

The Rights Of Veterans And Those Who Serve



By Jeffrey W. Larroca

After 9-11, the United States embarked on a massive mobilization that had a dramatic impact on the American workforce. Since 2001 and the resulting military efforts in Iraq and Afghanistan, over half a million reservists have left their job to serve their country. Iraq and Afghanistan have not been the only drivers. Recently, President Obama authorized the Pentagon and Department of Homeland Security to call up elements of the reserves for earthquake relief efforts in Haiti.

American employers owe these individuals not only their gratitude, but, pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), legal obligations at various stages of their service. Below is a checklist for employers and numerous requirements under the USERRA. It is by no means exhaustive, but it will assist an employer in terms of their responsibilities.

1. EVERY EMPLOYER IS COVERED. Unlike other federal employment laws, like the Family and Medical Leave Act ("FMLA"), which covers employers with 50 or more employees in a 75-mile radius, or Title VII, which covers employers with 15 or more employees, the USERRA covers all employers.

2. USERRA MEANS NO DISCRIMINATION. The USERRA is very clear: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." If an employer hires William over Mary because it determines Mary is a riskier choice given her status in the Navy Reserves, then that employer has just violated the USERRA.

3. THE HEART OF THE USERRA IS REEMPLOYMENT. The heart of the FMLA is simple: If you need to take time off of work to have a baby or deal with an illness or the illness of a family member, you will have job protection for a period of time. The USERRA is similar. If you serve (either

voluntarily or if you are so ordered), in most circumstances, your job is protected when your service is concluded.

4. THE RIGHT TO REEMPLOYMENT CAN SURVIVE FOR A VERY LONG TIME. Unlike the FMLA, where time off is counted in months, the USERRA can protect an employee's job for up to five years, and in certain circumstances, longer. For example, if the employee was ordered to active duty in support of a critical mission or requirement of the uniformed services, it is not counted as part of the five years. Similarly, service performed to fulfill periodic National Guard and Reserve training requirements is not counted toward the five-year limit.

5. AN EMPLOYER DOES NOT HAVE TO PAY AN EMPLOYEE ON MILITARY

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ASSIGNMENT. While many employers offer a period of transition pay or a pay differential to employees who are called to service, such pay is not legally required by the USERRA. That said, some states do require some pay for military service. For example, state employees in Wyoming and Idaho receive 15 paid days for military service.

6. AN EMPLOYER HAS TO PROVIDE EMPLOYEES RETURNING FROM SERVICE A HOST OF BENEFITS TO WHICH THEY WOULD HAVE BEEN ENTITLED HAD THEIR EMPLOYMENT BEEN UNINTERRUPTED. While employees need to be paid under the USERRA, they are entitled to any number of benefits when they return from military service, including, but not limited to, seniority benefits and a rate of pay they would have attained had they remained on the job. In one case, a court awarded a police officer who returned from military service his detective's "clothing allowance."

7. AN EMPLOYER CANNOT FORCE AN EMPLOYEE ON MILITARY SERVICE TO

USE ACCRUED LEAVE. Unlike the FMLA, employees cannot be required to use their accrued vacation or annual leave concurrently with leave under the USERRA.

8. THE USERRA PROVIDES SPECIAL PROTECTION FROM FIRING. Employees who return from military service of between 31 and 180 days cannot be fired for six months, except for cause. Employees with periods of service exceeding 180 days are protected from non-cause terminations for one year.

9. THE PENALTIES CAN BE STEEP. If an employer violates the USERRA, they may be subject to an administrative action or a lawsuit brought by the employee, the U.S. Attorney General or the Office of Special Counsel. A victorious employee could get

his or her job back, as well as back pay, lost benefits, retroactive seniority, and damages can be doubled if a violation is deemed willful.

10. HAVE A POLICY. If you don't have a policy, follow the posting requirements [see http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf] and take note of the special protections afforded those who answer the call of duty.

In employment law, there are sympathetic plaintiffs and then there are the mother-of-all sympathetic plaintiffs. No one wants to be the guy who sticks it to someone who committed their time and risked their life to assist earthquake victims or fight for their country. ●

Jeffrey W. Larroca is a member of the Eckert Seamans law firm in Washington, D.C., in the Litigation Division. He focuses his practice on labor and employment and litigation. If you have a legal question for Jeff, you can reach him via email at JLarroca@eckertseamans.com.