

Employees Returning From Military Leave: Newest Potential Legal Liability For Employers

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In the last 3 years over a quarter of a million citizen-soldiers have returned from military service to their previous civilian jobs² The purpose of this article is to examine the legal duty of U.S. employers relating to reemployment of employees returning from military leave. To a major extent, the federal statute, Uniformed Services Employment and Reemployment Rights Act (USERRA)³ defines employee rights and employer obligations with regard to military leave.

Employers already have a legal and ethical duty to protect against workplace violence. One of the effects of the increase in employees returning from military leave is the specter of expanded tort liability because of additional new employee rights and employer obligations. Therefore, it is important for employers to thoroughly understand USERRA, related regulations, but also understand related employment tort law, to avoid potential legal liability for violating employee rights.

Answers to the following key questions are explored in this article:

- 1) What action if any must an employer take if the employee returning from military leave is disabled?
- 2) Does an employer have a duty to ascertain if the employee returning from military leave is susceptible to post traumatic stress disorder (PTSD) or similar mental disorder?
- 3) Does the U.S. military have an obligation to advise employers about whether or not the employee returning from military leave may be susceptible to PTSD or similar mental disorder?

Employees completing military leave must notify their employers of intent to return to establish under USERRA an unqualified right of re-employment.⁴

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² Ogletree Deakins, Employment Law Authority – October/November, 2004, p. 4

³ 38 U.S.C. 4301, *et al*

⁴ *id*

Uniformed Services Employment and Reemployment Rights Act

Essentially, USERRA protects job rights of employees who voluntarily or involuntarily take military leave of absence, and prohibits discrimination in the workplace against job applicants and employees with military service.⁵ The U.S. Department of Labor has authority to interpret and enforce this federal statute.⁶

Full and part-time employees absent from their civilian jobs due to active duty, training or fitness exams in the uniformed services who have given proper notice to their employer are generally protected under USERRA. “Uniformed services” means all branches of the U.S. military including Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard units and Reserve units.⁷ Additionally, certain employees absent due to disaster response work are covered by USERRA.⁸ This far reaching federal statute prohibits discrimination against persons who are members of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a U.S. uniformed service.

The pre-service civilian employer must promptly reemploy the person taking leave provided:

- the cumulative period of service is no more than five years (with certain exceptions);
- the person must not have been dishonorably discharged or for other punitive condition;
- proper notice prior to absence due to uniform service is given to the pre-service employer;
- the person must return to the pre-service civilian job within the prescribed time limit or submit a timely application for reemployment. (Requirements for timely notice depends upon length of uniform service.)⁹

State laws, such as the California Family Rights Act or local city/county measures, which may provide greater protections and benefits, are not preempted by USERRA.

It is important to note that if a returning employee was disabled during military duty then the deadline for reinstatement to pre-service job may be extended for up to two years. Reasons for the extension are time required for reasonable accommodation or time for convalescence.

⁵ 38 U.S.C. 4303 (16)

⁶ DOL’s Veteran’s Employment and Training Service (VETS) generally promulgates regulations which clarify provisions of USERRA, their application, and enforcement (www.dol.gov/vets; www.dol.gov/elaws/userra.htm 2005) VETS also allows an employee to enforce USERRA rights by filing a private lawsuit without filing a complaint.

⁷ 38U.S.C. 4303(16)

⁸ Public Health Security and Bioterrorism Response Act (2002)

⁹ Details regarding specific prerequisites are available at www.esgr.org

Exactly when the returning employee assumes job duties also depends upon whether or not a reasonable accommodation is required under the federal Americans with Disabilities Act (ADA)¹⁰, or an equivalent state statute. ADA applies to employers engaged in interstate commerce who have 15 or more employees for at least 20 calendar weeks in the current or preceding calendar year. ADA prohibits discrimination against disabled persons who are able to perform the essential functions of the job after reasonable accommodation. Reasonable accommodation is generally not required if an undue hardship for the employer would result. “Disabled” for purposes of ADA is defined as a person (1) having a mental or physical impairment substantially limiting one or more major life activities, (2) having a record of such impairment, or (3) is considered to have such physical impairment.

Employers are, therefore, constrained under federal and state statutes from requiring an examination for fitness to return to work by employees who have taken leave of absence. In light of these restrictions, when does an employer have an obligation or right to have a returning employee take a physical or psychological examination? Does an employer have a duty to require such an exam in order to protect against potential harm to co-workers by a returning employee who may have PTSD ?

