



Employee Benefits Bulletin

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READY OR NOT, HERE COMES USERRA: THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT AND IRAQ

Our permanent uniformed armed forces depend heavily today on Reserve units and the National Guard. More than 100,000 Reservists and Guardsmen have been called to active military duty. And as in all matters military, the Southeastern states are among the most heavily impacted. Alabama, 21st among the states in population, has had the highest number of national guard and reserve units mobilized for the war in Iraq—more than 8,000 men and women. Louisiana has contributed more than 5,000 citizen soldiers to the war.

Virtually every employer of an activated reserve or guard member—regardless of size, regardless of form, regardless of activity—owes employment-related obligations to its temporarily absent employees under USERRA. The legal rights run the gamut, from continuation of health benefits upon entry into uniformed service, to various reemployment rights on cessation of uniformed service (including retirement plan credits for the period of military activation). This article summarizes the purpose and major provisions of USERRA.

(It should also be noted that some states, such as California, provide additional rights and protections for returning veterans, which can exceed those provided under USERRA.)

1. Purpose of USERRA

As we moved toward a smaller volunteer army, Congress recognized the increased importance of having a competent standby corps of trained, but non-career, personnel that could be called upon in times of national military emergency. In order to encourage civilian employees to enlist and stay enlisted in Reserve and National Guard units, Congress decided to remove or mitigate some of the disadvantages that such employees would otherwise experience in their civilian employment when their units were called up for active duty. The

OUR MERGER

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result was passage of USERRA in 1994. As already noted, USERRA effects this goal through the provision of reemployment and benefit continuation rights.

2. Scope of USERRA Coverage

USERRA sweeps broadly: it applies to voluntary or involuntary duty in the uniformed services of the Army, Navy, Marines, Air Force, Coast Guard, and Public Health Service commissioned corps, including all Reserve and National Guard components. (It does not, however, apply to state National Guard call-ups for disaster relief, riots, and other local emergencies.) USERRA rights are triggered when an employee is called to active military duty, active duty for training, inactive duty for training (drills), and any wartime or peacetime periods used to determine fitness for duty.

3. Summary of USERRA protections

An eligible employee is entitled to six principal rights. Some of these rights are triggered immediately upon activation and others upon discharge. The principal rights triggered upon a person's entering uniformed service are:

i. Continuation of health coverage for up to 18 months following the employee's activation;

ii. Ability to use accumulated leave time during periods of active service.

The principal rights triggered upon a return from uniformed service are:

i. Return to employment with compensation and seniority based benefits determined with credit for military service;

ii. Training or other assistance needed to help them qualify for reemployment;

iii. Return to health plan without pre-existing condition limitations;

iv. Crediting of military service for participation, vesting, and accrual purposes in retirement plans;

v. Protection against termination of employment, except for cause, for either 180 days or one year, depending on length of military service.

These rights, and limitations on them, are discussed further below.

4. Eligibility for USERRA Protections While in Uniformed Service

An employee is generally required to provide his or her

employer advance notice of a period of uniformed service. The notice does not have to be in written form and may be provided for the employee by an officer in the branch of service to which the employee is reporting. Moreover, USERRA excuses the notice requirement if military exigencies prevent the employee from giving notice, or if other circumstances make it impossible or unreasonable for the employee to give notice.

5. Health Plan Continuation While in Uniformed Service

An employee is entitled to COBRA-like rights to continue participation in an employer's health care plan while in uniformed service. If the period of military service is 30 days or less, the employer must continue coverage and must pay the employer's share of premiums. If the period of military service exceeds 30 days, the employer must permit the employee to elect continuing coverage for up to 18 months; as with COBRA, the employer can require the employee to pay 102% of the premiums. If the employee elects coverage, the right to that coverage ends on the day after the deadline to apply for reemployment or eighteen months after the date the employee's absence began, whichever comes first.

Unlike COBRA, which has an exception for small employers, USERRA applies to employers without regard to size.

6. Right to Draw on Accrued Leave Time While in Uniformed Service

A civilian employee is entitled to use annual leave or accrued vacation time while in military service, even though they are also receiving pay from the military. Although employees have this right, they cannot be compelled by the employer to exercise it.

7. Loans from Retirement Plans While in Uniformed Service.

A plan may, but is not required to, include a provision to suspend loan payments during an employee's absence from work on account of uniformed service. The suspension will not be considered a deemed distribution to the employee if interest on the loan accrues during the period of military service, repayments commence upon reemployment, and the plan loan (including accrued interest) is repaid by the end of the original term of the loan as extended by the period of military service. Moreover, the Soldiers' and



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Sailors' Civil Relief Act of 1940 caps the interest rate on loans at 6%. It is not clear whether this interest rate cap applies to accrued interest during a period of loan suspension.

