

THE EFFECT OF MILITARY LEAVE ON HEALTH INSURANCE COVERAGE AND FLEXIBLE BENEFIT PLANS

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (P.L. 103-353) was signed into law on October 13, 1994 to improve the reemployment rights and employee benefits of Veterans. The current applicability of USERRA is timely in consideration of the return to active duty of military reservists and members of the National Guard.

Overview of USERRA

USERRA contains specific rules addressing reemployment and employment retention rights following a military leave as well as specific requirements for employee benefits. One of USERRA's basic goals is to provide for the protection of seniority that the person had at the commencement of military leave, plus additional seniority rights and benefits the person would have attained if the person continued employment during the covered leave.

Employers covered by USERRA include private, state, and federal governmental employers. Unlike COBRA, there is no exception for small employers or governmental employers.

The term "service" as referenced by USERRA means the performance of duty on a voluntary or involuntary basis in the Uniformed Services. This includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and the time necessary for a person to be absent from employment for an examination to determine the fitness of the person to perform any of these duties. The Uniformed Services include the U.S. Armed Services (including the Coast Guard), the Army National Guard and the Air National Guard, and the commissioned corps of the Public Health Service.

Entitlement to reemployment, retention and benefit rights under USERRA is dependent on Service that ends honorably. A separation from service or discharge that is dishonorable or based on bad conduct, on grounds less than honorable, AWOL, or ending in a conviction under court martial would not result in USERRA protection.

Once the honorable discharge condition is met, an Employee seeking to enforce a USERRA right or entitlement must meet the following criteria:

- The employee, or a representative of the Uniformed Service, must have given the employer advance written or verbal notice of the impending Service unless such notice is precluded by military necessity.
- The employee's absence from work must have been on account of performing Service in the Uniformed Services.
- The cumulative length of the absence and all previous absences for periods of Service in the Uniformed Services must not exceed five years (with certain exceptions).
- The employee normally must have complied with the certain time deadlines for reporting for work or for applying for reemployment (anywhere from 8 hours to 90 days depending on the length of Service).

If the employee's absence from work on account of military leave was for more than 30 days, the employee must furnish any available documents requested by the employer to establish that the employee is entitled to the protections offered by USERRA. USERRA does provide an exemption from the reemployment requirements if changed circumstances make reemployment impossible or unreasonable, or if it would impose an undue hardship on an employer. However, caution should be exercised when denying reemployment rights as the employer must adequately substantiate the claimed exemption.

Effect of USERRA on Health Coverage

There are two options available to employers for the continuation of employer-provided health coverage (medical, dental, and vision) for employees on military leave. The first option is to continue health insurance under the same terms and conditions as any active employee. The second option is to provide employees on military leave with continuation of coverage rights under USERRA that are similar to COBRA.

A COBRA qualifying event occurs when an employee is called up to active duty and the group health plan under which he or she (and his or her spouse and/or dependents) is covered is otherwise subject to the continuation coverage requirements. This is applicable if the employer does not voluntarily maintain coverage for the reservist.

USERRA does not incorporate many of COBRA's rules such as payment of premium requirements, termination of coverage when a beneficiary becomes entitled to other group coverage, extending the duration of continuation coverage for disabled persons, or multiple qualifying events. Because military leave will constitute a qualifying event under COBRA, the provisions of COBRA will apply when the provisions of USERRA do not address continuation of coverage issues.

If a qualifying event occurs due to military leave, the group health plan must offer the reservist and the reservist's spouse and dependents (if they were covered under the plan) an election to continue coverage under COBRA. In addition, each qualified beneficiary must be furnished with a notice of COBRA rights under the same practices that employer's observe for other qualifying events. Employers that do not voluntarily continue coverage for employees who stop working due to a military leave should consider the following recommendations:

- Provide all qualified beneficiaries a COBRA election notice, as required by COBRA.
- If the person's military Service is for less than 31 days, do not require payment of the full COBRA premium. USERRA permits the plan to charge the employee with only his or her share of the premium within this time frame.
- The maximum length of continuation coverage required under USERRA is 1) the lesser of 18 months (beginning on the day that the military leave commences), or 2) a period beginning on the day that the military leave commences and ending on the day after the employee fails to return to or reapply for employment within the time allowed by USERRA.
- If a qualified beneficiary becomes entitled to Medicare, or becomes covered by another group health plan, during the 18-month USERRA maximum coverage period, do not terminate the qualified beneficiary's continuation coverage. USERRA does not permit termination under these circumstances. The only circumstance permitting cancellation of

continuation coverage mandated by USERRA is failure to return or reapply for employment within the required time period (anywhere from 8 hours to 90 days depending on the length of Service).

