

# One Minute Memo®

## DOL Clarifies Employers' Retirement Plan Obligations Under USERRA

By *Brian Barrett*

On August 9, 2019, the Department of Labor (“DOL”) issued [USERRA Fact Sheet 1](#), providing guidance to employers about their pension obligations to reemployed service members under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”).

### Background

Since its enactment in 1994, USERRA has provided that employees who return to employment with USERRA reemployment rights are entitled to service and certain retirement benefit accruals for their period of absence to perform military service. Generally, the returning employee is entitled to vesting, eligibility, and benefit service credit for the entire period of the absence. The employee is also entitled, upon reemployment, to all benefit accruals that are not conditioned on employee contributions or deferrals and to employer accruals that are conditioned on employee contributions/deferrals to the extent that the employee makes up missed contributions/deferrals upon return from military service.

Because many retirement plan contributions are based on employee compensation, and most employees do not receive pay or full pay during periods of military leave, USERRA requires employers to deem compensation for the military employees' period of absence for purposes of calculating retirement plan accruals attributable to the period of military service. USERRA provides that such deemed compensation must be computed at the compensation rate the employee would have received but for the period of military service, or if that determination cannot be made with reasonable certainty, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding the military leave of absence (or, if shorter, the period of employment immediately preceding the military leave of absence).

This deemed compensation requirement has raised several practical questions for employers seeking to comply with USERRA once an employee returns from military service. For example, what constitutes “reasonable certainty” when calculating the compensation an employee would have earned? Is deemed compensation based on base pay only, or must it include overtime? How should the 12-month lookback rule be applied in the case of multiple periods of military leave—should the employer reach back beyond 12 months to find the last 12 months of employment without military service, use an average of those months in the last 12 months of employment with no military leave, or use only the months since the prior period of military leave as the lookback period?

### The Guidance

Through a series of Q&As and examples, the fact sheet provides the DOL's viewpoint on many of these practical issues. For example:

1. A service member's rate of compensation may not be determined with reasonable certainty where the service member consistently works variable hours or earns various rates of pay (e.g., under a commission scheme).
2. If an employee who is scheduled to work 40 hours per week consistently worked 40 hours per week prior to the military absence, it is reasonably certain that the employee would have worked 40 hours per week during the period of service. However, if the same employee who was scheduled to work 40 hours per week consistently worked 50 hours per week before military service, it is reasonably certain the employee would have worked 50 hours per week during the period of service. And if the same employee who was scheduled to work 40 hours per week worked varying hours in the period preceding military service, then the employee's compensation cannot be calculated with reasonable certainty, and the 12-month lookback approach should be utilized.
3. An employee whose compensation varies by month has been employed by the company for six years. The employee returns from a one-year period of military service, works an additional six months, then serves an additional two weeks in the military before returning. To calculate the employee's rate of compensation for the most recent two-week period of military leave, the employer should look at the last 12 months of employment preceding the period of military leave and disregard the 6 months the employee spent on military service. Therefore, the employee's rate of compensation should be based on the average rate of compensation for the six months the employee worked upon returning from the one-year period of military leave.
4. An employee whose compensation varies has been employed by the company for ten years. Three months ago, the employee returned from a one-week military absence. The employee subsequently performed military service for one month. To calculate the employee's rate of compensation for the most recent one month period of military leave, the employer should look at the average rate of compensation during the last 12 months of employment preceding the one month period of military leave and disregard the 1 week the employee spent on military leave.

## Key Takeaways

The ruling provides the DOL's views on several of the more granular questions involved in applying USERRA's requirements for calculating retirement plan contributions upon an employee's return from military leave. Even more importantly, the fact sheet emphasizes that these requirements must be applied to employees on an individual basis and that there likely is no one across-the-board approach that will adequately address each returning service member's individual circumstances. Because USERRA's scheme for retirement plan contributions is complex, full of gray areas, and requires an individualized approach, practitioners will likely want to consult with legal counsel to determine compliance risks for all but the most straightforward situations.

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