

DOL Issues First Proposed Regulations Interpreting USERRA

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On September 20, 2004, the U.S. Department of Labor (DOL) published the first proposed regulations interpreting the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.* (USERRA), beginning a 60-day period for public comment. USERRA, enacted in 1994, provides certain employment rights for individuals who serve in the military, including non-discrimination, reemployment and benefits. Compliance with USERRA and state laws affecting military leave has become an increasingly important issue for employers as a growing number of employees have left employment for periods of military service following September 11, 2001, and as a result of the ongoing military operations in Afghanistan and Iraq. Since September 11, 2001, more than 420,000 military personnel have been mobilized.

This LawFlash details some of the key issues addressed in the proposed regulations, as well as the steps employers should take to understand and respond to the proposed regulations.

The Proposed Regulation

While the proposed regulations do not significantly alter previous interpretations of USERRA, they do attempt to provide clarification with regard to a number of issues, including:

- **Employers covered by USERRA** The regulations provide that virtually all employers, including successors-in-interest and joint employers, are covered by USERRA.
- **Employees covered by USERRA** The regulations provide that almost all employees, including executive, managerial and professional employees, temporary, part-time, probationary and seasonal employees, and those who have been laid off with recall rights, those who are on strike or on a leave of absence, may have reemployment rights under USERRA. Individuals employed in brief, non-recurring positions with no reasonable expectation of continued employment are covered by USERRA's non-discrimination provision, but do not have reemployment rights. Independent contractors are not considered employees under USERRA.
- **Period of military service** The regulations provide that an employee does not have to begin military service immediately after leaving employment in order to have USERRA reemployment rights. Rather, depending on the circumstances, an employee may need rest time so that he or she can report to the military fit for duty, or may need time to get his or her affairs in order before extended military service. Such periods of time after leaving employment but before starting military service, as well as time after military service but before returning to civilian employment, are not deemed to count toward the five-year cumulative limitation on military service.
- **Timing, frequency and duration of military service** The regulations provide that while an employee does not have to accommodate an employer's interests regarding timing, frequency or duration of

military service, an employer may bring concerns about this to the attention of the appropriate military authority. Military authorities are required to consider requests from employers of National Guard and Reserve members to adjust an employee's scheduled absence from civilian employment to perform military service.

- Reemployment positions The regulations attempt to clarify the type of position (i.e., "status") to which an employee must be returned following military service, and state that the following may be considered: opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility and geographical location.
- Prompt reemployment The regulations provide that an employee returning from military service must be promptly reemployed and that, under normal circumstances, prompt reemployment is defined as within two weeks of application for reemployment.
- Rate of pay following military leave The regulations provide that an employee's rate of pay should be determined upon return from military service based on the escalator principle, including all raises he or she would have obtained with reasonable certainty but for military service. If the employee had qualified for previous merit increases, then he or she should be given any missed merit increases upon return from leave. Any pay adjustment should be effective the date it would have occurred but for military service.
- Termination after military service USERRA provides a period of time following military service (six months for individuals who served 180 days or less and 12 months for individuals who served more than 180 days), during which an individual may be terminated only for cause. The regulations provide that a reduction in force resulting in elimination of the employee's job or a lay-off may constitute cause where the escalator principle has been applied and it can be shown that the same result would have occurred in the absence of military service.
- Health benefits The regulations provide that health plan administrators may develop reasonable requirements for how coverage may be elected and paid for, consistent with the terms of the plan. An administrator cannot, however, preclude an employee from electing coverage where military service made timely election impossible or unreasonable.

This list is by no means exhaustive, but rather highlights some of the proposed regulations which address issues we have seen arise most frequently in recent years. The proposed regulations are substantial in length and cover all aspects of military leave. The proposed regulations, published in the September 20, 2004 Federal Register, will be subject to a 60-day comment period through November 19, 2004. You may find the full text of the proposed regulations at: <http://www.regulations.gov/freddocs/04-20844.htm>.

How We Can Help

It is extremely important that employers work closely with counsel to understand the proposed regulations and ensure compliance with USERRA and other applicable laws regarding military leave to avoid litigation and other complaints, which have risen sharply as a result of increased military mobilization. Additionally, given the increased impact of military leave issues upon the workplace, employer comments to the DOL regarding the practical effects of these proposed regulations will be extremely valuable.

The Morgan Lewis Labor and Employment Practice regularly advises employers with regard to their obligations under USERRA and related state laws, and defends them against complaints and lawsuits alleging USERRA violations. Morgan Lewis lawyers have worked with a wide variety of companies

nationwide to develop policies and to address issues related to military leave, and have extensive knowledge of and experience with all aspects of this issue.

We are poised to assist you with analyzing these proposed regulations and their impact on your business and in submitting comments to the DOL.

To discuss the proposed USERRA regulations or any aspect of military leave, please contact:

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