

Returning Veterans: Employers' Obligations under USERRA and PAMLAA
Who is entitled to benefits and what benefits are they entitled to?

Part one of a three part series.

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In the past ten years the United States has engaged in two wars and a number of other actions at home and abroad which have resulted in the activation of a large number of individuals serving in the reserve components of the United States Armed Forces. Most employers have already been affected by the training and deployment demands of their reservist employees and many more will be impacted in the years to come. Thus, a comprehensive understanding of the requirements, prohibitions and mechanics of the applicable military leave laws is important to all human resource professionals who will undoubtedly encounter employees called to and returning from service. This series of three articles is intended to present to you the core tenets of the state and federal laws governing such leave.

The federal Uniformed Services Employment and Reemployment Rights Act (“USERRA”) was signed into law on October 13, 1994. The express intentions of the law are to encourage non-career uniformed service by minimizing the disadvantages to civilian employment that may result from service, to provide for prompt reemployment following service and to prohibit discrimination against persons because of their service. The protections established by USERRA set the minimum requirements for employers of military personnel. Under the Act, where the military leave standards under the federal law are more favorable to the employee than the corresponding state law, the federal law is to be followed. But, when the state law standards for military leave are more favorable to the employee, the state law is to be followed. In Pennsylvania, the Pennsylvania Military Leave of Absence Act (“PAMLAA”) supplements the provisions of USERRA and on the whole is more favorable to public sector employees, in particular, than the federal statute. Generally, these statutes provide for three categories of protections to individuals serving in the armed forces: 1) protection from service related discrimination, 2) entitlement to the continuation of certain non-seniority rights during military service and 3) the right to reemployment following a leave of absence due to military service.

Both statutes broadly define ‘employer’ and ‘employee.’ Specifically, public sector employers, including the Commonwealth of Pennsylvania and all of its political subdivisions, fall within the definition of ‘employer’ under both USERRA and PAMLAA. Accordingly, counties are covered by both laws. The definitions of ‘employee’ are equally broad, covering not only regular full time employees but also certain temporary, part-time, probationary and seasonal employees. Yet, there are distinctions made among employee classes with regard to the three categories of protections. An employer is not required to reemploy the employee who takes military leave if the employment he or she left to serve in the uniformed services was for a brief, non-recurrent period and there was no reasonable expectation that the employee would have continued indefinitely or for a significant period. This would normally apply to a

temporary or seasonal employee. In such a circumstance, if the employer's decision is to not extend reemployment benefits to such an employee and that determination is subsequently challenged, the burden will be on the employer to prove this affirmative defense. However, USERRA's prohibition against service related discrimination applies to any position of employment, including brief, non-recurrent positions that are not expected to continue for a significant length of time. Accordingly, while successfully demonstrating that an employee is temporary or seasonal may relieve the employer of their obligation to reemploy them following their service, such classification does not relieve the employer from their obligation to refrain from discriminating against those employees on the basis of their military service.

The service performed by the employee must be a qualifying service to be eligible for the afforded protections. The federal regulations provide that service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service including active duty, active and inactive duty for training, National Guard duty under federal statute, fitness for duty examination, funeral honors duty, intermittent disaster response activation and training for intermittent disaster response. Generally, any service under federal orders will fall under USERRA and service under either federal or state orders will fall under PAMLAA.

The first category of benefits afforded to service members is that they are protected from discrimination that is motivated by their service. This protection applies to individuals who have previously served, who are currently serving and those who have applied to serve. Under USERRA, employers are prohibited from taking an adverse employment action against such individuals including denying initial employment, reemployment, retention, promotion or any other benefit on the basis of the individual's service. PAMLAA provides a parallel prohibition of employment discrimination based on membership in the reserve components of the United States Armed Forces or because the individual is called to active duty by the Governor during an emergency or by the Federal government. With regard to the prohibition against discrimination against applicants for employment, it is important to note that such individuals may be veterans and therefore entitled to Veteran's Preference under Pennsylvania law. In this regard, state law does not just prohibit discrimination but provides for an affirmative preference.

In addition, employers are prohibited under USERRA from retaliating against employees by taking an adverse employment action against them because they engaged in conduct protected by USERRA. Such protected activities include: acting to enforce a protection afforded to any person under USERRA, testifying or making a statement in connection with a proceeding under USERRA, assisting or participating in a USERRA investigation, or exercising any right provided by USERRA. It is important to note that these retaliation provisions apply to any employee, regardless of whether or not they have served in the armed forces.

