



Labor Department Issues USERRA Guidance For Employers During COVID-19 Pandemic

Insights

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Many businesses have likely had one or more employees who serve in the National Guard or Reserves activated to help respond to the COVID-19 pandemic. This often happens in times of emergencies; citizen-soldiers are activated to help respond. With regards to the COVID-19 pandemic, the need is so great that the U.S. Army is asking retired soldiers with a health care MOS (military occupational specialty) to return to active service to help with the COVID-19 fight.

With so many servicemembers leaving work to help with the pandemic response, the Department of Labor (DOL) Veterans' Employment and Training Service (VETS) issued [a factsheet about the impact of the COVID-19 pandemic](#) on the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Employers should take notice of several items in the factsheet.

USERRA Basics

USERRA is a broad pro-employee statute that provides certain employment rights to active and reserve military personnel called to active duty. It provides returning service members a virtually unfettered right to re-employment with their pre-service employers upon timely application for return to work.

USERRA also requires employers to provide eligible employees with up to five years of unpaid leave during the life of their employment. Throughout this period, the employee's seniority, health care, and pension benefits must be maintained.

Important Reminders For Employers

The factsheet makes clear there are no new USERRA rights or obligations in light of COVID-19. However, as outlined above, it is important to remember that the protections and reemployment rights under USERRA are some of the strongest protections given to employees under federal law.

The factsheet offers guidance on some scenarios that likely will arise from the application of USERRA during the pandemic. First, the DOL makes clear that members of the National Guard or Reserves called to active duty under federal authority (such as Title 10 or Title 32 of the US Code) in response to the COVID-19 emergency are protected by USERRA. If the employee is activated under state law, there may be protections under state law relating to military service.

In order to determine the law employees are activated under, employers should ask for a copy of the employee's orders. Given the broad protections afforded under USERRA, employers should consult with an attorney before making a decision not to reemploy a returning service member.

The factsheet also addresses whether a service member can be furloughed or laid off upon return from uniformed service. The answer may surprise some people. Pursuant to what is known as the "escalator principle," the answer is yes. Under the "escalator principle," however, service members are entitled to reemployment in the position they would have attained with reasonable certainty but for their absence due to uniformed service.

Thus, the DOL advises that "if it is reasonably certain that [the service member] would have been furloughed or laid off had [the service member] not been absent for uniformed service," then the service member can be laid off or furloughed *upon* return from military service.

One issue that has not been decided by the courts or the DOL is whether an employer may prematurely furlough or terminate an employee prior to their return from military service even though, under the "escalator principle," the employee would have already been terminated or furloughed if not activated. Once again, due to the broad protections afforded under USERRA, employers should consult with an attorney before making a decision regarding an employee's status under the escalator principle.

Finally, the DOL addressed whether an employer may delay a service member's reemployment out of concern that the service member's service in a COVID-19 affected area may have exposed them to the virus. The answer to this inquiry is a resounding no. USERRA requires an employer to "promptly" reemploy a servicemember who satisfies the prerequisites to reemployment.

Promptness varies depending on the length of time a service member's service and can range from the next day after returning from duty for periods of service that were relatively short, to up to 14 days in the case of a multi-year period of service. The DOL advises that when an employer reemploys a service member who may have been exposed to COVID-19, an employer must make reasonable efforts in order to qualify the returning employee for their proper reemployment position.

Reasonable efforts can include providing paid leave, allowing the service member to work remotely, or work in another position during a period of quarantine for an exposed, before reemploying the servicemember into their proper reemployment position.

Conclusion

In sum, USERRA's broad protections are applicable to service members who volunteer for, or are called, to active duty to help respond to the COVID-19 pandemic. Since the protections provided to service members under USERRA are so broad, employers should consult with counsel prior to terminating or accommodating a returning service member.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the

updates as appropriate. Make sure you are subscribed to [Fisher Phillips Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, or [any member of our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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