

## MODERN MANAGEMENT

### A Basic Overview and General Guide in Understanding the Fundamentals of USERRA

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## Introduction

The Uniformed Services Employment and Reemployment Rights Act of 1994, commonly referred to as USERRA, was enacted to continue a long history of providing protections in the workplace for our military and uniform service members. USERRA is applicable to employees currently enlisted in the military, as well as veterans, in both public and private workforce sectors. Unlike most employment statutes, employers are not exempt based on the number of employees they have. To further provide assistance in understanding USERRA, the Department of Labor (“DOL”) issued its regulations and interpretations of the Act in December 2005. The DOL suggests these final regulations do not impose any new obligations on employers, but rather serve as an implementation of the statutory requirements, as well as to clarify and interpret areas of the law.

With nearly half a million uniformed service personnel being called upon by the Government to assist with the War on Terror since 2001, many employers have been, or will be, faced with returning service members. As these individuals return to the workplace after being called to assist the Country, the burden is on the employer to comply with USERRA. Specifically, consistent with the U.S. Supreme Court’s interpretation of USERRA’s predecessor statute, “This legislation is to be liberally construed for the benefit of those who left private life to serve their country... [and] ... no practice of employers ... can cut down the service adjustment benefits which Congress has secured the veterans under the Act.” *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946).

## Purpose of USERRA

The original purpose of USERRA is to encourage non-career service in the uniformed services and protect the rights of persons who voluntarily or involuntarily leave employment positions to undertake military services. In bringing this mission forward, the legislation’s goals are to assist in minimizing disruption in the lives of those performing duties for the Country, and to prohibit discriminating against a person because of his/her activities in the uniformed services. In effectuating the principles, USERRA and the newly-created regulations protect the rights and benefits of uniformed service persons with regard to his/her employment, as well as securing re-employment for the individual.

## Employees Covered Under USERRA

USERRA is applicable to any employee who is engaged in:

- Active duty;
- Inactive and/or active training;
- National Guard duty;
- Absences for examinations;
- Funeral duties; and
- Examinations for purposes of determining if an employee can qualify to become a uniformed service member.

Applicants for employment are also covered under USERRA. An employee's status as full-time or part-time, management or non-management, exempt or non-exempt are of no relevance to the applicability of USERRA.

Independent contractors are not covered under USERRA, nor are some temporary employees whose work is brief, nonrecurring and without an expectation that the employment will continue on an indefinite or significant period. In determining whether an employee is classified in this limited exception, employers must remember the law is to be interpreted in a broad manner to protect employees.

Despite an employee having a military service record, the following occurrences will exclude an employee from protections:

- Discharge from uniformed services based upon a dishonorable, bad conduct or conditions other than honorable;
- Dismissal from uniformed services because of general court martial, commutation of a sentence of a general court martial, or by order of the President during war time;
- Dropping from the rolls pursuant to an unauthorized absence of at least three months; or
- Separation from the uniformed services because of confinement in a federal or state penitentiary resulting from a conviction in state, federal, or other court of law.

### **Employers Covered Under USERRA**

USERRA is one of the largest reaching employment laws in the federal system—both in its covered subjects and its reach among employers. Simply stated, unlike other statutes that protect against discrimination (*i.e.* Title VII), continued medical coverage (*i.e.* COBRA), and leave protections (*i.e.* FMLA), USERRA has no minimum threshold number of employees to subject the employer to providing the protections of the statute. Rather, USERRA applies to *all* public and private employers in the U.S., regardless of size, as well as foreign employers that have a physical location in the U.S. The statute also applies to government employment, including public schools, public health care providers, and state, city and municipal government employees.

### **Employer's Notice Requirement To Employees**

Posting requirements, initially required under the Veterans Benefits Improvement Act of 2004, were incorporated in, and revised by, the DOL's implementation of its 2005 regulations. Specifically, the 2005 regulations revise the Veterans Benefits Improvement Act by extending protection beyond traditional military service to include individuals engaged in services with the National Disaster Medical System ("NDMS"). The NDMS is a section within the U.S. Department of Homeland Security that supports Federal agencies, including FEMA, in the management and coordination of the Federal government's response to major emergencies and federally declared disasters.

Individuals in the NDMS are professional and para-professional volunteers who may be called to duty or training in response to public health emergencies, and as such are considered to be serving in the uniformed services for purposes of USERRA.

Employers should ensure the latest version of the posting, which now includes language providing for protection of individuals of the NDMS, is being used at the workplace.

