

MCLE ON THE WEB

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TEST # 41
1 HOUR CREDIT

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Military Leave And Its Impact On Employers *When an employee is called to military service, what are his rights and what are the employer's obligations?*

By ALISON J. MORBEY

The federal Uniformed Services Employment and Re-employment Rights Act (USERRA or Act), 38 U.S.C. §4301, et seq., generally requires all public and private employers to provide leaves of absence for military service for up to five years; to reinstate employees into the positions they would have held had they not been on military leave; to continue certain benefits during periods of leave; and to refrain from discharging without cause an employee who is reinstated after military leave for a period of up to one year after re-employment. In addition, USERRA prohibits employment discrimination based on past, present or future military obligations.

Eligible employees

Employees who are voluntarily or involuntarily called into service by any of the following "uniformed services" or the corresponding Reserve units, are entitled to re-employment rights and benefits under USERRA: the Army, Navy, Air Force, Marine Corps or Coast Guard; the Army National Guard and Air National Guard; the Commissioned Corps of the Public Health Service; and any other categories designated by the president in time of war or emergency.

"Service" includes active duty, various types of training duty, full-time National Guard duty, examinations to determine fitness for military duty and funeral honors duty performed by National Guard or Reserve members.

Notice requirements

An employee must provide his or her employer advance notice of military service obligations. Notice is usually provided in the form of military orders, training notices or induction papers. However, the Act permits oral notice from the employee or a military officer.

The obligation to provide advance notice is waived if military necessity precludes giving notice or if, under the circumstances, providing notice is otherwise impossible or unreasonable.

Duration and timing of leaves

Under USERRA, an employer must provide a leave of absence for up to five years. This time period is extended in certain situations, including orders to or retention on active duty during a war or national emergency. In addition, the annual training sessions and monthly weekend drills for Reservists and National Guard members do not count toward the five years of leave.

An employer cannot refuse to grant an employee a leave of absence because the employer finds the duration, time or frequency of an employee's military obligations to be unreasonable.

Compensation during leave

Employers are not required to compensate non-exempt employees for absences due to military service.

However, under the federal Fair Labor Standards Act (FLSA), an employer may not make deductions from an exempt employee's salary due to "temporary military leave." Although this term is not defined under the FLSA, courts have concluded that temporary military leave is leave that ranges from 15 to 30 days.

In addition, employers cannot dock an exempt employee's salary for partial week absences due to temporary military duty without risk to the exemption. Both exempt and non-exempt employees may elect to use any accrued vacation leave in lieu of unpaid military leave. However, an employer cannot require an employee to use vacation time for military leave purposes.

Benefits during military leave

USERRA provides expansive protection of an employee's benefits during periods of military leave. In general, employees on military leave must receive comparable rights and benefits to those they would receive under the employ-

er's policies for other types of leave.

1. HEALTH INSURANCE

USERRA requires an employer to offer continuous health insurance coverage to individuals on military leave for a period of up to 18 months, even if the employer is not covered by the federal COBRA law. If an employee's military leave is 30 days or less, the employee may not be required to contribute more than his or her normal share of any premium. If military service exceeds 30 days, the employee may be required to contribute up to 102 percent of the full premium under the health plan. No waiting period or exclusion period can be imposed upon reinstatement, unless either would have been imposed regardless of the leave. However, service-connected disabilities are not subject to exclusion or waiting periods.

2. VACATION AND SICK TIME ACCRUAL

An employer can suspend the accrual of vacation and sick time during unpaid periods of an employee's military leave if the same practice applies to employees on leave for other reasons. Upon re-employment following a military leave, an employee must accrue vacation and sick time at the accrual rate he or she would have attained had the employee not taken a military leave.

3. PENSION BENEFITS

Periods of military leave may not be considered a break in service for vesting and pension benefit accrual purposes. When an employee returns from military leave, an employer must make any pension contributions that it would have made if the employee had not taken a military leave.

For contributory plans that offer benefits only when the employees make contributions, an employee returning from military leave will have three times the period of his or her absence to make up missed contributions (not to exceed five years). Under contributory plans, an employer must make matching contributions only to the extent that a returning employee makes up the missed contributions to the plan.

Reinstatement obligations

In general, if an employee has met the requirements for reinstatement following a military leave, an employer (or that employer's successor in interest) has an affirmative obligation to re-employ the employee subject only to very limited exceptions. The reinstatement obligations for both employees and employers are discussed below.

1. EMPLOYEES' REINSTATEMENT OBLIGATIONS

Under USERRA, employees returning from military service have between two days (plus travel time) and 90 days to report to work, or apply for reinstatement, depending upon the length of their military service. The Act allows for an extension of these time limits if an employee, through no fault of his or her own, is unable to meet these deadlines.

In addition, the time limits may be extended for up to two years if the employee is hospitalized or convalescing from a service-related illness or injury.

If an employee's period of military service exceeds 30 days, an employer may request documentation establishing the timeliness of the employee's application for re-employment and the length and character of the employee's military service.

2. EMPLOYERS' REINSTATEMENT OBLIGATIONS

Depending upon the length of military leave, USERRA requires that an employer reinstate an employee to the position he or she would have attained absent military leave — not simply the job held by the employee at the time the leave started — or a comparable position, so long as the employee is qualified (or can become qualified) for the position.

