

MAY 2007

An Analysis of Recent Developments & Trends

LITTLER MENDELSON, P.C.
THE NATIONAL EMPLOYMENT & LABOR LAW FIRM®

USERRA and the Five-Year Rule

by: David M. Jaffe and Todd K. Boyer

Summary: Employers should take special care before terminating the employment of military reservist employees who have been on active duty for more than five years of cumulative service.

More than five years after September 11, 2001 and the ensuing military engagements, many employers are facing the decision of what, if anything, they can or should do about employees who have been on military leave for more than five years. The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301, *et seq.*, protects the employment of employees who take up to five years of cumulative military leave with the same employer. But there are many exceptions to the five-year rule and employers would be wise to re-acquaint themselves with USERRA's statutory obligations and interpretative regulations, 20 C.F.R. §§ 1002.1, *et seq.*, before ringing any bells that cannot be unrung (i.e., terminating an employee who has been on military leave for more than five years). This Insight will lay out USERRA's basic requirements, provide practical guidance to employers on how to treat employees who have been absent for five years and outline steps that employers can take to ensure that absent employees are actually on military leave.

USERRA in the News: It Applies to All Employers

As the recent United States Attorneys firings demonstrate, no employer is excepted from complying with USERRA's requirements. In December 2006, former United States Attorney for the District of New Mexico, David Iglesias, was terminated by the Department of Justice (DOJ). The DOJ claimed that all eight U.S. Attorneys whom it fired served at the pleasure of the President and could be terminated for any reason or no reason at all. However, even United States Attorneys who serve at the pleasure of the President are protected from termination if their

military service was a "motivating factor" in their termination. Iglesias is a judge advocate in the Navy Reserves who holds the rank of Captain (equivalent of Colonel in the Army, Air Force and Marines) and during his tenure as U.S. Attorney, he had spent approximately 40 days per year on military duty. Documents released by the Justice Department show that one reason officials cited in justifying Iglesias's termination was that Iglesias was "an absentee landlord" who spent too much time away from the office. Iglesias recently filed a complaint alleging a violation of USERRA because of statements made by the DOJ regarding his absence. If he can demonstrate that his military service played a motivating factor in his termination, he could obtain damages from the United States Government and, although extremely unlikely, even seek reinstatement.

The Iglesias example should serve as a warning to all United States employers that no one is immune from the far reach of USERRA's obligations. More than five years after September 11, 2001 and the declaration of a National Emergency in response to those attacks, it is especially important that employers dig deeper than USERRA's statutory language and actually review the regulations interpreting the statute.

USERRA'S Basic Obligations

USERRA Requires Employers to Reemploy Returning Servicemembers.

USERRA permits employees who take leave to serve in the uniformed services to apply for reemployment to their former positions upon return from military duty. To be eligible for USERRA's benefits: (1) the employee must give advance written or *verbal* notice

continued from cover

of such service to his employer; (2) the cumulative length of absence of all previous absences from a position of employment with that employer cannot exceed five years; and (3) the employee must report or submit an application for reemployment to his employer within a certain prescribed period of time after returning from military duty. Employers should note that there are exceptions to the reporting requirement based on military necessity and they should consult the statute and applicable regulations.

USERRA sets forth specific requirements for how servicemembers must apply for reemployment. If the person is absent for less than 31 days, she must inform her employer no later than the beginning of the first full regularly scheduled work period on the first full calendar day following completion of the period of service and the expiration of eight hours for the safe transportation of the person from the place of that service to that person's residence. A person who is absent for more than 30, but less than 181 days, must submit an application for reemployment with her employer not later than 14 days after she completes her period of service. If a servicemember's term of service exceeds 180 days, she must submit an application for reemployment not later than 90 days after she completes her military service.