8. Eligibility for USERRA Rights and Protections After Cessation of Uniformed Service

An employee is eligible for reemployment, and certain other rights and protections that are triggered by reemployment, if:

- i. The employee is honorably released from the period of uniformed service;
- ii. the period of military service did not exceed five years;
- iii. the employee timely reports back to civilian employment.

The time requirements for reporting back or applying for work depend on the length of the period of military service, as follows:

If the employee's military service was 30 days or less, the employee must report for work by the beginning of the first regularly scheduled work day following completion of service (the service period includes the time needed for a safe return);

If the employee's military service was more than 30 days but less than 181 days, the employee must apply for reemployment within 14 days following completion of service;

If the employee's military service exceeded 180 days, the employee must apply for reinstatement within 90 days following completion of service.

There is also a safety valve for the employee: if, through no fault of the employee, returning to work within these time frames would be impossible or unreasonable, the employee must report back to work as soon as possible.

9. Reemployment Rights

The employer generally must provide an employee who returns from uniformed service the job the employee would have attained if he or she had not been absent. (The job does not have to be identical, but it must have equivalent seniority, status, and pay.) This notion that employees are hired to the job position that they would have attained is known as the escalator principle.

For example, the returning veteran's compensation would be increased by any cost-of-leaving increases that had been granted during the veteran's active military service. And if there is a reasonable certainty that the employ-

ee would have been promoted during the military absence (for example, the employee's position was upgraded), the employee should be rehired at the enhanced position.

USERRA generally requires employers to provide training to returning veterans to help them refresh or upgrade their skills. USERRA also requires the employer to make reasonable accommodation of any service-related disabilities, although they are not required to do so where such accommodation would subject them to "undue hardship."

There are, of course, situations where the employee's job does not have to be kept open. For example, if the employee had been hired for temporary work only, the employer might not be required to rehire the employee if he returns after the temporary work would have ended. Similarly, the employer does not have to rehire the employee if the employee's position was eliminated as part of a bona fide reduction in force.

When USERRA reemployment rights are applicable, they are absolutely applicable. Thus, the employer may have to displace replacement workers, either terminating them or demoting them if necessary to make room for the returning veteran.

An employer's obligation to employ the returning veteran does not end with the reemployment. USERRA in effect repeals the employment-at-will doctrine for a period of time following reemployment: during this period an employee may only be terminated for cause (or part of a legitimate reduction in force or layoff). For employees whose leave was at least 31

days but no more than 180 days, this period of protection is 180 days; if the leave was more than 180 days, the period of protection is one year. For employees whose leave was 30 days or less, USERRA's general rules prohibiting discrimination against returning veterans are applicable.

10. Health Benefits on Reemployment

A reemployed employee is entitled to immediate reinstatement of civilian health insurance coverage upon return to work, including coverage for previously covered dependents. A health plan cannot impose a waiting period and cannot exclude the returning employee based on pre-existing conditions (other than for those conditions determined by the federal government to be service-connected, which will be covered through Veteran's health programs).

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11. Retirement Benefits on Reemployment

Employees do not incur a break in service during military service and upon reemployment are given credit for their time on military leave. The crediting applies for purposes of plan participation, vesting, and, most expensive of all, benefit accrual. USERRA's protections are not limited to qualified retirement plans; they extend to all retirement plans, including top-hat and government plans.

Defined Benefit Plans

Upon reemployment, an employee's benefit is increased to reflect his or her period of military service.

Example: An employer maintains a plan whose benefit formula provides a normal retirement benefit equal to 2% of final compensation multiplied by years of service. The employee has worked for 8 years and his final pay under the plan's formula is \$50,000 when the employee is called up for military service. At this point, the employee's accrued benefit is 16% of final pay, or \$8,000.

The employee is called up to uniformed service for two years and then returns to work. Had the employee not been on military leave, his pay variable would have increased to \$55,000. Upon reemployment, his service is increased by 2 years and his pay variable is increased to \$55,000. Thus, upon reemployment, his benefit is immediately 20% of final pay, or \$11,000.

Defined Contribution Plans

The rule that the employer, upon reemploying the returning worker, must provide the employee with the benefits he or she would have had if not for the military service becomes complicated for section 401(k) plans, since the employer's contribution obligation is generally triggered by the employee's elective deferral. Under USERRA, the employer is required to make matching contributions only if the employee chooses to make the elective deferral in the period of reemployment. The employee has to do this by the end of a period equal to three times the length of his or her military service (with an outside limit of five years). If the employee does make up the contribution, the employer must then provide any matching contributions that would have been called for under the plan. The employer does not, however, have to provide the investment income the employee would have earned had the contributions been made while the employee was in the military.

Example: an employer maintains a 401(k) plan, which provides for an employer matching contribution of 100% of the employee's elective contribution, up to 5% of the pay. The employee is called up to active duty for one year, during which time he would have earned \$50,000.

The employee returns to his civilian job upon the completion of military service. The employee has up to 3 years to make the elective deferral. Assume the employee makes a makeup elective deferral to the plan of 6% of pay, i.e., \$3,000. The employer must at that time provide the matching contribution called for in the plan, which would equal 5% of pay, or \$2,500.



