Military Leave Laws

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The key protections for employees who are enlisted in the military is the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA requires employers to provide certain accommodations to employees serving in the military by imposing reinstatement obligations on employers, and it prohibits private employers from discriminating or retaliating against employees based on their military service and ensures that those employees receive certain benefits and reemployment rights and provides limited protection from termination upon return from military leave. In addition to the federal USERRA law, New York also has its own military leave statute, which offers certain protections to employees who are absent from work due to military service. This chapter provides a summary of USERRA's provisions, with references to New York law where applicable.

COVERAGE

Under USERRA, any person who is a member of the "uniformed services" of the United States (or who applies to be a member of the uniformed services) is entitled to protection from discrimination or retaliation under USERRA. In addition, persons who are absent from their regular employment due to "service in the uniformed services" are entitled to certain reemployment rights and benefits. The term "uniformed services" is broad and includes all of the following:

- all branches of the US Armed Forces (including both the active and reserve components of the Army, Navy, Air Force, Marine Corps and Coast Guard)
- the Army National Guard and Air National Guard, when members are engaged in active duty training, inactive duty training (e.g., weekend drills) or full-time duty
- the commissioned corps of the Public Health Service and any other category of persons designated by the President in time of war or national emergency
- intermittent disaster response appointees of the National Disaster Medical System (NDMS), but only when federally activated or attending authorized federal training.

The phrase "service in the uniformed services" is defined as the performance of a duty on a voluntary or involuntary basis in a uniformed service and includes all of the following:

- active duty
- active duty training
- inactive duty training
- full-time National Guard duty (under federal, not state, authority)
- absence from employment for an examination to determine fitness for duty
- absence from employment for the purpose of performing funeral honors duty by the National Guard or reserve members
- absence from employment to serve as an intermittent disaster-response appointee upon activation of the NDMS or as a participant in an authorized training program for the NDMS.

USERRA does not protect employees who leave civilian employment to pursue a full-time career in the military, unless the person returns to civilian life. Depending on the length of military leave, the employee may or may not have a right to reinstatement, but the employer cannot discriminate against the employee based on his or her military service.

Unlike other federal employment statutes, USERRA does not require an employee to work for an employer for any minimum amount of time in order to be covered. In fact, USERRA provides rights and protections even to job applicants. However, when there is no expectation that the employment would continue for an indefinite or significant period of time, temporary employees hired for a brief, nonrecurrent period are not covered by USERRA.

New York's military law protects the job rights of employees who are on active duty or active reserve duty in the US Armed Forces or the state militia. This includes individuals who are in the US military and the National Guard. The state law applies to employees regardless of whether they were drafted or voluntarily enlisted to enter or remain in active military service.

EMPLOYER COVERAGE

USERRA applies to virtually all employers in the United States, including private companies, tax-exempt entities and federal, state or local governments and agencies. There is no exception for small employers. In addition, some courts have even found that individuals may be liable for discrimination or retaliation under USERRA.

New York Military Law pertainfing to mandatory military leaves of absences applies only to both public- and private-sector employers as long as the job the employee left for military service was not a temporary one. As with USERRA, there is no exception for small employers.

LEAVE AND REINSTATEMENT RIGHTS

USERRA requires all employers to allow covered employees to be absent from work to provide service in the uniformed services. An employee is not required to obtain permission from an employer before taking military leave under USERRA. Employees are protected by USERRA not only for the time that they are actually out on military leave, but also for the time taken off from work to travel to and from military duty. Employers are very limited in the restrictions that they can place on an employee's ability to take a military leave of absence.

Employers must allow an employee to take a military leave of absence. Employees must be excused from work to attend inactive duty training (i.e., weekend drills or annual military training summer camp) or other service in the uniformed services.

EMPLOYEE OBLIGATIONS

An employee is responsible for notifying the employer of his or her military obligation. Such notice may be either written or oral. The notice may be informal and does not need to follow any particular format. It may be provided by the employee or by an appropriate officer of the branch of the uniformed services in which the employee will be serving. An "appropriate officer" is a commissioned, warrant or noncommissioned officer authorized to give such notice by the applicable military service.

The notice should be submitted by an employee as far in advance as is reasonable under the circumstances. Military necessity, such as where a need for secrecy exists or in situations where

it is impossible or unreasonable to provide advance notice, may lead to notice being given after the leave has already commenced.

