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Your Employee Has Been Drafted . . . What's an Employer To Do?

The country is at war. Thousands of reservists are being called to military duty in response to the recent terrorist attacks. How should employers respond?

The federal Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits employers from discriminating in any aspect of employment – hiring, firing, reemployment, promotion and benefits – on the basis of an employee's military obligations. The law covers anyone who serves or has served in any branch of the armed services as well as reservists and National Guard members, and applies to all employers in the public and private sectors. Connecticut law also protects employees who take leave of absence to attend military reserve or National Guard meetings or drills.

While most employers realize that they must permit their employees to take leave of absence to fulfill their military obligations, many questions linger. For example, how long is the leave? Is it paid or unpaid? What if the employee is injured during the military service? Here are answers to some of the key questions.

Does an employer have to pay an employee who is on military leave of absence?

No. Many employers do, however, provide some amount of paid military leave as part of a benefits package. In addition, an employee may elect to use any accrued vacation or similar leave with pay during the military leave.

What about benefits?

In general, an employee absent from work because of uniformed service is treated as though he or she were on furlough or leave of absence. Accordingly, the employee is entitled to the same rights and benefits available to any other employee on leave under the employer's practices or contracts in effect at the time. (This means that the

employee can also be required to continue paying his or her normal portion of the cost of any funded benefits, just like any other employee on leave.)

For an absence of less than 30 days, the employer must continue health benefits as if the employee had not been absent. After that, coverage stops unless the employee elects to pay for COBRA-like coverage for up to 18 months. Health insurance must be reinstated when the employee returns to work, with no waiting period.

Under the USERRA, an employee does not accrue vacation or medical/sick days while on military leave, unless such accrual is permitted for other sorts of employee leaves. Connecticut law, however, provides that an employee on military leave may not be subject to any "loss or reduction of vacation or holiday privileges by reason of such absence."

Is there a limit to the amount of military leave the employer must permit?

In most cases, there is a cumulative 5-year limit on the amount of *voluntary* military leave an employee can take and still have employment rights when he or she returns. However, the 5-year cumulative total does not include *involuntary* service, such as recall to active duty, or certain drills, training and other similar activities.

What job does the employee get upon return from military service?

The returning employee normally must be given the job he or she would have had if the leave had never occurred (including, possibly, a promoted position), provided that the employee is qualified for that job or can become qualified after reasonable efforts by the employer. In other words, the employee is entitled to get back on the job "escalator" at the point he or she would have been if employment had not been interrupted by military service.

If that is not possible despite the employer's best efforts, then the employee is to be reinstated in his or her old position or the closest thing to it. If the employee cannot become qualified even for his or her old position for any reason other than disability, the employee must be given any other available position for which he or she is qualified.

Additionally, the employee is entitled to be reinstated with the same privileges and status he or she would have enjoyed if there had been continuous employment – for example, enhanced vacation rights, automatic seniority-based pay increases, etc. The employer also must credit the employee for pension entitlements and other deferred-income plans for the time the employee was on military leave, and must allow the employee to make up missed employee contributions to such plans for a period of up to five years.

How soon must the employee report back to work after completing military duty?

The employee must report to work or submit an application for reemployment promptly after being released from military duty. This means immediately after service of less than one month; within two weeks after service of one to six months; and within 90 days after service longer than six months.

What if the employee is injured during military service?

If the employee is injured during military service, the deadline for reinstatement may be extended for up to two years while the employee is convalescing, and the employer must make reasonable accommodation for the impairment. This may require offering employment in a position, consistent with the employee's disability, as close as possible to the employee's "escalator" position in terms of seniority, status and pay.

Are any employers exempt from these obligations?

The USERRA covers all employers. However, an employer may not be required to preserve the job of an employee in military service if the employment was for a brief, non-recurrent period and there was no reasonable expectation that the job would continue indefinitely or for a significant period (*e.g.*, a temp, or someone working on an isolated short-term project or assignment). Employers may

also be excused from reemployment if: circumstances have so changed as to make reemployment impossible or unreasonable; reemployment imposes an undue hardship because the employee has incurred a service-connected disability; or the employee cannot become qualified for any position after a reasonable effort by the employer to qualify the person. An employer asserting any of these reasons for refusal to reemploy has the burden of proof. Finally, an employer need not reemploy a service member who was dishonorably discharged.

Are there other employment restrictions that apply after a military leave?

Yes. For a limited period of time following military service of more than a month, a reinstated employee cannot be discharged except for cause. The period of protection depends on the length of the military service – six months for service of one to six months, and a full year for service longer than six months. This is obviously a significant restriction on the employer's rights if the employee would otherwise be an "at will" employee.

What are the penalties for employer violation of these rules?

An employee who believes that his or her rights have been violated may seek assistance through the Department of Justice, or may file a private action in Federal court, and may recover double the amount of lost wages and benefits if the violation was willful, plus attorneys fees and other litigation expenses.

Recommendation

This may be the first time that many employers have had to deal with the issue of employees with military leave. It may be a good time to look at your employment policies to be sure that they reflect the state of the law and your company's expectations for these circumstances. If you would like us to assist you on this and related issues, please feel free to call **Dorit Heimer** or **Pat Weitzman** at (203) 222-0885.