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The Focus

A Compliance Check Newsletter

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Recently, the Solicitor of Labor, the Assistant Secretary for Veterans' Employment and Training, and the Wage and Hour Administrator issued a joint memorandum that makes clear the Department of Labor's position regarding the rights of returning uniformed service members to family and medical leave (FMLA) under USERRA. The memorandum says that the months employed and the hours actually worked for the civilian employer should be combined with the months and hours that would have been worked during the 12 months prior to the start of the leave requested but for the military service.

Under USERRA, returning service members are entitled to all the benefits of employment that they would have obtained if they had been continuously employed. Under FMLA, an eligible employee must work for a covered employer, have worked for his or her employer for at least 12 months and must have worked at least 1,250 hours for that employer during the 12-month period prior to the start of the leave.

A member of the National Guard or Reserve who is absent from employment for an extended period of time due to military service and who requests FMLA leave shortly after returning to civilian employment may not have actually worked for his or her employer for a total of 12 months or may not have performed 1250 hours of actual work with the employer in the 12 months prior to the start of the FMLA leave. The memorandum clarifies that, based upon the service member's USERRA rights, the time and hours that the employee would have worked but for his or her military service should be combined with the time employed and the hours actually worked for an employer to meet the 12-months of employment and the 1250 hours eligibility requirements.

A clearly written, simplified, 19-page, guide to the USERRA law may be found at the following website: <http://www.dol.gov/vets/whatsnew/userraguide0704.rtf>. This guide addresses employer obligations and helps employers understand the relevance of the following questions.

1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal)
2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used.

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3. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?
4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
5. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?
6. Did the employer consider the timing, frequency, or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?
7. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities? If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?
8. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority?
9. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?
10. Did the employer provide health coverage upon request of a service member? Upon the service member's election, did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days?
11. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute?
12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for service?