

Final USERRA Regulations Issued by DOL

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The United States Department of Labor (DOL) published the Final Regulations¹ for The Uniformed Services Employment and Reemployment Rights Act of 1994² (USERRA) on December 18, 2005. The regulations took effect on January 18, 2006. The final regulations do not mandate any new legal obligations but they clarify and explain, in some cases for the first time, the legal obligations imposed by USERRA.

The final regulations provide text for a new poster that meets the USERRA posting requirements. They also clarify provisions concerning: who is covered, who is an employee and who is an employer, joint employment, protected benefits, notice requirements, waiver of rights, reemployment rights, and the escalator principle. This article summarizes the most important areas of the final regulations that will be of concern to employers and their counsel.

Who Is Covered?

In addition to employees who provide service in the traditional uniformed service branches (Army, Air Force, Coast Guard, Marine Corps, Navy, the reserve component of each branch, the National Guard, and the Public Health Service Commissioned Corps), the final regulations explain that members of the National Disaster Medical System (NDMS), an agency within the Federal Emergency Management Agency (FEMA), are also treated as members of the uniformed services for USERRA purposes when they are called to service in response to public health emergencies or to participate in authorized training.³

Normally, membership in the Reserve Officers Training Corps (ROTC) is not considered uniformed service. However, the final regulations note that “some Reserve and National Guard enlisted members use a college ROTC program” to qualify for commissioned officer status. Under these programs, individuals may be receiving active or inactive duty credit during ROTC training sessions and, in these cases, they would be qualified for USERRA reemployment and anti-discrimination protections. Even when not participating in training sessions that qualify for reemployment protection, all ROTC members qualify for USERRA’s anti-discrimination protection.⁴

Employers and their counsel should be aware of these distinctions to ensure that they know which employees qualify for USERRA protections and the circumstances of service under which those protections can be invoked by an employee.

Who Is An “Employee” Under USERRA?

USERRA defines “employee” broadly so that it can provide protection to a maximum number of returning service members. The final regulations emphasize that USERRA provides coverage to temporary, part-time, probationary, and seasonal employees, as well as full time employees. And, unlike the Fair Labor Standards Act (FLSA), there is no exclusion for executive, managerial, or professional employees. The final regulations explain that independent contractors are not covered by USERRA and

¹ 20 CFR Part 1002.

² 38 USC §§ 4301-4334.

³ 20 CFR §§ 1002.5 – What definitions apply to USERRA?

20 CFR § 1002.6 – What types of service in the uniformed services are covered by USERRA?

⁴ 20 CFR § 1002.61 – Does USERRA cover a member of the Reserve Officers Training Corps?

provide the key factors that will be considered to determine independent contractor status.⁵ It is important for employers to know that the examination of the key factors governing the relationship will control the determination of independent contractor status. A statement contained in a contract or other document in which a person is identified as an independent contractor rather than an employee will not control the determination.

The regulations also clarify the distinction between “brief, non-recurrent, with no reasonable expectation of continued employment” and “temporary or seasonal”. This distinction is important to employers since employees with no reasonable expectation of continued employment are not covered by USERRA’s reemployment provisions even though they are covered by USERRA’s discrimination and anti-retaliation provisions. Attorneys representing employers must know these distinctions since the burden is on the employer asserting this defense against a claim for reemployment.

Who Is An “Employer” Under USERRA?

The final regulations provide definitions concerning important terms and phrases that might be at issue in USERRA litigation. Employers and their counsel should be aware that the term “employer” is different from, and more broadly defined, than in the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and Title VII of the Civil Rights Act (Title VII). The final regulations state that “any person, institution, organization, or other entity that pays salary or wages for work performed, or that has *control over employment opportunities*” is considered an employer, even though they are not directly responsible for paying wages to employees.⁶ DOL responses to comments concerning the final regulations noted two court decisions where individual supervisors have been held personally liable under USERRA. The regulations do clarify that an entity or person who performs “purely ministerial” functions such as maintenance of personnel files will not be considered an employer so long as they do not have any direct influence over employment related decisions.⁷

Thus, the final regulations make it clear that the actions of individual supervisors and managers can violate an employee’s USERRA rights and may subject individual supervisors and managers to personal liability in addition to any liability the employer may have. Company owners who are also managers should be aware that, in USERRA actions, the corporate liability shield may not shield them since, as an owner/manager, they clearly have control over employment and could be held personally liable for a USERRA violation. Employers should consider providing USERRA training for all supervisors and managers who have “control over employment” and may want to reexamine their liability insurance coverage and company policies regarding indemnification of employees, officers, or directors who have control over employment.

