



Minnesota Counties Intergovernmental Trust Resource Briefing

June 2010

Veterans' Employment Issues

Navigating the Military Laws

Members of the National Guard and federal branches of the military make many sacrifices in the performance of their military duties. In recognition of those sacrifices, service members and veterans (and in some limited circumstances their families) are afforded certain protections and rights under federal and state law. This *Resource Briefing* examines the applicability of veterans' preference law when hiring, promoting, terminating, demoting or suspending a veteran. It also provides a review of the veterans' hearing and appeals processes that may be available. Finally, it examines an employer's obligation regarding other employee military leave and reinstatement rights.

Veterans' Preference Act

Minnesota's Veterans' Preference Act (Minn. Stat. § 197.47 *et seq.*) was enacted to provide public employment benefits and protections to veterans of military service. The legislature established these statutes recognizing that the "training and experience in the military services... and loyalty and sacrifice for the government are qualifications of merit which can not be readily assessed by explanation." The Veterans' Preference Act provides veterans with security in public employment and also protection from the "ravages and insecurity of a political spoils system."

Minn. Stat. §
197.47 *et seq.*

Who is a Veteran?

The term "veteran" is defined as a citizen or resident alien of the United States who has separated under honorable conditions from any branch of the armed forces of the United States if he or she has:

Minn. Stat. §
197.447

- either served on active duty for 181 consecutive days;
- been disabled while serving on active duty;
- completed the minimum active duty requirements under federal law, as defined by CFR title 38, section 3.12a; or
- been service certified by the United States Secretary of Defense as active military service under Public Law 95-202.

The United States Secretary of Defense must certify the active service and discharge under honorable conditions of the veteran.

Retired military veterans have the same preference rights as other veterans in state and local government hiring.

Applying Veterans' Preference

A veteran applicant for hire or promotion may invoke special points for consideration during the hiring or promotion process. Veterans' Preference also provides procedural safeguards for employee veterans from removal or wrongful termination by a public employer.

Veterans' Preference applies to all public employers, including counties, cities, towns, school districts or other municipalities, or political subdivisions of the State of Minnesota that recruit or employ veterans. The University of Minnesota is not a political subdivision under the Act. Local units of governments are governed by a separate statute from the state.

Minn. Stat. §
197.455, subd. 1

Veterans' Preference applies to all positions in government **except** the positions of private secretary, superintendent of schools or one chief deputy of any elected official or head of a department, elected officials, temporary employees or any person holding a strictly confidential relationship to the appointing officer.

Minn. Stat. §
197.46

Hiring or Promoting a Veteran

Testing

The public employer must apply the Veterans' Preference laws during the hiring process. The public employer must adjust its hiring system to a 100 point basis to enable allocation of veterans' preference points.

Hall v. City of Champlin, 463 NW 2d 520 (Minn. 1990)

When the employer administers a written, formal test as part of the hiring process the law requires the test be rated on a 100 point scale. A veteran who achieves a passing score on the test is entitled to an additional five (5) points added to a passing score. A disabled veteran is entitled to have ten (10) additional points added to a passing score (A disabled veteran is defined as a person who has a compensable service connected disability as adjudicated by the United States Veterans Administration or by the retirement board of one of the several branches of the armed forces).

Minn. Stat. §
197.455, subd. 4

Minn. Stat. §
197.455, subd. 5

- Preference points are added **only** if the applicant receives a passing grade.
- The applicant **must** request the preference.
- A determination as to the veteran's disability status **must** be made and verified before awarding additional disability points.

Minn. Stat. §
197.455, subd. 6

Although the veteran must request that Veterans' Preference points be applied to the passing score, the public employer must notify veterans of the availability of preference points. Therefore, the public employer should have a place on the application for the veteran to request Veterans' Preference. The notice should also

Minn. Stat. §
197.455, subd. 9

indicate that proof of veteran or disabled veteran status may be required before preference will be granted.

An employer may not ask or require a person seeking employment to make a written or oral statement whether that person is a member of the National Guard or a reserve unit if they intend to use that information in a discriminatory manner. This provision does not apply to a public subdivision asking a question or requesting a statement for the purpose of determining whether a veteran's preference applies.

Minn. Stat. §
181.535

An employer may request a copy of the applicants' DD214 form before granting Veterans' Preference rights to them. Employers should reference this requirement on the job application.

Veterans' Preference points cannot be used to increase a failing score to a passing score. If the test requires a score of 70 points to pass and the veteran scores a 68, no preference points may be added. If the veteran scores a 70, the score is increased to 75 (or 80 in the case of a disabled veteran.)

