

## **FMLA & USERRA – What is the relationship?**

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In a time where many members of the National Guard and reservists have been deployed for duty, either throughout the United States or abroad, legal compliance with the laws that apply to employee leaves of absence is crucial. Specifically, compliance issues may arise when evaluating the relationship between the Uniformed Services and Reemployment Rights Act (USERRA) and the Family & Medical Leave Act (FMLA).

USERRA is a Federal law that provides re-employment rights for veterans and members of the National Guard and Reserve following qualifying military service. It also prohibits employer discrimination against any person on the basis of that person's past military service, current military obligations or intent to join one of the uniformed services. Upon satisfactory completion of military service, USERRA generally requires that employees qualifying for re-employment are restored either to their former positions or, if their former positions are not available, to jobs that are equal to their former positions in status and pay; provided employees make a timely request for the same.

FMLA is a Federal law that provides eligible employees of a covered employer the right to take up to 12 weeks of unpaid leave during any 12-month period for one or more of the following reasons: the birth and care of the newborn child of the employee; placement with the employee of a son or daughter for adoption or foster care; care for an immediate family member (a spouse, child, or parent) with a serious health condition; or when the employee is unable to work because of a serious health condition. For a person to be considered an eligible employee, the individual must have been employed by the employer for at least 12 months and must have worked at least 1250 hours for that employer during the 12 month period preceding the start of the leave.

However, situations arise when an employee returning from active duty requests a leave of absence under FMLA; however, the employee may not have the requisite 1250 hours of service for eligibility. In these situations, employee eligibility pursuant to FMLA will depend upon whether the employee would have satisfied the requirements outlined above had military service not been performed.

Under USERRA, employees who conclude their military service and are re-employed receive all benefits of employment that they would have obtained if they had been continuously employed, except those benefits that are considered a form of short-term compensation. When determining eligibility for FMLA leave of absence, a person re-employed after conclusion of military service must be given credit for any months that he or she would have been employed but for the military service. Thus, a person re-employed following military service should be given credit for the period of military service towards the months-of-employment eligibility requirement, i.e., each month served performing military service counts as a month actively employed by the employer. Likewise, a returning employee should be credited with the hours of service that would have been performed but for the period of military service. A person re-employed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1250 hour requirement.

FMLA rights may be further expanded for military families through recent legislation that was

overwhelmingly passed by the United States Congress. The National Defense Authorization Act provides for 12 weeks of FMLA leave to a spouse, son, daughter or parent to care for issues related to the call-up to active duty. Additionally, 26 weeks of FMLA leave may be granted for a spouse, son, daughter, parent or nearest blood relative to care for a recovering service member. Leave can be used on an incremental basis under each category.

President Bush recently vetoed the bill based upon provisions attached to the legislation. However, in light of the overwhelming bi-partisan support of this legislation by Congress, the possibility of a veto override exists when Congress reconvenes in mid-January 2008. This legislation should continued to be monitored to ensure compliance if the bill is enacted.

In summary, it is evident that employees may have FMLA rights upon their return from military deployment, Whether FMLA rights exist can be determined only through review of each individual's specific situation, employment and military service.