troops were withdrawn from Afghanistan earlier this year. Yet the U.S. maintains a military presence in Afghanistan and in more than 150 other countries throughout the world. These brave soldiers continue to return home from service around the globe to resume living civilian lives.

Federal laws, including the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the Family and Medical Leave Act (FMLA), provide re-employment rights as these veterans settle in. Many employers want to comply with these legal obligations and honor the service of these women and men. However, the statutes can be confusing and sometimes appear to be in conflict with an employer's business needs.

There also may be state and local laws providing additional rights that can add to the complexity of employing members of the military. With a bit of guidance, however, employers can successfully maneuver the legal landscape.

Who Is Covered?

USERRA guarantees service members leave from employment during active duty, provides that an employee can only be terminated for good cause for a period after such leave, and prohibits employers from discriminating or retaliating against service members on account of their service.

USERRA's reach is broad, covering both private and public employers (regardless of their size), as well as every employee who is called to military service. USERRA's classifications for military service are similarly broad, encompassing employees serving in the military in a variety of capacities:

- Active duty.
- Inactive duty training.
- Full-time National Guard duty.
- Funeral honors duty.
- Emergency response duty.

Notwithstanding the sweeping reach of USERRA, the law provides that when employment is "for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period," then USERRA leave is not required. Similarly, while on leave, an employee who is disqualified for military service becomes ineligible for the rights provided by USERRA. An employee may be disqualified, for instance, if she is dishonorably discharged, dismissed by court martial or an order of the president, dropped from the rolls as a result of an extended period of an unexcused absence, or imprisoned by a civilian court.

What Leave Rights Are Provided?

Under USERRA, an employer is required to provide an employee serving in the uniformed services with a leave of absence from his or her job. In most cases, however, an employee is not eligible for leave once his or her cumulative time of service exceeds five years. For instance, if an employee was called into active duty on two

separate occasions—each for two and a half years—the employee may not be entitled to another leave under USERRA. However, an employer should count the duration of an employee's service with care because certain types of service are excluded from the five-year cap.

All employees seeking leave under USERRA must provide their employers with advance written or oral notice of their military service. Notice may be given by the employee or by an officer within the uniformed services. However, an employee is excused from providing notice if it is impossible or unreasonable to do so, or if military necessity prevents it.

Returning Employees' Obligations

Employees qualified for service leave under USERRA and their employers must follow certain statutory requirements when those employees return to work.

The employee must report to his or her employer within a certain number of days following completion of military service. An employee whose service is 30 days or less must generally report back to work the day after completion of service. An employee whose service is longer has up to 90 days after completion of service to report to work.

If an employee becomes disabled or if a disability is aggravated during service, the time limits on returning to work are extended by two years or even longer in some cases.

An employee's rights under USERRA are not, however, automatically forfeited by failing to timely report to work; instead, the employer should consider the days following an employee's re-employment deadline as unexcused absences and apply general policies regarding unexcused absences to this situation.

Employers can ask their employees to provide documentation for any period of service longer than 30 days. Specifically, an employer may request that an employee provide proof that the relevant service period was qualified under USERRA, that the employee did not exceed the five-year limitation previously mentioned and that timely application was made for re-employment.

If the employee fails to provide such information, either because it doesn't exist or isn't readily available, the employer must still promptly re-employ the employee. However, an employer may terminate an employee if at any time it receives documents proving that an employee's service was not qualified under USERRA, that the service exceeded the five-year limitation or that an employee's application for re-employment was untimely.

Re-employment Right

An employer is required to promptly re-employ a qualified employee who provides it with timely notice and documentation. The employer must initially allow the employee to return to the position that she would have occupied if the returning employee had remained continuously employed (or to a position of like seniority status and pay for those serving 91 days or more).

In other words, if the employee would have been promoted once or even multiple times had she remained employed, then the employer is required to re-employ the returning employee in the higher position.

