SEYFARTH SHAW
MANAGEMENT ALERT

December 23, 2005

Department of Labor Issues USERRA Regulations

More than 11 years after the enactment of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or the "Act") and more than a year after issuing proposed regulations, the Department of Labor (DOL) has issued regulations to guide employers and employees in navigating the rocky terrain of rights and responsibilities under the Act — and not a moment too soon. According to the DOL's press release, almost 530,000 National Guard members and Reservists have been called to active duty since September 11, 2001. Of that number, more than 390,000 of these individuals have completed their military service and returned to civilian status. The new regulations, which go into effect on January 18, 2006, explain how the Act protects these and other individuals, in "an easy-to-read, question-and-answer format."

USERRA governs the rights of employees who temporarily leave their jobs as a result of their voluntary or involuntary service in the United States uniformed services. [Note that certain types of service in the National Disaster Medical System (NDMS) are considered to be service in the uniformed services for purposes of USERRA even though NDMS personnel are not in the uniformed services.] The Act provides service members protection against discrimination and retaliation, provides reemployment rights upon completion of military service, and addresses benefits such as access to health insurance while on leave. The Act applies to both public and private sector employers, and was designed to consolidate and simplify the rights of employees under the Veterans' Reemployment Rights Act, which previously determined the rights of individuals returning to their jobs following periods of uniformed service. [**Click here** to view a brief summary of USERRA from our September 20, 2001 Management Alert.]

Regulation Highlights

The good news for employers is that the new regulations are much more user friendly, and very comprehensive. Many of the most common questions employers and employees alike face with regard to military leave issues are addressed in fairly clear terms. While the majority of the regulations generally restate in a more readable format what is evident from the Act itself, the regulations also clarify several — but not all — issues employers have had when attempting to apply USERRA. Without addressing every provision of the new regulations, which is beyond the scope of this alert, some of the major USERRA issues clarified in the new regulations are addressed below.

USERRA Coverage Issues

Individuals as "employers" under USERRA subject to liability for USERRA violations. Adopting the positions taken by some federal courts, the DOL has taken the position that, as the definition of employer under USERRA is much broader than that under federal employment discrimination statutes, individual supervisors may be considered to be employers liable under the Act for USERRA violations. As such, the DOL refused to exclude individual supervisors and managers from its definition of employer. 20 CFR § 1002.5(d).

Employer and employee obligations where an employee has multiple employers. The new regulations attempt to clarify the application of USERRA to employees with multiple (joint) employers. For example, where two entities each exercise certain control over an employee's terms and conditions of employment, such as in the case of contract employees, then both entities are considered to be the "employer" and share responsibility for compliance under USERRA. 20 CFR § 1002.37. The DOL, however, refused to adopt provisions similar to the Family and Medical Leave Act regulations, which expressly allocate statutory responsibilities and liability between "primary" and "secondary" employers. Instead, the DOL indicated in its comments that in cases where more than one entity is the employer, each entity's responsibility, status and liability as an employer under USERRA "is assessed by determining whether the entity controls the employee's employment opportunities, not by reference to shorthand labels such as 'primary employer' and 'secondary employer.'"

The regulations clarify, however, that employees with more than one employer are required to notify each employer of the upcoming leave in order to remain eligible for reemployment. 20 CFR § 1002.85. Moreover, under USERRA, with certain

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exceptions, service members remain eligible for reemployment benefits only as long as their cumulative military service with the employer totals five years of service or less. Where the employee is employed by more than one employer, the regulations provide that each employer must provide a separate and distinct five-year limit, even if those employers share responsibility for the terms and conditions of the employee's employment. 20 CFR § 1002.101.

USERRA coverage for ROTC students. The regulations provide broader protections to individuals in college ROTC programs by including these individuals, in certain circumstances, under the umbrella of coverage with respect to the Act's anti-discrimination and anti-retaliation provisions. Thus, an employer may not deny employment, retention, promotion or any other benefit on the basis of an individual's college ROTC status. Except under very rare circumstances, however, college ROTC members are not entitled to reemployment benefits under the Act. 20 CFR § 1002.61.

Benefits While on Military Leave, When a Leave Begins

Absence from a position of employment necessitated by reason of service. Military service need not be the only reason that an employee leaves his/her employment in order for it to be covered by USERRA — provided that such service is at least one of the reasons. The DOL, while recognizing this, specifically declined to set guidelines or standards as to how much advance time an employee might need to prepare for a deployment, and refused to set specific guidelines as to when an employee must return to work following the cancellation of mobilization orders. 20 CFR §§ 1002.73-74.

