USERRA prohibits employment discrimination on the basis of military service

By Ann Bowden-Hollis
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In this second in a series about the civilian employment rights of members of the military, re-employment rights under the Uniformed Services Employment and Re-employment Rights Act of 1994 will be addressed.

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Employees who satisfy the eligibility requirement under USERRA are entitled to re-employment as long as they are a member of the U.S. armed services and meet the following five conditions: (1) The employee must have civilian employment; (2) the employee must give his employer notice prior to military service; (3) the employee's cumulative length of service causing his absence from employment must be less than five years; (4) the employee must have been released from military service with at least a general discharge under Honorable Conditions; and (5) when the employee returns from active duty, he or she must report back to work within a certain period of time.

An employee must give notice to his or her employer before taking military leave. Notice to the employer may be either written or oral and does not need to follow any particular kind of format. Valid notice of military leave may also be provided to the employer by an appropriate officer of the particular branch of the armed forces in which the employee will be serving. In rare cases, USERRA recognizes that it may be impossible for an employee to give advance notice to the employer. In those cases, the advance notice requirement may be excused because of "military necessity" or circumstances that make notice to the employer "otherwise impossible or unreasonable." The decision about whether notice is excused by military necessity is made by the Secretary of Defense and is not subject to review by the courts.

However, an employee does not need to receive the employer's permission before leaving for military service in order to protect his or her re-employment rights. Prior consent would improperly grant the employer veto authority over an employee's ability to perform in the uniformed services. Additionally, an employee is not required to decide, at the time of his or her leave for military service, whether he or she plans to return to that civilian job.

Generally, under USERRA a threshold requirement for armed services personnel seeking USERRA protection includes an honorable discharge from the armed forces.

USERRA provides that eligible employees should be re-employed in the job that they would have attained had they not been absent for military service (the "escalator" principle), with the same seniority, status and pay, as well as other rights and benefits determined by seniority. 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. When an employee has been absent for 91 days

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or longer, he or she is entitled to re-employment in the escalator position, but the employer may also reinstate the member in any position of the like seniority status and pay for which he or she is qualified. The following factors have been considered to determine whether the positions were of comparable status: (1) opportunities for advancement; (2) general working conditions; (3) job location; (4) shift assignment; (5) rank; and (6) responsibility.

USERRA also requires that reasonable efforts (such as training or retraining) be made to enable returning members of the uniformed services to refresh or upgrade their skills to help them qualify for re-employment. If an employee cannot qualify for the "escalator position" or a comparable position, the employee is entitled to re-employment in a position that is the nearest approximation to the escalator position.

USERRA provides that, upon completing uniformed service, an employee is required to notify his pre-service employer of the employee's intent to return to his employment position by "either reporting to work or submitting a timely application for re-employment." However, this application need not be in writing. Additionally, an employee's lists of issues or conditions accompanying his or her application do not void his or her reinstatement request.

In the case of a person whose period of service in the uniformed services was less than 31 days, an employee must report to work on the next full work day. A person whose period of service was for more than 30 days but less than 181 days must submit an application for re-employment with the employer no later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible. Finally, a person whose period of service in the uniformed services was for more than 180 days must apply for re-employment no later than 90 days after the completion of the period of service.

An employee who fails to comply with USERRA's application requirements does not automatically forfeit his entitlement to USERRA's protection, "but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

Congress enacted USERRA to prohibit employment discrimination on the basis of military service as well as to provide prompt re-employment to those individuals who engage in non-career service in the military. The Act, however, does not define "prompt re-employment." However, one of the regulations provides that absent unusual circumstances, re-employment must occur within two weeks of the employee's application for employment. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position. However, under the regulations, "prompt re-employment" means "as soon as practicable under the circumstances of each case."

There are three exceptions to re-employment rights under USERRA (1) changed circumstances, (2) undue hardship, and (3) when the prior employment was temporary or for a brief, nonrecurring period.

USERRA provides that an employer is not required to reemploy a returning service member if the employer's "circumstances have so changed as to make such re-employment impossible or unreasonable." This exception is available when there has been a reduction in the employer's workforce, which would have reasonably included the returning service member. However, this exception does not apply where no opening exists at the time of the re-employment application or where the replacement employee must be terminated in order in order to reinstate the returning service member.

Where the employer can establish that training or retraining the returning service member to enable him or her to qualify for re-employment is an undue hardship on the company, the employer can claim a statutory defense. In order to prove an "undue hardship" under USERRA, the employer must identify the nature and cost of the necessary action and the overall financial resources of the affected facility and the employer. Only after an employer has made a reasonable effort at no cost to the individual seeking employment, can it determine that an undue hardship prevents the training or retraining.

One defense to re-employment arises when the position from which the person leaves for military leave is for a "brief, nonrecurr[ing] period and there is no reasonable

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expectation that such employment will continue indefinitely or for a significant period." The statute does not define "significant period." However, a person holding a seasonal job may have re-employment rights if there was a reasonable expectation that the job would be available next season.

