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COVID-19

Employer Obligations for Members of the Armed Services

Due to the COVID-19 pandemic, there has been an increased need for the federal and state governments to call up members of the National Guard and/or the Reserves components of the federal armed forces for a variety of missions to help combat COVID-19. Employers need to be mindful of the rights and protections afforded to their employees who serve in the armed forces. Generally speaking, employers with employees who serve in the “Uniformed Services” are prohibited from discriminating against these employees and must protect their jobs when they return from military service under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), as well as under state laws. This Bulletin focuses mainly on employer’s obligations with respect to employee benefits for these employees.

■ Background

USERRA applies to all public and private employers in the United States, regardless of size, and protects certain employment and benefit rights for members of Uniformed Services. Uniformed Services include the Army, Navy, Marine Corps, Air Force, Coast Guard, and National Guard, among other commissioned corps. Their service includes both active and reserve duty (whether voluntary or involuntary) and time off for training or instruction.

In general, USERRA prohibits employers from discriminating against employees based upon their military service and requires employers to provide members of the Uniformed Services the following:

- the right to continue coverage under the employer’s group health plans while the employee is absent from work due to Uniformed Service;
- guaranteed reemployment following completion of the employee’s Uniformed Service;
- restoration of the seniority the employee had on the date of the leave, and additional seniority that the employee would have attained, if the employee had remained continuously employed; and
- reinstatement in group health plans if coverage was terminated as a result of Uniformed Service and the employee is reemployed following completion of Uniformed Service.

All employers are required to provide to employees entitled to the rights and benefits under USERRA, a notice of their rights, benefits and obligations. Employers may provide the notice “Your Rights Under USERRA” by posting it where employee notices are customarily placed or by mailing or distributing the notice by email. The USERRA poster can be accessed at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf

It is important to note that National Guard members may be called to service under either federal or state authority, but only Federal National Guard service is covered by USERRA. National Guard duty under state authority, commonly referred to as State Active Duty, is not covered by USERRA; however, members of the National Guard serving on State Active Duty may have similar employment protections under state law. This Bulletin will not address the specific state laws, but each of New York, New Jersey, Pennsylvania, California and Delaware have their own military laws which are similar to USERRA. Generally speaking, USERRA will preempt any state laws that provide lesser rights or benefits or impose additional eligibility criteria.

■ Military Leave

Under USERRA, employers must grant unpaid military leaves of absence to employees who request such leave in order to perform services in the Uniformed Services. With certain exceptions, they must grant a leave of absence for up to 5 years to any person who is absent from his or her job because of service in the Uniformed Services. Employees are required to provide their employers with advance notice of military service. The notice may be either written or oral, and may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. No notice is required if military necessity prevents the giving of notice, or the giving of notice is otherwise impossible or unreasonable. Employers must allow, but not require, service members to use any vacation and/or personal leave that had accrued before the beginning of their military leave instead of unpaid leave.

■ Health Benefits

Employees serving in the Uniformed Services are entitled to COBRA-like continuation health coverage. If an employee has group health plan coverage through an employer, s/he must be permitted to continue the same coverage s/he had before being called to duty (including dental and vision)

during military leave, including coverage for dependents if the plan offers dependent coverage. USERRA does not grant independent election rights to employees and their dependents; only the employee who performs Uniformed Service is granted the right to elect USERRA coverage for himself or herself, and for any covered dependents. This means that only the employee can elect coverage on behalf of dependents and dependents cannot elect coverage if the employee does not also elect the coverage. The employee may continue coverage for the lesser of 24 months beginning on the date of the military leave, or the period beginning on the date of the military leave and ending on the date the employee fails to return from service or apply for reemployment. If the military leave is less than 31 days, employers are not permitted to charge a premium that is higher than that paid by regular employees. If the leave is 31 days or more, employers may charge up to 102% of the full premium under the plan.

Can an Employer Terminate Coverage?

