

**THE UNIFORMED SERVICES EMPLOYMENT
AND REEMPLOYMENT RIGHTS ACT
AND ITS' COURT HISTORY**

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ABSTRACT

The Uniformed Services Employment and Reemployment Rights Act (USERRA) and its court interpretations have received little academic scrutiny. Given the hundreds of thousands of National Guards and reservists that are being mobilized and demobilized in a conflict that has no end in sight, it is worthy of review. This article reviews the major provisions of the USERRA and shows their application through an analysis of more than forty related court cases. We close with a set of guiding principles for managers. Essentially, we argue that there are serious gaps in the USERRA that need to be addressed at the national level, including differentials between company and military pay, the payment of premiums on health-care plans while on military leave, and performance-related types of pay. Because of these gaps, many potential military personnel could be rethinking their commitments to the military.

Shortly after that horrific late summer day in 2001, Congress authorized the president “to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 [1, p. 1A].” Thus began the

initial call-up of 50,000 members of the National Guard and the Reserve to conduct a war on terror that still has no end in sight [2]. As of June 2004, more than 387,000 citizen soldiers had been called to duty by their homeland to serve in that war, and nearly 233,000 of those soldiers had been demobilized, with about 155,000 remaining on active duty in various capacities and locations around the globe [3].

Unlike Desert Storm, where reservists were activated for months rather than years, the war on terror has necessitated much longer periods of service. Because of the nature of the conflict, these units can be and continue to be mobilized and demobilized repeatedly. In fact, President George W. Bush retains the authority under presidential order to activate up to one million reservists and guard members for up to two years [4]. These potentially long terms of service and the uncertainty associated with them, coupled with the possibility of multiple call-ups, places additional stresses and strains on reservists and further disrupts the lives of their families and the operations of their employers [4].

Unfortunately, many returning reservists and guard members are struggling to return to or keep the jobs they left behind [5]. “Nearly 3,200 job-related complaints have been filed with the U.S. Labor Department by returning Guard and Reserve soldiers since September 11, 2001 [5, p. B3].” Damages totaling nearly \$2.7 million have been collected by the Labor Department since October 2002 on behalf of those filing charges against their employers for Uniformed Services Employment and Reemployment Rights Act (USERRA) violations [5, p. B3].

The USERRA of 1994 is the current federal law that protects citizen soldiers’ jobs while they are serving in the armed forces during times of national crisis [7]. A number of articles have outlined the major provisions of the USERRA, but they failed to discuss important nuances of the act. Comparatively few of them have reviewed the respective case law and provided guiding principles to employers. Moreover, this often-overlooked statute receives no attention in major employment law texts [8, 9, 10]. The purpose of this article is to provide employers with a review of the intricacies of the major provisions of the USERRA and its attendant court interpretations. To that end, a LEXIS NEXUS search yielded more than forty court cases. This article reviews these cases and the related provisions of the USERRA.

BACKGROUND

For more than sixty years, reemployment rights have existed to protect members of the United States military from discrimination. The first reemployment legislation enacted by Congress was passed in anticipation of the United States’ involvement in World War II. With the need for induction and training of large numbers of civilians approaching, the Selective Training and Service Act of 1940 allowed members of the armed services to return to their civilian jobs after service even if war did not break out [11]. The Supreme Court upheld the law and

established the bedrock escalator principle that is enforced today—that employers are to treat each veteran:

[A]s having been on furlough or leave of absence during the period of his service to his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war [12, at 283].

This law also protected veterans from termination without cause for one year after job restoration. This does not apply to layoff situations. This protection is contingent upon a person's length of military service and provides one year's protection, for service of more than 180 days, and protection for 180 days if the period of service was more than 30 days but less than 181 days [7, § 4316].

Following World War II, Congress enacted the Military Selective Service Act (MSSA) of 1948 to support the draft-based policies used during much of the Cold War [13]. The MSSA also included specific provisions prohibiting discrimination against individuals who had served in the military. Probationary employees were included under this act [14], as were those temporary employees who had a reasonable expectation that the job would last indefinitely [15]. These coverages continue under the USERRA [7, §4312].

The Veterans Benefit Act of 1958 was the first federal law to place restrictions on personnel policies in terms of termination, promotions, probationary periods, payment of wages, leaves of absence, and vacation policies [16]. During most of the Cold War and in the Vietnam conflict, draftees generally served two or three year tours of duty and then returned to civilian life. Given the unpopular nature of the Vietnam war, these were important provisions.