It is important to note that the public employer is not limited to the administration of a formal, written, 100-point test. The appointing authority has broad discretion to determine what criteria will be considered in awarding the 100 points. The criteria may be based entirely on the job application, a written test, an oral examination, skills test or a combination of factors. The public employer may administer any type of evaluation so long as it is based on criteria capable of being reduced to a 100 point rating scale.

Minn. Stat. §
197.455, subd. 4
& 5

Regardless of the evaluation system adopted, the public employer should articulate objective criteria on which the initial evaluation is based prior to accepting applications. The criteria must be based upon the actual job duties. An up-to-date job description is critical in determining the criteria that are utilized. The maximum number of points out of a total of 100 for each category must be determined in advance of the testing and must be awarded in a uniform manner (these are also critical requirements in many areas of employment law beyond the application of Veterans' Preference).

Veterans' Preference may be used by the surviving spouse of a deceased veteran and by the spouse of a disabled veteran who because of the disability is unable to qualify when making an application for employment.

Minn. Stat. §
197.455, subd. 7

Interviewing

Veterans' Preference points are awarded when it is determined that the applicant meets the minimum qualifications for the job, i.e. obtains a passing score. The Veterans' Preference Act does not provide absolute preference for veterans. Rather, the awarding of Veterans' Preference credit increases the chance that a veteran will receive an interview. A veteran applicant, even with preference points, may fall short of points determined necessary for an interview. When this occurs the public employer is not obligated to interview the veteran. The law requires that a candidate with a

rating augmented by Veterans' Preference be entered on an eligibility list ahead of a non-veteran with the same rating.¹

If there are 40 applicants who achieve a score of 95, a veteran with a score of 75 will not likely receive an interview for the position. The additional points will move the veteran up on the eligibility list, but do not guarantee that the veteran will be at or near the top score.

Whenever a public employer fails to hire a veteran who has received Veterans' Preference, the employer is required to notify the veteran in writing of the reasons for rejection and file the notice with the appropriate local personnel officer.

Minn. Stat. §
197.455, subd.
10

Promotion

Veterans' Preference laws provide that five (5) points are added to the competitive promotional examination rating of a disabled veteran. A disabled veteran can use the promotional preference only one time and only in the securing of the first promotional position after securing public employment. The veteran must have obtained a passing rating on the examination without the addition of the preference credit points.

Minn. Stat. §
197.455, subd. 5

Seniority

Veterans' Preference provides no guarantees as to seniority. The law addresses only the issue of veterans ranking on an eligibility list. That is, a veteran hired at the same time as a non-veteran will not be entitled to greater seniority by virtue of Veterans' Preference. Additionally, an employer which defines seniority by training date, rather than date of hire, is not in violation of the act as long as the veteran received preference points and was correctly ranked on the list of eligible candidates.

Discipline and Discharge

Suspension

A disciplinary suspension without pay, which is unconnected to a discharge proceeding, does not constitute a "removal" under the act. No Veterans' Preference Act hearing rights exist.

Harr v. City of Edina, 541 NW 2d 603 (Minn. App. 1996)

- A suspension of more than thirty (30) days is considered to be a discharge for purposes of Veterans' Preference laws.
- If it is impossible for a veteran to comply with the conditions of his suspension, the suspension will be construed as a termination.

Mitlynd v. Wolff, 342 NW 2d 120 (Minn. 1984)

If a veteran is being proposed for termination, that veteran cannot be suspended without pay pending a determination of those charges. The public employer may suspend a veteran with pay pending a determination of the charges under which they were proposed for termination. Formal discharge occurs after the veteran receives notice and a hearing before the statutorily prescribed entity (See Veterans' Preference and Appeals Process *infra*).

Leininger v. City of Bloomington, 299 NW 2d 723 (Minn. 1980)

Termination or Demotion

¹ Minn. Stat. § 43A.11 (the statute which governs the state) requires that that the top 5 ranked recently separated veterans receive interviews.

No veteran employed by a political subdivision “shall be removed from such position or employment except for incompetence or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.” Removal from a position or employment has been interpreted to mean discharge, suspension or demotion. It has also been interpreted to include “resign or be terminated” situations.

Minn. Stat. §
197.46

The Minnesota Supreme Court has held that there is no significant difference between the “incompetence or misconduct” standard required by the Veterans’ Preference Act and the “just cause” standard identified in other public employment statutes incorporated in most collective bargaining agreements. The courts have held that the employer is required to establish that the veteran’s actions alleged to constitute misconduct or incompetence:

Johnson v. County of Anoka,
536 NW 2d 336
(Minn. App.
1995) rev. den.

