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Employment Law Forum

Military Service – Leaves of Absence and Reemployment Rights

Following the September 11, 2001 terrorists attacks in the United States, President Bush signed an executive order authorizing up to 50,000 military reservists to be called to active duty. The war with Iraq has further impacted those individuals who serve in the military reserves. The information herein is designed to provide employers with answers to common questions concerning the employment rights of reservists who may be activated into active duty and those individuals who voluntarily enlist into the armed services.

Question: What laws impact employers concerning the rights of employees who are called to active military duty?

Answer: Employers must comply with the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.¹ In California public sector employers must also comply with the provisions of the Military and Veterans Code concerning the rights and benefits of those employees serving in the armed forces.²

Question: What legislation applies if there is a conflict between the USERRA and the Military and Veterans Code?

Answer: The provisions of the legislation most beneficial to the individual are applicable.³

Question: Which employees are eligible for leaves of absence when activated for military service?

Answer: Private sector employees – The USERRA covers any person employed by an employer for periods of federal military service.⁴

Public sector employees – in addition to USERRA protections for qualifying persons, any public employee who is a member of the reserve corps of the Armed Forces of the United States or the National Guard or the Naval Militia is entitled to a temporary

military leave of absence as provided by federal law while engaged in military duty ordered for purposes of active military training . . . providing that the period of ordered duty does not exceed 180 calendar days, including time involved in going to and returning from that duty.⁵ The USERRA further provides public and private sector employees the right to return for a cumulative period of five years from the beginning of the military leave.⁶

Question: Are employees activated into military service entitled to be paid by their employer while on a military leave of absence?

Answer: Private sector – No. Under federal law employers do not have any obligation to pay an employee who is on military leave. An employee shall be permitted, upon request, to use any vacation, annual, or similar leave during the period of military service.⁷

Public sector – If an employee has a combination of employment with the employer and military service equaling one year or more prior to the date activated into military service, the individual is entitled to receive his/her salary or compensation for the first 30 calendar days while engaged in the performance of ordered military duty.⁸ The 30 calendar days applies to any one military leave of absence or during any fiscal year.⁹

Question: Are employees who are activated into military service entitled to health and medical benefits while on a military leave of absence?

Answer: Neither federal or California state law requires an employer to continue payment for health insurance coverage for employees who are on unpaid military leaves of absence. Federal law requires that health insurance benefits be extended for the first 31 days of military leave at the same cost that employees paid while an active employee.¹⁰ All employers must offer employees continued medical coverage for the first 24 months of military service¹¹ (e.g. COBRA procedure). An employee shall not be required to pay more than 102 percent of the full premium for health insurance.¹²

Question: What is the procedure for reinstatement to employment after release from military service?

Answer: An employee is entitled to reemployment rights and maintenance of employment benefits only if the person returning from military service meets the following criteria:

- a. The person must have held a civilian job with the employer.
- b. The person must have given advance notice to the employer that he/she was leaving the job for military service.¹³

- c. The period of military service must not have exceeded five years, with limited exceptions.¹⁴
- d. The person must have been released from military service with an honorable discharge. (A separation from the military service under other than honorable conditions disqualifies the individual for USERRA protection).¹⁵
- e. The person must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.¹⁶

Question: What is the impact on an employee's seniority and other benefits when returning to work after military service?

Answer: Retirement benefits continue to accrue as if the employee continued in his/her position without the break for military service. For example, an employee with three years of employment is activated into military service. The individual remains in military service for two years prior to returning to his/her job. The employee's retirement benefit is now based on five years of service.¹⁷

Returning private sector employees have their military service count as employment time for purposes of eligibility, vesting, and benefit accruals under qualified benefit plans. Employers must not consider military service leave as a break in service.¹⁸

Public employees shall receive the same vacation, sick leave, and holiday privileges and the same rights and privileges to promotion, continuance in office, employment, reappointment to office, or reemployment that the employee would have enjoyed had he/she not been absent for military service.¹⁹ For example, an employee with three years of seniority is activated into military service. The individual remains in military service for two years prior to returning to his/her job. The employee's benefits now accrue as if the employee has five years of service.

Question: What are the time limits for returning employees to report back to work following release from military service?

Answer: The time limits for reporting back to work depend on the length of the employee's military service. The reporting time limits are:

- a. Service of one to 30 days: Not later than the beginning of the first regularly scheduled work period on the first full calendar day following completion of service after a reasonable period allowing for safe transportation home from the place where the person was released from military service.²⁰
- b. Service of 31 to 180 days: Not later than 14 days following completion of military service.²¹
- c. Service of 181 days or more: Not later than 90 days from completion of military service.²²

Question: Upon reinstatement to employment after release from active military service, is a waiting period required prior to health insurance coverage becoming effective?

Answer: No.²³

Note: In November 2004, the Department of Labor announced proposed rules related to the USERRA of 1994. Woska Associates will closely follow the proposed legislation with respect to the impact on employers. It is expected that the any changes to the legislation will be in 2005. A copy of the proposed rules may be obtained from The Federal Register's website at www.gpoaccess.gov/fr/ "Uniformed services" is the keyword when performing the search.

¹ 38 U.S.C. Secs. 4301 *et seq.*

² Military & Veterans Code Secs. 389 *et seq.*

³ 38 U.S.C. Sec. 4302(a).

⁴ 38 U.S.C. Sec. 4303(3).

⁵ Military & Veterans Code Sec. 395(a).

⁶ 38 U.S.C. Sec. 4312(a)(2).

⁷ 38 U.S.C. Sec. 4316(d).

⁸ Military & Veterans Code Sec. 395.02

⁹ Military & Veterans Code Sec. 395.03.

¹⁰ 38 U.S.C. Sec. 4317(A)(2).

¹¹ Veterans Benefits Improvement Act of 2004 (Pub. L. No. 108-454)

¹² 38 U.S.C. Sec. 4317(A)(2).

¹³ 38 U.S.C. Sec. 4312(a)(1).

¹⁴ 38 U.S.C. Secs. 4312(a)(2); 4312(c) *et seq.*

¹⁵ 38 U.S.C. Sec. 4304(1)(2).

¹⁶ 38 U.S.C. Sec. 4312(e)(1) *et seq.*

¹⁷ 38 U.S.C. Sec. 4318(a)(2)(A); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977).

¹⁸ 38 U.S.C. Secs. 4316(a); 4318(a)(2)(A).

¹⁹ Military & Veterans Code Sec. 395(d).

²⁰ 38 U.S.C. Sec. 4312(e)(1)(A)(i).

²¹ 38 U.S.C. Sec. 4312(e)(1)(C).

²² 38 U.S.C. Sec. 4312(e)(1)(D).

²³ 38 U.S.C. Sec. 4317(b)(1).