

AN OVERVIEW OF USERRA AND THE FMLA'S PROVISIONS FOR MILITARY FAMILIES

Two federal laws offer employment protections specifically to service members and their families. A summary of these laws, the USERRA and provisions of the FMLA, follows.¹

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

Enacted in 1994,² USERRA provides employees who voluntarily or involuntarily take time off from work to serve in the uniformed services with up to five-years of job protection.³ Generally, the law entitles an employee to reemployment after an absence due to military service, provided the employee (or an appropriate military officer) gave his or her employer advance notice of the service and returns to work or applies for reemployment in a timely fashion.⁴

USERRA entitles an employee to return to work at his or her "escalator position," *i.e.*, a position of comparable seniority, status, and pay to which the employee "would have attained with reasonable certainty" but for the absence for service.⁵ If the employee is not qualified to hold the escalator position, the employer is required to make "reasonable efforts" to qualify the employee for such a position.⁶ Only if such efforts are unsuccessful may an employer place the employee in a position that is comparable to the position that the employee held when he or she *left* for service.⁷ Absent cause, an employer may not

¹ Information and in-depth legal analyses of these and other laws that impact workplace flexibility are available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/index.cfm>.

² USERRA was enacted to "encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment[; and] to minimize the disruption to the lives of persons performing service . . . as well as to their employers, their fellow employees, and their communities. . . ." 38 U.S.C. § 4301(a)(1)-(2). Congress envisioned the Federal Government would be a "model employer" in this area. *Id.* at § 4301(b).

³ 38 U.S.C. § 4301-4334. The first regulations implementing USERRA were promulgated in 2005. See 70 Fed. Reg. 75246 (Dec. 19, 2005). USERRA applies to all public and private employers regardless of size. Special rules apply to state and federal employers and certain federal intelligence agencies. See 38 U.S.C. §§ 4314-15, 4323-25.

⁴ 38 U.S.C. § 4312(a)(1) & (3). Employers are not required to rehire an employee who has left for uniformed service in three instances: (1) if the employer's circumstances have changed so as to make reemployment "impossible or unreasonable" (e.g., when there has been an intervening reduction in force that would have included that employee); (2) in the case of an employee who has suffered a disability (or who has had a disability aggravated) during service, or in the case of an employee who is not qualified for the job, "if such employment would impose an undue hardship on the employer;" or (3) if the employee's position from which he or she has left for uniformed service was "for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." 38 U.S.C. § 4312(d)(1)(A)-(C); 20 C.F.R. § 1002.139(a).

⁵ See 38 U.S.C. § 4313(a)(2)(A). If the absence is for fewer than 91 days, the employee is entitled to the exact position the employee would have held but for the absence. 38 U.S.C. § 4313(a)(1)(A).

⁶ 38 U.S.C. § 4313(a)(2)(B).

⁷ 38 U.S.C. § 4313(a)(2)(B). If the employee still is not qualified for that position after reasonable efforts by the employer (for any reason other than disability), the employee is entitled to the nearest approximate job the employee is qualified to perform, with full seniority. 38 U.S.C. § 4313(a)(4). An employee who is

discharge a reinstated employee for one year from the date of the individual's reemployment.⁸

USERRA also affords certain protections related to benefits:⁹

- Employees who leave work may elect to continue with their COBRA-like benefits while on military service.¹⁰ Health plans are required to offer up to 24 months of continued coverage to such employees (and their dependents), and generally may not require the employees to pay more than 102% of the full premium during that time.¹¹ In most circumstances, however, only the employee (and not the employee's beneficiaries) has the right to continued USERRA health care coverage. In addition, an employer-provided health plan may not impose an exclusion or waiting period on a reinstated employee, other than for coverage of an illness or injury incurred in or aggravated during the employee's uniformed service.¹²
- For pension purposes, an employee is treated as if he or she has been continually employed throughout the time of the absence.¹³ If a pension or retirement plan requires an employee contribution, the employee must make such contributions to receive any employer contributions.¹⁴ However, the employee is given a period of either five years or three times the length of uniformed service (whichever is shorter), to contribute to the pension plan once he or she is reemployed.¹⁵

Finally, the law prohibits discrimination in employment based on military service and protects against retaliation taken because someone engaged in an activity authorized or protected by USERRA.¹⁶

unqualified for a position due to a disability incurred in or aggravated by their service is entitled to separate, somewhat more generous reemployment protection under § 4313(a)(3).