Under USERRA, an employer must make reasonable accommodations for employees with service-related disabilities. If, despite reasonable accommodation, an employee is not qualified for the position he or she would have held but for military service, the employee must be re-employed in a position of equivalent seniority, status and pay for which he or she is qualified or could become qualified to perform.

Failing this, the employee must be re-employed in a position that is the "nearest approximation" in terms of seniority, status and pay, consistent with the individual's medical restrictions.

In addition, USERRA requires employers to make reasonable efforts to provide refresher training and any other training necessary to update a returning employee's skills in circumstances where the employee is no longer qualified for a position.

Employers are excused from providing training only if the required training would be of such difficulty or expense as to cause undue hardship for the employer. Under USERRA, undue hardship has essentially the same meaning as it does under the Americans with Disabilities Act.

3. LIMITED EXCEPTIONS TO REINSTATEMENT OBLIGATIONS

USERRA provides a few limited exceptions to an employer's obligation to reinstate an employee returning from military duty. An employer is excused from its re-employment obligations if the employer's circumstances have changed so much that re-employment would be "impossible or unreasonable."

For example, if an employee's position is eliminated due to a reduction in force during his or her military leave and the employee would have been terminated had he or she been actively employed, an employer will have no obligation to reinstate the employee.

Additionally, an employer is not obligated to reinstate employees hired on a temporary or seasonal basis prior to military leave where there was no reasonable expectation that employment would continue indefinitely or for a significant period. Thus, in most circumstances an employer has no obligation to reinstate temporary or seasonal workers or interns following periods of military leave.

Finally, an employer need not reinstate an employee who fails to complete military service under honorable conditions.

USERRA lists four circumstances under which an employee's re-employment rights would be terminated due to misconduct: separation from service with a dishonorable or bad conduct discharge; dismissal of a commissioned officer in certain situations involving a court martial or by order of the president in time of war; dropping of a commissioned officer from the rolls when the officer has been absent without authority for more than three months or when the officer is imprisoned by a civilian court; and separation from the service under other than honorable conditions.

Protection of employees against discharge or discrimination

An employee who is re-employed after a military leave of 181 days or more may not be discharged without cause for one year after the date of re-employment. Likewise, an employee re-employed after a military leave of 30 days, but less than 180 days, may not be discharged without cause for 180 days after the date of re-employment.

Employees who are re-employed after military leaves of less than 30 days are not protected from discharge without cause. However, an employer may not discriminate against any employee because of his or her military service or obligations.

USERRA provides protection from discrimination and retaliation because of past, current, or future military obligations. This prohibition on discrimination includes discrimination in hiring, promotion, re-employment, termination, compensation and benefits.

Employers also are prohibited from retaliating against individuals who file complaints under USERRA, who testify, assist or otherwise participate in investigations or proceedings under the Act, or who exercise any right provided under the Act, regardless of whether the individual has served in the military.

If an employee's past, present or future military obligations are a motivating factor in an employer's adverse employment action against an individual, the employer has violated the Act unless it can prove that it would have taken the same action regardless of the individual's military obligations.

USERRA clarifies that an employer may be liable if an employee's military service is just one of the reasons for an employer's adverse employment action. To avoid liability, an employer must prove that a reason other than military service would have been sufficient to justify its adverse employment action.

Enforcement

Actions for violations of USERRA may be brought by the attorney general or by individuals. Remedies include equitable remedies, lost wages or benefits. If a court determines that an employer's failure to comply with the Act is willful, the court may award an additional amount equal to the compensation owed to the employee as liquidated damages.

A court may award attorneys' fees, expert witness fees and litigation expenses to successful plaintiffs who retain private counsel.

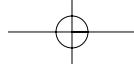
■ *Alison J. Morbey has more than 14 years' experience in employment law and human resources management. She is currently Employment Counsel for Yahoo! Inc.*

Test — 1 Hour MCLE Credit

1. USERRA covers public and private employers.
2. Small employers are not subject to USERRA's requirements.
3. Employers are not obligated to reinstate employees who voluntarily enlist for military service.
4. Employees serving full-time in the National Guard are not covered by USERRA.
5. Employers must provide leaves of absence for Reservists who serve as an honor guard in military funerals.
6. The period of protected military leave can extend beyond five years in times of war.
7. Annual training for Reservists counts toward a five-year military leave.
8. An employee must provide written notice of his or her military service obligations.
9. An employer can require an employee to postpone military obligations based on business necessity.
10. Employers can require employees to use accrued vacation during military leave.
11. Employers must pay exempt employees for periods of temporary military service.
12. An employer must continue an employee's group health coverage for up to 18 months during a military leave.
13. After 30 days of military leave, an employer may require the employee to pay 102 percent of the group health premium.
14. Military leave is considered a break in service for pension plan vesting.
15. Upon returning from leave, an employee can make up missed contributions to a contributory pension plan.
16. An employer must reinstate a temporary employee.
17. An employer can refuse to reinstate an employee who was dishonorably discharged from military service.
18. An employer may have to provide training for employees returning from military leave.
19. Employees are protected from retaliation under USERRA only if they served in the military.
20. USERRA suspends at-will employment for up to one year for employees returning from military leaves of 30 days or more.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.



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TEST #41 — Military Leave And Its Impact On Employers

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