

MEMORANDUM

TO: Clients and Friends of Coolidge, Wall, Womsley & Lombard

FROM: Timothy G. Pepper (Labor & Employment Department)
R. Brent Gambill (Employee Benefits Department)

DATE: October 3, 2001

RE: THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

The Uniformed Services Employment and Reemployment Rights Act was enacted in 1994 as a result of the employment-related problems experienced by military personnel after Operations Desert Shield and Desert Storm. It replaced the previous federal law on the subject with a new set of rules that comprehensively regulate servicemembers' leave and employee benefits rights.

GENERAL LEAVE OF ABSENCE ISSUES

Q: Which employers are covered?

A: USERRA covers all employers, both public and private, regardless of size.

Q: Which employees are covered?

A: USERRA protects employees who serve in the "uniformed services." That includes members of the Army, Navy, Marine Corps, Air Force, Coast Guard, Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, Coast Guard Reserve, 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 emergency.

Q: Are employees guaranteed a leave of absence for military service?

A: Any person who is absent from a position of employment by reason of service in the uniformed services is guaranteed an unpaid leave of absence. The leave of absence can last up to five years, and may last even longer in special cases. This applies to employees serving in any branch of the armed forces.

Q: What rights does an employee have if he or she *volunteers* for military service?

A: USERRA grants the same rights to all employees serving on active duty, whether they volunteered for active duty or not. In addition, employees with no prior relationship to the military – but who volunteer for military service – are also protected by the USERRA to the same extent as reservists who go on active duty.

RETURN TO WORK ISSUES

Q: What is the procedure for returning a servicemember to work?

A: Returning servicemembers are eligible for reemployment if they follow specified procedures. First, the employer must receive verbal or written notification of the need for leave *before* the employee leaves, unless giving notice was impossible or unreasonable under the circumstances. Second, servicemembers are required to return to work or apply for reemployment within certain time limits based on the duration of their leave.

If they were gone for thirty days or less, then they must report back to work at the beginning of the next regularly scheduled work period on the first full day after release from service, plus travel time and an eight-hour rest period. No formal application for reemployment is required, and the reporting time can be extended if reporting to work at the normal time is unreasonable or impossible through no fault of the employee.

If servicemembers are gone for more than thirty days but less than 180 days, the returning servicemember must apply for reemployment within fourteen days after completing service. Servicemembers who were gone for more than 180 days have ninety days to apply for reemployment.

Q: What happens if an employee misses the reemployment deadlines?

A: An employee who misses these deadlines does not lose all reemployment rights. Employees who miss them at their own fault are only subject to the employer's existing discipline policy for unexcused absences, and may not be discharged unless the absence policy provides for it. Furthermore, these reporting deadlines may be extended for up to two years or more for an employee who is recovering from a service-connected injury.

Q: To what position must the returning servicemember be reinstated?

A: Returning servicemembers do not step back on the "employment escalator" at the point at which they stepped off to take their leaves of absence. Instead, they step back on at the precise point they would have occupied had they kept their positions continuously during their military service. For example, if an employee would have received a longevity raise and promotion if no leave had been taken, then that employee must be returned to work in the new position with the higher pay. The principle works the other way, too. If an employer reduced employee benefits or reorganized the workforce during a servicemember's leave, then that servicemember will be returned to whatever position he or she would have occupied if no leave had been taken.

Q: Are there any exceptions to these reemployment rights?

A: Employers are not always required to accept returning servicemembers back to work. USERRA provides three exceptions designed to minimize the burden on employers in special situations.

First, employers are not required to reemploy a returning servicemember if reemployment would be impossible or unreasonable because the employer's circumstances have changed. Although this appears to be very helpful to employers, the reality is that many changes will not be significant enough to trigger this exception. Employers may only take advantage of this exception in cases where a reduction-in-force has eliminated the servicemember's job or where reemployment would force the employer to create a useless job.

The second exception denies reemployment rights to servicemembers who were employed before taking leave "for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."

The third exception denies reemployment rights to certain disabled servicemembers and servicemembers who have become unqualified for their old jobs for other reasons. This exception, like the "changed circumstances" exception mentioned above, is less helpful than it first appears. In some cases it even imposes requirements on employers that are more demanding than the Americans with Disabilities Act. For example, employers may have to search their companies for *any* job that a returning servicemember is qualified for and offer it to him or her.

Q: May servicemembers be terminated after they have been reinstated to their jobs?

A: Servicemembers may be terminated, but only with great caution. USERRA provides that servicemembers who are reinstated after being absent on military leave for 181 days or more may not be discharged without cause for one year after the date of their reemployment. Servicemembers who are reinstated after military leaves lasting less than 181, but more than 30 days, may not be discharged without cause for 180 days after the date of their reemployment.

GENERAL EMPLOYEE BENEFITS ISSUES

Q: Generally, how are employees who are away on military service viewed from an employee benefits point of view?

A: Employees who are away on military service are to be treated as being on a leave of absence from their employers. Those who are in uniformed service are entitled to other rights and benefits not determined by seniority that are generally provided by the employer to employees of similar seniority, status, and pay, who are on leaves of absence. Benefits offered to employees on leave also must be offered to employees serving in the uniformed services. To the extent other employees on leave are required to fund employee benefits, so must employees in service to obtain those benefits. However, service in the uniformed services does not give the servicemember rights to benefits that would not be available if the servicemember had remained continuously employed.

