Final Regulations Clarify The Employer's Duty To Employees On - And Returning From - Military Leave

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Final regulations implementing the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") were issued in December, and are effective January 18, 2006. While no amendments to plan documents are required, there are still several steps employers will want to take to make sure their benefit plans are administered in compliance with this high-profile law.

The Department of Labor ("DOL") estimates that over 500,000 members of the National Guard and Reserve have been mobilized since September 11, 2001. This has meant that USERRA, originally passed in 1994, has become relevant to an increasing number of employers. Compliance is important, because an individual whose rights are violated under USERRA may sue to recover lost benefits, and damages may be doubled if a court determines that the violation was willful.

In December, the DOL issued final regulations that clarify many of employers' obligations under USERRA. The regulations are effective January 18, 2006, so immediate attention by employers is required. The regulations cover more than 20 pages in the Federal Register, so this Alert will cover only the basic principles of USERRA and only a few of the more interesting or surprising aspects of the regulations. For application of this important law to your specific circumstances, consult with your legal advisor for a detailed analysis of your obligations as an employer.

USERRA's benefit plan provisions, in a nutshell:

USERRA and the new regulations cover a wide swath of situations between employers and employees, and include the following general provisions affecting benefit plans:

- Medical plans must offer continuation coverage of 24 months – somewhat similar to COBRA – to employees who serve in the uniformed services.

- An employee on leave in the uniformed services must be treated the same as employees on other types of leave, for purposes of benefits.

- Employees who qualify for reemployment following their military service must be allowed to re-enroll in the medical plan without waiting periods or pre-existing condition exclusions.

- With respect to retirement plans, reemployed military employees must be given the opportunity to make up elective deferrals to the employer's plan, and if the plan provides for matching contributions, employers must make them as the employee contributes make-up elective deferrals. In addition, if the plan provides for profit sharing contributions, the employer must make them as well, by calculating the amount of compensation the reemployed person would have earned during the period of military leave.

Significant provisions in the new, final regulations:

With regard to the **scope of USERRA's coverage**, USERRA mandates compliance by "employers," a term which is defined broadly to include "any person [who] has control over employment opportunities." This means that individual supervisors may be liable for USERRA violations. However, the regulations clarify that entities performing merely ministerial administrative functions for benefit plans do not meet the definition of employer.

With regard to USERRA's **group medical plan continuation coverage**, several issues are noteworthy:

- Dependents and spouses do not have an independent right to this coverage. Thus, if the employee fails to elect USERRA continued coverage, the spouse and dependents are not entitled to elect it for themselves. However, if the employer wishes to offer it, a medical plan can be drafted to permit dependents and spouses the right to elect coverage even if the employee declines.

- USERRA continuation coverage runs concurrently with COBRA. As a result, if a second qualifying event (like the employee's death) occurs in the 18-month COBRA period, the dependents and spouses have the right to extend COBRA to the 36-month period.

- The final regulations clarify that an employer may cancel an employee's health insurance if the employee fails to elect continuing coverage. However, the employer must offer retroactive reinstatement. While not mandated by the regulations, plans would be wise to include the specific procedures and rules that will be followed in administering this retroactive reinstatement feature.

With regard to **retirement plan benefits** of returning military employees:

- The regulations no longer include the requirement (which had been in proposed regulations) that a plan permit a person

to continue to make up missed contributions after leaving employment with the employer. This change was made in recognition of the administrative complexity of permitting such after-tax contributions from former employees.

- Make-up contributions (both employer and employee) may not be adjusted for earnings or losses on the employee's account. In other words, USERRA only permits the principal amount of the missed contributions to be returned.

- The provision permitting a military employee to repay withdrawn amounts upon reemployment is restricted solely to defined benefit plans.

- In calculating the amount of the employer's make-up contribution, where the employer has to estimate the rate of pay the employee would have earned during the military absence, the final regulations continue the requirement that the employer take into account pay increases, differentials, step increases, merit increases, or periodic increases that the employee "would have attained with reasonable certainty." The final regulations add that it is also permissible for an employer to take into account the returning employee's own work history, history of merit increases, and the work and pay history of employees in the same or similar position.

Finally, the final regulations include a new, revised **model notice** that employers are required to post. The notice is designed to inform employees entering military service of their rights, benefits and obligations under USERRA. The notice should be posted in the locations where employers typically place notices to employees. Alternatively, the notice can be provided by hand-delivery, mail or e-mail. The model notice is available on the DOL's website, at http://www.dol.gov/elaws/userra.htm.

If you would like assistance in understanding and meeting your obligations to your employees serving in the military, contact any of the attorneys in Holland & Hart's Benefits Law Group.

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questions as to the application of the law to your activities, you should seek the advice of your legal counsel.