- relate to and affect the administration of the position;
- are of a substantial nature directly affecting the rights and interests of the public;
- touch the qualifications of the position and the performance of the veteran’s duties, showing that he/she is not a fit or proper person to hold office.

Cass County v. Law Enforcement Labor Services, Inc., 353 NW 2d 627 (Minn. App. 1984)

Non-Disciplinary Layoff Or Demotion

A public employer may layoff or demote a veteran, without a showing of incompetence or misconduct, where the veteran is the least senior employee and the veteran’s current position is abolished. The employer, however, cannot abolish the position and assign duties to other less senior employees as subterfuge to avoid a veteran’s right to a hearing.

A layoff notice should state that the employee has sixty (60) days to petition the district court for a writ of mandamus compelling reinstatement and back pay if he/she believes that the layoff is being used to avoid rights under the Veterans’ Preference Act. The notice should also state that the veteran has the alternative right to petition the Commissioner of Veterans Affairs for a hearing on the matter.

When a position is abolished in good faith, an employer’s failure to give notice of a veteran’s right to challenge the layoff tolls the sixty (60) day period for the veteran to petition for a hearing. It does not entitle the veteran to back pay from the date of abolition to the date the veteran receives notice of the Veterans’ Preference rights.

A hearing on the issue of abolition of position may lead to an order of reinstatement. Reinstatement is appropriate only when it is established that the abolition of the veteran’s position was not in good faith.

Veterans’ Preference Hearing and Appeals Process

The Veterans’ Preference Act requires a public employer to notify the veteran of its intent to discharge him or her. Elements of the notice must:

Minn. Stat. §
197.46

- include the statutory ground for the proposed termination/demotion;
- include a factual basis for the proposed termination/demotion;

- state that, pursuant to the Veterans' Preference laws, the employee has the right to request a hearing within sixty (60) calendar days of the receipt of the notice;
- state that if the employee fails to request a hearing within the sixty (60) day period, the employee's right to a hearing and other legal remedies for reinstatement will be waived; and
- state that the hearing will be before a neutral panel.

Failure of the public employer to provide a discharged veteran of this notice indefinitely extends the sixty (60) day limitation period for requesting the hearing. During this sixty (60) day period the public employer is obligated to compensate the veteran. If the veteran chooses to appeal, compensation continues until final disposition is made. If the veteran fails to request a hearing within sixty (60) days of receiving the notice, the veteran's right to a hearing is waived, as are all other remedies for reinstatement under the Veterans' Preference Act.

Tombers v. City of Brooklyn Center, 611 NW 2d 24 (Minn. App. 2000)

In light of the risk associated with failing to provide notice to a veteran and recognizing that the veteran status of some employees is not known it is most prudent to include a notice of the right to a veteran's hearing with every discharge. If the employee is not a veteran he/she cannot invoke the statutory rights, but failure to provide the notice may expose the employer to unlimited liability if the employee is a veteran.

Hearing

The law provides that the veteran has the right to a hearing before a neutral body prior to discharge from employment. The veteran is entitled to compensation through the decision of the hearing panel. The hearing panel may consist of a civil service commission, the Merit System, the Personnel Board of Appeals appointed pursuant to the County Personnel Act, a grievance arbitration panel (if the employee agrees to have the decision of the arbitrator apply as the veteran's hearing) or some other panel authorized by statute. If no such panel is in place then the appeal is heard by an ad hoc panel. Selection of the ad hoc panel is as follows:

Minn. Stat. § 197.46

- Each party appoints a person to the panel. The two panel members then jointly choose a third member. If they are unable to decide upon the third member, the parties may have the district court judge appoint the third panel member.
- Failure or refusal by the veteran to choose a panel member, resulting in the delay of the hearing, may preclude the veteran from receiving an award of back pay.

Veterans who are covered by a collective bargaining agreement may have a right to a Veterans' Preference hearing AND to arbitration under terms of the agreement. If the veteran is a member of a bargaining unit, the employer and the veteran may agree to have an arbitrator serve as the Veterans' Preference hearing officer. The collective bargaining agreement may also limit the employee's access to the grievance procedure if the veteran elects to proceed under the statute. The agreement cannot limit the veteran's access to the statutory Veterans' Preference process.

Duty of the Veterans' Preference Hearing Board

The decision of the hearing panel must be made in writing. The decision must include findings of fact and conclusions of law. The hearing panel may fashion a remedy other than the action proposed by the employer. If the hearing panel finds incompetence or misconduct and that the employer acted reasonably, it may only modify the proposed penalty upon substantial evidence of extenuating circumstances that justify a lesser penalty. Extenuating circumstances could be such things as family problems, illness or disability.

