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New Regulations Regarding Military Leave Now Effective

Executive Summary

On January 18, 2006, regulations go into effect that explain and clarify the Uniform Services Employment and Reemployment Rights Act ("USERRA"), the federal law which provides job protection to employees who take leave to undertake military service. Most notably, the regulations clarify that the protections of USERRA apply to volunteers in the National Disaster Medical System ("NDMS"). The language of the notice employers must provide to their employees has also been modified to reflect that change. These and other major clarifications provided by the regulations are outlined below. *Reference: 29 C.F.R. Part 1002. Federal Register/Vol. 70, No. 242/Monday, December 19, 2005, pages 75246-75313.*

Detailed Analysis

The new USERRA regulations, mark the first time since USERRA's passage in 1994 that the U.S. Department of Labor ("DOL") has published regulations to explain and clarify the law that protects employment and reemployment rights and benefits protection of service members. However, the regulations specifically state that they do not impose any new legal requirements, but merely explain existing requirements. The regulations are issued in a convenient question-and-answer format similar to that used by the DOL in its regulations issued under the Family and Medical Leave Act ("FMLA"). The full text of the regulations is available on the DOL's website at <http://www.dol.gov/vets/programs/userra/>.

The following is a brief summary of the basic requirements of USERRA, and the most notable clarifications provided in the new regulations.

USERRA's Basic Requirements

There are three basic types of obligations USERRA imposes on employers: reemployment, anti-discrimination/retaliation, and benefits protection.

Reemployment

Employees who take leave to perform services in the uniformed services are entitled to reemployment at the end of the leave provided: (1) the employee ensures the employer receives advanced written or verbal notice of the service; (2) the employee has used five or less cumulative years of service while employed by that particular employer; (3) the employee returns to work or applies for reemployment in a timely manner after conclusion of service; and (4) the employee has not been separated from the service with a disqualifying discharge or under other than honorable conditions.

Anti-Discrimination

Employers are prohibited from discriminating or retaliating against past or present members of the uniformed service; individuals who have applied for membership in the uniformed service; or individuals who are obligated to serve in the uniformed service. An employer may not deny employment, reemployment, retention in employment, promotion, or any benefit of employment because of an individual's involvement with the uniformed service.

Benefits Protection

Employee benefits are protected under USSERA. A uniformed services employee is entitled to reemployment with the same seniority, status and pay, as well as other rights and benefits determined by seniority. Health and pension plan coverage is also provided by USERRA. Individuals performing uniformed service for more than thirty days are entitled to elect to continue employer sponsored health care for up to 24 months. Regardless of whether or not the election is made, upon reemployment the employee is entitled to have health care coverage reinstated without any waiting period or additional costs or exclusions (except for service-connected illnesses or injuries).

Employers are also required to provide notice to employees of their rights under USERRA. This requirement is generally satisfied by posting a Department of Labor approved USERRA poster where an employer customarily places notices for employees.

With these basic requirements in mind, below is an outline of some of the significant clarifications that have been provided in the new USERRA regulations with regard to the types of uniformed services that are covered, eligibility requirements for reemployment, rights of persons on military leave, health benefits, reemployment rights, discrimination and notice.

Significant Clarifications in the New Regulations

Type of Uniformed Services Covered

- Activated National Disaster Medical System ("NDMS") volunteers are considered to be performing in the uniformed services and protected under USERRA. The NDMS is composed primarily of teams of medical professional and para-professional volunteers who may be activated for training or in response to major emergencies or Federally declared national disasters. Additionally, time spent in service in the NDMS is exempted from the general five-year limit on service after which a person is not entitled to reemployment.

Eligibility for Reemployment

- The five-year service limit applies to an employee's entire employment with a particular employer, regardless of any changes in the employee's position.
- In determining whether part of the employee's absence was attributable to actual time served, employers are directed to contact the Secretaries of the military departments and the Commander of the Coast Guard, who are expected to assist employers.
- If an employee is hospitalized for or convalescing from a service-related injury, the time period for reporting back to work is extended up to two years.
- An employer cannot avoid the duty to reemploy an employee after military leave solely on the basis that no opening exists at the time of the reemployment application or that another person was hired to fill the position vacated by the veteran. Even if reemploying the veteran would require terminating the employment of the replacement employee.

Rights of Persons on Military Leave

- Vacation leave and sick leave are non-seniority benefits that must be provided to the employee on military leave only if the employer provides that benefit to employees on comparable leaves of absence.

Health Benefits

- Cafeteria plans and health flexible spending arrangements qualify as health plans that must meet USERRA's continuation and reinstatement provision.
- The maximum period of continued coverage is the lesser of 24 months or the period of military service (beginning on the date the absence begins and ending on the day after the service member fails to apply for reemployment).
- If an employee departs work for military service without electing continuing coverage an employer may cancel the employee's health insurance. However the employer may have to later retroactively reinstate the coverage, without imposing any

administrative costs, if it was impossible or unreasonable for the employee to give notice, or the employee later elects to reinstate continuing coverage by paying in full within the time periods established by the plan.

- Reasonable rules may be developed to permit termination of coverage if an employee elects to continue coverage, but does not pay for continuation coverage.
- If an employer uses a health plan involving a "bank" of credits, an employee on leave may be permitted to deplete banked credits in order to continue coverage at no cost. Alternatively, the employee may be permitted to "freeze" banked credits, pay for continuation coverage, and restore the credits upon reemployment.

Reemployment Rights

- The entire period of absence from work due to or necessitated by service in the uniformed services, including preparation time and recuperation time, is to be considered service with the employer upon reemployment for computation of seniority and seniority-based rights, including pension entitlements. This is in contrast to the counting of time towards an employee's five-year limit of USERRA leave, which only counts the actual time served.

Discrimination

- It is not unlawful, in and of itself, for a prospective employer to ask an applicant about military service or obligations. However, if the information elicited in response to such questions forms the basis of the employer's decision not to hire the applicant, or take other adverse action against the person once hired, the inquiries may constitute evidence of unlawful discrimination.
- An employer switching an employee's days off so that they coincide with the employee's obligation to participate in a regular monthly two-day military drill or similar military obligation, may be subject to liability for discrimination.

Notice

- The new USERRA regulations also include an appendix delineating the appropriate language to be used in employer notices to employees. Importantly, the language approved by the DOL has been amended from what was previously approved by adding a statement that service in the National Disaster Medical System is also protected by USERRA. The DOL has made posters containing the new language available on its website at: <http://www.dol.gov/vets/programs/userra>. Additionally, a copy of the new DOL approved poster is attached hereto. All hospitals should ensure that they have posted a USERRA notice which complies with the language approved by

the DOL. Consideration should also be given to a review of existing handbooks and policies to assure compliance with the new regulations.

Should you have any questions, please do not hesitate to contact your local counsel or Steve Lyman, John Ryan, Craig Williams, Jon Bumgarner, Kevin Stella, Dana Stutzman or Kevin Gfell at Hall, Render, Killian, Heath & Lyman, P.S.C., at 317/633-4884.

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