Benefit Insights

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A non-technical review of qualified retirement plan legislative and administrative issues

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Military Leave Rules for Retirement Plans

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") protects the rights of employees who leave their employment to enter military service. Among its protections are a number of rules governing contributions to and the crediting of service under an employer's retirement plan.

The Department of Labor ("DOL") recently issued final regulations, effective January 16, 2006, that clarify USERRA's employee benefit plan requirements and update the notice of USERRA rights that employers are required to provide to their employees.

This newsletter focuses on the final USERRA rules affecting retirement plans.

USERRA's Scope

USERRA's retirement plan protections apply to all employers (regardless of size), including foreign employers doing business in the U.S. and many foreign subsidiaries of U.S. companies.

Coverage Under USERRA

USERRA generally protects all employees (but not independent contractors) who serve in any of the following roles:

- Members of the Army, Navy, Air Force, Marine Corps, and Coast Guard;
- Members of the Reserves, Army and Air National Guards (when called up under federal, rather than state, authority);
- Members of the National Disaster Medical System; and
- Members of the Commissioned Corps of the Public Health Service.

To be eligible for USERRA protections, an employee must generally give advance notice to his employer of the need to be absent for military service. Notice may be given orally or in writing. Notice is not required where notice is impossible or unreasonable to give under the circumstances.

After an honorable discharge, an employee must generally apply for reemployment, based on the following timetable, to receive USERRA-provided reemployment benefits:

- Service less than 31 days: The first workday

that is at least eight hours after returning home.

- Service from 31-180 days: Within fourteen days after completing service.
- Service in excess of 180 days: Within ninety days of completing service.

If an employee is hospitalized or convalescing from an illness or injury incurred or aggravated during military leave, he must submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service (except in certain circumstances beyond an employee's control that make reporting within the period impossible or unreasonable).

Retirement Plans Covered by USERRA

USERRA applies to retirement plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA") and non-ERISA plans such as those sponsored by a state, government entity (other than the Federal Thrift Savings Plan) or church.

Notice Requirements

Employers are required to post, mail or email notice to their employees of their USERRA rights, benefits and obligations. A revised version of the DOL's model USERRA notice was published in December 2005 and is required to be used on and after January 18, 2006.

Service Crediting After Reemployment

After an employee is reemployed after military service, he must be treated as having not had a "break in service" under the employer's retirement plan. Rehired employees are treated as having uninterrupted service with the employer during the entire period of absence related to military service for purposes of determining participation, vesting and accrual of benefits.

Defined Contribution Plans Without Employee Contributions

When an employee is rehired by an employer maintaining a defined contribution plan that does not require employee contributions, such as a money purchase or profit sharing plan, the employer is required to make the contributions that would have been made on the employee's behalf had he been employed by the employer during the period of military service.

These contributions must be made by the later of:

- Ninety days after the date of reemployment, or
- When plan contributions are normally due for the year in which the military service was performed.

If, however, it is impossible or unreasonable for an employer to make these contributions within this time period, the employer must make the contributions as soon as practicable. An employee is not entitled to any allocation of forfeitures or earnings on missed contributions that he would have received during his period of military service.

Example: Prior to entering military service on January 1, 2007, Harry participated in his employer's profit sharing plan which provides for an annual contribution of 1% of his compensation. When Harry is reemployed on October 1, 2009, his employer must make profit sharing contributions of 1% of the compensation he would have received during the period he was on military leave.

Contributions for the 2007 and 2008 plan years must be contributed within 90 days of October 1, 2009. Contributions for the 2009 plan year must be made by the due date for regular 2009 contributions. Harry will not be credited with any investment return on these make-up contributions for the period of his military service.

Defined Contribution Plans With Employee Contributions

When an employee is rehired by an employer maintaining a defined contribution plan that permits employee contributions, such as 401(k) deferrals, the employee must be permitted to make up, in whole or in part, the contributions that could have been made had he been employed by the employer during the period of military service. Also, the employer is obligated to match an employee's make-up contributions if the employee contributions missed during the employee's military service were eligible for employer matching contributions.

If an employee wants to make up missed employee contributions, the employee must make these contributions within the period that is the lesser of:

- Three times the period of military service, or
- Five years from the date of reemployment.

An employee may only make these contributions while employed with his post-service employer.

Once missed employee contributions have been made, an employer is required to make up the matching contributions, if any, using the same timetable that would normally apply to the contribution of employer matching contributions.

An employee is not entitled to any allocation of forfeitures or earnings on missed contributions that he would have received during his period of military service and may not contribute the amount of earnings he would have received during this period.

Example: Prior to entering military service on January 1, 2007, Susan participated in her employer's 401(k) plan that provided that an employee's deferrals would be matched 50¢ for each $1.00 contributed on the first 6% of compensation. When Susan is reemployed on January 1, 2009, her employer must allow her to make up the deferrals she could have made during her period of military service. She has five years from her date of reemployment to make up the missed contributions.

When made, these deferrals must be matched by her employer at 50¢ for each $1.00 under the plan's matching contribution formula. Make-up matching contributions must be contributed to the plan on the same timetable that applies to regular matching contributions. Susan will not be credited with any investment return on these contributions for the period of her military service.

Defined Benefit Plans

In a non-contributory defined benefit plan, upon reemployment benefits will be the same as though the employee had remained continuously employed during the period of military service. In a contributory plan, the employee will need to make up contributions in order to have the same benefit as if he had remained employed.

Calculation of Compensation

In determining the amount of contributions or accrued benefits, an employer must use the rate of pay that an employee would have received during a period of military service. If the rate of pay the employee would have received is not reasonably certain (for example, where an employee's compensation is based on commissions), the employee's average rate of compensation in the twelve-month period prior to entering military service is used as an employee's compensation.

Repayment of Prior Distributions

If an employee is a participant in a defined benefit plan, he must be permitted to repay any distributions made in connection with the military leave, including interest. Repayment must be made within the same timeframe as employee make-up

contributions to a defined contribution plan or such longer time as may be agreed to between the employer and the employee. Distributions from defined contribution plans may not be repaid.

Interest Rate on Plan Loans Capped

Another military service related law, the Servicemembers Civil Relief Act of 2003 ("SCRA"), caps the interest rate on retirement plan loans. The types of military service covered by the SCRA are similar, but not identical, to the types of service covered by USERRA.

Under the SCRA, the maximum interest rate that a plan may charge on plan loans outstanding at the start of active duty service is equal to 6% from the date on which the employee is called to active service. Any interest in excess of the 6% cap must be forgiven, not simply postponed. However, a court may allow an interest rate higher than 6% if the employee's ability to pay is not materially affected by his or her military service.

Suspension of Plan Loan Payments

Under the Internal Revenue Code, a plan may suspend loan payments for participants in military service. Upon rehire, loan repayments must recommence and be repaid in full (including interest that accrued during the period of military service) by the end of the period which equals the original term of the loan plus the period of military service. The loan can either be reamortized to take into account interest accrued during the suspension, or the participant can make a balloon payment at the end of the extended loan repayment period.

Conclusion

USERRA imposes significant requirements on retirement plan sponsors and administrators. Plan sponsors who employ individuals who enter or return from military service should carefully review their plans to make sure they provide the benefits required by USERRA and SCRA.