An employee is not required to submit official documentation of his or her military orders at the time the employee requests the military leave of absence because military orders are often issued on an informal basis.

An employer may not require an employee to reschedule drills, military training or other military duty obligation to satisfy the employer's needs. However, when military duties require an employee to be absent from work for an extended period, during times of acute business need or when the requested military leave is unduly burdensome for the employer, the employer may contact the commander of the employee's unit to determine whether the duty could be rescheduled or performed by another service member. If the commander determines that the employee's military duty cannot be rescheduled or performed by another servicemember, the employer must permit the employee to perform his or her military duty.

An employee is not required to find someone to cover his or her work duties during the employee's absence from work.

Four specific categories of employees are identified in the New York Military Law:

1. those who are in the active military service of the US Armed Forces or the National Guard
2. those who participate in reserve duty training, instruction or duties or in annual full-time training duty
3. those who perform initial full-time training duty or initial active duty training with the US Armed Forces
4. those members of the organized militia or of a reserve component of the US Armed Forces.

Depending on the time that they are engaged in military service, all four categories of employees are considered as having been on furlough or leave of absence.

REEMPLOYMENT OF EMPLOYEES

USERRA requires that a private employer reemploy eligible employees who have served in the uniformed services, subject to certain conditions. USERRA also contains detailed provisions concerning the position into which an employee must be placed upon his or her return from military leave.

Under USERRA, an employee who takes a military leave of absence must meet six eligibility criteria in order to be entitled to the reemployment rights and benefits under USERRA. If the employee does not meet the following six criteria, the employer does not have to reemploy the employee:

1. The employee must be absent from civilian employment due to service in the uniformed services (as defined earlier in this chapter).
2. The employee must give timely advance written or verbal notice of his or her intention or obligation to serve, unless that notification is impossible due to military necessity or another reason outside the employee's control.
3. The employee's cumulative absence(s) from the employer due to military service must not exceed a total of five years. However, this five-year period does not include:
    a. service that is required beyond five years to complete an initial period of obligated service
    b. service during which the employee is unable to obtain discharge orders through no fault of the employee
    c. service required by the military for drills, annual training or completion of skills training
    d. involuntary active duty during domestic emergency, national emergency, war or national security situations
    e. service under an order to report for active duty or to remain on active duty, during a war or national emergency declared by the President of the United States or Congress

f. active duty (other than for training) by volunteers supporting "operational missions" for which selective reservists have been ordered to active duty without their consent

g. federal service by members of the National Guard when called by the President to suppress an insurrection, repel an invasion or execute federal law.

4. The employee must be honorably discharged from service. An employee who is separated from the military due to a dishonorable or bad conduct discharge or separated under less than honorable conditions is not entitled to reemployment rights or benefits under USERRA.

5. The employee must timely report for work or submit an application for reemployment as follows:

    a. Military leave of less than 31 days

    b. The employee must report for work by the beginning of the first full regularly scheduled work period on the first regularly scheduled workday that would fall eight hours after the employee has returned home from military service, allowing a reasonable time to commute home from service.

    c. Military leave of 31 to 180 days

    d. The employee must apply for reemployment not later than 14 days after completion of military service.

    e. Military leave of more than 180 days

    f. The employee must apply for reemployment not later than 90 days after completion of military service.

    Persons who suffered an illness or injury that was caused or aggravated by military service must report for work or submit an application for reemployment within the time periods listed previously, after their period of recovery has ended, which cannot exceed two years from the date of the end of military service. This time period must be extended by the minimum time necessary to accommodate

circumstances beyond the employee's control that make reporting or applying within that time period impossible or unreasonable.

6. Upon request from the employer, an employee who has been absent from work for more than 30 days must provide documentation from the relevant branch of the uniformed services establishing the preceding criteria for reinstatement. A failure to provide documentation cannot be a basis for delaying or denying employment if the documentation does not exist or is not readily available to the employee at that time. An employer should return the employee to work pending receipt of the requested documentation. If the documentation does become available and the employee does not meet the criteria for reinstatement, the employer is not obligated to continue to reemploy the employee and may terminate the employment.

   An employer is not permitted simply to terminate an employee who fails to return to work within the deadlines outlined previously. If an employee fails to meet the USERRA reapplication deadlines, he or she will be subject to the employer's standard policies and disciplinary procedure for employees who are absent for scheduled work in nonmilitary leave circumstances.

