

Employers' Obligations When the Troops Come Home

Tannenbaum Helpern Syracuse & Hirschtritt LLP

900 Third Avenue

New York, New York 10022

Tel: (212) 508-6700

Fax: (212) 371-1084



Joel A. Klarreich is the chair of the Employment Law and Staffing Industry Departments of Tannenbaum Helpern Syracuse & Hirschtritt LLP. He specializes in employment, business and corporate law. He is a recognized expert in the staffing industry, having represented countless staffing firms in all facets of their business including all aspects of employment law for more than 35 years. Mr. Klarreich is currently General Counsel to the New York Staffing Association.

Mr. Klarreich has counseled clients on a broad range of labor and employment issues, including pre-employment inquiries, wage and hour planning, discrimination, benefits, drug and alcohol use and testing, FMLA and ADA issues, and has defended countless lawsuits and arbitration proceedings involving employment related claims, discrimination and harassment in both federal and state courts and before federal, state and local agencies.

Mr. Klarreich graduated with a J.D. from St. John's University School of Law in 1968, where he ranked fifth in a class of 210 and was a member of Law Review. He graduated from the City College of the City of New York in 1965. He is admitted to the New York Bar and is admitted to practice before the District Courts for the Eastern and Southern Districts of New York, the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court.



Andrew W. Singer is a member of the Employment Law Department of Tannenbaum Helpern Syracuse & Hirschtritt LLP. He has extensive experience in all aspects of employment law, including the defense of discrimination claims based upon sex, race, sexual orientation, national origin, religion, disability, age, and other protected classes. He has handled discrimination matters filed with the Equal Employment Opportunity Commission, State Division of Human Rights and the National Labor Relations Board.

Mr. Singer regularly counsels employers on a wide spectrum of employment issues, including sexual harassment, discrimination, accommodating disabled employees, family and medical leave laws, hiring, disciplining and terminating employees, classifying employees and independent contractors, e-mail and internet policies and non-competition and confidentiality agreements.

Mr. Singer also conducts training seminars for supervisory and managerial employees on equal employment laws and sexual harassment and is frequently asked to speak on such matters at corporate sponsored programs and seminars.

A graduate of the State University of New York at Binghamton, Mr. Singer earned his law degree from Hofstra University School of Law (J.D. 1992) where he was a senior staff editor of the Hofstra Law Review. He is a member of the New York and Connecticut Bars and is admitted to practice before the District Courts for the Eastern and Southern Districts of New York.

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For additional information, additional copies of our *Employment Notes* or to add someone to our mailing list, please contact:

Joel A. Klarreich
(212) 508-6747

klarreich@tanhelp.com

or

Andrew W. Singer
(212) 508-6723

singer@tanhelp.com

Employment Law Department Contributors

Stacey A. Usiak

Frank J. Macchiarola

Jason Weiss

Employment Notes



When The Troops Come Home

Due to the war in Iraq and continuing U.S. military activities in the Middle East many employers have been faced with the loss of employees called up for duty. As military personnel come home employers will be required to deal with employees, particularly non-career members of the National Guard and Reservists, who have completed their tours of duty and subsequently request to return to their former civilian positions. The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4333 (USERRA), which was enacted to encourage non-career uniformed service by qualified individuals, provides men and women who serve in the United States Air Force, Army, Coast Guard, Marines, National Guard, Navy, Public Health Service and Reserves with certain benefits, reemployment rights and protections from discrimination that all employers should be familiar with.

Eligibility

USERRA covers all employers regardless of the number of employees or the size of their business. There are four basic criteria that must be met in order for an employee in a civilian job to be eligible under USERRA: (1) the employee must give prior written or oral notice to his or her employer of an upcoming absence due to military service or training, which may be either voluntary or involuntary, (2) the leave may not exceed five years cumulatively, (3) the employee must be released from active duty under honorable or general conditions, and (4) the employee must apply for reemployment in his or her civilian position within a reasonable time after discharge or return from duty.

