

E\*Alert

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## **DEPARTMENT OF LABOR ISSUES PROPOSED USERRA REGULATIONS**

By: Troy Martell

On September 20, 2004, the United States Department of Labor issued proposed regulations interpreting the Uniformed Services Employment and Reemployment Act of 1994 (USERRA). In general, USERRA provides protection to employees who leave their jobs to serve in the “uniformed services” of the military. USERRA covers members of the national guard, the military reserves, and all active components of the Armed Forces.

This represents the first time regulations have been developed to help enforce USERRA since passage of the law in 1994. Secretary of Labor Elaine L. Chao has commented: “These regulations will spell out the rights of our returning service men and women and the responsibilities of employers to honor their service. This Administration will back up these first-time ever USERRA regulations with aggressive outreach and enforcement.”

The proposed regulations offer some important and useful clarifications of USERRA’s key statutory provisions, some of which are summarized below:

- **USERRA: Reemployment:** Reemployment under USERRA is generally based on the escalator principle. The escalator principle provides that upon returning to his or her job, the employee is entitled to the job position he or she would have attained with reasonable certainty if not for the absence.
  - **Proposed Regulations: Changed Circumstances:** USERRA provides certain exceptions and exclusions to the right to reemployment, and the proposed regulations offer helpful clarification to the “changed circumstances” exception. The proposed regulations note as an illustration that an employer may be excused from reemployment where there has been an intervening reduction in force that would have included the employee. However, the employer may not be excused from reemployment if an employee was hired to fill the position vacated by the absence due to military service, even if reemployment might require termination of the replacement employee.
  - **Proposed Regulations: Discharge Based on Conduct or the Escalator Principle:** USERRA provides that employees returning to employment after a

period of service are entitled to protection from discharge except for cause for up to a full year, depending on the length of service. The proposed regulations explain that if the discharge of a protected employee is based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that the employee had notice that such conduct would constitute cause for the discharge. The discharge can also be based on the escalator principle. If the application of the escalator principle after reemployment results in the employee's job being eliminated, or in the employee being placed on layoff status, either of these situations would constitute cause under USERRA. The employer once again bears the burden of proving that the job would have been eliminated or that the employee would have been laid off.

- **USERRA: Pension Benefits:** On reemployment under USERRA, the statute provides that employees must be treated as not having a break in service for purposes of participation, vesting and accrual of benefits.
  - **Proposed Regulations: Repayment of Pension Account Balance:** The proposed regulations explain that if an employee withdrew all or part of his account balance from the pension benefits plan before becoming reemployed, the employee must be allowed to repay the withdrawn amounts when reemployed. In the case of a defined benefit plan (but not a defined contribution plan), the amount of repayment includes any interest that would have accrued had the monies not been withdrawn. This repayment generally must be made within a time period, starting on the date of reemployment, that is three times the length of the employee's immediate past period of military service, not to exceed five years.
  - **Proposed Regulations: Makeup of Missed Contributions or Elective Deferrals:** Under the proposed regulations, employees are not required to pay interest, i.e., they are not required to make up a missed contribution in an amount that exceeds the amount they would have been permitted or required to contribute had the employee remained continuously employed during the period of service.
- **USERRA: Notice:** Eligibility for reemployment benefits under USERRA is premised on the employee giving advance notice of the need to perform military service.
  - **Proposed Regulations: Notice Requirement Excused by Military Necessity or Impossibility Under Circumstances:** The proposed regulations clarify that employees can be excused from giving advance notice if such notice is prevented by military necessity. This generally covers situations where a mission, operation, exercise or requirement is classified, or could be compromised by public knowledge. Only designated military authority can make a determination of military necessity. Employees can also be excused from giving advance notice if the giving of such notice is impossible or unreasonable under the circumstances. This may include the unavailability of the employer or employer's representative or a requirement that the employee report for service in an extremely short period of time.

- **USERRA: Five-Year Limit:** Another requirement for reemployment benefit eligibility is that the employee must have five years or less of cumulative military service with respect to the employee's position of employment.
  - **Proposed Regulations: Five-Year Limit Does Not Include All Absences Related to Service:** The proposed regulations explain that the five-year period includes only the time actually spent performing service in the uniformed services. A period of absence from employment before or after performance of service does not count against the five-year limit. As an example, employees are allowed a certain amount of time (depending upon length of service) to report back to work or submit an application for reemployment. The period between the completion of the period of service and the time to report back to work does not count against the five-year limit.
  - **Proposed Regulations: Five-Year Limit Does Not Include Periods of Service Performed For Other Employers:** The proposed regulations also explain that employees are entitled to a leave of absence up to five years with each employer. Therefore, the five-year service limit does not include periods of military service the employee performed for a previous employer.

Wisconsin employers should also note that Wisconsin has a statute (Wis. Stat. s. 21.80) which essentially mirrors USERRA. It applies to Wisconsin residents who serve in the national guard, state defense force, or public health emergency service. These claims are processed by the Wisconsin Department of Workforce Development in the same manner as employment discrimination claims.

The dramatic increase in the number of troops being activated for service has impacted lives around the nation. Employers are being forced to deal with these issues more and more, such that increased familiarity with laws like USERRA is a necessity.

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If you have any questions about the issues raised by this e-alert, please feel free to contact Troy Martell at (414) 273-3910 or by e-mail at [tmartell@lindner-marsack.com](mailto:tmartell@lindner-marsack.com).

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