A SOLDIER'S STORY: A GUIDE TO ADMINISTERING THE FEDERAL, STATE, AND MUNICIPAL MILITARY LEAVE LAWS

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INTRODUCTION

The state of the world changed dramatically in conjunction with the tragic events of September 11, 2001. America was under attack and, once again, the United States military was called to serve and protect America and her ideals. Thereafter, with the renewed prominence of the Armed Forces in the domestic and foreign policy of the United States, employers and their employees that comprise our nation's all-volunteer military ranks began to revisit their responsibilities to each other pursuant to the applicable federal and state military leave laws, as well as any local ordinances and agreements. Today, with our country's military at war in Iraq, the rights and obligations of employers to the servicemen and women within their employ are even more significant.

FEDERAL LAW: UNIFORMED SERVICES EMPLOYMENT REMPLOYMENT RIGHTS ACT

I. When Was The Act Adopted And What Is Its Purpose?

The relevant federal law, the Uniformed Services Employment Reemployment Rights Act (hereinafter "USERRA" or the "Act"), was originally enacted on October 13, 1994. See 38 U.S.C. §4301, et seq. By the Act's passage, Congress intended to strengthen the existing Veterans Reemployment Rights Act and accomplish its three stated purposes: "(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to

civil careers and employment which can result from such military service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services." See 38 U.S.C. §4301(a)(1)-(3).

II. Who Is Covered?

- **"Uniformed Services."**

As its name suggests, USERRA applies to the members of the "uniformed services," namely members of the United States Armed Forces (including the United States Air Force, Army, Coast Guard, Navy and Marines), the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, as well as any other services designated by the President in time of war or national emergency. See 38 U.S.C. §4303(16). Generally, service in any one of these units renders the member eligible for the protections of the Act. Specifically, eligible service may take many specific forms — active duty, active duty for training, full-time National Guard duty, or inactive duty under some circumstances. See 38 U.S.C. §4303(13). In addition, any period during which a person undergoes an examination to determine the fitness of the person to perform any such service also constitutes protected duty under the provisions of USERRA. See 38 U.S.C. §4303(13). Furthermore, there is no distinction between those who serve voluntary and those who perform involuntary, or mandatory, service; nor does the Act differentiate between different types of assignments or locales. See 38 U.S.C. §4303(13). One of the few limitations on such eligible service is that the

cumulative length of the military leave absences required to perform such service and all previous military leave absences with that employer must not exceed five (5) years. See 38 U.S.C. §4312(a)(2). However, even this limitation period may be extended under certain circumstances. See U.S.C. §4312(c).

- **Covered Employees.**

The broad protections of USERRA are afforded to such members of the "uniformed services" (as defined above) while engaged in eligible service (also defined above) who are also employees holding "permanent," full-time or part-time, hourly or salaried positions of employment (including those employees in a probationary period) with a private industry, federal, state or local government employer. See 38 U.S.C. §4303(3). So-called "permanent" positions of employment are those positions which are reasonably anticipated to last indefinitely or at least for a significant period of time. Therefore, only employees who hold temporary positions lasting for brief, non-recurring periods of time are exempt from the safeguards of USERRA. See 38 U.S.C. §4312(d)(1)(C).

- **Covered Employers.**

USERRA covers all private and public employers irrespective of their size, status or business. Indeed, "employer" is broadly defined under the Act to include "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including:

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

(ii) the Federal Government;

(iii) a State;

(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

See 38 U.S.C. §4303(4)(A).

III. What Actions Are Required Of Employees By USERRA?

Generally, USERRA requires that employees who volunteer or are called to perform military service to give as much advance notice of the leave required as possible to their employers. See 38 U.S.C. §4312(a)(1). If feasible, this notice should be in writing. See 38 U.S.C. §4312(a)(1). However, employees may not be required to give notice where the giving of such notice is precluded by strategic and/or security concerns or where it is otherwise impossible or unreasonable for such notice to be provided. See 38 U.S.C. §4312(b).

There are no other general requirements that the employee must fulfill upon the commencement of any military leave of absence. However, employees must satisfy several specific conditions upon their return from leave in order to afford themselves of certain benefits and protections of USERRA. Due to the specific nature of these requirements, they will be discussed individually in connection with the corresponding rights and benefits available to returning employees in the following section.