⁸ 38 U.S.C. § 4316(c). That period is a year if the employee's service prior to reemployment was greater than 180 days, or 180 days if the employee's service was between 30 and 180 days. *Id.*

⁹ For any benefits based on seniority, the employee's absence does not count against the individual at all. 38 U.S.C. § 4316(a). With regard to benefits that are not based on seniority, the employer must treat the employee as if he or she were on furlough or leave of absence. *Id.* at § 4316(b)(1).

¹⁰ Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), if an individual loses health care coverage as a result of a COBRA qualifying event (e.g., termination of employment, divorce from a covered employee), the individual may continue health care coverage (by paying his/her own premiums) for 18, 29 or 36 months, depending on the type of qualifying event. *See generally* ERISA §§ 601,602, 604; I.R.C. § 4980B(f)(2),(4).

¹¹ 38 U.S.C. § 4317(a). If the employee's absence for uniformed service is for 31 days or fewer, the employee cannot be required to pay more than the employee's share had they remained employed. *Id.*

¹² 38 U.S.C. § 4317(b)(1)-(2). The Department of Veterans Affairs makes this determination, not the health plan. *Id.*

¹³ 38 U.S.C. § 4318(a)(2)(A).

¹⁴ 38 U.S.C. § 4318(b)(2).

¹⁵ *Id.*

¹⁶ 38 U.S.C. § 4311.

The Family and Medical Leave Act (FMLA)

The FMLA is the first federal law to *require* workplace flexibility in the private sector. Enacted in 1993, the law originally permitted eligible employees to take up to 12 weeks per year of unpaid, job-protected leave for: (1) the birth or adoption of a child; (2) the “serious health condition” of an employee; or (3) the “serious health condition” of an immediate family member of an employee.¹⁷ An eligible employee is someone that works for a private employer with at least 50 employees, or for a federal, state, or local governmental agency.¹⁸ An employee seeking time off must also have worked for his or her employer for at least one year and for over 1250 hours during the last year.¹⁹

On January 28, 2008, President Bush signed the National Defense Authorization Act for FY 2008 (“NDAA”)²⁰ -- the first ever expansion of the FMLA. Section 585(a) of the NDAA created two new types of FMLA leave specifically designed to support military families: (1) qualifying exigency leave; and (2) military caregiver leave. On November 17, 2008, the Department of Labor (DoL) issued regulations implementing the new military family leave provisions.²¹ The regulations offer key definitions of new statutory phrases and clarify the administrative structure and availability of the new provisions.²²

Qualifying Exigency Leave -- This provision allows eligible employees of covered employers to take up to 12 weeks of job-protected FMLA-qualifying leave:

Because of 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.²³

The “active duty” language referenced in the statute refers to a federal call to active duty for members of the National Guard or Reserves.²⁴

In implementing the NDAA, the DoL defines a “qualifying exigency” as at least one of eight categories of events:²⁵ (1) **short-notice deployment** of up to 7 days “to address any issue” arising from the notification of an impending call to active duty; (2) **military events and**

¹⁷ 29 U.S.C. §§ 2601 – 2654. The statute defines a “serious health condition” as an ailment requiring inpatient care or “continuing treatment” by a health care provider. 29 U.S.C. § 2611(11). Regulations further define inpatient care at 29 C.F.R. § 825.114 and continuing treatment at 29 C.F.R. § 825.115.

¹⁸ 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110. Governmental agencies do not have to meet the 50 employee test. 29 C.F.R. § 825.104(a).

¹⁹ 29 C.F.R. § 825.110(a).

²⁰ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585 (2008).

²¹ 29 C.F.R. § 825.126-127. This rulemaking also includes revisions to the existing FMLA regulations. Before the instant notice and comment, DoL undertook a number of activities related to learning about the implementation and current practices under the FMLA. A description of some of those activities, including a 2006 Request for Information (RFI) and 2007 Report on the RFI, is available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/documents/WF2010IntroductiontoRFIDocuments3.pdf>.

