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Department of Labor Provides Guidance on Retirement Plan Obligations When Employees Return From Military Service

Article By:

Joshua Rafsky

The Department of Labor recently issued a fact sheet intended to help employers understand their retirement plan obligations under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). The law provides that eligible employees that return to employment following qualified military service must be treated as though their military service was not a break in service for purposes of participation, vesting and benefit accrual under their employer's retirement plan.[1]

Among other things, USERRA requires the following for retirement plans:

- **Service credits:**
    - The plan generally must credit the entire period of the employee's absence for qualified military service as it would credit service by the employee if he/she had not been out on military leave.
- **Employee contributions:**
    - The employee is entitled (but not required) to make up all or part of their missed contributions. The employee has up to three times the duration of the military service (not to exceed 5 years) to contribute those makeup contributions to the plan.
- **Employer contributions:**
    - Plans with employee contributions – the employer must make all contributions that are contingent on an employee's contributions to the plan, but only to the extent of the employee's makeup contributions. For instance, an employer need not provide employer matching contributions to the employee for the period of military service unless the employee contributes makeup matching eligible contributions to the plan.
    - Plans without employee contributions – any required employer contribution attributable to the employee's absence must be made within 90 days after reemployment, or when plan contributions are made for the year of the military service, whichever is

later.

The DOL fact sheet provides examples that discuss how to deal with difficult scenarios related to pension accruals for periods of military leave. Many pension plans calculate accruals based (at least in part) on an employee's compensation, and the examples focus on how to calculate the compensation an employee would have earned had the employee not been out on military leave. The compensation used to calculate the accruals must be based on what the employee would have received but for the leave, if that can be determined with reasonable certainty. If it cannot be determined with reasonable certainty, the employer generally must use the employee's average rate of compensation for the 12 months before the military leave.

- An employee receiving pension accruals based on her compensation is scheduled for 40 hours a week but works 50 hours per week (with overtime) in the 9 weeks leading up to her 2-week deployment.

In that case, the DOL says the pension accrual should be calculated as though the employee had worked 50 hours (with overtime) for each week of the absence.

- An employee receiving pension accruals based on her compensation is guaranteed to be paid for 75 hours per month. For the 8 months before her 1-month military leave, the employee worked 80 hours per month.

In that case, the DOL says the pension accrual should be calculated based on working 80 hours per month (not the guaranteed 75 hours).

- An employee receiving pension accruals based on her compensation is guaranteed to be paid for 75 hours per month. For the 8 months before her 3-year military leave, the employee worked 80 hours per month. Upon reemployment, the employee's position is a promoted position earning a higher rate of pay than before her deployment.

In that case, the DOL says the pension accrual should be calculated considering the point in time the promotion is reasonably certain to have occurred. For instance, if the promotion would have occurred after 1-year of deployment, the pension accrual should use the rate of pay before the military service for the first year. For the second and third years, the accrual should be based on the post-promotion rate of pay.

- An employee receiving pension accruals based on her compensation is scheduled to work 40 hours per week. After being employed for 6 weeks, she is absent for 1 week of military service. In the 6 weeks leading up to the military service, the employee had a varying number of hours each week (ranging from 30-50 hours per week).

In that case, the DOL says the pension accrual should be based on the average number of hours the employee worked per week before the military service.

- An employee receiving pension accruals based on her compensation works 40 hours per week and earns base pay plus commission. The amount of commission varies each week. After 2 years of employment, the employee goes on military leave for 1 month.

In that case, the DOL says the pension accrual should be calculated based on the average of the employee's compensation for the previous 12 months. This is because the employer cannot calculate the compensation the employee would have earned but for the military leave with reasonable certainty due to the variable nature of her commission earnings.

- An employee receiving pension accruals based on her compensation works 40 hours per week and earns commission only. The amount of commission varies each week. The employee has been employed for 6 years with the employer. She returned from a previous one-year deployment 6 months ago. Now she is going on military leave for 2 weeks.

For the 2-week absence, the DOL says the pension accrual should be calculated based on the average rate of compensation earned during the previous 12 months. However, because of the previous military leave, the first 6 months of that 12-month period should be ignored. The next 6 months of compensation should be averaged to determine the average rate of compensation.

- An employee receiving pension accruals based on her compensation is scheduled to work 40 hours per week, but the hours actually worked were variable. The employee has been employed for 10 years with the employer. She returned from a previous 1-week military leave 3 months ago. Now she is going on military leave for 1 month.

For the 1-month absence, the DOL says the pension accrual should be calculated based on the average rate of compensation earned during the previous 12 months, excluding the previous 1-week of military leave.

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[1] USERRA affects benefits other than retirement plans and affects other aspects of the employment relationship. This blog post is not a broad discussion of all aspects of USERRA but focuses on some of the issues discussed in the recent Department of Labor guidance.

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