While an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the non-seniority rights accorded other individuals on non-military leaves of absence. Succinctly, with respect to non-seniority benefits, USERRA does not provide a returning service member preferential treatment in comparison to his or her civilian counterpart who takes a comparable form of non-military leave.

USERRA protects returning service members from discharge without cause for a period of time after re-employment. If the returning service member's military service lasted between 31 and 180 days, the service member may not be terminated without cause for 180 days after the date of re-employment. In order to qualify for this protection, the "period of service before the re-employment [must be] more than 30 days ...."

If the service member's period of military service was more than 180 days, this protection applies for one year after re-employment. Returning service members with fewer than 31 days of military service do not have protection against discharge without cause, but like other returning service members, they are protected from discrimination based on military service or a continuing service obligation.

Several courts have adopted a "reasonable" standard for what constitutes "cause" for purposes of USERRA, i.e., was the employer's termination decision reasonable under the circumstances.

USERRA requires employers to treat the period of military leave as service with the employer for purposes of vesting and the accrual of pension benefits. Additionally, military leave may not be treated as a break in service under the pension plan. On re-employment of the returning service member, the employer must make any employer contributions to the pension plan that would have been required on behalf of the returning employee had he continued working for the employer during the period of service. Similarly, the returning service member must be allowed to make up any employee contributions or elective deferrals he or she would have been eligible to make during his or her period of service. A rehired veteran has up to three times the period of service — not to exceed five years — to make up missed employee contributions. The amount of makeup contributions is subject to the limits that would have applied during the military service period.

As is the case with any set of statutes and regulations, courts interpret the various provisions, often coming to different conclusions. In a subsequent column, some of the cases addressing the various provisions of USERRA and its regulations will be discussed. USERRA is Also the case with USERRA is its complexity. Given the complexity of USERRA and its accompanying regulations, which are administered by the U.S. Department of Labor, no column of general interest can or is intended to substitute for appropriate legal advice, especially about particular situations. For more information, go to www.dol.gov/vets/.

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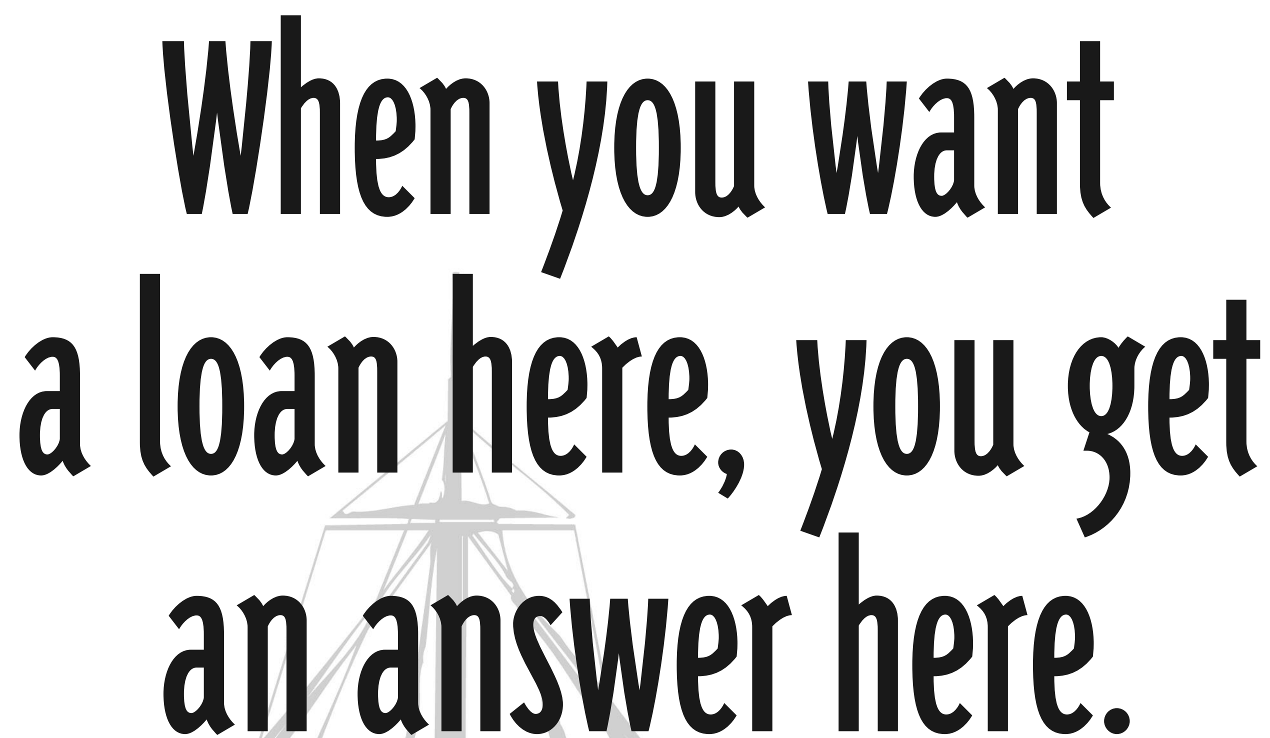

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