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12. Government Resources

The United States Department of Labor is responsible for administering USERRA. If you have particular questions about USERRA-protected benefits, you may contact the Veterans' Employment and Training Service (VETS) at the following locations:

United States Department of Labor/VETS
200 Constitution Avenue, NW
Room S-1316
Washington, DC 20210
(202) 693-4700
VETS: 1-800-442-2VET
AL VETS/USDOL: Thomas Karrh, Director
649 Monroe Street, Room 543
Montgomery, AL 36131-6300
(334) 223-7677
(334) 242-8115

13. Some Concluding Thoughts

USERRA, enacted in 1994, will face its most significant test as combat winds down in Iraq and tens of thousands of service members return to civilian employment. The next several years will answer key questions about USERRA's complexity, fairness, and affordability. While USERRA's goals are laudable, they can impose expensive burdens on employers, particularly small ones. Moreover, the costs of USERRA are generally not shared by the population, but are borne by those employers who happen to employ members of the Reserves and National Guard. Because membership in such units is high in the Southeastern states, businesses in such states will tend to bear a disproportionate share of the nation's cost of compliance with USERRA.

In the meantime, employers with employees on military leave should examine, and if need be, revise their policies and procedures to ensure returning veterans a smooth transition back to civilian work. Like gravity, it is not only a good idea, it's the law.

TIDBITS

Some Benefits Humor. Dave Barry, the humor columnist for the Miami Herald, wrote about his Keogh plan: “If you’re wondering what a Keogh Plan is, the technical answer is: Beats me. All I know is, I have one, and the people who administer it are always sending me Important Tax Information. Here is the first sentence of their most recent letter, which I swear I am not making up: ‘Dear David: The IRS has extended the deadline for the restatement of your plan to comply with GUST and various other amendments until, in most instances, September 20, 2003.’ I understand everything in that sentence, up to ‘David.’ After that I am lost.” The column is available on line at <http://www.iht.com/articles/92146.html>.

Proposed Cash Balance Regulations Partially Withdrawn. Treasury and the IRS proposed cash balance regulations last December. One piece of those regulations would have prohibited nondiscrimination testing for cash balance plans on a benefits basis unless they complied with rules parallel to those governing new comparability plans. Some critics of the regulations noted that these nondiscrimination rules would, in certain situations, prevent employers who were converting traditional defined benefit plans into cash balance plans from giving special transition credits or other relief for older workers who would otherwise be hurt by the conversion. The day prior to a hearing on the regulations, the agencies withdrew the nondiscrimination rules (but not the remainder of the proposed cash balance regulations).

Department of Labor Issues Rules on MEWA Reporting. The Department of Labor finalized a number of regulations on reporting requirements for multiple employer welfare arrangements (“EWAs”). The regulations are available on line at <http://benefitslink.com/erisaregs/mewa-reporting-final-2003.shtml>.

IRS Issues Final Regulations on Notice to Employees on Reductions in Future Benefit Accruals. EGTRRA added section 4980F to the Internal Revenue Code; this section imposes an excise tax when a plan administrator fails to provide timely notice of plan amendments that provide for a significant reduction in the rate of future benefit accrual. A reduction of an early retirement benefit or a retirement-type subsidy is also treated, for purposes of section 4980F of the Code, as a reduction in the rate of future benefit accrual. (EGTRRA also amended section 204(h) of ERISA to treat the elimination of an early retirement benefit or a retirement-type subsidy as a reduction in the rate of future benefit accrual, reversing a position that the IRS had taken in earlier regulations on section 204(h).) The IRS has now issued final regulations on section 4980F and 204(h), which generally requires employers to provide notice 45 days prior to the effective date of an amendment reducing future benefit accruals. The regulations are available on line at <http://benefitslink.com/taxregs/204h-final-2003.shtml>.

The Supreme Court Decides “Any Willing Provider” Case. Under Kentucky law, an insurance company or HMO must allow patients to use any willing provider (“AWP”), that is, any provider who is willing to accept the plan’s compensatory and regulatory mechanisms. The Kentucky Association of Health Plans, and others, sued the State, arguing that ERISA preempted the AWP law. The case ultimately worked its way up to the Supreme Court, which has now held that AWP laws such as Kentucky’s are not preempted because they are laws regulating insurance. In so holding, the Court wrote that a law regulates insurance if it satisfies two requirements: “First, the state law must be specifically directed towards entities engaged in insurance. Second, the state law must substantially affect the risk pooling arrangement between the insurer and the insured.” The Kentucky law satisfied both these requirements and thus was spared from preemption.

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Drop us a note...

If you have a question or would like to see a particular topic addressed, please let us know by emailing us at alesia.day@adamsandree.com or by writing to us at:

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We will try to address your question or topic in a future newsletter.



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