The second category of benefits enjoyed by qualifying service members are those rights and benefits that they enjoy during their military service. To be eligible for the continuation of certain benefits (and to later be reemployed) USERRA requires 'reasonable' written or oral notice unless "military-necessity" precludes such notice. The lack of a specific time requirement indicates that what is reasonable must be determined on a case-by-case basis. Practically speaking the reservists are usually provided instruction by the military to inform their employer as soon as they learn of possible deployments, and to keep employers updated as the specific

plans unfold. It must be noted however, that PAMLAA has no notice requirement. Accordingly, under the USERRA standard that the rule most favorable to the service person is to be applied, the Pennsylvania rule applies. Therefore, Pennsylvania employers may not deny military leave benefits on grounds of inadequate notice.

Under USERRA, an employee who is absent from their employment as a result of their service is deemed to be on furlough or leave of absence and should be afforded benefits commensurate with a similarly situated employee on similar leave. However, these two classifications may have vastly different implications. An employee on furlough from your county may be provided significantly different benefits than an employee on an unpaid leave. You must determine which form of leave is most analogous to the leave contemplated by the military leave laws. Most often, the character and circumstances surrounding an employee being granted a general unpaid leave are more similar to an unpaid military leave than the character and circumstances that result in an employee being furloughed. Whatever your determination, be sure to be consistent for all affected employees. Generally, employees on military leave are entitled to all rights and benefits not determined by seniority that would be provided by the employer to employees of similar seniority, status and pay who are on a similar leave of absence pursuant to an applicable contract or policy. This includes benefits in effect when the employee commences service and any benefits that are established while the employee is performing the service. The employee is not be entitled to any benefits during leave that they would not have been entitled to had they remained continuously employed.

However, there are requirements of the federal law which may supersede the level of benefits normally provided by the employer. For example, during qualifying periods of service, USERRA directs that the employees on leave are permitted to use any vacation, annual or similar leave with pay, which was accrued prior to their departure to serve regardless of what the employer's policy is regarding the use of such leave while on unpaid leave. In contrast, the law directs that employees are not entitled to use accrued sick leave while on service related leave unless the employer permits the use of sick leave for any reason or if the employer would otherwise permit similarly situated employees on furlough or leave to use paid accrued sick leave. In support of this distinction the law confirms that sick leave is usually not comparable to vacation; it is intended to provide income during a period of illness when the employee is unable to work. Simply, the law does not provide for the use of sick leave benefits for purposes other than what they were intended for. It is also important to note that while the employee has the discretion to use accrued paid vacation while on service related leave, USERRA prohibits the employer from compelling the employee to do so.

USERRA does not require that service members on military leave be paid wages. In contrast, Pennsylvania law does provide for paid military leave in certain circumstances. Under state law, county employees who are members of the Pennsylvania National Guard or are members of any reserve component of the armed forces, who are engaged in training or other military duty under orders authorized by federal or state law, are entitled to up to fifteen (15) days paid leave per year. While the statute is silent regarding whether the contemplated 'year' is a rolling year or a calendar year, in application it is viewed to mean within a calendar year. The state statute further provides that such employees who are members of the Pennsylvania National Guard shall be entitled to unlimited paid leave when they are called up pursuant to "state active duty" such as a call-up at the direction of the Governor in response to natural disasters and other

civil emergencies. (Activation under federal orders does not qualify as state active duty. In such circumstances the paid leave benefit would be capped at fifteen (15) days.) This means if a county employee who is serving in the Pennsylvania National Guard is activated by an order from the Governor which does not reference federal law, they are entitled to full pay and benefits during the entire period of state active duty whether that period is six (6) weeks, six (6) months or longer. It is important to note that the class of employees that qualify for the 15-day leave is broader than the class of employees that qualify for the unlimited paid leave upon state activation. The former applies to anyone serving in a reserve component of the armed forces, while the latter applies only to members of the Pennsylvania National Guard. Under both categories of leave, 'paid leave' does not mean the difference between their county wages and what they are paid by the military during the period of training or active duty. The requirement under the statute is that the service member be granted this leave without loss of pay or benefits. Accordingly, they are to be paid their full salaries and are entitled to all of the benefits they would otherwise be entitled to during the period of time that they qualify for paid leave under the state law.

