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COMPLYING WITH FEDERAL AND STATE LAWS PROTECTING EMPLOYMENT RIGHTS OF MILITARY PERSONNEL

By: Jennifer L. Anderson

Given recent hostilities, employers are being reminded by the Department of Labor that their workers who leave their civilian jobs for military service are protected by federal law—the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is enforced by the Department of Labor's Veterans' Employment and Training Service (VETS). Additionally, many states, like Louisiana, have enacted their own laws governing the employment rights of military personnel. Such state laws are often more protective of military personnel's employment rights than the federal law. Many of them, like the federal law, provide that such employees returning from protected military leave are no longer at-will employees and can only be discharged for cause, subject to certain limited exceptions. Thus, now is the time for employers to become familiar with these laws and to review their policies and practices for compliance.

USERRA generally requires all employers, regardless of how many employees they have, to grant up to five years of unpaid leave to employees who are members of or apply for membership in the military. To qualify for protection, an employee must notify you in advance of the need to leave for military service. As a practical matter, however, the exceptions to the advance notice requirement are broad enough that an employee rarely will be deemed not to have given sufficient notice.

When an employee returns from military service and requests reemployment, you must generally return the employee to the job the employee would have had if the leave had not been taken (typically referred to as the "escalator" provision because an employer may have to place the employee in a higher position than when he left if he would have been promoted in the interim). Reemployment is required if:

1. The employee reapplies for employment within the specific deadlines under USERRA; and

2. The employee has taken less than five years of total military leave (but note that there are some exceptions to this requirement).

However, depending upon whether the employee's leave lasts more than 90 days and whether she can perform the essential functions of the job, you may be required to return the employee to:

1. The escalator position or a position of equivalent seniority status;

2. The job that most closely approximates the escalator position;

3. The employee's job before taking leave or a job with equivalent seniority, status, and pay; or

4. The job that most closely approximates the employee's original job.

Additionally, if the employee becomes disabled through military service, you must provide a reasonable accommodation so the employee can perform the escalator position, an equivalent position, or the job that most closely approximates that equivalent position. Finally, an employer cannot fire an employee who returns from military leave for a specified period of time, the duration of which depends upon whether the leave is more than 180 days.

Generally, 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 requalify for participation in a retirement plan upon return. Such employees continue to vest and accrue benefits under any retirement plan during the leave period as if they were still employed. Employers 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. The continuation is allowed for up to 18 months at the employee's expense. Unlike COBRA, however, there are no exceptions for employers regarding this requirement under USERRA.

LOUISIANA LAW

Louisiana's Military Service Relief Act (MSRA) applies to any private or public employer in Louisiana. The MSRA was enacted to supplement the rights that persons called to military service have under federal statutes, including USERRA. Therefore, any right provided under USERRA that is more generous than the MSRA must still be followed. To the contrary, the MSRA supercedes any local law, contract, policy, etc. that reduces or eliminates any right or benefit provided in the MSRA.

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Antidiscrimination Provision

The MSRA prohibits discrimination in employment against any person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform in a uniformed service. Uniformed service means the voluntary or involuntary performance of duty in the armed forces of the United States, including active duty, active duty for training, inactive duty training, full-time National Guard duty, and a period of absence due to a fitness for duty examination.

The person in uniformed service may not be denied initial employment, reemployment, retention in employment, promotion, or a benefit of employment because of the person's uniformed service or obligation for uniformed service. The MSRA also has an antiretaliation provision that prohibits employers from taking adverse employment actions against individuals who try to enforce any of the protections afforded by this act. This retaliation provision applies to all employees, not just those who serve in the military.

Leave Status and Compensation During Leave

Any person who leaves employment to perform service in uniformed services shall be treated as being on a military leave of absence during the period of service, provided the person applies for reemployment. The MSRA does not require, but allows, employers to compensate employees while on military leave. However, if an employer has a policy, pattern, or practice of compensating any employee who takes military leave, the employer must compensate all employees who take military leave.

If compensation is paid to the employee on military leave, the employer may not deduct from that compensation any cost of replacing the employee during his period of service. If the employee chooses, he may use any amount or combination of his accrued annual leave, paid military leave, vacation, or compensatory leave. Additionally, while on military leave, the employee continues to accrue sick leave, annual leave, vacation leave, and military leave on his same basis of accrual.

Benefits/Insurance/Retirement Plans

An employee on military leave shall have the right to maintain any group life insurance, group health insurance, family group insurance, or health care services plan, provided by the employer. The employee on

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military leave may maintain this coverage by notifying the employer he wishes to continue participation in the plan and by giving the employer the money that otherwise would have been deducted from his pay for those plans.

