



Reintegrating Your Workplace Warriors

Insights

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Over the past decade, we have seen the largest military deployment since World War II. Our troops are now withdrawn from Iraq, and thousands more are scheduled to return from Afghanistan over the course of 2013. By the end of 2014, nearly 1.5 million veterans will have returned from combat operations in those two countries alone. Many will apply for reemployment with physical or mental impairments that potentially trigger a host of statutory obligations, ranging from the Uniformed Services Employment and Reemployment Rights Act (USERRA) to the Americans with Disabilities Amendments Act (ADAAA).

As our vets come marching home, it is important to reexamine the legal and practical ramifications for reintegrating them into your workplace. Effective reintegration calls for a top-down commitment from management, with an emphasis on proper training and education for supervisors and managers alike.

Any such program must begin with a review of the legal obligations imposed by laws such as USERRA, which establishes rigid timetables for reemploying our returning reservists, veterans and other uniformed service members, along with the accommodation requirements imposed by the ADAAA. To the extent that you employ the spouse or close family relative of a returning veteran (as opposed to the veteran him or herself), the Family and Medical Leave Act (FMLA) may also be implicated.

USERRA

USERRA is the primary federal statute governing the reemployment rights of returning veterans. To qualify for this protection, returning employees need only submit a timely reemployment application (typically within 14 or 90 days, depending on length of service) and otherwise establish that they were discharged from duty under honorable conditions.

Upon receipt of the application, an employer must promptly (typically within two weeks) reinstate uniformed service members to the position they would have occupied had they never taken military leave (their “escalator” position) in the first place. Before you decide whether or not the returning veterans are qualified to return to their escalator position, you must provide refresher and any other training that would have been furnished but for their leave of absence.

Exemptions from this reemployment obligation are few and far between, confined largely to cases involving temporary employees hired for non-recurring periods with no expectation of continued employment, or where the circumstances have so significantly changed (an intervening reduction in force, for example) that reemployment would be impossible or unreasonable under the circumstances.

Following reemployment, the returning veteran can only be terminated “for cause” for 180 days (if the deployment was for more than 30 but less than 180 days), or for one year following reemployment (if the length of deployment exceeded 180 days). USERRA also prohibits employers from discriminating against employees on the basis of military service, or from retaliating against those who pursue enforcement assistance.

FMLA

The FMLA was recently amended to provide both “military caregiver” and “qualifying exigency” leave to close family members (i.e., the spouse, child, parent or “next of kin”) of covered servicemembers. Military caregiver leave allows eligible employees to take up to 26 workweeks of unpaid leave during a 12-month period to care for close family members who have sustained serious injuries or illnesses in the line of active duty. FMLA also allows eligible employees to take upwards of 12 workweeks of qualifying exigency leave each year to tend to certain “exigencies” (attending military ceremonies, arranging for alternative childcare arrangements, etc.) brought about by their close family member’s federal active duty commitment.

Put simply, FMLA applies only to those circumstances in which your employee is impacted by virtue of *their relationship* to a uniformed servicemember. Where the employee actually is a uniformed servicemember, USERRA will dictate your legal rights and obligations.

ADAAA

As has often been said with regard to FMLA, USERRA “sets a floor, not a ceiling” on your legal obligations to returning veterans. Consequently, you may be operating under additional obligations imposed by laws such as the ADAAA (and any state law counterparts). The ADAAA prohibits employers from discriminating against qualified employees who are known, regarded as or have a history of being disabled.

Consequently, full compliance with USERRA will not eliminate the need for additional obligations in the form of reasonable accommodation to any known, service-connected physical or mental impairments that substantially limit the ability to perform one or more major life activities.

Absent undue hardship, employers must provide reasonable accommodation to disabled veterans so as to enable them to perform the essential functions of their pre-duty positions, and to allow them to enjoy equivalent benefits and privileges of employment (including access to sponsored training programs, break areas, social events, etc.).

With its recent amendments expanding the scope of the term, “disability,” the ADAAA has cast a wide net around this concept, cloaking millions of Americans in statutory protection. Consequently, it is more important than ever before to properly engage in the interactive process with regard to service-connected injuries such as mobility, cognitive, sensory, and psychiatric impairments.

Unique Challenges Presented By Mental Impairments

Over the decade that followed 9-11, approximately 25% of all veterans serving in the middle east conflict have returned from active duty with physical disabilities. As of this past August, approximately 32,000 wounded veterans sustained injuries in Iraq, and another 17,000 in Afghanistan. Due in part to the nature of the conflict, nearly 20% of them are returning with diagnoses consistent with Post-Traumatic Stress Disorder (PTSD) or depression, and close to an equal number with traumatic brain injuries.

It is fair to assume that a substantial number of additional veterans are returning with symptoms that have yet to be formally diagnosed, perhaps due in part to a reluctance to acknowledge or disclose the disorder. While most will return fit to immediately perform the essential functions of their “escalator” positions, others may require a period of adjustment that calls for their gradual reintegration over time. Still others will require additional training on new products, services or technological capabilities.

Public Resources Are Available

A number of public resources are available to facilitate the readjustment process, including the ESGR, a federal ombudsman service devoted to Employer Support for the Guard and Reserve, the Disability Management Employer Coalition, the Veterans Administration, and a host of private third-party programs. In recent weeks, organizations such as the Society for Human Resource Management have partnered with the U.S. Army to provide additional resources in the form of educational videos designed to facilitate the reemployment process.

The ADAAA calls for a case-by-case interactive process when it comes to accommodating returning veterans and other disabled employees. But, as these resources make clear, accommodations for those afflicted with impairments such as PTSD can often be implemented for a relatively nominal expense. In other cases, enhanced supervisory training may be indicated to help ensure that the return-to-work transition is a smooth one, and that employee performance is properly monitored thereafter.

Conclusion

Every veteran who reports for reemployment potentially triggers a broad spectrum of practical and legal considerations, and every situation must be evaluated on a case-by-case basis. In many cases, challenging hurdles await those who encounter these considerations. But with a sufficient amount of investment in practical planning, supervisory training and legal analysis, there are rewards for employer and employee alike.

Indeed, a successful reintegration can lead to new-found opportunities for all parties, as the returning veteran applies his or her recently acquired skill set to the evolving technological environment of today's workplace.

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