An employer may be excused from reemploying the employee if: (1) the employer's circumstances have so changed as to make reemployment impossible or unreasonable; (2) reemployment would impose an undue hardship on the employer; or (3) the employment from which the person leaves for service in the uniformed services is for "a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." In these circumstances, the employer has the burden of proving that one of these exceptions exists.

An employer is required, in most circum-

stances, to restore the servicemember to the position she would have occupied if she had not been called to military duty. Even if the employee is no longer qualified to perform those duties, the employer may be obliged to train that employee so that she can perform those duties. If an employer cannot employ a person who returns from military service in either the position she would have occupied had she remained continuously employed, or in the position she occupied when she departed for military service, and the employer cannot, after reasonable efforts, train that employee for either of those positions, then the employer must restore that employee to "any other position which is the nearest approximation" to those positions, which she is qualified to perform, with full seniority.

A person who is reemployed is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of military service plus the additional seniority and rights and benefits that such person would have attained if that person had remained continuously employed.

Employers May Not Discriminate Against Employees Who Perform Military Service.

USERRA also prohibits discrimination based on the employee's affiliation with the armed forces as well as reprisals for his participation in any action to enforce a servicemember's rights under the statute. An employer cannot deny initial employment, reemployment, retention in employment, promotion or any benefit of employment on the basis of that employee's membership, application for membership, performance of service, application for service, or obligation in the armed services. An employer is liable if discriminatory animus played a motivating factor in the employer's decision, unless the employer can prove that it would have made the same decision in the absence of that employee's affiliation with the armed forces.

USERRA does not require employers to pay employees their salary while they are on military leave. However, employers who pay similarly situated employees when they are on other types of leave (e.g., jury duty leave, FMLA leave), may be required to pay salaries for employees who are on military leave. Under such conditions, a court might construe an employer's failure to pay an employee's salary while on military leave as discriminatory.

Similarly, employers are generally not required to pay personal performance-based bonuses to employees while they are on military leave, except for bonuses which are earned, but not paid prior to the military leave, or when the bonuses are paid to those on other types of leave. Employers must simply ensure that they treat employees who take military leave as they treat employees who take other types of leave.

USERRA also has a safe harbor provision that protects returning employees from discharge if they meet certain conditions. A person who is reemployed by an employer under USERRA shall not be discharged, except for cause, within one year after returning to his job if his period of military service exceeded 180 days. If an employee takes military leave exceeding 30 days, but fewer than 181 days, the employee shall not be discharged, except for cause, within 180 days of returning to his civilian job. Employers must also grant an employee's request for vacation or other owed leave before the commencement of that employee's military service, but an employer may not require the employee to use accrued paid leave while on military leave. Despite the safe harbor provision, the USERRA regulations specifically permit an employer to lay off an employee while on military leave as part of a reduction in force so long as that employee would have been laid off regardless of his military service.

Damages under USERRA include injunctive relief, reinstatement, backpay, restoration

continued from page 2

of benefits and liquidated damages in an amount equal to the amount of loss suffered by the employee if the court determines that the employer's failure to comply was willful. In addition, an aggrieved employee is not liable for fees or court costs in an action brought to enforce USERRA rights, and, if she prevails, the court may award her reasonable attorney's fees, expert witness fees and other litigation expenses.

Practical Concerns for Employers Whose Employees Have Been Absent for Five or More Years

More than five years have elapsed since September 11, 2001 and the United States Military began its subsequent engagement in Afghanistan. Employers are now faced with how to treat employees who have been absent on military leave during that time. The five-year milestone is important because USERRA provides that an employee's reemployment rights with the same employer only cover up to five years of cumulative service. That said, many employers are now reviewing their employees' personnel files and finding that some employees have exceeded this five-year limitation. Some employers have concluded, at their peril, that they can now terminate these employees because they no longer enjoy the statute's protection. USERRA's regulations, however, contain several significant exceptions that apply to employees who have been called to serve during the last five years.