In 1974, Congress enacted the Vietnam Era Veterans Readjustment Assistance Act that required employers with federal contracts in excess of \$10,000 to take affirmative action with respect to veterans of the Vietnam era conflict [9]. The employment protection provided by this act was vital to the government's efforts as it moved from a conscript-based military to a voluntary one [11].

Before the current legislation was passed, the federal courts had already established the "escalator principle" [12], which requires returning veterans to receive general pay increases granted the workforce, such as group increases, cost-of-living, or longevity increases [17, 18]. This continues under the USERRA. The Supreme Court's landmark ruling in *Fishgold v. Sullivan Drydock and Repair Corp.* [12] has also been interpreted to apply to any promotions a veteran would have been entitled to receive while away on active duty, as long as he or she would have been qualified, even if it requires "bumping" a nonveteran [19, 20], as long as it is reasonably certain that the veteran would have been granted the promotion if not for military leave [19, 21].

Protection extends to other benefits as well. For example, veterans are entitled to retroactive vacation benefits while in service, and the time spent in service is to be used to determine vacation and retirement eligibility [19]. Any bonuses such as holiday pay must be paid even if the person is away on active duty for as long as two years [22]. In a case that arose under a collective bargaining agreement, employees had to work the day before and the day after a holiday to receive the holiday as paid. The Supreme Court found this to be a violation of military leave law (in effect at the time) because it denied a benefit to those reservists that were on military leave [22]. Reservists are also entitled to any overtime opportunities missed while on active duty [23, *cert. denied* 24]. For example, in *Carney v. Cummins Engine Company*, a collective bargaining agreement allowed workers to make up overtime opportunities that were missed unless they were transferred to another department. Upon transfer to another department, one reservist was not allowed to make up eight hours that he had missed due to military leave. The Seventh Circuit held that the reservist's economic well-being had been disrupted by the company because of his military leave and was therefore illegal [23].

In the mid 1980s, a task force of several government agencies labored to rewrite the older laws to provide additional coverage and to simplify compliance [25]. Following the 1990 call-up of reservists for the Gulf War, new emphasis was placed on the rewrite because the war magnified gaps in the law, such as losing medical protection while on active duty. Another impetus for the legal overhaul was the desire by Congress to overturn two Supreme Court decisions. In *King v. St. Vincent's Hospital*, the Court unanimously held that there was no limit on the length of military service that was entitled to civilian reemployment protection [26], and in *Monroe v. Standard Oil Co.*, the Court ruled that the Vietnam Era Veteran's Readjustment Assistance Act of 1974 "was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, *motivated solely by reserve status* [27, at 556 emphasis added]." The culmination of this effort led to the construction and passage of the USERRA in 1994.

MAJOR PROVISIONS AND CASE LAW OF USERRA

Coverages

All public and private employers must comply with the requirements of the act. The main thrust of the USERRA, as with earlier legalization, is to provide reemployment rights to citizens called to active duty in the uniformed services either voluntarily or involuntarily [7, §4303] and to prohibit discrimination against them [6]. Uniformed services are defined as the armed forces, Army National Guard, Air National Guard, commissioned corps of the Public Health Service, and any other category of persons designated by the president in time of war or

national emergency [7, §4303]. These protections do not cover those who received a dishonorable or bad conduct discharge, any separation for other than honorable conditions, or anyone who was dismissed from the uniformed services pursuant to military regulations [7, §4304].

This law limits coverage to those who are absent from a position of employment by reason of military service for five cumulative years. However, a number of exemptions extend the five-year limitations. These include: participation in the Navy's nuclear power program, expiring service dates while at sea, critical mission requirements, the requirement to complete an initial period of obligated service, inability to attain orders releasing the person from service through no fault of his/her own, and because of the extended length of the war or a national emergency declared by the president or Congress (as in the war on terror) [6; 7, §4312].

The USERRA is not intended to cover career service persons, and, given the number and types of exceptions to the five-year limit permitted under the act, past federal case law concerning this issue is still relevant. In *Woodman v. Office of Personnel Management*, a civilian National Guard Technician voluntarily accepted an appointment to a two-year tour of duty with the Active Guard Reserve [28]. At the end of that period, he agreed to an extension of his tour of duty, and later, even more extensions of service. When he finally left the active military and requested to return to his old position, he was denied reemployment. The Appeals Court for the Federal Circuit ultimately affirmed the district court's judgment against the returning veteran, noting that "he served continuously and repeatedly for fourteen years as a full-time member of the Active Guard Reserve [28, at 1377]." This kind of absence exceeds the requirements of the act.

