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Federal Rights to Military Leave for Reservists and the National Guard

By Alec Beck and Marc Chrismer

The tragic events of September 11, 2001 have thrust the issue of military leave back into the foreground. The federal law governing military leave can be very complicated, particularly with respect to employee benefits. Basically, however, the law states that employers must give military leave to eligible employees, may not discriminate based on military obligations (including enlistments and Guard or Reserve obligations), and must reinstate veterans who timely reapply.

The primary federal law that applies to employees who undertake military service is the Uniformed Services Employment and Reemployment Rights Act (“USERRA”). The statute provides job and benefit protection rights for members of the uniformed services, and generally allows employees to take up to five years of leave for military service. The Act applies to all employers, regardless of size, and includes government employees. Leave under USERRA is unpaid. Employees on leave are entitled to the same benefits provided generally to employees on other forms of leave, although it is unlikely that this means that FMLA-type paid insurance must be provided.

USERRA also provides that, after an employee’s service is completed, he or she has the right to reinstatement. Employees returning from military leave are entitled to the seniority and other rights and benefits (a higher vacation accrual rate for example) determined by seniority that they would have attained had they not gone on leave (the so-called “escalator principle”). Finally, among its other additional benefits for employees, USERRA states that employers may not discharge a reinstated service member except “for cause” for a period following the veteran’s reemployment. This very important feature of the statute in effect creates a rebuttable presumption that discharge or other “adverse employment actions” following a return to work are in retaliation for the employee’s military leave. In effect, returning employees are (at least for a period of time) not employees at will and care must be taken in termination decisions that cause can be established.

Obviously, application of the USERRA statute creates great practical and legal difficulties for employers, even when the employer is making an honest, good faith effort to comply with the law. More information on the statute, and its effect on wages and benefits, is available from Seaton, Beck & Peters.

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