Relative to healthcare, for the majority of county employee PAMLAA will provide greater benefits than USERRA. USERRA provides for an optional continuation of health insurance coverage that is not dissimilar from COBRA benefits. Specifically, the employee may request that health insurance coverage be continued for themselves and their dependents for up to twenty-four (24) months. During the first thirty (30) days of coverage the employer may not charge the employee more than what their normal monthly contribution would be. After thirty (30) days the employer may charge the employee up to 102% of the total premium cost. The coverage may be discontinued at any time at the request of the employee. Further, if the employer provides a benefit greater than this to other similarly situated employees on similar leave, employees on service related leave shall be entitled to that enhanced benefit.

PAMLAA provides an improved healthcare benefit to employees on service related leave for active duty other than "active duty for training." The state law provides that when called up on active duty employees shall be provided coverage by the employer during the first thirty (30) days at no cost. The clear language of this provision would not even require the employee to continue to make a pre-existing employee contribution toward healthcare during the first 30 days of leave. After that, the employee enjoys the same right to continue coverage at his/her own expense but the employee's cost for continued coverage may not exceed 100% of the employers' actual cost, rather than 102%, and the period in which the employee may continue coverage is not capped at twenty-four (24) months. These enhanced healthcare benefits apply whenever the service member is called or ordered onto active duty, other than active duty for training. During any period of training, the federal benefit standards shall apply. Again, because of USERRA's better-coverage mandate, the PAMLAA healthcare benefit is the minimum that counties must provide to eligible employees.

A valid waiver or negative conduct by the employee may extinguish their rights under USERRA and PAMLAA, in limited circumstances. The employer's obligation to provide continuing benefits may be terminated by an informed waiver that includes a notice in writing which clearly evidences intent not to return to the position of employment after military service and an awareness of the specific rights and benefits that are lost. While such a notice may relieve the employer of the obligation to provide the during-leave benefits outlined above, it does

not alleviate the employer of its obligations for reemployment of the employee following service nor the non-discrimination provisions of USERRA. Accordingly, even if the employee executes a legally sufficient, informed waiver of their right to continuing benefits, quits, resigns or otherwise communicates their intention to not return, they nonetheless retain their right to be reemployed and the protections afforded to them from service based discrimination.

The employer's obligation to continue benefits and reemploy the service member under USERRA and PAMLAA are extinguished by a dishonorable or bad conduct discharge, a sentence of general court-martial or for being dropped from the rolls due to desertion. Therefore, where an employee who is serving receives a bad conduct discharge, the employer is relieved of their obligations to provide continuing benefits and their obligation to reemploy the service member.

Unilateral action by the employer to reclassify the employees' status during a service related leave, such as terminating the employee, will not extinguish the employees' rights under USERRA. Just because an employer takes steps to terminate the employee or eliminate the position does not relieve the employer of their obligations to continue providing benefits during a period of service, to reemploy the service member or to refrain from discrimination based on military service. While an employee is not entitled to be reemployed into a position that would not have existed in the absence of the military leave, an employer cannot extinguish this right to reemployment by selective termination or furlough of individuals on protected leave. (This topic will be covered further in part two of this series.)

Generally, absent a valid waiver or a court-martial or negative discharge status, a qualified employee who is on a service related leave is entitled to the continuing non-seniority benefits and right to reemployment for up to five (5) years of military service. However, USERRA provides a long list of exceptions to the general five (5) year cap which includes: service which requires a period of service beyond five (5) years to complete the initial service obligation, the service member is unable to obtain orders releasing them from service through no fault of their own, the service member has been ordered to remain on active duty as a result of war or national emergency declared by the President or Congress. While there technically is a cap, because of the long list of broad exceptions, very few actually hit it. As a result, efforts to account for the time so as to limit the county's obligations are most often futile. Further, any action by an employer, especially a public employer, to cut off the benefits of a service member on a technical violation (especially one that is unlikely to stand-up) is the sort of story that would likely draw negative press and public attention. One of the worst things an employer can do in the eyes of the public is to mess up the benefits owed to our service men and women. That is why it is critically important to understand and correctly apply the laws governing the benefits to which they are entitled.

The third category of benefits afforded to county employees serving in the reserve components of the United States Armed Forces is the right to reemployment upon returning from military service. In part two of this three part series of articles, I will examine the requirements, prohibitions and mechanics of service employee reemployment rights under USERRA and PAMLAA.