USERRA also requires the employer to make reasonable efforts to qualify the employee for the higher position by providing training to refresh her existing skills and to assist her in acquiring new knowledge because of changing technology.

If the reasonable efforts by the employer to qualify the returning employee for the higher position are unsuccessful, the employer must allow the employee to return to the position of employment that she had on the date her service leave began. And, here again, the employer is required to assist the employee in getting up to speed on the requirements of and changes to the position. If the returning employee is still unqualified for her previous position despite the reasonable efforts of the employer, the employer is required to place the returning employee in a position of equivalent or nearest approximation of status and pay that the returning employee is qualified to perform.

USERRA does not, however, mandate that an employer continue to employ a returning service member who is not qualified for any job within its organization after working to qualify that individual. Only after the employer makes reasonable efforts to qualify a returning employee may it determine that she is not qualified for re-employment.

An employee is qualified for a position if she has the ability to perform the essential tasks of the position. In determining what constitutes an essential function, the courts will consider a number of factors, including, for example, written job descriptions, the amount of time on the job spent performing the function or the terms of a collective bargaining agreement.

An employer is also not required to re-employ a returning service member if the employer's circumstances have so changed as to make such re-employment impossible or unreasonable. The employer's burden of proving such impossibility or unreasonableness, however, is very high.

Ongoing Rights to Benefits

Under USERRA, a qualified employee is entitled to the seniority, and all benefits and rights associated with such seniority, that he would have attained if the employment had been continuously maintained. Likewise, an employee is entitled to the benefits and rights available to employees taking other types of leave.

Employers must allow employees, at their request, to use any accrued vacation time to offset any unpaid time during

USERRA leave. An employer must provide for continuation of health plan eligibility for eligible employees and their dependents under USERRA for up to 18 months after the start of the USERRA leave, or for the period of leave plus the time allowed for re-employment, whichever is shorter.

An employer must operate pension and retirement benefits as if the USERRA employee was continuously working through his period of leave. Employers remain liable for funding any obligations, and employees are entitled to any accrued benefits. If, however, any benefit is contingent on employee contributions, then the returning employee must either repay the employer for the required contributions or forfeit the benefits.

Right to Continuing Employment

Once an employer has fully re-employed a returning service member and restored all of her benefits, the employer is prohibited from discharging her without just cause for up to six months to one year after the date of re-employment, depending on the length of the leave.

"Just cause" may include unacceptable or unprofessional public behavior, incompetent or inefficient performance of duties, or criminal acts. Employers accustomed to doing business within a union context will be familiar with the just cause language. However, it remains unclear whether USERRA's standard is the same as, or merely similar to, the just cause language in labor law.

One thing is certain: The standard remains high, with the employer bearing the burden of proving that a discharge either was based on the employee's conduct or was the result of some other legitimate nondiscriminatory reason that would have affected any employee in the re-employed service member's position, regardless of her protected status or activity.

Right to Be Free from Discrimination

Employers are prohibited from making employment decisions that discriminate against applicants or employees on the basis of their past, current or potential future membership in the uniformed services. As such, an employer cannot, based on an individual's military service, fail to hire, promote or re-employ the individual; terminate the individual; or determine or adjust the individual's benefits. An employer has committed a violation under USERRA if an individual's past, present or potential future connection with the uniformed services is a motivating factor in an employer's adverse employment action against the individual.

Similarly, employers are prohibited from retaliating against anyone who files a complaint under USERRA, participates in a USERRA investigation or proceeding, or exercises any right provided under the law. The VOW to Hire Heroes Act of 2011 further expanded USERRA, also recognizing claims for a hostile work environment based on an individual's military status. As a consequence, employers will find it much more difficult to obtain dismissal of USERRA claims than in the past when the employee has not been subject to a tangible loss.

Damages for USERRA violations can be high, including back pay, lost benefits, attorney fees, expert witness fees and other litigation expenses.

