Military Leave Issues For California Employers

Insights
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Introduction

Kosovo – 1999. Afghanistan – 2001. Iraq – 2003. What military deployments lie ahead, and how long will they last? Today's employers must be aware of their obligations to those employees called to serve in the military. California employers are usually familiar with the basic employee leave protections such as those arising under the federal Family Medical Leave Act ("FMLA"), the California Family Rights Act, and the California Workers' Compensation Act. These common entitlements have anti-retaliatory provisions that may provide a basis for a wrongful termination action. Not surprisingly, there is a strong public policy under California and federal laws protecting the rights of members of the armed services to certain leave and benefit continuation, and as often is the case, California provides even greater protections in some instances than does federal law.

Employee rights and corresponding employer obligations associated with military leave arise under the Uniformed Services Employment and Re-Employment Rights Act ("USERRA"), 38 U.S.C. §§ 4301 et seq., and certain provisions of the California Military and Veterans Code, and the California Government Code. This article provides a brief overview of these rights and obligations. Specific questions should be directed to legal counsel.

California's Anti-Discrimination Provisions

California law broadly prohibits discrimination against members of the armed forces, which includes "any officer, warrant officer, or enlisted member of the military or naval forces of the state or of the United States." Cal. Mil. & Vet. Code §394.

First, this prohibition extends to adverse employment actions, such as failure to promote, demotions, or terminations based upon military membership:

No person shall discriminate against any officer, warrant officer, or enlisted member of the military or naval forces of the state or of the United States because of that membership. No member of the military forces shall be prejudiced or injured by any person, employer, or officer or agent of any corporation, company, or firm with respect to that members employment, position or status or be denied or disqualified for employment by virtue of membership or service in the military forces of this state or of the United States.

Cal. Mil. & Vet. Code §394 (e) (emphasis added).

Beyond this general prohibition, service members are specifically protected, as follows:

Discharge. An employer cannot "discharge any person from employment because of the performance of any ordered military duty or training or by reason of being an officer, warrant officer, or enlisted member of the military or naval forces of this state."

Hinder Performance of Military Duties. An employer cannot "hinder or prevent that person from performing any military service or from attending any military encampment or place of drill or instruction he or she may be called upon to perform or attend by proper authority."

Retaliation For Service or Training. An employer cannot "prejudice or harm [the enlisted person] in any manner in his or her employment, position, or status by reason of performance of military service or duty or attendance at military encampments or places of drill or instruction."

Retaliation for Enlistment or Commission. An employer cannot "dissuade, prevent, or stop any person from enlistment or accepting a warrant or commission in the California National Guard or Naval Militia by threat or injury to him or her in respect to his or her employment, position, status, trade, or business because of enlistment or acceptance of a warrant or commission."

Cal. Mil. & Vet. Code §394 (e).

Employers should be thoroughly familiar with each of these prohibitions and train their managers to comply with the law.

Federal Anti-Discrimination Provisions

In 1994, Congress passed the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA").[1] USERRA does not extend to the California National Guard or the Naval Militia. However, where USERRA and California law cover the same subject, employers generally are bound by the law that is more beneficial to covered service members.

The provisions of USERRA are enforced by the Veterans Employment and Training Service ("VETS"), and service members may refer certain complaints to the United States Department of Justice for enforcement action. VETS is a division of the United States Department of Labor ("DOL"). The heart of USERRA is its broad anti-discrimination language. It explicitly provides that any "person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a Uniformed Service shall not be denied *initial employment, reemployment, retention in employment, promotion, or any benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. §4311(a) (emphasis added).

These anti-discrimination and anti-retaliation provisions apply to *any* position of employment, including positions which are only for brief, non-recurring periods. Furthermore, this anti-discrimination protection covers more than service members; it also covers those who have testified

discrimination protection covers more than service members; it also covers those who have testified in a proceeding or otherwise participated in an investigation. VETS applies a "but for" test in evaluating alleged acts of discrimination to determine whether the individual's service obligation was a "motivating factor" in the employer's personnel actions.