Joint Employers

Consistent with the final regulations’ broad definition of employer, an employee in one job may have two employers. The final regulations use the example of a security guard employed by a security company who is then assigned to the worksite of a customer of the security company. In this and similar scenarios, the actual employer, the security company, or the customer of the security company could violate the security guard’s USERRA rights if either entity caused the guard’s removal from his or her position because of uniformed service obligations.⁸

⁵ 20 CFR § 1002.44 – Does USERRA cover an independent contractor?

⁶ 20 CFR § 1002.5(d) – Definition of employer.

⁷ *Id.*

⁸ 20 CFR § 1002.37 – Can one employee be employed in one job by more than one employer?

The final regulations also define the situation under which a union hiring hall can be considered an employer under USERRA. If the hiring and job assignment functions have been delegated to the hiring hall by an employer, then the hiring hall is considered the employee's employer under USERRA and the hiring hall will have reemployment responsibilities along with the employer using the hiring hall's services. The final regulations specify that USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.⁹

Companies and sole proprietorship businesses must be aware of their USERRA obligations even if they have no "employees" and only use labor supplied by temporary labor firms because they will also be considered employers under USERRA.

What Benefits Are Protected?

Employers must offer the employee the opportunity to continue coverage under the employer's health insurance plan and, if the employee's uniformed service is for 31 days or more, the employer can require the employee to pay the full premium plus a 2% administrative fee. The final regulations clarify that if the employee's uniformed service is less than 31 days, the employer cannot require the employee to pay more than the employee's regular cost for coverage. The final regulations further clarify that USERRA does not compel an employer to establish a health plan or allow the employee to initiate coverage under a health plan if the employee was not already covered by the employer's plan.

The final regulations also explain circumstances under which an employer may not be required to continue, or may cancel, health plan coverage for the employee. The key issues involve employees who do not provide notice of service and/or do not elect continuation of coverage. Employers should become familiar with this area of the final regulations since they contain a number of interrelated issues that may affect what an employer can or must do regarding health insurance benefits.¹⁰

Notification Of Service

The final regulations also clarify the notification that the employee is required to give the employer prior to a service-related absence. While there is no minimum required amount of notice that must be given, the Department of Defense expects that service members will exercise care, when they are able, to provide employers sufficient notice of absence. Notification may be verbal or in writing and the service member does not have to request permission from the employer in order to be absent for service. If the serviceperson is employed through a multiple-employer referral service such as a hiring hall, then he or she must notify each employer of the impending service-related absence.

Because some service related deployments can be initiated with little or no notice to the employee, there may be little or no notice to the employer. Employers should be prepared for the sudden absence of an employee who may have uniformed service obligations requiring immediate deployment.

Waiver Of Rights.

No employee may waive his or her USERRA rights prior to or during service, even if the employee notifies the employer that he or she does not wish to return to work after service or enters into an agreement that contains a waiver provision. The final regulations do, however, provide that an employee may waive non-seniority rights and benefits if the employee provides the employer written notice of intent not to return to employment following his or her uniformed service. Even if written notice

⁹ 20 CFR § 1002.38 – Can a hiring hall be an employer?

¹⁰ 20 CFR § 1002.149-267.

of intent not to return is provided to the employer, the employee does not waive any other USERRA rights, including reemployment rights.¹¹

Nevertheless, even when there is written notice, the determination of whether the waiver is effective will be based on federal common law. The common law test is fact intensive and seeks to determine whether the employee's waiver is "explicit, knowing, voluntary, and uncoerced."¹² So, employers and their counsel should know that there is no way for an employee to waive most of the substantive USERRA rights and, even in the one area where waiver is allowed, non-seniority based rights and benefits, a court could determine that the waiver is ineffective.