IV. What Protections Does USERRA Offer?

- **No Discrimination.**

USERRA prohibits discrimination against individuals who are or have been members of the Uniformed Services as well as those who simply have applied to become members of such military service units. See 38 U.S.C. §4311(a). The Act also provides a blanket of protection from discrimination for any individual who performs, applies to perform, or has any obligation to perform military service. See 38 U.S.C. §4311(a). Specifically, USERRA prohibits discrimination of such individuals with respect to any right of employment or employment benefit on the basis of their military service. See 38 U.S.C. §4311(a)-(b). Among the actions specifically enumerated as discriminatory, and therefore unlawful, if taken as a result of the individual's actual or potential membership in the military or his or her military service and the obligations associated with such service, are the following: denial of initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer. See 38 U.S.C. §4311(a). Furthermore, any employer must not discriminate in employment or take any adverse action against individuals who attempt to enforce their rights or assist others in the enforcement of the rights and benefits available to them pursuant to USERRA. See 38 U.S.C. §4311(b). Notably, the anti-discrimination provisions apply to such persons regardless of whether they have *actually* performed any military service. See 38 U.S.C. §4311(b).

For an employer to be found to have violated the anti-discrimination provisions of USERRA, the actual or potential military membership, service or obligations must have been "the motivating factor" behind an adverse action prohibited by the Act such as denial of initial employment or reemployment. See 38 U.S.C. §4311(c). However, the employer may establish a

valid defense if it can prove that the adverse employment action would have been taken in the absence of the individual's military membership, service or obligations. See 38 U.S.C. §4311(c). The burden shifting analysis applies to situations in which an individual claims that his/her employer has violated the anti-discrimination provision through the taking of an adverse action in retaliation of the individual's enforcement of his/her own rights or assisting with the enforcement of the rights of others pursuant to the Act. See 38 U.S.C. §4311(c)(2).

- **Leave of Absence.**

Pursuant to USERRA, employers are required to allow employees a leave of absence to perform qualified military service. See 38 U.S.C. §4316(b)(1)(A). However, employers are not required to continue the salaries of their employees who are on a military leave of absence. Nevertheless, some employers may be bound by collective bargaining agreements, individual employment agreements, or their own personnel policies to supplement any military compensation received by the employee. See 38 U.S.C. § 4316 (b)(1)(B). Additionally, some public sector (state and municipal) employers are required by their respective state laws to provide supplemental compensation under certain circumstances.

- **Accrual of Benefits.**

USERRA also guarantees an ongoing entitlement to and accrual of certain benefits to employees on leave to perform military service. First, under the explicit terms of the Act, employees absent from work to perform military duty are automatically entitled to ongoing accrual of seniority as well as any other rights and benefits determined by seniority that the employee would have attained if he/she had remained continuously employed. See 38 U.S.C. §4316(a). Second, USERRA obligates employers to also extend to those on military leave such other non-seniority based rights and benefits as are generally provided to other employees having

similar seniority, status and pay who are on other types of furloughs or leaves of absence under a contract, agreement, policy, practice or plan in effect at the commencement of such military service or established while such person performs military service. See 38 U.S.C. §4316(b)(1)(B). Even so, employees on military leave will be required to continue to pay the employee contribution associated with any funded benefit to the extent that other employees on furlough or leave of absence are also subject to the same contribution requirement. See 38 U.S.C. §4316(b)(4). Third, employees on military leave have specific entitlements to continuation of health insurance and pension benefits under the Act. These particular benefits are discussed in detail below.

Not only are employees entitled to accrue certain benefits while on military leave, they may also use certain benefits that they have accrued prior to their leave under some circumstances when they are on military leave. Indeed, upon request, employers must allow employees to use any vacation, annual or similar leave with pay that was accrued before the commencement of such employees' military service. See 38 U.S.C. §4316(d). However, no employer may require such employees to use any accrued paid leave during military leave. See 38 U.S.C. §4316(d).

- **Continuation of Health Insurance Coverage.**

Pursuant to the provisions of USERRA, employers must offer employees on leave to perform military service (and the employees' eligible dependents) the opportunity to continue participation in the employer-provided health benefit at his/her own expense for up to eighteen (18) months. See 38 U.S.C. §4317(a)(1)(A). If the duration of the employee's military service is less than 31 days and he/she elects to continue such health insurance coverage, he/she may not be required to pay more than the premium cost share paid by active employees. See 38 U.S.C.

§4317(a)(2). For periods of service lasting longer than 30 days, the employee may be required to pay up to 102% of the premium for such continued coverage. See 38 U.S.C. §4317(a)(2). If an employee's health insurance coverage ceases during his/her military leave, such coverage must be reinstated immediately following the employee's return to his/her job, without any conditions or waiting periods. See 38 U.S.C. §4317(b)(1).

