

# management matters

## Military Reserves Activated: Obligations of Employers

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In times of military crisis, such as the aftermath of the Sept. 11th terrorist attacks in New York City and Washington, D.C., the United States increasingly relies on members of the reserves and national guard to support its military operations. This article 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"), and apply to voluntary or compulsory service in the Army, Navy, Air Force, Marine Corps, Coast Guard and their reserve components; the Army and Air National Guard; and the commissioned corps of the Public Health Service.

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.
  - 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.

### 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.
- 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/she would have held if he/she had been continuously employed; or (b) if he/she is not qualified for that position even after reasonable efforts by the employer to qualify him/her, in the position he/she held when the period of uniformed service began. If he/she is not qualified for the position described in either (a) or (b), even after reasonable efforts by the employer, he/she must be reemployed in any position for which he/she 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/she would

have held if he/she had been continuously employed or in a position with like seniority, status and pay, for which he/she is qualified; or (b) if he/she is not qualified for those positions, even after reasonable efforts by the employer to qualify him/her, he/she must be reemployed in the position he/she 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/she must be reemployed in any position for which he/she is qualified, although it may be with lesser status and pay.

- Service-Incurred or Service-

### 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/she would have held if he/she had been continuously employed, must be reemployed in (a) any other position of equivalent seniority, status and pay for which he/she 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 he/she would have had the employee continued working for the employer during the period of military service.

### At-Will Discharge Limitations and Nondiscrimination Provision

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. USERRA also 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.

### 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/herself and his/her 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/her 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.
- Make-up contributions made by or on behalf of a reemployed veteran are not subject to the generally applicable plan contribution limits.
- Make-up contributions are also not taken into account for applying the qualified plan nondiscrimination coverage, minimum participation, and top heavy rules, and therefore need not be included for testing purposes. ■

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