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Uniformed Services Employment and Re-employment Rights Act

by Richard L. Stokes

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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 National Guardsmen, in the Reserve, are planning to enlist, or, in the worst-case scenario, are drafted. Military leave can affect your city's employee benefits and compensation package and, ultimately, your city's budget.

The Uniformed Services' Employment and Re-employment Rights Act of 1994 (USERRA), 38 U.S.C. § 43, was signed into law on Oct. 13, 1994. It modified and strengthened some of the provisions of the Veterans' Re-employment Rights Statute that affected all uniformed service members. The act protects the rights and benefits of civilian employees who serve the country and expands the total amount of time an individual may be absent from work and retain re-employment rights.

The law provides four basic entitlements to employees returning from active service. The first is prompt reinstatement. The second entitlement involves accrued seniority. The third entitlement is training or retraining to ensure the employee can perform the functions of the job. And finally, the re-employed 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). The protection is extended to one year for periods of service of 181 days or more.

Under USERRA, re-employment rights are required for any person who is absent from work because of service in the uniformed services. USERRA requires that returning service members are re-employed in the job that 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, and absences for the administration of examinations to determine fitness" (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, and any other category of persons designated by the president in time of war or emergency (38 U.S.C. § 4303(16)).

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

The act expands the length of time an individual may be absent from work for military duty and retain re-employment rights from four years to five years (38 U.S.C. § 4312(c)). Exceptions to the five years include situations in which initial enlistments last longer than five years, periodic training is required, and involuntary active-duty extensions and/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)).

During an employee's leave of absence for military service, decisions about employee benefits must be made. USERRA provides for health insurance continuation coverage. If the individual's military service is less than 31 days, health coverage should be provided as if the employee had remained employed. If the military duty exceeds 30 days, the employee must be offered continued health care for up to 18 months under the city's COBRA plan. On return from service, health insurance must be reinstated, and a waiting period or exclusions for pre-existing 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. Finally, the re-employed person is entitled to any accrued benefits from the employee's contributions (38 U.S.C. § 4318).

Vacation accrual is generally not tied to seniority. However, if an employer allows an employee to accrue vacation while on leave without pay, the employee is entitled to the same benefit. The USERRA provides that service members must, at their request, be allowed to use any vacation leave that had accrued before the beginning of 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)).

USERRA establishes re-employment rights to a job but does not require additional pay for service. Under Tennessee state law, however, eligible service members are entitled to 15 days of paid leave per year (T.C.A. § 8-33-109) for active duty. If an employee has not used his/her military leave thus far this year, he/she is entitled to the first 15 days of his/her 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. Tennessee Code Annotated also provides that reservists called to duty by the governor "... in case of invasion, disaster, insurrection, riot, attack, or combinations ..." shall be paid 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 (T.C.A. § 58-1-109).

The time limits for reporting back to work upon discharge from military service now depends on the duration of the person's military service. If an employee serves fewer than 31 days, the employee must report to his/her employer by the beginning of his/her first regularly scheduled workday that would fall eight hours after the end of the calendar day. For service of 31 days to 180 days, the employee must submit an application for re-employment within 14

days of completion of military service. If the employee performs military service for 181 days or more, an application must be submitted no later than 90 days after completion of the service (38 U.S.C. § 4312(e)).

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

Feel free to contact Richard L. Stokes, MTAS human resources consultant, at (615) 532-6827 for copies of the Uniformed Services Employment and Re-employment Rights Act. Additional information about the act may be obtained from the U.S. Department of Labor's Veterans' Employment and Training Service at 1-800-336-4590 or on the Web at <http://www.dol.gov/dol/vets>, <http://www.ncesgr.osd.mil> (the National Committee for Employer Support of the Guard and Reserve Employers), or <http://www.esgr.org> (Employer Support for the Guard and Reserve).

In Tennessee, you can contact the 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
(615) 736-7680, 741-2135
(615) 736-5037
FAX (615) 741-4241

Veterans' Employment and Training Service
U.S. Department of Labor
350 Pageant Lane, Suite 406
Clarksville, Tennessee 37040
(913) 572-1688
FAX (931) 648-5564

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

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