MILITARY LEAVE

By Karen Sutherland

Legal Background

There are both state and federal laws governing employers' rights and responsibilities with respect to employees who perform service in the uniformed services. Some of the Washington state laws are very recent, with effective dates in May 2001 and October 2001. There are also different laws for the public sector than for the private sector. As a result, be careful that the information you are relying on is current, that it applies to you, and that it takes the law of the state where your employees are employed into account. The analysis in this article is based on federal and Washington state law. The law may differ slightly in other states.

Some of the Key Laws Applicable to All Employers

With very few exceptions, all employers must grant leave for employees who are called to active duty, training for the service, National Guard duty, and being absent for an exam to determine fitness to perform any such duty.

Employees are entitled to re-employment without loss of seniority, and are entitled to participate in insurance, vacations, retirement pay, and other benefits offered by the employer "pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into the service." (The quote is from a Washington statute.) Continuation of health insurance coverage is available similar to COBRA.

Under federal law, if the employee is absent less than 91 days, the employee must be returned to the position he or she would have held if he or she had not left. After 90 days, employees must be given the positions they would have held if they had not left, or put into a position of like status, pay and seniority. Similar language is found in Washington law.

If the employee sustains a disability while in service, but is qualified to perform another position, then the employer must re-employ the person in the position for which he or she is qualified. The replacement position for a disabled returning employee shall provide the employee with "like seniority, status and pay, or the nearest approximation thereto consistent with the circumstances of the case." (The quote is from a Washington statute.) Employees who receive a discharge that is not under honorable conditions are not eligible for re-employment protection under the statute.

There are some exceptions to re-employment where it would be an undue hardship to the employer, but they will be interpreted narrowly, with an eye to finding work for returning veterans.

Employees must request re-employment within set time periods that vary with length of service.
Employees who return to employment after active military duty or service cannot be terminated without cause for one year after they return to employment. This is true even if your policies state that employees are employed at will.

The length of time that an employer must hold a job open for a returning employee depends on what law applies and whether the employee is recovering from a service-related injury. For example, Washington state law requiring re-employment applies to employees serving four years or less, except that an employee who has additional service imposed by law, from which the employee is unable to obtain orders relieving the employee from active duty, is also entitled to re-employment. The time period for submitting an application for re-employment is extended for up to two years for an applicant who is hospitalized or convalescing from a service-related injury or illness. There are also exceptions to this two-year limit to accommodate circumstances that are beyond the employee' s control.

Discrimination against employees in or returning from service and retaliation against employees who participate in investigation of discrimination allegations are prohibited.

Some of the Key Laws Applicable to Public Sector Employers Only

Public sector employers have additional requirements besides the requirements set forth above. Some examples are set forth below.

If a state (including agencies and political subdivisions thereof) employee elects to continue health insurance coverage, and the employee performed service for less than 31 days, the person may not be required to pay more than the employee's share, if any, of the costs of the coverage.

State employees (including political subdivisions) are entitled to 15 days of paid leave per year. Up until October 31, 2001, this leave was calculated on a calendar year basis. An amendment to the law went into effect October 1, 2001 that changed the calculation of a year from a calendar year to a year that begins October 1 and ends September 30 of the next year. In other words, if your employees already used paid leave earlier in the 2001 calendar year for training, they are entitled to a new allotment of 15 days' paid leave effective October 1, 2001. The calculation of days of leave depends on the employee's schedule, and is based on how many work days the employee misses, not on calendar days.

This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at ksutherland@fair-workplace.com