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## **Military Leave Rights**

Insofar as current events appear to suggest more of our members will be assigned to military duty in the near future, what follows is a brief description of the rights of employees when they go away and return from military duty to their jobs.

You might want to distribute this to your organizers and business representatives so they can help members as these issues arise.

### **Employee's Responsibilities**

An employee asserting rights under USERRA is subject to the following requirements:

1. If possible, the employee, or an officer of the uniformed services, must provide advance written or verbal notice of such service to the employer;
2. The employee must have had no more than 5 years of total absences from the employer for all military service; and
3. The employee must report to the employer, or submit an application for reemployment, after termination of his or her military service as follows:
  - A. If the military leave period is less than 31 days, the employee must report to work by the beginning of the first full regularly scheduled work period on the first calendar day following completion of the service and the expiration of eight hours after a time for the safe transportation back to the individual's residence;

- B. If the military leave period is between 31 and 180 days, the employee must submit an application to the employer within 14 days following completion of such service; or
- C. If the military leave period is in excess of 180 days, the employee must submit an application for reemployment within 90 days after completion of such service.

### **Benefits During Military Leave**

The employer must consider the employee to be on a furlough or leave of absence during the military leave. This means that the employee is entitled to all rights and benefits, not determined by seniority, that are generally provided to employees on an unpaid leave of absence. The employer must permit the employee to use accrued vacation pay, annual leave, or other similar accrued pay during the military leave, if requested. On the other hand, the employer cannot require the employee to use such amounts during the military leave.

The employee is entitled to elect to continue health coverage during military leave for up to 18 months. Note that the commencement of the military leave is also a COBRA qualifying event. Thus, the continued health coverage must be available for the entire COBRA period, even if the employee does not return to work at the end of the military leave.

If the absence for military service lasts less than 31 days, the employee can only be required to pay the usual employee share of the cost of the continued health coverage. If the military leave lasts more than 30 days, the employer may require the employee to pay up to 102 percent of the cost associated with continued coverage (i.e., the usual COBRA premium). The IRS has ruled that the health care coverage that becomes available during a military leave (called CHAMPUS) is not “group health coverage,” and therefore does not cut off the employee’s COBRA rights under the employer’s health plan.

If the employee works for a public employer and has been employed for over a year, the employee is entitled to 30 calendar days pay during military leave.

In some cases, the employee will also have rights to continue other benefits provided by the employer during a military leave.

### **Reemployment Rights**

Upon termination of the military leave, the employee is generally entitled to reemployment in the position he or she would have been in (or attained) had no military leave been taken. The specific reemployment rights under USERRA are as follows:

1. If the employee was absent from employment for less than 90 days, the employer must return the employee to:

- A. The position the employee would have attained if he or she had continued in employment and had not been absent for military service, if he or she can perform the job duties; or
  - B. If the employee is not qualified to perform the duties in the position in 1(A) above after the employer has made reasonable efforts to qualify the employee, the employer must reinstate the employee to the position the employee was employed in on the date he or she began military service, if he or she can perform the job duties of that position.
2. If the employee was absent from employment for more than 90 days, the employer must return the employee to:
  - A. The position the employee would have been employed in if his or her employment had not been interrupted by military leave service, or in a position of like seniority, status and pay, if he or she can perform those job duties; or
  - B. If the employee is not qualified to perform the duties in the position in 2(A) above after the employer has made reasonable efforts to qualify the employee, the employer must reinstate the employee to the position the employee was employed in on the date he or she began military service, or in a position of like seniority, status and pay, if he or she can perform the job duties of that position.
3. If the employee suffers from a disability caused or aggravated by military service, and is not qualified to perform his or her job duties of the position described 1(A) above, the employer must return the employee to:
  - A. A position of equivalent seniority, status and pay to a position described in 1(A) above; or
  - B. If the position in 3(A) is not possible, a position that is the nearest approximation to that in 3(A).

### **Exceptions to Reemployment Responsibilities**

The employer is not required to reemploy the employee if such reemployment is impossible or unreasonable, such as where a reduction in force occurred that would have included the employee or where the employer would have to create a useless job in order to reemploy the employee. However, an employee's position is not unavailable simply because it is occupied by another employee.

The employer is also relieved of reemployment responsibilities where the employee has become disabled during leave and reemployment would cause the employer undue hardship. Finally, the employer is not required to reemploy an employee who had been employed in a temporary position.

## **Job Protection Upon Reemployment**

Once an employee has been returned to employment, the employer may not terminate him or her, except for cause, (1) within one year after the date of reemployment if the military leave period was more than 180 days, or (2) within 180 days of reemployment if the military leave period was between 30 and 180 days.

## **Seniority and Benefits Upon Reemployment**

An employee returning from military leave is entitled to the seniority, and other rights and benefits determined by seniority, that he or she would have had if employment had been continuous. For example, if the employer's policy provides three weeks of paid vacation to employees with five years of service on January 1st, the period of military leave must be treated as service for purposes of calculating whether the employee meets the five year requirement. On the other hand, where benefits such as vacation or sick pay accrue based on actual service rather than seniority (e.g., where the employee accrues two days of vacation for each month worked), the rehired employee does not need to be credited with the amounts that would have accrued during the military leave, unless the employer grants such credits to other employees returning from a leave of absence.

For benefits, including retirement benefits, that are determined based on the employee's compensation, the employee must be treated as having earned compensation during the military leave as follows: (1) if the employee was paid based on a fixed rate, the deemed compensation is the compensation the employee would have received with reasonable certainty had his or her employment been continuous; (2) if the employee was not paid based on a fixed rate, the employee is treated as having earned his or her average rate of compensation during the 12 month period preceding the military leave.

## **Health and Other Welfare Benefits Upon Reemployment**

If the employee's health benefits terminated during the military leave, upon reemployment, no waiting period or exclusions may be imposed on the employee (or on any dependents covered under the employer's plan) by virtue of that absence. Any other benefits in which the employee or dependents participated at the start of the military leave must also be reinstated upon reemployment. The employee is also entitled to participate in any benefit programs that began during the military leave for which the employee would reasonably have been eligible if the leave had not occurred.

## **Retirement Benefits Upon Reemployment**

Upon reemployment, the period of military service must be treated as if it had been service with the employer for purposes of determining vesting and accrual of benefits under the employer's retirement plans, and cannot be treated as a break in service for purposes of such plans. For example, a defined benefit pension plan must treat the employee as accruing additional pension credits during the leave, using the deemed compensation rules described above to determine the amount of that accrual. Similarly, the employer must make any employer money purchase pension or profit sharing contributions that the employee would have received while on military leave.

In the case of plans requiring elective deferrals (such as 401(k) plans and 403(b) programs), the employee must be given the opportunity to make up any deferrals that were missed during the military leave. The deadline for the employee to make those contributions is the earlier of (i) three times the period of military service, or (ii) five years. If the employee makes the make-up contribution, the employer must contribute any matching contributions that would have been based on those elective deferrals. Make-up contributions made in a subsequent plan year are not subject to any of the limits that apply in the year they are received. The employee is not required to be credited with investment earnings on the make-up contributions, and is not entitled to share in any forfeitures that were reallocated during the military leave.

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