Many employees have been called to serve in the armed forces over the past decade. We know that employers have done their best to support employees in their call to service and to comply with current laws and regulations. But even with the best interest of their employees in mind, employers may not be fully aware of the rights and benefits to which their employees are entitled by law. This fact sheet will help you to better understand your responsibilities to service members returning to work and how these responsibilities apply to defined contribution and deferred compensation retirement plans.

**Legislative background**

**USERRA**

The rights of returning service members and the responsibilities of their employers are captured under the Uniformed Services Employment and Reemployment Rights Act (USERRA). This act was signed into law in October of 1994, although the Department of Labor did not actually issue final regulations until January of 2006. Coverage of this act is broad and extends to employers in the private, public, and not-for-profit sectors. All employees, with the exception of independent contractors, are covered by USERRA, including full-time, part-time, seasonal and temporary workers.

The intent of USERRA is to provide certain rights to non-career members of the uniformed services who are called away from their employers to serve their country. According to the act, a civilian employer cannot deny initial employment, reemployment, retention, promotion, or any benefit of employment to an individual on the basis of membership, application for enlistment, performance of service, or obligation of service in any of the uniformed services listed in the law. More simply stated, employers must restore benefits that a rehired individual would have received had he or she not been called into uniformed service.

USERRA identifies the specific reemployment conditions that veterans must meet to return to work (see Page 2). Employers must then ensure that returning employees are granted the rights and benefits they are entitled to due to a job absence resulting from their service. Returning service members must meet a number of criteria before being entitled to the benefits outlined under USERRA. These criteria include:

- Advance notice to employer of service
- Military service of five years or less
- A timely return to work upon completion of service (as defined in Table 1)
- An honorable discharge from service
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Table 1: Return to Work Timeline for Benefit Eligibility*

<table>
<thead>
<tr>
<th>Length of Military Service</th>
<th>Action Required by</th>
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<tbody>
<tr>
<td>30 days or less</td>
<td>Reporting to work for the next work period plus an 8-hour rest period</td>
</tr>
<tr>
<td>31 to 180 days</td>
<td>Applying for reemployment by no later than 14 days after completing service</td>
</tr>
<tr>
<td>More than 180 days</td>
<td>Applying for reemployment by no later than 90 days after completing service</td>
</tr>
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</table>

* Please note there are some exceptions to this timeline based on extenuating circumstances.

USERRA remains the cornerstone legislation governing the rights and benefits of returning service members, but several other Acts have more recently expanded the benefits and protections granted to these individuals.

PPA and HEART

The Pension Protection Act of 2006—better known as PPA—made sweeping reforms to both defined benefit and defined contribution plans, including one change that allowed service members or their survivors to temporarily take special distributions from their retirement plans without a 10% penalty. Service members can take the distribution—known as a qualified reservist distribution—from an IRA, or a distribution of elective deferrals from a 401(k), or 403(b) plan, during an active duty period which lasts longer than 179 days or is for an indefinite period.

Another law, the Heroes Earnings Assistance and Relief Tax Act (HEART) of 2008, further expanded USERRA requirements and made permanent the 10% tax exemption on early withdrawals for qualified reservist distributions that was originally introduced by PPA. Among its many provisions, HEART included requirements to improve the benefits of participants who died or were disabled while performing qualified military service. Another provision determined how differential pay—i.e., payments made by an employer to an individual who has been called to active duty for more than 30 days—was treated.

- **Military service death or disability**—This provision was meant to provide military personnel with the same benefits available to current employees upon their death or disability. Service members or their survivors are entitled to these benefits if death or disability, while performing qualified military service, prevents a service member from returning to work. These benefits include:
  - Accelerated vesting in plan benefits
  - Eligibility for ancillary life insurance benefits
  - Other survivor’s benefits that are contingent on an employee’s death

- **Differential pay**—The passage of HEART changed federal income tax rules to treat differential pay as wages that were subject to federal income tax withholding, as opposed to 1099 income. As a result, employers would now have to withhold FICA and other taxes from differential pay. HEART also required employers to treat differential pay as compensation and, as such, differential pay must be included in employees’ compensation when determining their eligibility for plan benefits and contributions. As a reminder, employers are not required to offer differential pay, but they are subject to the above requirement if they do so.

