MEMORANDUM

TO: All Pension Clients

FROM: Klausner, Kaufman, Jensen & Levinson

DATE: November 2019


This memo discusses the rights and responsibilities of employers and retirement plans under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). USERRA is a federal law intended to protect the rights of those who have served or those who will serve in the United States Armed Forces, Reserve, or National Guard. Importantly, federal law preempts state law in this area of regulation; any inconsistencies between state law and federal law will be governed by USERRA.

USERRA has three main objectives:

(1) ensuring employees are not disadvantaged in their careers based on their time in the military;

(2) prompt reemployment in an employee’s pre-military position upon return from duty; and

(3) eliminating discrimination based on military service.

All public retirement plans “that provide retirement income to employees or that defer payment of income to employees until after employment has ended” must comply with USERRA. (20 C.F.R. §1002.259).

MILITARY RELATED BREAK(S) IN SERVICE

Managing military related breaks in service can be difficult. Under USERRA, single breaks in service and consecutive breaks are treated equally. Employers and retirement plans must treat an employee’s entire "period of absence from employment due to or necessitated by" military service as continuous employment. (20 C.F.R. §1002.259).
Generally, to qualify for reemployment under USERRA, service members must show that they:

(1) notified their employer in advance of departure;

(2) have a cumulative length of absence from employment due to voluntary or involuntary military service of less than five years;

(3) have separated from military service under honorable conditions; and

(4) made a timely request for reemployment accompanied by proper documentation. (38 U.S.C. §4312).

To be timely, an employee who served more than thirty days in the military must reapply for work within fourteen days of release from service. “For service of more than 180 days, an application for reemployment must be submitted within 90 days of release from service.” (38 U.S.C. §4312(e)(1)(C)).

CONTRIBUTIONS TO THE PENSION PLAN DURING MILITARY SERVICE

Employers are required to make pension contributions only during the time employees actually work for such employer. Therefore, employers are not obligated to make contributions to a pension plan on behalf of employees while they are serving in the military. The time upon which employers must begin making contributions on behalf of employees depends on whether the pension plan is non-contributory or contributory.

According to 20 C.F.R. §1002.262(a), employers of non-contributory pension plans, those plans that do not require or permit employee contributions, must commence contributions “no later than 90 days after the date of reemployment or when plan contributions are normally due for the year in which military service was performed, whichever is later.” Under certain exceptions, those plans unable to make timely contributions must make such contributions as soon as practicable.

The rules for employers of contributory pension plans are different. In a contributory pension plan “contributions are contingent on a reemployed service member's contributions or elective deferrals.” (C.F.R. §1002.262(c)). Employers are not responsible for repaying the pension plan unless and until an employee first repays his or her contributions, without interest. Id. Under USERRA, employees are not obligated to make up any missed contributions, but may choose to repay some or all. Employees electing to repay missed contributions may do so commencing on their date of reemployment. The repayment period varies depending on an employee’s length of military service, but under no circumstances may
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it exceed five years. (38 U.S.C. §4318(b)(2))

DETERMINING A REEMPLOYED SERVICE MEMBER’S PENSION ENTITLEMENT

Upon return from military service, employers must rehire employees into the position and provide the benefits they would have attained, with “reasonable certainty,” but for their military related break in service. In Huhmann v. Federal Express Corporation, the court explained that when applying the reasonable certainty test, courts use both a forward-looking and a backward-looking approach.

First the court determines whether it appears as a matter of foresight, that individuals like a given claimant who successfully completed training would have obtained a certain position had employment not been interrupted by military service. The court next analyzes whether, as a matter of hindsight, a particular claimant either has, or would have, completed the necessary prerequisites for a position. 874 F.3d 1102, 1106 (9th Cir. 2017).

Once rehired, “[E]mployers must determine a reemployed service member’s eligibility for participation in a pension plan and the vesting and accrual of the service member’s pension benefits as if he or she never left.” (30 U.S.C. §4318(2)(b)). Pursuant to 20 C.F.R. §1002.5(b), rehired employees are entitled to and must not be denied a “benefit of employment.” Id. Benefits of employment include “any advantage, profit, privilege, gain, status, account, or interest… that accrues by reason of an employment contract or agreement…” Id.

