

Final USERRA Regulations: Required Steps for Employer Compliance

The Department of Labor (“DOL”) recently published final USERRA regulations which are effective starting January 18, 2006. The first step that employers will need to take in order to comply is to post a new notice as described in this *Alert*. In addition, this *Alert* describes two potential employee benefits compliance pitfalls under the regulations and actions that employers can take to address them. Finally, this *Alert* also provides some highlights of the regulations’ other provisions regarding employee benefits.

“USERRA” is the acronym for the *Uniformed Services Employment and Reemployment Rights Act of 1994*. USERRA provides various protections to individuals who leave their jobs to serve in the military — including those called up from the reserves or National Guard — or perform certain other service. (The regulations refer to service for which USERRA provides protections as “service in the uniformed services.” For convenience, we refer to USERRA-covered service as military service.) The DOL’s Veterans’ Employment and Training Service (VETS) administers USERRA. Virtually all employers — public and private, and regardless of size — are subject to USERRA.

Posting Requirement

Legislation passed late in 2004 added a posting requirement to USERRA, under which employers must notify all employees of their rights under USERRA. Now, along with issuing final USERRA regulations, the DOL also made some minor revisions to its previous USERRA forms. (The DOL has issued two versions — one for private and state employees, and one for federal agencies.)

Employers may satisfy this notice requirement by posting the notice where other employee notices are customarily posted. Employers also may use alternative means of providing the notice, including hand-delivery or mailing. In order to comply with the posting requirement, *on or before January 18, 2006*, employers should post the updated USERRA poster in a conspicuous location where other employee notices are posted.

The new notices are available online through the Department of Labor at:

- http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf (private/state employers), and
- http://www.dol.gov/vets/programs/userra/USERRA_federal.pdf#federal (federal employers).

Employee Benefits Requirements

The regulations address a broad range of topics under USERRA and include provisions relating to employers’ obligations to continue benefits for those on military leave and to reinstate benefits for those who return from military leave. In the continuing benefits category, the regulations explain USERRA’s requirements that:

- Employers allow a COBRA-like opportunity to continue health coverage for up to 24 months during military leave (only 18 months’ continuation is required for those who elected USERRA continuation before December 10, 2004, however); and
- Employers allow those on leave for military service to continue non-seniority benefits other than health plan coverage (e.g., accrual of vacation pay, life insurance, and disability coverage) on the same basis as other employees on comparable leaves continue such benefits.

First Potential Pitfall — Adopting Reasonable Election and Pay Procedures

Although the USERRA continuation opportunity is similar to COBRA, it is not identical. For example, unlike COBRA, USERRA does not specify minimum periods during which employees must elect and pay for continuation coverage. The regulations confirm that employers may:

- Adopt reasonable election and payment procedures (including deadlines) with respect to USERRA continuation coverage, and
- Subject to several exceptions, terminate coverage of employees who do not elect or pay for USERRA continuation according to those procedures.

The regulations also note that it may be reasonable to adopt COBRA-compliant procedures as USERRA procedures, provided there is no conflict with USERRA requirements. To avoid a conflict, an employer that adopts its COBRA procedures as its USERRA procedures would need to allow exceptions to the deadlines for elections and payments for situations where it would be unreasonable or impossible for an employee going on military leave to make an election or in which military necessity precluded making an election. (USERRA's provisions also are more generous than COBRA in certain other respects and additional exceptions to COBRA procedures should be made to ensure that an employee who qualifies for both COBRA and USERRA has the benefit of USERRA's protections.)

The potential pitfall arises because the regulations indirectly penalize employers that do not adopt election and payment procedures. If the employer does not have reasonable USERRA continuation election procedures, the penalty is the election period remaining open for up to 24 months. This means that the employer's plan will potentially remain liable for continuation coverage costs that might otherwise have been avoided. The effect of failure to have payment procedures is less clear, but some might read the regulations as disallowing termination of an employee's coverage for failure to make timely payment if the plan does not have reasonable payment procedures.

Example: Jo is an employee of Acme, Inc. and has coverage under Acme's health plan at the time she gives notice of and begins leave for 18 months of military service. Jo neither elects nor waives coverage under Acme's health plan until she has been on leave for 13 months. At that time, she requests Acme to reinstate her coverage retroactively and tenders payment of the premiums for the previous 13 months' coverage. Is Acme required to reinstate Jo's coverage?

If Acme has not adopted reasonable election requirements, then it must retroactively reinstate Jo's coverage when she tenders payment. If Acme has adopted reasonable USERRA election procedures, however, then Acme may be able to deny the

retroactive reinstatement request. Even if Acme has reasonable election procedures in place, Jo will be entitled to retroactive reinstatement if it was impossible or unreasonable for Jo to elect continuation during the election period specified in the Acme's procedures, or if doing so was precluded by military necessity. In addition, even if Acme can refuse retroactive reinstatement at the time of Jo's request, she will be entitled to prospective reinstatement of her health coverage with no waiting period or, subject to minor exceptions specified in USERRA, preexisting condition exclusion when she returns to employment with Acme if she meets USERRA's reemployment requirements.

Although adopting election procedures does not guarantee that an employer will not be required to retroactively reinstate health coverage as much as 24 months after a military leave begins, it does provide some protection. Employers that are subject to both COBRA and USERRA may wish to begin with their COBRA procedures and adopt modifications to them to accommodate USERRA's requirements for those going on military leave. Because courts generally frown on enforcing undisclosed procedures, employers should plan on disclosing USERRA procedures in a manner similar to disclosures of COBRA procedures (e.g., disclosure in the SPD and election notice).