Terms of Service for Reemployment

To qualify for reemployment, service members must meet one of the following service requirements:

- Active duty
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty
- Periods for examination to determine fitness to perform such duty
- Funeral honors duty performed by National Guard or Reserve members
- Special duties performed by intermittent employees of the National Disaster Medical System (NDMS)
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Where do I start?

USERRA, PPA and HEART contain many diverse provisions for employers to follow. Employers seeking to comply with the provisions of these acts can begin by familiarizing themselves with the disclosure requirements and reemployment eligibility guidelines of USERRA. Under USERRA, employers are required to provide disclosure notices that outline employees’ rights to individuals entitled to benefits and obligations. You may post this notice in the workplace where similar employment-related notices are typically displayed. If you need assistance with the disclosure notices, DOL has model notices available on their site.

You should also become familiar with the reemployment eligibility requirements for service members returning to work. Reemployment eligibility is important because it dictates whether benefit and compensation determinations are necessary. These determinations include the position, salary, accrued vacation time and other benefits to which the employee is entitled. As you may have already found, some of these benefits decisions are not always straightforward and may require a certain degree of interpretation on your part.

Key retirement plan benefits to be continued and reinstated

Below we have listed some key benefits that must be reinstated for rehired or returning employees. It is important to note that qualified defined contribution plans, non-ERISA Section 403(b) Plans, and Section 457(b) Deferred Compensation Plans are all subject to USERRA, PPA and HEART.

ERISA required disclosures—ERISA plans must continue to provide participants in active military service with required disclosures. Disclosure materials include but are not limited to Summary Plan Descriptions (SPDs), Summary of Material Modifications (SMMs), and Fee Disclosures.

Eligibility, vesting and benefit accruals—A plan sponsor must include a returning employee’s time served in qualified military service as part of their plan’s eligibility, vesting, and benefit accruals. Prior vested benefits are protected and may not be lost, even if the employee does not return to work.

Missed nonelective (noncontributory) employer contributions—If the plan sponsor made a plan nonelective (noncontributory) employer contribution for any period during which the individual was away on qualified military service, upon rehire, the plan sponsor must make a contribution equal to that he or she would have received if not in qualified military service.

Missed employee deferrals or after-tax contributions—Reemployed participants have up to three times their period of service that doesn’t exceed five years to make up employee elective deferrals (or after-tax voluntary contributions) that could have been made during the period of military service.

Employer matching contributions—A plan sponsor must make up matching contributions if a rehired service member makes up elective deferrals and the plan provided matching contributions for the year. The matching contribution is based on the rate that was in effect the year the employee is making up the contribution.

Earnings, forfeitures and prior year’s tests—Employee and employer make-up contributions are not adjusted for earnings (i.e., gains or losses) that were experienced by the plan during the USERRA service period. The individual is not entitled to an allocation of forfeitures—plan assets surrendered by participants upon termination prior to fully vesting—that occurred while in military service.

Participant loans—If an employee takes a participant loan and is called into military service while the loan is being repaid, loan repayments may be suspended for the period of military service, but interest will continue to accrue at a rate that doesn’t exceed 6%.
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What you can do today
As the U.S. military continues to disengage from global conflicts, employers will continue to see a steady stream of veterans returning to work who are covered by USERRA. We realize there are many nuances that employers need to consider when it comes to adhering to the requirements of USERRA. The act covers a wide range of employee rights and benefits, and in the event of non-compliance, employers could find themselves the subject of litigation. With this in mind, if you have employees in military service, you should carefully review your policies to ensure that they are in compliance with USERRA. If not, you should establish procedures for this eventuality.

The Department of Labor and the IRS provide a wealth of information to assist employers in complying with USERRA, but employers may need more assistance. Although many determinations of rights and benefits are straightforward, others may require a certain degree of interpretation. An example of such a situation would be the reinstatement of an employee to an equivalent position and level of seniority upon his/her return to work if the original position was no longer available. It would be prudent to confer with legal counsel when making determinations about employee rights and retirement benefits for service members returning to work.

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