EXCEPTIONS TO THE OBLIGATION TO REEMPLOY

In the following situations, an employer may not be obligated to reemploy a person returning from military leave, even if the criteria discussed previously are satisfied:

- The employer's circumstances have changed sufficiently so as to make reemployment impossible or unreasonable. The employer always bears the burden of proving such changed circumstances. However, an employer cannot meet this burden simply by showing that another person has been hired to fill the position vacated during the leave period or that no opening exists at the time of the reapplication. Reemployment of the returning employee must be more than inconvenient or undesirable in order for this exception to apply. For example, if an employer can show that it had 500 employees when the employee commenced military leave but had only two employees at the time the returning employee sought reemployment, the employer may not be required to reemploy the returning employee.
- Reemployment would cause an undue hardship on the company, such as when the returning employee has a disability incurred in or aggravated during, service

or if the person is not qualified to be employed in the position to which she would have been and cannot become qualified with reasonable efforts by the employer in any position nearest to that position. For instance, if the returning employee has been so severely injured that he or she can no longer work, the employer is not obligated to reemploy the returning employee.

- The employee's prior job with the employer was only for a brief, nonrecurrent period and there was no reasonable expectation by the employee at the time of departure that employment would continue for an indefinite or significant period of time. For instance, if the returning employee was formerly employed for a two-week job between semesters in college, the employer is not obligated to reemploy him or her.

POSITION TO WHICH THE EMPLOYEE IS ASSIGNED UPON RETURN FROM DUTY

Except with respect to persons who have a disability caused or aggravated by military service, USERRA provides that the position into which an employee is reinstated be determined by priority based on the length of military service:

- ### Service of 1 to 90 days:
  The employee must be reemployed as follows:

  - The returning employee must receive the job position the employee would have held "with reasonable certainty" had the employee remained continuously employed, but only if the employee is qualified for the job or can become qualified after reasonable efforts by the employer. This is commonly referred to as the "escalator" position. To be qualified for a position, the individual must be both physically and emotionally capable of performing the duties of the position and working with coworkers and supervisors.

  - If the returning employee cannot qualify for an "escalator" position (as described in the previous section), the employee must be placed in his or her pre-service position or a job of equivalent seniority, status and pay if the employee is qualified for the job or can become qualified after reasonable efforts by the employer.

- If the employee cannot become qualified for an "escalator" position or the employee's pre-service position, the employee must be offered any other position that is the nearest approximation first to the "escalator" position and then to the pre-service position.

- Service of 91 or more days:
  The employee must be reemployed as follows:

  - The returning employee must receive the job position the employee would have held "with reasonable certainty" had the employee remained continuously employed or a position of equivalent seniority, status and pay, but only if the employee is qualified for the job or can become qualified after reasonable efforts by the employer.

  - If the returning employee cannot qualify for an "escalator" position, (as described in the previous section) the employee must receive the employee's pre-service position or a job of equivalent seniority, status and pay, if the employee is qualified for the job or can become qualified after reasonable efforts by the employer.

  - If the employee cannot become qualified for an "escalator" position, the employee's pre-service position or an equivalent position, the employee must be offered any other position that is the nearest approximation first to the "escalator" position and then to the pre-service position.

The fact that another employee was placed in the individual's former position does not render it impossible or unreasonable for the employer to reinstate the returning employee. The employer is expected to accommodate a returning employee's right to his or her position, regardless of whether reinstatement displace another employee.

TERMINATION AFTER REINSTATEMENT

An employee who has been reinstated after serving in the military cannot be terminated except for "cause" within six months of reinstatement (if the employee's prior service with the employer was between 30 and 180 days) and one year (if the employee's prior service with the employer

was more than 180 days). To demonstrate "cause," the employer must show, among other things, that the employee had notice that the conduct at issue could lead to termination.

The New York military law provides that covered employees are entitled to return to their prior permanent employment at the end of military service, provided that they make application for reemployment within the following statutory time periods:

- **90 days** for those who are in the active military service of the US Armed Forces or the National Guard
- **10 days** for those who participate in reserve duty training, instruction or duties or in annual full-time training duty
- **60 days** for those who perform initial full-time training duty or initial active duty training with the US Armed Forces
- **10 days** for those members of the organized militia or of a reserve component of the Armed Forces of the United States.