Second Potential Compliance Pitfall — Identifying Comparable Leaves

As noted above, USERRA entitles an employee who is on leave for military service to continue non-seniority benefits other than health plan coverage on the same basis that other employees on comparable leaves continue such benefits. If the non-seniority benefits available vary depending on the type of leave, "the employee must be given the most favorable treatment accorded to any comparable form of leave." The regulations provide some clarification of how to determine which leaves are considered comparable to leave for military service, noting that "the duration of the leave may be the most significant factor to compare" and that "other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered."

If there are variations in the benefits available for different leaves that an employer provides, then this provision creates a risk that an employee on military leave will disagree with the employer's identification of the comparable leave that is most generous to the employee. For example, most employers continue all benefits — including accrual of vacation pay and other paid leave —

during an employee's paid vacation, but do not continue all such benefits for employees taking an unpaid leave. An employer will be best able to enforce its decision on this issue if, before an employee starts leave for military service, the employer identifies and documents the types of leave it provides to employees that are comparable to military leave and which of those leaves provides the most favorable treatment to the employee. Clearly communicating to an employee going on military leave which benefits will continue — and which will not — also may help prevent disputes.

Other Benefits Provisions

In addition to the two issues discussed in detail above, the regulations cover a variety of other employee benefits issues. Here are some highlights.

- *Cafeteria Plans.* The final regulations confirm that health care flexible spending account (FSA) plans provided through cafeteria plans are considered health plans under USERRA. Therefore, employees on military leave must be allowed to continue health FSA participation for up to 24 months. (The COBRA rule that allows termination of COBRA coverage under certain health FSAs at the end of the plan year in which the qualifying event occurs does not apply to USERRA continuation rights.)
- *Health Benefits upon Reemployment.* The preamble to the regulations states that employers are responsible for negotiating with third-party health insurers to provide health coverage that is compliant with USERRA. That is, an employer remains liable for violating USERRA even if the violation is caused by an insurer's refusal to reinstate coverage as required by USERRA. Therefore, in the future, all employers should take care to have that provision included in their contracts.
- *Time for Making Contributions to Pension Plans.* An employer generally is required to make make-up contributions to a defined contribution plan for an employee returning from military leave in the same amount and manner as it made contributions on behalf of other employees during the military leave. (A similar requirement applies with respect to benefit accruals under a defined benefit plan.) No such make-up contributions are required, however, unless the employee is actually reemployed. In the case of plans that do not require or allow participant contributions, the employer must make required

contributions no later than the date they are normally due for the year in which the military service was performed or, if later, 90 days after the date of reemployment. If employer contributions to a plan are contingent on employee contributions and the employee funds the make-up contributions as permitted under USERRA, the employer's matching contributions must be made according to the plan's terms for such contributions.

- *Repayment of Plan Distributions.* Only defined benefit plans are required to permit an employee to repay amounts distributed from the plan in connection with a period of uniformed service upon reemployment with the same employer.

Non-Benefits Provisions

In addition to addressing employee benefits issues, the regulations interpret USERRA's anti-discrimination and anti-retaliation provisions, explain the requirements that an individual must meet in order to have reemployment rights under USERRA, and describe the role of the DOL in enforcing USERRA. The regulations provide a number of helpful details and they are well worth reading for those administering military leave programs.

The regulations are available at <http://edocket.access.gpo.gov/2005/pdf/05-23961.pdf>.

U.S. Benefit Office Locations

Anchorage, AK (907) 562-2266	Atlanta, GA (404) 224-5000	Austin, TX (800) 861-9851	Baltimore, MD (410) 527-1200
Birmingham, AL (205) 871-3871	Boise, ID (208) 340-0645	Boston, MA (617) 437-6900	Cary, NC (919) 459-3000
Charlotte, NC (704) 376-9161	Chicago, IL (312) 621-4700	Cleveland, OH (216) 861-9100	Columbus, OH (614) 766-8900
Dallas, TX (972) 385-9800	Denver, CO (303) 218-4020	Detroit, MI (248) 735-7580	Eugene, OR (541) 687-2222
Farmington, CT (860) 284-6137	Florham Park, NJ (973) 410-1022	Ft. Worth, TX (817) 335-2115	Grand Rapids, MI (616) 954-7829
Greenville, SC (864) 232-9999	Houston, TX (713) 625-1023	Jacksonville, FL (904) 355-4600	Knoxville, TN (865) 588-8101
Las Vegas, NV (702) 562-4335	Long Island, NY (516) 941-0260	Los Angeles, CA (213) 607-6300	Louisville, KY (502) 499-1891
Memphis, TN (901) 248-3100	Miami, FL (305) 373-8460	Milwaukee, WI (414) 271-9800	Minneapolis, MN (763) 302-7100
Mobile, AL (251) 433-0441	Mountain View, CA (650) 944-7000	Naples, FL (239) 514-2542	Nashville, TN (615) 872-3700
New Orleans, LA (504) 581-6151	New York, NY (212) 344-8888	Omaha, NE (402) 778-4851	Orlando, FL (407) 805-3005
Philadelphia, PA (610) 964-8700	Phoenix, AZ (602) 787-6000	Pittsburgh, PA (412) 586-1400	Portland, OR (503) 224-4155
Roswell, NM (505) 317-3397	St. Louis, MO (314) 721-8400	San Diego, CA (858) 678-2000	San Francisco, CA (415) 981-0600
San Juan, PR (787) 725-5880	Seattle, WA (206) 386-7400	Spokane, WA (206) 386-7400	Tampa, FL (813) 281-2095
Washington, DC (301) 530-5050	Wilmington, DE (302) 477-9640		

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