Similarly, a Minneapolis police officer resigned his position "to accept several challenging assignments in the military [29, at 723]." He even withdrew his pension contributions. After many years and multiple tours of duty, he requested to return to his prior position. This request was denied. In ruling for the defendant, the Eighth Circuit of Appeals found that providing reemployment rights to career soldiers was not Congress's intent and that it would be an unfair burden to require an employer to hold a job open for such a long period of time [29]. Moreover, by his actions at the time of resignation (in effect abandoning his job) the court decided that he had waived any rights he might have had to reemployment [29].

Waiver of Reemployment Rights

While not a specific provision in the USERRA, the federal judiciary does allow protected individuals to waive their reemployment rights. However, generally "at a minimum the waiver of re-employment rights under the USERRA must be clearly expressed to be effective . . . a waiver of statutory rights requires at least an awareness of the statutory right and an expressed intent to waive the right [30, at 1131]." In *Wrigglesworth vs. Ellis Brumbaugh*, a patrol officer went on

active duty with the Michigan National Guard and at the request of his employer signed a letter of resignation [30]. However, he expressed interest in returning to his job after completing his active duty assignment. He did request a three-year extension of his Guard assignment but continued to pay his union dues. Upon his return, the union argued that he had lost all seniority and reemployment rights under the collective bargaining agreement because he had resigned and that he could be rehired only as an entry-level deputy. In ruling for the patrol officer, the court found that there was no expression of waiving his reemployment rights and that he had signed a letter of resignation only at the request of management, which indicated that this was being done for administrative purposes and not because he did not intend to return to his job [30].

Collective Bargaining Agreements

Courts generally oppose efforts to deny reemployment rights to a returning veteran because of provisions in collective bargaining agreements. They often view such action as “simply a subterfuge to pretend that the collective bargaining agreement is the legitimate, nondiscriminatory reason for not reemploying a returning veteran [30, at 1136].” In *Wrigglesworth* [30], the court went on to state that “the Supreme Court’s decision in *Fishgold* [12] made it clear that an employment decision denying reemployment rights cannot be cloaked in the language of a collective bargaining agreement [30, at 1136].” Even bargaining agreements that deny holiday pay and overtime work established by certain work rules to workers on military leave have been declared illegal [23, 31].

Notice Requirements

To be eligible for reemployment, anyone entering the uniformed services must provide advance written or verbal notice of such service to his/her employer, unless giving such notice is precluded by military necessity or in cases where providing such notice would be impossible or unreasonable. However, only the secretary of defense may deem when notice is *not* required [7, §4312].

Under most circumstances written notice may be required by the employer. Notice is also demanded of those returning veterans wishing to exercise their reemployment rights. Individuals who serve less than thirty-one days must report to the employer not later than the beginning of the first, full, regularly scheduled work period on the first calendar day following completion of the service after allowing for safe travel time plus eight hours [7, §4312]. People who are unable to comply through no fault of their own, as might apply in the case of an accident, must report to work as soon as possible after the time previously delineated [7, §4312]. If the person whose period of service in the uniformed service was for more than thirty days but less than 181 days, an application for reemployment must be submitted to the employer not later than fourteen days after completion of service [7, §4312]. If the individual is unable to do so through no fault of his/her

own, the person must make application the first full calendar day when submission of such application becomes possible [7, §4312]. Uniformed service members who are on active duty for more than 180 days must submit a reemployment application to their employer not later than ninety days after the completion of service [7, §4312].

These time limits are waived for persons who are hospitalized or convalescing from service-connected illnesses or injuries as long as they make a reemployment application as soon as they have recovered. Recovery time is limited to two years, unless reemployment application and reporting is prevented by circumstances beyond their control, such as an accident [7, §4312].

Reemployment may be denied when returning veterans do not make proper notice, but employers may not delay or deny a reemployment obligation by demanding documentation that does not then exist or is not readily available [7, §4312]. But neither the USERRA nor its predecessors define what it means to submit an application for reemployment. It surely involves more than just a mere inquiry [32], or asking about conditions at the plant and other casual conversation with friends [33]. It also requires more than asking for a job application from a guard [34].

