


MAY 30, 2019 | WAGE & HOUR COMPLIANCE

Memorial Day Reminder: Remember Your Obligations to Employees Currently Serving and Those Returning From Service

As we paused on Memorial Day to remember those who gave their lives in active military service, employers  should not forget that employees who are currently serving in the Army, Navy, Air Force, Marines and Coast Guard (collectively, the “uniformed services”) are afforded a broad range of rights and protections by the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”). USERRA is a federal law that protects civilian job rights and benefits for veterans and members of the Guard and Reserves. USERRA, like the Family and Medical Leave Act, includes both substantive job restoration rights—at the conclusion of one’s service—as well as non-discrimination and non-retaliation provisions. The job restoration rights provided by USERRA, however, impose heightened obligations on employers in an effort to ensure the returning service member is not disadvantaged when reentering the workforce because of his or her service. Many employers also do not realize that returning service members—those that return to the same employer from which they took leave to serve—may only be terminated for just cause for certain periods of time depending on the length of their service.

No discrimination or retaliation. Let’s start with the easy part. As you might expect, employers must not deny initial employment, reemployment, retention in employment, promotion or any benefit of employment to an individual on the basis of his or her military service. Additionally, an employer cannot retaliate against an individual by taking any adverse employment action against him or her because the individual has acted to enforce protections under USERRA, testified or otherwise made a statement in (or in connection) with a proceeding under USERRA, assisted or participated in a USERRA investigation or exercised a right provided for by USERRA.

Job Restoration Rights. Employees who have been on leave or otherwise absent from their position due to “service in the uniformed services” have extensive reemployment rights under USERRA. Service is defined as the “performance of duty on a voluntary or involuntary basis in a uniformed service” and can include:

- Active duty and active duty for training;
- Initial active duty for training;
- Inactive duty training;
- Full-time National Guard duty;

- Absence from work for an examination to determine a person's fitness for any of the above types of duty;
- Funeral honors duty performed by National Guard or Reserve members; and
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Health and Human Services, when activated for a public health emergency.

Employers should also note that the "uniformed services" consist not only of the Army, Navy, Marine Corps, Air Force and Coast Guard, but also each branch's Reserve wing, the Army National Guard and Air National Guard, the Commissioned Corps of the Public Health Service and any other category of persons designated by the President in time of war or emergency.

Restoration rights are, in certain limited circumstances, forfeited, if the returning service member was:

- Separated from uniformed service with a dishonorable or bad conduct discharge;
- Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;
- Dismissed as a commissioned officer by sentence of a general court-martial, in commutation of a sentence of a general court-martial, or, in time of war, by order of the President;
- Dropped from the rolls as a commissioned officer due to absence without authority for at least three months or for being imprisoned by a civilian court.

If the returning service member became disabled as a result of his or her service, or aggravated a prior disability, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position.

The Escalator Principle. Unlike the FMLA which merely requires that an employee returning from leave be reinstated to the same or an equivalent position, USERRA mandates that the returning service member must be placed in his or her prior job or the position that he or she would have attained with "reasonable certainty" but for his or her military service. This job restoration obligation is referred to as the "escalator principle" and is often misapplied by employers.

While not a common occurrence, there are instances in which the returning service member may be transferred or demoted to a lesser position due to a workforce reorganization or change in business circumstances. Employers must take care to ensure that the returning service member's position includes not only the pay level he or she would have attained but for his or her service, but also any enhanced benefits and other job perks he or she would have received if he or she had not left his or her position. While this may be a simple question when an employee holds a position governed by a collective bargaining agreement or otherwise subject to seniority rules, challenging questions can arise when the returning employee maintains that he or she would most likely have been promoted to a different position but for his or her service. In one interesting case, a Pfizer employee learned upon returning from a tour of duty in Iraq that his position had been eliminated and was offered a "special tasks" role with comparable pay and benefits but reduced responsibilities. While he held a non-exempt hourly position before leaving for Iraq, the employee requested that he be given one of the newly created exempt team lead positions because he believed he would have received the position had he been able to apply for it. While the lower court dismissed the employee's case finding that discretionary promotions were not subject to the escalator principle, the First Circuit Court of Appeals vacated the dismissal, explaining that "assessments of discretionary and non-discretionary promotions could both be subject to the same 'reasonable

certainty' test of whether promotion would have occurred in the absence of military service." *Rivera-Meléndez v. Pfizer Pharm., LLC*, 730 F.3d 49 (1st Cir. 2013). The lesson learned here is that employers should not simply place a returning service member in his or her prior position; they should, instead, evaluate each situation on a case by case basis—including the employee in the discussion—and try to determine where the employee would be on the "career ladder" had he or she not taken leave to serve.

If a returning service member is unable—due to a disability—to return to the position he or she would have received via the escalator principle despite the employer's efforts to identify a reasonable accommodation and help the employee to become qualified, the employer should place the individual in an equivalent position or one that is the nearest approximation to the equivalent position with respect to seniority, status and pay.

Just Cause Termination, Only. Many employers do not realize that servicemembers may only be terminated if just cause exists for a certain period of time after they return to work. If the returning service member's most recent period of service in the military was more than 30 days, he or she must not be discharged, except for cause, for: (a) 180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days, but less than 181 days; or (b) for 1 year after the date of reemployment if the returning service member's most recent period of uniformed service was more than 180 days.

The concept of "just cause" under USERRA differs from the concept we see in unionized workplaces as the returning service member may be discharged because of conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons. When terminating a returning service member because he or she engaged in misconduct, the employer must prove that it was reasonable to discharge the individual for the conduct in question, and that he or she had express or implied notice that the conduct would constitute cause for discharge. Such notice can, obviously, be established through handbooks or policies and procedures that outline the types of offenses that can result in termination without resorting to the employer's progressive discipline policy. Job eliminations can, under USERRA, also constitute "just cause" for termination. Here, too, the employer will bear the burden of proving that the returning service member's job would have been eliminated—or that he or she would have been laid off—had he or she not taken military leave. Obviously, if you are eliminating only one position—the one to which the service member is returning—you will likely find it difficult to carry your burden.

Doing Your Duty. There are a number of steps that employers can take to help ensure they comply with USERRA. Review your employee handbook to confirm military status is included in the EEO/non-discrimination policy and that you have a military leave policy that addresses job restoration rights. Training your managers is another important step so they understand what they should and should not do both when employees need to take leave related to their service as well as when they are preparing to return. Given the complexities described above, it is often a good idea to train members of your human resources team as well because they may not be fully versed on these issues. We at Conn Maciel Carey LLP are here to help if you have questions about USERRA or need help reviewing your policies and/or training your managers. If your organization is interested in exploring ways to go above and beyond what USERRA requires, the Employer Support for the Guards and Reserves ("ESGR")—a Department of Defense program established in 1972 to promote cooperation and understanding between Reserve Component Service members and their civilian employers—has created programs that recognize employers with various categories of awards based on their efforts to support their employees (and caregivers) in the uniformed services.