Health insurance continuation issues. Under USERRA an employee called to service for more than 30 days may elect to continue to participate in the employer's health insurance plan for up to 24 months, similar to COBRA, with the employer having the right to require the employee to pay up to 102% of the full insurance premium for coverage. For service of 30 or fewer days, the employee cannot be required to pay more than the normal employee share of the premium. The new regulations clarify that employers may cancel health insurance coverage for employees on military leave if the employee departs for leave without electing to continue coverage. 20 CFR § 1002.165. The regulations also allow the employer to develop reasonable rules for canceling coverage for employees who opted to continue coverage, but who have failed to pay for the continued coverage. 20 CFR § 1002.167. The regulations provide for liberal reinstatement clauses that allow the service member to restore coverage in certain situations.

Vacation leave as a non-seniority benefit. USERRA requires employers to credit an employee's period of uniformed service as active employment for purposes of calculating the employee's "seniority and other rights and benefits determined by seniority." For non-seniority based benefits, USERRA requires an employer to provide employees on military leave with the same non-seniority benefits it would provide to non-service members on furlough or leave of absence. As vacation is often earned based on an employee's length of seniority, some employees and employers were confused as to whether vacation was a seniority benefit. The new regulations clarify that vacation leave is a non-seniority benefit, and as such, the employer need only provide vacation benefits to an employee on military leave if it also provides those benefits to similarly situated employees on comparable leaves. 20 CFR § 1002.150(c). Although unclear from the new regulations, for purposes of calculating vacation accrual rates going forward after an employee returns from service, the employee should earn vacation at the rate which he would have earned it but for his military service.

Clarification as to what other leaves are comparable to military leave for determining the non-seniority based rights and benefits to which an employee on military leave is entitled. Although USERRA requires an employer to provide employees on military leave with the same non-seniority benefits and rights it would provide to non-service members on furlough or leave of absence, it does not clarify what leaves of absence must be considered comparable to military leave. The new regulations attempt to clarify how an employer is to determine whether the non-seniority benefits it provides employees on military leave are the same or better than an equivalent non-military leave of absence. 20 CFR §§ 1002.149-150. The regulations provide that the duration of the leave may be the most significant factor to consider when determining if leaves are comparable. For instance, a two-day funeral leave is not comparable to an extended military leave. Other factors to consider include the purpose of the leave and the ability of the employee to choose when to take the leave. 20 CFR § 1002.150. According to the DOL, however, whether the non-military leave is paid or unpaid is irrelevant as to whether the leave should be considered comparable for purposes of determining what benefits to provide an employee on military leave.

The DOL deliberately did not comment, however, upon whether certain non-seniority benefits that are provided by law for certain leaves (e.g., FMLA), rather than by an employment contract or employer policy, must be provided to employees on military leave. As the DOL determined that the legislative history gave no "unambiguous indication" of what Congress intended as to whether legally required leave benefits for other comparable leaves must be applied to military leaves, it declined to comment on the issue other than to say such situations must be decided on a case by case basis and would depend upon the nature of the leave to which the benefits apply, whether the leave is comparable, the type of benefit mandated, etc.

Use of accrued paid leave may include sick leave. Employees are permitted upon request to use any accrued vacation, annual or similar paid leave during the period of military service. An employer, however, cannot require them to do so. The new regulations further provide that, while an employee generally is not entitled to use his/her sick pay while on military leave, an employee can use sick leave if the employer allows employees to use sick leave for any reason, or if it allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. 20 CFR § 1002.153.

Reemployment Issues

Right of returning service members to engage in other employment before seeking reemployment with their pre-service employer. Under USERRA, returning service members, depending upon the length of the military service, can have an "application period" as long as 90 days to apply for reemployment. Some returning service members have used that period to try jobs with other employers before applying for reemployment. Although the initial proposed regulations blessed this practice, in response to employer comments expressing concern that such a broad-based policy may allow returning service members to violate various employment policies, including policies prohibiting employees from working for competitors, the DOL revised the rule. As amended, the returning service member retains wide latitude to seek alternate employment during the "application period," so long as that alternate employment does not violate company policy. 20 CFR § 1002.120. Thus, for example, if an employer forbids employees from moonlighting for direct competitors, a returning service member who violates that policy by working for a competitor before seeking reemployment could be subject to discipline or even termination.

