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# DOL Issues Final Regulations Interpreting USERRA

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On December 19, 2005, the U.S. Department of Labor (DOL) published final regulations interpreting the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.* At the same time, DOL also issued final regulations requiring employers to provide employees with notice of their rights and obligations under USERRA and published a final version of the poster employers may use to comply with the notice requirement. Both sets of regulations will take effect on January 18, 2006.

USERRA, enacted in 1994, governs the rights and obligations of individuals who serve in the military regarding various aspects of their civilian employment, including nondiscrimination, reemployment and benefits. Many states also have laws that provide greater benefits to employees, such as additional time to return to work following a period of military service. Compliance with USERRA and state laws affecting military leave has become an increasingly important issue for employers as a growing number of employees have left employment for periods of military service following September 11, 2001, and as a result of the ongoing conflicts in Afghanistan and Iraq. Since September 11, 2001, more than 525,000 National Guard and Reserve personnel have been mobilized.

It is critical that employers work closely with counsel to understand the regulations and ensure compliance with USERRA and other applicable laws regarding military leave to avoid litigation and other complaints, which have risen sharply as a result of increased military mobilization. This LawFlash highlights some of the key issues addressed in the regulations, with a focus on those questions we have seen arise most frequently in recent years.

- USERRA's Broad Coverage.
  - Employers generally. The regulations confirm that USERRA governs virtually all employers, regardless of size. This includes successors-in-interest and joint employers.
  - Individual liability. In the comments accompanying the regulations, DOL notes that in some cases there may be individual liability for managers and supervisors under USERRA's definition of "employer."
  - Applicants. The regulations confirm that job applicants are covered by USERRA and, if an entity rejects a candidate or withdraws an offer of employment because an individual is called upon to fulfill a military obligation, the entity is considered an employer for purposes of USERRA.

- Notice Obligations.
  - Time for giving notice. USERRA provides that an employee or appropriate representative of the military service generally must give written or oral notice of the need for military leave. However, the statute does not specify how far in advance an employee must give notice. In the regulations, DOL declines to provide a specific time period but cites Department of Defense (DOD) regulations, which state that an employee should give 30 days' notice of the need for military leave, when feasible.
  - Intent to return. The regulations provide that an employee giving notice of the need for military leave is not required to state whether he or she intends to return to work following military leave, and that an employee may not prospectively waive his or her right to reemployment when going on military leave.
- Period of Military Service.
  - Other activities during leave. The regulations provide that military leave does not need to be the sole reason for the leave of absence and that if the leave is necessitated by military service, the employee may use the leave for other purposes as well. Thus, an employee may engage in other activities during military leave, such as visiting with relatives or working a part-time job. Additionally, the fact that an employee applies for positions with other employers while on military leave will not result in the employee losing reemployment rights.
  - Time counting toward the five-year limitation. The regulations provide that an employee need not commence military service immediately after leaving employment in order to have USERRA reemployment rights. Rather, depending on the circumstances, an employee may need rest time or may need time to get his or her affairs in order before military service. Such periods of time after leaving employment but before starting military service, as well as time after military service but before returning to civilian employment, are not deemed to count toward the five-year cumulative limitation on military service.
  - Timing, frequency and duration of military service. The regulations provide that while an employee does not have to accommodate an employer's interests regarding timing, frequency or duration of military service, an employer may bring concerns about this to the attention of the appropriate military authority. The DOL regulations cite DOD regulations that require military authorities to consider requests from employers of National Guard and Reserve members to adjust an employee's scheduled absence from civilian employment to perform military service.
- Benefits During Military Leave.
  - Health care.
    - Continuation provisions. The preamble to the final regulations clarifies that dependents do not have any independent right to elect USERRA health plan continuation, and dependents or retirees who perform military service do not have any rights to continue health plans under USERRA.
    - Cafeteria plans. The preamble clarifies that USERRA also applies to cafeteria plans. The result of this clarification is that employees who have continued pay while on leave can purchase health plan coverage on a pretax basis, and they can also elect to continue their health care flexible spending arrangement. Further, cafeteria plan change-in-status

rules will not be violated if a plan offers a new health plan or spending account election upon an employee's leaving for, or returning from, military service.