Employers and retirement plans must determine what pension benefits a reemployed service member would have received but for their military related break in service. This requires an analysis of an employee’s rate(s) of pay and whether such pay can be determined with “reasonable certainty.” For employees who have a consistent rate of pay, employers must make a projection as to the number of hours the employee would have worked and how much they would have earned but for the military related break in service. (38 U.S.C. §4318(b)(3)(A)). This projection is “based on the service member’s work history leading up to the military-related absence.” Id. The focus must be on the number of hours an employee consistently works per week.

For employees who work varying hours and shifts, employers must determine the average rate of pay for the employee’s proceeding twelve months leading up to the break in service. On occasion, employees may have worked less than twelve months prior to their military related break. In this scenario, employers and retirement plans will use the “period of employment immediately preceding the military service” to determine what pension benefits
are owed. (38 U.S.C. §4318(b)(3)(B)). USERRA is only applicable to active employees. Employees who have separated employment and retirees have no reemployment rights.

CONCLUSION

Those who serve or who will serve in the military have substantial protections under USERRA. Employers and retirement plans may face challenges navigating the requirements imposed under USERRA due to the unique features found in each plan. Please contact our office if your retirement plan has any questions regarding the application of USERRA.
MEMORANDUM

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(1) ensuring employees are not disadvantaged in their careers based on their time in the military;

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necessitated by" military service as continuous employment. (20 C.F.R. §1002.259). Generally, to qualify for reemployment under USERRA, service members must show that they:

(1) notified their employer in advance of departure;

(2) have a cumulative length of absence from employment due to voluntary or
involuntary military service of less than five years;

(3) made a timely request for reemployment accompanied by proper documentation;
and

(4) have separated from military service under honorable conditions. (38 U.S.C.
§4312).

Under certain situations, qualifying pre and post military service time will also be treated as
continuous service. USERRA is only applicable to active employees. Employees who have
separated employment and retirees have no reemployment rights.

DETERMINING A REEMPLOYED SERVICE MEMBER'S BENEFIT ENTITLEMENT

Under Florida law, firefighters and police officers are entitled to receive, at no cost,
credited service of up to five years for intervening military service when they are:

(1) an active plan member immediately before a voluntary or involuntary military break
in service;

(2) entitled to reemployment under USERRA; and

(3) return to employment as a firefighter or police officer within one year of being
honorably discharged from the military (Fla. Stat. §175.025(6)(d) and §185.02(7)(d)).

Prior nonintervening military service may be purchased and added to a firefighter's or police
officer’s actual service only when permitted pursuant to local law. Id.

Upon return from military service, employers must rehire employees into the position
and provide the benefits they would have attained, with "reasonable certainty," but for their
military related break in service. This means employees are entitled to the seniority, rights,
and benefits they would have received had they remained continuously employed. In
Huhmann v. Federal Express Corporation, the court explained that when applying the
reasonable certainty test, courts use both a forward-looking and a backward-looking approach.

First the court determines whether it appears as a matter of foresight, that individuals like a given claimant who successfully completed training would have obtained a certain position had employment not been interrupted by military service. The court next analyzes whether, as a matter of hindsight, a particular claimant either has, or would have, completed the necessary prerequisites for a position. 874 F.3d 1102, 1106 (9th Cir. 2017).

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Employers and retirement plans must determine what pension benefits a reemployed service member would have received but for their military related break in service. This requires an analysis of an employee’s rate(s) of pay and whether such pay can be determined with “reasonable certainty.” For employees who have a consistent rate of pay, employers must make a projection as to the number of hours the employee would have worked and how much they would have earned but for the military related break in service. (38 U.S.C. §4318(b)(3)(A)). This projection is “based on the service member’s work history leading up to the military-related absence.” Id. The focus must be on the number of hours an employee consistently works per week.

For employees who work varying hours and shifts, employers must determine the average rate of pay for the employee’s proceeding twelve months leading up to the break in service. On occasion, employees may have worked less than twelve months prior to their military related break. In this scenario, employers and retirement plans will use the “period of employment immediately preceding the military service” to determine what pension benefits are owed. (38 U.S.C. §4318(b)(3)(B)).

CONCLUSION

Florida firefighters and police officers who serve or who will serve in the military have substantial protections under USERRA and Florida law. Employers and retirement plans may face challenges navigating the requirements imposed under USERRA due to the unique
features found in each plan. Please contact our office if your retirement plan has any questions regarding the application of USERRA.