An employee who returns to employment by the end of the military leave of absence must be restored without loss of seniority unless the employee is no longer qualified to perform the duties of that position or unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. The employee is entitled to participate in insurance or other benefits offered by the employer under its established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time the person commenced the leave. For one year after return to employment, the employee may not be suspended or discharged from employment without cause.

COMPENSATION OBLIGATIONS WITH RESPECT TO EMPLOYEES ON LEAVE

Per USERRA, an employer is not required to pay the employee during military leave. However, under the Fair Labor Standards Act (FLSA), an employer cannot dock an exempt employee's pay for absences due to military leave in any workweek in which the employee performs any work for the employer. Therefore, if an exempt employee works a partial workweek in the same payroll week that military leave begins or ends, the employee must be paid for the entire week. In addition, if an exempt employee continues to do some work for the employer during military leave, by telecommuting or otherwise, the employee must continue to be paid. In all cases, the pay may be reduced by any military pay received. This reduced pay (the difference between military pay and the employee's civilian pay) is called differential pay. Some employers elect to pay differential pay even when it is not required. Other employers choose to provide a specific

number of paid military leave days per year and pay differential pay only when required for exempt employees.

With respect to compensation after the employee returns from military leave, the employer is generally required to reinstate the employee in a position at the level of pay the employee would have achieved if the employee had never taken military leave. Pay includes all elements of compensation, such as salary, commission, bonuses, shift premiums, and hourly rates.

Returning employees are also entitled to all seniority-based raises, as well as all merit-based raises that are consistently awarded to nearly all employees and were granted during the period of military leave.

Similarly, nothing in the New York Military Law obligates private-sector employers to pay employees during a military leave of absence. Under New York State Military Law, reservists and National Guard members are eligible for paid leave while performing ordered military duty for 30 calendar days or 22 workdays (whichever provides the greater benefit to the employee) in any calendar year or continuous period of absence that spans more than one calendar year. This also applies to reservists and National Guard members holding part-time, per diem or hourly positions. Workdays are calculated based upon the employee's scheduled workdays. Agencies are required to record military leave under both the calendar day and the workday methods, until it is determined which method of calculation provides the greater benefit to the employee.

Additionally, employees who served in a combat theater or combat zone are entitled to be paid his or her salary for any and all periods of absence relating to receiving healthcare treatments that are needed as a result of such duty. This benefit is available for up to eight working days in each calendar year.

After eligible public employees exhaust their entitlement to full pay, they are entitled to be placed on leave at reduced pay. This enables them to request the use of leave credits, other than sick leave, before being placed on leave at reduced pay. Employees in reduced pay status are paid their regular state salary reduced by their military pay. The reduced salary is calculated as of the employee's last day in full pay status and the military pay is calculated as of the first day of activation and remains unchanged during the entire period of activation.

EMPLOYEES ON LEAVE AND THEIR BENEFITS

In order to be eligible for benefits during military leave and upon return from military leave, the employee must meet the eligibility requirements of USERRA, as described previously, namely:

- leaving work for temporary service in the uniformed services,
- providing proper notification prior to taking leave, and
- returning to work within the required timeframe.

USERRA includes specific rules for the provision of benefits under an employer-sponsored health plan, both during and after military leave. "Health plan" is broadly defined as "an insurance policy or contract, medical or hospital service agreement, membership or subscription contract or other arrangement under which health services for individuals are provided or the expenses of such services are paid." This definition of health plan includes all health plans, regardless of the number of participants, the size of the employer or whether the employer is a government agency or church.

A person reporting for a tour of active duty of 31 days or more will qualify for individual military health insurance coverage and coverage for his or her dependents. Ongoing COBRA continuation coverage cannot be terminated because a reservist or a reservist's family receives or is eligible to receive health coverage under the federal military health insurance plan.

The employee and his or her dependents are entitled to re-enroll in the employer's health plan when the employee returns to work without any new waiting period, exclusions or pre-existing condition limitations. However, if an employee incurred an illness or injury during military leave and the Secretary of Veterans Affairs determines that the illness or injury was incurred in or aggravated during service, that illness or injury may be subject to an exclusion or pre-existing condition limitation. Therefore, a health plan can include a provision excluding from coverage an injury or illness incurred as a result of military service under those circumstances.

If the plan does not include such an exclusion, the plan's pre-existing condition limitations, if any, would apply. However, in all likelihood, the employee would have sufficient "creditable coverage" from the military's plan to eliminate the limitation. If the employee was in the middle of a waiting period or was subject to a pre-existing condition limitation at the beginning of military leave, the waiting period is tolled during the military leave and will resume when the employee returns to work.

