

# *What Employers Need to Know About USERRA & Veteran Recruiting*

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# *USERRA Generally*

- USERRA is the federal law which governs leave for employees who are military service members. It has primarily two purposes:
  - Provides leave from one's employment to serve in the uniformed services; and
  - Provide reemployment rights for those who have taken military leave.
- If you are an organization, a person, or any other form of entity that pays the salary or wages for work performed or has control over employment opportunities, you are a covered entity. This would encompass overseas operations and successors in interest, amongst other groups.
- It is important to remember that many states, including all of the New England states and New York, have separate military leave statutes.
- Since most of you are involved in hiring and firing decisions, you should know that some state courts, not the First Circuit Federal Court, have permitted individual personal liability for violations of the statute. This does not mean that it would not happen here in Maine or Massachusetts or New York, so you need to be very cognizant of this statute.

# *Employees Covered By USERRA*

- Full-time, part-time, and even probationary employees who are absent from work because of service in the uniformed services are covered by USERRA's military leave and reemployment provisions. USERRA does not cover independent contractors, which makes the ever-evolving definition of independent contractors, both under state and federal law, critical to any analysis you make.
- All of the branches of the military are covered, including Army National Guard and Air National Guard, when the person is engaged in active duty for training, inactive duty training, or full-time National Guard duty. Also covered are the Commission Corps of the Public Health Service and any other category of persons designated by the President in times of national war or emergency.

# *Notice Requirements*

- Generally, advanced notice is required. It can be given by several different entities, including the employee, and there is no particular format required.
- The Department of Defense recommends at least 30 days before the leave is to start, but no specific amount of notice is required, and you should be wise to consider how much notice was reasonable to give. Of course, advanced notice is not needed when a military necessity occurs or it is impossible and not reasonable to give notice.

# *Benefits: Application and Eligibility*

- Employers / Plans
  - Applies to all employers of any size
  - Often applies directly to TPA's and insurance carriers
- Eligible Employees
  - Absence for “service in the uniformed services”
  - Advance notice (if possible)
  - May not exceed 5 years (generally)
  - Service not terminated for dishonorable/undesirable conduct
  - Must report to work / reapply within specified timeframes

# *Health Plans: USERRA Continuation*

- Covered employees have right to continue coverage under USERRA
  - Up to 24 months
  - Premiums
    - < 31 days = employee's share only
    - 31+ days = COBRA premium
  - Reasonable election procedures (light on details)
- **MUST talk to your insurance carrier or, if self-insured, your stop loss carrier**

# *Health Plans: USERRA and COBRA*

- COBRA (20+ employees)
  - Several specific requirements
- Plans subject to both COBRA and USERRA must offer eligible employees the protections of both laws
- How?
  - Prepare USERRA cover sheet to COBRA election notice
  - Run coverage concurrently, extend coverage, no premature termination
  - Careful about premium charges
- How are premiums paid?
- Entitled to reinstatement upon reemployment

# *Retirement Plans: Mandatory Rights*

- USERRA and HEART Act
- Eligible Employee Rights:
  - Reinstatement in plan on reemployment
  - Service credit for plan eligibility, vesting, and employer contributions
  - Opportunity for make-up deferrals and to receive missed employer contributions
    - Timing for make-up deferrals
    - Determining “Compensation”
    - Employer contributions must occur
    - Nondiscrimination rules?



# *Retirement Plans: Optional Provisions*

- Plan MAY provide:
  - Service credit and make-up employer contributions for deceased employee as if employee resumed employment
  - Optional Distributions:
    - Qualified Reservist Distribution (QRD)
    - Deemed Severance Distribution (DSD)
  - Plan loan modifications

# *Requests for Reemployment*

- An employee who wishes to be reemployed must make out an application for reemployment. When that application must be made is dependent upon how long the employee was on leave for military service.
  - Less than 31 days – next business day
  - 31 to 180 days – submit application within 14 days of completion of service
  - More than 180 days, notice must be given no later than 90 days following completion of service.
  - Injured military personnel or those returning from illness have up to 2 years from the date of completion of service to return to their jobs or apply for reemployment. The 2-year period may be extended if necessary to accommodate specific circumstances beyond the individual's control.

## *Interplay with FMLA*

- Employees on military leave under USERRA can qualify for the 1,250 hourly requirement to be eligible for FMLA leave, even when they have not worked the 1,250 hours in the previous 12 months if they have exceeded 1,250 hours by combining (a) the hours the employee would have worked in the previous 12 months but for the USERRA covered military service leave; or (b) the hours the employee actually worked for the employer in the previous 12 months.
- Military Caregiver Leave

# *USERRA Enforcement*

- DOL Veterans' Employment and Training Service (VETS)
- U.S. Attorney General
- Private Right of Action
- Relief:
  - Equitable Relief
  - Compensation for lost wages or benefits
  - Double damages for “willful” violations
- No statute of limitations

# *Best Practices*

- Create a military leave policy.
- Disseminate the policy.
- Obtain signatures of the receipt of the policy.
- Have a way for employees to obtain a copy of the policy during their employment if they wish to do so, such as an employer intranet.
- Don't guess when it comes to whether leave needs to be granted or what needs to be done about reemployment or any other aspect of USERRA's rights for employees.

# *Best Practices*

## *continued...*

- Either train someone carefully for administering USERRA or be sure to seek advice before making final decisions.
- Before you deny USERRA leave, check to make sure that there are not separate rights that are more generous to the employee under relevant state law.
- Determine the companies compensation benefits during military service leave, including whether the employee is entitle to any continued pay or benefits.
- After reemployment, be sure any post-reemployment requirements such as limitations on termination for cause are followed.

*Hypothetical*

# USERRA

- A regular part-time employee that has worked for the company for over 5 years in a non-union setting has been absent for uniform service training for more than 180 days.
- He now wants to return to the employer.
  - *When and how does he have to provide notice that he wishes to return to employment?*



# USERRA

- The employee was injured while in service.
  - *What additional rights does this employee have with regard to returning to his employment?*

# USERRA

- The employee's injury has rendered him unable to perform his prior job with his employer.
  - *How does this change the valuation of his return to work rights?*

# USERRA

- *What are the accommodation periods for an employee who has a in-service injury that is qualifying under the ADA as a disability?*

# USERRA

- *What benefits is the employee entitled to when he returns to work?*

# *USERRA*

- *How is the employee's wage to be determined when he returns to work?*

# USERRA

- The employee's spouse also works for you and did while the employee was away for service.
  - *To what benefits is she entitled?*