
EMPLOYEE BENEFITS AFTER UNIFORM SERVICE

by Katherine J. Alexander

Since 1940, laws have protected the rights of veterans returning to the work-force. The most recent federal form of this legislation is the Uniformed Services Employment and Re-Employment Rights Act, 38 USC 4301 et seq. (1994), commonly referred to by its acronym, "USERRA." USERRA requires employers to rehire, promote and retain returning members of the Uniformed Services. The length of service often affects the exact nature of the employer's obligation. The scope of USERRA is broader than previous protections, extending its coverage to voluntary and involuntary service and recognizing both training service and National Guard duty.

When you combine the broad scope of USERRA with the intricacies of ERISA (the Employee Retirement Income Security Act of 1974), the potential impact on the employee benefits your company offers should be given careful consideration. The Small Business Job Protection Act of 1996 codified certain benefits-related portions of USERRA as Internal Revenue Code § 414(u), but these relate only to the treatment of qualified pension plans. No codification of the welfare plan impacts has been issued, and there are virtually no regulations to clarify the details of applying USERRA's requirements in the operation of all manner of benefit plans.

The following is a brief overview of what we know and don't know about USERRA's impact on employee benefit plans:

Broad Coverage

Unlike many benefits laws that exempt certain portions of the employer and employee populations, USERRA casts an extremely broad net.

1. Uniformed Service

Uniformed Service can be voluntary or involuntary, extends to service with the Army, Navy, Air Force, Marines, Coast Guard, National Guard and the commissioned corps of the Public Health Services and includes time spent in active duty, active duty for training, initial active duty for training, inactive duty training, and fitness examination time. Returning employee benefits rights are generally conditioned on an honorable discharge and are for periods of service up to a five-year maximum, with some exceptions.

2. Employer

There is no small employer exception from any portion of USERRA's requirements. The obligations run to successor employers as well as to persons or entities "to whom the employer has delegated the performance of employment related responsibilities." 38 USC 4303(4)(A)(i).

3. Employee

Part-time as well as full-time employees are covered by USERRA and there is no minimum duration of pre-service employment required to trigger USERRA's protections. The only exception is for temporary employees, but it is a narrow exception that applies only to those whose pre-employment service was for a "brief, non-recurrent period and there is no expectation that such employment will continue indefinitely or for a significant period." 38 USC 4312(d)(1)(C). Independent contractors are, of course, excluded since they are not "employees".

Pension/401(k) Plans

1. Service Credit

A person returning from uniformed service is to be treated as not having a "break in service" under the company's pension plans. In addition, the period of uniform service must be treated as service under the pension plans for vesting and for benefit accrual purposes. While USERRA is not clear, it appears that it must also be counted for eligibility purposes. In crediting the service under this provision, there is no clear guidance on how to count hours during uniformed service for a participant who was a part-time employee before the uniformed service began.

2. Employer Contributions

Once the service credit has been granted, the employer must make contributions that the employee would have been entitled to as a result of the service credited, essentially to put the returning employee into the position he or she would have been in but for the absence. The employer is not required to make any contribution to account for lost earnings nor are forfeitures required to be reallocated. 38 USC 4318(b).

To the extent a contribution is based on compensation, the employer is to use the rate of compensation the employee would have received but for the period of service, taking into account the "escalator" provisions of USERRA that would give a returning employee the benefit of raises or promotions that would have occurred if the employee had remained. If it is not possible to calculate such an amount, the employer may use the compensation paid during the 12 months prior to leave, or, if shorter, the period of employment prior to uniformed service.

An employer is not required to make contributions that are contingent on employee elective contributions unless the participant makes up the elective contributions on his or her return.

There is no guidance yet on the timing required for these employer contributions in order for the employer to be able to receive a deduction under Internal Revenue Code § 404.

3. Elective Contributions

A returning employee eligible to participate in a pension plan must be provided an opportunity to "make-up" any elective deferrals or employee contributions that the employee could have made during the period he or she was performing uniformed service. The returning employee is granted a period of three times the uniformed service or, if less, five years to make-up the elective contributions. 38 USC 4318(b)(2).

The make-up deferrals are subject to the various contribution limits for the year they would have been made if the uniformed service had not occurred. This prevents a negative impact on the returning employee's right to make maximum deferrals in the years after return from service.

The make-up contributions will not cause the plan to fail to satisfy nondiscrimination rules. This means that the amounts are not considered in performing discrimination testing for the year in which the elective contributions are made and, presumably, means that the plan is not required to go back and retest the prior years.

There are complications that could arise if the returning employee is a highly compensated employee and the plan has hit ADP or ACP limits in the years of Uniformed Service that would have impacted the employees elective deferrals and resulting matching contributions. There has been no guidance yet on this topic, and care should be taken in the event this situation arises to determine what options may be available in interpretation.

4. Plan Loans

A plan is allowed but not required to suspend plan loan repayments during the period of uniformed service. Having said that, if the plan allows suspension during other types of leave, suspension at least as favorable must be offered to the uniformed serviceperson. The period of suspension may exceed the one year limitation otherwise provided under plan loan regulations. On the participant's return he or she must pay back the loan within a period equal to the original term of the loan plus the period of the uniformed service. The repayment must include interest that accrued during the period of uniformed service. The plan can choose to gross up the installment payments to allow for a full repayment during the extended term or can require a balloon payment at the end of the maximum term. Payments after the return must not be less in amount or frequency than before the leave began.

