PROSKAUER ROSE LLP®

Client Alert

A report
for clients
and friends
of the firm

February 2006

U.S. Department of Labor Issues USERRA Regulations Interpreting Employers' and Employee Benefit Plans' Responsibilities

Eleven years after Congress passed the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which protects the rights of employees who leave employment to undertake military service, the U.S. Department of Labor (DOL) has published final regulations interpreting the statute's provisions.

Although the regulations do not impose any new legal requirements, they do clarify various existing requirements (including the statute's anti-discrimination and reemployment protections). This Client Alert focuses on the regulations' implications for employee benefit plan sponsors and employee benefit plans. Also included is a brief discussion of the notice obligation applicable to employers, since many benefit plans also function as employers.

We recommend that plan sponsors immediately begin to undertake a review of their administrative rules and procedures to ensure compliance with the interpretations set forth in the regulations. To assist this effort, we have included a specific "Action Plan" at the end of this Client Alert.

A. Health Plan Issues

USERRA requires health plans to provide service members with certain benefits both during military service and upon reemployment. In the preamble to regulations, the DOL has clarified that cafeteria plans are considered health plans subject to USERRA and must comply with the statute's continuation and reinstatement provisions.

1. Continued Health Plan Coverage: Protections for Service Members *While* Serving

USERRA provides that a service member who leaves work to perform military service has the right to elect to continue existing *employer-based* health plan coverage, on a self-pay basis, for himself/herself (and his/her eligible dependents) for a period of time up to the lesser of (a) 24 months; or (b) the period of the military service (as defined in the regulations). Generally, a health plan may not charge a service member more than 102 percent of the full premium for such coverage.

The DOL regulations provide guidance regarding who may elect continued health coverage pursuant to USERRA. In particular, the regulations clarify that a health plan is not required to allow a service member to initiate coverage at the beginning of a period of military service if he/she did not previously have such coverage. Moreover, the DOL clarified in the preamble that, since USERRA continuation coverage is only available in the context of an employment relationship, a service member who has health coverage by virtue of his/her status as a dependent of an employee or as a retiree does not have a right to elect to continue health coverage pursuant to USERRA. Similarly, unlike COBRA, a dependent of a service member does not have an independent right to elect continued health coverage pursuant to USERRA.

The statute itself does not contain any guidance concerning the procedures for electing and paying for continuation coverage pursuant to USERRA. However, the regulations provide that plan administrators may develop reasonable requirements governing a service member's election of, and payment for, continuation coverage, provided that

such requirements are consistent with the terms of the plan and USERRA's rules. The regulations further state that it may be reasonable for a plan to adopt the same election and payment rules that the plan applies to COBRA continuation coverage, provided that such rules do not conflict with any provision of USERRA. Importantly, if a plan does not adopt reasonable rules regarding the election period, the plan will be required to permit retroactive reinstatement of coverage to the date of the employee's departure from employment upon the member's election and payment of all unpaid amounts at any time during the required continuation coverage period.

The regulations also contain detailed rules concerning the circumstances under which a health plan may terminate a service member's coverage upon departure for military service due to failure to timely elect or pay for such coverage. As noted in the regulations, the action that a plan administrator may take regarding cancellation of coverage depends on whether the employee was excused from USERRA's requirement to give advance notice of military service (*e.g.*, because it was impossible or unreasonable, or precluded by military necessity) and whether the plan has established reasonable rules for electing and paying for continuation coverage.

2. Health Plan Coverage Upon Reemployment

Regardless of whether a service member elects to continue health coverage while serving in the uniformed services, USERRA requires reinstatement of health plan coverage to the returning service member and his/her dependents upon the individual's reemployment. In addition, the statute generally prohibits a health plan from imposing an exclusion or waiting period on the reemployed employee and his/ her dependents, where one would not have been imposed if the individual's coverage had not terminated as a result of service in the uniformed services.