In a recent case, a returning member of the Army Reserve contacted his old supervisor who, after some checking, referred him to the human resources department. The reservist failed to contact human resources but did file a lawsuit against United Parcel Service (UPS) for failing to comply with the USERRA. The Seventh Circuit denied his claim, stating “that UPS cannot be expected to train all of their supervisors in the intricacies of employment law . . . we can expect UPS to train its supervisors to refer personnel matters to those what are trained to handle them properly [35, at 677].”

In general, under the USERRA, an employer must recognize that a person is a returning veteran who is seeking reemployment. Employers may require that this recognition take the form of a written application provided to someone in decision-making authority (not a relative or first-line supervisor) [34].

Employer Reemployment Responsibilities

Upon legal application, employers must promptly reemploy the returning veteran who has served less than ninety-one days in the position held prior to entry into the military as long as s/he is still qualified to perform the work. If not qualified, the employer must be able to demonstrate that it made reasonable efforts to qualify the individual [7, §4302].

For those who served more than ninety days, employers must return them to the same job or a position of like seniority, status, or pay if they are no longer qualified to perform the position they had held prior to entering the military. Once again, the employer must first make reasonable efforts to qualify such individuals so they can return to their original positions. In the unlikely event that

two or more workers took leave from the same employment position and more than one has applied for reemployment, the employer is only obligated to rehire the person who went on military leave first. In any event, if an employer is unable to qualify a person or place him or her in the prior position, it must return him or her to a position that provides similar status and pay and full seniority [7, §4302].

In the case of a person who is disabled because of service, the employer must make reasonable efforts to accommodate such disability. If the employer cannot reasonably accommodate the person or make the person qualified, it must place the individual in any other position the person could perform or would become qualified with reasonable efforts and is equivalent in seniority, status, and pay to the job originally held. If the employer is unable to reasonably qualify a returning disabled veteran, it must place the individual in a job that is the nearest approximation to the position held just prior to military leave. Such persons are to be accorded full seniority [7, §4302].

Employers are not compelled to reemploy a returning veteran if an employer's circumstances have changed so much as to make such reemployment impossible or unreasonable, would impose an undue hardship on the employer, or the leave of service was brief and nonrecurring without an expectation that employment would continue [7, §4312]. Undue hardship depends on the nature and the cost of the action required, considering the financial resources of the firm and the location of its facilities [7, §4302].

Jobs left by those on leave and which are eliminated because of downsizing or reorganization are not usually protected by the USERRA [5]. However, the organization bears the burden of proof in these situations: It must demonstrate that reemployment would be unreasonable. Examples of such unreasonable actions include creation of a useless job or where there has been a reduction in force that would have reasonably included the veteran [36]. In *Horton v. United States Steel Corp.*, United States Steel dramatically reduced its operation on the midnight shift and as a result laid off a substantial number of employees based on seniority [37]. The plaintiff, but for being on military leave (nearly one year), would have been one of the employees laid off. Upon return from leave, the employee was denied reemployment because his job had been eliminated and the Fifth Circuit subsequently denied his claim [37].

Companies that have reductions in force that eliminate veterans' jobs still may be required to reemploy the veterans if it is reasonable to do so. For example, in *Davis v. Halifax*, school enrollments had declined, and staff had been reduced by six teachers. The school system claimed that it would be an undue hardship to create an unnecessary and useless teaching position [36]. However, the court noted that the legal exception is very limited and is to be applied only where reinstatement would create a useless job or the reduction in personnel would have reasonably included the veteran [36]. In this situation, the reduction in the number of teachers would not have reasonably included the veteran [36]. In another case, a reduction in workforce was accomplished through normal attrition

[38]. During the period of the person's military leave from a school system, a large number of new teachers were hired. At least two possessed the same certification as the returning veteran, while others were teaching outside of their field [38]. It was not a sufficient excuse to state that another person had been hired to fill the position vacated by the veteran nor that no opening exists at the time of the re-application to deny reemployment rights [38]. Similarly, in *Kay v. General Cable*, a company physician was called to duty and then returned to find his job had been filled by someone else. The appeals court ruled the company violated the act when it refused to reinstate the physician under these circumstances [39].

