

Effect of Qualified Employee Military Leave on Employee Benefit Plans

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Introduction

The Uniform Services Employment and Reemployment Act of 1994 (“USERRA”) was enacted on October 13, 1994 to provide certain benefits to employees who leave their civilian employer to perform uniformed service and then return to work for their employer. Employers have been required to comply with the reemployment provision since December 12, 1994 without the benefit of regulations. Final regulations were not issued until December 19, 2005 when the Department of Labor finalized the proposed regulations. These regulations modify and solidify the specific requirements under USERRA and are effective January 18, 2006. This publication reviews key aspects of USERRA and its impact on an employee's participation in employee benefit plans, including retirement (i.e., 401(a), 403(b), 457, 401(k) plans) and health plans, as well as certain other employment rights. If the provisions of USERRA conflict with other federal or state (including local) statutes, the law that is most beneficial to the employee takes precedence. USERRA prescribes the minimum rights to which an employee is entitled. Employers can, of course, provide more generous benefits to employees on active duty.

Employers are obligated under USERRA to grant leave to workers for active military duty, training, or such other military obligations, such as periodic physical fitness exams. Reemployment is obligatory if all of the following conditions are met:

- the employee left the civilian job to enter active duty, receive training, or undergo a fitness-for-duty examination;
- the cumulative length of the absence and all previous absences for uniformed service does not exceed five years (with certain exceptions);
- the employee or a representative from the military service reasonably gave the employer advance notice of impending service, unless such notice was precluded by military necessity; and
- the employee complied with the deadlines for applying for reemployment (see below).

An employee on active military duty has the right to draw vacation, annual, or similar paid leave accrued before the active uniformed service began. An employer cannot require a reservist or National Guard member to use earned vacation pay for military service. Employees must receive earned vacation in addition to military leave unless they agree to waive the right to such vacation.

Coverage

USERRA's definitions are sufficiently broad to effectively cover all private and public sector employers and both full- and part-time employees. USERRA makes no exception to coverage for the type of organization or the number of workers an entity employs.

Employees on uniformed service leave are required to apply for reemployment upon their return from active duty based upon the following schedule:

- If the active service was for less than 31 days, the employee must report to the employer for reemployment by the start of the first regularly scheduled work period on the first day after completion of the military service, plus at least eight hours after the employee's return to his/her residence.
- If the active service was for more than 30 days but no more than 180 days, the employee must apply for reemployment within 14 days of completion of active duty.
- If the active service was for more than 180 days, the employee must apply for reemployment within 90 days of completion of active duty.

Service members returning from active duty of more than 180 days may not be discharged, once reinstated, for a full year, other than for cause. For a period of active duty between 31 and 180 days, the protected period of employment is 180 days from reinstatement. USERRA is intended to guarantee that employees on uniformed service leave have the same rights and benefits as their stay-at-home colleagues but is not intended to afford them special privileges. Thus, an employee on active military leave may, for example, be legally laid off if the action is part of a general layoff.

Employee Rights

Eligible employees who perform qualified military service will not incur a break in employment service with their employer during their absence from work and are considered to be in the service of their employer for retirement plan vesting, contribution and benefit accrual purposes. Section 414(u)(5) of the Internal Revenue Code of 1986 ("Code"), as amended, defines qualified military service as "any service in the uniformed services (as defined in chapter 43 of title 38, *United States Code*) by an individual if such individual is entitled to reemployment rights under such chapter with respect to such service."

Defined Contribution Plans. Eligible employees who return to work for their employer must immediately participate upon re-employment and if the plan provides for elective deferrals and/or employee after-tax contributions, be given the opportunity to contribute additional elective deferrals (on a salary reduction basis) and employee after-tax contributions. These contributions are referred to as "make-up contributions." The employer must make any corresponding matching contributions if the plan provides for such contributions. USERRA does not require a plan sponsor to make employer-matching contributions for an eligible employee while that employee is on qualified military service.

The make-up contributions must be made by the reemployed employee within a period of time, which is three times the period of active military service, not to exceed five (5) years. For example, assume an employee performed eighteen months of qualified military service before he was reemployed by his employer. Upon his reemployment, the employee has 54 months (i.e., the lesser of 54 (3 x 18) months or 5 years) to contribute any make-up contributions. The employer has the same period of time to make any matching contributions. The employer is not obligated to contribute earnings on any contributions. On the other hand, employer contributions that are not dependent on employee contributions (i.e., non-elective contributions) must be made within ninety days following reemployment or when contributions are normally made for the year in which the service was performed whichever is later.