Q: If the employer permits different types of nonmilitary leaves of absence, does that affect what types of benefits must be extended to an employee on military leave?

A: When an employer differentiates the rights and benefits extended to employees on different types of nonmilitary leave, the most favorable treatment should be accorded the service member. If a leave of absence under the Family and Medical Leave Act is the most favorable leave available from an employee benefits perspective, the employer should extend to the employee who is away on military service similar benefit considerations.

HEALTH PLAN ISSUES

Q: What are a servicemember's rights regarding health insurance during the first 30 days of military service?

A: A servicemember away on military service can request that the employer continue to provide health insurance for the servicemember and any dependents. The servicemember will be responsible for the normal employee share of the premium.

Q: What are a servicemember's rights regarding health insurance after the first 30 days?

A: The employer must provide the servicemember and any dependents with the opportunity for continuation coverage similar to COBRA coverage. The continuation coverage can last up to 18 months. The employer can charge up to 102% of the entire cost of this coverage.

Q: If the employer is not otherwise subject to COBRA, will the employer be required to provide continuation coverage under USERRA?

A: Yes. All employers, including those who are not otherwise subject to COBRA, are required to provide continuation coverage under USERRA. Therefore, employers with less than 20 employees, churches and government employers must provide continuation coverage under USERRA, even though they are not covered by COBRA.

Q: How long does the continuation coverage last?

A: The coverage lasts 18 months beginning on the date the military absence begins. However, the coverage will terminate on the day after the date on which the servicemember fails to apply for a return to a position of employment under USERRA.

Q: How does the employer calculate the servicemember's coverage and premiums when the servicemember leaves on a day other than the first day of the month?

A: The calculation will be dependent upon the terms of the health insurance plan. For example, if the servicemember has paid health insurance for the entire month in advance and leaves on the 15th day of the month for military service, that month is covered as usual under the health insurance plan. The next month would be treated as the first 30 days after leaving for military service. Consequently, the servicemember and any dependents should be treated as usual and the employee should pay the employee's regular share of the premium. After the first 30 days, the servicemember and any dependents would be eligible for continuation coverage.

Q: When should a notice be sent regarding the election of continuation coverage when military service extends beyond 30 days?

A: No regulations exist directing the timing requirements for the notices and elections. The best practice is to follow the general COBRA rules. Therefore, the notice should be sent within 30 days from the 30th day of military service. The servicemember and his or her dependents should be given 60 days from the date the notice is sent to elect coverage. We recommend that employers discuss the continuation coverage with the servicemember prior to the start of military leave because the servicemember and any dependents may be difficult to locate after the start of military service. We have drafted a sample notice form and included it with this newsletter.

Q: What are a servicemember's health insurance rights upon returning from military service?

A: The servicemember and any dependents will be immediately eligible for health insurance coverage. No waiting period or pre-existing condition exclusions, other than those relating to service-connected conditions, will apply.

PENSION PLAN ISSUES

Q: Which retirement plans are subject to USERRA?

A: Generally, all defined contribution and defined benefit retirement plans are subject to USERRA.

Q: Will a servicemember incur a break in service under a retirement plan during military service?

A: No, a servicemember will not incur a break in service under a retirement plan.

Q: What are the consequences of not incurring a break in service?

A: Any contributions or benefit accruals that the employer would otherwise have made for the servicemember must be made unless the contributions are contingent upon an employee contribution. The servicemember will not have to requalify for participation in the plan upon return from military service.

Q: What are a servicemember's rights regarding elective deferrals or other required employee contributions that would have been made during the military service?

A: The servicemember has three times the period of service, not exceeding five years, to make up any contributions that the employee would otherwise have made during the military service.

Q: If the plan calls for matching contributions, is the employer required to make those contributions?

A: If an employee makes elective deferral contributions that would have otherwise entitled the employee to matching contributions, the employer must make the matching contributions. The rate of the contribution must be the same that would have been made for the year in which the employee contribution is attributable.

Q: What are the consequences to the plan regarding testing and limitations with respect to any contributions made for a servicemember?

A: Generally, the contribution will be attributable to the time for which the servicemember was away on military service. The contribution will only be subject to limitations for that year. The contribution will not be subject to testing and limitations for the year in which the contribution is made.

Q: Will a servicemember away on military service incur account forfeiture?

A: No forfeitures of accounts will be made during leave for military service.

Q: Will a servicemember away on military service be entitled to credit for earnings and forfeitures?

A: A servicemember will not be entitled to credit for earnings and forfeitures during leave for military service unless otherwise provided in the plan. If the plan is self-directed, credit the servicemember with the applicable earnings.

Q: Are servicemembers required to repay loans from the plan while on military leave?

A: Loans may be suspended while servicemembers are on military leave.

VACATION ISSUES

Q: How are vacations treated while a servicemember is on military leave?

A: If the employer accrues vacation for any other servicemembers on a leave of absence, vacation must be accrued for servicemembers on military leave. If vacation is "use it or lose it" for everyone, the vacation for the servicemember is also "use it or lose it" for the servicemember on military leave. Servicemembers may elect to receive vacation pay while on military leave, but they may not be forced to use paid vacation time while on military leave.

PREPARED BY:

Timothy G. Pepper, Esq.
Labor & Employment Department
pepper@coollaw.com
937-449-5766

R. Brent Gambill, Esq.
Employee Benefits Department
gambill@coollaw.com
937-449-5539