Interestingly, some organizations have policies restricting the number of persons entering military service or policies restricting when and how they can perform their military duties. For example, the city of Baltimore had a rule limiting to 100 the number of police officers who could be members of the reserves at a given time [40]. After one 100-person limit had been reached, no one could join the reserves until a reservist quit or retired (exceptions were made for new hires, but current officers were placed on a waiting list) [41]. The Fourth Circuit Court of Appeals did not agree with the city's argument that allowing so many to join the military would be an undue burden and did not feel such an argument was a viable legal defense [41, *cert. denied* 42].

Terminations for Cause

Protected individuals may still be terminated for cause, and cause may include being uncooperative and dishonest in providing notice for military leave. In *Gummo v. Village of Depew*, a police reservist participated in training sessions one weekend each month and two weeks each year [43]. However, on several occasions he failed to provide an official copy of his orders, instead electing to provide a handwritten note. Management demanded a copy of his orders, but instead he submitted an incomplete copy of his reservist work schedule, which appeared to have been re-dated. The reservist finally provided management with a typed note outlining his annual two-week training dates. Management contacted his military commander and discovered that he had re-dated the dates of training. When confronted with this information, the reservist became very angry, disrespectful, and physically threatening while arguing that he was privileged to withhold information from the police department and that it had no right to contact the military. He was eventually terminated for these actions. The Second Circuit found that his uncooperative, combative, dishonest, and otherwise insubordinate behavior was the cause of his termination, rather than discrimination [43].

In *Hill v. Michelin*, a naval reservist was placed in a new department under light-duty restrictions after returning from medical leave for a back injury [44]. When told of his reservist obligations, the supervisor expressed concern about whether the small department could cover his job while he was on leave. During this time the reservist apparently continued to use his accrued vacation days for

personal reasons. After being told he needed to save them for upcoming plant closures, he falsified his time card to show he was at work even though he took a vacation day. As a result, he was terminated. The Fourth Circuit ruled in favor of the company because falsification of time cards is considered a serious offense and the reservist could not demonstrate that the company had not fired others who had falsified their time cards [44].

In another case, an Air Force Reserve plaintiff, while acting as an interim high school principal, was terminated for poor performance [45]. His inadequacies included failing to develop work goals, having incomplete development activity plans, and failing to obtain the required amount of peer shadowing. Even though evidence existed that at least one administrator had found his periodic military leave to be a source of agitation, the district court determined that his inadequate performance rather than reserve status caused his termination [45].

Illegal Discrimination

To prevail in a discrimination case against an employer, the victim must demonstrate that management relied upon, took into account, considered, or conditioned its decision on military status [7, §4311; 45]. The USERRA does not require the employer's action to be *solely* motivated by military status, as was the case under the Supreme Court's ruling in *Monroe v. Standard Oil Co.* [27]. As a consequence, it is easier for plaintiffs to succeed under this lighter burden of proof. Plaintiffs may also win claims by showing that their employer took an adverse action against them because they exercised their rights under the USERRA [7, §4311].

Schmauch v. Honda illustrates how easily a discrimination case can now go against a defendant [46]. A member of the Ohio Air National Guard had an attendance problem at work. Under Honda's attendance policy, when an employee's attendance fell below 98% (excluding Family Medical Leave and military leave), that employee was placed on probation, where subsequent absences were severely restricted. While military leave did not count toward an employee's attendance record, Honda's policy did extend the probation by the length of the military leave. During this period, the employee violated Honda's attendance policy and was terminated, but if his probation attendance period had not been extended, he would not have been terminated. The district court agreed that the extension of his probation amounted to discrimination under the USERRA. Further, the probation extension could also be interpreted as though the employer considered his service a motivating factor in that action [46]. Under the USERRA, to avoid liability Honda should have treated the Guardsman as if he had never left work. In other words, his probation period for attendance should not have been extended [46].

In another case, a member of the Oregon National Guard attended and participated in ballooning recruiting events for the Oregon Guard [47]. Because of the

large number of ballooning programs he had attended, his employer denied him one request for which he had no oral or written orders and instructed him to stop soliciting ballooning events because it was causing a hardship for the company [47]. The employer also told him that it would not honor any future orders pertaining to ballooning events. Nevertheless, he attended several Guard events for which he had orders and one for which he had none and was terminated. In reversing a lower court's decision and remanding the case, the Ninth Circuit Court of Appeals explained that even though there were legitimate reasons for the termination, the guardsman's military status could have been a motivating factor in his adverse employment action. More specifically:

discriminatory motivation of the employer may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between proffered reasons and other actions of the employer, an employer's expressed hostility towards members protected by the statute . . . and disparate treatment of certain employees compared to other employees with similar work records or offenses [47, at 899].

