

Update: New Legal Developments Affect Employers with Employees In The Military

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Ohio municipalities and other Ohio employers continue to face new legal requirements affecting the relationship with their employees. Though Ohio employers dodged a bullet recently when the Service Employees International Union pulled its mandatory paid sick leave bill (the Ohio Healthy Families Act) from the November 2008 ballot, many other new developments continue to pose challenges. One area of significant regulatory and legislative activity concerns the rights of employees who are either in the military, or have family members in the military.

Since 9/11, many employers, including municipalities, have lost valued employees to military service, whether through call-ups of military reserve units or National Guard units, voluntary enrollment or otherwise. In fact, over 525,000 National Guard and reserve troops have been called to active duty since 2001 — the largest such mobilization since WWII. Discrimination in employment based upon the military service of employees is prohibited by the Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA). USERRA, which was enacted in response to the return of thousands of Persian Gulf War veterans, prohibits employers from denying employment, re-employment, promotion or employment benefits because of an employee's military or National Guard service.

There have been several new legal developments that impact employers with employees who are in the military or who have family members in the military. First, in 2006 the U.S. Department of Labor issued regulations under USERRA for the first time since it was enacted. Second, the federal Family and Medical Leave Act (FMLA) was amended, effective in January 2008, to provide greatly expanded leave rights for those who care for an ill or injured service member. Finally, an Ohio law that took effect in August 2008 provides employees with the same rights to be reinstated to their jobs as they would have under USERRA and further provides that they may enforce these rights in state court. Previously, the only court available to enforce such rights was federal court. Together, these and other developments underscore the importance to employers of being familiar with the rights of employees with respect to their (or their family members') military service.

USERRA

USERRA Overview: A Unique Employment Discrimination Law

In considering employee legal rights regarding military service, it is useful to keep the purpose of USERRA in mind. Finding that military service had historically disadvantaged soldiers in their pursuit of civilian careers and employment, Congress enacted USERRA to codify and expand prior law prohibiting employment discrimination based upon an employee's

military service (and thereby to encourage service in the armed forces). In keeping with this purpose, USERRA applies to *all aspects* of employment: initial employment, retention, promotions, benefits and re-employment after military service. It includes within its scope *all employers* who pay salary or wages for work performed, including the federal and state governments. Indeed, individual supervisors may be considered employers liable for violations of USERRA. Finally, unlike most employment discrimination laws, when a covered employee alleges a violation of USERRA, it is the *employer's burden* to demonstrate compliance or the applicability of a statutory defense to compliance — rather than the employee's burden to demonstrate the opposite.

Department of Labor USERRA Regulations

The regulations issued by the Department of Labor effective January 18, 2006 clarify a number of previously vague or undefined issues under USERRA. The DOL's USERRA regulations are comprehensive and are set out in a relatively clear and user-friendly question-and-answer format. The DOL's USERRA regulations, and much additional information regarding USERRA, may be obtained through the Department of Labor website associated with the Veterans' Employment and Training Service (VETS) at www.dol.gov/vets.

USERRA Basics: Leave Rights

Under USERRA, an employee must be given leave from work for active military service and also for military training, such as National Guard and Reserve training. The employee's only duty with regard to such leave is to provide advance written or oral notice — unless military necessity dictates that no notice be given. The new USERRA regulations clearly provide that the notice may be either verbal or written, that it may be informal, and that it need not follow any particular format. However, Department of Defense regulations strongly recommend that civilian employers be provided with 30 days advance notice of an employee's departure for uniformed service when it is feasible. There is a 5 year cumulative service cap on the amount of military leave an employer must provide. However, the 5-year cap is subject to important exceptions. For example, the computation of the 5 years does not take into account periods of time spent due to inactive duty training, annual training, involuntary recall to active duty, involuntary retention on active duty, or active duty in support of a war or national emergency, regardless of whether such duty is voluntary or involuntary. Thus service in support of current United States military operations "Operation Iraqi Freedom," "Operation Enduring Freedom" (in Afghanistan), etc., is *not* counted against the 5-year cap.

USERRA Basics: The Right To Be Promptly Reinstated After Service

Upon return from military leave, USERRA provides that an employee must be "promptly re-employed" by the employer. The employee need only notify an employer of his or her return from military leave and intention to return to employment within the following specified time periods:

- for military service of 1 to 30 days' duration, on the first full day after

completion of service and expiration of an 8 hour rest period following return travel home;

- for military service of 31 to 180 days, within 14 days of completion of service;
- for military service of more than 180 days, within 90 days after completion of service.