- COBRA similarity. The preamble to the final regulations indicates that the IRS informed the DOL that compliance with USERRA rules will not conflict with the Internal Revenue Code requirements under COBRA.
- Failure to elect. New provisions in the final regulations permit employers to establish COBRA-like rules that terminate health coverage upon the employee's departure from employment and failure to elect continuation coverage, as long as such rules also permit, in limited circumstances, retroactive reinstatement of coverage upon election and payment without any additional administrative reinstatement cost to the employee. The specific election provisions required vary depending upon whether the employee gave notice of the service or whether the employee was excused from giving notice under USERRA. Failure of an employer to develop election rules when an employee gives notice of service will result in the possibility of retroactive reinstatement at any time during the maximum 24-month continuation period.
- Failure to pay. New provisions in the final regulations permit employers to adopt reasonable rules allowing cancellation of coverage when payment is not made on a timely basis. For employers covered by COBRA, it may be reasonable to adopt COBRA-compliant rules for premium payment.
- Multiemployer plans. The final regulations create new rules for handling plans that allow employees to "bank" account balances attributable to prospective health benefit eligibility. These new rules allow usage of the banked balances while on leave or preservation of the banked balance to be used upon reemployment.

- Nonseniority based benefits.
  - Comparable leaves of absence. USERRA provides that with regard to nonseniority based benefits (other than those directly addressed by the statute such as health care and retirement benefits), employees on military leave must be treated at least as favorably as employees on other comparable types of leave. The regulations attempt to clarify what types of leave are comparable and state that the length of a type of leave may be the most important factor in determining whether a type of leave is comparable to military leave. For example, the regulations state that a two-day funeral leave will not be considered comparable to an extended period of military leave. In addition to comparing the duration of the leaves, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered. The comments accompanying the regulations note that DOL has declined to include the question of whether a leave is paid or unpaid as one of the factors in determining whether a leave is comparable to military leave.
  - Vacation accrual. The regulations provide that vacation accruals are a nonseniority based benefit, and that employees on military leave should be permitted to accrue vacation if employees on comparable types of leave are permitted to do so.
  - Sick leave. The regulations provide that an employee is not entitled to use sick leave during military leave unless the employer permits sick leave to be used for any reason or allows employees on comparable types of leave to do so.
  - Benefits when employee does not intend to return. If an employee affirmatively states in writing that he or she does not intend to return to work following military service, the

employer does not have to afford to the employee the nonseniority based benefits to which he or she would have otherwise been entitled during the leave.

- Reemployment.
  - Documentation of military service. The regulations list the types of documentation that an employee may submit to establish his or her entitlement to reemployment, if requested to do so by the employer following military leave of more than 30 days. The regulations stress that an employer may not delay or deny reemployment where documentation does not exist or is not readily available.
  - Prompt reemployment. The regulations provide that an employee returning from military service must be promptly reemployed and that, absent unusual circumstances, an employee must be reemployed within two weeks of application for reemployment.
  - Reemployment positions.
    - The escalator principle. The regulations attempt to clarify the type of position to which an employee must be returned following military service, based upon the "escalator" principle, which is intended to place the employee in the position he or she would have attained but for military service, taking into account seniority, status and rate of pay. The "status" of a position may include factors such as opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility and geographical location.
    - Reasonable efforts to qualify. When an employee returning from military leave is not qualified for the position, the regulations provide that the employer must use reasonable efforts to help the employee become qualified (i.e., able to perform the essential tasks of the position). For this purpose, the regulations adopt the criteria used by the Americans with Disabilities Act for determining the "essential functions" of a position.
    - Promotional examinations. The regulations provide that where an employee missed an opportunity for promotion or eligibility for promotion based on a skills test or examination, then the employer should give the employee a reasonable amount of time to readjust and then give a make-up examination.
  - Reemployment health benefits. Employees whose health coverage terminated at the start of a leave, or during the leave, must have their coverage (and coverage for any dependents) reinstated upon reemployment. Employers who use third parties to provide health coverage are obligated to negotiate coverage that meets this requirement.
  - Rate of pay following military leave. The regulations provide that an employee's rate of pay should be determined upon return from military service based on the escalator principle, including all pay increases, differentials, step increases, merit increases and periodic increases that the employee would have obtained with reasonable certainty but for military service. In determining whether a merit increase would have been reasonably certain, the employer may look at the employee's work history and history of merit increases, as well as the work and pay history of employees in the same or similar positions. If an employee missed an increase that was based on an examination, a make-up examination should be given after a reasonable readjustment period. Any pay adjustment should be effective the date it would have occurred but for military service.