In re Matter of Schrader, 394 NW 2d 796 (Minn. 1986) *rhq. den.*

Judicial Review of the Hearing Board Decision

District Court

The veteran may appeal the findings of the hearing panel to the district court. The appeal must be in writing and state the grounds for the appeal. The employer must be served with the notice to appeal within fifteen (15) calendar days of the decision and it must be filed with the court administrator within ten (10) calendar days after service upon the employer (The employer may appeal the decision, but only on the very limited basis that the panel exceeded its authority granted by statute or engaged in misconduct that significantly impacted its decision).

Minn. Stat. § 197.46

The question before the reviewing court is whether the hearing panel abused its discretion. On appeal, the factual findings must be upheld if they are supported by substantial evidence on the record.

Court of Appeals

The right of appeal from a district court order is to the Court of Appeals. This Court of Appeals will apply the same standard of review as the District Court.

Minn. Stat. § 197.46

Penalties and Costs

The willful disregard of Veterans' Preference laws may constitute a misdemeanor by the public employer. An aggrieved veteran may also petition the Commissioner of Veterans Affairs for relief. Under the Act, a wrongfully discharged veteran is entitled to compensation. Even if the discharge is upheld, the veteran is entitled to compensation through the decision of the hearing panel. If reinstated, the veteran is entitled to back pay and benefits.

Minn. Stat. § 197.46

The political subdivision is responsible for all costs of the hearing process regardless of whether or not it prevails.

Enforcement of Veterans' Preference Laws

A veteran may petition the Commissioner of Veterans Affairs if the veteran believes he or she has been denied Veterans' Preference rights. The Commissioner may grant relief as justified. The Commissioner has broad subpoena power as well as access to records, witnesses and documents. The Commissioner shall hold a hearing on the petition of any party within twenty (20) calendar days of serving, or being served with the petition. The veteran may demand an opportunity to be heard at a time set by the Commissioner. A party who fails to demand such hearing within twenty (20) calendar

Minn. Stat. § 197.481

days shall be heard only by permission of the Commissioner, except that if any party demands to be heard all parties shall have the right to be heard.

Minn. Stat. §
197.481, subd. 4

The political subdivision will be responsible for all costs incurred by the Commissioner.

Minn. Stat. §
197.481, subd. 5

Either party may appeal the Commissioner's decision via writ of certiorari to the Court of Appeals. A petition for writ of certiorari by an aggrieved party for judicial review must be filed with the Court of Appeals and served on the agency not more than thirty (30) calendar days after receipt of the agency's final decision and order. If a request for reconsideration is made within ten (10) calendar days after the Department of Veterans Affairs decision and order, the thirty (30) day period will not begin to run until disposition of the application for consideration. On appeal, the court will review a decision of the Commissioner and determine whether it is arbitrary and capricious and without substantial support in the record.

If a party refuses or fails to comply with a final decision of the Commissioner, the Commissioner may seek compliance in Ramsey County District Court. If warranted, the district court may award damages.

Minn. Stat. §
197.481, subd.
8

Military Leave Rights of Reserve and National Guard Members

Federal and state laws guarantee certain benefits and securities to employees who are called to military service. The federal protections are addressed in the Uniformed Services Employment and Re-employment Rights Act (USERRA). Minnesota provides protection in Minnesota Chapter 192 and Minn. Stat. §471.975.

Introduction

USERRA prohibits discrimination and retaliation based on a person's military status. It applies to a person who:

- is a past or present member of the uniformed service;
- has applied for membership in the uniformed service; or
- is obligated to serve in the uniformed service.

38 U.S.C. § 4303
(16)

Uniformed services are defined as Army, Navy, Marine Corps, Air Force, Coast Guard, each reserve branch, Commissioned Corps of the Public Health Services, Army and Air National Guard when on active duty, inactive duty training or on full-time National Guard duty and any other group designated by the President during a war or national emergency.

The law prohibits an employer from denying the following based on military status:

- initial employment;
- re-employment;
- retention in employment;
- promotion; or

38 U.S.C. § 4311

- any benefit of employment.

An employer is also required to notify employees of their rights under USERRA. The notice must explain what rights and protections employees have under the Act including:

- right to re-employment;
- freedom from discrimination and retaliation; and
- health and pension benefit protections.

The employer can provide this notice to individual employees that are covered by USERRA or it can post a notice. The U.S. Department of Labor has prepared a poster that employers can use to meet this notice requirement. It is available at:

http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf

General USERRA Leave Requirements

Employers are required to provide employees military leave for up to five (5) cumulative years of active duty service. Inactive duty status, such as drill weekends and annual trainings are not to be counted as part of the five (5) year cap. There are several other exceptions that extend the five (5) year cap, which can be found in 38 U.S.C § 4312. Military leave is available regardless if the military duty is voluntary or involuntary.

