

Employee Benefits Briefing

A bulletin designed to keep clients and other friends informed on employee benefits law matters

September 2001

MILITARY RESERVES ACTIVATED: REEMPLOYMENT AND BENEFITS OBLIGATIONS FOR EMPLOYERS

In times of military crisis, such as the Gulf War, the air war in Kosovo, and in the aftermath of the September 11th terrorist attacks, the United States is increasingly relying on members of the reserves and national guard to support its military operations. This Bulletin reviews the employment and benefits obligations of employers whose employees are called to active duty.

USERRA

The special reemployment and benefits rights of these personnel are governed by the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

USERRA generally requires all employers to:

- maintain, during the period of military service, the same benefits available to other employees on leaves of absence;
- make available a special 18-month extension of health benefits coverage;
- reemploy a returning veteran to the position he/she would have held had he/she been continuously employed, or to an equivalent position;
- reinstate health insurance and other benefits terminated during the absence without any waiting periods or preexisting condition exclusions;
- count the period of uniformed service for pension vesting and accrual purposes; and

- allow a returning veteran to make up any missed 401(k) or 403(b) elective deferrals and after-tax contributions and also make up any missed employer profit-sharing and matching contributions.

These employer obligations are described in more detail below.

Covered Service

USERRA covers service in:

- the Army, Navy, Air Force, Marine Corps, Coast Guard, and their reserve components;
- 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; and
- the commissioned corps of the Public Health Service.

An employee's service in the uniformed services is covered regardless of whether it is voluntary or involuntary. USERRA defines covered service as including voluntary and involuntary active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and any absence needed for an examination to determine fitness for military duty.

Nondiscrimination Provision

USERRA prohibits employment discrimination based on an individual's membership in the uniformed services or application or obligation to serve in the uniformed services. USERRA also prohibits retaliation for exercising, enforcing or assisting the enforcement of rights under the statute.

Reemployment

USERRA requires all employers, regardless of size, to reemploy a returning veteran if:

- the employer received reasonable advance notice of the uniformed service;
- the length of the current absence plus all prior absences for uniformed service does not exceed five years; and
- the returning veteran applies for reemployment within the time required.

However, reemployment is not required in the following limited circumstances:

- The returning veteran was employed as a temporary employee when the period of uniformed service began.
- The employee leaves the uniformed services with a dishonorable or bad conduct discharge.
- Circumstances have changed, making reemployment "unreasonable or impossible." The fact that the position has been filled or no opening exists ordinarily is not sufficient to deny reemployment.

Time to Apply for Reemployment

The time period in which the returning veteran must apply for reemployment depends on the length of uniformed service:

Uniformed Service of Less Than 31 Days: The first calendar day after completion of the service plus eight hours, unless it is unreasonable to do so.

Uniformed Service of 31 to 180 Days: No more than 14 days after the service ends, or, if it is unreasonable to do so, on the next calendar day possible.

Uniformed Service of More Than 180 Days: Within 90 days after the service ends.

When a returning veteran is hospitalized for, or recovering from, a service-related illness or injury, the above application deadlines are measured from the end of the recovery period. The recovery period, however, cannot last longer than two years.

Position to Which Entitled

The position in which the returning veteran must be reemployed depends on the length of the period of uniformed service:

Uniformed Service of 90 Days or Less: The returning veteran must be reemployed (a) in the position he would have held if he had been continuously employed; or (b) if he is not qualified for that position even after reasonable efforts by the employer to qualify him, in the position he held when the period of uniformed service began. If he is not qualified for the position described in either (a) or (b), even after reasonable efforts by the employer, he must be reemployed in any position for which he is qualified. In the last case, the position may be a lower job grade with a corresponding lower rate of pay.