- Pension issues.
    - Preleave service. The regulations provide that any period of time off prior to the period of military service that is "necessitated" by such service must be taken into account for purposes of participation, vesting and benefit accrual.
    - Contributions following reemployment. A reemployed employee must be permitted to make up any missed employee contributions or elective deferrals (without interest). The regulations clarify that missed contributions may be made up only to the extent the employee is employed by the employer as of the repayment date. The regulations clarify that a partial make-up is permitted.
    - Employer contributions. The regulations provide that any employer contributions required under USERRA must normally be made within 90 days following reemployment, although certain exceptions apply.
    - Repayment of distribution. The regulations clarify that only defined benefit plans must permit an employee to repay amounts distributed from the plan (including interest thereon) in connection with the period of military service. As above, repayment is conditioned upon employment with the employer at the time of repayment.
    - Multiemployer plans. The regulations clarify that a contributing employer's obligation to notify the plan that an employee has been reemployed pursuant to USERRA does not begin until the employer has knowledge that an employee was reemployed pursuant to USERRA. The regulations also provide that where an employee's premilitary service employer and postmilitary service employer are different contributing employers, no USERRA obligation attaches to the postservice employer unless the pre- and postservice employers share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

- Termination After Military Service. USERRA provides a period of time following military service (six months for individuals who served 180 days or less, and twelve months for individuals who served more than 180 days), during which an individual may be terminated only for cause. The regulations provide that "cause" may include:
    - Discharge based on conduct. The employer bears the burden of proving that a discharge is reasonable for the conduct in question and that the employee had express or fairly implied notice that the conduct would constitute cause for discharge.
    - Other legitimate, nondiscriminatory reasons. Job elimination or being placed on layoff status may constitute cause for purposes of USERRA if the employer can show that the same action would have been taken in the absence of military leave.
- Enforcement and Litigation Issues. The regulations and accompanying comments make a number of important observations regarding the nature of military leave claims.
    - Burden of proof. A plaintiff must establish that military service was *a* motivating factor in the employment decision; it is not necessary for the employee to demonstrate that military service was *the* motivating factor in order to establish his or her *prima facie* case. The employer then has the burden of proof to demonstrate that it would have taken the same action in the absence of military service.

- Statute of limitations. USERRA does not contain a statute of limitations, and DOL has declined to impose one in the regulations. The regulations note that some courts have applied the federal provision providing for a four-year statute of limitations where none is given, 28 U.S.C. § 1658, to USERRA claims. The regulations also note that courts have also applied the equitable doctrine of laches to bar USERRA claims in which employees have unreasonably delayed in bringing those claims. The regulations encourage individuals to act promptly to preserve rights under USERRA.

- Notice of USERRA Rights. DOL has also issued under separate regulations a final version of the USERRA poster, originally issued in March 2005, which contains the information regarding USERRA rights and obligations that an employer is required to provide to employees. Employers may meet the notice requirement by displaying the USERRA poster where they customarily place notices for employees. The poster can be found at: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf.

The regulations are substantial in length and cover all aspects of military leave. The foregoing list of highlights is by no means exhaustive but emphasizes some of the key issues addressed by the regulations. The full text of the regulations can be found at: http://www.dol.gov/vets/regs/fedreg/final/USERRA_Final_Rule.pdf and http://www.dol.gov/vets/regs/fedreg/final/2005023960.pdf.

The Morgan Lewis Labor and Employment and Employee Benefits Practice Groups regularly advise employers with regard to their obligations under USERRA and related state laws, and defend against complaints and lawsuits alleging USERRA violations. Morgan Lewis lawyers have worked with a wide variety of companies nationwide to develop policies and address issues related to military leave, and have extensive knowledge of and experience with all aspects of this issue. We are poised to assist you with analyzing these regulations and their impact on your business.

To discuss the USERRA regulations or any aspect of military leave, please contact:


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