

labor and employment bulletin

Military Leave Requirements For Employers

As the United States engages in a war with Iraq and an increasing number of individuals are called to active military service, employers should review the benefits and other entitlements they owe to employees who are called to military service. The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 430, et seq. (USERRA), sets forth the requirements that the federal government places on employers for employee military leave. Massachusetts employers who comply with USERRA will satisfy Massachusetts state law requirements for military leave. Other states, however, may have more generous military leave provisions, and employers with employees in states other than Massachusetts should check with labor counsel to ensure compliance with their states' laws.

Who is covered by USERRA?

USERRA applies to all employers and to all employees, except (1) temporary employees (who are defined as individuals who hold positions that are "brief or nonrecurrent and that cannot

reasonably be expected to continue indefinitely or for a significant period"), (2) employees who provide written notice of their intent not to return to work after completion of military service, and (3) employees who are dishonorably discharged from military service.

What does USERRA require?

USERRA requires employers to provide up to five years of unpaid leave to members of the uniformed services. USERRA also obligates employers to reemploy returning service members in the job that they would have attained had they not been absent for military service, with the same seniority, status, pay and other relevant benefits commensurate with the new position. If the returning service member cannot qualify for this "escalator" position, employers are required to reemploy the service member in an alternative position—the exact position depends on the length of military service. Employers must also provide training to refresh and/or upgrade skills and are required to provide reasonable accommodation to a service member who has incurred or aggravated a disability during military service.

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What about benefits?

Generally, employers must provide employees on military leave the same rights and benefits accorded to employees on non-military leaves of absence. For example, if an employer allows employees on personal leave to continue to accrue vacation during their leave, that employer must allow employees on military leave to continue to accrue vacation as well. Likewise, if an employer pays for three months of health care coverage for employees who take leave under the Family and Medical Leave Act (FMLA), that employer must pay for three months of health care coverage for employees on military leave. If there is a variation in benefits offered to employees on different types of non-military leaves of absence, employees on military leave are entitled to the most favorable treatment so long as the non-military leave is comparable to military leave.

Do employees on military leave have to be paid for all or any portion of military leave?

USERRA does not require that military leave be paid. However, many employers offer a certain number of paid military leave days or offer to pay the difference between military pay and an employee's earnings for a specified period of time.

May employers require employees on military leave to use accrued paid leave?

No. USERRA is quite strict on this point. Although employers must allow employees to use accrued paid leave if the employees request it, they may not require employees to use their accrued paid leave.

What about health care coverage?

For leaves of 30 days or less, employers must treat employees on military leave as if they were active employees and maintain their group health insurance. For leaves greater than 30 days, COBRA-type coverage kicks in and employees may maintain their group health insurance for up to 18 months, so long as the employees pay the premium cost and up to a two-percent administrative fee.

What are the procedures for seeking reemployment?

Time limits for returning service members to seek reemployment depend upon the length of their military service. Those performing military service of less than 31 days must report back to their employer on the first full day of work following their completion of military service, allowing for an eight hour rest period. Those serving 31 days to 180 days must submit an application for reemployment not later than 14 days after completing military service. Those serving 181 days or more must submit an application for reemployment not later than 90 days after completing military service. If a returning service member is injured during military service, the deadlines are extended until the recuperation period is complete, but such recuperation period cannot exceed two years. All of these deadlines can be extended if circumstances make compliance with the deadlines unreasonable.

Are returning service members still at-will employees?

Upon reemployment, returning service members cannot be discharged, except for cause, for a specified period of time even if they were at-will employees before they commenced military leave. Service members whose leave exceeded 30 days but was less than 181 days cannot be discharged, except for cause, within 180 days after their date of reemployment. Service members whose leave exceeded 180 days cannot be discharged, except for cause, within one year after their date of reemployment.

What about participation in pension or other retirement plans?

For purposes of pension plans, military leave is not to be treated as a break in service. An employee who would have become eligible to participate in a pension plan during his/her military leave should, upon reemployment, be placed in the plan retroactive to the date of initial eligibility. Returning service members also must be allowed to contribute "make-up" contributions to retirement plans, and

employers who match such contributions must match for returning service members as soon as the “make-up” contributions are made.

Does the time an employee spends on military leave count toward eligibility for leave under the Federal Family and Medical Leave Act (FMLA)?

Yes. Employers must count the months and hours that employees would have worked if they had not been serving in the military towards FMLA eligibility. Thus, the months and hours an employee would have worked, but for his or her military service, must be combined with the months employed and the hours actually worked to determine if the employee has completed the 12 months and 1,250 hours of work required for eligibility for leave under the FMLA.

What are the penalties for non-compliance?

The Labor Department and U.S. Attorneys' offices have enforcement authority. USERRA provides for private causes of action and double damages in cases of willful violations. The statute is intended to protect those returning from military leave and we believe that judges and juries will interpret USERRA liberally in favor of those who have provided military service on behalf of our country.

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