An employer is not required by USERRA to make contributions for health coverage for an employee or family members during military leave, although the employer may choose to do so. USERRA provides the employee with the right to elect to continue coverage upon the beginning of military leave in a manner similar to COBRA. When COBRA applies to the employer, the employee could also elect COBRA continuation coverage. In addition, the employee's spouse

may have a special enrollment right that would allow the family to be covered under the spouse's employer's health plan.

CONTINUATION OF HEALTH INSURANCE COVERAGE

Under USERRA continuation coverage, if an employee and any dependents are enrolled in a health plan immediately prior to military leave, they have the option of remaining on the health plan for the lesser of:

- 24 months from the beginning of military leave, or
- the date on which military leave began to the day after the date on which the person was required to return to employment for reinstatement.

The employee may be required to pay up to 102% of the full premium for the coverage provided under the plan —calculated in the same manner as COBRA. But, if the period of service is only for 30 days or less, the employee and dependents must be maintained on the employer's health plan during the leave with an employee contribution no greater than that normally required of employees. There is no notice requirement for USERRA continuation coverage.

If COBRA applies to the health plan, COBRA is triggered by the beginning of military leave because of the employee's reduction in hours and the employer must provide a COBRA notice. COBRA continuation coverage applies even though the employee and his or her family are eligible for coverage (and may even become covered) under TRICARE (the military's health plan). This is an exception to the normal rule that coverage under another employer's group health plan cuts off the right to COBRA continuation coverage. In general, unless the spouse or a dependent is disabled, the employee and family members will receive the same coverage for the same cost under either COBRA or USERRA. In either case, if, during the military leave:

- the employee dies,
- becomes divorced or legally separated,
- becomes entitled to Medicare,
- a dependent's status as a dependent under the plan terminates, then

the spouse and/or dependent will be entitled to elect COBRA coverage for a period of up to 36 months from the date of the employee's reduction in hours.

Because COBRA is triggered by the employee's reduction in hours at the beginning of military leave, COBRA is not triggered if the employee chooses not to return to work at the end of the military leave.

USERRA also grants spouses of members of the uniformed services certain special enrollment rights in employer-sponsored health plans. If a family loses health coverage because one spouse goes on military leave and the spouse is otherwise eligible for coverage as an employee under another employer-sponsored plan, rather than electing continuation coverage, the family could elect coverage under the non-serving spouse's employer's plan. This may be less expensive than electing continuation coverage if the spouse's employer pays a portion of the premium. The electing spouse must elect coverage within 30 days of losing eligibility for coverage under the initial plan to fall within the special enrollment provisions.

PENSION BENEFITS

USERRA includes specific rules for employee pension benefit plans both during and after military leave. These rules apply to all employee pension benefit plans, whether they are defined benefit or defined contribution plans, including:

- traditional pension plans
- profit-sharing plans
- 401(k) plans
- 457 plans
- 403(b) plans.

Military leave is treated as covered service with the employer for purposes of eligibility, vesting and accrual. The time an employee is on military leave does not constitute a break in service. Once the employee returns, the employee has the lesser of five years or three times the length of service to make contributions to the plan that the employee could have made during military leave. In addition, the employer has the same period within which to contribute an amount equal to the amount that would have been contributed if the employee had not taken military leave, without taking into account either earnings or forfeitures. If matching contributions would have been made with respect to any employee contributions, had the employee contributions been made during the period of military leave, the employer is also obligated to make those contributions.

The employer is not required but has the option to make employer contributions to an employee pension benefit plan on behalf of an employee during his or her military leave. The employer is also not required but has the option to allow the employee to make employee contributions during military leave.

OTHER BENEFITS

Benefits other than health and pension benefits are also addressed in USERRA. For USERRA purposes, benefits include:

"any advantage, profit, privilege, gain, status, account or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan or practice and includes rights and benefits under ... an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations and the opportunity to select work hours or location of employment."

Benefits have been found to include such things as:

- clothing allowance
- housing allowance
- law enforcement commission
- training.