Upon receipt of the employee's co-pay, the employer shall send the total payment, including the employer's contribution, to the applicable insurer or HMO. Any employee who leaves employment to perform service in the uniformed services and reapplies for coverage after release shall be reinstated, including all dependents previously covered, with the group insurance program or medical and health care coverage, without any restriction because of a preexisting condition.

Finally, because the MSRA requires employers to restore employees to their pre-leave status, employees who take military leave do not forfeit any benefits they have already accrued under an employer's retirement plan and do not have to requalify for participation in the plan upon returning from leave. The employees' period of uniformed service, up to four years, counts toward vesting and computation of benefits in the retirement system, pension fund, or employee benefit plan.

REINSTATEMENT OF EMPLOYMENT OF PERSONS CALLED TO DUTY

If an employee returning from military leave meets the following requirements, he is entitled to reemployment and other employment benefits within ten days following the employee's application for reemployment:

1. the employee, or a uniformed services officer, gave advanced written or verbal notice of service to the employer;

2. the employee's cumulative length of absence due to uniformed service does not exceed five years;

3. the person reports to or submits an application for reemployment to such employer within the time allowed; and

4. the person was honorably discharged from uniformed service.

An exception to the notice requirement applies if such notice of service is impossible due to military necessity. Likewise, the five-year service maximum does not count time periods of more than five years if:

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1. required to complete an initial period of obligated service;

2. during which time person was unable to obtain orders releasing such person from uniformed service before the five-year period (such as POWs);

3. performed to fulfill additional training requirements determined necessary for professional development or for skill training or retraining; or

4. performed by a member of uniformed service who has been ordered to or retained on active duty in time of war or national/state emergency, or in support of a critical mission of uniformed services.

WHAT MUST THE PERSON DO TO BE REINSTATED?

If the person's service was less than 31 days or if the person was absent for any length of time for fitness for duty examination, the person must notify the employer on the first full regularly scheduled work period on the first full calendar day following the completion of the period of service plus an eight-hour period for the transport of the person to that person's place of residence (or as soon as possible after the eight-hour period if reporting during that period is impossible due to no fault of employee).

If the person's service was between 31 and 181 days, the person must submit an application for reemployment not later than 14 days after the period of service (or on the first calendar day submission becomes possible if impossible due to no fault of employee).

If the person's service was more than 181 days, the person must submit an application for reemployment not later than 90 days after the period of service.

WHAT IS THE PERSON ENTITLED TO UPON REEMPLOYMENT?

Upon meeting the requirements of reemployment, the employee must be restored to the same position, seniority, status, and benefits (including participation in any training program) he would have enjoyed if he had continued to work for the employer.

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Once reemployed, the employee shall not be discharged without cause within one year of reinstatement of his position. Thus, in contrast with Louisiana's at-will employment relationship, an employee who returns to work from military leave has the equivalent of a one-year employment contract.

ENFORCEMENT

An employer who violates this provision is liable for lost wages or benefits and can be compelled to comply with the above provisions. A court may double this amount if the violation is found to be willful. Additionally, in proceedings brought to redress practices prohibited by the above statutes, courts can award reasonable litigation expenses, including attorneys' fees.

INFORMATION ON FEDERAL AND STATE MILITARY LEAVE LAWS

By: Jennifer L. Anderson

The following resources containing information about federal and Louisiana laws governing the employment and benefits rights of covered service personnel are available through the Internet. As always, you should consider the information available in these resources as general guidance and not as a substitute for legal advice on any particular situation. If you have any question about compliance with applicable laws or the application of these laws to a particular situation, you should seek legal advice.

I. <u>Federal Law: Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301</u>

A. http://www.esgr.org

Employer Support of the Guard and Reserve (ESGR) is an agency within the office of the Assistant Secretary of Defense for Reserve Affairs within the Department of Defense. It was established in 1972 and now offers free ombudsman services to employers and service members to answer questions and informally mediate disputes arising under USERRA. The website contains links to ombudsmen in all 50 states and in D.C., Guam, Puerto Rico, and the Virgin Islands as well as on-line fact sheets and other resources. Download the *Employer Resource Guide* for more information about ESGR and USERRA.

B. http://www.dol.gov/vets/

U.S. Department of Labor's (DOL) Veterans' Employment and Training Service (VETS).

C. http://www.dol.gov/vets/usc/vpl/usc38.htm

DOL web page containing full text of USERRA.

D. http://www.dol.gov/vets/whatsnew/uguide.pdf

DOL's USERRA Resource Guide.

E. http://www.dol.gov/ebsa/faqs/faq 911 2.html

Employee Benefits Security Administration (EBSA, formerly the Pension and Welfare Benefits Administration) Frequently Asked Questions.

F. http://www.dol.gov/dol/topic/hiring/veterans.htm#doltopics

DOL web page with links to various pages containing veterans' and military rights information (including some of above).

G. http://www.va.gov/

U.S. Department of Veterans Affairs home page.

