

Military Leaves of Absence

An often-overlooked element of employment law is the statutory right that members of the armed services are provided against discrimination and for re-employment after service. With an increasing number of service members deployed, this area of law will likely become of greater concern for employers.

The Uniformed Services Employment and Reemployment Rights Act of 1994, U.S.C.A. §§4301 *et seq.*, (“USERRA”), provides comprehensive and significant job protections for members of the military services. The USERRA applies to all employers regardless of size, including federal and state governments. The USERRA generally prohibits discrimination against service members in the initial hiring decision, reemployment after active service, promotion, or any benefit of employment- including health and pension coverage. Additionally, it prohibits any retaliation against those who exercise their rights under the act or testify or make a statement in such a matter, and the Act requires a posting of the Department of Labor’s “Your Rights Under USERRA” or something substantially similar.¹

To be entitled to reemployment and benefits, employees must give their employers advance notice of their military obligation, unless they are otherwise prevented from giving such notice. With various exceptions, the employee is not entitled to reemployment and benefits unless the cumulative length of the absence and all previous absences from the employer’s employment is less than five years. Similarly, the employee must notify the employer of his or her intent to return to work. The amount of time in which the employee must give this notice varies upon his or her length of service related absence, but it does not exceed ninety days unless the employee was hospitalized.

Upon reemployment, the employee is entitled to all seniority and seniority based rights and benefits he or she had at the time of service plus any that he or she would have attained if he or she were continually employed. Included in this protection, an employee on military leave must be allowed to continue health coverage at his or her expense for up to eighteen months. Likewise, for pension purposes any amount of leave time an employee takes may not be considered a break in service for purposes of vesting an accrual of benefits under the plan.

The USSERRA provides only three exceptions to the duty to reemploy a returning service member: 1) if the employer’s circumstances have so changed as to make reemployment impossible or unreasonable, 2) if reemployment would impose an undue hardship, and 3) if the employment the service member left was only a brief nonrecurring period with no reasonable expectation of continued employment. Similarly, in order to prove discrimination a service member would have to show that his or her service was a motivating factor for an adverse employment decision. If such a showing could be made,

¹ The Department of Labor’s “Your Rights Under USERRA” may be found at <http://www.dol.gov/vets/regs/fedreg/final/2005023960.pdf> (last visited January 26, 2006).

an employer would have to counter this by showing that the same employment decision would have been made regardless of the service member's status.

Remedies for a violation may include an order requiring compliance with the Act, compensation for lost wages or benefits, and, in the case of willful violation, an equal amount of punitive damages. Additionally, a prevailing plaintiff may be awarded reasonable attorney's fees and other litigation costs.

While this article cannot begin to cover the immense amount of exceptions, time lines and exceptions to exceptions, it hopefully provides a basic understanding of service member's rights and the corresponding obligations of employers. The diligent employer would be advised to review this law, and adjust its procedure to come into compliance with the law.