Employers' Obligations Under Federal and Wisconsin Law to Employees Serving in the Military

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Practice Area: Compensation and Benefits/ERISA

The federal Uniformed Service Employment and Reemployment Rights Act of 1994 ("USERRA") provides employees with certain employment and reemployment rights after service in the United States Armed Forces or the National Guard. While USERRA has been the law for twelve years in the United States, there were no regulations interpreting this law until recently. After issuing proposed regulations in September 2004, the Department of Labor ("DOL") published final regulations on December 19, 2005 implementing USERRA. These final regulations became effective January 18, 2006.

Similarly, in December 2001, Wisconsin passed a USERRA-type law that provides reemployment rights for employees following service in the National Guard. In July 2005, Wisconsin passed additional legislation that provides reemployment rights for employees completing service in the United States Armed Forces.

These state and federal laws, which apply to virtually all employers regardless of size, provide employees serving in the United States Armed Forces or the National Guard with three basic types of employment protections: (1) protection from discrimination; (2) reemployment rights; and (3) protection of employee benefits. To the extent that the state and federal laws differ, employers are obligated to apply the provisions of the particular law that are more favorable to the employee. This Update highlights some of these differences and discusses some of the legal obligations Wisconsin employers face with respect to employees serving in the military.

Discrimination Protection

USERRA prohibits an employer from discriminating against current or prospective employees because of past, current or future military obligations. This protection extends to hiring, promotion, reemployment, termination as well as employee benefits. Thus, USERRA applies to job applicants as well as current employees. In Wisconsin, employees are also protected from discrimination because of military service, but such protection exists under the Wisconsin Fair Employment Act ("WFEAA) not under the Wisconsin version of USERRA.

Both the state and federal law prohibit retaliation if an employee exercises any right under the laws. Thus, an employer may not take an adverse employment action against an employee who, for example, takes action to enforce a right under the laws, testifies in an enforcement proceeding, or assists or participates in an investigation.

Reemployment Rights

Notice of the Need for Leave. USERRA requires an employee to give his or her employer advance notice of the need for leave except in the case of military necessity. The notice can be oral or in writing. The 2005 state statute, which applies to employees serving in the Armed Forces only (not to service in the National Guard), does not require advance notice of the need for leave. Thus, in Wisconsin, members of the National Guard are required to give advance notice of the need for leave, while members of the Armed Forces are not. While the Department of Defense strongly recommends that at least 30 days notice be given in advance of the leave, the USERRA regulations require only that notice be provided "as far in advance as is reasonable under the circumstances." Under USERRA, an employee is not required to state whether he or she intends to return to work following military leave, nor can he or she prospectively waive his or her right to reemployment after military service.

Length of Service. Under USERRA, the cumulative length of military service that causes an employee to be absent from work generally must not exceed five years. Wisconsin's reemployment law provides for a four year limit on military service. Because the USERRA service limit is more generous than Wisconsin's service limit, an employee retains reemployment rights with an employer as long as his or her cumulative service in the military does not exceed five years. A cumulative service period means the employee can go in and out of military service several times, as long as the total time served while working for one employer does not exceed five years. In addition, if an employee switches positions and/or employers, the employee is entitled to a new five-year cumulative service period.

Timelines For Seeking Reemployment. Under USERRA, if an employee's military service was for less than 31 days, he or she must report to work no later than the first regularly scheduled workday following completion of military service plus eight hours. If an employee's military service was for more than 31 days but less than 180 days, he or she must submit an application for reemployment within 14 days of discharge from service. If an employee's military service was for more than 180 days, he or she must submit an application within 90 days of discharge. Wisconsin's 2001 reemployment statute contains an identical timeline as the USERRA timeline for employees returning from service in the National Guard. Under the Wisconsin 2005 reemployment statute, however, an employee returning from service in the Armed Forces must return to work or apply for reemployment within 90 days of discharge from service, regardless of his or her length of service. Accordingly, under the more generous state reemployment statute, an employee returning from service in the Armed Forces must apply for reemployment within 90 days of discharge from service, while an employee returning from service in the National Guard must seek reemployment in accordance with the timelines established by USERRA.

If an employee is hospitalized for military service-related injuries, he or she must apply for reemployment upon recovery from those injuries, but no later than two years after the end of service under USERRA and Wisconsin's 2001 reemployment statute. Under the Wisconsin 2005 reemployment statute, an employee has up to six months after release from the hospital to report to work regardless of the amount of time that has elapsed since his or her discharge from the Armed Forces. Wisconsin's 2001 reemployment statute does not provide a timeline for seeking reemployment after hospitalization for injuries sustained during service in the National Guard. Thus, under the state reemployment statute, an employee returning from service in the Armed Forces who has been hospitalized for military-related injuries must report to work within six months after being released from the hospital or, if later, within two years after the end of service under USERRA, while an employee returning from service in the National Guard must apply for reemployment within two years after the end of service under USERRA, even if he or she is still hospitalized.

Protection from Discharge. Under USERRA, an employee whose military service lasted for more than 30 days but less than 180 days cannot be discharged, except for cause, within 180 days after returning to work, while an employee whose military service lasted for more than 180 days cannot be discharged, except for cause, within one year after reemployment. Under the Wisconsin 2005 reemployment statute, an employee returning from service in the Armed Forces is protected from discharge without cause for one year regardless of the length of his or her service. Thus, an employee returning from service in the Armed Forces is protected from discharge without cause for one year regardless of the length of service, while an employee returning from service in the National Guard is protected from discharge without cause under USERRA for either 180 days or one year, depending upon his or her length of service.

