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Uniformed Services Employment and Reemployment Rights Act (2007)

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THE UNIVERSITY of TENNESSEE
MUNICIPAL TECHNICAL ADVISORY SERVICE

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#152
HOT topic

September 12, 2007

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

Richard L. Stokes, Human Resources Consultant

Recent and ongoing national events prompted this Hot Topic, which includes the most up-to-date information on employee military leave. Your city could be affected if you have employees who are in the National Guard or military reserve, who are planning to enlist, or, who are drafted. Military leave can affect your city's employee benefits and compensation packages and, ultimately, your city's budget.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 43, was signed into law on October 13, 1994, and modified on December 19, 2005, with the changes becoming effective on January 18, 2006. The new rules modified and strengthened some of the provisions of the Veterans' Reemployment Rights statute that affected all uniformed service members. The act protects the rights and benefits of public and private civilian employees who serve the country and expands the total amount of time an individual may be absent from work and retain reemployment rights.

The law provides four basic entitlements to employees returning from active service. The first is prompt reinstatement. The second involves accrued seniority. The third is training or retraining to ensure the employee can perform the functions of the job. And finally, the reemployed service member is entitled to special protection against discharge for 180 days following periods of service from 31 days to 180 days (except for cause). This protection is extended to one year for periods of service of 181 days or more.

Under USERRA, reemployment rights are required for any person who is absent from work because of service in the uniformed services. USERRA requires that returning service members be reemployed in the job they would have attained had they not been absent for military service, with the same seniority, status, and pay, as well as other rights and benefits determined by seniority 38 U.S.C. § 4316(a). Additionally, returning employees are entitled to any other benefits not based on seniority 38 U.S.C. § 4316(b).

"Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including active duty, active duty for training, initial active duty for training, inactive-duty

training, full-time National Guard duty, absences for examinations to determine fitness, funeral honors duty by National Guard or reserve members and certain duties performed by National Disaster Medical System employees 38 U.S.C. § 4303(13). The uniformed services consist of the Army, Army Reserves, Army National Guard, Navy, Naval Reserve, Marine Corps, Marine Corps Reserve, Air Force, Air Force Reserve, Air National Guard, Coast Guard, Coast Guard Reserve, Commissioned Corps of the Public Health Service, certain types of service in the National Disaster Medical System, and any other category of persons designated by the president in time of war or emergency 38 U.S.C. § 4303(16).

There is no exclusion for executive, managerial, or professional employees. The law even protects temporary, part-time, probationary, and seasonal employees, as well as employees on strike, layoff, or leave of absence. It does not, however, apply to individuals who act as independent contractors rather than as employees.

An employer cannot refuse to hire, reemploy, retain, promote, or deny any benefits to an individual because he or she is a member of a uniformed service, has applied for membership in the uniformed services, or must fulfill service obligations. It is also illegal for an employer to retaliate against someone who exercises his or her rights under USERRA.

The law requires all affected civilian employees to provide their employers with advance notice (written or oral) of their military service orders. No notice, however, is required if military necessity prevents giving advance notice or if giving notice is impossible or unreasonable 38 U.S.C. § 4312(a)(1).

Employees may need time off before starting military service. The regulations recognize that absences for military service may include a period of time between the date the employee leaves the job and the date the employee actually begins service. In addition, the regulations recognize that employees may need intermittent time off from work prior to military service for brief periods to put their affairs in order (for example, to interview child care providers, meet with bank officers regarding financial matters, or seek assistance for elderly parents).

The amount of time an employee may need to prepare for military service will vary. Relevant factors include the duration of the military service, the amount of notice given an employee called to military service, and the location of the service.

The act expands the length of time an individual may be absent from work for military duty and retain reemployment rights from four to five years 38 U.S.C. § 4312(c). The time depends on the length of the employee's military service as follows:

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Service of fewer than 31 days (or any length of the absence that was for an examination to determine fitness to perform military service): The employee must report back to work not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the military service and the expiration of eight hours after a period allowing for safe transportation from the place of military service to the employee's residence. So, if an employee completes his or her period of service and arrives home at 10 p.m., an employer cannot require the employee to report to work until the beginning of the next full regularly scheduled work period that begins at least eight hours after arriving home (in this example, no earlier than 6 a.m. the next morning). If it is impossible or unreasonable for the employee to report in that time frame through no fault of his or her own, the employee must report to work as soon as possible after the expiration of the eight-hour period.

Service for more than 30 but fewer than 181 days: The employee must submit an application for reemployment (written or oral) no later than 14 days after completing service. If this is impossible or unreasonable through no fault of the employee, the employee must submit the application no later than the next full calendar day after it becomes possible to do so.