Uniformed Service of More Than 90 Days: The returning veteran must be reemployed (a) in the position he would have held if he had been continuously employed or in a position with like seniority, status and pay, for which he is qualified; or (b) if he is not qualified for those positions, even after reasonable efforts by the employer to qualify him, he must be reemployed in the position he held when the uniformed service began or in a position with like seniority, status and pay. If the returning veteran is not qualified for any of the positions described in (a) or (b), and cannot become qualified after reasonable efforts by the employer, then he must be reemployed in any position for which he is qualified, although it may be with lesser status and pay.

Service-Incurred or -Aggravated Injury: A veteran who suffers from a disability incurred or aggravated during the period of service, and who is not qualified, because of the disability and after reasonable accommodation by the employer, for the position he would have held if he had been continuously employed, must be reemployed in (a) any other position of equivalent seniority, status and pay for which he is qualified (after reasonable efforts of the employer); or (b) in the nearest thing to an equivalent position.

Escalator Principle

Upon reemployment, a returning veteran's seniority, pay and benefits must be reinstated at the level they would have been had the employee continued working for the employer during the period of military service.

At-Will Discharge Limitations

Employees returning from uniformed service are protected from discharge without cause (a) for one year of employment after uniformed service of more than 180 days; and (b) for 180 days of employment after uniformed service of 31 to 180 days.

Benefits Provisions

Leave Status: An employee absent due to uniformed service is deemed to be on a leave of absence, at least initially, and is entitled to the same rights the employer provides to other employees on leaves of absence.

Vacation: An employer must allow, but may not require, an employee leaving employment for uniformed service to use any accrued vacation or personal days.

Continued Health Insurance Coverage: Generally, employer health plan coverage must be maintained on the same terms as for other employees on an unpaid leave of absence. However, for military leaves of less than 31 days, an employee may not be charged more than the active premium for such coverage. If health plan coverage would otherwise terminate due to the extended length of the leave, both USERRA and COBRA allow an employee to elect up to 18 months of continuation coverage for himself and his dependents. Employee premiums are calculated in the same manner for both COBRA and USERRA.

Health Insurance Reinstatement: If health benefits coverage terminates during the period of uniformed service, the returning veteran and his dependents generally may not be subject to any waiting periods or preexisting condition exclusions upon reemployment.

Retirement Benefits: The following rules apply when a returning veteran is reemployed following a period of uniformed service:

- The period of uniformed service counts as service with the employer for retirement plan

vesting and accrual purposes, and may not be considered a break in service.

- The employer must make up any missed employer contributions and allow the returning veteran to make up any missed employee 401(k), 403(b) or after-tax contributions provided for under the plan. An employer will be treated as satisfying USERRA's make-up requirements if reemployed veterans are permitted to make additional 401(k) or 403(b) contributions and after-tax employee contributions during a period equal to the lesser of (a) five years or (b) three times the length of the individual's absence due to uniformed service.
- Make-up contributions made by or on behalf of a reemployed veteran are not subject to the generally applicable plan contribution limits, including the annual limit on 401(k) and 403(b) contributions (\$10,500 in 2001 and \$11,000 in 2002) and the limit on annual additions (the lesser of \$35,000 or 25% of compensation in 2001 and the lesser of \$40,000 or 100% of compensation in 2002).
- Make-up contributions are also not taken into account for applying the qualified plan non-discrimination, coverage, minimum participation, and top heavy rules, and therefore need not be included for testing purposes.
- An employer is required to match any employee contributions made as make-up contributions at the same rate as if the contributions had actually been made during the period of qualifying military service.
- USERRA does not require any make-up allocation of forfeitures for the period of qualified military service.
- Repayment of a plan loan may be suspended during a period of qualified military service if the plan so provides.

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The Employee Benefits Group

Vedder Price has one of the nation's largest employee benefits practices, with ongoing responsibility for the design, administration and legal compliance of pension, profit sharing and welfare benefit plans with aggregate assets of several billion dollars. Our employee benefits lawyers also have been involved in major litigation on behalf of benefit plans and their sponsors. Our clients include large national corporations, smaller professional and business corporations, multi-employer trust funds, investment managers and other plan fiduciaries.

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