Reemployment Rights Following Uniformed Service

The preliminary regulations stated that a service member who was honorably discharged had an unconditional right to reemployment even if he or she worked for another employer after completing military service. The final regulations, however, acknowledged that if a service member went to work for an alternate employer who was a competitor or the returning employee had a conflict of interest as a result of the alternate employment, the service member's alternate employment might violate the pre-service employer's legitimate employment policies. Such legitimate policies could include prohibiting concurrent work for a competitor or conduct that might be just cause for discipline. So, under the final regulations an employer may be able to discipline or terminate an employee if his or her alternate employment constituted cause for discipline or termination under the employer's policies.

USERRA also grants members of the uniformed services a reasonable amount of time to recover, recuperate, and readjust to life after the service period terminates. The amount of time granted is dependent upon length of service, and may include a recuperation period of up to two years for uniformed service related injuries. After recuperation, the service member may invoke his or her USERRA rights and seek reemployment with their pre-service employer.

Employers may not have to reemploy the former employee if the employer can establish that: 1) assisting the employee to become qualified for reemployment would impose an undue hardship;¹³ or 2) the employment position vacated was for a brief, nonrecurrent period with no reasonable expectation of continued employment. However, the final regulations are clear that the employer cannot refuse to reemploy the returning service member even if the employer must terminate a replacement employee. The final regulations also clearly state that the employer bears the burden of proof to establish these defenses against the returning service member's reemployment rights. Employers should have their counsel review existing employment policies to ensure compliance with USERRA.

The Escalator Provisions¹⁴

Probably the most difficult obligations for employers under USERRA are the "escalator provisions." In addition to the right to be reemployed, USERRA provides that, in most situations, the reemployment position must reflect the status and other benefits that the employee would have achieved had the employment not been interrupted by service. This means the employer will have to track things like seniority and automatic promotions, pay increases, or benefit increases based on length of employment for all former employees who leave employment for uniformed service.

¹¹ 20 CFR § 1002.152.

¹² 70 Fed. Reg. 75246, 75264 (Dec. 19, 2005).

¹³ 20 CFR § 1002.5(n) – Definition of undue hardship.

¹⁴ 20 CFR §§ 1002.191-213.

Employers must ensure that their personnel systems properly track the status and benefits of employees who have left employment for uniformed service so that, upon reemployment, the returning employee is placed in the same position he or she would have had if there had been no service-related interruption to employment. The final regulations clarify and explain the circumstances under which escalator provisions may or may not apply.

Discharge of a USERRA-Eligible Employee

Generally speaking, USERRA protects returning employees from discharge from civilian employment except for just cause. The prohibition is based on the amount of time the employee served in the uniformed services. If the employee served more than 30 days, he or she is protected from discharge for up to one year, unless based on cause. Those serving for less than thirty days are not afforded this protection, so long as the discharge is non-discriminatory.

Discharging a USERRA-eligible employee must be conduct-based or for other nondiscriminatory reasons. Such reasons might include the elimination of the employee's position, downsizing, and layoff, as long as they are not motivated by the employee's protected status as a member of the uniformed services. Conduct-based discharge must include some kind of notification advising the employee that his or her conduct is a justification for discharge. The final regulations clarify that such notice may be either express or implied.

Summary

The final USERRA regulations do not require employers to modify their employment policies. DOL has stated that it has confidence that the majority of the employers are already in compliance with the major provisions of the act. However, employers may want to review their employment policies and should be knowledgeable regarding their obligations to employees returning from uniformed service to avoid an unintentional USERRA violation that might result in costly litigation.

This article can only provide a brief overview of the final USERRA regulations. Employers and their counsel are encouraged to review the final regulations, which are available online at: <http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>. Attorneys representing employers should read the *Section-by-Section Summary of the Final Rule and Discussion of Comments*¹⁵ that precedes the final rule in the *Federal Register* for additional background information and relevant case law relied upon by the Department of Labor.

¹⁵ 70 Fed. Reg. 75246, 75247 (Dec. 19, 2005).