In the regulations, the DOL has provided detailed guidance regarding reinstatement of health coverage upon reemployment. First, in the preamble to the regulations, the DOL explained that an employer is only required to reinstate an individual's health plan coverage upon the employee's actual reemployment, and not upon the individual's *application* for reemployment. Second, the regulations clarify that USERRA permits, but does not require, an employer to allow a reemployed individual to delay reinstatement of health plan coverage to a date that is later than the date of reemployment. However, if a health plan allows an individual to delay reinstatement to health plan coverage, that individual may be subject to the plan's exclusion or waiting periods.

3. Special Rules for Certain Multiemployer Health Plans

The regulations articulate detailed rules applicable to multiemployer health plans that provide coverage through a "credit bank," "dollar bank," or "hour bank" arrangement. As described in the preamble to the regulations, "bank" health plans employ "accounts" through which employees save prospective health benefit credits that may be spent later, and typically use a lag period system for accumulating credits for eligibility and coverage.

The regulations provide that these types of "bank" plans must permit (but cannot require) service members to use "banked" credits during the period of military service instead of paying for continued coverage during that period. Upon the individual's depletion of the banked credits, the plan must allow the service member to continue health plan coverage on a self-pay basis for the remainder of the required continuation period. In addition, upon reemployment, the plan must reinstate the individual's coverage, but may require the individual to pay the full cost of the reinstated coverage until he/she has earned enough credits to resume coverage under the plan. Alternatively, an employee may opt not to use banked credits during his/her military service and instead pay for coverage during that period, so that he/she may use the banked credits upon reemployment. Finally, the regulations require employers or plan administrators providing these plans to counsel employees regarding their options.

B. Pension Plan Issues

As noted in the preamble to the regulations, USERRA establishes specific rights for *reemployed* service members in their employee pension benefit plans (including non-ERISA plans such as state, government or church-sponsored plans). Provided that the service member returns to employment within a specified timeframe, the reemployed individual must be treated as though he/she had remained continuously employed for purposes of calculating his/her pension benefits. The reemployed service member may not be treated as having incurred a break in service for purposes of participation, vesting or benefit accrual under the plan. The regulations clarify that the *entire* period of an employee's absence "due to or necessitated by" the military service, including preparation time, should be considered service with the employer for determining pension benefit entitlement.

1. General Rules Governing Pension Plans

The regulations make clear that the employer is liable to the plan for funding the plan's obligation to provide pension benefits attributable to the reemployed individual's period of military service. (Special rules apply in the context of multiemployer pension plans, as described in the following section.)

In a defined contribution plan, upon reemployment, the employer must allocate its make-up contributions, the employee's make-up contributions (if any), and the employee's elective deferrals (if any) in the same manner and to the same extent that the employer allocates the amounts for other employees during the period of service. In a defined benefit plan, the employee's accrued benefit must be increased for the period of service once the individual is reemployed and, if applicable, once the employee has repaid any amounts previously paid to him/her from the plan and made any employee contributions that may be required under the plan.

The regulations clarify that, with respect to *employer* contributions to a plan to which the employee is not required or permitted to contribute, the employer generally must make the contribution attributable to the individual's period of service by the later of: (a) ninety days after the date of reemployment, or (b) the date that plan contributions are normally due for the year in which the military service was performed.

With respect to *employee* contributions or elective deferrals under a contributory plan, the regulations reiterate that the employee is permitted (but not required) to make up these contributions or elective deferrals, but they must be made during the period beginning with the date of reemployment and extending for a period of up to three times the length of his/her period of military service, not to exceed five years. The regulations add that an individual may only make such repayments while he/she is employed with the employer. Thus, once a reemployed employee leaves employment, he/she loses the right to make up the missed contributions or elective deferrals to the plan.

Finally, the regulations provide that employer contributions that are contingent on the employee's make-up contributions or elective deferrals must be made in accordance with the plan's requirements for matching contributions. In this regard, the regulations state that, if the employee does not make up the missed contributions or elective deferrals, the employee will not be entitled to receive the employer match or accrued benefit that is dependent on the employee contribution or elective deferral.

The preamble to the regulations also states that employers and plan administrators should develop reasonable rules for the allocation of make-up contributions that are appropriate for the type and size of the particular plan.

