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Re: Overview of Selected Uniformed Service Employment and Reemployment Rights Act (USERRA) Requirements

Dear :

Many companies today employ individuals who are called to active duty in the uniformed services and must take an extended military leave. Recently, I have received a number of inquiries as to employer obligations in this regard. This brief synopsis will review basic principles in this area.

Federal law, through the Uniformed Services Employment & Reemployment Rights Act (USERRA), mandates a litany of employee entitlements which are applicable to virtually all employers. USERRA prohibits discrimination against employees because of their service in the Armed Forces, Reserves, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for such service. USERRA also protects the rights of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.<sup>1</sup>

### **Coverage and Basic Concepts**

Under USERRA, depending upon the length of the military leave and the employee's timely return from military leave, an employer generally is required to restore an employee to the employee's previous employment position, to the position the employee would have reached had the military leave not occurred, or to a position with like seniority, status, and pay, depending on the particular circumstances. The employee also must receive those employee benefits which would have been accrued had (s)he not left for uniformed service.

Virtually all employees are covered by USERRA. The only employees who are not protected by USERRA are those who occupy positions that are deemed to be "brief nonrecurrent", i.e. not reasonably expected to "continue indefinitely or for a significant period." In other words, the

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<sup>1</sup> This overview provides a brief summary of particular USERRA requirements. It does not represent a complete review of pertinent requirements and does not contain all possible nuances and exceptions in this law. Nor does this brief review represent legal advice regarding any particular situation. For answers to particular questions, feel free to contact me.

employee must hold an “other than temporary” position. Accordingly, positions of employment held for short, intermittent periods in which the employee could not have had any reasonable expectation of continuing and/or definite employment for an extended period of time generally do not qualify for protection under the USERRA.

Unlike other federal laws such as COBRA, there are no exceptions in USERRA for employers who have a small number of employees. As indicated, USERRA protects those who serve in the “uniformed services”--the U.S. Armed Services, the Army National Guard, the Air National Guard, and the commissioned corps of the Public Health Service, and other categories established by the President during times of war or other emergency. “Service” in the uniformed services encompasses all types of voluntary and involuntary service, including active duty, active duty for training, inactive duty training, full-time National Guard duty, and the like. Covered employees, may serve, for example, in Iraq, Afghanistan, and elsewhere in America’s war against terrorism.

### **Reemployment and Other Obligations**

USERRA imposes a number of obligations on employers, including reemployment and retention requirements. The nature of the employer’s reinstatement obligation generally is based on the length of the employee’s military service. An employee whose service lasts less than 90 days must be “promptly reemployed” in the position (s)he would have held had (s)he remained continuously employed, so long as the employee is qualified or can reasonably become qualified for that work. If the employee is not and cannot become qualified for that position, (s)he should be returned to the position (s)he left. If the employee cannot become qualified for either position, (s)he is to be reemployed in a position that is the nearest approximation of those positions which (s)he is able to perform, with full seniority, as applicable.

If military service exceeds 91 days, the employee is to be reinstated to the position (s)he would have held if continuously employed if the employee can become qualified for that position after reasonable efforts by the employer. Only if the employee is not able to become qualified to perform in such position (s)he would be returned to his/her prior position. Further, the employee may only be reemployed in a position of lesser status and pay that (s)he is qualified to perform if the employee cannot qualify for other opportunities described above.

The employer must make reasonable efforts to qualify returning service members who are not qualified for reemployment in a position to which they would have been entitled for reasons other than a disability incurred or aggravated by military service, in the absence of “undue hardship to the employer.”

Note that a three-part reemployment scheme also is required (in the absence of “undue hardship”) for employees who have disabilities that were incurred or aggravated during military service. The employer’s obligations in this regard include, for example, providing training and other reasonable accommodation to facilitate the performance of the duties of the position the returnee would have held if continuously employed, the provision of an equivalent position for which the employee is qualified if that is not possible, and the provision of an alternative position which most readily approximates an equivalent position in terms of seniority, pay, and status if the returnee is not qualified for the other opportunities.

Generally, to initiate the employer’s obligations, an employee must fulfill certain requirements. For example, the employee (or an appropriate officer) must provide advance notice (verbal or written) to the employer of the employee’s request for military leave, except when notice is

impossible or unreasonable. Additionally, the military leave generally must not exceed five years (although that may be extended in certain circumstances); the employee must be honorably discharged from military service; and (s)he must timely report back to the employer.

The time periods for reporting back vary depending upon the length of military leave, as follows:

- (1) If the time period of an employee's uniformed military service lasted less than 31 days, the employee must return to his/her civilian job at the beginning of the next regularly-scheduled work period on the first full day after from service. The employer, however, must take into account the time necessary for the employee's safe travel home, plus an eight-hour rest period.
- (2) If the time period of an employee's military service lasted more than 30 days, but less than 181 days, the employee must submit an application for reemployment with the employer within 14 days of release from service.
- (3) If the time period of an employee's military service lasted more than 180 days, the employee must submit an application for reemployment with the employer within 90 days of release from service.
- (4) The reporting or reemployment deadlines are extended up to two years when the employee is hospitalized or due to a disability or aggravated during military service.