- Do not require payment of the initial premium before expiration of the COBRA 45-day grace period. This is true even if the period of service is less than 31 days. USERRA does not have a provision for the termination of continued coverage for non-payment of premium. The guidelines under COBRA should be followed in these instances.
- Should an employee and/or dependents elect to continue their health coverage pursuant to USERRA, such employee and/or dependents would be required to pay 102% of the full premium for the coverage elected (same rate as COBRA).

An employee returning from Service in the Uniformed Services, within the time frames established by USERRA, is guaranteed the right to reinstatement in the employer's health plan without coverage limitations attributable to the Service-related break in coverage. An employee whose coverage was terminated during the period of Service (and the employee's dependents) must be reinstated in that coverage without exclusions for preexisting conditions or a waiting period. However, reinstatement may be prospective (i.e., claims for medical care rendered during the period of non-coverage need not be reimbursed) and the Plan may contain exclusions for disabilities, injuries, or illnesses found by the Veterans Administration to have been incurred or aggravated during the covered Service.

Employers that voluntarily maintain full coverage under their group health plans for reservists and their families do not have to offer the reservists, or their family members, a COBRA election. The continuation of coverage under these situations should be treated by the employer as any other leave, e.g. FMLA leave. Reservists should be given the opportunity to pay their normal contribution for health care coverage for themselves and their dependents during military leave. An employee's voluntary termination of coverage that he or she would otherwise be eligible to maintain is not a COBRA qualifying event.

The termination of coverage due to the failure of the reservist to pay his or her normal contribution during military leave should be treated differently than FMLA leave. Coverage can be terminated at the end of any period for non-payment of required contributions. Termination of coverage can be immediate, such as the end of a month in which contributions were not received. Unlike FMLA leave, the termination of coverage is a COBRA qualifying event as of the date that coverage ceases, not at the end of the leave period. Reservists should be given the same notices that you would give any other COBRA beneficiary, and the rules and provisions of COBRA and USERRA will then apply to his or her rights to continued coverage. Employers do have the option of measuring the required periods of continued coverage from the date that regular coverage ceases, or from the date that an employee would have otherwise had a reduction in hours or loss of eligibility, e.g. the start date of the leave. In the case of reservists, it is probably better for employers who voluntarily maintain full coverage to treat the date that coverage is terminated for non-payment of contributions as the date of the qualifying event.

Effect of USERRA on Flexible Benefit Plans

Employers who voluntarily continue coverage to employees on military leave will need to address employees' participation in a flexible benefit plan. The issues to be addressed are the pre-tax contribution of insurance premiums, and contributions to a Health Care Reimbursement Account and Dependent Care Reimbursement Account.

USERRA does not directly address how participation in a flexible benefit plan should be treated during a covered military leave. The proposed FMLA regulations provide direction that is applicable to employees covered under the provisions of USERRA. The FMLA regulations provide three ways to handle employee insurance contribution elections under a flexible benefit plan during leave: the "pre-pay" option, the "pay-as-you-go" option and the "catch-up" option.

- Continuing Coverage via Prepayment of Contributions: The "Pre-Pay" Option:

Prior to the commencement of military leave, the employee is given the opportunity to prepay the contributions the employee is expected to owe during the leave period. The employee's regular salary reduction election for the duration of the leave is then suspended, but his or her benefit election remains in force during the leave. The employer could pay its share of the cost in the same manner as before the leave or require that the employee pay the full cost of coverage. When the leave ends, the employee's previous flexible benefit plan salary reduction election resumes for the duration of the plan year unless the employee makes a change in family status election upon return from the leave. If the employee's leave will straddle two plan years, payments attributable to subsequent plan years must be made on an after-tax basis in order to avoid the rule which prohibits contributions from one year from funding benefits in a subsequent year.

- Continuing Coverage via After-Tax Contributions: The "Pay-As-You-Go" Option:

Under the pay-as-you-go option, the plan could permit an employee to elect to pay for the cost of coverage during the leave. The contributions could be paid with after-tax dollars or pre-tax dollars to the extent that the employee receives compensation during the leave. When the leave ends, the employee's previous salary reduction election resumes for the duration of the plan year unless the employee makes a change in family status election upon return from the leave.

If the employee stops making contributions during the leave, and the employer doesn't make such payments on the employee's behalf, the employee's coverage would cease. If the employee returns to work after the leave, USERRA requires the employer to allow such employee to reenter the flexible benefit plan immediately upon the employee's return.

