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USERRA: When Employees Go on Active Duty, Employers Have Duties of Their Own *Upper Valley Business Journal*

When employees return from active military duty, they have reemployment rights that may surprise many employers. With continuing conflicts in Iraq and Afghanistan, and National Guard and Reserve units being activated, it's important for employers to understand and honor their obligations to employees in uniform.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law intended to give returning veterans rights to reemployment in their former jobs and protection against discrimination because of their service. In enacting the law, Congress specifically stated that it wished to encourage noncareer service in the military by reducing or eliminating the disadvantages to civilian employment that come with it, and to minimize the disruption to the civilian lives of people performing active duty service.

Regardless of an employer's size, and regardless of whether it is a public or private employer, USERRA applies to it. The "uniformed services" covered include the Army, Navy, Marine Corps, Air Force, Coast Guard, National Guard, Reserves - and even the Public Health Service Commissioned Corps. The President has the power to designate "other categories of persons" as protected by USERRA in time of war or national emergency. There are narrow exceptions from USERRA's coverage for temporary or short-term employees, but they are likely to be strictly construed.

In order to be protected by USERRA, an employee has three obligations. First, the employee (or an officer of the service in which the employee serves) must give the employer advance notice that the employee will be absent from the job by reason of military service. There is no minimum advance period of notice, and the notice can be written or oral. Moreover, even the notice requirement may be dispensed with if giving it "is precluded by military necessity" or otherwise impossible or unreasonable. To be protected by USERRA, an employee does not need to be in the military when employment begins. An employee who decides to enlist has the same protections as a member of the National Guard or Reserves who is called up for active duty.

Second, the cumulative length of the employee's absence from the employer for military service may not exceed 5 years. This 5-year period can, however, be extended by circumstances specified in the law, such as a soldier's inability to obtain release orders prior to the expiration of the 5-year period.

Third, the employee must report back for reemployment within time limits specified in the law. For example, an employee who has been on active duty for more than 180 days must apply for reemployment within 90 days after completion of the period of service.

When an employee returns from active duty and complies with the reemployment application requirements, the employer is obligated to treat the employee as if he or she had never been absent. The employer must put the employee in the position the employee **would have had** if he or she had never left. If the employee is not qualified for that position, the employer must first try to train the employee to do that job. Only if the employee is not qualified to do that more advanced job after reasonable efforts to qualify him or her is the employer allowed to



return the employee to the job he or she actually held before leaving for military duty.

What if - as will usually be the case - someone else is doing the job the returning veteran is supposed to be placed in? While USERRA provides that an employer is not required to reemploy someone if the employer's circumstances have so changed as to make reemployment impossible or unreasonable, the mere fact that the position to which the veteran is returning is held by someone else is not, by itself, a sufficient basis to deny the veteran his or her legally mandated job. Changed circumstances is an extremely narrow defense for failing to reinstate a veteran and rarely will be available to the employer.

A veteran's reemployment rights include the right to the seniority and other benefits the employee **would have had** if there had been no break in employment for military service. As to pension, the employer is obligated to fund the employee's pension as if he or she had continued to be employed during the period of military service.

Another section of USERRA provides that an employee may not be discharged except for cause for 6 months if the employee has been on active duty for less than 6 months, and for a full year if the employee served for more than 6 months.

USERRA's nondiscrimination protections are broad. They don't just apply to actual military service by current employees; they also apply to the possibility of military service in the future by current employees or even applicants. An employer may not discriminate in hiring, retention, promotion, or any employment benefit because someone is in the military, was in the military, or has applied to be in the military.

The consequences of failing to comply with USERRA can be serious for an employer. An employee can seek and obtain assistance from the United States Department of Labor and the Justice Department, or may bring suit directly against a private employer in federal court. (Different rules apply for state and federal employers.) A successful complainant in a suit under USERRA may obtain an order directing the employer to comply, damages for lost wages and benefits, and costs and attorney's fees. In cases of willful violations of an employee's rights, the damages award may be doubled.

This is not a time for employers to guess about their obligations to returning service people. USERRA's requirements are very specific, compliance obligations can have significant impact on a business, and the law provides very few defenses for noncompliance.