Exceptions to the five-year rule can be broken down into three broad categories:

1. Service to fulfill an initial period of obligated service or inability to obtain release from service that exceeds five years.
2. Required drill and annual training certified by the military to be necessary for professional development or skill training/retraining (e.g., drill weekends).
3. Service performed during time of war or National Emergency or for other critical missions/contingencies/military requirements.

The third exception is the most important to employers today because a period of National Emergency has existed since September 23, 2001. On that day, President George W. Bush declared a National Emergency (Executive Order No. 13224) in "response to the extraordinary threat posed to the national security..." by the September 11, 2001 attacks. This Executive Order arguably covers any employee who has been called to active service to participate in the War on Terrorism.

In addition, on May 22, 2003, President Bush declared a National Emergency (Executive Order No. 13303) to "deal with the unusual and extraordinary threats to the national security and foreign policy of the United States constituted by the action and policies of the Government of Iraq." Thus, any military members called to active duty to serve in Iraq are also likely excepted from the five-year rule.

Employers who have concerns or questions about an employee's notification that he must take military leave because he has been called up to active duty have options for verifying the employee's explanation. Although employees are not required to provide written prior notice to employers (verbal notice will suffice) to trigger USERRA's protection, after 30 days of consecutive service, employers may request documentation to prove military duty, such as military orders. If an employee is unable to provide documentation in a timely manner, as might reasonably be the case if the employee has deployed overseas, the employer may seek such proof from the employee's unit. It is therefore prudent for employers, upon discovering that the employee is a Guardsman or Reservist, to ask the employee to provide information identifying her unit of attachment and her commanding officer. Additionally, all

military services have established personnel locators that employers can call to find out how they can verify whether the employee is actually performing military service:

[Army: \(800\) 318-5298](tel:8003185298)

[Air Force: \(210\) 565-2660](tel:2105652660)

[Navy: \(901\) 874-3383](tel:9018743383)

[Marines: \(800\) 268-3710](tel:8002683710)

[Coast Guard: \(202\) 493-1697](tel:2024931697)

These personnel locators should be able to provide information on whether the member is on active duty orders and, in some cases, whether the member is deployed overseas.

Employers should also be aware that the military frequently allows a member a period of personal leave when she returns from temporary duty in a deployed location. Thus, an employer may become aware that one of its employees has returned to the U.S., but that person may still be considered to be "on duty" until her "leave" expires.

In addition, an employee may also be permitted to take some reasonable period of leave from her civilian employer to prepare for military duty. For example, if an employee is a single mother living in Florida and her orders require her to report on a Monday, an employer should permit her a reasonable period of time prior to her report date to arrange for her children's childcare while she is deployed. Such periods of military leave prior to being activated on military orders will vary according to each member's personal circumstances. Thus, it may be reasonable for a single mother to need one week to prepare to be activated while such a long period may not be reasonable for a single person without children. Employers should invite a dialogue and attempt to be reasonable.

Conclusion

All employers are subject to USERRA's requirements and would be wise to review

continued from page 3

not only its statutory requirements, but the interpreting regulations that accompany them. Now that five years have elapsed since the beginning of the U.S. Military's engagement in Afghanistan, it is imperative that employers understand the rights and obligations created by, or derived from, USERRA, especially before making any termination decisions concerning employees who have been absent on military leave for five years.

David M. Jaffe is an Associate in Littler Mendelson's Boston office and Todd K. Boyer is an Associate in Littler's San Jose office. In addition, Mr. Jaffe currently serves in the Air National Guard as the Deputy Staff Judge Advocate of the 102nd Fighter Wing at Otis Air National Guard Base in Massachusetts, where he holds the rank of Major, and Mr. Boyer currently serves in the Air Force Reserves as the Deputy Staff Judge Advocate for the 349th Air Mobility Wing at Travis Air Force Base in California, where he holds the rank of Major. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Jaffe at djaffe@littler.com, or Mr. Boyer at tboyer@littler.com.
