



Weekly Employment Brief

September 17, 2001

Kirsten Heaton

Contributor 650.335.7956

Trey Wichmann

Contributor 415.875.2418

Allen Kato

Co-Editor 415.875.2464

FAQs Regarding Military Leaves of Absence

In the wake of the September 11, 2001 terrorist attack on the United States, military leave has become an issue for employers whose employees either have enlisted in the armed services or are military reservists subject to a call to active duty. The following Frequently Asked Questions are intended to assist employers in understanding the rights of these employees and the employer's obligations to protect them.

Q: Are there laws which govern military leave?

A: Yes, both state and federal laws provide for military leave. The most widely applicable law is the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA").

Q: Are all employers governed by USERRA?

A: Yes. The USERRA applies to all American employers, regardless of size, whether or not they are in the United States.¹

Q: What does USERRA protect?

A: USERRA prohibits employers from discriminating against, or retaliating against an individual because of his or her affiliation with a military service organization, and protects that individual's right to reinstatement and to benefits during the period of leave.

Q: Could you give me an example of the type of "discrimination" prohibited by the USERRA?

A: The USERRA makes it unlawful to, for example, refuse to hire an employee because he or she serves

in the military reserves. It is also unlawful to terminate a reservist employee's employment because he or she is called to active duty. Similarly, an employer cannot terminate an employee because he or she enlists in the military.

Q: How long of a leave can an employee take?

A: The USERRA generally allows employees to take up to five years of leave for military service.

Q: Do I have to pay my employees while they are on military leave?

A: No. The USERRA does not require employers to compensate employees during absences due to military service. Many employers, however, choose to pay their employees the difference between the employee's armed services' compensation and the compensation they would have received from the employer. Others continue to pay their employees' wages in full for at least some period of time.

Q: Do I have to continue to provide benefits while my employee is on leave?

A: It depends. The USERRA provides that employees on military leave are entitled to the same benefits provided to employees who are on other forms of leave. For example, if employers typically provide continued life or disability insurance benefits to employees on unpaid leave, these benefits must be provided to those employees who are on military leave.

Q: What about health insurance?

A: Employers must provide the option of COBRA-like

medical coverage for on-leave employees (and their families). Coverage must be continued for the lesser of the eighteen-month period beginning on the date of the leave, or the day after the date the employee fails to apply to return to work.

Q: Is an employee's seniority affected while he or she is on leave?

A: Employees returning from military service are entitled to the seniority and other rights and benefits based on seniority that they would have been entitled to had they not taken military leave. They are also entitled to non-seniority based rights and benefits conferred by any contract, practice, policy or agreement that was in place at the beginning of the leave or implemented during the leave.

Q: Do I have to reinstate the employee following the military service?

A: Yes. The USERRA provides that an employee is entitled to reinstatement following his or her term of military service. After completing military service, the employee has a certain amount of time (which varies depending on the length of the employee's military service, and which may be extended for up to two years if the employee is injured during the course of military service) to notify the employer that he or she is ready to return to work. The scope of the right to reinstatement is largely defined by the length of the absence due to military service:

Q: Once I reinstate the employee, can he or she be terminated "at-will?"

A: No. The USERRA provides that any reinstated employee may only be discharged for cause during a specified period of time after they return to work. As

with the right to reinstatement itself, the particular period of time is dependent on the duration of the leave.

Q: Who qualifies for coverage?

A: To qualify for coverage under USERRA, the employee must be absent from work because of "service in the uniformed services." "Uniformed services" are broadly defined to include all branches of the military, including the Army, Navy, Air Force, Marines, Coast Guard, Army National Guard and Air National Guard, the Public Health Service's commissioned corps, and any other category of persons designated as such by the President in time of war or national emergency.

Q: Do I get any notice?

A: Yes, assuming notice is possible. To be entitled to USERRA's benefits, the employee must provide advance verbal or written notice (typically consisting of a copy of the employee's military orders, training notice or induction information). This notice obligation is waived, however, if military necessity precludes it.

Q: What are the penalties for violating the USERRA?

A: Both the federal government and individual employees can sue to enforce USERRA leave provisions. Possible penalties for USERRA violations include lost wages and benefits, liquidated damages (in the case of willful violations), attorneys' fees, expert witness fees, and other litigation costs.

©2001 Fenwick & West LLP. All rights reserved.

¹ In 1989, USERRA was amended to cover not only workers resident in the United States, but also U.S. citizens and permanent residents working for U.S. controlled companies in foreign countries.