

Employer Update

Out of Sight But Not Out of Mind **– Rights of Reemployment for Returning** **Service Men and Women**

By Candy W. Dale

On February 18, 2007, Idaho witnessed the return of some 50 service men and women of the 1-183rd Aviation Battalion from Afghanistan. More troops will arrive home this week, following combat and separation from their loved ones for one year or longer. Not all soldiers return home, however, as we learned last week of the loss of three more Idaho service men due to roadside bombings in Iraq.

As the Senate debates President Bush's troop surge plan, legislation first passed in 1994 and amended effective January 18, 2006, called the Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 USC Sections 4301 through 4333) helps our service men and women return to the workforce. USERRA also requires certain benefits be continued for uniformed members of the service, whether the service is voluntary or involuntary. Additionally, under the Public Health Security and Bioterrorism

Response Act of 2002, certain disaster response work, including authorized training for such work, may be considered "service in the



uniformed services.”

Given the ongoing need of employers for familiarity with USERRA, this article provides a refresher of the key provisions of USERRA, incorporating the final rules effective 2006, and reminds employers about the anti-discrimination provisions in the Act.

Refresher and Final Rules

Commenting about the fact that the mobilization of men and women for military action in Iraq and Afghanistan is the largest deployment of the Military Reserves and National Guard since World War II, Labor Secretary Chao referenced in December 2005 the final regulations issued by the Veterans Employment & Training Services (VETS) implementing USERRA. The primary focus of the final rules is restoration of pay and benefits levels to service members who return to the workplace, as if their military service had never inter-

Next month's topic:

How Idaho Courts and Employers are Dealing With Changes in the Law Related to Non-Compete, Non-Solicitation, and Confidentiality Agreements.

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vened in their employment course. "These brave men and women should not have to worry about their civilian jobs and benefits when they are on the front lines defending our freedom," commented Chao.

Eligibility Rules

To be eligible for reemployment under USERRA, an employee returning from military service must meet five criteria: (1) The employee must have been in uniformed services during the absence from employment. (2) The employee must have provided advance notice, where possible, of the uniformed service. (3) The employee must have no more than five years cumulative uniformed service away from the particular employer. (4) The employee must return to work or apply for reemployment according to the regulation's timetable, which varies depending on the employee's length of service. (5) The employee must not have been dishonorably discharged or have received any other disqualifying discharge from military service.

Key Provisions

As a general rule, the regulations require employers to reinstate returning service members within two weeks after they apply for reemployment, absent unusual circumstances. The final rules apply the "escalator principle," which requires employers to provide returning service members with the same seniority, status, and pay they would have attained had their employment not been interrupted by military service.

The "escalator principle" also applies to returning employees' opportunities to take promotional examinations or skills tests, and to earn merit pay increases and performance bonuses. The final regulations also require employers to make reasonable efforts to accommodate a disability incurred during military service. Additionally, discharge from employment within 180 days after return to the workplace must be for "cause."

Over objections from various employee groups, and despite a conflict in court decisions on the subject, the DOL adopted the view in its regulations that "employer" under USERRA can include supervisors and managers in their individual capacity in appropriate cases. Returning employees also have specific rights for continued coverage under their employer's healthcare and pension plans.

Impact on Employer-based Health Coverage

USERRA gives employees returning from military service the right to continue their employer-based health coverage for up to 24 months while they are in the military. If the employees do not elect continuation, the employer must reinstate them in the plan upon their reemployment, *without* waiting periods or exclusions.

USERRA is similar, although not identical, to the Consolidated Omnibus Budget Reconciliation Act (COBRA). Several important distinctions exist between the healthcare provisions of USERRA and COBRA. First, USERRA covers all employers regardless of size, while COBRA only covers employers of 20 or more employees. Unlike COBRA, USERRA has no set timetable for electing continuation of coverage. Rather, the DOL will allow employers and health plan administrators to develop their own "reasonable" rules, apparently out of deference to smaller employers who are not covered under COBRA. While many employers may adopt the COBRA timetables for continuation of coverage, employers may establish shorter or longer timeframes, as long as the requirements are "reasonable." Furthermore, USERRA election rights, unlike COBRA election rights, are available only to employees who enter military service, not to retirees or dependents of employees who enter military service.

