Refresher on the USERRA: Employers' Obligations Regarding Employees in Military Service

Labor & Employment Law Update

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This month, two federal circuit court of appeals reversed district courts' grants of summary judgment in cases filed under the Uniformed Services Employment and Reemployment Rights Act (USERRA). With these twin cases, it seems as good of a time as any to provide a brief refresher on employee rights and employer obligations regarding those in military service.

On December 3, 2019, the Tenth Circuit reversed a decision by the U.S. District Court of Kansas in *Greer v. City of Wichita*, which dismissed an USERRA claim alleging that a city museum denied an employee an interview for a supervisory position due to her military service in the reserves. The Tenth Circuit found that there was sufficient evidence that a jury may find that anti-military animus was a "motivating factor" in the employer's decision not to interview the employee where a supervisor had previously complained about the employee's need to attend reserves training because it conflicted with her "real job." The court made clear that statements can reflect anti-military animus relevant to a USERRA claim even where the animus relates only to the effect the military service has on scheduling or the employee's availability and does not contain negative comments about the military service more generally.

The next day, on December 4, 2019, the Seventh Circuit reversed a decision by the United States District Court for the Northern District of Illinois that granted summary judgment to an employee alleging that he was denied benefits due to his military service. In *Mueller v. City of Joliet*, a police sergeant alleged that he was discriminated against under USERRA when his employer placed him on unpaid leave and required him to use his benefit time when he needed to report to duty for the National Guard. The Seventh Circuit found that the district court incorrectly concluded that the employee's service in the National Guard Counterdrug Task Force was not uniformed service covered by the USERRA.

These two opinions resurrecting USERRA claims provide a good opportunity for employers to review the key points and protections of USERRA to make sure that they are in compliance with this federal statute:

- **What does the USERRA do?** It prohibits employers from discriminating against employees or applicants on the basis of their military status or military obligations. Specifically, employers may not deny initial employment, continued employment, reemployment, promotion or any benefit or employment because of an employee's military status.

- **What constitutes uniformed services under the statute?** The statute defines uniformed service as the performance of duty on a voluntary or involuntary basis in uniformed service, including the U.S. Reserve forces and National Guards.

- **Does the USERRA also provide reemployment rights for those who must leave their civilian jobs to serve in the uniformed services?** Yes. If an employee is eligible to be reemployed, employers must restore employees to the job and benefits they would have attained had they not been absent due to military service. This may require employers to make reasonable efforts to help returning veterans become qualified to perform the duties of the position they would have held but for the military service, including requiring employers to make reasonable accommodations for employees who have incurred or aggravated a disability during their military service.

- **Who enforces USERRA violations?** Employees may file complaints with the U.S. Department of Labor, Veterans Employment and Training Service or bypass this process and file a civil lawsuit.

It's a good idea for employers to check their applicable state statutes as well. In some instances states may extend further benefits to employees.