MILITARY LEAVES OF ABSENCE

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GOVERNING LAW

There is a comprehensive federal statute governing the rights of employees who leave their employment to serve in the military. The statute is the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). USERRA supercedes any state or local law as well as any collective bargaining agreement, employment contract, or employment policy that limits any right or benefit that USERRA confers. State or local law, as well as any collective bargaining agreement, employment contract, or employment policy, may provide an employee with more rights or benefits than exist under USERRA.

The State of Michigan has broad statutory provisions prohibiting employers from discriminating against members of the military, hindering military members from performing their duties, or persuading someone not to enlist. Michigan law also requires an employer to reinstate an employee after a military leave has ended. Violations of these Michigan laws are criminal misdemeanors, but Michigan courts likely would allow an employee to pursue a civil lawsuit for monetary damages.

Each individual circumstance will require detailed legal analysis to determine if Michigan law or any applicable employment contract, employment policy or collective bargaining agreement provides a greater benefit to the employee in question than does USERRA. Because of the intricacies of the law in this area, employers should have a specific written employment policy governing military leave.

The following is a summary of USERRA's provisions.

COVERED EMPLOYERS

USERRA applies to all public and private employers and any successors in interest. Employers are excused from compliance if, and only if, their circumstances have changed so as to make compliance impossible or unreasonable, or reemployment would impose an undue hardship on the employer.

COVERED EMPLOYEES

USERRA covers all employees who serve in the uniformed services, whether voluntarily or involuntarily. USERRA also covers employees of American companies in foreign countries.

The uniformed services include the Armed Forces, the Army National Guard and the Air National Guard (when engaged in active duty for training, inactive duty, or full-time National Guard duty), the commissioned corps of the Public Health Service, and any other category of person the President designates in time of war or national emergency.

Covered service in the uniformed services is not limited to regular, active duty. USERRA also covers time spent in inactive duty training (as when reservists train one weekend per month and two weeks per year), being examined to determine fitness for duty, attending basic training and performing funeral honors duty.

DISCRIMINATION AND RETALIATION PROHIBITED

USERRA prohibits employers from discriminating against anyone who applies to serve, serves, or has served in the uniformed services, in hiring, rehiring, retraining, promoting, or providing any benefit of employment. At least one court has held that USERRA provides a cause of action for harassment based on prior service where such harassment is sufficiently severe and pervasive as to alter the terms and conditions of employment and create an abusive working environment.

An employer may not take any adverse employment action against an employee for taking any action to enforce USERRA rights, whether directly or on behalf of another employee. This anti-retaliation provision protects all employees irrespective of whether the employee serves, or has served, in the uniformed services.

The employer is not liable for discrimination or retaliation if it can prove that the action would have been taken even if the employee had not taken military leave.

RIGHT TO LEAVES OF ABSENCE

Employers are required to provide leaves of absence to a covered employee if the employee provides verbal or written notice of the leave, unless giving notice is impossible, unreasonable, or precluded by military necessity. Because USERRA does not specify how much notice the employee must give, courts will likely require "reasonable" notice. When an employee takes military leave authorized by USERRA, the employer must assume that the employee will return to work when discharged from service. Employees' rights while on leave, and upon returning from leave, are discussed below.

RIGHT TO REEMPLOYMENT

Rehiring Covered Employees Who Properly Report Back to Work:

An employer must "promptly" reemploy a covered employee if the employee properly reports back to work within a certain period of time. The length of an employee's military service determines both the manner and the time period for reporting back to work.

Employees Who Serve 30 Days or Less:
Employees whose military service is less than 31 days must notify their employer of their intention to return to work by the beginning of the first regular, full work day after completion of service (after adding eight hours for transportation back home). If this is impossible or unreasonable through no fault of the employee, the employee must simply report to work as soon as possible thereafter.

Employees Who Attend Examinations to Determine Fitness for Duty:
Employees in this category must notify their employer in the same manner and time as those who serve less than 31 days.

Employees Who Serve 31 to 180 Days:
Employees whose military service is from 31 to 180 days must submit an application for reemployment no later than 14 days after completion of service. If this is impossible or unreasonable through no fault of the employee, the employee must apply for reemployment on the first possible full calendar day.

Employees Who Serve 181 Days or More:
Employees whose military service is greater than 181 days must submit an application for reemployment no later than 90 days after completion of service.

Exception for Ill or Injured Employees:
Employees who are convalescing from an illness or injury that either happened while they were in military service, or was aggravated during their military service, must report back for work (either by notifying the employer or submitting an application for reemployment, depending on the length of absence, as explained above) as soon as they are recovered. This extension is limited to two years unless circumstances beyond the employee's control make it impossible or unreasonable to report back for work within that time.

Neither USERRA nor case law defines "recovered." At a minimum, however, if the employee is able to perform the essential functions of his/her job, with or without reasonable accommodation, courts will likely deem the employee to be "recovered."

Employers have the right under USERRA to require employees who serve more than 30 days to prove that they have reapplied within USERRA's time limits, their cumulative leave did not exceed USERRA's five year limit and their separation from service was honorable. If the documentation is not readily available, the employer must rehire the employee, but may terminate the employee if documentation later establishes that the employee did not meet one or more of the requirements for rehire under USERRA.

Employees who miss the applicable deadline for reporting back to work, including the extended deadline for those injured in service, forfeit their automatic reemployment rights under USERRA. In such a case, the employee is subject to the same policies as any other employee who is absent without excuse from scheduled work.

