K&L Alert
EMPLOYMENT LAW

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Employer Obligations with Respect to Employee Requests for Military Service Leave

INTRODUCTION

We have all been deeply saddened by the tragic events of September 11. As our nation returns to work, America's strong sense of patriotic pride is demonstrated by the record numbers of men and women enlisting in the Armed Forces or signing up for Reserve or National Guard duty. Based on the extent of the anticipated military buildup, leave requests to perform military service will undoubtedly become common in the workplace. In order for Employers to be prepared for such requests and to comply with applicable law, we have set forth below a brief summary of the *Uniformed Services Employment and Reemployment Rights Act of 1994* ("USERRA" or the "Act"). The Act is codified at 38 U.S.C. §4301 *et seq*.

PROTECTIONS UNDER THE ACT

Following the Gulf War, Congress enacted USERRA to provide protection for members of the Armed Forces who leave employment to perform military service, including Reserve duty. The Act prohibits employment discrimination against an employee who takes leave for military service and protects the employee's job status. Significantly, the Act requires that returning service personnel must be reemployed in the same or similar position that they would have attained if they had not been absent for military service. Employers also are obligated to maintain certain benefits or offer their continuation.

SCOPE AND COVERAGE OF THE ACT

USERRA applies to all Employers, large and small alike, regardless of the number of employees on their payroll. The Act also covers the workplace of an Employer in a foreign country, if the foreign entity is incorporated or otherwise organized in the United States or is controlled by an entity organized in the United States.

The Act protects any employee performing uniformed service in the Armed Forces (Army, Navy, Marine Corps, Air Force or Coast Guard), including Reserve duty. The Act also covers service in the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time duty with the National Guard, as well as service in the commissioned corps of the Public Health Service. In addition, there is a catch-all provision that allows the President to designate any other category of persons to be protected.

RIGHT TO REINSTATEMENT

For leave periods of 90 or fewer days, the Employer must reinstate the employee to the position the employee would have attained or held had he or she been continuously employed and not taken the leave, provided that the employee is qualified for the position. For leaves of more than 90 days, the employee must be returned to the position the employee would have attained or held had he or

she been continuously employed and not taken the leave, or a position of like seniority, status, and pay, provided the employee is qualified for the position.

Significantly, this means that an employee returning from military service ***must be given all promotions and pay increases that the employee would have received by virtue of seniority or employment service***, just as if he or she had not taken leave to perform military service.

If a returning employee would have been promoted, the Employer has the obligation to attempt to qualify the employee for the new position by providing training or education. If the returning employee is not qualified to perform that job, and cannot be qualified, he or she must be returned to the position held at the commencement of military service.

EXCEPTIONS TO REINSTATEMENT

Only employees who receive an "honorable discharge" are entitled to reinstatement and protection under the Act. Additionally, under certain limited exceptions, Employers may be exempt from the reinstatement requirement where:

(1) the Employer's circumstances have so changed that reinstatement would be "impossible or unreasonable";

(2) the Employer can prove "undue hardship," but only in connection with certain types of reinstatement; or,

(3) the employment from which the person leaves for military service was to be for a brief, non-recurrent period and there was no reasonable expectation that such employment would continue indefinitely or for a significant period.

OBLIGATIONS OF THE EMPLOYEE

Employees are required under the Act to give Employers "advance written or verbal notice" of their military service obligations unless, under the circumstances, such notice is impossible or unreasonable. In addition, an employee must request to return to work within certain time limits depending upon the length of military service in order to fully protect his or her right to reinstatement. The Act establishes the following categories:

(1) Service of 1 to 30 days: The employee must report to his or her Employer by the beginning of the first full regularly scheduled work day that would fall 8 hours after returning home following completion of service (allowing a reasonable period for safe transportation from site of service);

(2) Service of 31 to 180 days: An employee must submit an application for reemployment within 14 days after completion of service or, if that submission is not possible, on the first full calendar day that submitting an application is possible;

(3) Service of more than 180 days: An employee must submit an application for reemployment within 90 days after completion of service; and,

(4) Hospitalized or convalescing employee: An employee may have up to two years to submit an application.

EMPLOYMENT DISCRIMINATION PROHIBITED

Employment discrimination based on past, current or future military obligation is prohibited with respect to any term, condition or benefit of employment. The Act also prohibits retaliation against any person who has exercised his or her rights protected under the Act.

