

## **What Every Employer Should Know About Employee Military Leave**

*By Jennifer L. Muse*

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In light of world events, a growing number of employers across the country are faced with having their employees called to active duty military service for indefinite lengths of time. This includes both employees who serve as military reservists and employees brought back into active duty service through military “stop loss” policies. Obviously, employers in Hampton Roads are particularly impacted by such deployments given the large number of active and reserve military personnel who live in our community. Importantly, employers should realize that the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) places specific requirements on how employers must handle employee leaves of absence from work due to military service.

USERRA protects the reemployment rights of individuals who are absent from employment due to service in the uniformed services. USERRA applies to all public and private employers in the United States, regardless of size, and covers all categories of voluntary and involuntary military service and training. USERRA also prohibits an employer from discriminating or retaliating against an employee on the basis of his or her membership or obligation for service in the uniformed services.

USERRA generally requires that an employer offer reemployment to any employee returning from military service if the employee gave advance notice to his employer of such service, the cumulative length of the absence and all previous absences with that employer because of military service does not exceed five years, and the individual seeks reemployment within a specified period of time after conclusion of military service. The employee is not required to decide before leaving for military service whether the employee will seek reemployment upon return. In fact, even if an employee indicates before leaving, or during the employee’s military service, that the employee does not intend to seek reemployment, the employee will still be entitled to reinstatement upon return if the employee desires reemployment at that point.

If a returning service member seeks reemployment, the reemployment must occur within two weeks of the employee’s application for reemployment. When reinstating the employee, the employer must consider carefully the position in which the employee should be placed. Under USERRA, an individual generally is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to military service, a concept known as the “escalator principle.” Although the employee must be qualified to perform the duties of the escalator position, USERRA imposes an obligation on the employer to engage in reasonable efforts to qualify the employee for the escalator position.

The escalator principle also determines the returning employee’s seniority, status, and rate of pay. An individual who is reemployed under USERRA generally has the right to the same seniority, rights and benefits determined by seniority that the employee would have attained if he or she had not left due to military service. The absent employee is considered to be on furlough

or leave of absence while serving and is entitled to any other rights and benefits not determined by seniority that the employer generally provides to employees who are on furlough or leave of absence. In addition, an employer must use the escalator principle to determine the returning employee's rate of pay, taking into account all pay or step increases, as well as merit or performance increases, which the employee would have attained with reasonable certainty.

In certain circumstances, an employer may not be required to reemploy a returning service member. USERRA does not require an employer to reinstate an employee if the employer's circumstances have so changed as to make reemployment impossible or unreasonable. In addition, an employer is not required to reemploy a returning service member if the position the employee held before leaving for military service was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue for a significant period of time.

Employers of all sizes must be aware of the requirements placed on them by USERRA. Failure to follow this law can lead to costly penalties and legal exposure. Employers should, therefore, inform themselves of their responsibilities under USERRA and seek appropriate legal advice when necessary.

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