### **Discrimination and Retaliation**

USERRA affords protections to employees and applicants regarding discrimination and retaliation based on military status. Employers must not deny initial employment, reemployment, retention in employment, promotion or any other benefit of employment because of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services and are prohibited from taking adverse employment actions against employees for exercising their rights or attempting to enforce their rights under USERRA.

USERRA's anti-discrimination provisions apply to all employees, not just those performing military services. This means that any employee can seek discrimination and/or retaliation based on an anti-discrimination provision of USERRA. Further, adverse employment actions cannot be taken against any employee based on his or her participation in an investigation made in connection with protections under USERRA, including testifying or statements made by the employee.

It is noted that the regulations provide that a claim for failure to reemploy a returning service member may be a claim for discrimination, but additionally, is a separate cause of action under USERRA.

### **Employee's Notice to Employer of Leave**

An employee must give, oral or written, advanced notice, within a time that is reasonable under the circumstances, to his/her employer of the impending leave. However, there is no specific time frame mentioned to establish what "reasonable" is, although the Department of Defense suggests 30 days of notice if it is feasible. Certain circumstances will eliminate this requirement. Employees engaged in national security matters (*i.e.* "top secret" matters) may not know when their deployment will be, or may not be able to disclose their deployment time. As such, these employees, despite not providing notice, will still be covered by USERRA. This exception becomes increasingly important with respect to the employee's rights under the health care and pension provisions of USERRA.

### **Employee's Rights To Leave**

An employee's leave for purposes of uniformed services can be for a cumulative period of five years. This leave will rarely be on a continuous basis. Leave does not cover the time period between the employee's active duty and preparation for departure or return from active duty to work.

### **Compensation During Leave**

USERRA does not require an employer to compensate employees while on military leave, although, it has been suggested in writing by the DOL that it may be an employer's civic duty or civic commitment to provide compensation or a reduced compensation to employees on military leave.

Employers may not require an employee to use accrued vacation or paid leave during the employee's leave period, however, an employer is required to allow an employee to use his or her accrued vacation or paid leave during the military leave period should the employee wish to do so.

The employee's leave does not have to be confined strictly to military service. An employee on leave may take opportunities to engage in other work while on off-duty hours. An employee, while on active duty and on leave protected by USERRA, can participate in employment during his/her off-duty time with another employer. An example of this would be an employee called to duty in a state different from employer. This employee could tend bar during his/her off-duty time in the evenings. This activity would not impinge on the employee's rights to leave or reemployment with his/her employer.

### **Employee's Intent to Return to Work**

An employee is not required to inform his/her employer of his/her intent to return to work until after his/her military service has concluded. The regulations specifically state that, even if an employee, prior to taking leave, informs the employer that he/she does not intend to return to work after active duty, this does not waive the right of the employee's reemployment rights upon conclusion of his/her active duty. The employee has a limited time-frame for requesting reemployment, which is dependant on the length of the employee's leave for military service. An employee dishonorably discharged from the uniformed services will not have rights to reemployment.

### **Re-Employment: Employer's Time Frame**

An employer must reemploy a returning service member, absent unusual circumstances, generally, "within two weeks of the employee's application for employment." An employee returning from a short duration (such as weekend duty) should be reemployed by the next regularly scheduled shift. "Prompt reemployment" may require additional time if the employer is actively attempting to reassign or give notice to another employee in the position originally held by the returning service member, or is attempting to place more than one returning service member. An employee must seek re-employment by the employer—or, simply, an employer need not seek out and offer an employee that has returned service but has not sought re-employment. An employer's responsibilities under USERRA expire should the employee's military leave last longer than five years.

The following time frames are general requirements of USERRA for returning employees from military service to report to work:

- If the employee's leave is between 1 to 30 days, then, the employee must report within 8 hours after completion of the duty causing the leave;
- If the employee's leave is between 31 to 180 days, then, the employee must report not later than 14 days after completion of the duty causing the leave; and
- If the employee's leave is more than 180 days, then, the employee must report not later than 90 days after completion of the duty causing the leave.

However, despite the above requirements for reporting to the workplace to work, these time frames may be extended up to two years if the employee was injured or ill because of his or her service during the leave period.

An employee that fails to report during the specified time frame does not forfeit his or her rights under USERRA, but rather, the failure to report back can activate the employer's conduct/disciplinary rules related to absences from scheduled work.

### **Re-Employment: Escalator Provision**

Generally, a returning service member is entitled to be reemployed at "the position the employee would have attained if his or her continuous employment had not been interrupted due to uniformed services." This includes seniority, pay, and status. If the employee's military leave is less than 90 days, the employee must be offered the same position he or she held prior to military leave. If the employee's military leave is more than 90 days, the employee may be offered a similar position with the same seniority and same rate of pay.

