



Heads Up

By Thomas J. Gallitano

Employers' Obligations to Employees on Active Duty

Employers who violate the Uniformed Services Employment and Re-employment Rights Act may be exposed to substantial liability.



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As a result of recent events, many employers have received requests for leaves of absence from employees who are military reservists called to active duty, or from employees desiring to enlist voluntarily for military service. This article highlights the most important provisions of the *Uniformed Services Employment and Re-employment Rights Act* ("USERRA" or the "Act"), 38 U.S.C. § 4301 *et seq.*, with respect to the rights and obligations imposed upon employers concerning military leaves of absence.

Covered Employers and Employees

USERRA applies to all employers, regardless of size, and requires employers to grant employees leaves of absence to perform military service obligations in all branches of the uniformed services, along with the Public Health Service Corps and National Guard. The Act applies to non-temporary employees who are drafted, who voluntarily enlist, or who are on reserve status and are called to active duty.

Length of Re-employment Protection Rights

Generally, USERRA grants employees certain rights to be re-employed so long as the cumulative period of military service does not exceed five years. To be eligible for re-employment, the employee must either report for re-employment or submit an application for re-employment within a specified period after concluding service. Exceptions from the five-year limitation are made for periods of war or other national emergency and certain other enumerated exceptions.

Notice Requirements

Ordinarily, the employee is required to provide advance notice of the need to take a leave of absence. This requirement is waived if it would be unreasonable or impossible to provide such notice, or if advance notice is prevented by military necessity.

Reinstatement Rights

Most of the obligations imposed upon employers arise when the employee returns from uniformed service. An employee who has completed military service, received an honorable discharge, and served less than ninety days must be re-employed in the position the employee would have attained had the employee not taken a military leave of absence, assuming the individual is qualified to perform all of the duties associated with that position. If the employee has served ninety-one or more days, the employer has the option to offer a position equivalent in seniority, status and compensation to the position the employee would have held if military leave had not been taken. The employer must make reasonable efforts to qualify an employee who has returned from military leave for the new position.

Importantly, the Act does contain a safety valve – re-employment is not required if the employer’s circumstances have changed to such a degree as to make re-employment impossible or unreasonable, or if re-employment otherwise would impose an undue hardship on the employer.

Finally, the Act imposes certain restrictions on an employer’s right to terminate an at will employee. Depending on the length of service, employees who return from service may only be terminated for cause for up to one year following reinstatement.

Benefits During Military Leave

Employees on military leave are entitled to the same benefits provided to employees on other forms of leave. For example, if employees are provided with health, life, disability, or other insurance when out on other forms of unpaid leave, then employees who take a military leave of absence must be provided with the same benefits. Moreover, persons eligible for military leave are also entitled to continued group health plan coverage, for themselves and their dependents, similar to continued coverage rights afforded by COBRA. The extent of continued group health plan coverage is dependent upon the length of the leave of absence:

- For military leaves of less than 31 days, employees are entitled to continued group health plan coverage and the employer may not require the employee to pay more than the amount, if any, that active employees pay for the same coverage.
- For military leaves of 31 or more days, employees are afforded the right to receive continued coverage under terms and conditions that are similar to COBRA.

Under either scenario, the group health plan must provide a COBRA notice and election form to an employee who has a period of uniformed service, and must offer continuation coverage under both COBRA and USERRA.

Minimum Requirements

USERRA establishes the minimum requirements, and employers are free to provide more generous benefits. For example, employers are not required to pay employees for absences due to military leave, but companies may pay employees the difference between armed forces pay and their regular salary or wages.

The consequences of failing to comply with USERRA are not insignificant: employers found to have violated USERRA may be faced with substantial liability, including payment of lost wages and benefits, reinstatement orders, attorney’s fees, and other litigation-related expenses. Accordingly, and at a minimum, employers should be encouraged to examine their current leave of absence policies and practices, including employee benefit plans, to determine whether they comply with the obligations imposed by USERRA.

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