PUBLICATION

USERRA: Insulate Your Business from Violation Liability

March 17, 2021

Almost half of the men and women serving in our armed forces are members of the National Guard and Reserve. After almost two decades at war, it is virtually inescapable that employers will hire employees with military service or their spouses, so it is important to be aware of the specific laws that protect service members and their families as they balance civilian and military careers, namely the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Recognizing that employees are a company's best asset, businesses that invest in their teams in these ways typically enjoy faster growth and outpace their competition.

What is USERRA?

USERRA is the primary federal statute prohibiting employment discrimination based on past, present, or prospective military service. Administered by the U.S. Department of Labor's Veterans' Employment and Training Service (VETS), USERRA made major improvements in protecting service member rights and benefits by clarifying the law, improving enforcement mechanisms, and adding federal government employees to those employees already eligible to receive Department of Labor assistance in processing claims. USERRA applies to virtually all employers, regardless of size, including the federal government and employers with only one employee. It also applies to foreign employers doing business in the United States and, in most instances, American companies operating in foreign countries. USERRA applies to all service-connected employees, with no exclusion for executive, managerial, or professional employees. However, USERRA does not provide protections for independent contractors.

In addition to its anti-discrimination provision, USERRA requires employers to reemploy those who have taken military leave under designated services and governs employee benefit plans for employees on military leave. While employers are not necessarily required to pay employees during military leave, an employee is still entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay who are on furlough or leave of absence. Accordingly, an employer must treat employees on military leave comparable to employees on other forms of offered leave.

Recent USERRA Lawsuits

A recent lawsuit filed against one of the largest employers of U.S. servicemembers in the world alleged a violation of USERRA in failing to provide fully paid leave during a servicemember's short-term military leave. USERRA defines short-term military leave as leave that lasts 30 or fewer consecutive days. By providing fully paid leave to employees who take jury duty leave, bereavement leave, and other comparable forms of leave, the employer was obligated by USERRA to do the same for its employees who take short-term military leave, according to the lawsuit.

The lawsuit alleges that for over a decade, the employer's military leave policies violated the requirement that employers treat servicemember benefits the same as those of other employees. The employer paid differential pay for most types of military leave of at least four days, but it never provided fully paid leave to employees who took short-term military leave of three days or less.

On the day the lawsuit was filed, a joint notice of proposed class action settlement was filed. The $14 million proposed settlement, if approved by the court, could include more than 7,000 current and former employees

who took military leave since 2004. As part of the settlement, the employer changed its military leave policy to increase the paid military leave benefit during shorter-term military duties.

So How Does This Affect Other Employers?

When an employee takes more than 30 days of military leave in a calendar year, the employee may be eligible for differential pay for the additional days of military leave — the difference between their civilian pay and their military pay, if their civilian pay is greater than their military pay — for up to 12 months.

While the settlement is not binding on other employers, the $14 million price tag should certainly raise eyebrows. Even with extensive legal resources, insufficient policies may not insulate employers from potential liability. In developing policies regarding employees who volunteer for military service, it is imperative that employers become familiar with USERRA, the Servicemember Civil Relief Act (SCRA), and other laws aimed at developing and protecting the rights of veterans and their families.

Fortunately, there are several resources available at little to no cost for employers and their employees in this area, including information and technical assistance from VETS. While VETS investigates and attempts to resolve complaints between employers and their employees, complaints not successfully resolved by VETS may be referred to the U.S. Attorney General for possible representation. If the USAG is satisfied that a complaint is meritorious, they may file a court action on the complainant's behalf.

Employer Support of the Guard and Reserve (ESGR) local offices in each state have ombudsman who work with VETS, employers, and servicemembers to prevent, reduce, or resolve misunderstandings regarding employment rights and responsibilities, usually through mediation. If an issue arises or is anticipated, it is important to discuss the matter with an attorney on the forefront rather than pay thousands of former employees for a misunderstanding of the law.

If you have any questions on this matter, please contact a member of Baker Donelson's Labor & Employment Team or your Baker Donelson attorney.