Reemployment Position. An employee is eligible for reemployment provided that: (1) the employee was in military service during the absence from employment; (2) the employer received advance notice of the military service if possible; (3) the employee had no more than five years of cumulative military leave away from the employer; (4) the employee returned to work or applied for reemployment in a timely manner; and (5) the employee is discharged from military service on an honorable basis.

Under both the Wisconsin and federal laws, an employee is generally entitled to reemployment in a job or position that he or she would have attained with reasonable certainty if not for the military service. An employee's rate of pay upon reemployment must be the rate he or she would have attained with reasonable certainty but for his or her military service. An employer is not obligated to reemploy an individual if the employer's circumstances have changed such that reemployment is impossible, unreasonable or causes undue hardship. Reemployment rights do not entitle an employee to be placed in a better position than if he or she had remained employed. This means that if the employee's wage rate was reduced while in military service, he or she is only entitled to the lesser amount.

Employee Benefits Health Plans. An employee has the right to continue existing employerbased health plan coverage while on military leave under USERRA. Plans must permit employees to elect to continue coverage for the lesser of: (1) the 24-month period beginning on the date the military leave begins; or (2) the period beginning on the date the military leave begins, and ending on the date the employee fails to return from service or apply for reemployment. (Prior to December 10, 2004, the maximum period of health plan coverage under USERRA was 18 months rather than 24 months.) Unlike continuation coverage under COBRA, continuation coverage under USERRA applies to all employers, regardless of size.

Health plan administrators are free to develop reasonable procedures for an employee's payment for continuing health plan coverage, subject to certain restrictions. Specifically, if the employee's military service is less than 31 days, the employee cannot be required to pay more than the regular employee share, if any, for health plan coverage. If the employee's military service is for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents both the employer's and the employee's shares of the health plan premium, plus a 2% surcharge for administrative costs.

If an employee fails to provide advance notice of military service and the failure is unexcused, the employer may terminate the employee's participation in the health care plan, subject to the employee's rights under COBRA and the Wisconsin continuation coverage statute. Similarly, an employer may also terminate an employee's health care coverage, subject to COBRA and the Wisconsin continuation coverage statute, if the employee provides notice of his or her military service to the employer, but fails to elect USERRA continuing coverage. However, an employer must permit retroactive reinstatement of coverage to the employee's date of departure if the employee elects continuing coverage and pays all unpaid amounts due within the USERRA coverage election period established by the plan (if any) or, if none, at any time within the minimum period of continuation coverage described above.

In addition to USERRA requirements, if the health plan is subject to COBRA or Wisconsin continuation requirements, the employer must comply with those requirements as well. The employee and/or his dependents experience a COBRA "qualifying event" if health coverage is lost as a result of the employee's absence during military service. Consequently, the employer should provide a COBRA and, if applicable, Wisconsin continuation coverage notice and election form to the employee, his or her spouse, and any dependent not living at home.

Generally, a health plan may not impose an exclusion or waiting period in connection with an employee's reinstatement of health plan coverage upon reemployment if an exclusion or waiting period would not have beenimposed had coverage not been terminated because of the military service. However, a health plan may impose an exclusion or waiting period for an illness or injury that the Secretary of Veterans Affairs determines was incurred in, or aggravated during, the performance of military service. An employer may (but is not required to) allow an employee to delay reinstatement of health plan coverage until a date after the reemployment date.

Retirement Plans. Upon reemployment after a period of military service, USERRA requires that an employee be treated as not having a break in service for purposes of participation, vesting, and accrual of benefits under a retirement plan. If an employer makes contributions to a defined contribution plan that are not contingent on employee elective contributions, *e.g.,* profit sharing contributions or 401(k) safe harbor contributions, the employer must make a "make-up contribution" on the employee's behalf after he or she returns from a military leave. Furthermore, the employer must allow the employee to make up elective deferrals that he or she could have made if employment had continued during the military leave and, if the employee does so, the employer must make any matching contributions that would have been made on those elective deferrals during the leave. The plan administrator must allocate the employer's make-up contributions and the employee's elective deferrals, if any, in the same manner and to the same extent that the plan administrator allocates such amounts for other employees. An employee participating in a defined contribution plan is not entitled to forfeitures and earnings or required to experience losses that accrued during the period of military service.

A defined benefit plan that requires employee contributions must increase the employee's benefit for the period of military service if the employee makes make-up contributions for that period. An employee's benefit under a non-contributory defined benefit plan is the same as if the employee had remained continuously employed during the period of military service. If the employee previously received a distribution from a defined benefit plan, the plan must allow the employee to repay the amount previously received. By doing so, the employee may be able to have a forfeiture that occurred as a result of the prior distribution reinstated.

Under USERRA, an employer is not required to make its contribution to the plan until the employee is reemployed. Employer contributions to a plan in which the employee is not required or permitted to contribute must be made by the later of 90 days after the date of reemployment, or when plan contributions are normally due for the year in which the military service was performed. Employee contributions to a plan in which the employee is allowed, but not required, to make up contributions or elective deferrals must be made during the period beginning with the date of reemployment and ending on the earlier of (1) three times the period of military service; or (2) five years. To the extent employer contributions are contingent on or attributable to the employee's make-up contributions or elective deferrals, such contributions must be made according to the terms of the plan for employer matching contributions. An employee that does not make up missed contributions or elective deferrals will not receive the employer match or accrued benefit attributable to the missed contribution. Moreover, an employee may not be permitted to make up a missed contribution in an amount that exceeds the amount that would have been permitted to be contributed had the employee remained continuously employed.

Employers need to be aware of their obligations regarding employees returning from military service under the applicable state and federal laws.