LIMITATION ON RIGHT TO TERMINATE EMPLOYEE FOLLOWING RETURN FROM LEAVE

The Act imposes a significant restriction on an Employer's right to terminate an employee who would otherwise be employed "at will." For up to a one-year period following reinstatement (depending on the length of military service), an

Employer may terminate an employee only "***for cause***." Employees who return from more than 180 days of military service may be terminated only "for cause" for a one-year period from the date of reinstatement. Employees who return from leave after serving 31 to 180 days may be terminated only "for cause" for a 180-day period from the date of reinstatement.

BENEFIT CONTINUATION AND PROTECTION

Health Benefits. Employees on leave for ***fewer than 31 days*** are entitled to have their health benefits (including dependent coverage) continued at the Employer's normal expense for the period of the leave. In addition, once the Employer-provided health coverage lapses, employees are entitled to purchase coverage on terms similar to COBRA. Upon reinstatement, employees are entitled to coverage without exclusions or waiting periods.

Pension. Returning employees are entitled to ***full credit*** during periods of military service for purposes of vesting and accrual of benefits under retirement plans, including defined benefit plans, defined contribution plans and profit sharing and retirement plans. Periods of service may not be treated as a break-in-service for purposes of forfeiture. ***Employers are responsible for making the necessary contributions to pension funds for any liabilities that accrue as a result of benefit accrual during military service covered by the Act***. However, the employee is responsible for any employee-required contributions.

Vacation. Vacation benefits do not continue to accrue during military leave, unless the Employer separately provides for such continued accrual under other types of leave. An employee cannot be forced to use vacation time or other paid leave during a period of military leave. However, an employee is permitted, upon request, to receive accrued vacation pay while on military leave.

Seniority. Seniority, and other rights and benefits determined by seniority, continue to fully accrue during military leave to the same extent they would have accrued if the person had remained continuously employed, provided the employee returns to work following the leave.

Other Benefits. With respect to other rights and benefits ***not determined by seniority***, such as sick pay, clothing allowances, or employer training, the employee is treated as being on a leave of absence and is entitled to receive the same rights and benefits that the Employer would otherwise provide to employees on other types of leave from employment.

OTHER PROTECTIONS UNDER THE ACT

Employees are entitled to protection under the Act for leaves involving a cumulative length of absence of up to five years, or longer in some circumstances. Employers that violate the discrimination, reinstatement, or retaliation provisions of the Act can face significant liability, including court ordered reinstatement, payment of lost wages and benefits, liquidated damages for willful violations (equal to the amount of compensation), attorneys' fees, expert witness fees, and other litigation expenses. Interestingly, an Employer that prevails in court against an employee cannot recover fees or costs from the employee.

USERRA preempts State laws to the extent any State law provides for less protection than that afforded under the federal law as discussed above. However, States are permitted to enact laws that provide for greater protections than those afforded under the federal Act. Accordingly, Employers should check with counsel to determine whether existing State law or pending legislation may impose additional obligations on the Employer.

THOMAS PETRIDES
Partner, Los Angeles
tpetrides@kl.com
310.552.5077

APRIL BOYER
Associate, Miami
aboyer@kl.com
305.539.3380

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This Employment Alert provides a summary of the significant provisions of USERRA. However, the Act itself contains many detailed provisions and exceptions. If you would like to discuss any of these issues in greater detail, please contact any of the following K&L employment lawyers:

Boston	Henry Goldman	617.951.9156	hgoldman@kl.com
Dallas	Amy Bourret	214.939.4951	abourret@kl.com
Harrisburg	Carleton Strouss	717.231.4503	cstrouss@kl.com
Los Angeles	Thomas Petrides	310.552.5077	tpetrides@kl.com
	Paul Sweeney	310.552.5055	psweeney@kl.com
Miami	Daniel Casey	305.539.3324	dcasey@kl.com
Newark	Anthony La Rocco	973.848.4014	alarocco@kl.com
New York	Loren Schechter	212.536.4008	lschechter@kl.com
Pittsburgh	Stephen Olson	412.355.6496	solson@kl.com
	Michael Pavlick	412.355.6275	mpavlick@kl.com
	Hayes Stover	412.355.6476	hstover@kl.com
San Francisco	Charles Thompson	415.249.1017	cthompson@kl.com
Washington	Lawrence Lanpher	202.778.9011	llanpher@kl.com

Kirkpatrick & Lockhart LLP
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