Positions for Returning Employees:

The position into which a returning employee must be hired depends on the length of the employee's military service, as well as the employee's qualifications. If two or more employees are reporting back to work after military service, and both are entitled to the same position, the employer must give the position to the employee who first left for military service. Of course, the employer must also find the best possible position for other employees returning from military service using the means specified below.

Employees Who Serve 90 Days or Less:
As a general rule, employees whose military service is less than 91 days must be placed in the position the employee would have attained if the employee's military service had not interrupted employment. If the employee is unqualified to perform that job (i.e., cannot perform the essential tasks), the employer must make reasonable efforts to help the employee become qualified. If the employer's reasonable efforts to qualify the employee fail, the employer may place the employee in the same job that employee held on the date military service began, at whatever pay he/she would have been earning if employment had been continuous.

Reasonable efforts are defined as those that do not place an undue hardship on the employer. What constitutes undue hardship is likely to be construed extremely narrowly. Courts will consider factors such as the difficulty and expense of qualifying an employee, the financial resources of the facility at which the employee works and the resources of the employer as a whole.

Employees Who Serve More Than 90 Days:
Employees whose military service is greater than 90 days must be placed in either the position that the employee would have attained if the employee's military service had not interrupted his/her employment, or a position of like seniority, status and pay, for which the person is qualified. If the employee is unqualified for the job he/she would have attained, or a job of like seniority, status and pay, the employer must make reasonable efforts to help the employee become qualified. If reasonable efforts fail, the employer may place the employee in the same job that employee held on the day military service began, at whatever pay the employee would have been earning if employment had been continuous, or in a position of like seniority, status and pay.

Employees Who Have Become Disabled:
If an employee has become disabled during military service, or a previous disability has been aggravated by military service, the employer must make reasonable efforts to accommodate the disability. If, after those efforts, the employee is still unqualified to perform the job he/she would have attained but for the military leave, the employee must be placed in a position equivalent, or as close as possible to equivalent, in seniority, status and pay, for which the

employee is qualified or can be made qualified through reasonable efforts by the employer. If none of the above is possible due to the employee's disability, then the employee must be placed a position of less status and pay for which he/she is qualified, but with full seniority.

Protection from Discharge:

Once reemployed, employees returning from military leave temporarily become "just cause" employees. The period of time for which this provision applies depends on the length of the employee's military service. At the end of the applicable period, employers may again designate these employees as "at will" employees in the absence of an employment contract to the contrary (e.g., a collective bargaining agreement).

Employees Who Serve 31 to 180 Days:
These employees may not be terminated, except for cause, for the first 180 days after their return to employment.

Employees Who Serve 181 Days or More:
These employees may not be terminated, except for cause, for the first full year after their return to employment.

Employers Are Not ALWAYS Obligated to Reemploy under USERRA:

USESSA does not require an employer to reemploy an employee returning from military service if:

- the employee's employment was for a "brief, nonrecurrent period" and there was no reasonable expectation of indefinite employment or employment for a significant period;
- the employee could have given notice before leaving but failed to do so;
- the employee's discharge from military service was in some way dishonorable;
- the employee's cumulative military absences from one employer's employment has exceeded five years, unless certain conditions are met;[1] the employee has failed to reapply for employment within USERRA's time limits;
- the employer can prove it would not have reemployed the person even if he/she had not been returning from a military leave;
- the employer's circumstances have changed so as to make reemployment impossible or unreasonable; or
- reemployment would impose an undue hardship on the employer.

[1] One example of an employee taking more than five years of military leave but still being entitled to USERRA rights and benefits occurs when the employee's initial period of military service exceeds five years. Because there are a myriad of other conditions that negate the five-year exception, analysis of the individual circumstance will be required.

ENFORCEMENT OF USERRA

Procedure:

Employees who believe their USERRA rights have been violated may, if they choose, file a lawsuit in the appropriate federal district court. No one has standing to bring suit, however, except the person who claims his/her USERRA rights have been violated.

Alternatively, employees may file a written complaint with the Secretary of Labor ("Secretary"), who must investigate the complaint. If the Secretary determines that the alleged violation occurred, the Secretary must "make reasonable efforts to ensure that [the employer] complies [with the requirements of USERRA]." If the Secretary cannot resolve the complaint, the Secretary must notify the employee of the results of the investigation and offer to refer the complaint to the Attorney General of the United States ("Attorney General"). If the Attorney General is reasonably satisfied that USERRA has been violated, the Attorney General may appear on behalf of the employee and act as his/her attorney. The Attorney General may then file a lawsuit against the employer, in any federal district court in which the employer maintains a place of business.

Remedies Available:

A court may provide injunctive relief, by ordering the employer to comply with USERRA. A court may also order the employer to pay money damages for any loss of wages or benefits because of the violation. If the court determines that the violation was willful, it may order the employer to pay, as liquidated damages, an additional amount equal to the money damages caused by the violation. In addition, a court may issue contempt orders in order to vindicate fully the rights or benefits of employees who have performed uniformed service. At least one court has held that there are no damages for mental anguish or suffering under USERRA. Future decisions from other courts may hold otherwise.

In addition, no fees or court costs may be charged against any employee bringing suit pursuant to USERRA. When an employee retains his own lawyer, the court may also award reasonable attorney's fees, expert witness fees and other litigation expenses.