Until the Department of Labor issued its new regulations, no specifics were provided as to the speed of re-employment (i.e., what is “prompt”?). The 2006 USERRA regulations answer that question, providing that "absent unusual circumstances," the returning employee should be reinstated within two weeks after applying for reemployment. Note that for a short leave such as weekend National Guard duty, the regulations provide that "prompt reinstatement generally means the next regularly scheduled working day."

Failure to report back to work or apply for re-employment within the above-specified time periods does not mean that an employee automatically forfeits the right to re-employment or employment benefits. Rather, such failure simply makes the employee subject to the employer's general policies regarding absences from scheduled work.

There are some very limited exceptions to the re-employment rights of a covered employee returning from military service. The re-employment requirement does not apply:

- if the employer's circumstances have so changed that re-employment is impossible or unreasonable;
- if, in the case of a disabled employee's return, the re-employment of said employee would impose an undue hardship on the employer; or
- if the employment that the returning employee left was only for a brief and nonrecurring period, with no reasonable expectation that it would continue indefinitely or for a significant period of time.

However, in any proceeding involving an employer's claim that it is not required to re-employ an employee who gave notice upon his or her return and notification, the statute provides that the employer has the burden of proving that one of the exceptions applies.

USERRA Basics: Reinstatement And The "Escalator Principle"

The essence of the obligation of an employer notified that an employee intends to return to work is to place that employee in the position he or she would hold if he or she had never been on military leave. This means that the employer may be required to place the employee in a position to which he or she would have been promoted if continuously employed, if he or she is qualified or can become qualified. If the period of service exceeds 90 days, the employee may

be placed in either a) the position he or she left or to which he or she would have been promoted, or b) in a position of like seniority, status and pay, if he or she is or can become qualified. If the returning employee cannot become qualified for a position to which he or she would have been promoted but for the military leave, he or she must be placed in the same position held prior to military service or, if the leave exceeded 90 days, either the same position or one that is substantially equivalent. These provisions embody the so-called “escalator principle,” that an employee returning from military service is to be placed back on the career escalator in the location he or she would occupy but for the military leave absence.

The USERRA law also provides that if two or more returning employees are entitled to be reinstated to the same position, the employee who left the position first has the right to it. The other returning employee(s), of course, would still be entitled to re-employment under USERRA, which might mean placement in *another* position of like seniority, status and pay.

USERRA and Job Protection Against Discharge

USERRA provides that an employee reinstated following uniformed service of 31-180 days may not be discharged except for cause for 180 days. An employee reinstated following uniformed service of more than 180 days may not be discharged except for cause for one year.

USERRA, Pay, and Ohio Public Employers

USERRA neither requires employers to pay employees during military leave nor precludes them from doing so. However, USERRA expressly permits state and local law to provide greater or additional protections for employees than USERRA does, which may include pay obligations. In Ohio, Revised Code Section 5923.05 provides that permanent public employees who are members of the Ohio organized militia, Ohio National Guard or reserve components of United States armed forces are entitled to a leave of absence for up to one month per calendar year without *any* loss of pay. The employee should submit to the appointing authority the published order or call to service, or written documentation from the appropriate military commander, before being credited with such leave. If the employee is called or ordered to service for *longer* than one month per calendar year due to an executive order of the President or an act of Congress, he or she is entitled to be paid either the difference between his or her gross civilian pay as a public employee and his or her gross military pay, or five hundred dollars (\$500) per month — whichever is less. This differential pay obligation does not apply, however, if the employee’s gross military pay and allowances exceed his or her gross pay as a public employee.

Note that Ohio Revised Code Section 5923.05(E) provides that a political subdivision may elect to pay any of its permanent employees entitled to leave under this section *more* than the minimum required by that section. Many Ohio municipalities have chosen to do so. Finally, R.C. 5923.05(G) provides that permanent public employees whose employment is governed by a collective bargaining agreement that addresses military service shall abide by the terms of that agreement — but further provides that no such agreement may provide fewer rights and benefits than R.C. 5923.05.

Health Insurance Continuation Under USERRA & Other Benefits

Employers are required by USERRA to offer employees the opportunity to continue health care coverage during military leave, in a manner very similar to COBRA, subject to applicable employee payments. Under USERRA, for a leave of 30 days or less an employee cannot be required to pay more than the regular employee share of the cost of coverage; for longer periods of military leave, the employee may be required to pay the full premium cost. In 2004, pursuant to the Veterans' Benefits Improvement Act (VBIA), the length of continuation coverage required under USERRA was extended from eighteen (18) to twenty-four (24) months for continuation elections made on or after December 10, 2004. Employees' pension or retirement benefits, too, must be made available to the employee upon re-employment as if the employee had never incurred a break in employment. The period of military service is deemed to constitute service with the employer for purposes of vesting and accrual of benefits. And, the employer must continue to make any contributions to the employee's retirement or pension account that it would make were it not for the military leave absence.

