

From the War on Terror

Ensuring Successful Transitions for Our Citizen-Soldiers Under USERRA

By Daniel Klein and Michael Fleischer

Since the War on Terror began in 2001, HR professionals have continually faced challenges to interpret and apply the Uniformed Services Employment and Reemployment Rights Act (USERRA) to their workforces. For many in the Reserves and National Guard, military service is no longer weekend and summer guard duty. It has meant putting civilian careers on hold, often through multiple deployments, resulting in personal sacrifices and logistical problems for their employers.

Since 9/11, over 778,000 Reserve and National Guard soldiers have mobilized and over 556,000 have returned to civilian life. Now, as U.S. troops are scheduled to transition out of Iraq by the end of 2011, the number of soldiers who will return to civilian employment will continue to increase. This article serves as a primer to HR professionals in understanding an employee's USERRA rights both as they prepare to deploy for military service and upon their return.

OVERVIEW OF USERRA

Congress enacted USERRA in 1994, recognizing a shift in the nation's defense policy toward citizen-soldiers. USERRA provides employment and reemployment rights to members of the uniformed services, including veterans and members of the Reserves and National Guard. USERRA allows our citizen-soldiers to leave their civilian jobs for military service with the knowledge that they will be able to return to their jobs with the same pay, benefits, and status they would have attained had they not been away on duty. USERRA also prohibits employers from discriminating against these individuals because of their military service.



to the Workplace



USERRA applies to virtually all employers regardless of size, and covers nearly all employees including those who are part-time or probationary. Specifically, USERRA protects the employment rights of employees who are (1) members of the “uniformed services” (Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service commission corps, Reserves, Army National Guard, Air National Guard, and certain disaster response workers); (2) employees who apply for membership in these “uniformed services”; or (3) those obligated to serve in the “uniformed services.” USERRA prevents an employer from denying an employee initial employment, reemployment, retention in employment, promotion, or any other benefit of employment because of this status. Further, an employer cannot retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

Because USERRA does not have a statute of limitations, citizen-soldiers can bring a complaint at any time. Currently, there is an average of 1,300 to 1,400 USERRA complaints a year, which will likely increase as more soldiers return from their deployments. The U.S. Department of Labor, Veterans’ Employment and Training Service (VETS) is responsible for investigating and resolving complaints of USERRA violations. However, an employee also has the option to bypass VETS and instead bring a civil action directly against the employer.

Violations of USERRA are taken extremely seriously and penalties allow employees to claim both lost wages and benefits, as well as liquidated damages for “willful violations.” Recent USERRA awards have been substantial, and they can have a significant

financial impact on employers. For instance, in March 2009, a federal court in Connecticut awarded \$779,000 in back pay, damages, and attorney fees to a financial advisor who was not restored to his previous pay after returning from active military duty. In 2008, the Department of Labor and American Airlines entered into a class action settlement in which American Airlines agreed to pay 353 pilots a total of \$345,773 for the loss of vacation and sick benefits while on military duty.

WHAT HR PROFESSIONALS NEED TO KNOW

Providing employees notice of their USERRA rights and responsibilities. USERRA requires an employer to provide covered employees with a notice of the rights, benefits, and obligations of both employees and employers under USERRA. To do so, an HR professional should ensure that the DOL USERRA poster (www.dol.gov/vets/programs/userra/USERRA_Private.pdf) is either posted where employer notices are customarily placed, mailed to employees, or distributed via email.

Is your employee eligible for USERRA protection? To qualify for USERRA protections, employees must first meet certain eligibility requirements. These prerequisites serve as an important checklist for HR professionals to determine if an employee deserves USERRA protections:

1. Employees must give advance notice of upcoming military service: either written or verbal unless it is impossible for them to do so.
2. The employee has a cumulative absence with the employer of five years or less to perform military service. (Note: since almost all military service related to the Global War on Terror is statutorily exempted from this requirement, most employees will generally meet this prerequisite.)
3. Employees must apply for reemployment within the USERRA timeframes (see below).
4. Employees must not receive a dishonorable discharge.

Are formal military orders required to trigger USERRA protections? No. In a recent court decision, *Vega-Colon v. Wyeth Pharmaceuticals*, the U.S. Court of Appeals for the First Circuit, held that an employee who informed his employer of his impending activation to active duty, without receiving formal military orders, had triggered USERRA protections.

What does an employer need to consider before an employee's deployment? After an employee notifies the employer of his or her upcoming military service, it is a best practice for the employer to send an individualized notice regarding the employee's USERRA rights. The HR professional should also note whether the employee elects to continue their employer-based health plan coverage. Under USERRA, employees have the right to continue their employer-based health plan coverage for themselves and their dependents for up to 24 months during their military service. During

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this period, the employer can require the employee to pay up to 102 percent of the full premium. There is no mandated timeframe for the employee to elect USERRA health coverage; however, an employer can specify a "reasonable" election period, such as 60 days, for an employee to make a decision. Even if an employee does not elect to continue with an employer's health coverage plan, the employee has a right to be reinstated when reemployed without any waiting periods or exclusions, except for service-connected illnesses or injuries.

