

EMPLOYMENT LAW ALERT



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The U.S. Department of Labor Issues New Regulations for the Uniformed Services Employment and Reemployment Rights Act ("USERRA")

Over 500,000 members of the National Guard and Reserves have been activated for duty tours since September 11, 2001.

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") prohibits employers from discriminating or retaliating against any person who is a member of, applies to be a member of, or has performed in a uniformed service. It also provides, among other things, that members of the armed services are entitled to return to their civilian employment—with the same pay, status and benefits that they would have received had they not left their job for military service. The law applies to virtually all private employers, regardless of size.

The U.S. Department of Labor recently issued two sets of regulations regarding employers' obligations under USERRA.

Key provisions of the regulations include:

- Very detailed rules regarding the determination of employees' pay and pension benefits after returning from military service.
- The requirement that an employee give advance notice to the employer, to the extent practicable, regarding leave for military service.
- The obligation of an employer generally to reinstate an employee returning from military service within two weeks of the employee's request for reinstatement; This obligation extends to successor employers, engaged in a substantial continuity of operations.
- The prohibition that once reinstated after military service, employees may not be discharged except for cause for one year, provided their military service extended for more than 181 days. Moreover, to fire an employee, the employer bears the burden of establishing (1) that it was reasonable to discharge the employee and (2) that the employee was on notice that he or she could be discharged. The regulations define "cause" to include layoffs or job eliminations, and relate to that the employer bears the burden of establishing that the employee would have been laid off or had his or her job eliminated, regardless of his or her military service.
- The right of an employee on leave for military service to elect continued health coverage. The regulations provide that an employee who serves less than 31 days in the military, cannot be charged more than other employees for health plan coverage. If the employee is on duty for 31 days or more, however, the employer's health plan may

require the employee to pay up to 102% of the full premium (similar to COBRA requirements). NOTE: The regulations do not specify the manner by which an employee may elect continued health coverage. We recommend a COBRA-style election procedure for this purpose.

- The requirement that if the employee does not elect continuation coverage and, as a result, his or her health care coverage is terminated, the coverage must be reinstated as of the date of the employee's reemployment.
- The obligation of employers to post a notice regarding employee rights and benefits and employer's obligations under USERRA. The notice must be placed where employers customarily place notices for employees. A sample poster can be obtained at http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal

The stakes for USERRA non-compliance are large. Under the regulations, in a case of discrimination or retaliation, the employee bears the burden of proving that his or her conduct or status was protected by USERRA and that the protected status or conduct was a reason for the employer's adverse action. The burden then shifts to the employer to establish that it would have taken the same action, absent the USERRA-protected status or conduct. There is no statute of limitations under the statute, though some courts have applied a four-year statute of limitations. Individual supervisors and managers may be personally liable for discrimination or retaliation.

We recommend that all employers review their employment policies and their benefit plans in order to put in place procedures for dealing with issues under USERRA's new regulations.

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