

# Chicago Daily Law Bulletin®

Volume 154, No. 215

Friday, October 31, 2008

## When employees are called to duty

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The National Guard and the Army Reserve have made vital contributions to national security both at home and abroad and reliance upon the citizen soldier has only increased since Sept. 11, 2001.

The Illinois National Guard is deploying a Brigade Combat Team of more than 2900 soldiers to Afghanistan. This is the largest Illinois National Guard overseas deployment since World War II. The Brigade Combat Team will comprise the majority of American forces in the NATO mission in Afghanistan.

The activation of National Guard and Reserve forces has significant consequences in the communities from which they come. In a March 3, 2006, Law Bulletin article, it was reported that conflicts over the labor and employment issues of activated and returning service members were on the rise. With the upcoming Brigade Combat Team deployment, conflicts will only increase — and the need for employers to fully understand their obligations under federal law will also increase.

### Employment and Reemployment Rights under the Uniformed Service Members Employment and Reemployment Rights Act

Following the Gulf War, Congress passed legislation designed to protect the employment rights of deployed National Guard and Reserve members. The Uniformed Service Member

Employment and Reemployment Rights Act was enacted in 1994 to provide a comprehensive framework for the rights and obligations of the employer and the employed military member. The USERRA statute has the following main purposes:

- To encourage service in the Guard and Reserve by minimizing the disruption to the service member's civilian employment due to military service
- To minimize disruption to the service member's employers, family, community and coworkers by providing for prompt reemployment upon return
- To prohibit discrimination in employment and reemployment against Guard and Reserve members because of their military service.

For the protections of USERRA to apply, the service member must meet five eligibility criteria.

- 1) The employee must have left civilian employment.
- 2) The employee must have given notice that he or she was leaving to perform military service.
- 3) The cumulative period of service must not have exceeded five years — with certain exceptions.
- 4) The employee must have been released from military service under honorable or general conditions.
- 5) The employee must have reported back to work within the statutory time frame.

While it is an extensive statutory framework, some of the key provisions of USERRA provide for the following:

- Prompt reinstatement to civilian employment upon return from military duty without loss of seniority, status or pay rate
- Up to five cumulative year leave of absence from civilian employment for the period of voluntary or involuntary military service
- Continuation of seniority during period of service — including pension credit

- No termination for a defined period following return other than for just cause
- Resolution of employment issues through enforcement by the U. S. Department of Labor.

USERRA is applicable to all employers, without regard to the number of employees. When the men and women of the Guard and Reserve return from deployment, it is important that they are promptly returned to their civilian employment. The goal of USERRA is to return protected employees to the position they would have been, as if they never left.

As a resource on USERRA issues, the Department of Defense funds the Employer Support of the Guard and Reserve — a program staffed by volunteers and designed to both teach the requirements of USERRA and also engage in resolving employment disputes related to military service. ESGR supplies no cost speakers, presentations and materials to employers, labor unions, bar associations, civic and trade organizations and other interested groups. ESGR also provides the free services of hundreds of trained volunteer mediators located in every state of the union. Main conflict areas include: placement upon return from service, promotion while deployed, benefit accrual and pay rates.

### Amendments to the Family and Medical Leave Act

The effects of the National Guard and Reserve mobilizations and return are seen in the families that remain at home. In response, the Family and Medical Leave Act was amended on Jan. 28, 2008 with the National Defense Authorization Act. The amendments allow increased unpaid leave from 12 to 26 weeks for eligible employees. Eligible employees are a spouse, child, parent, or other nearest blood relative of a member of the Armed Forces who takes leave to care for a member of the Armed Forces. The leave may be taken to care for a relative

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member of the Armed Forces who is undergoing medical treatment, recuperation, or therapy, or who is otherwise in outpatient status or on the temporary disability retired list, for a serious injury or illness suffered in the line of active duty.

The FMLA amendments also permit a 12-week period of leave for “any qualifying exigency” arising from the fact that the employee’s spouse, child, or parent is on active duty or has been notified of impending active duty in the Armed Forces. The definition of “qualifying exigency” has yet to be determined. The Secretary of Labor must issue a final regulation defining

what a “qualifying exigency” before the provision will be effective. The Department of Labor has stated that the regulation will be “expeditiously prepared.”

Employees seeking leave under the new military-related amendments must meet the same eligibility requirements as all other employees seeking FMLA leave.

Also of critical import to Illinois employers is the Illinois Family Military Leave Act. The Family Military Leave Act extends unpaid leave to certain civilian family members affected by military service. The statute is modeled on the Family Medical Leave Act and is

designed to allow spouses and parents additional unpaid leave time to attend to issues related to their family member’s military service. Examples include time off to visit with the spouse or child on leave from the military or to take the spouse or child to follow up medical care for injuries or conditions related to military service.

The above statutes and regulations are designed to ensure that service members’ jobs are preserved while they are serving the country. The return of the service member to civilian life is hopefully made easier with these aspects of civilian life preserved and protected.