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When Duty Calls Your Employees: USERRA and COVID-19

As companies across the country continue to adapt their operations to respond to the COVID-19 pandemic, nearly one million employees may be pulled from their employers to serve the federal government in its efforts to battle the disease. The recent “call up” authorization for up to one million reserve members to active duty is a good reason for businesses to review obligations of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In late March, President Donald Trump authorized a call up of “elected reserve and certain members of the individual ready reserve of the armed forces.” The call for service of reservists may be for a period of up to two years.

In 1994, USERRA was established to provide certain job protections for uniformed service members and impose employment-related obligations on their civilian employers. All private and public sector employers (including foreign employers doing business in the United States) are subject to USERRA — regardless of the employer’s size. Along with full-time employees, part-time and former employees are covered under USERRA. However, employees who are in positions not reasonably expected to continue indefinitely fall outside USERRA’s protections.

While the employer obligations and employee protections under USERRA have not changed, it’s important for employers to understand the compliance requirements and confirm that the necessary compliance documents and forms are in place. Organizations should also communicate with reserve employees in a responsive manner.

COVID-19 and USERRA

The Employer Support of the Guard and Reserve (ESGR) recently provided these responses to inquiries related to USERRA and the COVID-19 pandemic:

1. An employer cannot delay a service member’s reemployment solely out of concern that the service member’s service in a COVID-19 affected area may have exposed him or her to COVID-19.

In accordance with USERRA, an employer must reemploy Service members returning from service in the Uniformed Service ‘promptly’. [Title 20, Code of Federal Regulations \(C.F.R.\) 1002.181](#) states that ‘prompt’ typically means within two weeks of the employee’s application to return to work, unless unusual circumstances exist. In some cases, a reinstatement beyond the typical two-week period may be warranted due to the company’s policy regarding the COVID-19 health emergency as applicable to all employees.

Please also note that the company policy should be broad in scope and intended for all employees traveling to areas with a high risk for exposure to the Coronavirus. If an employer’s policy limiting return to work is focused only on service members, it could be viewed as discriminatory under USERRA. Please see [20 C.F.R. 1002.18](#) regarding discrimination.

The employer may want to consider “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.”

2. An employee may still be laid off or furloughed upon return from their military (including National Guard) service if they would have been subject to that action unrelated to their service.

USERRA at a Glance

USERRA covers:

- Pension plans covered by ERISA and certain pension plans not covered by ERISA, such as those sponsored by a State, government entity, or church for its employees. However, USERRA does not cover pension benefits under the Federal Thrift Savings Plan (which are covered under 5 U.S.C. 8432b).
- Group health plans that are subject to ERISA and plans that are not subject to ERISA, such as those sponsored by State or local governments or religious organizations for their employees
- Multiemployer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations

The Protections and Obligations under USERRA are Extensive

Right to Timely Reemployment

When uniformed service members (with five years or less of cumulative uniformed service during the relevant employment period with the civilian employer) leave to perform uniformed service, they must be timely rehired upon their return, assuming “notice to employer” requirements had been met in advance (and no exceptions apply), and provided they were discharged under honorable conditions. It is important to note that notice is not required if “military necessity” prevents the giving of notice; or if the giving of notice is otherwise impossible or unreasonable. In addition, there are exceptions to the five-year requirement.

To qualify for USERRA’s protections, a service member must be available to return to work within certain time limits. These time limits for returning to work depend (with the exception of fitness-for-service examinations) on the duration of a person’s military service.

Right to be Restored

If uniformed service members are eligible to be reemployed, they must be restored to the job and benefits they would have attained had they not been absent due to military service or, in some cases, a comparable job.

Right to be Free from Discrimination and Retaliation

An employer may not discriminate (or retaliate) against a member of the uniformed services due to past, current, or future military obligations. The ban broadly extends to hiring, promotion, termination, and benefits. In addition, an employer may not retaliate against anyone assisting service members in asserting or seeking to enforce their USERRA rights, even if the person assisting them has no service connection.

Health Insurance Protections

If health plan coverage would terminate because of an absence due to military service, they must be allowed to continue their existing employer-based health plan coverage (including dependent coverage) for up to 24 months while in the military, and even if they elect not to continue coverage they must be allowed to reinstate their coverage upon return, and generally, without any waiting periods or exclusions (if one would not have been imposed had the person not been absent for military service) except for illnesses or injuries connected to their military service.

Note: If a service member is on active duty for more than 30 days, military health care is provided to the service member and their eligible dependents. In addition, service members cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

USERRA Notice/Poster

Employers, regardless of size, are required to provide to persons 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. Employers are also free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice by e-mail). The poster can be downloaded [here](#) from the Department of Labor website.

For a complete list of protections and obligations under USERRA, see [A Guide to the Uniformed Services Employment and Reemployment Rights Act](#) on the DOL website.

The DOL offers a [USERRA checklist](#) for employers.

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