In addition to the insurance entitlements of employees under USERRA, some employees may have additional rights to continue their health benefit coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act ("COBRA") and/or Health Insurance Portability and Accountability Act (HIPAA). Some employers may have additional obligations to continue coverage pursuant to their collective bargaining agreements, individual employment agreements or their own personnel policies.

- **Reemployment Rights.**

USERRA also requires all employers, regardless of whether they are public or private entities, to offer eligible employees who return from qualified military leave either his/her former job or a job, the duties of which he/she is qualified to perform, with the same pay and benefits, rank and seniority that the employee could have expected if his/her work hadn't been interrupted by emergency military duty. See 38 U.S.C. §4312 – 4313(a)(1)-(2). This means that an employee who was promoted immediately before the call-up or promised a raise, must receive that job or a similar job with the promised promotion and raise provided that he/she is qualified to perform the duties of the position offered. The intent of the Act is to reinstate uniformed service personnel "as if they had never been away." To that end, the Act also requires employers to make reasonable efforts to provide training to refresh or upgrade the skills where it is necessary to do so in order for employees to qualify and return to their positions. In the event

that an employee returns from military leave injured or otherwise disabled and unable to perform his/her previous job, his/her employer must still reemploy him/her in another position that he/she can perform (with or without reasonable accommodation from the employer) that is as close as possible in pay, rank and seniority to the one he/she left. See 38 U.S.C. §4313(a)(3).

In order to qualify for reemployment, employees must report for duty with their employers within the time frames set forth in the Act; those deadlines are based on the length of their military service. See 38 U.S.C. §4312(e). Those employees who perform military service for less than 31 days must return to work at the start of the first scheduled workday on the first full calendar day following his/her service, his/her safe transportation home and a break of at least eight (8) hours. See 38 U.S.C. §4312(e)(1)(A)(i). Those employees who perform military service for more than 30 days but less than 181 days must apply for reinstatement within 14 days of completing the military service. See 38 U.S.C. §4312(e)(1)(C). Those employees who perform military service of more than 180 days must apply for reinstatement within 90 days of completing the military service. See 38 U.S.C. §4312(e)(1)(D). If it is impossible or unreasonable for an employee to comply with the applicable reemployment deadline through no fault of the employee, the employee shall be permitted additional time to return to work, provided they return to work as soon as possible. See 38 U.S.C. §4312(e)(1)(A)-(C). In addition, employees shall be permitted additional time off to recover or convalesce from injuries incurred or aggravated during the employees' military leave. See 38 U.S.C. §4312(e)(2)(A). Only after the period of such employees' recovery period shall they be required to comply with the deadlines for returning to their jobs. See 38 U.S.C. §4312(e)(2)(A). The allowable recovery period may be extended where circumstances warrant. See 38 U.S.C. §4312(e)(2)(A). If an employee fails to report to work or apply for reemployment as appropriate within the applicable

time frame, he/she does not immediately lose his/her benefits under the Act. Rather, he/she shall be subject to the employer's policies, practices and procedures regarding unexcused absences from scheduled work. See 38 U.S.C. §4312(e)(3).

As mentioned above, employees are generally entitled to reemployment with their employer for up to five (5) years of military service. However, this maximum may be extended under certain circumstances. See 38 U.S.C. §4312(c). Employees may be required to submit documentation regarding the timeliness of their application for reemployment. See 38 U.S.C. §4312(f)(1). Regardless of whether such an application for reemployment is timely, employees shall lose their reemployment and other rights under USERRA if they are dishonorably discharged from military service. See 38 U.S.C. §4304.

Under the Act, returning employees receive protection from discharge, except for just cause, for a certain time period following their reemployment. See 38 U.S.C. §4316(c). Employees who return to their jobs after serving on active duty for 180 days or more may not be discharged without cause for one year after returning to their jobs. See 38 U.S.C. §4316(c)(1). Those employees who perform uniformed service for more than 30 days but less than 180 days before returning to their former positions may not be discharged without cause within 6 months after returning to their jobs. See 38 U.S.C. §4316(c)(2). Furthermore, as previously mentioned, all returning members of the uniformed service are generally protected from discrimination based on their military service. See 38 U.S.C. §4311.

