

FEDERAL REEMPLOYMENT RIGHTS AND BENEFIT ENTITLEMENTS OF UNIFORMED SERVICE MEMBERS

As a result of the current military action in Iraq, employers may wish to review their federal law obligations to employees who serve in the uniformed services. Most of these obligations are imposed by the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), which broadly prohibits discrimination in terms and conditions of employment and establishes reemployment rights and benefit entitlements for individuals who return to their former employers after military training or service. Additional protections are contained in the Soldiers’ and Sailors’ Civil Relief Act (“SSCRA”). This Alert summarizes the obligations applicable to non-government employers under USERRA and the SSCRA, and is intended to assist you in understanding your potential responsibilities in the event your business is affected.

General USERRA Requirements. USERRA applies to individuals who serve on a voluntary or involuntary basis in any of the following uniformed services: (i) Army, Navy, Marine Corps, Air Force, or Coast Guard; (ii) reserve units of any of the foregoing; (iii) Army or Air National Guard; and (iv) Commissioned Corps of the Public Health Service. In order to be eligible for coverage under USERRA, an employee generally must provide advance notice to his employer of a military service obligation.

USERRA requires employers promptly to reemploy a returning service member in the position he would have held if he had been continuously employed throughout the duration of the uniformed service. If a returning service member is not qualified for that position (other than because of a service related

disability) after reasonable efforts are made by the employer to assist him in becoming qualified, then the returning service member must be reemployed in the position he left. If an individual’s period of uniformed service exceeds 90 days, however, the employer may substitute a position of like seniority, status and pay. If a returning service member cannot become qualified for the foregoing positions even after the employer has made reasonable efforts, then he must be reemployed with full seniority in a position for which he is qualified that is the nearest approximation to those positions.

Reemployment rights under USERRA do not apply to employees absent for a cumulative length of service that exceeds 5 years (with certain exceptions for mandatory service) or to employees who are not honorably discharged from uniformed service. Also, an employer is not required to reemploy an individual whose employment prior to military service was for a brief or non-recurrent period with no reasonable expectation that the employment would continue indefinitely. In addition, an employer can be excused entirely from reemploying uniformed service members if the employer’s circumstances have changed so much that reemployment would be impossible or unreasonable.

Disabled Employees. An employer must make reasonable efforts to accommodate a returning employee who has a service-related disability so that the employee can work in the position that he would have held if he had remained continuously employed. If the disabled returning service member is not qualified for that position despite the employer’s

reasonable accommodation efforts, he must be employed in a position of equivalent seniority, status, and pay for which he is qualified or could (with reasonable efforts by the employer) become qualified. If the returning service member is not or cannot become qualified for either of the foregoing positions, he must be employed in a position that, consistent with his individual circumstances, most nearly approximates a position of equivalent seniority, status and pay.

Reasonable Efforts. Under USERRA employers must make reasonable efforts to qualify returning service members for reemployment. Such “reasonable efforts” include providing refresher training, any training necessary to update skills for technological advances, and taking any other action that does not place an undue hardship on the employer. An action causes an “undue hardship” if it entails significant difficulty or expense on the employer’s part when considered in light of the type of action required and the overall financial resources and circumstances of the employer.

Employee Reporting Obligations. In order to be eligible for reemployment under USERRA, employees absent on account of uniformed service for periods of less than 31 days must report back to work by the beginning of the first full regularly scheduled working period on the first calendar day that begins 8 hours after a time period for safe transportation from the location of uniformed service to the employee’s residence. If the period of uniformed service is more than 30 days but less than 181 days, the returning service member must submit an application for reemployment to the employer no later than 14 days following completion of service. For service of over 180 days, the returning service member must submit an application with the employer no later than 90 days after completion of military service. In all cases, if reporting to work within the specified period is impossible or unreasonable through no fault of the returning service member, USERRA requires the individual to report to work as soon as possible. In addition, all time limits for reporting back to work may be extended for up to 2 years if the returning service member is hospitalized or convalescing from an injury caused by active duty.

Special Protection from Discharge. Employees returning from uniformed service may not be discharged from employment without cause for 1 year

after the date of reemployment if the person’s period of military service was for more than 180 days, or for 6 months after the date of reemployment if the person’s period of military service was from 31 to 180 days. It is important to note that this USERRA requirement preempts the standard common law “employment-at-will” relationship. Returning employees whose uniformed service period was 30 days or less are not protected from termination of employment without cause.

