

# CLIENT ALERTS

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## DOL Issues Final USERRA Regulations

*As reservists return from Afghanistan and Iraq, not all of them find their civilian employers waiting for them with open arms or an open job. The military actions of the United States in the war against terrorism have led to renewed attention by the Bush administration and Congress, as well as by the public, to the rights of employees and the obligations of employers under USERRA.*

While the federal Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") was enacted nearly twelve years ago, until recently, there were no regulations accompanying the law. Proposed regulations were published on September 20, 2004, and after a comment period, the U.S. Department of Labor ("DOL") published the final rules to implement USERRA on December 19, 2005. These final rules, which are available on the Department of Labor's website, will become effective on January 18, 2006. At a press conference announcing the rules, Labor Secretary Elaine L. Chao said that over 525,000 members of the National Guard and reserve units have been mobilized for military action in Iraq and Afghanistan since the attacks of September 11, 2001, and over 390,000 have been released from active duty.

Generally speaking, USERRA protects any employee who needs to be absent from civilian employment in order to serve in the country's uniformed services. It does not matter how long the employee has been employed, the size of the employer or whether the employee is probationary, permanent, part-time or full-time. The objective of USERRA is to ensure that these citizen soldiers are able to retain their civilian employment and benefits, and to prohibit discrimination against them because of their uniformed services. USERRA is administered by the United States Department of Labor through the Veterans' Employment and Training Service ("VETS"). The three main components of USERRA are:

1. a prohibition on employment discrimination against uniformed service members;
2. a grant of reemployment rights to those absent from employment because of uniformed service; and
3. preservation of employment benefits for employees on uniformed service leave.

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## **USERRA Regulations, Finally...**

The regulations were developed by VETS, in consultation with the Department of Defense, and are based on legislative history and case law. The guidance offered by these regulations is critical for employers now that more employees are being called to duty and many of them are being asked to serve longer than was initially expected as military commitments are extended. Some who have returned to work face the possibility of being reactivated. The final rules should further ensure that service members are comfortable in the knowledge that they will be able to return to their jobs with the same pay, benefits and status that they would have attained had they not been on military duty.

Under the final regulations, a returning service member is eligible for reemployment provided that: (1) the employee was in uniformed service during the absence from civilian employment; (2) the employer received advance notice of the employee's uniformed service; (3) the employee had no more than five years of cumulative uniformed leave away from the particular employer; (4) the employee must return to work or apply for re-employment in a timely manner compliant with the final rules; and (5) the employee must not have received a disqualifying discharge or other-than-honorable separation from service.

Comments received during the period following publication of the proposed regulations led to clarification of certain sections of the proposed regulations. For instance, while the rules are generally written in a question and answer format, the final rules adopt a more technical and formal approach in addressing the complex issues of health and pension plan rights and obligations. In the preamble, the DOL states that USERRA's definition of "employer" is broader than that of civil rights statutes, and notes that individual supervisors and managers may be liable under USERRA. The DOL has also clarified its position that USERRA protects not just a service member's activities, but also a service member's status in the uniformed services (i.e. an employer may not discriminate against an employee because of his or her status as a military veteran or member of a uniformed service, regardless of whether the status resulted in the performance of military activities).

The DOL also published a final version of the notice that employers must post informing employees of their rights, benefits and obligations under USERRA. The original notice was a requirement of the Veterans Benefits Improvement Act of 2004 ("VBIA"), which amended several provisions of USERRA. The DOL has slightly modified the poster, creating one for private and state employers, and a second for federal agency employers, both of which now include the logos and telephone numbers of VETS as well as the same for several other agencies, in the hopes that these would serve as reminders that USERRA requires a multi-agency partnership in its administration and enforcement. In the final rules on posting, in response to a comment seeking guidance as to how long a USERRA poster must remain on a bulletin board and whether new employees be notified by e-mail, the DOL responded by advising employers to use their best judgment and discretion in determining the means to provide notice. We recommend distributing the notice to all employees, in print or electronic format, posting the notice in a "high-traffic" area, and then including the notice in all new-hire materials.

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## Conclusion

Finally, it should be stressed that, in addition to its obligations under USERRA and VBIA, an employer must be attentive to state law obligations applying to employees who serve in the uniformed services. USERRA acts as a threshold or minimum set of requirements, and many states provide rights broader than those under USERRA to employees in the military or with military commitments.

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If you have any questions regarding the changes to USERRA, the law in general or your obligations therein, please contact **Dean L. Silverberg** at 212/351-4642, [dsilverberg@ebglaw.com](mailto:dsilverberg@ebglaw.com); or **Gayla C. Crain** at 214/397-4325, [gcrain@ebglaw.com](mailto:gcrain@ebglaw.com). **Tracey A. Cullen**, an associate in the Labor and Employment Department, assisted in the preparation of this alert.

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