

# PERSONNEL NOTEBOOK

*For Your Most Important Resource*

## UNCLE SAM WANTS YOU

To Help Our Veterans Keep Their Jobs and Benefits

Most of us know that veterans have rights to the jobs they left when they entered the military. (See the Personnel Notebook "When Johnny Comes Marching Home Again, He'll Be Wanting His Old Job Back" on this site.) But still many employers in full support of returning veterans, are confused with the details of how to deal with the questions and problems that arrive. Just as veterans entering the military are facing difficulty and confusion, so are many employers. This Personnel Notebook will try to clarify some of those issues.

### **What are employers called upon to do?**

Primarily the answers fall into the following categories:

1. Non-discrimination against employees based on their military status,
2. Time off to serve or prepare,
3. Assure opportunities to maintain insurance benefits.
4. Job protection.

Let's review not only our requirements under the regulations but what other employers are doing.

The primary law affecting the military personnel's and reservists' employment rights is the Uniformed Services Employment and

Reemployment Rights Act (USERRA). This law, enacted on October 13, 1994, functionally revises and replaces the original Veterans Reemployment Act of 1940.

### **Who is Covered by USERRA?**

USERRA applies to all employers. It represents the rights of all veterans, reservists and National Guard who are called upon for service, training and short term drills by the federal military. This does not apply to state military service such as local or state service performed by the National Guard. However, if the state National Guard is called upon for federal service or "federalized," they are then covered by USERRA. You need to check with the state regulations to see if your state requires more than the federal USERRA. State laws are allowed to demand more benefits to employees, but are not allowed to accept less than the federal requirements.

### **The Four Basic Requirements of USERRA**

#### **1. Non-Discrimination.**

You may not discriminate against an employee based on their military status. This means because they applied, were formerly in the military or have an obligation to perform a military service. Such individuals cannot be

denied employment, reemployment, promotions or any benefit of employment on the basis of their military relationship. Nor may an employer retaliate against an employee who exercises or enforces these rights.

## **2. Time Off.**

There are two types of leave under USERRA, annual and active leave. Annual leave is generally for a short period of 14 or 15 days once each year. The employer must allow this leave whether the duty is voluntary or involuntary. This duty may be for training, weekend drills, summer camp or fitness-for-duty examination.

Active leave is generally for a prolonged period of duty, as in a national emergency or declaration of war. The individual may be on employment leave for up to five years.

Employers are not required to grant more than a combined total of five years leave under the regulations. Accumulated requests exceeding five years may be refused and are not covered by law. However, there are so many exceptions to the five-year rule that you will need to review each case with your attorney or a veteran's representative. The company may not require an employee to sign a document guaranteeing their return to employment after service.

Notice Employees are advised to inform the employer in advance of leave requirements if this is possible. Although proof of the call-up should be provided, the employer cannot demand written proof to grant leave. The employer may contact the military.

Pay. There are no regulations requiring you to pay for an employee's time off the job for military duty. However, the employee may use his/her vacation time in order to receive pay for that period, if they so choose. You, the employer, cannot require that they use up any of their accrued paid leave.

Since Desert Storm (1990) and during the Iraqi War call-ups and again today, many private employers voluntarily continued to pay employees called into service from their jobs. Many did so for two to four weeks, some did so for months. In some cases employers elected to pay them their full pay minus any military pay they received. Otherwise vacation policies and accumulation of earned time-off rules are controlled by the employer's policy.

## **3. Health Benefits**

Enlistments, being drafted, annual training, and any other military leave that will result in a lapse or cessation of health benefits must be treated as a COBRA event. That is to say that the affected employee must be given the opportunity to continue the benefit premium at his/her own expense. The company must follow all COBRA requirements during a military leave, even if they are not otherwise covered by COBRA (employers with fewer than 20 employees are not subject to COBRA requirements). The employer, however, may elect to pay the premiums or merely continue to provide the benefit for 18 months. But the military employee cannot be deprived of health benefit coverage due to the call up without at least being allowed the option of self paying for 18 months. (Note: Also see "Benefits" below.)

## **4. Job Protection.**

### During the Leave Period

You may replace the individual with temporary help, a reassigned employee, contracted-out services, dividing the work among other employees, etc., but you would be wise to inform them that an employee on military leave may be returning to claim the position. The employer should keep records showing all general wage increases, training programs, etc, that are affecting that position, because you will have to provide them all to the returning employee.