The amount of compensation used to compute make-up contributions for an eligible employee during the period of qualified military service period is equal to what the employee would have been paid during that period if the employee had been employed. If this compensation cannot be reasonably ascertained (i.e., the employee did not have a fixed salary), then the average compensation received by the employee from the employer during the twelve (12) month period immediately preceding the military service can be used. The maximum make-up contribution a participant can contribute to a section 401(k), 401(a), 403(b), or 457 plan is limited to the amount he/she would have been permitted to contribute if he/she had been continuously employed by the employer during the period of military service.

The plan may allow suspension of participant loan repayments on outstanding loans during the qualified military service. This is true even if the loan would exceed the maximum 5-year loan repayment period. Upon reemployment, the loan repayments must again commence in the same manner as the original loan but the repayment period can be extended for a period equivalent to the period of active military service. Loan repayments must include the interest accrued during the active military service. Note that under the Servicemember Civil Relief Act of 2003, the applicable interest rate on a plan loan must be reduced to six percent during the period of military service. In order to take advantage of this reduced interest rate the service member must provide notice to the Sponsor no later than 180 days after completion of the military service.

Plan Testing. For purposes of the applicable annual nondiscrimination tests under the Revenue Code, the make-up and matching contributions relate to the plan year to which they originally would have been made had the employee not been on active military duty. In addition, these contributions are not considered contributions for the plan year in which they are actually made. An employer should identify eligible employees who are making make-up contributions and receiving corresponding matching contributions and notify the organization performing the nondiscrimination tests to avoid having these amounts inadvertently subjected to nondiscrimination testing.

Example: How to compute the amount of military make-up contributions that a participant in a retirement or public employer deferred compensation plan may make and the period of time over which those military make-up contributions may be made is shown below.

Assume that Wayne went on active military duty on October 1, 2004 and returned to work on April 1, 2006. In this example, Wayne was on military duty for 18 months (76 weeks). Wayne, therefore, may make military catch-up contributions for up to 54 months (226 weeks) from the date the first military make-up deferral is taken from his salary.

The second assumption is that Wayne was paid an average monthly salary of \$5,000 before he left for active duty and earned \$45,000 through September 2004. He deferred 10% of his salary to his retirement or public employer deferred compensation plan for a total of \$4,500 in 2004. In 2005, Wayne did not defer any amounts to his retirement or public employer deferred compensation plan because he was on military duty. Wayne could have contributed \$8,500 in 2004 and \$14,000 in 2005. Therefore, the maximum military make-up amount for Wayne is \$22,500 (\$13,000- \$4,500 in 2004 and \$14,000 in 2005).

Therefore, Wayne can make up to \$20,500 in military make-up contributions over 54 months in addition to his regular deferral maximums. Of course, his deferrals are limited to his includable compensation.

Pension benefits. An employer's pension plan must treat an employee on military leave as though he/she had been in continuous employment. Military service must be considered service by the plan with regard to the plan's vesting and benefit accrual provisions. Pension rights do not, however, accrue if no reemployment occurs.

Health benefits. USERRA requires employers to offer continuous coverage for up to 24 months to employees and their dependents who were previously covered by the employer's health plan and who are absent due to military service. If the military service does not exceed 31 days, the health plan cannot require the employee to pay more than the employee's normal share for the coverage. For longer military leaves, the employer can charge the employee 102% of the full premium. Unlike coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), there is no exception under USERRA for small employers, government employers, or church plans.

Upon reemployment, the returning employee has the right to immediate reinstatement in the health care coverage in which he or she was enrolled prior to the intervening military service. The health plan cannot enforce any waiting periods or limitations on coverage for the employee and all covered family members.

Other Benefits. For seniority and benefits that are determined by seniority (such as accrual-based vacation plans), individuals returning from military leave are entitled to the benefits they had at the beginning of the leave plus any additional seniority and benefits they would have become entitled to if they had remained continuously employed. In other words, the returning employee does not step back on the seniority escalator at the point the employee stepped off to perform their military service; rather, the employee steps back on at the precise point the employee would have occupied had he not performed the military service. These benefits include rights under a pension plan, a health care plan, or an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

Finally, for nonseniority-based benefits, employees returning from military leave must be treated the same as any other employees on leave of absence under any policy or practices in place at the time that an employee's military leave begins and under those policies and/ or practices implemented while the employee is on military leave.

This article provides a general overview of USERRA's requirements relating to employee benefits. The article is not intended to be or provide legal advice. Plan sponsors and employers should consult with their own legal advisers to ensure compliance with the law and regulations.

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