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Client Advisory

EMPLOYER RIGHTS AND OBLIGATIONS CONCERNING MILITARY LEAVE

In light of our Country's increasing military engagements, many employers are reviewing their leave policies and reacquainting themselves with the legal obligations surrounding employee requests for military leave. This update will touch upon the most important considerations involved in dealing with employee requests for military leave.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), employers must grant employees leave for military service. In general, USERRA provides employees who take leave for military service with reemployment rights provided that: advance notice is given, the cumulative total of the leave taken during the employment relationship does not exceed five years and, at the conclusion of service, the employee either reports for duty or submits an application for reemployment.

There are, however, a number of exceptions to these requirements. For example, advance notice of the need for leave is not required if it would be unreasonable, impossible, or prevented by military necessity. And, the length of the leave may be extended due to training and involuntary duty requirements, including service due to war or other national emergency. In addition, in certain circumstances employers are not required to offer reemployment if to do so would impose an undue hardship. The burden of proving undue hardship in such cases is upon the employer.

Under USERRA, leave may be taken for voluntary or involuntary duty including: active duty and active duty for training; initial active duty for training; inactive duty training; full-time National Guard duty; and, absence from work for an examination to determine a person's fitness for any type of duty.

Generally speaking, an employee who has completed military service and been discharged under honorable conditions must be reemployed in the position the employee would have held if continuously employed. If, however, the employee has served 91 days or more, employers have the option to offer a job equivalent in seniority, status and pay to the job the employee would have held if continuously employed.

Persons who take leave and return are entitled to the same seniority and benefits they had on the date the leave commenced, plus the additional seniority and rights to benefits they would have attained if they remained continuously employed. Employees on military leave are considered to be on furlough or leave of absence, and are entitled to all rights and benefits that are provided by the employer to employees on this status, whether by contract, policy or practice.

Most of the rights and issues surrounding military leave arise when the active duty service is concluded and employees look to return to their former jobs. Employers should review their policies now to assure that they comply with the current statutory requirements and are a ready reference for managers confronted with requests for reinstatement.

If you have any questions regarding this advisory, contact Mark Ventola, a member of Sheehan Phinney Bass + Green's Labor, Employment, and Employee Benefits Group at 617-897-5630 or via e-mail at mventola@sheehan.com.

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