Service for more than 180 days: The employee must submit an application for reemployment (written or oral) no later than 90 days after completing service.

Upon return, the employer may request that the employee who is absent for more than 30 days provide documentation that the employee's application for reemployment is timely, that the employee has not exceeded the five-year service limitation, and that the employee's separation from service was honorable 38 U.S.C. § 4312(f).

Exceptions to the five-year service limitation include situations in which initial enlistments last longer than five years, periodic training is required, or there are involuntary active-duty extensions or recalls, especially during a time of national emergency 38 U.S.C. § 4312(c). Additionally, employees recovering from injuries received during the service or training may have up to an additional two years to return to their jobs 38 U.S.C. § 4313(e).

An employer is not required to reemploy a returning service member if the employer's circumstances have so changed as to make reemployment impossible or unreasonable. For example, the employer would not be required to create a useless job or reinstate an employee after a reduction in the workforce that reasonably would have included the service member. The employer

cannot, however, refuse to reemploy the service member just because another employee was hired temporarily during the service member's absence.

An employer is not required to reemploy a returning service member if the position vacated by the service member was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

Reemployment must occur within two weeks of the employee's application for reemployment, absent unusual circumstances. The reasonableness of any delay depends on such factors as the length of the absence or changes in the circumstance of the employer's business.

After military service of 90 days or less, the military service person is entitled to reinstatement in the escalator position—the position in which he or she would have been employed if not for the interruption in employment. The employer must make reasonable efforts to help the employee become qualified for that position. If the employee cannot become qualified for that position, the employee is entitled to the position in which he or she was employed when military service started.

After military service of more than 90 days, an employee is entitled to reinstatement in the escalator position, but the employer may choose, instead, to reinstate the employee to any position for which the employee is qualified if that position has the same seniority, status, and pay as the escalator position. The employer must make reasonable efforts to help the employee qualify for one of those positions. If the employee cannot become qualified, the employee is entitled to be placed in any other position that is the closest approximation to the escalator position. If there is no such position for which the employee is qualified, the employer must place the employee in any other position that is the closest approximation to the pre-service position. Note that the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated, depending on events that occurred during the employee's absence.

Employers may treat missed opportunities for promotions differently, depending on whether the promotions are automatic, or, as with many white collar jobs, based primarily on the employer's discretion. The Department of Labor (DOL) acknowledges that if a promotion is not based simply on seniority or other forms of automatic progression, but depends on the employer's discretion, a reemployed veteran would have to demonstrate that it was reasonably certain that he or she would have received the benefit if he or she had remained continuously employed.

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Employers are required to make reasonable efforts to enable the returning service member to qualify for the position to which the employee is entitled. "Reasonable efforts" include training and retraining that does not place an undue hardship on the employer. The employer is not required to train or retrain an employee if this would require significant difficulty or expense considering the employer's size and resources.

An employee leaving a job for military service is not required to decide at that time whether he or she intends to return to the employer upon completion of military service but can defer that decision until after completing service. The employer may not press the employee for assurance about the employee's plans.

Even if the employee tells the employer that he or she does not intend to seek reemployment with that employer following military service, the employee can still change his or her mind and not forfeit reemployment rights. But, if the employee provides written notice that he or she does not intend to return to the job after military service, the employee is not entitled to non-seniority rights and benefits during the absence.

Note that an employee can obtain employment with a different employer while waiting for reinstatement without giving up reemployment rights with the first employer. But if this alternative employment during the application period violates the pre-service employer's employment policies (such as a city's prohibition against second jobs) to such a degree that it would be just cause for discipline or termination, then there is no right to reemployment. Additionally, a returning employee loses his or her reemployment rights if he or she is discharged from military service for dishonorable or bad conduct.

USERRA establishes reemployment rights to a job but does not require that employers pay employees their regular pay while absent for military service, although employers may choose to do so. Some employers provide "differential pay," which is the difference between the employee's military pay and civilian pay. Differential pay is not required or addressed by USERRA, but, as DOL notes, it is "a generous show of support by employers for their employees who are in service to the nation."

Under Tennessee state law, however, eligible service members are entitled to 20 days of paid leave per year (T.C.A. § 8-33-109) for active duty. If an employee has not used his or her military leave thus far this year, he is entitled to the first 20 days of his service at full pay. Whether the organization supplements the difference between an employee's military pay and regular pay is a decision the local government can make. T.C.A. § 58-1-109 also provides that reservists called to duty by the governor "...in case of invasion, disaster, insurrection, riot, attack, or combinations..." shall be paid

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from appropriated funds by the military. No member shall receive less than $50 per day. No member shall receive less than $55 per day when called to active duty in cases of grave emergencies.