The DOL has subpoena authority with respect to these investigations, and once it determines that a USERRA complaint is valid, the DOL must inform the service member of his or her right to request referral to the United States Justice Department for enforcement. In addition to remedies such as back pay, reinstatement, and attorneys' fees, liquidated (double) damages are awarded for willful violations.

Cautionary Notes on Employment Practices

There are potential traps in these statutes for unwary employers. This article does not purport to address them all. Employers should review all policies, programs, and procedures as they apply to veterans, reservists, and National Guard members. In complying with USERRA and applicable California laws, employers need to make sure that their EEO statements refer to "Veteran/ Reserve/ National Guard Status" instead of just "Veteran Status." Application forms that ask about service or membership in the Armed Services, Reserves, or National Guard raise the risk of a discrimination claim under USERRA. Employers should contact legal counsel if they have any questions regarding practices that may be perceived as discriminatory.

Military Leaves of Absence and Rights of Reinstatement

California law provides military personnel with the right to take temporary leaves of absence to perform military duties, as follows:

> Any employee of any corporation, company, or firm, or other person, who is a member of the reserve corps of the armed forces of the United States or of the National Guard or the Naval Militia shall be entitled to a temporary leave of absence without pay while engaged in military duty ordered for purposes of military training, drills, encampment, naval cruises, special exercises, or like activity as such member, providing that the period of ordered duty does not exceed 17 calendar days annually including time involved in going to and returning from such duty.

Cal. Mil. & Vet. Code §394.5 (emphasis added).

This provision, however, should be harmonized with §395.06, which apparently provides service members with an open-ended right to employment reinstatement, in that any member who:

> ... makes application within **40 days** after release from service shall be considered as on leave of absence during that period and shall be restored by the former employer to the former position or to a position of similar seniority, status, and pay without loss of retirement or other benefits, unless the employers circumstances have so changed as to make it impossible or unreasonable to do so, and shall not be discharged from the position without cause within one year after being restored to the position

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Cal. Mil. & Vet. Code §395.06 (emphasis added).

USERRA provides similar reinstatement rights to members of the various branches of the Armed Forces including the Army National Guard, the Air National Guard, and the commissioned corps of the Public Health Service, but only for those members whose "cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services **does not** exceed five years." 38 U.S.C. §4312(a)(2).

Furthermore, the five-year period applies as long as the person affected has been ordered or retained on active duty due to, and not merely coincidental with, the war or a national emergency. Employees must be given the time off "necessitated" by military service, which includes time needed to arrive safely at the site of service and the time needed to return home safely from service. Applications for reemployment are based on time away from the employer rather than length of service. For example, any individual with less than 31 days of military service must report for work by the beginning of the first regularly scheduled work day following completion of service and allowing eight hours for their safe return. An individual with between 31 and 180 days of service must apply within 14 days following his/her completion of service. For service over 180 days, application must be submitted no later than 90 days following completion of service. Once reemployed, an individual may not be discharged, except for cause, for a period of six months (if service was more than 30 days but less than 181 days) or for a period of one year (if service exceeded 180 days). 38 U.S.C. §4316(c).

Service members failing to report to work or to apply for reemployment pursuant to USERRA's requirements must be treated the same as other employees on leave of absence. Specifically, USERRA requires as follows:

> A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such persons entitlement to the rights and benefits referred to in subsection (a) 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.

38 U.S.C. §4312(e)(3).

However, a service member who is hospitalized for, or convalescing from, an illness or injury incurred or aggravated during the performance of military service may have his or her rights extended for up to two years. See 38 U.S.C. §4312(e)(2)(A).

