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EMPLOYMENT LAW

The USERRA Obligations of Returning Veterans' Employers

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A question many employers will be asking in the months and years to come is: "What obligations do companies have to members of the armed services returning from war or military training?" The answer lies in a federal law entitled the Uniformed Services Employment and Reemployment Rights Act, or USERRA. Generally speaking, USERRA provides members of the armed forces with the right to return to the civilian jobs they left to perform military service or training. This article examines USERRA's scope and application.

Unlike other federal laws that require employers to have a minimum number of 15, 20 or 50 employees before being subject to the law, employers with only one employee are subject to USERRA. Moreover, in addition to covering private employers, USERRA applies to the federal government, as well as states, counties, cities, school districts and other local government organizations. USERRA even applies outside of the country to U.S. employers and to foreign employers that are owned and controlled by U.S. employers. Further, foreign-owned employers are subject to USERRA with respect to their operations in the U.S. The only employers within the U.S. that are exempt from USERRA are religious institutions, Native American tribes, international organizations (e.g., the World Bank), and embassies and consulates for foreign governments that are located in the U.S. Thus, the breadth of USERRA is significant and distinguishes it from most other federal employment laws.

In order to trigger his/her re-employment rights, a member of the armed forces must meet five conditions. First, the individual must have left his/her civilian job for the purpose of performing voluntary or involuntary service in the uniformed services. This includes active or inactive duty, examinations for fitness for duty and reserve training. Second, the individual must give the employer prior oral or written notice that he/she is leaving for service-based reasons. This requirement neither specifies the amount of advance notice required nor obligates the individual to tell the employer that he or she intends to come back. Indeed, even if the individual uses the term "quit" or "resign," the individual does not lose the right to return to his or her job after service. Third, the period of service must not exceed five years. There are several caveats regarding this requirement so employers should seek clarification on this condition before denying someone re-employment because his or her service was longer than five years. Fourth, the individual must be released from service under honorable conditions. Fifth, the individual must be "timely" in reporting back to work or applying for re-employment.

Under the fifth requirement, what is considered "timely" when reporting back to work depends on the length of service. If one's period of service is less than 31 days, then the individual must report back to work after completion of the period of service, plus the time required for safe transportation back home, plus eight hours of rest after returning home (i.e., typically the next work day or the second day if there is a long return trip). If the period of service is between 31 days and 180 days, inclusive, one must apply for re-employment within 14 days after the date of release from service. If the period of service is 181 days or more, the individual has up to 90 days after the date of release from service to apply for re-employment.

Once a member of the armed forces meets the above conditions, companies have at least six obligations to such members. First, employers must re-employ members "promptly." Prompt re-employment depends on the length of the member's service. If the period of service is less than 31 days, the employer must put the member on the payroll as soon as the member reports back to work. For any period of service of 31 days or more, the employer must place the member back on the payroll within 14 days after the member submits his or her application for re-employment. This requirement even applies when there is no vacancy or open position. Thus, an employer may have to lay off someone or create a position to re-employ a returning veteran.

Second, employers must provide certain benefits to a returning veteran as if the veteran had remained continuously employed during such period of military service. Returning service members are entitled to a benefit as a perk of seniority if the benefit meets a two-part test: the benefit is a reward for length of service rather than a form of compensation for services rendered; and it is reasonably certain that the veteran would have received the benefit if he or she had been continuously employed. Examples of such benefits may include one's rate of pay or the rate at which one earns vacation.

Third, employers are required to re-employ members of the armed services in the position of employment that the member would have attained if he or she had been continuously employed. If the period of service was 91 days or more, the employer may re-employ the member in another position for which the member is qualified provided it has equivalent seniority, status and pay. Again, this may require the employer to displace another employee.

Fourth, service members are entitled to immediate reinstatement of health insurance coverage upon re-employment, including coverage for family members. Employers cannot impose any waiting period or exclude "pre-existing conditions," other than certain service-connected conditions.

Fifth, employees returning from service are protected from discharge after re-employment for certain timeframes. The length of such protection depends on the length of the member's period of service. If one's period of service was 31 to 180 days, it is unlawful to discharge such employee without cause within 180 days of his/her re-employment. If one's period of service was 181 days or more, it is unlawful for the employer to discharge the member without cause within one year of his/her re-employment. The purpose for this protection period is to protect returning veterans from bad faith reinstatement.

Finally, if a veteran returns from service with a service-related disability, the employer must make reasonable efforts to enable the veteran to return to the position he or she would have attained if he had been continuously employed. If one's disability cannot be reasonably accommodated, the employer must re-employ the veteran in some other position for which he or she is qualified that provides like seniority, status and pay.

An employer's obligations under USERRA should be distinguished from an employer's obligations under the Americans with Disabilities Act, or ADA, because USERRA is much broader than the ADA in at least four significant ways. First, the term "disability" is not defined in USERRA. Indeed, the drafters explicitly rejected a request to apply the ADA's definition of "disability" for purposes of USERRA. Thus, the term "disability" under USERRA could include conditions not recognized as disabilities for purposes of the ADA (e.g., temporary conditions). Second, under USERRA, an employer's obligation to accommodate an employee may include either displacing an employee or creating a new position, neither of which is required by the ADA. Third, a determination of whether an employee is "qualified" for a position under USERRA is made after the employer has made reasonable efforts to qualify the individual. Under the ADA, the employer has no obligation to assist an employee to become qualified. Finally, there is no requirement under USERRA for the employee to engage in the interactive process to determine the proper accommodation even though such a requirement exists under the ADA.

Given the global conflicts in which the U.S. is involved, many individuals are leaving their jobs to serve in the uniformed services. When these individuals return from their service, they have certain rights under USERRA. USERRA is an important law to educate oneself about given its broad coverage, some of its counterintuitive obligations and the number of service members that will be re-entering the civilian workforce. It is imperative that employers be familiar with the rights and obligations under USERRA so that appropriate steps can be taken to avoid violations of the act. •

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