In this case, the court felt that these factors were sufficiently present that a jury could conclude that his service was a motivating factor in his termination.

Under a more common set of circumstances, a reservist was terminated for cause but sued for discrimination based on taking leave for the Air Force Reserve [48]. Over about an eighteen-month period, a female reservist was called up for training and military service on many occasions. Each time her manager expressed concern about her being away from the job and its potential effect on her job performance. Sometimes her manager voiced a reluctance to approve her leave and made comments to other employees "that the plaintiff was going to be gone for another weekend, or out in the woods for another weekend [48, at 1115]." In the meantime, the employer had received many complaints about her work, some of which involved inappropriate comments to customers, for which she was counseled. The employer began monitoring her e-mails to support terminating her employment, but other employees were never monitored in this manner. In time, her performance improved, and she was recommended for a raise. Later, she once again made inappropriate comments in an e-mail to a customer and was terminated by the senior manager [48].

The district court denied summary judgment for the defendant. In doing so, it explained that to succeed in court the plaintiff is not compelled to show that her military obligations were the sole reason she was dismissed, but rather a motivating factor. Even though the senior manager that terminated her did not show bias toward her, his decision to sever her employment was influenced by the first-line manager who had shown such bias [48].

Discrimination can also take the form of denial of employment benefits. In *Rogers v. City of San Antonio* [49], the city had a work rule that did not permit

military leave to count toward missed overtime work, unlike vacation and other related leave. This work rule was found to be in violation of the USERRA because the act requires employers to treat those on leave as if they never left [44].

A change in working conditions because of military status had also been ruled to be a denial of an employment benefit [44]. Because his frequent military leave would cause the small work group in which he was assigned to perform significantly more overtime to cover his absence, one reservist was transferred to another position that required him to work more twelve-hour shifts than he had previously. Even though he lost none of his base pay, the Fourth Circuit noted that one's working schedule is also a benefit of employment and found in his favor [44].

Benefit Plans Protection

Should a person be called to service while under coverage of an employer-provided health plan, s/he may elect to continue such coverage. The maximum period of coverage is the lesser of an eighteen-month period beginning with the first absence from work or the day after the person fails to return to his or her job as prescribed in the section on employer responsibilities [7, §4317]. Covered individuals may be required by their employers to pay up to 102 percent of the full premium of such health-care plans [7, §4317].

Persons covered by the USERRA also have certain pension plan protections. A reemployed person is treated as not having incurred a break in service for pension plan purposes, and the period of service in the uniformed services constitutes service credit under the company's pension program [7, §4318]. Upon reemployment, the employer must make the employer contribution to the pension fund that would have been made had the person not entered military service (this includes 401(k) programs [7, §4317]). "Presumably, employer make-up contributions to defined contribution plans other than 401(k) plans must be made within a reasonable period of time following a return to work in accordance with the USERRA, provided that contributions need not be made prior to the time that they would ordinarily have been made to accounts of other participants under the plan (50, p. 29)." The USERRA does not specify how long the employer has to make these payments. However, pension experts state that these payments must be made within a reasonable period of time, perhaps no longer than within 90 days of the employee's return to work [50].

A reemployed person is entitled to accrued benefits that are contingent on making employee contributions or elective deferrals only if the person makes the required payment to the plan [7, §4317]. Reemployed persons may be required to pay any amounts that they would have paid if they had not been in military service [7, §4317]. The payment period cannot exceed five years [7, §4317]. Under no situation can those returning from military leave make up contributions that exceed the contribution limits that applied under the 401(k) plan during the

period of their military leave [50]. For those who had an outstanding loan from the 401(k) plan, payments are not required during military leave [50]. However, upon return to work, loan payments resume, and the payment period may be adjusted [50]. It is important for employers to understand that “the pay, allowances and benefits to which a Guard or Reserve member is entitled should have no bearing on the calculation of retirement benefits that flow from a civilian career” [51, p. 40].

Pay

The USERRA does not call for employers to provide salary or wages to employees on military leave [52]. However, other laws and regulations may require organizations to pay employees their regular compensation. “Regulations under the Fair Labor Standards Act (FLSA) state that employers cannot dock an exempt employee’s pay for absences due to military leave in any workweek in which the employee performs any work for the employer” [52, p. 114]. This could include contact by e-mail and other Internet communications [52]. Employers must also consider any applicable state laws.