Additionally, if reporting or reapplying for work at the end of the two-year period is rendered impossible or unreasonable for the service member due to circumstances beyond the service member's control, the two-year period must be extended by the employer to "accommodate the circumstances beyond such persons control." 38 U.S.C. §4312(e)(2)(B). In any event, an employer may require a service member returning from medical leave to provide documentation establishing

may require a service member returning from medical leave to provide documentation establishing that he or she is entitled to benefits or protections arising under USERRA, including timeliness and military deportment issues. See 38 U.S.C. §4312(f)(1).

Service members are expressly allowed to choose to use vacation, annual, or similar leave with pay while on military leave, but may not be *required* to do so by an employer. It is a violation of USERRA for an employer to require a service member to use paid or unpaid vacation, annual, or similar leave when the use of such leave is not requested by the service member.

Benefits

Employees returning from military service generally are entitled to all the rights and benefits they would have had if they had remained continuously employed. Benefit plans should also be reviewed for compliance with the law, particularly as it applies to defined contribution plans. For example, USERRA requires employer health plans to offer continuous coverage to employees and dependents for up to 18 months following departure for military service. The employer must pay its share of the insurance premium during the first 31 days of military service. Once military service exceeds 31 days, the service member cannot be required to pay more than 102% of the full premium. Although multi-employer plans may allocate the responsibility to pay for coverage, the last employer assumes full responsibility in the absence of such allocation. Plan reinstatement must immediately follow reemployment, and exclusion or waiting periods may not be applied to employees or family members.

With respect to pension plans, USERRA provides that during military service, civilian employment continuity may not be deemed broken, and accrued benefits may not be forfeited. In short, service members returning from military leave must be treated as not having incurred any break in service for purposes of pension rights. Upon return from service, a service member need not requalify for plan participation, and employers must make any contribution that would have been made absent military service. For defined contribution plans, returning veterans have up to three times their total service period (not to exceed five years after returning to employment) to make up for missed contributions, although employers need only make matching contributions to the extent that the reemployed service member makes required contributions to the plan.

Disabilities

USERRA's disability provisions require that employers promptly reemploy any service member with service-connected disabilities who is not qualified to return to his or her last position or to the position he or she would have attained but for the military service (even after reasonable accommodation efforts) to any other position of similar seniority, status, and pay for which the individual is qualified (or would have become qualified through the employer's reasonable accommodation efforts). This is commonly referred to as the "escalator" position. Failing this, the person must be returned to a position "which is the nearest approximation ... consistent with circumstances of such person's case." 38 U.S.C. §4313(a)(3).

According to this "escalator principle," the service member generally "is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." 38 U.S.C. §4316(a). These individuals also shall be "deemed to be on furlough or leave of absence while performing such service; and ... entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service. 38 U.S.C. §4316(b)(1).

While Section 4313(a)(3), noted above, applies to service-connected disabilities, there is also a provision for reemployment of service members who are not qualified for their pre-service position or "escalator" position for reasons other than a service-connected disability. See 38 U.S.C. §4313(a)(4). The amendments have now included in this category of employees the protection of reemployment in a position which is the nearest approximation of the reemployed person's pre-service or "escalator" position. Id.

Conclusion

Employers must become familiar with the military leave laws and seek out legal counsel where needed to resolve specific issues. These laws address a broad variety of situations and protections that, if not heeded, may give rise to claims of discrimination and wrongful termination. Employers need to be proactive and prepare in advance for responding to requests for leave pursuant to employees' military obligations or service members who seek reemployment following their return from military duty. In a post 9/11 world, employers could be inundated at any time with issues regarding military leave and reinstatement. Even an occasional military leave issue could trigger problems if an employer does not process leave requests with sufficient frequency to become familiar with the applicable laws. Now is the time to become well versed in this often neglected area of employee entitlements.

[1]While USERRA replaced the confusing Veterans' Reemployment Rights Law, the 1994 USERRA had its own confusing aspects. Recent amendments to USERRA clarified the reemployment rights of members of the National Guard and Reserves. They also significantly expand upon several additional job rights in the areas of anti-discrimination, benefit coverage, and disability protection.

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