

# Labor Law Bulletin

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## MILITARY LEAVE REGULATIONS ISSUED

On December 19, 2005, the Department of Labor (“DOL”) issued final regulations under the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (“USERRA”). These are the first comprehensive regulations ever issued describing the employment and reemployment rights of military service members under federal law. The full text of the final regulations can be found at: [http://www.nacua.org/documents/USERRA\\_FinalRules.pdf](http://www.nacua.org/documents/USERRA_FinalRules.pdf).

The regulations become effective January 18, 2006. Employers should review and update as necessary their military leave policies and related practices at this time to ensure that they are consistent with the new federal regulations and applicable state laws.

Highlights of the regulations include:

- **Joint employers.** The regulations contain a broad definition of joint employer. When two entities, such as a staffing company and its client, both exercise control over aspects of an individual’s employment, the regulations impose obligations on both entities with respect to employment and reemployment rights.
- **Job applicants protected.** The regulations clarify that hiring decisions are covered by USERRA’s non-discrimination rules and generally prohibit an applicant’s military service status or obligations from being considered as a negative factor in hiring decisions.
- **Scope of “services in the uniformed services” clarified.** The regulations define in detail the various types of service for which an employee is entitled to the protections of the law including not only active duty and inactive duty for training, but also military fitness examinations, funeral honors duty, and disaster-response appointee service upon activation of the National Disaster Medical System or an authorized training program. In addition, National Guard service under federal, but not state, call-up is protected by USERRA. Although state call-ups of National Guard members due to floods and other local matters technically are not covered by USERRA, many states have laws extending similar employment protections under those circumstances.
- **Preparatory time protected.** The regulations make clear that an employee need not necessarily report for military duty immediately after leaving his or her employment in order to be entitled to USERRA reemployment rights. Depending on the circumstances, including the expected duration of the service, the amount of notice received by the employee, and the location where the service will be performed, the regulations state that additional time may reasonably be necessary for an employee to rest or to arrange his or her affairs before leaving home to report for duty.

- **Advance notice requirements.** The regulations confirm that an employee’s notice of leave under USERRA may be either written or oral and also that it must be provided to the employer as far in advance as is reasonable under the circumstances. The regulations recognize that, in rare instances, an employee may not be able to provide any advance notice of the need for leave.
- **Statements of Intent to Return to Work.** Under the regulations, an employee is not obligated to inform his employer about whether he intends to return to work following military service. The regulations also state that, because reemployment rights cannot be waived, an eligible employee who makes a timely application for reemployment is entitled to reemployment even if he initially informed told his employer that he would not be returning to work after completing his military service.
- **Five-year maximum period of service.** The regulations clarify the calculation of the five-year maximum on protected periods of service under USERRA and also the various exceptions to that five-year maximum.
- **Reapplication and reporting back to work.** The rules concerning reapplication for employment and the time within which an employee must report back to work, both in cases of short-term and extended periods of service, have been clarified.
- **Entitlement to non-seniority benefits.** The regulations reiterate that employees absent for military service are entitled to the “non-seniority rights and benefits” generally provided by the employer to employees on a leave of absence. The regulations confirm that vacation accrual is considered a non-seniority benefit and generally must be provided to employees on military leave only if provided to employees on other comparable types of leave.
- **24 months health benefits continuation.** The regulations reflect changes to USERRA made by the Veterans Benefits Improvement Act of 2004, which extended from 18 to 24 months the maximum period of elective continuation of employer-sponsored health insurance that must be offered to an employee leaving for military service. The regulations also contain special rules addressing the application of USERRA’s health insurance continuation requirements to multi-employer health benefits plans.
- **Reemployment rights.** The regulations contain detailed guidance on reemployment rights, including timing and application of the “escalator principle” in determining the position, seniority status, and rate of pay to which a returning employee is entitled.
- **Retirement plan benefits.** The regulations provide additional guidance on the administration of qualified retirement plans under USERRA, including timing of required employer contributions for periods of military service, the repayment of defined benefit plan distributions received in connection with a period of military service, and calculating an employee’s presumed “compensation” for retirement plan purposes for periods of unpaid military leave. The regulations also contain special rules governing multi-employer pension plans, including the allocation of responsibility for employer contributions.

- **Multiple avenues for pursuing USERRA claims.** Any person claiming rights or benefits under USERRA may file a complaint with the DOL's Veterans' Employment and Training Service ("VETS"). The regulations emphasize that this avenue is optional. An individual need not file a complaint with VETS before commencing a lawsuit to enforce his or her USERRA rights.
- **Employer notice.** The regulations also contain a revised model notice for employers to post in all workplaces as required by the Veterans Benefits Improvements Act of 2004. The notice is available at <http://www.dol.gov/vets/programs/userra/poster.htm>.

If you have any questions about rights, benefits and obligations under USERRA, or would like assistance in reviewing your organization's military leave policies and practices in light of the new regulations, please contact Tom Hancuch (312/609-7824), Jenny Friedman Koerth (312/609-7786), Elizabeth Noonan (312/609-7795) or any other Vedder Price attorney with whom you have worked.

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