- **Accrual Pension Benefits.**

Pursuant to USERRA, returning employees are entitled to certain rights and benefits with respect to the employer-sponsored pension plans in which they participate. First, reemployed individuals shall be deemed not to have incurred a break in service as a result of their military

service for pension purposes. See 38 U.S.C. §4318(a)(2)(A). What's more, such military service shall constitute credited service for purposes of determining accrued and vested benefits under the applicable pension plan. See 38 U.S.C. §4318(a)(2)(B). Employers are required to fund these military service obligations in the same manner as they are required to fund other periods of credit service under the pension plan. See 38 U.S.C. §4318(b)(1). However, to the extent that entitlement to accrued benefits under the plan is contingent on employee contributions, returning employees shall be afforded such benefits only to the extent that they make the appropriate contributions or payments. See 38 U.S.C. §4318(b)(2). Therefore, USERRA affords reemployed individuals an opportunity to make up any missed employee contributions. See 38 U.S.C. §4318(b)(2). Specifically, such returning employees shall be permitted to make such payments commencing with the employee's date of reemployment and continuing for a period equal to three (3) times the length of the employee's leave to perform military service. See 38 U.S.C. §4318(b)(2). In any case, such repayment period shall not exceed five (5) years. See 38 U.S.C. 4318(b)(2).

V. Are There Any Exceptions To The Protections Of USERRA?

Employers may be excused from their reemployment obligations under the provisions of USERRA if the actions required by the Act present "undue hardship" to the employer or if the employer's circumstances have changed such that reemployment is impossible or unreasonable. See 38 U.S.C. §4312(d)(1)(A)-(B). In such cases, the employer shall bear the burden of proving the impossibility, unreasonableness, or undue hardship. See 38 U.S.C. §4312(d)(2). Factors that may be considered in determining whether undue hardship exists are the nature and cost of the necessary action; the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses

and resources or the impact otherwise of such action upon the operation of the facility; the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer. See 38 U.S.C. §4303 (15)(A).

VI. Who Is Responsible For Enforcing The USERRA's Terms?

The Veterans' Employment and Training Service ("VETS"), a division of the United States Department of Labor investigates all complaints filed against employers under USERRA. See 38 U.S.C. § 4322.

STATE LAW

In addition to the provisions of USERRA, there are state laws which reinforce the requirements of the federal Act. However, older state law provisions, legislated prior to the adoption of USERRA, may also conflict with the provisions of federal law. Still, other state law provisions provide enhanced benefits such as paid leave for active duty or military training drills; more expansive continuation of insurance benefits; additional time allowed for employees to return to work; and veterans' preference for purposes of hiring and promotion. In some cases, these state laws apply only to public sector (state and municipal) employees; others apply to public and private sector employees alike.

MUNICIPAL ORDINANCES AND POLICIES

Many municipal employers have also adopted official ordinances/resolutions and/or policies in response to the September 11, 2001 terrorist attacks, the President's War on Terrorism, and, most recently, Operation Iraqi Freedom. In most instances, such municipal laws and policies also provide for expanded benefits in the same ways as the many state laws to which reference has already been made.

ADMINISTRATION OF THE FEDERAL, STATE & MUNICIPAL MILITARY LEAVE LAWS AND LABOR CONTRACT PROVISIONS

Employers may encounter specific challenges in their attempts to administer the federal Act and applicable state and municipal laws. For example, as mentioned above, some state and municipal provisions that were adopted prior to enactment of USERRA conflict with federal law. Similarly, some provisions in the collective bargaining agreements may also present a conflict. USERRA provides that nothing shall diminish the rights of covered employees under its provisions. See 38 U.S.C. §4302. However, the situation becomes more complex where some

subsections of a state or municipal law or ordinance provide more benefits while other clauses or subsections of the same state or municipal provision provide reduced, and at times significantly less, benefits. It will take time for such conflicts between federal law and state and municipal provisions to be satisfactorily resolved. Furthermore, it will take a concerted effort and even then may be difficult to negotiate new military leave provisions in state and municipal collective bargaining agreements where employees are resistant to change areas in their contracts that, until recently, went largely unused and with which employees have minimal understanding and experience.

In response to these challenges, some public and private employers have adopted supplementary policies that supercede existing provisions in their labor contracts and that are targeted to provide enhanced benefits to those called to serve with respect to particular deployments. Many of these operation-specific policies have involved extension of additional benefits including paid military leave, more favorable terms for health insurance continuation, and more expansive leave accumulation and usage provisions beyond what is already required by federal, state and municipal law.

Of course, the creation or revision of new military leave laws, collective bargaining agreements, or employment policies requires examination of the complex web of the military leave and other employment laws that already exist. In so doing, employers should be advised to review all applicable laws and seek the advice of their legal counsel before applying those new provisions, particularly since negotiation may be required before implementation.

