Blog Post

With U.S. Troops Heading to Europe, Employers Should Revisit Military Leave Policies

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In the wake of the recent Ukraine invasion, more U.S. troops are being deployed to Europe to support NATO countries. Among these are members of the National Reserve and National Guard, who typically maintain civilian jobs throughout the year, but can be called for duty at any time. With that in mind, now is a good time for U.S. employers to revisit their policies regarding military leave to ensure they are fully compliant and tailored to best support employees who need to take leave from work due to deployment.

Military-Related Leave

The primary federal laws related to military leave are the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the Family and Medical Leave Act (FMLA). While different, both protected leaves apply not only to actual military members, but also to family members who are affected by the employee's military leave.

USERRA

USERRA requires all employers (regardless of size) to provide leaves of absence to workers who enter military service while employed and to re-employ them upon the conclusion of their service. USERRA

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applies to all regular employees, regardless of full or part-time status, length of employment or service, or position. Further, USERRA applies to leaves of absence taken for voluntary or involuntary active service, training and funeral honors duty.

USERRA provides for the following benefits related to military leave: (1) protection from discrimination based on military status or military obligations; (2) the right to re-employment upon conclusion of military service; (3) protection from termination for a period of time after returning from service; and (4) certain rights in connection with pensions and other employee benefits plans.

When returning from leave, service members should be treated as if they never left work. After *service of 90 days or less*, service members are entitled to return to the same position or the position they would have attained, if not for taking leave. Additionally, the returning employee is entitled to all pay increases, seniority increases and other benefits that would have been earned if not for the leave. For employees returning from leaves *longer than 90 days*, employers may consider other positions that closely approximate the job an employee would have held or attained in terms of seniority, status, and pay.

Aside from certain exceptions listed below, the right to re-employment for a service member is contingent on several eligibility requirements, such as:

(1) The employee must have left the job for the purpose of performing service in the uniformed services;

(2) The employee must give prior oral or written notice of the need for leave to the employer. Prior notice is not required if it is precluded by military necessity or otherwise impossible or unreasonable, and employers are not permitted to demand written notice;

(3) With some exceptions, the employee must not exceed five years of military leave with any employer. Annual training and monthly drills do not count against the cumulative total;

(4) The employee must have reported back to work in a timely manner, or have submitted a timely application for reemployment; and

(5) The employee must be released from service under honorable conditions.

The three exceptions to an employer's re-employment obligation are:

(1) Re-employment would impose an undue hardship on the employer.

(2) The employment was for a brief, nonrecurring period with no reasonable expectation that such employment would continue indefinitely or for a significant period.

(3) The employer's circumstances have changed and would make such re-employment impossible or unreasonable.

FMLA

Generally, FMLA leave provides qualifying employees of covered employers with up to 12 weeks of unpaid leave per year to care for their own or a family member's serious medical condition. In addition, the FMLA provides for the following military family leave entitlements:

(1) An eligible employee who is the spouse, child, parent, or next of kin of a current service member with a serious injury or illness incurred in the line of duty on active duty may take up to 26 workweeks of FMLA leave during a single 12-month period to care for the service member (military caregiver leave).

(2) An eligible employee whose spouse, child, or parent is a member of the National Guard or Reserve may take up to 12 workweeks of leave for qualifying exigencies arising out of the military member's active duty or call to active duty in support of a contingency operation (qualifying exigency leave).

(3) An eligible employee may take leave to care for certain veterans with a serious injury or illness incurred or aggravated in the line of duty on active duty and that manifested before or after the veteran left active duty.

(4) Military caregiver leave is also allowed for current service members with serious injuries or illnesses that existed prior to service and that were aggravated by service in the line of duty on active duty.

Unlike USERRA, FMLA leave is only available to employees who have worked 1,250 hours in a 12-month period within 75 miles of a site having at least 50 employees.

In addition to federal laws regarding military leave, many states have laws governing this type of leave as well. However, state laws vary widely. As a best practice, employers should make themselves aware of all applicable federal and state laws and provide the greater benefits if the laws differ. Further, employers may also offer military members benefits that are more generous than those mandated by federal and state laws.

Overall, employers should brush up on all applicable laws, to ensure their policies are fully compliant. If you have any questions or for further assistance with developing a compliant military leave policy, contact your Akerman attorney.

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