State Laws

At least forty-five states provide protections for their residents who take military leave [53]. Most states afford some type of bare-bones protection, such as requiring that employers allow workers to take leave, prohibiting discrimination against those that serve in the Guards or reserves, and/or requiring no loss of seniority or pay [53]. Florida, for example, prohibits discrimination, and Delaware requires that neither seniority nor pay be lost.

A number of states, and even some local communities, have passed laws that exceed the requirements of the USERRA. For example, under Pennsylvania law, an employer must pay the full cost of health insurance for the first thirty days of leave [52]. Some states even impose mandatory salary continuation on public employers, such as Massachusetts, which requires seventeen days paid military leave for service in the reserves, or thirty-four days of paid military leave for service in the state armed forces [54].

More recently, in 2002, Alabama enacted legislation for state employees called to active duty, which provides compensation for the difference between an individual’s military active-duty pay and the pay of his or her regular employment [55]. California in 2002 also enacted a law that allows active-duty personnel to begin receiving health-care benefits from the state thirty days from call to service [56].

Local municipalities have also enacted legislation to protect their citizens who serve. For example, Tacoma, Wash. recently passed a law guaranteeing that the city’s employees who are active-duty reservists receive the difference between their city salaries and military pay [57].

CONCLUSIONS

A number of fundamental principles emerge from the legal record that can be utilized to prevent or protect employers from charges of discrimination:

- Treat those returning from military leave as if they had never left.
- Do not have policies or collective bargaining agreements, however benign they may appear, that limit participation in the military, affect pay or working conditions due to uniformed service.
- Do not make negative comments about the military.
- Be sure that any resignations intended to waive reemployment rights are clear and unambiguous on the waiver of preemployment rights.
- Organizations may generally require proof of military call-up.
- Supervisors may require those returning from military leave to make reemployment application in accordance with the USERRA provisions.
- Supervisors should be sufficiently trained to refer reemployment requests to the proper organizational officials for processing appropriately.
- Organizations should require that preemployment requests be made in writing.
- Organizations must generally return veterans to their prior jobs unless they are no longer qualified. Even then, employers should document attempts to requalify them if their skills are now below standard.
- If unable to place a person returning from leave, the organization must be able to demonstrate and document that reemployment is an undue hardship on the organization.
- Should a firm choose to transfer a protected individual to another position because of the burden leave places on the company, the new position must be one with the same compensation/benefits and similar working conditions.
- Guards and reservists may still be terminated for cause.
- Employers should also check for other laws that might affect those leaving for active duty, such as the FLSA and any applicable state or local laws.

While the USERRA has many provisions that protect those that serve in the military, there are still serious gaps that have been highlighted by the current war. First, the USERRA does not require employers to make up the difference between the employees' military pay and their civilian salary, which is usually higher. Second, those called to active duty who elect to continue their health insurance may be required to pay 102 percent of the premium. They are also limited to eighteen months of such continuous coverage. Finally, many compensation programs are currently based on performance (merit or incentive), which the USERRA does not appear to cover (courts have not addressed the issue). These gaps can cause serious problems when the leave lasts more than a few months such as is increasingly occurring today.

As a result, many citizen soldiers are rethinking their commitments to National Guard and reserve duty [3]. Given the national importance of serving in the military, the greater usage of the Guard and reserves as compared to prior conflicts, the protracted periods of call-up, and the need for a fully manned military, the aforementioned problems should be addressed by the government.

A number of larger companies have already chosen to make up the difference in pay and benefit differentials [6, 58], but this addresses a relatively small percentage of the workforce. Even local governments are addressing the problem with respect to public employees, albeit in a piecemeal manner [57]. However, making up these differences would place a significant burden on small businesses, where much of the nation's workforce is employed.

We believe that government action at the national level is needed. In a limited response to the problem, the Department of Labor recently announced financial assistance, whereby state governments may request National Emergency Grant funds to provide assistance to returning military personnel. However, further systematic action on a wide scale is warranted. Perhaps Congress should consider, as some have suggested, revising the tax code to offer tax breaks to those businesses that cover more of the compensation/benefits gap. Whatever the solution, addressing these problems in the near future is imperative (or the war should be resolved more quickly), so that the Guard and reserves will continue to attract patriots who will defend and protect the country.

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