EMPLOYMENT ALERT – MILITARY LEAVE

With the current military build-up, employers are faced almost daily with the activation of employees enlisted in the military Reserve. Given this potential crisis, employers must be informed of the laws governing military leave and reemployment rights of activated employees.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301 *et seq.* Generally, the statute provides job protection for veterans returning to their jobs without any concomitant loss of seniority, status, or pay. Veterans may not be denied initial employment, reemployment, retention in employment, promotion or any benefit of employment on the basis of membership in uniformed services.

Notice of Military Leave

Although USERRA requires that employees provide their employers with written or verbal notice of pending military duty, this requirement is waived if notice is precluded by military necessity or is otherwise unreasonable or impossible. Although there is no strict requirement, the applicable federal regulations on this matter suggest a preference for written notice and strongly recommend at least a 30-day notice. Therefore, the best course of action for employers is to know which employees have military affiliations, then proactively work with them to get as much notice as possible in order to work out potential conflicts before they become problematic.

Returning to Work

The USERRA provisions applicable to returning to work vary depending on the length of the absence as a result of military duty. For service of one to thirty days, the service member must report to work at the beginning of the next regularly-scheduled work period on the first full day following the completion of service. However, the timing of this return must accommodate at least an eight-hour rest period following a safe return home by the service member. For example, if the service member returns home at 11 p.m., he cannot be required to report to work at 1 a.m. the next morning, but he can be required to return to work at 7 a.m. the next morning, unless it is impossible or unreasonable for the service member to do so. For military service members taking leave for a fitness-for-service exam, the same rules apply, regardless of the length of absence.

For service members absent from work for thirty-one to 180 days, an application for reemployment must be submitted within fourteen days after the completion of service. However, as with the above requirements, an exception to this rule exists where it is impossible or unreasonable, through no fault of the service member, to apply within the fourteen-day limit. In such case, the application must be submitted as soon as possible. For example, if the fourteenth day falls on a day when the employer's offices are closed, then the time period extends to the next business day.

For service of more than 180 days, the service member must file an application for reemployment within ninety days after the completion of service. There appears to be no exception to this timely filing requirement following this length of service.

An employee's failure to timely file an application for reemployment does not automatically forfeit his rights under USERRA, but such a failure does subject the employee to the employer's policies and procedures regarding unexcused absences. Further, if an employee is hospitalized for or convalescing from an injury or illness either incurred or aggravated during military service, that employee may follow the reapplication procedures above upon his recovery. The time limit on this reapplication is two years, with extensions to accommodate circumstances beyond the hospitalized/convalescing employee's control.

Maximum Limit on Military Leave

An employee may not exceed a cumulative total of five years of military leave, counting most types of military service already listed. However, there are several exceptions to this limit, all of which allow an employee to exceed five years of military leave without forfeiting USERRA rights. Those exceptions are: (1) service required beyond five years to complete an initial period of obligated service; (2) service from which an employee, through no fault of his own, is unable to obtain release within the five-year limit (i.e. – service time ends while employee still at sea with Navy); (3) training required of reservists and National Guard members (i.e. – monthly drills and annual two-week training by reservists); (4) service pursuant to an involuntary order to active duty or to remain on active duty during domestic emergency – or national security-related circumstances; (5) service pursuant to an order to active duty (other than for training) or to remain on active duty due to a war or national emergency declared by the President/Congress; (6) active duty (other than for training) by volunteers supporting designated "operational missions;" (7) service by volunteers ordered to active duty in support of a designated "critical mission or requirement;" and (8) federal service by National Guard members ordered by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.

Disqualifying Service

There are four categories of circumstances where an employee's separation from the military will cause a loss of USERRA protection. They are: (1) dishonorable or bad conduct discharge; (2) separation from service under "other than honorable" conditions, as defined by each military branch; (3) dismissal of a commissioned officer in situations involving a court martial or by order of the President in time of war; and (4) dropping a service member from the rolls when he has been absent without authority for more than three months or is imprisoned by a civilian court.

Reemploying the Returning Service Member

Except for those situations in which a service member has a disability incurred during or aggravated by military service, the method for reinstating a returning service member is based on length of service.

First, employees absent from one to ninety days must be promptly reinstated in the following order of priority: (1) in the position the employee would have occupied had he remained continuously employed, so long as the employee is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the employee (i.e. – refresher training, etc.); or (2) if the employee cannot become qualified for the position in option 1, in the

employee's preservice position, so long as employee is qualified for the job or could become qualified after reasonable efforts by the employer; or (3) if the employee cannot become qualified for the positions in either option 1 or option 2, then in any other position which is the nearest approximation of option 1 for which the employee is qualified, with full seniority.

Second, employees absent for more than ninety days must be promptly reinstated in the following order of priority: (1) in the position the employee would have occupied had he remained continuously employed, or a position of equal seniority, status, and pay so long as the employee is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the employee; or (2) if the employee cannot become qualified for the position in option 1, in the employee's preservice position, or a position of equal seniority, status, and pay, so long as the employee is qualified for the job or could become qualified after reasonable efforts by the employer; or (3) if the employee cannot become qualified for the positions in either option 1 or option 2, then in any other position which is the nearest approximation of option 1 for which the employee is qualified, with full seniority.