How Is USERRA Enforced?

An employee who claims that an employer has or is about to violate USERRA may complain to the Department of Labor for an investigation, or may proceed directly to federal court without first filing a DOL complaint. If the court finds a violation of USERRA, it may issue injunctive relief that orders the employer to comply with the law and may award damages to compensate the employee. In the case of a willful violation, the court may award an additional amount equal to the compensatory award as liquidated punitive damages.

Note that USERRA provides only for a *federal* court forum for employees who believe they have been harmed by a violation of USERRA. On May 23, 2008, Ohio Governor Ted Strickland signed into law a bill that became effective on August 21, 2008, S.B. 289, and that provides that an employee who would have reinstatement rights under USERRA shall have the same rights under Ohio law, and further allows such employees to bring an action to enforce such rights *in state court*. This provision, based upon the belief that state courts can process such cases more quickly than federal courts, is designed to help provide a speedier remedy to employees harmed by an employer's violation of re-employment rights following military service.

Required Notice of USERRA Rights

Finally, note that under the Veterans Benefits Improvement Act of 2004, employers are required to provide, to persons entitled to rights and benefits under USERRA, a notice of the rights, benefits and obligations of such persons and such employers under USERRA. This notice obligation may be fulfilled by the posting of an approved notice in a place where the employer customarily places notices for employees. A poster form of the required notice is available at www.dol.gov/elaws/userra.htm. Notice may also be provided by other means such as handing notice out or e-mailing it, but as a general rule each employer should place the USERRA poster in the area where other legal notices to employees are posted in addition to any other means of notice.

USERRA provides broad protections for employees who serve in the military and, as stated above, places on the employer the burden of showing that any of its very limited exceptions may apply. Further, the protections provided by USERRA are sometimes augmented by state and local law. The touchstone of an employer's obligations under USERRA is that employees must be treated exactly as they would have been treated but for military service.

Military Leave Under the Family & Medical Leave Act (FMLA)

On January 28, 2008, the FMLA was amended to provide leave rights to employees in connection with military service-related needs. The amendments add a number of definitions to the FMLA and also provide for two new types of leave: (1) leave to care for an injured servicemember; and (2) leave arising from a family member's call to active duty.

FMLA Leave To Care For An Ill Or Injured Servicemember

This new leave entitlement, effective January 28, 2008, permits a "spouse, son, daughter, parent, or next of kin" to take a job-protected leave of up to 26 workweeks' duration to care for a family member in the uniformed services who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. "Next of Kin" is one of the new definitions under the FMLA and means "the nearest blood relative of that individual." "Serious Injury or Illness," another new definition, means "an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating."

Family Leave Related To A Call To Active Duty

The amendment also created a new category of leave to the FMLA's prior 12-week entitlement. Specifically, an employee may take up to 12 weeks of job-protected leave in a 12-month period of any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call to active duty. The Secretary of Labor has not yet defined "qualifying exigency," and this new "qualifying exigency" leave entitlement will not take effect until regulations defining the term are issued. However, even the term is not yet defined, the Department of Labor has suggested that the following types of exigency *may* qualify: making childcare arrangements; making financial and legal arrangements related to the servicemember's absence; counseling; attending farewell or arrival arrangements for a servicemember; and attending to affairs caused by a servicemember's death or missing status. Further, the Department of Labor "encourages employers to provide this type of leave to qualifying employees" immediately, even pending the issuance of regulations and definitions.

Note that the 26 weeks of job protected family leave per year that is now permitted is a significant expansion of the leave available under FMLA when it was originally enacted (12 weeks per year). However, 26 weeks is the maximum amount of leave permitted in a 12 month period for *all* FMLA-related purposes, and the previous 12 week cap continues to apply to the

previous categories of leave (for example, to care for an employee's own serious health condition, etc.). In addition, spouses who are employed by the same employer may take an *aggregate* of 26 weeks FMLA leave. The new categories of FMLA leave, like the previous categories, are unpaid, but subject to the same rules regarding substitution of paid leave.

As Ohio's municipalities continue to honor and respect the military service of their employees, they must be mindful of the ever-changing legal landscape that governs their treatment of such employees.