

## **Rights and benefits for Uniformed Service Members under the new USERRA regulations**

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In December 2005, the U.S. Department of Labor (“DOL”) published final regulations interpreting the Uniformed Services Employment and Reemployment Act of 1994 (“USERRA”). Broadly speaking, USERRA prohibits discrimination and retaliation against past and present members of the uniformed services and establishes reemployment rights for service members returning to civilian employment. USERRA may become increasingly significant given that hundreds of thousands of protected employees have been mobilized since September 11, 2001 and the Department of Defense (“DOD”) estimates that 50,000 to 125,000 service members will demobilize this year, many of whom will be returning to civilian employment.

The final regulations, like the interim regulations published in 2004, provide an easy to read, question and answer format explanation of how USERRA works in practice. This article is designed to provide some general background on USERRA and to shed light on areas where the final and interim regulations differ, or where the final regulations clarify prior areas of confusion.

### **Broad Coverage for Employers and Employees**

The final regulations, consistent with the interim regulations, express an intent to provide broad protection for employees who voluntarily or involuntarily undertake uniformed military service. The final regulations confirm that the breadth of this protection even prevents employees from waiving reemployment rights prior to or during a period of service. USERRA applies to employees of all private sector employers and state and local governments. Indeed, the final regulations extend liability for USERRA violations to individual managers and supervisors because they are an “employer,” which is defined as “any person ... who has control over employment opportunities.”

The final regulations further confirm that USERRA protects a broad range of employees, including those on strike, layoff, or other leave of absence. Unlike the FMLA, there is no “key employee” exception. Professional, executive, and managerial positions are protected. The final regulations also clarify that qualifying “uniformed service” includes certain service with the Federal Emergency Management Agency’s National Disaster Medical System. The final regulations further provide that USERRA’s anti-discrimination provisions protect some ROTC members.

The final regulations also confirm that, part-time, probationary, temporary or seasonal employment may have reemployment rights and protection from discrimination or retaliation. Contrary to commentary received in response to the interim regulations, the DOL confirmed that part-time, probationary, temporary or seasonal employment is not necessarily synonymous with

employment for a “brief, non-recurrent period” that would not afford an employee reemployment rights, but is protect from discrimination.

### **Advance Notice and Period of Absence**

USERRA requires that employees provide employers with advance notice of service. Unfortunately, the statute does not define “advance notice.” The DOL rejected requests to establish a bright-line rule for timeliness of advance notice in the final regulations. Rather, the DOL suggested timeliness should be considered on a case-by-case basis, while also referencing separate DOD regulations recommending 30 days notice. The interim regulations were amended to state that an employee with multiple employers must provide advance notice of service to each employer.

USERRA provides reemployment protection for a cumulative absence period of five (5) years, although with numerous exceptions. The DOL received comments to the interim regulations concerning whether the period between an employee’s last date of employment and first date of service counts toward this period. Unfortunately, the final regulations reject imposing a specific limit on the time that may elapse in this time period. Rather, the regulations suggest a case-by-case analysis of the circumstances.

### **"Prompt Reemployment"**

USERRA requires employers to provide “prompt reemployment” to returning service members, although “prompt reemployment” is undefined in the statute. The new regulations provide that “absent unusual circumstances, reemployment must occur within two weeks of the employee's application for employment.” On the other hand, the regulations also state that where an employee, for example, is returning from weekend National Guard duty, “prompt reemployment” is the next regularly scheduled work day, while “prompt reemployment” after several years of active duty may require more time due to job reassignments or to give notice to another employee who occupied the returning employee's position. Again, it appears that a case-by-case analysis is required.

### **"Escalator Principle"**

The regulations further clarify the “escalator position” requirement for reemployment rights, an issue which has been particularly confusing for employers. The regulations define the “escalator position” as “the position the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service.” Depending on the circumstances, the reemployment position may be: the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or the nearest approximation to one of those positions. The final regulations further clarify that the escalator position applies to employees with a disability incurred in, or aggravated during, uniformed service. Notwithstanding the escalator principle, the regulations emphasize that USERRA does not require an employer to reinstate a returning service member in an employment position if the returning service member is unqualified, although the employer must make reasonable efforts to assist the returning employee in becoming qualified.

