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Four Things You May Not Know About … USERRA

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In the second in a series of blogs examining often overlooked or misunderstood provisions of common employment laws, today we are covering four things employers may not know about the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA").

USERRA generally protects military service members and veterans from discrimination based on their military service. Among other protections, covered employees may not be denied initial employment, reemployment (in accordance with USERRA's terms, discussed further below), promotion, or any benefit of employment because of their service status. USERRA also provides employees the right to elect to continue existing employer-provided health coverage for up to 24 months during uniformed service or, if not electing continued coverage, the right to be reinstated to their employer's health plan upon reemployment without any waiting periods or exclusions (other than for service-connected illnesses or injuries).

Who is Covered by USERRA?

Unlike other federal anti-discrimination laws that require an employer to have a threshold number of employees to be covered, USERRA applies to public and private employers regardless of size. Even employers with a single employee are covered by the law.

USERRA coverage generally applies to employees who: (1) are a past or present member of the uniformed services; (2) have applied for membership in the uniformed services; or (iii) are obligated to serve in the uniformed services.

“Uniformed services” is defined broadly to include not only service in the Armed Forces (*i.e.,* the Army, Navy, Marine Corps, Air Force, Space Force and Coast Guard) and the Army and Air National Guard (including training), but also service in the Commissioned Corps of the Public Health Service or the commissioned officer corps of the National Oceanic and Atmospheric Administration; members of the National Urban Search and Rescue Response System during a period of appointment into federal service; intermittent personnel appointed into Federal Emergency Management Agency service (or to train for such service); and “any other category of persons designated by the President in time of war or national emergency.”

Who Is Entitled to Reemployment Under USERRA?

One of the key protections for covered employees under USERRA is the right to reemployment in their civilian job upon the conclusion of service in the uniformed services. The reemployment right is not unqualified, however, and individuals must satisfy numerous requirements to exercise their reemployment right unless an exceptions applies.

In all cases, reemployment is not required if the employer’s circumstances have changed such that reemployment would be “impossible or unreasonable” (such as due to a reduction in force impacting the employee’s role) or if the pre-service position was for a “brief or non-recurrent period” and there was “no reasonable expectation that employment would continue indefinitely or for a significant period.” Below are some of the key requirements associated with the right of service members to be reemployed under USERRA.

Advance Notice of Service

USERRA requires that employees provide their employers with advance notice of military service, whether orally or in writing. Such notice may be provided by either the employee or an appropriate officer of uniformed service in which the employee will be service.

However, advance notice is not required if military necessity prevents the giving of notice, or notice is otherwise impossible or unreasonable – for example, where participation in an operation is classified or may be “compromised or otherwise adversely affected by public knowledge.”

Five-Year Service Limit

As a general matter, employees whose uniformed service exceeds five years during the course of their employment with their current employer are not eligible for USERRA's reemployment protections. However, there are numerous exceptions to this service limit.

For example, the five-year limit does not apply to: (i) an initial period of obligated service beyond five years; (ii) service from which a person, through no fault of their own, is unable to obtain a release within the five-year limit (such as servicemembers whose obligated service dates expire while they are at sea); (iii) required training for Reservists and National Guard members (that is, the statutory two-week annual training sessions and monthly weekend drills are not counted toward the five-year limitation); and (iv) orders to service or to remain on active duty because of a declared war, national emergency, or similar events. In these cases, an employee would have the right to reemployment even after 5 years or more or service.

Timely Return

To qualify for USERRA's protections, a service member must generally be available to return to work within certain time limits, which vary depending on the length of the service:

- Service of 30 days or less generally requires an employee to report back to work by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service. However, the employer must also allow for safe travel home from the service location and at least an 8-hour rest period.
- For service of 31 to 180 days, an employee must apply for reemployment no later than 14 days after completing service, unless doing so is impossible or unreasonable through no fault of the employee, in which case application must be made as soon as possible.
- For service of 180 or more days, an employee must apply for reemployment no later than 90 days after completing the military service.

The above deadlines must be extended for up to two (2) years in cases of an injury or illness incurred or aggravated during the performance of military service.

Discharge Status

There are four circumstances in which the status of an employee's discharge would disqualify them from having USERRA reemployment rights: (1) separation from service with a dishonorable or bad conduct discharge; (2) separation from service under "other than honorable" conditions (as defined by the applicable military branch); (3) dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war; and (4) when the individual was dropped from the military roll due to unauthorized absence for more than three months or imprisonment by a civilian court.

Disability Incurred During Service

If an employee incurs (or aggravates) a disability during uniformed service, the employer must make reasonable efforts to accommodate the disability and help the employee become qualified to perform the duties of the reemployment position. If an employee cannot become qualified despite reasonable efforts by the employer, the individual must be reemployed in a position of equivalent seniority, status, and pay to the reemployment position for which they are otherwise qualified or able to become qualified, or, if this is not possible, a position that most nearly approximates the equivalent position. However, employers' obligation to make efforts to qualify returning service members or accommodate employees with service-connected disabilities is subject to an undue hardship defense, similar to under the Americans with Disabilities Act.