II. Louisiana Law: Military Service Relief Act (MSRA), La. R.S. 29:38, *et seq.* and 29:401, *et seq.*

A. http://www.legis.state.la.us/

Louisiana legislature web page containing full text of MSRA (*see* 29:38, *et seq.* and 29:401, *et seq.*).

B. http://www.ldva.org/benefits.html

Louisiana Department of Veterans Affairs web page containing general information about MSRA.

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WHAT SHOULD YOU DO IF YOU GET A SOCIAL SECURITY ADMINISTRATION NO MATCH LETTER?

By: Charlotte S. Marquez

In 2002 the Social Security Administration (SSA) began issuing Social Security number (SSN) "no match" letters to all employers whose wage reports contain even one SSN or employee name that does not match their records. As a result, over the last year employers have been flooded with no match letters and have had severe difficulty responding to same. Responding to these letters is more difficult than it may seem because in order to respond properly employers must be cognizant of antidiscrimination laws, immigration laws, and federal wage reporting laws. Fortunately, in response to the numerous complaints and panic caused by the policy on no match letters, the SSA has decided to change the policy for 2003. The 2003 no match letters will not include any reference to IRS fines, and letters will be sent only to those employers with more than 10 employees with mismatched information or for whom mismatched employees represented one half of 1% of the W2 forms filed with the SSA. This policy change is expected to reduce the number of no match letters from 900,000 in 2002 to an estimated 130,000 letters in 2003. However, regardless of the reduced number of letters, the SSA reminds employers that it is still important for them to respond promptly.

As the SSA is quick to point out, it is critical that an employee's name and SSN match up with his employer's payroll records and year-end W2 so that the employee's earnings can be recorded to the proper account. Additionally, this information is also important to employers because they can be fined for providing an incorrect SSN and are required to keep accurate employment identification information for purposes of complying with their obligations under the Bureau of Citizenship and Immigration Services I-9 form.

Because of the importance of having the proper Social Security information, under no circumstances should employers simply ignore a Social Security no match letter. That being said, a no match letter is also not in and of itself a cause for an employer to become alarmed. It is simply an identification of a potential problem that should be investigated.

The first thing that the employer should do is review its employment records to determine whether a typographical or transposition error was

made in the documentation submitted to the SSA. If there was an error you will need to fill out a correction form, which can be obtained from the SSA.

If there was no error, the employer should make the employee aware of the no match letter and ask him to verify that the information the company has on file accurately reflects his name and SSN. Oftentimes employers will find that the error was caused because an employee changed her name due to marriage or other personal reasons and failed to inform the company. If there was an error you will need to fill out a correction form as discussed above. You will also need to check the employee's I-9 form to see if he used his Social Security card as his only means of employment identification. If so, check to make sure that information is correct and update the I-9 with the new information if necessary.

If the employee confirms that there is no error and the information the company has on file is correct, ask the employee to contact the local SSA office or call 1-800-772-1213 to determine why the SSA's records do not match what was reported by the employee and employer. Give the employee a reasonable amount of time to resolve the situation and ask the employee to keep the company posted on how the situation is progressing.

Again, you should also check the employee's I-9 to determine if the employee used his Social Security card as the only document to support his employment eligibility. If so, he will need to provide you with alternative I-9 documentation. The Bureau of Citizenship and Immigration Services requires that employers accept any listed I-9 documents as long as the documents appear to be genuine and related to the person presenting it. However, if the document appears questionable because of an irregularity, the employer cannot use it for employment eligibility verification purposes and should ask the individual to produce other acceptable I-9 documentation. In cases where acceptable documentation that appears genuine and to relate to the individual presenting it cannot be produced, the employee should not be considered authorized to work.

Knowingly hiring or continuing to employ unauthorized aliens is a serious offense that is punishable by law. In this context, the term "knowing" includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances that would lead a reasonable person, through the exercise of reasonable care, to know about a certain condition.

Often, in dealing with these situations, it is not necessary to speculate whether the no match letter constitutes constructive knowledge of

illegality because the employer will discover information that identifies that the employee is illegal or the employee will simply confess this to the employer. In either case, the employer can no longer employ the individual and must terminate him. Before making any decision to terminate an employee, it is advisable to contact your employment counsel.

In any event, once the investigation is complete the employer should report back to the SSA on the results obtained for each individual on the no match list. In order to cover all of your bases, if the employee reported that the information that the company submitted was correct and that he cannot find any reason for the discrepancy, ask the SSA to contact the company if any further action is needed.

Also, as with all employment investigations, employers should be sure to treat all employees about whom they have received a no match letter equally without regard to race, religion, national origin, or citizenship.

Finally, in order to prevent being flooded with a barrage of no match letters employers should also consider taking advantage of the SSA verification program when they hire any employee. This program allows employers to immediately verify the accuracy of Social Security numbers.

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