The employee's seniority continues to accrue during military duty. All seniority or service time controlled benefits continue to accrue. For example, an employee who works for you for two years and then joining the military for five years, has seven years seniority or service time upon returning. So his/her vacation allowance, 401(k) fund etc, must allow the same privileges as any seven-year employee.

#### B. Returning to Work :

The employee must report back to work within a given number of days. If the employee's military time was one to 30 days, then he/she must return the first scheduled work day or eight hours after the end of the military duty (plus reasonable commuting from military station to home).

- Military time was 31 to 180 days. The employee must make application of employment within 14 days after the military duty ends.
- Military time was 181 or more days. The employee must make application within 90 days after military duty ends.

#### C. Position Reporting Back To:

If the employee was released under honorable conditions and military time was one to 90 days, they must be returned to the position they would be in as if they had never left. If that position were expanded or elevated during the individual's absence, and if they are qualified or can become qualified in a reasonable period of time, they must be then placed in that position. If they cannot become qualified, then they can be returned to the position they were in when the separation occurred.

Military time was 91 or more days. They must be returned to the position they would be in as if they had never left. If that position were expanded or elevated during the individual's absence, and if they are qualified or can become

qualified in a reasonable period of time, they must be then placed in that position (same as in "one to 90 days"), or a position of equal seniority, pay and status as that elevated position, or as a last resort, if that is not possible, then to the position the individual held when they left or one which reasonably approximates that position.

#### **Benefits.**

The employee's benefits restoration also depends on the amount of their military time. For:

- Military time up to 30 days. Benefits must continue during the 30 days. The employer may require the employee to pay their normal employee premium payment to cover the 30-day period with continuous benefits.
- Military time longer than 30 days. The employer uses the COBRA process and may charge the employee 102% of the complete premium (both employer and employee portions) for 18 months. After that the employer need not provide nor offer benefits. However, upon their return, they must be fully reinstated in coverage with no waiting period, no requirement regarding pre-existing conditions other than those determined to be military connected.

And as the new COBRA benefits have been extended into 2010, employers are required to pay 65 percent of the total premium costs of health benefits for veterans and their families who want to keep up their company provided benefits. Employers recoup those costs through their tax filings.

If the employer offers any other form of benefits to employees of this status, those benefits must all be applied to this position.

In addition, the families of active veterans are entitled to Family and Medical Leave (FMLA) rights to care for veteran family members

## **Veterans - At Work**

Such veterans as we are talking about truly have two jobs. The job at your company doing your work and our job working all over the world protecting us.

The people who control those two jobs must work together to help them, to assure that they, along with all the sacrifices they make, large and small, are not further burdened with the problem of unemployment. They must know that they are not going to be left behind because of their military service.

And as we regularly see, there are many kinds of heroes. Not all have military protection. If you employ one of the thousands of volunteer fire fighters we have in this country, maybe you can allow him or her some of that same protection.

## **Questions & Answers.**

**Q. Can an employer require an employee to reschedule annual training, drills or any other military duty?**

No. However, under extreme circumstances such as losing your only employee at a very bad time or having several employees go at once, you may contact the military commander of the employee's unit to request rescheduling. There is no other recourse.

**Q. What if an employee is injured or disabled during military duty?**

A. First, it extends the time an individual has to re-apply to your company or to report to work for up to two years. You are also required to consider the person as an applicant under the Americans with Disabilities Act (ADA) and provide "reasonable accommodation " to assist the individual to perform the job.

**Q. If the company's workforce has been reduced by 50% and that person's job no longer exists, must I still re-employ him/her?**

A. In all of the return to work cases, the company must identify the original job and track the evolution and development of that job (and probably the person(s) who were in it) and determine where that job is today. If that job no longer exists, then you need not reinstate the individual further. If, for example, the returning veteran has an accumulated seniority of two years on the job plus five years in military service, he/she now has seven years time with your company, but if your layoffs have cut back to employees with 10 years seniority, then that person need not be reinstated.

**Q. Can an employee be required to find their own replacement during their military duty?**

A. No.

**Does an Employee's vacation time continue to accrue during active duty?**

Yes, he/she continues to earn eligibility time but does not accrue actual vacation time. The accrual time for purposes of seniority, benefit eligibility, pension time all continue to accrue.

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