- Continuing Coverage Via Promise to Make "Catch-Up" Salary Reduction: Contributions Upon Return From Leave:

Under the "catch-up" option, the employer pays both the employer share and the employee share of the cost of coverage during the leave. The employee's health coverage is not changed for the leave. The employer pays for the coverage with the understanding that when the employee returns to work, the employee will repay the amount the employer advanced. When the employee returns from leave, the employee would make a special catch-up salary reduction that will cover his or her contribution amounts that were paid by the employer during the leave. (Although there

is no guidance on this issue, it would seem that catch-up contributions could be made on a pre-tax basis for a prior year's coverage). The employee could also repay his or her contributions with after-tax dollars. When the leave ends, the employee's previous salary reduction election resumes for the duration of the plan year unless the employee makes a change in family status election upon return from leave.

Health Care Reimbursement Account Issues

A flexible benefit plan that has a health care reimbursement account (HCRA) must conform to the generally applicable rules concerning health coverage and eligibility for employees who take a leave. Employees on military leave who are enrolled in a HCRA will be able to:

- Continue coverage under a HCRA while on leave. This would include the continuation of both employer-provided flex plan credits and elective pre-tax employee contributions to fund the HCRA election amount.
- Revoke an existing HCRA election under the cafeteria plan for the remainder of the coverage period.
- Elect continued coverage as a COBRA beneficiary if a positive account balance exists when the existing election is revoked or eligibility is lost.

USERRA requires the plan to permit the employee to be reinstated in the HCRA upon return from military leave on the same terms and conditions that existed prior to the start of the leave.

The uniform coverage rule applies during the leave period as long as the employee continues HCRA coverage. Regardless of the payment option selected by the employee, as long as the employee continues coverage, the full amount of the employee's HCRA election, less any prior reimbursements, must be available to the employee at all times (the uniform coverage rule) during the period of the leave.

If an employee's coverage under the HCRA terminates while the employee is on leave, the employee is not entitled to receive reimbursements for claims incurred during the period after the coverage is terminated. If that employee subsequently elects to be reinstated in the HCRA upon return from leave for the remainder of the plan year, the employee may not retroactively elect HCRA coverage for claims incurred during the period when the coverage was terminated. Further, the employee is not entitled to greater HCRA benefits relative to contributions paid than an employee who has been continuously working during the plan year. Therefore, if an employee elects to be reinstated in the HCRA upon return from leave, the employee's coverage for the remainder of the plan year would likely be the employee's election for the 12-month period of coverage prorated for the period during the leave for which no contributions were paid, and reduced by prior reimbursements.

An employee on military leave has the right to revoke or change elections (e.g., because of qualified status events) under the same terms and conditions that apply to employees participating in the flexible benefit plan who are not on military leave. Notwithstanding the rules described above, an employee who returns from leave may make a new HCRA election for the remainder of the plan year if return from leave is a qualified status event under the employer's flexible benefit plan.

Dependent Care Reimbursement Account Issues

Dependent Care Reimbursement Accounts (DCRA) have different considerations than Health Care Reimbursement Accounts for employees on any type of leave. The loss of eligibility as a participant in a DCRA is not a COBRA qualifying event.

Employees on military leave can continue their participation in a DCRA. Contributions for the DRCA can be from any combination of employer-provided flex plan credits or elective pre-tax employee contributions. DCRA participants must satisfy the Internal Revenue Code (IRC) requirements that they be gainfully employed and meet the other criteria in order to be able to claim day care expenses. This requirement is applicable without regard to the employer of the DCRA participant. The day care expenses must also be incurred by dependents that are considered eligible under the IRC provisions.

DCRA participants that cease to make their contributions during their leave will lose their eligibility. While this is not a COBRA qualifying event, there are ways for a participant to access unreimbursed balances in a DCRA after participation has terminated. DCRA balances can be used to reimburse eligible expenses for employees on leave who meet the IRC requirements for being able to claim dependent day care costs. The uniform coverage rule of a HCRA is not applicable to a DCRA. Participants can only be reimbursed for the amount of their account balances.

An employee on military leave has the right to revoke or change his or her DCRA election under the same terms and conditions that apply to employees participating in the flexible benefit plan who are not on military leave. An employee who returns from military leave may make a new DCRA election for the remainder of the plan year if return from leave is a qualified status event under the employer's flexible benefit plan.

Caveat: The information in this summary is intended to inform our clients and friends about recent developments in the area of employee benefits that are of a general interest. In no case does this information constitute a complete representation of regulatory and compliance requirements, nor is it intended to be legal advice. The applicability of the information depends upon the evaluation of the specific facts of a particular situation.

For further information regarding USERRA, contact the Department of Labor's Veterans' Employment and Training Service at (202) 219-8611 or check their website <http://www.elaws.dol.gov/userra/wren/userra.htm>.

References

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