An employee on military leave is entitled to the same benefits to which furloughed employees or employees on another type of leave are entitled during the same period. If different types of leave of absences or furloughs provide different benefits, employees on military leave are entitled to the most advantageous benefits provided. Employees on military leave will be required to make the same employee contribution for benefits as employees on other types of leave. An employee on military leave is entitled to any benefit that the employee would be eligible for if he or she had not been on a military leave of absence. Therefore, an employee on military leave would be entitled to accrue sick days during military leave if persons on other types of leave are entitled to do so. However, the employee would not be eligible to purchase stock under an employee stock purchase plan if the employee was not otherwise eligible to participate in the plan, even though other employees who satisfy the eligibility requirements are entitled to purchase stock under the plan during periods of leave.

VACATION TIME

The employer is not required to allow the employee to accrue vacation or sick days during military leave, unless employees on other types of leave are allowed to accrue vacation or sick leave. If vacation or sick leave is not accrued over time, but rather is accrued in one annual lump sum, then an employee on military leave on the date of the lump-sum accrual should be granted the entire lump sum to the extent employees on other types of leave would receive the full benefit.

The employer cannot require an employee to use vacation or leave time that the employee had previously accrued during military leave unless all employees are required to use that leave time. Therefore, if a plant shuts down every year for the week of Christmas and every employee is required to take vacation time during that one-week period, any employees on military leave would also be required to take vacation during that week.

If an employee wants to take vacation or similar leave time while on military leave, the employer cannot refuse the request. If employees are allowed to accrue vacation or sick leave while taking vacation, the employees will accrue leave during any portion of the military leave in which the employees take vacation. Taking vacation would be advantageous for an employee who is on military leave if the employer has a use-it-or-lose-it policy for vacation days. For instance, if the employee had accrued a week of vacation prior to going on military leave and could not use it before the military leave starts, he or she would risk losing it under the employer's use-it-or-lose-it policy. This employee could request use of this vacation time during the military leave. The employee would therefore be paid for the vacation time during the military leave and not entirely lose its value.

BENEFITS UPON RETURN FROM LEAVE

Under USERRA, an employee is entitled, upon return from military leave, to the seniority and benefits based on seniority that the employee had immediately prior to the leave plus the additional seniority and seniority-based benefits that the employee would have attained if the employee had been continuously employed with the employer during the military leave.

The employee is entitled, upon return from military leave, to all benefits that are not based on seniority in the same manner as any employee on any leave of absence is entitled to upon return from leave. If the treatment of other types of leave varies, the returning employee is entitled to the most favorable benefits afforded for some other type of leave, regardless of the type of leave

or if it is paid or unpaid. In no event is the employee entitled to any benefits to which the employee would not otherwise be entitled if not for the military leave. The employee returning from military leave will be required to make the same employee contribution for benefits as employees returning from other types of leave.

Once the employee returns to work, he or she is entitled to accrue the number of vacation and sick days per year that he or she would be accruing if he or she had remained in employment during the period of active duty. Thus, if employees with up to five years of service with the employer have two weeks of vacation per year and employees with more than five years of service have three weeks, an employee who worked for the employer for four years before leaving for a two-year tour of active duty would be entitled to three weeks of vacation per year upon her return.

If vacation or sick days are non-seniority based and persons on other types of leave are credited once they return to work with the vacation or sick days that would have accrued during the leave had they been continuously employed, the employer is obligated to do the same for employees returning from military leave.

If vacation or sick days are seniority-based, the employee is entitled upon return from military leave to be credited immediately with all vacation or sick days the employee would have accrued during the military leave except any days that would have been lost under a use-it-or-lose-it policy.

Severance Benefits

If an employer experiences a downsizing or reorganization while an employee is on military leave, the employee on military leave should be considered along with other employees who are not on military leave. If his or her position is eliminated, he or she will be entitled to any severance benefits based on length of service that are provided. If the downsizing or reorganization occurs after the employee returns from military leave, the period of military leave must be counted in determining eligibility for and the amount of any severance benefit.

UNIQUE NEW YORK REQUIREMENTS

Under the New York Family Military Leave Law, employers are required to provide unpaid time off to family members of those on active duty in the military. Employers with 20 or more employees must provide the spouse of a person on active duty in a combat theater or zone of operations up to 10 days of unpaid leave. This leave may only be taken while the person in the military is on leave from active duty. Only employees who work at least 20 hours per week are

eligible for this leave. Significantly, the law does not require any minimum length of service for eligibility, nor is the employee required to give the employer notice prior to taking leave. Retaliation against employees taking this leave is prohibited.

