

## Veterans' Rights Under The Uniformed Services Employment and Reemployment Rights Act

By Raymond Bertrand and Pat Shea

In response to the recent attacks on the United States, President Bush has announced a call-up of military reservists and National Guard personnel to join in operations Homeland Defense and Infinite Justice. Many reservists will be leaving their civilian jobs to support this effort. Here is a brief overview on how employers can fulfill their obligations under the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

### What is USERRA?

USERRA was enacted by Congress in 1994 to strengthen and expand the employment and reemployment rights of all uniformed service members. It prohibits an employer from discriminating in employment or taking any adverse employment action against a person because of his or her past, present or future uniformed service obligations. The ban on discrimination under the statute is very broad, extending to most areas of employment, including hiring, promotion, reemployment, termination and benefits.

### Which employees are protected and what employers are covered?

All persons serving in the Army, Navy, Air Force, Marines, Coast Guard, Public Health Service commissioned corps, and the reserve components of these services, as well as the National Guard, are protected by the statute.

Public and private employers are covered. There is no "small company" exception, nor is any distinction made between full-time and part-time positions. A very limited exception does exist for temporary jobs not reasonably expected to continue for significant periods of time.

### Are employers required to pay service members who are performing military service?

USERRA does not require employers to compensate employees who are on a service-connected leave of absence.

In the past, many employers have elected to provide employees who are serving in the armed forces with some amount of compensation.

Employee benefits need only be provided to the extent they are provided to employees on other types of leave. Special rules for health benefits and pensions are discussed below.

### When is a service member entitled to reemployment rights and maintenance of employment benefits?

There are five eligibility criteria under the statute. The law states that:

- (1) The service member must have held a civilian job;
- (2) The service member must have provided advance notice to the employer that he or she was leaving his or her employment for service in the uniformed services, if there was an opportunity to do so;

- (3) The period of uniformed service must not have exceeded five years; however, there are numerous exceptions to this rule, including service during national security related situations, domestic emergencies and war;

- (4) The service member must have been released from active duty under honorable conditions; and

- (5) The service member must have submitted a timely application for reemployment or reported back to his or her job in a timely manner.

- Employees recalled to service for more than 180 days must have applied for reemployment within 90 days from completion of service.
- Returning employees whose service was for less than 181 days but more than 30 days must have applied for reemployment within 14 days from completion of service.
- If the returning employee's service was for less than 31 days, the employee must have reported to work on the first regularly scheduled work period following completion of service.
- The reporting or application deadlines can be extended up to two years for employees who are hospitalized or convalescing because of a disability incurred or aggravated during the period of service.

## What are the employer's reemployment obligations?

A returning employee must be promptly reinstated in the position he or she would have held if employment had remained continuous. This is commonly referred to as the "Escalator" principle. A key concept in federal veterans reemployment legislation has been to ensure that the service member actually steps back onto the "seniority escalator" at the point he or she would have occupied had there not been a service-connected leave of absence.

An employer must make reasonable efforts to qualify or requalify the employee for his or her job. If the employee cannot be accommodated, the employer must find a position that is the nearest approximation in terms of seniority, status and pay.

An employer must make reasonable efforts to accommodate an employee who is prevented from being able to perform the duties of his or her reinstated job because of a service-connected disability.

An employer is excused from reemploying a service member on a leave of absence if the employer's circumstances have changed so much that reemployment would be impossible or unreasonable. This exception is construed narrowly.

## What are the service member's rights with respect to the employer's health benefit plans?

Completely apart from COBRA, an employee may elect to continue coverage under the employer's plan for up to eighteen months. During this time, the employer can require the service member to pay up to 102% of the full premium.

If the employee's period of service is for less than 31 days, the employer must provide the employee with health care coverage as if he or she had continued to be employed.

A returning employee must be immediately reinstated in the employer's health plan. An employer may not impose any waiting period or pre-existing condition exclusions, except for service-connected injuries as determined by the Department of Veterans Affairs.

## What are the returning employee's pension rights?

Where the pension plan is tied to seniority,

- the employee must be treated as not having incurred a break in service;
- the time spent by the employee on a service-connected leave of absence must be considered service with the employer for vesting and benefit accrual purposes; and
- the employer must fund the plan as if the service member had not taken a leave of absence.

An employer generally must also make contributions to any defined contribution plan for the period of time during which an employee was on a service-connected leave of absence.

If the pension plan requires employee contributions, a returning employee may pay his or her contributions into the retirement plan over time. The employee can take three times the period of service to make this repayment, but not longer than five years.

## Are there any limits placed on an employer's ability to discharge a reinstated service member?

In addition to the general ban on service-connected employment discrimination, USERRA also provides special protection against discharge for reinstated employees.

A returning employee cannot be discharged, except for cause, for one year if that person's period of service was for more than 180 days. If the period of service was for 31 to 180 days, the protection is for six months.

## Can states provide additional rights?

Yes.

## Conclusion.

Employers are advised to review and reexamine their personnel policies as they relate to the reemployment and benefits rights of employees who serve in the uniformed services.

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*We encourage you to contact the Paul Hastings attorney with whom you work to discuss how you can meet your obligations under USERRA. Alternatively, you may contact any of the following attorneys: **Eric Joss** in Los Angeles at (213) 683-6121, or via email at [ericjoss@paulhastings.com](mailto:ericjoss@paulhastings.com); **Leslie Dent** in Atlanta at (404) 815-2233, or via email at [lesliedent@paulhastings.com](mailto:lesliedent@paulhastings.com); **Bonnie Pierson-Murphy** in Stamford at (203) 961-7415, or via email at [bonniepiersonmurphy@paulhastings.com](mailto:bonniepiersonmurphy@paulhastings.com); **Ken Willner** in Washington, D.C. at (202) 508-9527, or via email at [kenwillner@paulhastings.com](mailto:kenwillner@paulhastings.com); **Cheryl Saban** in New York at (212) 318-6022, or via email at [cherylsaban@paulhastings.com](mailto:cherylsaban@paulhastings.com); **Steve Berry** in Orange County at (714) 668-6200, or via email at [stephenberry@paulhastings.com](mailto:stephenberry@paulhastings.com); or **Tom Geidt** in San Francisco at (415) 835-1600, or via email at [tomgeidt@paulhastings.com](mailto:tomgeidt@paulhastings.com).*

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