The regulations add new guidance with respect to an employee's ability to repay certain amounts previously withdrawn from a defined benefit plan. Under the regulations, upon reemployment, the employee must be allowed (but is not required) to repay any amounts previously paid to him/her from the plan in connection with his/her service in the uniformed services. If the individual chooses to repay withdrawn amounts, the amount the individual repays must include any interest that would have accrued had the monies not been withdrawn. Although the regulations provide that, generally, the repayment period may not exceed five years, they allow an employer and employee to agree to a longer repayment period. It should be noted that the DOL stated in the preamble that it was not extending this repayment option to participants in defined contribution plans.

2. Special Rules for Multiemployer Pension Plans

The regulations amplify the statute's special provisions for multiemployer pension plans.

With regard to liability for the employer contributions attributable to the period of military service of a reemployed member, the statute and regulations provide that the liability is allocated as specified by the plan sponsor, and, if the plan sponsor does not address this issue, then the individual's last pre-service employer is liable for the contributions. The regulations further state that an employee is entitled to the same employer contribution regardless of whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same plan, provided that the pre-service employer and post-service employer share a common means or practice of hiring employees.

The regulations also provide guidance on certain notice obligations. Under the statute, an employer that contributes to a multiemployer plan and reemploys a service member must notify the plan administrator, in writing, within 30 days of such reemployment. However, the regulations clarify that the employer's obligation to so notify the plan does not begin until the employer has knowledge that the employee was reemployed pursuant to USERRA.

C. Notice Obligations Applicable to Employers

Recent amendments to USERRA require *employers* (including employee benefit plans that function as employers) to provide employees with a notice of the rights, benefits and obligations of employees and employers under USERRA. The text of this notice was initially published on March 10, 2005. Since the DOL has slightly revised the notice, a new version of the notice has been published. Employers should begin using the revised notice immediately. A copy of the revised notice is available at the following address: http://www.dol.gov/vets/programs/userra/poster.htm. Employers may provide the notice by positing it where notices are customarily placed.

D. Action Plan for Employers and Employee Benefit Plans

The DOL has stated that it does not anticipate the regulations will require significant plan adjustments, as the regulations impose no new legal requirements. Nevertheless, we recommend that employers and plan sponsors take the following actions (if they have not already done so) to ensure compliance with the interpretations set forth in the regulations.

1. **Health plan sponsors should draft procedures to govern a service member's election of, and payment for, continuation coverage.** These procedures should include provisions regarding when a service member's health coverage will be terminated for failure to make timely payment.

2. **Health plan sponsors should draft procedures regarding whether a returning service member can enroll in the plan, if the individual does not enroll immediately upon reemployment.** On a related note, health plan sponsors should determine whether the reemployed individual will be subject to the plan's exclusion provisions if he/she does not immediately enroll in health plan coverage upon reemployment.

3. **Pension plan sponsors should develop reasonable rules for the allocation of make-up contributions.** Although the DOL refused to require plans to adopt a sequential approach, plans may wish to consider this approach.

4. **Employers should begin distributing to employees the revised notice of USERRA rights.** Again, a copy of the notice can be found online at http://www.dol.gov/vets/programs/userra/poster.htm.

This Client Alert is only intended to provide a brief highlight of the final USERRA regulations and requirements and does not provide legal advice concerning these regulations. Please contact your Proskauer attorney, or any of the attorneys listed below, for a full analysis of your rights and obligations under USERRA.

NEW YORK • LOS ANGELES • WASHINGTON

BOSTON • BOCA RATON • NEWARK

NEW ORLEANS • PARIS

Proskauer's Employee Benefits and Executive Compensation Law Group includes nearly 50 attorneys with significant and diverse employee benefits and executive compensation law experience. The following individuals serve as contact persons on this alert and would welcome any questions you might have:

Roberta K. Chevlowe
212.969.3949 – rchevlowe@proskauer.com

Robert M. Projansky
212.969.3367 – rprojansky@proskauer.com

Ira M. Golub
212.969.3008 – igolub@proskauer.com

Gia G. Brock
212.969.3304 –gbrock@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.