

ACCOMMODATING MILITARY LEAVE

There are federal and state laws which provide for rights for returning service members (military and National Guard). The Uniformed Services Employment and Reemployment Rights Act of 1994 is the most comprehensive protection afforded service members. State laws also offer protection, including the State of Washington. Under federal law, service members are entitled to certain benefits, including reemployment, so long as their absence from a position of employment is due to their participation in the uniformed services. They must meet the following criteria: (1) advanced written or verbal notice of service to the employer; (2) the length of the absence that they will be away (and all previous absences from the military service for the employer) do not exceed five years; and (3) the employee submits an application for reemployment to the employer.

There are also criteria regarding when the employee must submit the application for reemployment.

If the employee is gone for 30 or fewer days, they must submit their request for reemployment by the first full regularly scheduled work period on the first full calendar day following the period of service (together with some other special rules). If the employee is gone more than 30 but less than 180 days, they must submit their application for leave of employment no later than 14 days after their period of forced service. And if the employee is gone for more than 180 days, they must submit their application for reemployment no later than 90 days after completion of service. Note there are certain exceptions under the rules when reporting may be impossible or unreasonable through no fault of the employee.

When an employer fails to rehire an employee, there may be certain defenses available to them. They are as follows: (1) where the service member is “qualified for the position upon return from service”; (2) where the circumstances of the employer’s workplace have so changed that reemployment is not possible or is unreasonable; (3) where the employer would suffer undue hardship in reemploying the service member; and (4) where the employment was for only a brief, nonrecurring period and that there was no expectation that employment was to continue indefinitely or for an extended period. There may be other defenses which the employer can raise, such as the service member’s failure to reapply for the position and the like.

In the event of a violation of the laws, a court may require the employer to comply with the Act, to compensate the service member for any lost wages or benefits, to pay the service member liquidated damages (double the lost wages and benefits) if the employer’s failure was willful, and to issue a temporary or permanent injunction and/or contempt order.

Under Washington State law, service members are protected for their position. The Washington Legislature’s intent is to provide protections for state military service similar to the USERRA’s protections for federal service and requires reemployment to same or like positions unless changed circumstances make it impossible or unreasonable or it would constitute an undue hardship on the employer.

As many employers are having employees on military leave, even those who are in the reserves, many employers, especially in Washington State where we have military installations, are feeling the pinch from having some of their employees leave for military service. The handling of these issues must be very carefully undertaken as an employer who is perceived as not having accommodated a service member's reemployment rights would be a very unpopular party in any potential claim or litigation.