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When Johnny (or Joanna) Comes Marching Home Again – Are You On Top of USERRA?

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USERRA

The Basics

USERRA: The Basics

- Why is USERRA hot right now?
 - More frequent use of reservists
 - President Obama recently outlined his administration's plans to withdraw the 142,000 troops that are presently in Iraq.
 - Under the current plan, combat forces would be withdrawn by August 2010, with all remaining troops gone from Iraq by December 2011.

USERRA: The Basics

- Uniformed Services Employment and Reemployment Rights Act, codified at 38 U.S.C. Sections 4301-4304 *et seq.*
- Enacted in 1994
- Substantially modified the Veterans Reemployment Rights Act

USERRA: The Basics

■ USERRA:

- Prohibits discrimination in hiring or employment based on military commitment or service
- Provides for 5 years (minimum) of excused leave
- Entitles covered employees to the status, pay, and seniority based benefits they would have received had they been continuously employed
- Requires covered employees to be given any other non-seniority rights given to others on “comparable” leaves of absence
- Protects reemployment rights of covered employees

USERRA: The Basics

- Which employers are covered?
 - Applies to all public and private employers regardless of size
 - Applies to U.S. employers doing business in the United States and abroad
 - Applies to foreign employers doing business in the United States

USERRA: The Basics

- Which Employees Are Covered?
 - Active and reserve components of Army, Navy, Air Force and Marines
 - Army National Guard and Air National Guard when engaged under federal authority (including training)
 - Commissioned personnel of the Public Health Service
 - Any other category of persons designated by the President in time of war or emergency
- Can apply to temporary, part-time, probationary, or seasonal employees

USERRA: The Basics

- What type of service is covered?
 - Active duty
 - Active duty for training
 - Inactive duty training
 - Full-time National Guard duty
 - Absence from work for fitness examination
 - Funeral honors duty by National Guard or reserve members
- Service can be voluntary or involuntary

USERRA: The Basics

■ Requests for Military Leave

- When a need for leave arises, employee is required to give advance notice of his or her service
- Notice may be verbal or written
- No particular amount of advance notice is required; the amount of notice need only be “reasonable”
 - 30 days is recommended
 - Notice is excused if impossible or unreasonable under the circumstances or if due to military necessity
- An employer is not entitled to refuse leave based on hardship and cannot require an employee to reschedule leave
- Employee does not have to tell the employer whether he or she intends to seek reemployment

USERRA: The Basics

Hot Issues Related to Coverage:

- USERRA can apply to individuals who have not ever performed military service if the individual:
 - Testified or made a statement in connection with a USERRA proceeding
 - Assisted or participated in a USERRA investigation
 - Is preparing to serve in the uniformed services (e.g., attends a military academy)
- Individuals may be liable as employers
- Successorship liability
- Former employees may also be covered

USERRA: The Basics

Hot Issues Related to Leave:

- Not all National Guard duty is covered
- Employee does not have to begin service immediately following last day of work
- 5 year service limit has many exceptions
- 5 year service limit starts over with each new employer
- If employed by multiple employers, separate 5 year periods apply
- No forfeiture of the right to reemployment even if employee states that he or she does not intend to return to work when his or her service ends

USERRA

Reemployment Rights

USERRA: Reemployment Rights

- In general, the purpose of USERRA's reemployment protection is to promptly restore the employee to the same job he or she would have held if there had been no military service
- "Prompt" reemployment generally means as soon as practicable (generally within two weeks of application)
- Conditions:
 - Absence for service
 - Notice given to employer (where possible)
 - Five year leave limit
 - No disqualifying discharge from service
 - Timely application for reemployment

USERRA: Reemployment Rights

- Timely Application For Reemployment:
 - Less than 31 days of service – report to work on first regularly scheduled work day following service
 - 31–180 days of service – apply within 14 days
 - Greater than 180 days of service – apply within 90 days
 - These limits get extended for individuals hospitalized or rehabilitating from injuries incurred while serving

USERRA: Reemployment Rights

- Which Reemployment Position?
 - Depends on length of service, employee's qualifications, and any disability
 - General Rule – “Escalator Position” – the job the returning service member would have attained with reasonable certainty but for the service
 - Service of 91 days or more – an additional employer option: or job of “like seniority, status, and pay”
 - Disabled returning veteran – Duty to accommodate including reasonable efforts to qualify the employee

USERRA: Reemployment Rights

- Three Exceptions To Reemployment Obligations:
 - Changed circumstances which make reemployment impossible or unreasonable (e.g., position was subject to “RIF”)
 - Employee is not qualified and assisting employee to become qualified would impose an “undue hardship”
 - Position vacated by the employee was for a “brief, nonrecurrent period”

USERRA: Reemployment Rights

Hot Issues Related to Reemployment:

- “Application” for reemployment must be more than a mere inquiry but determined case by case
- Characterization of service issues
- Failure to timely reapply does not mean automatic forfeiture of reemployment and other rights – apply employer policy applicable to other leaves
- Reemployment rights are not terminated by employment with another employer during the application period

USERRA: Reemployment Rights

Hot Issues Related to Reemployment:

- Employer cannot require documentation in connection with an application for reemployment unless the period of service exceeds 30 days and is not allowed to deny or delay reemployment pending return of documentation requested
- Position of “like seniority, status, and pay”
- May be required to terminate a replacement employee in order to return covered employee to work
- Reduction in force issues

USERRA: Other Rights/Benefits



USERRA: Other Rights/Benefits

- USERRA provides for protection against discharge upon return:
 - Elimination of at-will employment for a period after return
 - No discharge except “for cause:”
 - This applies for 1 year from the time of the employee’s return from service, for service of 181 days or more.
 - This applies for 6 months, for service of 31-181 days.

