

EMPLOYMENT LAW UPDATE

Jennifer A. Becker
David P. Borovsky
Shoshana Y. Chazan
Edward F. Donohue, III
Kathleen M. Ewins
Mehrdad Farivar
Bruce N. Furukawa
Howard M. Garfield
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Seth E. Watkins
Gerald G. Weisbach
Irene K. Yesowitch

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A Summary of Employer Obligations To Employees Called To Active Duty In The Uniformed Services.

by Shoshana Y. Chazan and David P. Borovsky

Following the September 11, 2001 terrorist attacks, President Bush issued an order enabling up to 50,000 reservists to be called to active duty. In addition, others may voluntarily enlist in the armed forces. The following summarizes the implications for employers should their employees choose to enlist in the armed forces or be called to active duty.

Both Federal and California law govern the employer's duties under these circumstances. The primary federal law is the Uniformed Services Employment and Reemployment Rights Act (USERRA). The California Military and Veterans Code gives Californians rights beyond those covered by the USERRA.

The USERRA applies to all American employers, public and private, regardless of size. It covers any employee who is a member of the "uniformed services," whether membership is voluntary or involuntary. "Uniformed Service" means service in the Army, Navy, Air Force, Marines, Coast Guard, Army National

Guard, and Air National Guard, among others.

USERRA generally prohibits an employer from discriminating against those who are, or who apply to become, members of uniformed services. Thus, an employer may not refuse to hire someone, terminate them, or retaliate against them because they serve in or join the military.

If an employee is called into service by the uniformed services, the employee is eligible for military leave under the USERRA. To qualify, the employee is first required to provide the employer with advance written or oral notice of his or her service obligations, unless military necessity prohibits it.

Under USERRA, employers must comply with four basic requirements dealing with military leave. Employers must (1) provide leaves of absence for those serving; (2) provide certain benefits during this leave; (3) reinstate the employees upon their return; and (4) temporarily suspend "at-will" employment after reinstatement.

First, the employer must provide a leave of absence for up to five years, and occasionally more. Employers need not continue to pay employees during military leave. However, some large employers choose to pay the difference between the employee's military and their civilian compensation.

Next, employers generally must provide employees on military leave with comparable benefits to those given to employees on other types of unpaid leave.¹ In addition, employers must provide the option of COBRA-like health plan coverage for employees and their dependents during military leave for up to 18 months.

Third, employers must reinstate the employee in the position that *they would have attained* if they had never taken leave—not simply the position the employee held when they left. If the employee is not qualified for this new position, the employee must be given a “comparable” position. Employees returning from military leave have between 2 and 90 days to notify their employer that they are ready to return to work, depending on their length of service. Further, the employee's compensation must be calculated as if he or she had never left.

Finally, a reinstated employee may only be discharged *for cause* during a specified period of time after they return to work. This period may last up to one year, depending on the length of leave. Thus, employees who were “at-will” prior to service must have this status suspended for a period after they return.

The foregoing requirements will, undoubtedly, prove challenging for many California employers should large-scale troop mobilization become necessary in the coming months. Most California employers have not previously been required to comply with laws or to cope with their impact on operations. Affected employers should seek the advice of counsel as questions arise.

¹ It is not entirely clear whether this includes the employee's stock option plan. The USERRA was amended in 1994, after the Persian Gulf war, when such plans were not common.

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