ADA prohibits employers from conducting pre-employment medical exams and/or inquiries about an applicant’s or employee’s disability, unless such exams or inquiries are job related and justified by business necessity. For example, confidential exams after hire or reemployment but prior to starting work are legally permitted if performance of the job (“job-related”) requires certain minimum physical attributes. Under these circumstances it may be prudent for employers to adopt a policy, applied on a uniform non-discriminatory basis, of having all employees returning from military leave to take a confidential routine exam. The purpose justified by business necessity would be to take reasonable precautions to make sure that the returning employee is able to handle job related stress without creating a risk of harm to oneself or co-workers. In other words, employers should take a proactive good faith effort to assist – as a form of reasonable accommodation - the returning employee to safely transition to a productive work environment, particularly if there is a known physical or mental disability.¹¹ A helpful example of similar policy for employees who return from military leave are those used under the federal Family and Medical Leave Act (FMLA).¹² FMLA and equivalent state statutes essentially permit employers to require employees who have taken leave for a “serious health condition” to furnish a certification from the healthcare provider before being allowed to return to work.

¹⁰ Public Law 101-336, 1990

¹¹ For example, California *Government Code*, § 12926.1-n (AB 2222) imposes a duty on employers to engage in “timely good, faith interactive process” with employees and applicants to determine if an effective reasonable accommodation if there is a known physical or mental disability.

¹² See www.dol.gov . Also, an equivalent state statute is the California Family Rights Act, amending the Fair Employment and Housing Act

Employment Torts

A tort is, generally, a wrongful act or omission that causes physical injury or interference with physical security and freedom of movement, damage to property, or invasion of protected interests. Commonly spoken of as a private wrong, as opposed to public wrong, which is called a crime. Most states permit compensatory and punitive damages.¹³

One of the threshold torts is negligence, including negligence by employers. Negligence occurs when there is a failure to exercise the degree of care expected of a prudent individual (or employer) in like circumstances to protect others from foreseeable and unreasonable risk of harm. The duty of care sometimes is defined by statute, sometimes by court cases.¹⁴

One type of employment tort relevant to the issue of employees returning from leave of absence may be negligent retention.¹⁵ The most common example is where an employer fails to take reasonable steps to protect co-workers from obvious violent tendencies of an angry confrontational employee who eventually injures a co-worker.

Based on the foregoing, employers have a duty to take steps to make sure that employees returning from military duty do not pose a direct serious threat to co-workers, without violating anti-discrimination statutes relating to disabled persons, e.g. ADA, California Fair Employment and Housing Act (AB 2222).¹⁶

Impact on Employee Benefit Plans

Retirement Plans

Under USERRA uniformed service of the returning employee generally counts for participation eligibility, vesting and benefit accruals under qualified retirement plans.¹⁷ Under the Servicemembers Civil Relief Act (SCRA)¹⁸ provides that interest on 401(k) plan loans to active duty military in excess of 6% per year must be forgiven.

Life Insurance

¹³ Law of Torts (4th edition), William L. Prosser, West Publishing

¹⁴ E.g. *Randi v. Muroc Joint Unified School District*, Ca. Sup Ct. 14 Ca 4th 1066 (1997); persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct.

¹⁵ E.g. California AB 1068 and AB2868.

¹⁶ Refer to *Eschazabal v Chevron* case in which the U.S. Supreme court set the standard for employer's duty to prevent injury to the employee and/co-workers when the employees physical or mental condition poses a direct threat in the workplace without healthcare provider release to return to work.

¹⁷ www.dol/vets/programs/userra/main/htm (2004)

¹⁸ SCRA (2203) §207

SCRA prohibits cancellation of coverage of life insurance for employees on military leave.¹⁹

Medical and Consolidated Omnibus Budget Reconciliation Act (COBRA)

Under USERRA generally permits employees on military leave to extend health plan coverage to up 24 months at a rate of not greater than 102% of the full premium under the plan.²⁰

COBRA essentially allows eligible employees and covered dependents to elect to continue for a limited period group medical, dental and vision plans sponsored by employers at group rates if a “qualifying event occurs.”²¹

Employee Assistance Program (EAP)

Although not required by law, an EAP may be particularly helpful for certain transitioning employees to return to work. More importantly, employers may be held to a new standard of care by having employee assistance program capable of repatriating employees returning to work from military leave. (Recent surveys indicated that not all EAP providers have professionals trained to provide

New Duty of Employers: Transitioning Employees

- Monitoring and assisting

In light of the impact on several employee benefit plans, employers need to have a procedure for transitioning employees back to work. For example, an employer may have an obligation to provide a reasonable accommodation to any disabled employee released to return to work. An employer *may* have an obligation to determine if there is any military disability requiring a reasonable accommodation under state and federal disability statutes.²²

An important question relating to how an employer assist an employee return to work is whether the employer has an affirmative duty to find out if the employee is susceptible to Post Traumatic Stress Disorder (PTSD) or other mental disorder. Must the employee disclose such information? The answers to these questions must take into consideration the privacy requirements under ADA and HIPAA.²³

¹⁹ SCRA §404

²⁰ Veterans Benefits Improvement Act of 2004 (Public Law 108-422). §§ 4301, et seq. provide greater healthcare continuation coverage for employees and requires employer notices that advise employees of USERRA rights.