The main difference between these two sets of prioritized options is that with the latter group, employees absent for more than ninety days, the employer may offer a position of equal seniority, status, and pay to employees falling into either option 1 or 2. Additionally, the reemployment position with the highest priority in both schemes reflects the "escalator" principle, which requires that each returning service member steps back onto the seniority "escalator" at the point the employee would have occupied had he remained continuously employed. The "promptness" requirement depends upon the circumstances of each case; for instance, "prompt" reinstatement after weekend National Guard duty would probably be the next scheduled work day, while "prompt" reinstatement after several years' active duty may require providing notice to the employee who occupied the position left by the employee on military leave.

As to employees who incurred or aggravated an injury or illness during military service, a special set of rules apply. Specifically, employers are to follow a three-part reemployment plan for such employees: (1) the employer must make reasonable efforts to accommodate an employee's disability so that the employee can perform the job he would have held had he remained continuously employed; (2) if, despite such reasonable accommodation efforts, the employee is not qualified to do the job due to his disability, the employee must be given a position of equal seniority, status, and pay, so long as the employee is qualified for the job or could become qualified after reasonable efforts by the employer; and (3) if the employee does not become qualified under part 1 or part 2, then he must be employed in a position that, consistent with the circumstances of that person's situation, most nearly approximates the job in part 2 in terms of seniority, status, and pay.

If two or more employees are entitled to reemployment in the same position, the employee who left the position first has the superior right to it. The other employee(s) are entitled to employment with full seniority in any other position(s) that provide similar status and pay in the order of priority under the reemployment plan from above which is otherwise applicable to such person(s).

Changed Circumstances and Undue Hardship

The employer's obligations to reemploy a returning service member are discharged where the employer's circumstances have changed so much that reemployment of the person is impossible or unreasonable, such as a reduction in force that would have included the service member had he been at his job instead of on military leave. Also, employers are excused from making efforts to qualify returning service members or from accommodating those with service-related disabilities when doing so would cause undue hardship. Both of these situations, like the rest of USERRA, are to be liberally construed in favor of the returning service members.

Pensions and Benefits

Service members who return to employment are entitled to seniority and all rights and benefits based on seniority which they would have attained with reasonable certainty had they remained continuously employed rather than taken military leave. A right based on seniority is one based on length of service with the employer. Further, since employees on military leave are considered to be on a leave of absence from the employer, they must be granted all the rights and benefits not based on seniority that are available to employees who take non-military leaves of absence, whether paid or unpaid. Should there be a variation among types of non-military leave of absence, the service member must be granted the most favorable treatment. Employers may require the service member to pay the cost of any funded benefit to the extent that other employees on leave of absence would be required to pay. Finally, if a service member knowingly provides clear written notice of an intent not to return to work following military service, the employee waives entitlement to leave-of-absence benefits not based on seniority. Such a waiver, however, does not surrender other rights and benefits under USERRA, particularly reemployment rights.

For pension plans which are tied to seniority, USERRA provides: (1) a reemployed service member must be treated as not having incurred a break in work with the employer who maintains a pension plan; (2) military service must be considered work with the employer for purposes vesting and benefit accrual; (3) the employer is liable for funding any resulting obligation; and (4) the reemployed person is entitled to any accrual of benefits from employee contributions only to the extent that the person repays the employee contributions.

Service members, rather than take military leave without pay, must be permitted to use any vacation time that had accrued before the beginning of their military service. This is done at the service member's request, but employers cannot force service members to use vacation time for military service.

USERRA provides for health benefit continuation for employees on military leave, even when their employers are not covered by COBRA (i.e. – fewer than twenty employees). If an employee's health plan coverage would end due to military leave, the employee may elect to continue the coverage for (A) up to eighteen months after the absence begins or (B) for the period of service plus time to apply for reemployment, whichever period is shorter. The employee cannot be required to pay more than 102 percent of the full premium for coverage, and if the military service is thirty or fewer days, the employee cannot be required to pay more than the normal employee share of any premium.

Prohibition of Discrimination

Under USERRA, a reemployed service member may not be discharged without cause: (1) for one year after the date of reemployment if the employee's military service was for more than six months (181 days or more); or (2) for six months after the date of reemployment if the service member's military service was for thirty-one to 180 days. Employees who use 30 or fewer days of military leave before reemployment are not protected from discharge without cause, but all service members are protected from discrimination because of military service or obligation.

Employment discrimination because of past, current, or future military obligations is prohibited; this broad prohibition includes the following areas of employment: hiring, promotion, reemployment, termination, and benefits. USERRA protects past service members, current service members, and those who apply to be a member of any of the branches of the uniformed services.

Essentially, if an individual's past, present, or future connection with military service is a motivating factor in an employer's adverse employment action against that individual, the employer has presumptively violated the law. The employer's burden is then to prove that it would have taken the same action regardless of the individual's military connection. Further, an employer can be liable for unlawful discrimination when an individual's military connection is merely one of the reasons a particular adverse action was taken. To avoid liability, an employer must prove that a reason other than an individual's military connection would have been sufficient to justify its action.

Finally, employers are forbidden to retaliate against anyone, whether or not that person has a military connection who: (1) files a complaint under USERRA; (2) testifies, assists, or otherwise participates in an investigation or proceeding under USERRA; or (3) who exercises any right under USERRA.

West Virginia Law

West Virginia law provides similar protections to those provided by USERRA. Under W. Va. Code § 15-1F-11, "[m]embers of the state military forces of this State who are ordered to active state duty by the governor shall, upon being relieved from such duty, be entitled to the same reemployment rights provided by" USERRA. Further, W. Va. Code § 15-1F-8 states that "[m]embers of the organized militia in the active service of the state shall be entitled to the same reemployment rights granted to members of the reserve components of the armed forces of the United States by applicable federal law" (USERRA).