The Soldier's and Sailors Civil Relief Act of 1940 ("SSCRA") contains a 6% maximum limit on the interest rate that may be charged during a period of military service. The Department of Labor has confirmed that this does apply to 401(k) plan loans. The one exception is where a plan fiduciary petitions the court to retain a higher rate based upon the individual's ability to pay.

Health Plans

USERRA requires employers of any size to allow for the continuation of health plan coverage for up to eighteen (18) months during a period of uniformed service. 38 USC 4317. These rules apply to all health plans, including dental, vision, and medical flexible spending accounts. They apply even to plans maintained by employers who fall within the small-employer exceptions of COBRA.

If the military leave is for fewer than thirty-one (31) days the employer may not charge the individual or dependants any more than the premium that is charged to active employees for their medical coverage. After thirty-one (31) days individuals may be charged for coverage at a rate of one hundred and two percent (102%) of the premium. For plans that are subject to COBRA, this leave runs concurrently with COBRA, but COBRA notices must be given to meet the requirements of ERISA. Notices should be modified to explain that the continuation rights under USERRA do not extend the rights otherwise available under COBRA. Where military coverage exists concurrently, it is treated as primary coverage for the service member and as secondary coverage for the family.

No exclusion or waiting period can be imposed because of military service when the participant returns, regardless of whether they elected continuation coverage. The only exception is the right to exclude coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, Uniformed Service. 38 USC 4317(b)(2). Presumably, an Act of War exclusion of general application to the plan should still be enforceable.

Other Welfare Plans

For all other employee benefit plans, including such benefits as cafeteria plans, group term life insurance, disability plans, and other fringe benefits, the determination of what needs to be covered and to what extent depends on whether the benefit is seniority based or non-seniority based.

1. Seniority Based Benefits

A service member returning to employment is entitled to have his or her seniority restored and to be given seniority credit for the period of absence. For example, a vacation or severance benefit will be applied on the employee's return as if the employee had never left. If an employer gives two weeks vacation for employees with less than five years of service and three weeks of vacation after five years of service, a returning service member who would have passed the five-year mark during the term of absence will have a right to three weeks vacation for their continued service. The actual accrual of vacation is based on actual performance of service, and would be a non-seniority based benefit accrued only to the extent it is granted to others on leave, as discussed below. As a general principle, the returning employee is treated as having gotten back on the "seniority escalator" and is, therefore, riding at the place he or she would have been if pre-uniformed service employment had continued.

2. Non-Seniority Based Benefits

Benefits that are not based on seniority must be provided to the employee during the uniformed service to the same extent they are provided on leave to "employees who have similar seniority, status and pay." 38 USC 4316(b)(B). This is sometimes referred to as a "most favored leave" status. So, for example, wages do not need to continue, but they must if you offer paid leave to other employees in leave situations. Cafeteria Plans are a common concern in leave situations. Generally, the beginning of uniformed service will likely be a change in status enabling participants to modify elections. The right to continue contributions during uniformed service may depend on whether the employee is receiving any payments from which contributions could be deducted. It would be look at the specific terms of your plans and determine what categories of benefits are offered on leave and where uniformed services leave might fit into the total picture. To the extent payments are continued to employees during service, you should consider whether such amounts constitute "wages" for withholding purposes.

3. Family and Medical Leave Act

The DOL has recently confirmed that periods of uniformed service are required to be counted toward the eligibility requirements(12 months and 1250 hours of service) for leave under the Family and Medical Leave Act. In this con-text, the DOL indicates that the employee's work schedule prior to uniformed service can be considered in determining the number of hours that would have accrued.

Enforcement

The enforcement provisions of USERRA have some strong differences from the enforcement of ERISA benefit rights. Returning employees subject to the protections of USERRA have a private right of action or can file a claim with the Department of Labor. There is no exhaustion of administrative remedies required. The Department of Labor must investigate every claim and if it finds merit in the claim must assist in attempting to resolve it informally.

Unlike ERISA which prevents any damages in excess of the restoration of benefits or equitable relief, USERRA allows an employee to recover up to two times the lost wages and benefits where there is a willful violation of its provisions. There is a right to attorneys' fees and costs in the statute and the court may order reinstatement or enjoin the employer against discharging or demoting the employee. The attorneys' fees provision is one-sided. The employer will not be able to recover attorneys' fees relating to the USERRA claim, although it may have the ability to obtain a partial attorneys' fees judgment if the claim is part of a group of claims brought unsuccessfully.

Unanswered Questions

Although USERRA has been in place since 1994, there is still a lack of detailed regulation relating to the impacts on pension plans. A few of the unanswered questions are:

1. What happens if the plan terminates before the individual returns from service?
2. What is the deadline for the employer make-up contributions to insure deductibility under IRC § 404?
3. What if the returning employee terminates reemployment before his right to make up elective deferrals has ended?
4. To what extent does summary plan descriptions need to fully describe USERRA rights?
5. How will the elective deferral rights of a highly compensated employee be determined in a plan where ADP or ACP testing capped the deferrals or matching contributions for highly compensated employees?
6. How will catch-up contributions enter into the right of returning service members to make-up their lost deferrals?
7. Is 5 years the maximum service credit that an employer would need to grant?

It is a good idea for every company to consider how the requirements of USERRA might impact its employee benefits. Your plan provisions, the benefits you extend to employees on leave of absence and the explanations of benefits you give to employees should all be reviewed. When in doubt, interpret your benefits in favor of providing more to the returning service person.