In the absence of a prescribed timetable for election of continuation of coverage, employers should develop reasonable rules and timeframes to advise their employees of when and how to make a timely election. If an employer does not establish reasonable

USERRA rules, employees could have until the end of the 24-month USERRA coverage period to elect continuation. If the employee elects and pays the required premiums at any time before the end of the 24-month period, the employer must provide retroactive coverage to the date the employee entered military service until the end of the 24-month period.

Under USERRA, the amount of the employee's contribution for continued coverage depends on the duration of military service. If the military service is fewer than 31 days, the employee pays the regular employee share. If the service is for 31 or more days, the employee may be required to pay up to 102% of the full premium, representing the employer's and the employee's share, plus a 2% administrative cost.

Retirement Plans

The final regulations provide guidance on the effect of military service on retirement plans. The pension section requires employers to treat employees on military leave as if the military leave had not occurred, or as if the employee was on a furlough. The employees continue to accrue pension benefits, and the level of employer contribution does not drop to the level of the military salary.

For employers who sponsor a 401(k) plan, the regulations allow returning employees the greater of three times the period of military service, or five years, to make up the contributions that they otherwise would have made during the period of service. USERRA also requires employers to make retroactive contributions to defined benefit pension plans. These contributions must be made by the later of 90 days after the employee's return to work, or the date on which the contributions otherwise would have been due for the period of military service.

The current regulations help explain many of the issues raised by USERRA's initial enactment, but leave several issues unanswered. One issue not addressed by the regulations is how long the employee must remain at work for the retirement plan rights to apply. This and other issues will likely be

the subject of future litigation, making the management of returning employees a difficult undertaking for Human Resources professionals and others.

Poster

With the final rules, a DOL-approved poster is required for the work site. This can be obtained from www.dol.gov/vets/programs/userra/poster.htm.

Be Wary of Discrimination

When reviewing the "protected classes" for potential discrimination claims, uniformed service members should not be overlooked. A recent decision in a case filed in the United States District Court for the Western District of Pennsylvania illustrates insensitivity to the rights of service men and women that should be condemned from the workplace. In the case of McLaughlin v. Newark Paperboard Products, an action was initiated by Michael McLaughlin against his former civilian employer, alleging discrimination on the basis of his military status in violation of USERRA, after he was terminated from employment the first day he returned to work following two weeks of National Guard duty. Although the alleged discrimination occurred in 2001, McLaughlin's wife was substituted as the plaintiff (as the Administratrix of Michael's estate) in his lawsuit after Michael was killed when serving active duty and action on January 5, 2006. Although the defendant employer filed a motion for summary judgment dismissal of the action alleging McLaughlin's military status was not a motivating factor for his discharge, the district court rejected the employer's arguments.

In the decision denying summary judgment (issued 9/05/06), the court focused on evidence that McLaughlin's direct supervisor had made derogatory comments on multiple occasions regarding McLaughlin's military service—at the time, reservist status. For example, on an occasion prior to his leave that ended the day of his termination, McLaughlin was deployed to Germany with the Pennsylvania Army Na-



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tional Guard for several weeks. The deployment dates conflicted with an important budget meeting. After McLaughlin returned from deployment, his supervisor commented that “at no point would [McLaughlin’s] military service interfere with another budget meeting.” McLaughlin was a plant manager at one of the defendant’s paper product plants.

McLaughlin presented other persuasive evidence to avoid summary judgment dismissal, including evidence of his positive performance appraisals and the positive performance of his plant, despite his periodic leaves for military service. He also pointed to the fact that plant managers who had less than stellar performance had been demoted or moved to different positions, rather than terminated, and that these individuals were not members of the uniformed services. Finally, he offered evidence of the “hostility” expressed by his supervisors regarding his prior leaves and the fact that the superinten-

dent onsite at the plant while he was on leave was investigated and disciplined for discriminating against military service members. All of this, combined with the inference of discrimination derived from the timing of the termination (the day McLaughlin returned from leave) was more than sufficient to defeat the employer’s motion.

We don’t like imagining the trial of this case—with the plaintiff the wife of an American soldier who was disrespected at work and later killed in combat, if the facts prove out as alleged by McLaughlin. However, the lesson for employers is to train supervisors and monitor your workplace to insure your supervisors don’t maintain the hostility or insensitivity allegedly maintained by the supervisors of Newark Paperboard. Like other forms of discrimination, neither the intentional nor the insidious should be tolerated.