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Managing Re-employment Rights of Service Members In a Troubled Economy

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In recent years we have witnessed our nation's largest mobilization of military personnel since World War II. Over the next few months, we are expected to welcome home up to 4,000 New Jersey-based members of the National Guard and Reserves. At a time when the work force continues to shrink and unemployment rates remain at record highs, many of these returning service members will be seeking re-employment to their prior job positions. This unprecedented combination of circumstances will place some employers in the uneasy position of trying to reconcile the service members' rights to re-employment with the legitimate business need for staff reductions.

Re-employment Under USERRA

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §4301, et seq., provides comprehensive employment and re-employment rights to members of the military. USERRA applies to practically every employer, including private employers, without regard to size. See *Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992). In addition to the USERRA rights and obligations addressed below, employers should be aware that New Jersey maintains state laws protecting: employees from discrimination and retaliation because of military service; military service members called to state action by the governor; and public employees who require leave from employment for military duty.

To be eligible for re-employment under USERRA, service members must meet five conditions: a) the leave must have been for "service in the uniformed services"; b) notice of the need for leave must have been provided to the employer; c) the aggregate of the service periods, excluding involuntary and some voluntary service periods, must not exceed five years; d) the discharge from service must have been honorable; and e) the application for re-employment must be timely.

The "uniformed services" include the United States Army, Navy, Air Force, Marine Corps, Coast Guard, and commissioned corps of the U.S. Public Health Service. USERRA is not limited to the National Guard and Reserves, although it is these service members who commonly seek to invoke their re-employment rights following military service.

USERRA does not mandate the manner or timing of the required notice to the employer of the need for military leave, only that the notice is in advance. If advance notice is precluded by military necessity, or otherwise impossible or unreasonable, a service member will not lose the right to reemployment.

A covered service period may be for only a few hours, or up to as much as five years. Thus, employees who enlist in the regular military, and who serve a four-year obligation, are eligible for re-employment to their prior job positions. A service member loses re-employment rights under USERRA by volunteering for military service extensions that exceed a total period of five years. However, an employee whose initial period of military duty exceeds five years (i.e., enlistment in a specialized military program) does not forfeit re-employment rights under USERRA. Drill periods for members of the National Guard and Reserves do not count against the five-year limitation. Accepting a job with a new employer restarts the service calculation.

A service member whose service period was 30 days or less must report back to work at the beginning of the shift on the first day he or she is scheduled to work following the service

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period. However, the service member is entitled to time for safe transportation home from the place of service, plus eight hours of rest. If the service period was at least 31 days, but not more than 180 days, the service member must apply for re-employment within 14 days from the end of service. Service periods lasting more than 180 days require the service member to apply for re-employment within 90 days after release from service.

If the service member meets each of the eligibility requirements for re-employment, the employer must provide prompt re-employment. If the service period was 30 days or less, prompt means immediate. If the service period was longer than 30 days, re-employment must occur within 14 days from the date of the application for re-employment. The employer must re-employ the service member, even if no vacant positions are available. This re-employment right also extends to positions which were temporary, probationary, or at-will. In some cases, the employer must lay off the replacement worker to re-employ the service member.

The Escalator Principle

USERRA contains an explicit "escalator principle," which applies to the seniority of the returning service member. See 38 U.S.C. §4316(a). Under this rule, service members are entitled to the position they would have attained if they were employed continuously by the employer during the service period. This could be the position the service member left, or a different position. This concept was first announced by the U.S. Supreme Court following World War II in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946) ("[The service member] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war"). However, if the military leave was for more than 90 days, the employer has the option to re-employ the service member in a similar position, with like seniority, status and pay. Additionally, service members are entitled to all other "escalated" benefits if: a) the benefit is a "reward for length of service"; and b) it is "reasonably certain" the service member would have received the benefit if employed continuously. In addition to obvious benefits such as compensation and vacation calculation, USERRA also applies the escalator principle to pensions. See 38 U.S.C. §4318.

The escalator principle may work against the returning service member. If an employer can show a service member's job position was eliminated during the period of service, the returning service member has no right to re-employment under USERRA. The burden of proof is on the employer to show the job elimination would have occurred even if the employee had worked continuously for the employer during the period of service. This proof is easier to establish if a collective bargaining agreement or policy dictates a specified order in which employees are to be laid off. This becomes more difficult to prove when staff reductions are based on subjective determinations.

Health Benefits

Returning service members are entitled to immediate reinstatement of their health benefits. They are not subject to waiting periods or exclusions for pre-existing conditions, unless the pre-existing condition has been determined by the U.S. Department of Veterans Affairs to be service-connected.

Job Protections

Returning service members who exercise their re-employment rights under USERRA have certain protections from termination of employment. If the service period was for 31-180 days, the employer may not discharge the service member within 180 days of re-employment without just cause. If the service period was for more than 180 days, the employer may not discharge the service member within one year, unless the employer can demonstrate just cause for the discharge decision. USERRA also prohibits discrimination and retaliation because of an employee's military status, or because of the exercising of rights under USERRA.

Proposed Legislation

Whether claims under USERRA are subject to mandatory arbitration agreements between employers and employees have become a battleground with mixed results. See *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 565 (6th Cir. 2008); *Garrett v. Circuit City Stores Inc.*, 449 F.3d 672, 677-78 (5th Cir. 2006); *Breletic v. CACI Inc.-Federal*, 413 F. Supp. 2d 1329, 1336-37 (N.D. Ga. 2006); *Lopez v. Dillard's Inc.* 382 F. Supp. 2d 1245, 1248 (D. Kan. 2005). Currently before Congress is the Servicemembers Access to Justice Act of 2009, H.R. 1474, 111th Congress (2009), which would prohibit agreements between an employer and employee requiring arbitration of claims under USERRA. This proposed law also would, among other things, add the potential for liquidated and punitive damages, mandate an award of attorneys' fees to a prevailing service member, and require immediate injunctive relief when re-employment is denied.

The proposed Wounded Veteran Job Security Act, H.R. 466, 111th Congress (2009), would amend USERRA to prohibit discrimination and retaliation against persons who receive treatment for illness, injuries and disabilities incurred in, or aggravated by, service in the uniformed services. Further, the National Urban Search and Rescue Response System Act of 2009, H.R. 706, 111th Congress (2009), which also is before Congress, classifies "System Members" as providing "service in the uniformed services," thereby making them eligible for the rights and protections under USERRA. "System Members" are persons who serve on a task force for the purpose of urban search and rescue for the Federal Emergency Management Agency.

In the coming months and beyond, many employers in New Jersey will be met with the challenge of trying to satisfy the broad re-employment rights of our returning service members in a time of unique economic complexity. Understanding the considerable rights and obligations created by USERRA is essential.■