How long does an employee have to reapply for his/her job? To qualify for USERRA protections, employees who have served more than 180 days of military service have 90 days after completing military service to apply for reemployment. For employees who served between 31 and 180 days, they have 14 days. For employees who served 30 days or less, they must reapply for their positions by the beginning of the

first regularly scheduled work period after the end of their last day of duty, provided that time is allowed for them to return home safely and have an eight-hour rest period.

HR professionals need to be aware that employees who fail to apply within the required timeframes **do not forfeit reemployment rights** but do become subject to an employer's disciplinary procedures. For example, if an employer has reinstated other employees after unauthorized absences from scheduled work, the employer is advised to reemploy the returning service member so as to avoid discrimination charges.

The employee has returned—now what? This may be the most complicated time for HR professionals. The employer may have undergone significant changes, such as a reduction-in-force, merger, etc., since the employee left for military service. The HR professional faces several difficult decisions, which must be made quickly as the employer must

reemploy a returning service member within two weeks of the application for reemployment.

The first hurdle for HR professionals is to determine the exact position in which the employee will be reemployed. USERRA follows the "Escalator Principle," which states that employees are to be reemployed in the job that they would have attained had they not been absent for military status, with the same seniority, status, and pay, as well as other rights and benefits determined by seniority. This requires the employer to make reasonable efforts, such as training or retraining an employee, to enable them to qualify. If the employee cannot qualify for the "Escalator" position, the employee must be reemployed, if qualified, in a position that is closest to the "Escalator" position or else return to the pre-service position.

The second hurdle for HR professionals is to determine the returning employee's compensation. If a company's compensation is based on length

of service, then the employer should simply move the returning employee “along the scale” and pay the employee what he or she would have attained if not for the absence due to military service. However, many employers today have a performance-based matrix to determine compensation. USERRA regulations provide that a returning employee’s salary “reflects with reasonable certainty” the pay and benefits that the employee would have attained. To determine “reasonable certainty,” an employer should consider the service member’s past work history or the history and pay practices of employees in the same or similar jobs.

The next major consideration is how to treat the employer’s retirement plan contributions to a returning employee. USERRA provides that an employee’s military service is treated as continuous service with the employer for purposes of participation, vesting and accrual of benefits. An employer is required to resume retirement plan contributions within 90 days of reemployment. Further, an employer must allow an employee the opportunity to make up missed contributions over a period of up to three times the length of the military service, not to exceed five years. An employer should permit an employee to make up missed contributions beginning with the first paycheck upon reemployment. Upon reemployment, the employer also has to make up all missed employer-contributions that were not contingent on employee contributions within 90 days of the employee’s return (or, if later, the time when such contributions would have been made if the employee never left for military service). The employer also has to make up matching contributions, but only to the extent that the employee makes up the missed employee contributions.

Aren’t there any exemptions? Yes. There are a limited set of exemptions which may relieve an employer of its obligation to reemploy service members. First, if the reemployment of a service member is “unreasonable or impossible” because the employer’s circumstances have changed, the employer may deny reinstatement. For example, if an employee’s job has been eliminated in a

reduction-in-force, reinstatement is not required. However, an employer does not satisfy this standard simply because the employee’s former position has been filled or no opening exists.

The second exemption arises when reemployment of a disabled veteran poses an undue hardship. An employer, however, must first make reasonable efforts to accommodate the disability before relying on this exemption.

The last exemption arises when the employee received a dishonorable discharge. If a service member receives a dishonorable discharge, then he or she waives all USERRA protections.

A few practical considerations.

Delivering bad news—There is no requirement concerning when an employer must notify an employee on military leave of a reduction in force. However, it is a best practice to wait until after the service member returns and actually submits an application for reemployment.

Successor interests—An employer may be liable as a successor in interest even if it was unaware that an employee might claim reemployment rights when the employer acquired the new business. Recently, the Veterans Benefits Act of 2010 created a multi-factor test to determine if a successor employer had to reemploy an employee. The factors are:

1. Use of the same or similar facilities;
2. Continuity of workforce;
3. Similarity of jobs and working conditions;
4. Similarity of supervisory personnel;
5. Similarity of machinery, equipment and production methods; and
6. Similarity of products and services.

Two or more employees entitled to the same position—In cases where two or more returning service members are entitled to the same position, the employee who first left the position has priority. The remaining employee(s) are still entitled to be reemployed in a similar position.

CONCLUSION

Employers should foster a work environment that celebrates military service. Employers should consider training all levels of employees that comments and/or employment decisions that reflect anti-military service animus are improper and could result in liability. ■

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