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USERRA Requires All Employers to Provide Military Leave

Business practices

The tragic events in New York and Washington have led to the activation of certain military reserve units, the largest call-up since the Persian Gulf War. This will undoubtedly affect many employers, already suffering in a relatively tight labor market.

By Howard B. Hoffman

Before an employer permanently replaces a departing service member, it is

worth noting that a long-time federal employment law known as the Veterans Reemployment Rights Act (VRR) underwent a comprehensive revision when the Uniformed Services Employment & Reemployment Rights Act (USERRA) was enacted in 1994.

USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code, at chapter 43 (§§ 4301 through 4333).

Unlike most other federal anti-discrimination laws that require certain numbers of employees for coverage, USERRA applies to virtually all civilian employers in the public or private sectors, regardless of size. It potentially covers every individual in the country who has served, currently serves, or is in the process of being inducted. It applies in peace-time and in times of war.

As many employers may not be knowledgeable of USERRA, this article serves as a basic summary of its provisions.

Reemployment

The purpose of USERRA is to prohibit discrimination against persons who serve

in the military. USERRA also seeks to reduce the disruption that military service may have on those persons, in terms of their career or related benefits, by providing rights to reemployment and benefit continuation.

USERRA operates to prohibit discrimination against persons because of their military service. Prohibited forms of discrimination may be a denial of initial employment, a termination from employment, a failure to promote, or discrimination with respect to any other "benefit of employment."

Like many other federal anti-discrimination laws, USERRA prohibits retaliating against an employee who may oppose acts made illegal under USERRA, or who may participate in investigations or proceedings brought to vindicate USERRA rights.

Like its predecessor, USERRA basically provides an entitlement to reemployment if an individual leaves a civilian job for military service, and is otherwise "eligible."

To be eligible, the following five criteria must be met:

- The employee must have held a civilian job;
- Under most circumstances, notice must have been given to the employer that military leave was needed;
- Military service must not exceed five years;
- Discharge must be under conditions other than dishonorable; and
- The employee must report back to the civilian job in a timely manner.

The time in which an employee must give notice, and the time in which an

employee must report back to work, depend largely upon how the law applies to a particular case. For instance, military necessity may dispense with the need for any notice to the employer whatsoever (giving new meaning to the phrase, "here today, gone tomorrow").

An employer is not required to provide reemployment if circumstances have changed so as to make it "impossible" or "unreasonable," or if reemployment would impose an "undue hardship" on the employer, or if the nature of the employment was for a "brief, nonrecurrent period" and there no reasonable expectation that employment will continue indefinitely or for a "significant period."

Other rights

In addition to reemployment, USERRA provides other special rights.

Seniority, benefits and bonuses. The act codifies an "escalator principle" with respect to seniority rights. In other words, an eligible employee is entitled to be treated as if s/he had been continuously employed for purposes of an employer's system of seniority, and had not stepped off the "escalator," so to speak.

The same continuous-employment principle applies for purposes of an employer's retirement plan(s) (e.g., eligibility to participate, vesting rules, etc.). Moreover, an employee is entitled to retain the same pay and status (e.g., Sales Manager, Charge Nurse) upon reinstatement.

If the employer offers health insurance, reinstatement of health insurance is also required, and no waiting period or exclusion of pre-existing conditions can

be imposed.

A provision in USERRA, not contained in VRR, allows a departing employee a "COBRA-like" right to elect continued employer-related health insurance coverage for the person and his or her family, during the period of military service. The period of coverage is limited, however, to 18 months.

If an employer provides benefits or bonuses to others who may be on other forms of leave (e.g., continued life insurance coverage, Christmas bonuses, etc.), then the employer must offer the employee similar benefits while serving in the military.

Disabled veterans. USERRA also contains protections for the disabled, vaguely similar to the Americans with Disabilities Act.

Like the ADA, USERRA requires that an employer must provide accommodations for "qualified" employees with a disability. However, unlike the ADA, USERRA requires an employer to make "reasonable efforts" to qualify the employee. (The ADA looks at whether the employee is first "qualified," in order to determine coverage). This can include job training for a disabled returning employee.

If a disability disqualifies an employee from his or her pre-service job, USERRA requires the employer to provide reemployment in the "nearest approximation" position. Thus, USERRA goes farther than the ADA in requiring an employer to assist disabled returning veterans, and can be somewhat of a trap for the unwary employer familiar only with the ADA.

Burden of proof. USERRA's enactment has also made it easier for employees to complain of wrongdoing.

Prior to USERRA, it was illegal to discriminate based *solely* by an employee's military service. USERRA broadened the protection afforded those in military service by prohibiting discriminatory actions where the employee's military status is a *motivating factor* in the employment decision.

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If an employee establishes that military status was a motivating factor in the employment decision, USERRA shifts the burden of proof, allowing an employer to escape liability only if "the employer can prove that the action would have been taken in the absence of" the employee's military status.

Conclusion

Obviously, USERRA has a tremendous impact upon the operations of small employers, exempt from some federal employment laws. However, the

government has recently sought to alleviate some of the distress on small businesses by providing loan assistance through the Small Business Administration to meet "ordinary and necessary operating expenses."

The purpose of these loans is not to cover lost income or lost profits. The program is known as the Military Reservist Economic Injury Disaster Loan, and more information can be obtained at the website of the Small Business Administration (www.sba.gov/disaster/mreidlall.txt).

Again, this discussion serves as a basic summary of the legal requirements under USERRA. Some employers may not be concerned with USERRA's requirements because the law reflects what they would otherwise do as part of their patriotic duty. And employers who have leave and anti-discrimination policies already contained in their employee handbook may want to add written policies regarding military leave.

USERRA is administered by the United States Department of Labor, Veterans' Employment and Training Service (VETS). Employers who have questions regarding USERRA's impact upon their operations should contact either VETS or an attorney knowledgeable in employment and labor law matters.

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