Yes, but only in certain circumstances. An employee's health plan coverage may be terminated upon the employee's departure from employment for Uniformed Service if the employee does not give advance notice of service and/or does not elect to continue coverage during his or her leave. However, the employee must be retroactively reinstated if the employee is excused from the advance notice requirement because it was impossible, unreasonable, or precluded by military necessity, and the employee later elects coverage and pays all amounts due. Plans may also adopt reasonable rules allowing cancellation of coverage if timely payment is not made.

Can an Employer Impose a Waiting Period in Connection with Reinstatement?

When uniformed service members return to employment, an employer is required to provide them and their dependents with health care benefits immediately. While an employer may not impose an exclusion or waiting period in connection with reinstatement of coverage upon reemployment following Uniformed Service, an employer is permitted, but not required, to allow an employee to choose to delay reinstatement of health plan coverage until a date that is later than the employee's reemployment date.

Can an Employee Make a New Election in a Cafeteria Plan?

Yes. Employees absent from employment by reason of military service will be treated as any other employees on leave. A service member's ability to discontinue or change coverage under a cafeteria plan will depend on whether the plan allows mid-year election changes. If under the terms of the plan, an unpaid leave by either the employee or the employee's spouse triggers the right to make mid-year election changes, an employee on military leave will be allowed to make such changes. If participation in a cafeteria plan is discontinued by reason of military leave, eligibility for cafeteria plan benefits following the leave must be restored.

■ Layoffs

If an employee is laid off with recall rights or on a leave of absence, s/he is an "employee" for purposes of USERRA. If an employee is laid off before or during his or her service in the Uniformed Services, and the employer would not have recalled him or her during that period, the employer is not required to reemploy him or her following his or her period of service simply because s/he is covered under USERRA. A service member can be furloughed or laid off upon return from Uniformed Services only if it is reasonably certain that s/he would have been furloughed or laid off had s/he not been absent for uniformed service. Reemployment rights under USERRA cannot put the employee in a better position than if s/he had remained in the civilian employment position.

■ Reemployment

If an employee satisfies the prerequisites to reemployment, the employee should be promptly reemployed in the job position that s/he would have attained with reasonable certainty if not for the absence due to Uniformed Service. "Prompt" reemployment generally depends on the length of time the person was away and can range from the next day after returning from duty if the deployment was relatively short, to up to fourteen days in the case of a multi-year deployment.

When reemploying a service member who might have been exposed to COVID-19, an employer must make reasonable efforts in order to qualify the returning employee for his or her proper reemployment position. This can include temporarily providing paid leave, remote work, or another position during a period of quarantine for an exposed reemployed service member or COVID-19 infected reemployed service member,

before reemploying the individual into his or her proper reemployment position.

Employers are required to reemploy a returning service member in all cases except:

- if the employer's circumstances have changed, so as to make it impossible or unreasonable for the employer to reemploy the individual;
- if the returning service person is no longer qualified to reemployment despite reasonable efforts to requalify that person, and reemployment would impose an undue hardship; or
- if the position the employee held before service was for a brief, non-recurrent period and there is no reasonable expectation that employment would have continued indefinitely for a significant period.

Under USERRA, a reemployed employee may not be discharged without cause for 180 days after the date of reemployment if the person's period of military service was for 31 to 180 days, and for one year after the date of reemployment if the person's period of military service was for 181 days or more. Those who serve for 30 days or less are not protected from discharge without cause.

■ Employer Action

Although legislation is being introduced at a quick rate at both the federal level and state level, employers should pay attention to laws already in existence that protect leave for members of the Uniformed Services when called to combat emergency situations. Employers should also review their Plan Documents and Summary Plan Descriptions (SPDs) for policies and procedures regarding leaves. In addition, employers with employees who are subject to a collective bargaining agreement should review the agreement to determine what, if any, additional rights are included for those on military leave. Employers with employees in the Uniformed Services should consult with counsel to ensure they are in compliance with existing requirements under both federal and state law, where applicable.

For more information on USERRA, visit the following websites:
<https://www.dol.gov/agencies/vets/programs/userra/resources>
<https://www.dol.gov/agencies/vets/programs/userra/USERRA%20Pocket%20Guide>