FMLA

Service members may also be eligible for FMLA leave if they work for an FMLA-covered employer. Moreover, if an eligible employee has a family member in the service that requires certain care or attention, the FMLA provides the eligible employee with additional leave benefits to meet certain related service members' needs.

Military caregiver leave. A covered employer must grant an eligible employee a leave of absence if such leave is to care for certain family members who are service members and suffering from a serious injury or illness incurred in the line of duty. The leave period is up to 26 unpaid workweeks (instead of the 12 weeks provided under traditional FMLA leave) during a single 12-month period and can be taken intermittently whenever medically necessary. The employee should make reasonable efforts to schedule planned medical treatments so as not to unduly disrupt the employer's operation.

This leave continues to apply to veterans up to five years after military service ends. Please note that the definition of "injury or illness" is different from a "serious health condition" under nonmilitary components of the FMLA. Moreover, the employer is restricted from seeking a second or third opinion regarding such injury or illness.

Qualifying exigency leave. A covered employer must grant an eligible employee a leave of absence if certain of the employee's family members are on active duty or have been notified of an impending call to active duty and a qualifying exigency arises in connection with such active duty or impending call. The leave of absence is up to 12 unpaid workweeks during the normal 12-month period established by the employer for FMLA leave and can be taken intermittently within the established 12-month period.

"Qualifying exigencies" include:

- Deployment of a service member.
- Military events and related activities.

- Child care and related activities, if they are necessary because of the active duty or call to active duty of a service member.
- Making or updating financial or legal plans arising from the absence of a service member.
- Attending nonhealth care provider counseling when the need is related to a service member's call to or being on active duty.
- Taking up to five days of leave to spend time with a service member during his or her short-term, temporary rest and recuperation leave from deployment.
- Making various arrangements and attending various events related to post-deployment or death of a service member.
- Any other event that the employer and employee agree is a qualifying exigency.

Under this leave benefit, covered military members include those in the National Guard or the reserves, or those in the regular armed forces who are deployed to a foreign country.

Notice requirement. An employee seeking military-related leave under the FMLA must generally provide his employer with notice as soon as practicable and must provide "sufficient information" to make the employer aware of the need for FMLA leave and its anticipated timing and duration. When an employer acquires knowledge that an employee's leave may be covered under the FMLA, the employer must provide the employee with specific information about the FMLA and the employee's eligibility or noneligibility for such leave.

Discrimination and retaliation. As with any FMLA rights, an employer is prohibited from discharging or otherwise discriminating against any individual who opposes any practice, or participates in any proceeding, related to the FMLA. It is therefore unlawful for an employer to interfere with, restrain or deny the exercise of any right provided under the FMLA.

State and Local Laws

In addition to the federal laws regarding leave and re-employment rights, there may be additional state or local regulations that require an employer's compliance.

For instance, Minnesota requires an employer to provide up to one day each calendar year of unpaid leave to any employee whose immediate family member has been ordered into active duty. An employer is also required to give an employee up to 10 days of unpaid leave if an immediate family member is injured or killed while engaged in active service.

And, under California law, an employer is required to provide an employee who is the spouse of a deployed service member up to 10 days of unpaid leave to spend with his or her spouse while at home from deployment.

In Washington, the employee-spouse is entitled to a total of 15 days of unpaid leave per deployment, to be taken either after the impending call but prior to deployment or when the military spouse is on leave from deployment. Given these additional rights, it is important to consult all applicable laws—both municipal and state—in the location where the employee works.

Coordinating Compliance

Navigating the variety of local, state and federal laws that protect the employment rights of those who serve in the military can be tricky, but it is not unmanageable.

It is imperative to keep in mind, however, that the law provides special protection for our men and women that serve in the military. In those situations, the employer must comply with all employment laws, paying special attention to the extra rights granted to those who serve our country through participation in the military. State and local laws might provide additional protection for such employees, and those laws should be consulted as well.

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