There are exceptions to the escalator provisions, as well as employer responsibilities similar to those under the American's with Disabilities Act for reemploying an injured returning service member, or for training a returning service member in order to qualify that member for the civilian job.

### **Terminating A Reemployed Uniformed Service Member**

Upon return to work, even in an "at-will" employment environment, a returning service member may only be terminated "for cause". If an employee was on USERRA-protected leave for less than 180 days, but more than 31 days, the "at will" relationship is suspended for 180 days. Should the employee's protected leave been more than 180 days, the "at will" employment relationship will be ineffective for one year from reemployment. The regulations clarify that "for cause" discharges include not only conduct, but also application of other legitimate non-discriminatory reasons. This includes changes in circumstances that make reemployment impossible or unreasonable, such as a reduction-in-force or position elimination. The employer will bear the burden of proving such discharge was "for cause".

### **Healthcare Benefits**

The 2005 regulations, as well as the 2004 changes to USERRA made by the Veterans Benefits Improvement Act, require 24 months of continued optional COBRA-like benefits (this is a change from the 18-month period initially implemented in USERRA). This benefit allows the service member to elect continued coverage under the employer-based health plan on a self-paying basis for himself/herself and any dependents. This benefit is provided for up to 24 months or the end of the employee's military service (whichever is shorter). It should be noted that a health care plan does not have to initiate an employee in the plan if that employee was not enrolled in the health care plan prior to being activated to military service. Dependents do not have the right to elect coverage if the USERRA-covered employee has not elected such continuation of coverage, further, a uniformed service-dependent does not have independent election rights under USERRA. An employee's rights for health care under USERRA vary greatly depending on the employer's implementation of reasonable requirements for election and continuation, and on the employee's requirement to give the employer advance notice of departure (a requirement that may fluctuate or be nonexistent based on other provisions of USERRA).

Regardless of whether an employee elects to continue coverage while on uniform service duty, upon reemployment with employer, the employee is entitled, without a waiting period, to be reinstated to the health plan.

Benefits must remain unchanged if the employee's service is for less than 30 days. Upon return from service, the service member must be reinstated to employer's health plan without a waiting period or exclusion. The regulations take the position that cafeteria plans are health plans under USERRA and must comply with the statute's continuation and reinstatement provisions.

### **Retirement Benefits**

The regulations provide further information on the administration of qualified retirement plans under USERRA, including calculating an employee's presumed compensation and the timing of employer's contributions and distributions. The regulations provide for guidance on a variety of pension plans, including non-ERISA plans and government plans. Military leave cannot be treated as a break for purposes of vesting or accrual of benefits. Employers should consult with its benefits counsel before adjusting any pension plans to comply with the regulations.

When an employer maintains a defined contribution plan such as a profit-sharing plan or ESOP (non-401(k) plans), the employer must contribute to the plan for the period of military service upon the return of the employee-service member. The rate of contribution is based on the "would-be" rate of contribution that the employee would have earned during his or her absence.

Under 401(k) plans, an employer must permit an employee to make salary deferral contributions over a period that is not more than three times the employee's accrued military leave (i.e. if the employee is returning from a three month military leave, the

employee's time period would be a maximum of nine months) or five years, whichever is longer. All matching benefits under the employer's 401(k) plan must be made on any of the employee's make-up contributions.

An employee's leave under USERRA may not be deducted or counted as a break-in-service for benefits purposes, including vesting and/or required employment time for eligibility purposes.

### **Enforcement of USERRA**

Employees can make a complaint with the DOL or commence a private lawsuit to enforce his/her rights under USERRA. USERRA provides no statute of limitations, although some jurisdictions may apply the 'catch-all' four-year limit for filing an action under USERRA against an employer.

As with any legislation or regulations applicable to the employee-employer relationship, employers should take the time to familiarize themselves with new requirements, as well as review (and make the necessary updates to) all policies and practices to ensure compliance and consistency with the legislation or regulations. Learning after a claim is filed that the employer's policy or practice is inconsistent with the regulations is too late. Preventative maintenance on the employer's policies and practices is the best start for avoiding litigation.

### **Five Actions Employers Should Take to Comply with USERRA**

1. Distribute or post USERRA Notice;
2. Review/adjust/revise health care plan documents;
3. Ensure that retirement plans can function under, and are in compliance with USERRA;
4. Provide training to supervisors regarding discrimination, harassment, and retaliation under USERRA (as well as other federal laws); and
5. Make sure that management can identify USERRA issues, including re-hiring and leave issues.

**About Lemle & Kelleher, L.L.P.**

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