²² See, e.g., 29 C.F.R. §§ 825.309, -310 (containing new certification provisions for qualifying exigency and military caregiver leave, and referencing new optional certification Forms WH-384 and WH-385).

²³ 29 U.S.C. § 2612(a)(1)(E).

²⁴ 29 U.S.C. § 2611(14), cross-referencing to 10 U.S.C. § 101(a)(13)(B); 29 C.F.R. § 825.126(b)(2)(i)-(ii). Hence, caregivers of members of the Regular Armed Forces are ineligible for this provision regarding qualifying exigencies. 29 C.F.R. § 825.126(b)(2)(i).

²⁵ 29 C.F.R. § 825.126(a)(1)-(8).

related activities such as official, sponsored, or promoted ceremonies, programs, events or information briefings related to active duty or a call to active duty; (3) **childcare and school activities**,²⁶ (4) **financial and legal arrangements**,²⁷ (5) **counseling** needed as a result of active duty or the call to active duty that is provided by someone other than a health care provider; (6) **rest and recuperation** to spend up to five days per period of short-term, temporary, R&R leave that a covered service member has during deployment; (7) **post-deployment activities** to attend reintegration and other official events for up to 90-days after active duty terminates or to deal with the death of a covered service member; and (8) any **additional activities** related to service for which the employer and employee agree.²⁸ A covered service member is defined as the employee's "spouse, [child], or parent on active duty or call to active duty status."²⁹

Military Caregiver Leave -- Under the NDAA, this provision entitles:

an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember ... to a total of 26 workweeks of leave during a [single] 12-month period to care for the servicemember.³⁰

Unlike other FMLA-provisions with an age cap of 18, a "son or daughter of a covered servicemember" is defined without regard to age.³¹ "[N]ext of kin" is defined as "the nearest [other] blood relative."³² A "covered servicemember" is one "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."³³ A "serious injury or illness" is one that is "incurred by the member in line of duty on active duty . . . that may render the member medically unfit to perform the duties of [his or her] office, grade, rank, or rating."³⁴

Both the military caregiver and qualifying exigency leave may be taken intermittently or on a reduced schedule.³⁵ An employee that is eligible to take more than one type of FMLA leave is limited to 26 weeks of FMLA time off for any reason in a 12-month period.³⁶

The military caregiver provision went into effect when President Bush signed the NDAA in January, 2008. The qualifying exigency provision – along with all of the new regulations implementing the NDAA – takes effect on January 16, 2009.

²⁶ The regulation clarifies that this does not include "routine, regular, or everyday" childcare, rather it relates to changes that need to be made as a result of the active duty or call to active duty, such as making "arrange[ments] for alternative childcare[;]. . . provid[ing] childcare on an urgent and immediate need basis[;]. . . enroll[ing] in or transfer[ing] to a new school or day care facility[;]. . .and attend[ing] meetings with [school or daycare] staff." 29 C.F.R. § 126(a)(3)(i)-(iv).

²⁷ Regulatory examples include making or updating a will, obtaining military ID cards or service-related benefits, executing powers of attorney, and enrolling in DEERS. 29 C.F.R. § 126(a)(4)(i)-(ii).

²⁸ 29 C.F.R. § 825.126(a)(8). They must "agree to both the timing and duration of such leave." *Id.*

²⁹ 29 U.S.C. § 2612(a)(1)(E); 29 C.F.R. § 825.126(b)(1) (child has no age limitation).

³⁰ 29 U.S.C. 2612(a)(3)-(4).

³¹ 29 C.F.R. § 827.127(b)(1). "[P]arents 'in law'" are explicitly excluded from coverage. § 827.127(b)(2).

³² 29 U.S.C. § 2611(18); 29 C.F.R. § 827.127(b)(3). Next of kin is determined using the following priority order: "blood relatives who have been granted legal custody[, siblings,] grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave." An employer may require certification of the familial relationship before granting leave under this provision. *Id.*

³³ 29 U.S.C. § 2611(16).

³⁴ 29 U.S.C. § 2611(19); 29 C.F.R. § 825.126(a).

³⁵ 29 C.F.R. § 825.202(b) & (d).

³⁶ 29 C.F.R. § 827.200(f).