

Employer's Obligations

CLAIMS BRIEF



Issue No. 22

October 2001

Employer Obligations to Reservists

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In the wake of the recent attacks on our country, it is estimated that 50,000 members of the armed forces reserves will be called to duty. It is, therefore, an appropriate time to review the obligations of employers required by the Uniformed Services Employment and Reemployment Rights Act ("USERRA), 38 U.S.C.S. §4301 et. seq. USERRA applies to all employers, both public and private, regardless of size. Every employer must permit a military leave of absence to any full or part-time non-temporary employee who voluntarily or involuntarily enters active duty or training in the Army, Navy, Marines, Air Force, National Guard, Air National Guard, reserves, the commissioned corps of the Public Health Service, and any other category designated by the President in time of war or national emergency. USERRA requires employers to grant a leave of absence for up to a maximum of five years and gives an employee reemployment rights and employee benefit protections.

Reemployment Rights

At the conclusion of the military leave of absence, an employer is obligated to restore the reservist to his or her former position or to a "position of like seniority, status, and pay." For instance, if an employee would have received a promotion during the leave period, the reservist is entitled to that promotion as long as he or she can perform the essential functions of the position. Additionally, the employer must make reasonable training and/or accommodation efforts to make the reservist qualified for the position. If the veteran cannot become qualified for the promotional position, the employer must reinstate the employee to the pre-leave position. And, if the individual is not qualified to perform the duties of the pre-leave position by reason of disability sustained during the service but is qualified to perform duties of any other position, an employer must offer employment. Following reinstatement, an employee who is on military leave for more than 180 days cannot be discharged, without cause, for twelve months after his or her reinstatement.

Job reinstatement is not required where it is impossible, unreasonable or creates an undue



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hardship on the employer. However, the employer will bear the burden of proving undue hardship. In the past, hardship has been allowed for situations involving layoffs or other financial hardships only.

Eligibility

- To become eligible for reemployment rights, a reservist must notify the employer of the call to duty. The reservist cannot simply fail to report to work. In addition, the employee must seek reinstatement within a specified time period.
- If the period of military service is less than 31 days, the individual generally must report to the employer for reemployment on the first day following completion of the military service.
- If the period of military service is more than 30 days but less than 181 days, the individual must request reemployment no later than 14 days following the completion of military service.
- If the period of military service is over 180 days, the individual must submit an application for reemployment not later than 90 days after completion of military service.
- When the reservist applies for reemployment, he or she must present documentation verifying the timeliness of the application and an honorable discharge from the uniformed services.

Veterans who are dishonorably discharged are not entitled to the reemployment protections of USERRA.

Wages

An employer is not required to continue salary or wages for military leave personnel while they are on active duty, nor is an employer required to supplement military pay. However, an employer may do so.

Health Benefits

If the military leave of absence was less than 31 days, the employer must continue to provide health benefits during the leave at the same cost paid by the employee prior to the military leave. After 31 days of leave, employees are entitled to continue health benefits coverage under COBRA for up to 18 months. Even if the employer has less than 20 employees and is generally exempt from COBRA, it must offer continued health coverage for reservists at a cost of not more than 102% of the premium.

If the employee is reinstated, the employer may not impose any waiting period or exclusions in the health plan coverage for the reservist and his or her family, even if the employee terminated the coverage during the military leave. The employer is not required, however, to cover military service related illness or injuries.

Pension Benefits

Employers must offer re-employed reservists pension benefits as if no break in employment during the time of military service occurred. The period of military leave is treated as continuous service and qualifies as years of employment. Furthermore, the reservist is entitled to all pension benefits, such as matching 401 contributions. During the military leave the pension plan may, but is not required to, suspend the repayment of any loan made to the employee.

Substitute Employees

An employer is free to hire other individuals to perform the reservist's duties during the military leave period. However, substitute employees should be informed that an employee on active military duty has a right to be reinstated in the substitute's position. An employer should require a substitute employee to sign a document, which indicates their understanding that they are working on a temporary basis and can be removed from their position by a reemployed reservist.

This article states the minimum requirements of USERRA although some employers provide more extensive benefits. Before making the decision to offer benefits, which surpass USERRA requirements, an employer should review all benefit plan contracts, including health insurance, life insurance, disability, and pension plans to determine if a plan contains military leave provisions. Each employer should have a detailed personnel policy that clearly states the employer's military leave of absence policy. Supervisors should know and understand the military leave policy to insure that the employer follows the law and applies the policy in a fair and non-discriminatory manner.

Sources:

38 U.S.C.S. §4301 et. seq.

Miles & Stockbridge, P.C., News Brief, Handling Requests for Military Leave (No. 01-15 September 2001)

Miller Canfield Online, Employers' Obligations to Reservists Under Federal Law, September 20, 2001.

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