An employer must treat an employee during his or her period of military service as being on furlough or leave of absence. This means that the employee is entitled to the rights and benefits that the employer generally provides to other employees who are on furlough or leave of absence with similar seniority, status, and pay.

During an employee's leave of absence for military service, decisions about employee benefits must be made. USERRA provides for health insurance continuation coverage. Employees may elect to continue their health plan coverage while in the military. The plan must permit the employee (and dependents if the plan offers dependent coverage) to elect to continue the coverage for a period that is the shorter of the following two periods: (1) the 24-month period beginning on the date on which the employee's absence begins, or (2) the period beginning on the date on which the employee's absence begins and ending on the date on which the employee fails to return to the job or apply for reemployment.

The amount the employee must pay for continuing health coverage varies according to how long the employee is absent. If the individual's military service is fewer than 31 days, health coverage should be provided as if the employee had remained employed, and the employer cannot require the employee to pay more than the employee's share (if any) for coverage. If the military duty exceeds 31 days, the employee must be offered continued health care and may be required to pay up to 102 percent of the full premium (the employee's share plus the employer's share) for coverage. In any case, the payment obligation begins on the 31st day of absence. On return from service, health insurance must be reinstated, and a waiting period or exclusions for preexisting conditions cannot be imposed 38 U.S.C. § 4317.

Pension plans that are tied to seniority are specifically covered by the law. The law provides that, while away performing military service, the employee must be treated as not having incurred a break in employment. The military service must also be considered service for an employee for vesting and benefit-accrual purposes. The employer is liable for continuing to fund the plan and any resulting obligations.

If an employer offers a defined contribution plan, the employer must allocate its make-up contribution, the employee's contribution, and the employee's elective deferrals in the same manner it would allocate these amounts for other employees. For defined benefit plans, the employee's accrued benefits will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amount previously

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paid to the employee and made any employee contributions that are required under the plan.

A reemployed service member has the right to make contributions or elective deferrals but is not required to do so. The employee's right to make up missed contributions is conditioned on continued employment with the post-service employer.

Employee contributions to a pension plan that is not dependent on employee contributions must be made within 90 days following reemployment or when contributions are normally made for the year in which the military service was performed, whichever is later.

If employers match employee contributions, the reemployed service member may make his or her contributions or deferrals during the period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of military service, but the repayment period may not exceed five years. Employer contributions that are contingent on employee contributions or elective deferrals must be made according to the plan's terms.

The reemployed person is entitled to any accrued benefits from the employee's banked benefits 38 U.S.C. § 4318. Vacation and sick leave accrual generally are not tied to seniority. However, if an employer allows employees to accrue vacation while onleave without pay, the employee in military service is entitled to the same benefit. USERRA provides that service members must, at their request, be allowed to use any vacation leave that had accrued before beginning their military service instead of unpaid leave. The employer, however, cannot force the employee to use vacation leave for military service 38 U.S.C. § 4316(d). The employee is not entitled to use accrued sick leave, unless the employer allows employees to use sick leave for any reason, or allows employees on comparable furlough or leave of absence to use accrued paid sick leave.

Feel free to contact the MTAS human resources consultants, Bonnie Curran at (865) 974-0411, or Richard L. Stokes, PHR, IPMA-CP, at (615) 532-6827 for copies of the Uniformed Services Employment and Reemployment Rights Act. Additional information about the act may be obtained from the U.S. Department of Labor's Veterans' Employment and Training Service at (800) 336-4590 or via the Web at http://www.dol.gov/dol/vets.

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In Tennessee, you can contact Region IV representatives of the Veterans' Employment and Training Service for more information at the following locations:

Veterans' Employment and Training Service
U.S. Department of Labor
P.O. Box 280656
Nashville, Tennessee 37228-0656
Tel: (615) 736-7680, (615) 741-2135 , or (615) 736-5037
Fax: (615) 741-4241

Veterans' Employment and Training Service
U.S. Department of Labor
1309 Poplar Ave.
Memphis, Tennessee 38104-2006
Tel: (901) 543-7853
Fax: (901) 543-7882

Veterans' Employment and Training Service
U.S. Department of Labor
350 Pageant Lane, Suite 406
Clarksville, Tennessee 37040
Tel: (931) 572-1688
Fax: (931) 648-5564

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Knoxville (Headquarters) . . . (865) 974-0411
Johnson City . . . . . (423) 854-9882
(423) 282-0416
Jackson . . . . . (731) 423-3710
Nashville . . . . . (615) 532-6827
Martin. . . . . (731) 881-7057

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