Make Sure You Honor Rights Of Employees In Armed Services

By: Thomas H. Clarke and Adrian Driscoll

There are a lot of misconceptions about how businesses must treat employees who are in the military reserves or the National Guard. The federal law covering those employees is the Uniformed Services Employment and Reemployment Rights Act, and there is an equivalent California law. Here are a few myths and facts about USERRA:

MYTH: The law only applies to large, private employers.

FACT: The protections are applicable to all employers, public and private, large and small.

MYTH: Legal protection applies only in times of crisis.

FACT: The anti-discrimination and employee protections apply at all times. However, USERRA's re-employment rights do not apply to call-ups by governors of a state for non-federal service;in California, re-employment protection is provided by the Military and Veterans Code.

MYTH: The law only applies to large, private employers.

MYTH: The prohibition against discrimination applies only to people called into military service.

FACT: The provisions apply to all prospective and current employees who are members of, or applicants for membership in, the uniformed services, or who have an obligation to serve.

MYTH: The law requires re-employment only of reservists following their tours of duty.

FACT: The range of protection provided is quite broad. Employers may not discriminate in the hiring, employment, re-employment, retention for promotion, or in any other benefit of employment because of past, current or planned military service.

MYTH: The application of re-employment rights applies almost without qualification.

FACT: Generally speaking, employees must meet five criteria:

1. Held a civilian job and had a "reasonable expectation that the employment will continue indefinitely or for a significant period."
2. Gave written or oral notice of military service as soon as possible.
3. Had a cumulative period of military service while working for his or her employer of less than five years. (There are several exceptions that, a practical matter, render the limitation meaningless.)
4. The military service must have been completed under honorable conditions.
5. The employee promptly reports back or applies for employment. What constitutes prompt reporting depends on the length of service. Further, an employee injured or disabled while in federal military service has up to two years to give a notice of intent to return to work.

MYTH: The employee is only entitled to get back his "old job".

FACT: The returning employee is entitled to the position he or she would have achieved if not for the military service, including job advancement. If the returning employee is not qualified for the higher position to which he or she is entitled, the employer must make reasonable efforts to train or otherwise qualify the employee.Employees are entitled to the same employment benefits as employees on a leave of absence. Returning employees are also entitled to immediate reinstatement under the employer's health plans, and their pension plans must be treated as though there was no break in service. If a returning employee cannot perform the tasks of the job he or she is entitled to as a result of injury or disability, then the employer is required to offer the "nearest approximation" of that position.

MYTH: There is little effective protection for former at-will employees.

FACT: Employees who are subject to USERRA cannot be terminated for 30 days after returning. At-will termination (except for cause) is prohibited for six months in the case of employees deployed for 30 to 180 days, and for one year in the case of employees called to service for more than 180 days.

MYTH: The penalties for violations are minor.

FACT: An employer violating USERRA may be ordered to comply with the statute through temporary and permanent injunctions, and to make up all losses of wages and benefits caused by the violation. This amount can be doubled if the violation is found to be willful. Under California law, district attorneys may also represent employees in these cases. Discrimination in employment due to military service can be charged as misdemeanors under California law, and employers can be held liable for actual damages plus attorney's fees.

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