### **Employee Benefits**

The employee benefits protected by USERRA include, but are not limited to, rights and benefits under medical plans, pension plans, dental plans, short and long-term disability plans, accident and sickness plans, pension plans, 401(k) plans, ESOPs, vacation and paid leave programs, severance pay, bonuses, and other employment-related benefits. USERRA also differentiates between seniority-based benefits and non-seniority benefits, as briefly outlined below.

### **Seniority-Based Benefits**

Upon returning from military leave, an employee must be given all seniority-based employee benefits that the employee had at the time the military leave began, as well as all additional seniority based benefits that the employee would have accrued had (s)he remained employed. "Seniority based employee benefits" include any benefit of employment that accrues with or is based upon length of service. Such benefits must be provided to the employee upon return as if the employee had remained employed, based upon the USERRA-defined "escalator principle." The "escalator principle" essentially requires that, upon the employee's return from military leave, the employee must get back on the escalator exactly where the employee would have been had (s)he never gotten off. If the employee does not return from military leave as required by USERRA, (s)he generally will have no rights to the seniority-based benefits.

### **Non-Seniority-Based Benefits**

During an employee's military leave, the employee has a right to the same non-seniority based employee benefits that the employer provides to any employee on a non-military leave. If the employer provides different levels of benefits to employees on different types of leave, the employee on military leave is entitled to the most favorable treatment that is accorded any type of leave by the employer. For example, if the employer permits an employee on ADA leave or

FMLA leave to continue to participate in the employer's long-term disability plan during leave, the employer must allow an employee on military leave to continue to participate in the long-term disability plan. If the employer requires that an employee on leave pay a portion of the long-term disability premiums and the employee chooses not to do so, generally, the benefits may be discontinued. Additionally, if the employee would not be entitled to a non-seniority based benefit if (s)he were actually employed, the employee is not entitled to such non-seniority based benefit while on military leave. Further, the employer may not terminate or force an employee to resign in the event when (s)he goes on military leave. Any such termination or resignation will have no effect in determining the employee's right to non-seniority based employee benefits, unless the employee provides a written notice of intent not to return and knowingly and voluntarily waives his/her rights to those benefits.

### **Vacation and Other Paid Leave**

USERRA requires that an employer provide an employee who goes on military leave with the right to use any vacation, annual, or similar paid leave that accrued before the military leave began. However, USERRA prohibits an employer from requiring that an employee use such paid leave when the employee goes on military leave.

### **Termination**

Generally, a reemployed employee who served in the military for more than six months may only be discharged for "cause" for one year from the date of return to civilian employment. The USERRA requirement to discharge only for "cause" lasts for six months from the date of reemployment for the returnee whose military service lasted between 31-180 days.

### **Health Care Benefits**

USERRA has special provisions relating to health care benefits. For military service lasting less than 31 days, the employee's health care coverage must remain in place as if the employee had not been absent from his/her position of employment. Otherwise, the employer generally must provide employees with COBRA-like coverage under any health care plan when the employee goes on military leave. A health care plan includes a plan, policy, contract or other arrangement under which health services for individuals is provided or such expenses are paid. This definition includes, for example, certain dental, vision and health benefits. As indicated, unless the military leave is less than 31 days, the employer may charge 102% of the full premium for the coverage elected for the extended health care plan coverage, which may be continued for up to 18 months. Note that the employer should be cautious in setting deadlines and terminating coverage for non-payment, because USERRA does not expressly authorize termination for non-payment. The employer should make sure that the employee is given prior notice of all time periods and requirements, and clear advance notice of termination of coverage. Further, if the employer provides an employee on a different type of leave with health care benefits that are greater than COBRA-type benefits, the employer must provide the same benefits to an employee on military leave. Upon an employee's return from military leave, no waiting period, pre-existing conditions, or other restrictions may be applied to the employee or his dependents. Of course, in this area, as elsewhere, nothing prevents the employer from exceeding USERRA's requirements.

## **Retirement Plans**

USERRA has special provisions relating to retirement benefits, and pension counsel should be consulted for guidance in that area. Generally, however, USERRA requires that the period of military leave be counted as covered service with the employer for eligibility, vesting, and benefit accrual purposes in the employer's retirement plans. An employee who returns from military leave is to be treated as if (s)he had been continuously employed regardless of the type of retirement plan the employer has adopted. However, an employee who is reemployed is entitled to accrued benefits resulting from employee contributions only to the extent that the employee actually makes the contributions to the plan. USERRA has particular provisions requiring 401(k) plans, and employer and employee contributions thereunder.<sup>2</sup>

The above information has been provided as an overview of basic employer obligations under USERRA. Feel free to call if you have particular questions.

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<sup>2</sup> Note: Other laws also may be applicable to employees in military leave status. For example, under the Soldiers' and Sailors' Civil Relief Act, generally, a retirement plan must reduce the interest rate charged on participant loans to six percent during a military leave. Here again, pension counsel should be consulted regarding questions of this nature.