²¹ 29 U.S.C. §§ 1161-1169; amends the Employee Retirement Income Security Act of 1974; notice regulations Fed. Reg. 31832 (www.dol.gov)

²² E.g. Americans With Disabilities Act of 1990, Public Law 101-336 (www.usdoj.gov)

²³ Supra; Health Insurance Portability and Accountability Act (1996)

- Require disclosure of EAP or other support group referral information
- Review health plans for specific coverage of PTSD with brokers or insurance carrier representatives.
- Train HR professionals and supervisors to understand the basics of PTSD, including what it is, how to recognize possible symptoms, how and when to respond with attempts at reasonable accommodations and related ADA requirements.

Employers are not required to accept an employee returning from military leave *if* circumstances in the organization change to the point that re-employment of such employee is impossible or unreasonable, or in the case of qualifying disability accommodation would cause undue hardship.²⁴

Impact on Wages & Other Workplace Issues

Military Differential Pay

The difference between an employee's former pay and military pay for employees on military leave is subject to employment taxes.²⁵ However, employers cannot collect employment taxes on the differential pay of former employees nor allow them to continue participating in qualified plans with election deferrals.

Scheduling Work Assignments

Return to work may require coordination with other mandated time off from work benefits, such as Family and Medical Leave Act and similar state statutes, e.g. California Family Rights Act.

PTSD & Symptoms

PTSD²⁶ is a mental illness attributable some sort of trauma, e.g. military combat. Symptoms include memory loss, intolerance, anger, sleep problems and depression. Frequently victims of PTSD do not seek help because they do not want to appear weak.²⁷ Veteran's Administration psychiatrists may prescribe outpatient group-therapy Effective PTSD prevention and treatment programs have become more commonplace. The U.S. military has various transition or "debriefing" programs to assist persons completing their

²⁴ 38 U.S.C. 4312(d) (1)

²⁵ Revenue Rulings 68-238, 69-136; Employment taxes include FICA, FUTA and income tax withholding (Note: Congress started in 2005 to consider legislation to change these rulings.)

²⁶ National Center for PTSD; <http://www.ncptsd.va.gov/>; VA/DOD Clinical Practice Guidelines

²⁷ E.g. Dr. Charles Hoge, chief of psychiatry, Walter Reed Army Institute of Research

military service to return reemployment.²⁸ More study seems to be needed regarding foreseeability of potential harm and steps needed to prevent such harm in the workplace.

Conclusion

USERRA provides some job protection rights for employee return take military leave. Employers need to have a comprehensive understanding of these rights both from a legal compliance standpoint, but also for practical purposes. Organizations want reemployed employees to return to maximum productivity as soon as possible. Applicable statutes primarily involve USERRA, ADA and COBRA. But the legal issue of duty of care of the employer is may be equally important for employers to be concerned about.

Therefore, employers may be between the proverbial “rock and a hard place”. On the one hand, the employer is required to protect the job within certain limits and the rights of the employees returning from military leave. On the other hand, employers must provide a safe work environment and protect against harm to employees by co-workers with known (or should be known) propensity for violence, e.g. negligent retention.

To meet this duty, employers must take proactive steps as follows:

- 1) HR professional should arrange meeting with employee, and legal dependents, if any, before military leave to explain USERRA rights and benefits.
- 2) Build a thorough understanding of the rights of employees under USERRA; Develop and implement easily understood communications for employees and dependents.
- 3) Adopt an EAP, or upgrade existing EAP to include counseling for employees returning from military leave.
- 4) Develop and implement a repatriation policy and procedures for proper administration of employees returning from military leave; Institute related training programs for HR professionals.
- 5) Ask legally permitted questions to ascertain whether or not returning employees are disabled and, therefore, whether or not a reasonable accommodation is available; Require on a uniform nondiscriminatory a *certification of healthcare provider* of release to return to work, similar to release required for FMLA leaves.
- 6) Post mandatory notices regarding USERRA rights;
- 7) Consider converting to Paid Time Off (PTO) plan, if not already implemented; and,
- 8) Assess possible need for reasonable accommodation, i.e. EAP and VET referral, to assist disabled employees returning from military leave.
- 9) Develop risk management strategies to strengthen workplace violence prevention programs to include assessment of violence potential due to PTSD, and implement preventative measures

²⁸ E.g. U.S. Army’s *Well-Being* program

There are strengths and weaknesses to each of these recommendations. But employers need to take a proactive approach by reviewing their current policies and procedures for assisting employees returning from military duty.