Seniority Rights. Upon reemployment, a uniformed service member is entitled to the seniority and rights and benefits determined by seniority to which he was entitled on the date the uniformed service began, plus any additional seniority and rights and benefits to which he would have become entitled if he had remained continuously employed. A right or benefit is seniority-based if it is determined by or accrues with length of service.

Rights Not Based on Seniority. Uniformed service members must be treated as if they are on a leave of absence from their employers and are therefore entitled to any rights and benefits not based on seniority that are available to employees on non-military leaves of absence. However, a uniformed service member may be required to pay the employee portion of the cost, if any, of any benefit continued pursuant to the requirements of USERRA to the extent other employees on leave of absence are required to pay this cost. Upon reemployment, the uniformed service member is also entitled to any non-seniority rights and benefits that became effective during his period of military service.

Health Benefits. If an employee’s health plan coverage would terminate because of an absence for uniformed service, USERRA and the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) entitle the employee to elect to continue health plan coverage for up to 18 months after the absence begins or for the period of uniformed service, whichever is shorter. A uniformed service member cannot be required to pay more than the normal employee portion of any premium cost for military service absences of 30 days or less, or more than 102% of the full cost of the premium for absences of more than 30 days. The employee should receive a notice from his health plan explaining these rights.

In the alternative, an employee may elect coverage under another group health plan to the extent available (e.g., a group health plan sponsored by an employee's spouse). Under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), an employee and his family are entitled to enroll in this other plan without regard to the plan's normal enrollment periods. In order to qualify for enrollment, the employee and his family must seek coverage under the new plan within 30 days of losing eligibility for medical care under the original health plan. Once the employee has requested enrollment, coverage must begin no later than the first day of the first month following the enrollment request.

Finally, reemployed service members are entitled to reinstatement of health coverage without pre-existing condition exclusions or waiting periods, with certain exceptions for illnesses or injuries that are deemed by the Department of Veterans' Affairs to be service-related and covered by the military health plan.

Pension Benefits. A reemployed uniformed service member must be treated as not having incurred a break in service for purposes of any pension or retirement plan maintained by his employer. In addition, the period of uniformed service must be considered as service with the employer for purposes of vesting and benefit accrual, and the employer is liable for funding any resulting obligation. But the returning employee is entitled to any benefits derived from employee contributions (e.g., employer matching contributions under a 401(k) plan) only to the extent he makes the employee contributions on which those benefits are based. Payment of those employee contributions can be made over a period that is 3 times as long as the duration of military service, but no longer than 5 years. For purposes of determining the amount of an employer's liability or an employee's contributions under any pension or retirement plan, the employee's deemed compensation during the period of uniformed service is based on the rate of pay the service member would have received but for his absence.

SSCRA Requirements. If an employee has received a 401(k) (or other pension plan) loan, USERRA allows (but does not require) the plan to suspend repayments for the loan during the period of service. In any event, the interest rate on the loan is capped by the SSCRA at no more than 6% for the duration of military service. This capped interest rate also applies to any other debt

owed by an employee during the period of military service. Under some circumstances an employer may petition a court to retain a higher interest rate based on the employee's ability to pay.

Vacation Pay. A uniformed service member must be permitted—but cannot be required—to use any vacation time that accrued before the beginning of his military service in lieu of unpaid leave.

Enforcement. A uniformed service member's rights under federal law may be enforced by the Veterans' Employment and Training Service (VETS) of the Department of Labor, the United States Attorney General, or the affected uniformed service member. The United States courts may use their full equity powers to vindicate these rights, including requiring an employer to comply with specific provisions of the law and to compensate a uniformed service member for the loss of any wages or benefits. In addition, USERRA specifically provides that awards of back pay or lost benefits may be doubled in cases where violations of USERRA are found to be willful, *i.e.*, where the employer's conduct is found to be knowingly or recklessly in disregard of the law. USERRA permits a court to award attorneys' fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel, and prohibits the charging of court fees or costs against uniformed service members who bring suit.

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The foregoing is only a summary and does not include all the provisions of federal law that may be applicable to a particular set of circumstances. In addition, State and local laws and other federal laws such as the Americans with Disabilities Act could affect your obligations to employees who enter the uniformed services. Thus, we encourage you to contact us with any questions you may have about military leave issues.

Should you have any questions about this Alert, please contact the Kirkland & Ellis employee benefits attorney with whom you normally work, or any of the following:

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