U.S. Department of Labor

Assistant Secretary for
Veteran's Employment and Training
Washington, D C 20210

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MEMORANDUM FOR: REGIONAL SOLICITORS;
VETERANS' EMPLOYMENT AND TRAINING SERVICE
REGIONAL ADMINISTRATORS AND DIRECTORS;
WAGE AND HOUR DIVISION REGIONAL
ADMINISTRATORS AND DISTRICT DIRECTORS

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SUBJECT: Protection of Uniformed Service Members' Rights to Family and Medical Leave

The purpose of this memorandum is to advise staff of the three agencies regarding the rights of reemployed members of the uniformed services to family and medical leave under the provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (FMLA), and the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4333 (USERRA). This memorandum also provides guidance regarding coordination between the Department of Labor's Wage and Hour Division field staff (WHD) and the Veterans' Employment and Training Service (VETS) field staff on cases involving this issue.

Over 90,000 members of the National Guard and Reserve have been called up since the President's declaration of a national emergency following the attacks of September 11, 2001. As these service members conclude their tours of duty and return to civilian employment, it is important for employers to recognize that USERRA requires that returning veterans receive all benefits of employment that they would have obtained if they had been continuously employed. One such benefit is eligibility for leave under the FMLA.

Under the FMLA, an "eligible employee" is entitled to 12 workweeks of leave during any 12-month period because of childbirth, adoption or foster care, or a serious health condition of the employee or certain family members. The FMLA provides that, to be eligible for family or medical leave, an employee must work for a covered employer, must have worked for the

employer for at least 12 months and must have worked at least 1250 hours for that employer during the 12-month period prior to the start of the leave. The requirement of 1250 hours worked applies to persons employed by private employers, state and local governments, and the Postal Service.

A member of the National Guard or Reserve who is absent from employment for an extended period of time due to military service and who requests FMLA leave shortly after returning to civilian employment may not have actually worked for his or her employer for a total of 12 months or may not have performed 1250 hours of actual work with the employer in the 12 months prior to the start of the FMLA leave. Thus, the question may arise as to whether the time and hours that the employee would have worked but for his or her military service should be combined with the time employed and the hours actually worked for an employer to meet the 12-months of employment and the 1250 hours eligibility requirements.

For example, suppose that an employee who normally works a 40-hour week leaves civilian employment on November 5, 2001, to serve a tour of duty in Afghanistan, and is reemployed by the same civilian employer on June 10, 2002. On July 1, 2002, the employee begins FMLA leave, at which time the employee has only 840 hours of actual work performed for the civilian employer in the twelve months prior to the leave request (18 weeks prior to the military service, and 3 weeks following reemployment, at 40 hours per week). If the employee is otherwise eligible for FMLA leave, the 1240 hours that the employee would have worked but for his or her service in Afghanistan (31 weeks at 40 hours per week) should be added to the 840 hours actually worked, for a total of 2080 hours for purposes of determining FMLA eligibility.

Under USERRA, a person who is reemployed is entitled to the rights and benefits that he (or she) would have attained if he had remained continuously employed.[1] The "rights and benefits" protected by USERRA include those provided by employers and those required by statute, such as the right to leave under FMLA. Accordingly, a returning service member would be entitled to FMLA leave if the hours that he or she would have worked for the civilian employer during the period of military service would have met the FMLA eligibility threshold. Therefore, in determining whether a veteran meets the FMLA eligibility requirement, the months employed and the hours that were actually worked for the civilian employer should be combined with the months and hours that would have been worked during the twelve months prior to the start of the leave requested but for the military service.

Recognition of the rights and responsibilities established by USERRA will facilitate reentry into the workforce by those who stood ready to serve our nation. To assure that reemployed service members receive family and medical leave benefits that they are entitled to, all WHD and VETS investigators should follow the guidance in this memorandum when dealing with inquiries involving family and medical leave rights for such service members. WHD will refer to VETS any complaint in which this interpretation may be determinative along with a written determination that the information provided by the complainant appears, on its face, to indicate that: 1) the reason for leave qualifies as leave under the FMLA; 2) the employer is covered by

[1] However, a service member would not be entitled to rights and benefits that are considered as a form of short-term compensation, such as accrued vacation.

the FMLA; and 3) the service member would have been eligible for FMLA but for his or her military service. If the complainant in such a case meets USERRA's eligibility criteria (i.e., notice given, duration and nature of service, timely return/application), VETS will open a USERRA case. For cases opened directly with VETS in which the USERRA eligibility criteria are met, VETS will seek a written determination from WHD regarding the FMLA eligibility issues. With respect to cases opened directly by VETS or cases opened upon referral from WHD, VETS State Directors and WHD District Directors will coordinate as necessary to investigate and resolve these complaints. A request for assistance from one Director to another will constitute a delegation of authority to the other to assist in the conduct of the investigation.