Under New York's Paid Family Leave Law, employees may also receive paid leave because of any qualifying exigency as interpreted under the Family and Medical Leave Act, arising out of the fact that the spouse, domestic partner, child or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces of the United States.

PROTECTIONS FOR EMPLOYEES ON MILITARY LEAVE

USERRA protects individuals from all types of employment discrimination and retaliation based on their membership in the uniformed services. USERRA provides that an employer may not refuse to hire, promote or retain an employee based (in whole or in part) on their membership in the uniformed services and it may not terminate such individuals or deny them any benefit of employment on that basis. An employer can be liable for discrimination under USERRA even if military service is only one of several reasons the employer took an adverse action against the employee.

USERRA specifically provides that an employer may not terminate an employee without cause following military leave for a specified period of time. A person who has been reemployed by the company under USERRA cannot be discharged from employment except for cause for a particular time period, based upon the length of service:

- service of 30 to 180 days — within 180 days after the date of reemployment
- service of 181 or more days — within one year after the date of reemployment.

USERRA and its regulations do not describe what constitutes "cause" that would justify a termination during the protected time period. However, it appears that virtually any reason other than the employee's military service will be sufficient cause for termination. Only employees who are eligible for reemployment are entitled to this protection from termination.

Employers are prohibited from taking any adverse employment action against a person because that person has taken an action to enforce rights under USERRA, testified in a proceeding to enforce USERRA or has assisted or participated in an investigation under USERRA. However, individuals who are dishonorably discharged from their military service are not protected under this provision.

Pursuant to New York law, for one year after employees return to employment, the employer may not suspend or discharge them from employment without cause.

LEAVE RIGHTS OF FAMILY MEMBERS OF MILITARY MEMBERS

In January 2008, President Bush signed into law the National Defense Authorization Act (NDAA), which amended the FMLA to include military family leave entitlements. These entitlements were expanded further in October 2009, when President Obama signed into law the National Defense Authorization Act.

Among other things, the NDAA amended the FMLA to permit a "spouse, daughter, parent or next of kin" to take up to 26 weeks of unpaid leave in any single 12-month period to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is otherwise on the temporary disability retired list, for a serious injury or illness." Under the 2009 FMLA amendments, military caregiver leave coverage was expanded to include employees whose family member is a veteran who was a member of the Armed Forces in the preceding five years. As amended by the 2009 FMLA amendments, a "serious injury or illness" includes an injury or illness that was incurred in the line of active duty as well as conditions that predate a servicemember's active duty but were aggravated by active duty. The 12-month period is measured from the day the employee takes leave, regardless of how the employer calculates FMLA leave periods. An eligible employee is only entitled to a combined total of 26 weeks for any qualifying FMLA leave during the single 12-month period and is not entitled to receive more than 12 weeks traditional FMLA leave or qualifying exigency leave. Finally, the 26-week caregiver leave entitlement applies on a per-servicemember, per-injury basis.

The FMLA amendments also permit an employee to take FMLA leave for "qualifying exigencies" arising out of the fact that the employee's spouse, son, daughter or parent is called to covered active duty. "Covered active duty" is defined to include any deployment of an Armed Servicemember to a foreign country and any deployment of an Armed Service reservist to a foreign country under a call or order to active duty. Under the 2008 FMLA amendments, qualifying exigency leave was limited to employees whose family members were in the reserves or National Guard and who were ordered to active duty as part of a "contingency operation." As amended, family members of regular members of the Armed Forces now qualify for qualifying exigency leave. Further, leave is no longer limited to contingency operations, but may instead include any deployment on active duty. Eligible employees are entitled to up to a total of 12

workweeks of unpaid leave for qualifying exigencies during the normal 12-month period established by the employer for FMLA leave.

The NDAA also permits an employee to take FMLA leave for "any qualifying exigency arising out of the fact that the spouse or a son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."

The following is a specific and exclusive list of what constitutes a "qualifying exigency":

- short-notice deployment
- military events and related activities
- childcare and school activities
- financial and legal arrangements
- counseling
- rest and recuperation
- post-deployment activities
- additional activities agreed upon by the employer and the employee.

REQUIRED NOTICES

Employers are required to provide a notice of the rights, benefits and obligations of such persons and such employers under USERRA. Employers may provide the notice by posting it where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice or distributing it via electronic mail). A copy of the poster can be downloaded from the Department of Labor website.

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