What Does USERRA's "Escalator Principle" Require?

Employers are likely familiar with reinstatement requirements under other laws that provide job protection for employees, such as the Family and Medical Leave Act ("FMLA"). The FMLA regulations specify that employees returning from a designated leave are entitled to be returned to the same position held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. However, returning employees are not entitled to accrue additional pay, benefits or seniority during unpaid FMLA leave (except for certain unconditional pay increases) unless such pay, benefits or seniority bumps are made to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

USERRA, however, takes a different approach by adopting what is commonly referred to as the “escalator principle.” The escalator principle requires a returning service member be reemployed in the position they *would have occupied with reasonable certainty* if they had remained continuously employed, with full seniority. This means that if an employee on military leave would have moved up in pay or position if not on leave, then they would need to be returned to the position they would have held had the leave not been taken. The position may not necessarily be the same job the employee previously held. For example, if the employee would have been promoted with reasonable certainty had they not been absent due to military service, the employee would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held or a different job (such as due to a restructuring), or it could be a layoff status. That is, the escalator can move either up or down. This principle, which is unique to USERRA when it comes to federal leave laws, often generates a fair number of questions from employers when uniformed services members are planning to return to work.

Does USERRA Require Employers to Pay Employees During Military Service?

This is a hot topic, with several recent cases addressing the issue. USERRA does not expressly require a set amount of wage continuation during miliary leave, but does entitle employees to “such other rights and benefits . . . as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence.”

The USERRA regulations state that where the treatment of comparable non-military leaves varies, the employer must give the service member the most favorable treatment given to any comparable non-military leave. With regard to comparability, the regulations state:

In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. . . . In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

In a May 2024 opinion in *Scanlan v. American Airlines Group, Inc.*, the Third Circuit Court of Appeals (which includes the states of New Jersey, Pennsylvania and Delaware, as well as the U.S. Virgin Islands) reversed the dismissal of claims under USERRA based on the airline's failure to pay pilots and provide certain benefits during short-term military leave, while providing pay and benefits to pilots during bereavement and jury duty leave. The circuit court held that a reasonable jury could find that the military leave at issue is comparable to the airline's jury duty and/or bereavement leave benefits based on the average duration of each type of leave (between 1-3 days), the purpose of the leave (jury duty and military service having a common purpose of fulfilling a civic duty), and the control the employee has over when they must take the leave. The court noted, however, that there were also certain factors that could lead a jury to conclude that the three types of leave were *not* comparable. For that reason, it remanded the case for jury consideration.

And in an opinion from February 2023 in *Clarkson v. Alaska Airlines, Inc.*, the Ninth Circuit Court of Appeals (which includes California, Oregon, Washington, Arizona, Nevada, Idaho, Montana, Alaska, Hawaii and Guam) held that the district court incorrectly granted summary judgment on USERRA class action pay claims by comparing all forms of military leaves, rather than just those that were short-term, with the asserted comparator non-military short-term leaves (in this case, jury duty, bereavement and sick leave). Put another way, the Ninth Circuit held that, for purposes of USERRA, when analyzing military leave alongside other paid leave offered by the employer, comparability should be determined by examining the length of the military leave *actually being taken* by an employee, rather than by categorically considering all forms of military leave (regardless of length) as a whole. The parties in *Clarkson* subsequently agreed to a $4.75 million dollar settlement to resolve the matter.

And most recently, on August 22, 2024, the Ninth Circuit in an unpublished (and therefore non-precedential) opinion in *Synoracki v. Alaska Airlines, Inc.* revived a USERRA class action in which a class of pilots who served in the U.S. Air Force Reserve alleged that because employees who take paid short-term non-military leaves, such as sick leave and jury duty leave, continue to accrue paid sick and vacation time during such leaves, employees on comparable military leave should also receive the same benefits under USERRA. While the district court granted the airline's motion for summary judgment, holding that military leave as a general matter was not comparable to the other cited leaves based on both frequency and duration, the circuit court held that, following its decision in *Clarkson*, the court must assess the pilots' claims by comparing the amount of military leave actually taken against the proposed comparator leaves.

These decisions suggest that a trend is forming that courts will closely scrutinize whether different leaves *are in fact comparable* when deciding whether employees taking USERRA leave are entitled to continued pay during military leave, and that when looking at comparability between leaves courts will look at the actual amount of time taken by employees on leave.

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Employers are also reminded that state laws may provide for greater benefits for employees engaging in and/or returning from military service beyond what is required under federal law. For example, New York State's military leave law provides employees returning from military service a longer period of time to request reinstatement than is provided for under USERRA. Employers should consult local laws to ensure full compliance with military leave requirements.

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