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MILITARY LEAVE LAWS PROTECT WORKERS CALLED TO FIGHT “WAR ON TERRORISM”

- By Jennifer Anderson, Associate, Labor Relations and Employment

Federal Law

The September 11, 2001, terrorist attacks on New York and Washington could have a long-term effect on employers whose workers are reserve members of the United States military or the National Guard. On September 17, President Bush announced that as many as 35,000 reservists and National Guardsmen could be called to duty as part of the nation’s response to the recent attacks and sustained effort to eliminate terrorism. The Department of Labor is reminding employers that workers who leave civilian jobs for military service are protected by the Uniformed Services Employment and Re-employment Rights Act (USERRA), which is enforced by the DOL’s Veterans’ Employment and Training Service.

The USERRA requires all employers, regardless of how many employees you have, to grant up to five years of unpaid leave to employees who are members of or apply for membership in the military. Military and National Guard training time does not count toward the five year leave period. To qualify for protection, an employee must notify you in advance of the need to leave for military service. The exceptions to the advance notice requirement are so broad that an employee rarely will be deemed not to have given sufficient notice.

When an employee returns from military service and requests re-employment, you must return the employee to the job he would have had if leave had not been taken. You may have to place the employee in a higher position (called the “escalator” position) if he would have been promoted in the interim. Re-employment is required if:

- The employee reapplies for employment within the specific deadlines under the USERRA; and,
- The employee has taken less than five years of total military leave (but note that there are some exceptions to this requirement).

If the employee’s leave lasts more than 90 days, you may be required to return the employee to:

- The escalator position or a position of equivalent seniority status;

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- The job that most closely approximates the escalator position;
- The employee's job before taking leave or a job with equivalent seniority, status, and pay; or,
- The job that most closely approximates the employee's original job.

Additionally, if the employee is disabled due to his military service, you must provide a reasonable accommodation so he can perform the escalator position, an equivalent position, or the job that most closely approximates that equivalent position. Finally, you cannot fire an employee who returns from military leave for a specified period of time following reinstatement, depending on how long he was on leave.

Upon reinstatement, returning employees must receive all benefits they would have received had they not taken military leave. You cannot require such employees to forfeit accrued retirement benefits or to re-qualify for participation in a retirement plan upon return. Employees on military leave continue to vest and accrue benefits under any retirement plan during the leave period as if they were still employed. You must also provide continuation coverage for health care to employees who take military leave, a requirement that is virtually identical to the COBRA requirement for separated employees.

Louisiana Law

Louisiana has its own military leave law, the Military Service Relief Act (MSRA), which imposes even greater requirements than the USERRA. Under the MSRA it is unlawful to refuse to hire, rehire, promote, or terminate a person because of military service. The MSRA also prohibits firing or otherwise retaliating against workers who take military leave. The prohibition against retaliation applies to all employees, not just those who actually serve in the military. Thus, an employer cannot fire anyone, whether or not she is in the military, for assisting in the enforcement of an employee's rights under the MSRA.

Under the MSRA, employers must reinstate employees returning from military service within ten days following their application for re-employment. However, you do not have to reinstate an employee who has been dishonorably discharged from the military.

- They gave written and verbal notice of leaving for military service to their employer; and

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- They took less than five years total military leave.

The MSRA also requires you to return an employee to the job he would have had if he had not taken military leave. *But, the MSRA goes even further than the USERRA on this point.* If an employee is re-employed under the MSRA, you cannot fire him without cause for one year after his re-employment. Under normal circumstances, Louisiana employers can hire and fire employees at will, and a fired employee has no recourse unless he can prove a violation of some specific anti-discrimination statute.

Additionally, if an employee gives you notice of his desire to continue insurance coverage at the time he enters military service and makes the required premium payments, you must maintain the employee's insurance. Like the USERRA, the MSRA requires you to act as if an employee on military leave never left. However, under the MSRA, an employee cannot get more than four years of military service credit on any retirement system or employee benefits plans.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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