

When Employees Leave for Military Service

by Jack K. Merrill

You run a small construction company. Eighteen months ago, you had to hire and train a manager to replace an employee whose Army Reserve unit was called up and sent to Iraq. Things are finally running smoothly again, when the reservist calls to say he's been discharged and wants his job back. The problem is that you have no job openings and did not think he would be coming back. Nonetheless, you may have a legal obligation to re-employ this veteran.

This dilemma has become increasingly common, because the Pentagon is relying heavily on reservists to fight wars in Iraq and Afghanistan. After losing a productive member of the work force to military service, an employer may then be faced with difficult and costly return-to-work issues. Since 2001, hundreds of thousands of reservists have been called to service, often on short notice. As they are discharged to the civilian work force, the number of disputes over their legal rights has increased substantially.

USERRA Spells Legal Protection For Servicepeople

The key law in this area is the Uniformed Services Employment and Re-employment Rights Act (USERRA). The goal of this federal statute is to encourage civilian military service by requiring the prompt re-employment of veterans and outlawing discrimination against them.

In general, the law requires employers to grant furloughs or leaves of absence to employees who leave work to serve in any uniformed military service. Upon discharge, service personnel have broad re-employment rights under an array of procedures intended to cover the varied issues that can

arise when they return to work. Employers who fail to comply with the provisions of USERRA may be sued, suffer large damage awards, and be forced to rehire employees who have been off the job for years. What follows is an overview of the issues companies commonly face when dealing with this law.

Rights and Obligations

Workers who are called to military service are required to give their employers as much advance notice as possible. The notice can be written or oral. In many cases, employers will have time to plan for the absence. Where short notice or other circum-

At the end of their military service, people who are honorably discharged are entitled to return to work, even when an absence spans up to five years.

stances cause undue hardship to a business, an employer may contact an employee's military commander to request rescheduling or even rescission of the duty order. The commander is under no obligation to honor the request, but may do so if he sees fit.

Length of service. At the end of their military service, people who are honorably discharged are entitled to return to work, even in cases where an absence spans up to five years. The type of job protection these workers

enjoy varies with the length of service. Employees who serve less than 91 days are entitled to the same job they would have had if they were not called up. If they serve more than 91 days, they must be returned to the job they would have had without a service interruption or to another position of similar seniority, status, and pay. These requirements apply to all regular employees unless the employer's circumstances change so much during the worker's absence that re-employment is impossible or unreasonable.

If the returning serviceperson served for more than 180 days, he cannot be fired for one year, except for cause; veterans who serve for 180 days or less enjoy the same job protection for six months.

Grace period. The length of military service also determines how long employees have to return to the job. Those serving fewer than 31 days must return immediately. Employees who serve between 31 and 180 days have 14 days to report back to work. Those serving for 181 days or more have 90 days to return to the job. Workers who are disabled by military service may be entitled to up to two years to recover from their injuries and return to work.

Disability Issues

Employers are obligated to re-employ service personnel who suffer disabling injuries in the line of duty. If a disabling injury is suffered or aggravated by military service, the employer must make a reasonable effort to accommodate the employee's disability. Accommodating the disability means reviewing the duties the injured veteran can perform, defining the essential functions of the job, and then modifying the job so the employee can

perform its essential functions. If there is no way that the injured employee can do his old job, the employer is required to place him in a different job (one he can do) with equivalent seniority and pay. The only time the employer can avoid the obligation to re-employ the disabled veteran is when doing so would cause undue hardship to the employer.

Unfortunately, there is no black-and-white definition of what it means to make a "reasonable" effort to accommodate a disability or at what point the requirement to re-employ causes "undue" hardship. In cases of dispute, these issues are often decided in court.

Maintaining Benefits

When military veterans return to work, they are entitled to all seniority and other benefits they would have received had they remained on the job. For example, an employee who worked for six months before service and returns 12 months later must be considered to have 18 months of seniority. Any and all pay raises the employee would have received while on the job must be granted on his return. Vacation time does not accrue during the employee's absence, but the returning worker is entitled to accrue it at the same rate that would have applied if he hadn't left. The employee must be allowed but is not required to receive pay in lieu of accrued vacation while on duty.


Health insurance. As for health insurance, companies have a duty to continue coverage for the first 30 days of a military serviceperson's absence from the job. After that, a continuation benefit similar to that under other federal laws applies (workers can continue coverage at their own expense for up to 18 months). An employee whose coverage was terminated because he was in the service is entitled to rejoin the company health plan without going through a waiting period.

Enforcement

USERRA provides two tracks for enforcing the rights of those it protects. The most frequently applied is the administrative route. An employee who believes he has been denied some benefit under USERRA can file a written complaint with the Department of Labor. The department will investigate and, if it determines the complaint has merit, will seek a voluntary resolution between the employer and the employee.

Over the past three years, the number of complaints handled by the department has increased substantially as large numbers of servicepeople are discharged from duty. About a third of those are found to have merit, and the ones that are not amicably resolved

can be referred to the U.S. attorney general for litigation. In that case, the employee will be represented by the federal government.

Where a worker elects, he may retain private counsel and commence a civil suit, normally in federal court. A prevailing veteran can be awarded his job, all legal fees and costs incurred, and damages equal to lost wages and benefits suffered as the result of a legal violation. Where that violation is found to be willful, a court can double the damages award against the employer. 

Jack K. Merrill counsels small businesses on employment matters and dispute resolution for Kushner & Sanders LLP in Wellesley, Mass.

Employee's Active Duty Return Notification Letter to Employer

[Employee's Home Address]

[Date]

[Employer's Business Address]

*Send by Certified Mail, Return receipt requested

RE: Application for Reinstatement - Uniformed Services Employment and Reemployment Act, Title 38, U.S. Code Section 4312

Dear Sir/Madam:

On [date], I entered active duty with the [service]. On [date], I was honorably released from active duty with the service.

Please accept this letter as a formal request to be reinstated in my former job. With your permission, I plan to report to work on [date]. Please call me at the number listed below if this date is not convenient. Pursuant to the Uniformed Services Employment and Reemployment Rights Act, Title 38, United States Code Sections 4301-33, I am entitled to be reinstated as soon as possible in my former position.

If you have any questions about the provisions of the Uniformed Services Employment and Reemployment Rights Act, the National Committee for Employer Support of the Guard and Reserve, toll-free telephone number 1-800-336-4590, will be happy to answer them.

Sincerely,
[Signature]

Original Received for Employer by:
[Printed Name and Signature]