Prompt reemployment defined. USERRA requires that employers provide for the prompt reemployment of returning service members who request it. The regulations clarify that as a general rule, an employer shall reinstate the employee as soon as practicable under the circumstances. Reinstatement must occur within two weeks after the employee applies for reemployment "absent unusual circumstances." 20 CFR § 1002.181.

Guidance on placing returning service members in the positions they would have had. One of the hallmarks of USERRA is its reemployment provisions, and in particular, the application of the escalator principle, which requires the employer to reemploy service members in the positions they would have held if they had not served in the military. Not only does this provision apply to promotional opportunities for which the employee may have been eligible, it also applies to salary increases. Where these increases or promotions are subject to the employee's passing a test or exam, an employee that returns from military leave must be provided an opportunity to take the missed exam and receive the increase. The regulations address the factors an employer should consider in the timing of a "make-up" exam, including but not limited to the length of time the employee was away from work on military leave, duties and responsibilities of the reemployment position, and the nature of responsibilities of the service member while he or she was in the service. 20 CFR § 1002.193.

The regulations also provide further clarification as to when/if to apply the escalator principle to merit increases. In particular, when determining whether an increase would have been attained with "reasonable certainty" and thus be subject to the escalator principle, employers may consider the employee's work history, history of merit increases, and the work and pay history of other employees in the same or similar positions. 20 CFR § 1002.236.

Restoration of retirement plan credit. An employee who is reemployed after military leave is entitled to have his/her benefit under any retirement plan (including nonqualified plans) determined as if the leave had not occurred. If a retirement plan is contributory, such as a 401(k) plan, the employee is entitled to make up any contributions missed during the military leave. The regulations clarify the manner in which retirement benefits must be restored, and require that the employer make any required contributions to a plan within 90 days after reemployment, except for contributions that are conditioned upon employee contributions (*i.e*., matching contributions in a 401(k) plan). 20 CFR § 1002.262.

Litigation Related Issues

Burden of proof in USERRA discrimination cases. Recognizing that Congress intended that the evidentiary scheme for discrimination cases under the National Labor Relations Act that was set forth by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), should be applied to USERRA discrimination cases, the DOL's regulations purport to follow those standards. An individual alleging discrimination and/or retaliation under USERRA bears the initial burden of proving that one of the reasons for the alleged discrimination and/or retaliation was his or her USERRA-protected status or USERRA-protected activities. If the individual is able to show that military status or otherwise protected activity was a reason for the alleged action, the burden shifts to the employer, who must then prove as an affirmative defense that it would have taken the same action even if the employee was not protected by USERRA. 20 CFR §§ 1002.22-23.

Statute of limitations. USERRA has no express statute of limitations. The DOL regulations recognize that an unreasonable delay by a claimant in asserting his/her rights under USERRA that prejudices an employer may result in the claim's dismissal under the doctrine of laches. 20 CFR § 1002.311. The DOL rejected the contrary position taken by at least one federal court that the four year general

federal statute of limitations period provided for in 28 U.S.C. § 1658 applies. Thus, employers cannot assume that claims older than four years are time-barred.

USERRA Notice Revisions

The DOL also released final regulations relative to the USERRA notice requirements under the Veterans Benefits Improvement Act of 2004 (VBIA) and updated its notice of rights language. The primary change is an acknowledgement in the USERRA notice that certain types of service in the National Disaster Medical System is protected by USERRA, and the creation of separate notices for federal and non-federal employees. The new notice requirements take effect **January 18, 2006**. A copy of the VBIA notice regulations and amended notice can be found at **http://www.dol.gov/vets/regs/fedreg/final/2005023960.pdf**. A poster form of the new notice can be found at **http://www.dol.gov/elaws/userra.htm**.

Conclusion

All in all, the new regulations will help employers and employees avoid USERRA violations. Employers who face military leave questions should keep a copy of the regulations handy. A copy of the complete text of the final regulations may be found at **http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf.** Employers also should substitute the newly revised USERRA notices for the old temporary notices before the new notice regulation takes effect January 18, 2006.

Employers also must remember, however, that many states have separate military leave laws. While states may not limit or restrict the rights granted under USERRA, they are free to provide employees with greater rights and protections than those provided under USERRA.

For more information about the new regulations, or if you have specific questions about a particular state's military leave requirements, please contact your Seyfarth Shaw attorney or any attorney on our website at www.seyfarth.com.

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