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The U.S. Department of Labor has issued its final regulations implementing the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA prohibits discrimination and retaliation by employers because of an employee's military service, and establishes a service member's reemployment rights after he or she completes voluntary or involuntary military duty. The new regulations took effect on January 18, 2006, and some of the more significant components are summarized below:

**Reemployment.** The new regulations clarify that employees are eligible for reemployment following a period of military service if: (1) the employer had advance notice (written or verbal) of the employee's leave for service; (2) the employee's cumulative military leave with the employer has not exceeded five years; (3) the employee timely returns to work or applies for reemployment (with time limits generally ranging from one to 90 days after the end of military service, depending on the length of the leave); and (4) the employee was not discharged for a dishonorable or some other disqualifying reason. Eligible employees need not be reemployed if changed circumstances make reemployment impossible or unreasonable, such as an intervening reduction in force. The employer may not be excused from its reemployment obligations, however, if it hired another employee to fill the position vacated by the employee on military leave.

**The Escalator Principle.** One of the most important aspects of the new regulations is the "escalator principle," which entitles an employee to reemployment in the position that he or she would have attained with reasonable certainty if not for the military leave of absence. The escalator principle applies not only to the job placement itself, but also to the pay, benefits, seniority, and other perquisites that would have been attained if not for the military leave. The regulations acknowledge, however, that the escalator principle can also result in adverse consequences for the returning employee. For example, if the employee's seniority or job classification would

have caused the employee to be transferred or receive a pay decrease during the period of service, the reemployment position would reflect these changes.

**Five-Year Duration.** Under USERRA, employees generally are entitled to a leave of absence for military service of up to five years. The regulations clarify that the five-year leave of absence is cumulative and applies to each individual employer. Therefore, when an employee takes a job with a different employer, the five-year period starts anew, regardless of how much leave the employee took for military service while with a prior employer. Periods of leave taken before or after the employee performs actual military duties do not count against the five-year limitation (e.g., the time period between completing service and reporting back to work).

**Healthcare and Pension Plan Rights.** USERRA provides that service members have the right to continue their employer-based healthcare for up to 24 months while in active duty. Upon reemployment, employees must be reinstated in the employer's healthcare plan without a waiting period, regardless of whether a service member elected to continue healthcare coverage during military leave. The regulations also clarify that employees on a military service leave must be treated as though they remained continuously employed for pension plan purposes. If an employee withdraws all or part of his or her account balance from a pension benefit 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. The repayment generally must be made within a time period that is three times the length of the employee's immediate past period of military service, not to exceed five years.

**Termination Protection.** USERRA prohibits employers from discharging an employee "without cause" during the first six to twelve months (depending on the length of military service) following his or her return to work. The new regulations clarify that an employee may be discharged for cause based on misconduct or because of the "application of other legitimate non-discriminatory reasons," such as job elimination. Employers, however, have the burden of proving good cause for the discharge.

According to the Department of Labor, over 530,000 members of the National Guard and Reserve have been mobilized since September 11, 2001. As a result, employers must familiarize themselves with USERRA rights and make certain that their policies and practices are compliant. Employers are also required to post the new USERRA poster in their workplaces by January 18, 2006. The new poster can be downloaded from the following website: [http://www.dol.gov/vets/programs/userra/USERRA\\_Private.pdf#Non-Federal](http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal).

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