USERRA protects employees in part-time positions, but does not protect independent contractors or temporary employees (i.e., individuals employed in positions for a brief, non-recurring period not expected to last indefinitely or for a significant period). USERRA's broad scope protects all members of the uniformed services from discrimination in employment regardless of when they served. Any individual discriminated against based in whole or in part on their U.S. military service, has rights under USERRA.

During Term of Military Service

Employees on leave may choose to use accrued vacation and/or personal time in order to continue their salary during their period of service, if the employer does not. An employer can not require an employee to use accrued vacation or personal time for military leaves of

absence. Employees on military leave do not accrue civilian vacation during their military leave. However, while on leave for military reasons employees are entitled to continue to receive the same benefits provided to employees on leave for non-military reasons. Therefore, if an employer allows individuals on non-military leaves of absence to accrue vacation, the individuals on military leaves of absence must also be allowed to accrue vacation.

USERRA provides for the continuation of employer provided health insurance, at the service member's election, for up to 18 months. As under COBRA, the service member shall be responsible for paying up to 102% of the full premium for such insurance. An employee's military service may not be deemed a break in service for pension benefit purposes and must be considered service with an employer for vesting and benefit accrual purposes.

Right to Return to Work

One of the main goals of USERRA is to ensure members of the uniformed services are entitled to return to their civilian employment upon completion of their military service. Returning service members must report back to work within certain periods of time in order to preserve their reemployment rights. For example, if the period of service was 31 to 180 days the employee must report back within 14 days of release. Although a failure to return within the specified time period does not necessarily forfeit the individual's right to reemployment it does leave him or her subject to the employer's rules regarding unauthorized absences.

Returning employees must be reemployed in the job they would have obtained had they not been absent for military service, with the same seniority, status, salary and all other rights and benefits determined on seniority as they would have achieved. Employers must train or otherwise assist returning employees to refresh or upgrade their skills, if necessary, to qualify for reemployment. If a returning service member is not able to qualify for his or her previous position or is disabled due to military service he or she must be reinstated to a position that most nearly approximates the original position based on his or her current capabilities.

Upon Reemployment

Under USERRA a person who is reemployed is entitled to the rights and benefits that such person would have obtained had he or she remained employed throughout the period of service. Health insurance benefits must be reinstated immediately, with no waiting period and no exclusions for preexisting conditions, except spe-

cific conditions determined by the U.S. government to be service related.

The rights and benefits of veterans that are protected by USERRA include those provided by employers on their own accord, as well as those mandated by statute. One such statutory benefit protected by USERRA is eligibility for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (FMLA), which provides for up to 3 months of unpaid leave for a variety of health and family reasons in a 12 month period. Generally to be eligible for leave under the FMLA an employee must have worked at least 1250 hours for a covered employer during the 12 months prior to the start of the leave. Under USERRA a member of the National Guard or Reserves who returns to work after an absence due to military service must be credited with the time he or she would have worked based on his or her previous schedule, but for his or her military service for purposes of calculating eligibility for FMLA benefits.

For example, Max, an Acme employee who typically works a 35 hour work week, left on May 1, 2004, to begin his military service. His tour of duty ends and he returns to civilian employment with Acme on November 1, 2004. He gives notice that he will be taking FMLA leave beginning on December 1 due to the birth of his child. In actuality Max has worked roughly 749 hours for Acme in the 12 months preceding his FMLA leave; however, under USERRA Acme must take into consideration the roughly 924 hours he would have worked had he not served in the military. Thus, Max is credited with 1673 hours in the previous 12 months and qualifies to begin his FMLA leave on December 1, 2004.

USERRA temporarily suspends the at-will employment relationship upon a service member's qualified return to civilian employment. An employee who was in military service for 31 to 180 days prior to returning to work may not be terminated for any reason other than for cause for 180 days after beginning reemployment, while an employee who was on military leave for 181 days or more may not be terminated for any reason other than for cause for one year.

USERRA is a powerful federal statute and due to current unfortunate circumstances is worth becoming familiar with. Various states have also enacted their own legislation to provide service members with rights regarding their benefits and employment which supercede those provided by USERRA if they provide greater benefits or rights to the service members.