The regulations also clarify the application of the escalator principle to “rates of pay.” The interim regulations stated that the “escalator position” would require “merit pay” increases the service member would have obtained with “reasonable certainty,” while leaving “reasonable certainty” undefined. In response to comments prepared by Ogletree Deakins, the final

regulations allow employers to examine the returning employee's own work history, the employee's history of merit increases, and the work and pay history of employees in the same or similar position in determining whether the returning employee is entitled to a non-seniority, performance-based "merit pay" increase which might have been earned during the employee's leave of absence.

### **Health Care and Pension Plan Rights**

Health care and pension plan rights are also addressed in the final regulations. As in the interim regulations, the final regulations outline implementation of USERRA's requirement that employees and eligible dependents be reinstated in an employer's health plan without a waiting period or exclusion upon reemployment, and that an employee need not elect to continue health plan coverage during a period of uniformed service to be entitled to reinstatement upon reemployment.

The final regulations also include a new section governing a plan administrator's actions where an employee fails to elect or pay for continuing coverage in a timely manner. Where an employee fails to give notice of service or to elect continuing coverage, the plan administrator may cancel coverage, unless failure to give advanced notice is impossible, unreasonable, or precluded by military necessity. Plan administrators may develop reasonable requirements where an employee has given notice, but has failed to elect continuing coverage. Similarly, plan administrators may develop reasonable requirements where an employee properly elects continuing coverage but fails to make timely payment.

The regulations also provide guidance in implementing rights for reemployed service members in their employee pension benefits, and clarify that for determining the amount of contributions or deferrals to a pension plan a reemployed service member must be treated as though the employee had remained continuously employed for pension purposes. The regulations explain the pension benefits that must be provided, as well as the responsibility to make contributions and/or deferrals attributable to a particular period of military service.

### **Other Employment Benefits**

As stated in the statute, interim regulations, and final regulations state that employers must provide employees on military leave with non-seniority rights and benefits that are available to other employees with similar seniority, status, and pay on a non-military leave of absence. Due to commentary on the interim regulations, the DOL confirmed in the final regulations that vacation accrual, like life insurance coverage, holiday pay, bonuses, etc., is a non-seniority benefit. Also, the final regulations significantly alter the position in the interim regulations that, while employees may use accrued vacation, annual, or similar leave during a period of service to continue civilian pay, sick leave may not be used in this fashion. The final regulations state that sick leave may be used in this fashion if an employer's policies allow for sick leave to be used to supplement pay during other non-paid leaves.

### **Protection from Discharge**

The final regulations clarify a returning service member's special protections from discharge except for "just cause." The regulations provide that although the "just cause" requirement is an exception to at-will employment, protection from discharge is not absolute. The regulations provide that "the employer bears the burden of proving either that the discharge was based on the employee's conduct or it was the result of some other legitimate nondiscriminatory reason

that would have affected any other employee in the reemployed service member's position regardless of his or her protected status or activity." The regulations list other illustrative examples for discharge to include "elimination of the employee's position, corporate reorganization or 'downsizing' and layoff, provided that those reasons are legitimate, nondiscriminatory, and non-pretextual." One significant change from the interim regulations concerns discharging employees for working for another employer during the reemployment period between discharge from service and return to his or her pre-service employer. Unlike the interim regulations, the final regulations state that where an employer has a policy forbidding other employment during leaves, such employment may be a violation subjecting the employee to discipline under the policy, even including discharge.

### **Final USERRA Rights Poster**

Finally, employers should be advised that, in addition to implementing the final regulations, the DOL has issued a final poster to provide notice of employees' rights under USERRA. The final poster, found at, <http://www.dol.gov/compliance/laws/comp-userra.htm#posters>, should be posted by January 18, 2006.

### **About the author**



Matt Johnson's practice is focused on advising and representing management and employers in all aspects of employment and labor (union) law, including military leave issues and litigation related to employment and business matters. He has significant experience in civil litigation and trial practice, including handling jury and non-jury cases in state and federal court.

If you would like assistance in drafting new policies and procedures or reviewing existing policies for compliance in light of the final regulations, please contact Matt at (864) 271-1300 or at [matthew.johnson@ogletreedeakins.com](mailto:matthew.johnson@ogletreedeakins.com).

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