RECENT CASELAW & DEVELOPMENTS

In response to the renewed prominence of the American military, there have been several new developments regarding the application of the military leave laws that have recently taken center stage.

Caselaw Developments

- **Rogers v. San Antonio, 2003 U.S. Dist. LEXIS 4612 (W.D. Texas, 3/24/03).** In Rogers, a federal magistrate judge held that a group of San Antonio firefighters and emergency medical services workers were entitled to seek back pay and damages under USERRA, looking back four years from the filing date of their lawsuit. In reaching this decision, the judge found applicable the four-year statute of limitations period that applies to federal actions arising after 1990, instead of the two-year statute of limitations period that the defendant municipal employer urged should apply. USERRA does not reference any specific statute of limitations.

- **Gillie-Harp v. Cardinal Health, Inc., 171 LRRM 2956 (W.D.Wis. 1/9/03).** In this case, the plaintiff alleged that her employer violated USERRA's provisions by requiring her to utilize vacation time to perform reserve duty and ultimately by terminating her employment because of her military service obligations. She also alleged that her employer violated the Fair Labor Standards Act by making improper deductions from her wages. The employer filed for summary judgment on all counts. The district court judge granted the employer's motion with respect to the vacation time and wage and hour claims, in part because the plaintiff did not oppose the employer's motion on those issues. However, the judge denied the motion with respect to the wrongful termination claim because a reasonable jury could find that the plaintiff's military status was a "motivating factor" in the employer's decision to fire the plaintiff.

- **Lapine v. Town of Wellesley, 170 LRRM 2965 (1st Cir., 9/4/02).** In Lapine, a police officer retired from his employment with the Town's police department in May of 1990. Subsequent to his resignation, he actively sought out and was called up to active reserve duty in June of 1990. More than two years later, the officer contacted the Town's new chief of police to seek reemployment with the police department. At that time, the Town informed him that he was not entitled to reemployment. Still, the officer continued to pursue his claim with the Department of Labor, and he ultimately filed a lawsuit in federal court in 1995. A magistrate judge heard the case and found that because the plaintiff left his position to voluntarily enter active duty he was entitled to the protections of the Veterans' Reemployment Rights Act, the predecessor statute to USERRA, and ordered reinstatement, back pay, and other benefits. The Town's appeal was denied by the First Circuit. Ironically, the officer's claim would have failed under

the notification provisions of USERRA, but the court held that USERRA did not control because the plaintiff had initially asserted his rights in 1993 under the earlier statute.

Other Legal Developments

- **Reservists and Guardsmen Pay Protection Act of 2003, (S. 442).** This proposed legislation which was introduced by Senator Mary Landrieu (D-La.) on February 25, 2003 would provide a tax credit to employers that pay the difference between the regular salary and military pay of a worker called to active duty. If passed, the Act would also require the federal government to pay government employees called to active service the difference between their regular and military salaries. This further demonstrates that there is a real trend aimed at recognizing the service of U.S. military service personnel and providing additional benefits.

- **U.S. Dept. of Labor Fact Sheet dated July 25, 2002.** This guidance addresses the effect that USERRA has on a reemployed individual's eligibility for leave under the Family and Medical Leave Act ("FMLA"). The fact sheet provides that any period of military leave service performed by a returning employee must be counted towards the requirement that an employee be employed for 12 months with the employer in order to be eligible for FMLA leave benefits. In addition, an employee who returns from military leave should receive credit for any hours of work that the employee would have otherwise performed but for his/her military service for purposes the FMLA's other threshold eligibility requirement, that the employee has worked 1250 hours during the 12-month period prior to the commencement of any FMLA leave.

- **Fair Labor Standards Handbook, Issue No. 193, (October 2001).** As mentioned in an earlier newsletter to Personnel Section members of IMLA, the Handbook suggests in its article, entitled "Military Leave: Different Salary-Test Rules for Public and Private Sectors," that private sector employers may jeopardize the exempt status of otherwise exempt employees as a result of deductions from salaries for partial-week absences due to military leave while public sector employers will not be subject to the same fate. This reinforces the concept that the rights and benefits of public and private sector employees *and* their employers are sometimes treated differently under the applicable federal, state and municipal military leave and other employment laws.

FOR MORE INFORMATION

No discussion of employees' rights and responsibilities can touch on all the questions that may arise. At best, each employer should be aware of these common questions, and in doubtful

cases, seek further guidance. Additional information is available through the Veterans' Employment and Training Service ("VETS") on the Department of Labor website which is located at www.dol.gov/vets.

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