USERRA: Other Rights/Benefits

Health coverage:

- If covered under a health plan, the employee must be allowed to continue coverage for (1) 24 months or (2) the period of service plus the application period following service (whichever is less)
- Employee may be required to pay to continue coverage:
 - If service is less than 31 days – regular employee share
 - Service is 31 days or more – up to 102% of the full premium under the plan (employer share plus employee share plus 2% administrative cost)
- If health plan coverage is terminated at the time of service, it must be reinstated immediately upon reemployment

USERRA: Other Rights/Benefits

Seniority rights:

- Entitled to the seniority and all rights and benefits based on seniority that they would have attained with “reasonable certainty” had they remained continuously employed

Non-seniority rights:

- Entitled to participate in any rights or benefits not based on seniority that are available to employees on comparable, nonmilitary leaves of absence



USERRA: Other Rights/Benefits

Pensions:

- Upon reemployment, employee is treated as not having a break in service
- Employer is required to fund any contributions due to employee's period of service
- If contributions based on employee's rate of pay, the calculation must be made using the rate of pay the employee would have received but for the service

USERRA: Other Rights/Benefits

Leave for Family of Service Members:

- National Defense Authorization Act
 - Signed by President Bush and in effect January 28, 2008
 - Amends Family Medical Leave Act and adds two new types of leave for family members of service members

USERRA: Other Rights/Benefits

- “Qualifying Exigency” Leave:
 - Eligible employees are entitled to up to 12 weeks of leave because of “any qualifying exigency” arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation.
 - Is part of the 12 weeks per eligible employee per year
 - Only for family members in the **National Guard or Reserves**, not the regular Armed Forces
 - “Son or daughter” includes adult children
 - **Form WH-384** – Certification of Qualifying Exigency

USERRA: Other Rights/Benefits

- Regulations define “Qualifying Exigency” leave in eight categories:
 - Short-notice deployment (7 day limit)
 - Military events & related activities
 - Childcare & school activities (including providing care)
 - Financial & legal arrangements
 - Counseling
 - Rest & recuperation (5 day limit)
 - Post-deployment activities (within 90 days after duty)
 - Additional activities related to active duty or call to duty as agreed by employer and employee

USERRA: Other Rights/Benefits

- **“Military Caregiver” Leave:**
 - A spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of **26 workweeks** of leave during a single 12-month period to care for the service member
 - Only available during a **single 12-month period** per service member, per injury
 - Must be counted from date leave begins
 - Requires a **rolling forward year** for this leave type only
 - The employee may not take more than 26 weeks in a single 12-month period

USERRA: Other Rights/Benefits

■ “Military Caregiver” Leave

- A “covered service member” is a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a “serious injury or illness”
- “Serious injury or illness” is defined as an injury or illness incurred that renders a covered service member medically unfit to perform duties of the member’s rank, grade or rating

USERRA: Other Rights/Benefits

- “Military Caregiver” leave
 - “Next of kin”= Nearest blood relative other than the spouse, parent, son or daughter, in the following order of priority:
 - Blood relatives with legal custody
 - Siblings
 - Grandparents
 - Aunts and uncles
 - First cousins
 - Unless the service member has designated in writing a specific blood relative
 - If multiple kin at the same level, all may provide care either consecutively or simultaneously

USERRA: Other Rights/Benefits

- The new leave categories
 - Spouses employed by the same employer may be required to share the combined 26 weeks
 - May be taken intermittently or on a reduced schedule
 - Employee may be temporarily transferred to a position that better accommodates the schedule
 - Same substitution of pay provisions as other FMLA
 - Generally, the same notice provisions

USERRA: Other Rights/Benefits

- Employers should update policies to:
 - Add explanation of both new military family leaves
 - Add “Qualifying Exigency” (and eight leave categories) as an additional type of FMLA for which employees may take 12 weeks of leave
 - Add definition of “covered service member” and note single rolling forward 26-week leave entitlement



USERRA: Other Rights/Benefits

- Employers should modify procedures to:
 - Identify both new military family leaves in Request for FMLA Leave Application
 - Include both leaves in Notice of Eligibility and Rights & Responsibilities Form
 - Use revised DOL forms (2009) (or equivalent)
 - WH-384 “Certification of Qualifying Exigency for Military Family Leave” <http://www.dol.gov/esa/whd/forms/WH-384.pdf>
 - WH-385 “Certification for Serious Injury or Illness of Covered Service Member”
<http://www.dol.gov/esa/whd/forms/WH-385.pdf>

USERRA: Other Rights/Benefits

Hot Issues Related to Other Rights/Benefits:

- Employment status while on leave
- Benefits accrual during leave
- Bonuses

USERRA: Legal Issues



USERRA: Legal Issues

- The United States Department of Justice, which is responsible for enforcing the provisions of USERRA against employers, has stepped up its enforcement of the statute by filing a record number of USERRA suits in 2008, and four already in 2009.

USERRA: Legal Issues

- No statute of limitations
- Remedies:
 - Injunctive Relief
 - Lost wages and benefits
 - Liquidated Damages (2x for willful violations)
 - Attorneys Fees

USERRA: Legal Issues

- In general, the legal analysis under USERRA is more favorable to the employee than in other types of discrimination cases
 - Other discrimination cases: Employee must show the protected category was *the* reason for the adverse action
 - USERRA discrimination cases: Employer must show that the protected category (*i.e.*, military service) was not even *a* reason (motivating factor) for the adverse action

USERRA: Legal Issues

- Recent Litigation:
 - *Serricchio v. Wachovia Securities, LLC* (D. Conn. March 19, 2009)
 - *Middleton v. City of Sherwood* (D. Oregon, May 18, 2009)

QUESTIONS?

