



Little-known provision in military leave law can spell trouble for unwary employers

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The Uniformed Services Employment and Reemployment Rights Act (USERRA) is one of several laws that provides protections to reservists and active military personnel. It addresses not only how long a covered employee's job must be held open, but it also addresses the duration of health care benefits, other benefits and compensation. In general, this law, passed in 1994, protects service personnel against discrimination and extends civilian job rights and benefits to veterans, members of reserve forces and persons activated by the president to respond to national emergencies. Non-compliance with the law is enforced by the Department of Labor and, in some instances, by the Department of Justice.

USERRA establishes the amount of time that an individual may be absent from work on account of military duty while remaining eligible for reemployment rights. With some exceptions, an employer may be required to return the service member to work for up to five years from the time service commenced. Based on the duration of service, the law also specifies how long an employer must afford the returning service member from the time service ends until the employee must report back to the civilian job.

The USERRA amendments passed in 2005 also extended additional benefits, such as lengthening the period of COBRA coverage, although this provision is not often used because military personnel have access to competitive military health care benefits.

While employers may be familiar with these basic protections and the details that surround them, many companies are unaware of the escalator clause. This provision requires that returning service members be reemployed in the job that they would have attained had they not been absent for military service, with the same seniority, status and pay, and other rights and benefits determined by seniority. It also requires that reasonable efforts, such as training or retraining, be made to enable returning service members to refresh or upgrade their skills to help them qualify for reemployment. As examples, if in the service member's absence, the company has granted across-the-board raises, has advanced personnel into new positions based on tenure, or has implemented a change in its 401(k) match, the returning service



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member would be entitled to receive the benefit of all such changes as if she or he had worked continuously. In effect, it is generally impermissible to treat the employee as if there has been a break in service.

Hand-in-hand with the escalator clause requirements, USERRA's disability protections require employers to make reasonable accommodations and to provide convalescing employees up to two years from the date of completion of service to return to their jobs or apply for reemployment. USERRA differs slightly from basic non-discrimination obligations in the Americans with Disabilities Act (ADA) in that it expressly prohibits employers from discriminating against employees or applicants on the basis of their military status or military obligations. While the ADA requires employers to make "reasonable accommodations" to qualified persons with disabilities, USERRA goes further by requiring employers to affirmatively make reasonable efforts to assist a veteran returning to employment. This includes not only making efforts to return the veteran to his or her position (or the position in which he or she would have been employed but for the leave), but also making reasonable efforts to help qualify the veteran for a job of equivalent seniority, status and pay, through training or retraining for the position, at no cost for the veteran. The Department of Labor, through its Veterans' Employment and Training Service (VETS), provides assistance and resources to employees and also assists them with bringing claims. If the service member cannot qualify for the "escalator" position, she or he will be deemed to be on a furlough or leave of absence and would be entitled to the non-seniority rights accorded to other individuals on non-military leaves of absence.