38 U.S.C. § 4312

Any employee who engages in active service in time of war or other emergency for which leave is not otherwise permitted by law shall be entitled to a leave of absence. The obligations of the employer and rights of the employee may vary depending on the length of the leave (as discussed further below).

Employee to Provide Employer Notification:

- Employee must provide employer with notice (either written or verbal) unless giving notice is impossible, unreasonable, or precluded by military necessity.
- Notice should be “as far in advance as is reasonable under the circumstances.”
- An authorized officer may provide notice on the employee’s behalf.

38 U.S.C. § 4312

Health Insurance:

Leaves up to thirty (30) days:

- The employee can not be required to pay more than the regular employee share, if any.

38 U.S.C. § 4317
(a) (2)

Leaves over thirty (30) days:

- It may be reasonable for a health plan administrator to adopt COBRA compliant rules (even if the entity is otherwise not subject to COBRA requirements) regarding election of coverage, as long as those rules do not conflict with USERRA or state regulations.
- Employee can not be precluded from electing continuing health plan coverage because it is impossible or unreasonable for him to elect coverage.

38 U.S.C. § 4317

- May not be required to pay more than 102% of full premium under the plan (employer’s share plus 2% for the administrative costs).
- Employee must be able to elect to continued coverage for a period of 24 months.
- If health insurance is terminated it must be reinstated upon reemployment.

Reemployment/Right of Reinstatement:

Leave up to thirty (30) days:

- To claim reemployment rights, the employee must report back for the next regularly scheduled shift on the day after release. The time must allow for safe transportation from the place of service to the employee’s residence and an eight (8) hour rest period.
- Reemployment position is the same as for leaves less than 90 days.

38 U.S.C. § 4312
(e) (1) (A)

Leave more than thirty (30) days, but less than 181 days:

- An application for reemployment (written or verbal) must be made to the employer not later than fourteen (14) days after completing service.
- Employer is to provide “prompt reemployment” meaning as soon as practicable under the circumstances. Absent unusual circumstances, reemployment must occur within two (2) weeks.
- Employee is entitled to reinstatement to the job position that he or she would have had if not for the military leave (escalator principle):
 - Pay
 - Benefits
 - Seniority
 - Non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status and day that are on similar non-military furlough or leave
- Employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.
- If leave was more than ninety (90) days employee may be also eligible, in the alternative, for an escalator position of like seniority, status and pay, the duties of which the person is qualified to perform.
- If after reasonable efforts (including additional training) by the employer, the employee does not qualify for the appropriate escalator reemployment position(s), the employee must then be employed in the position held on the date of entering military service.
- If after reasonable efforts by the employer, the employee can not qualify for any of the above (other than due to disability incurred in or aggravated during military service), the employee must be employed in any other position which is the nearest approximation to a position above with full seniority.

38 U.S.C. § 4312
(e) (1) (C)

38 U.S.C. § 4313
20 C.F.R. §
1002.181

38 U.S.C. § 4313

Leave more than 181 days:

- An application for reemployment must be submitted not later than 90 days after completing service.
- Employer is to provide “prompt reemployment” meaning as soon as practicable under the circumstances. Absent unusual circumstances, reemployment must occur within two (2) weeks.
- Employee is entitled to reinstatement to the job position that he or she would have had if not for the military leave (escalator principle).
 - Pay
 - Benefits
 - Seniority
 - Non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status and day that are on similar non-military furlough or leave
- Employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.
- In the alternative, an escalator position of like seniority, status and pay, the duties of which the person is qualified to perform.
- If after reasonable efforts (including additional training) by the employer, the employee does not qualify for the appropriate reemployment escalator position(s), the employee must then be employed in the position held on the date of entering military service.
- If after reasonable efforts by the employer, the employee can not qualify for any of the above (other than due to disability incurred in or aggravated during military service, the employee must then be employed in any other position which is the nearest approximation to a position above with full seniority.

38 U.S.C. § 4312
(e) (1) (D)

38 U.S.C. § 4313

38 U.S.C. § 4313

Disability Incurred or Aggravated During Military Service

If the employee has been physically disabled, the employer must make a reasonable accommodation so that the employee may perform the duties of one of these positions (in order of priority):

- the escalator position;
- if the person is not qualified for the above by reason of the disability, a position that is the equivalent in seniority, status, and pay to the escalator position, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by employer;
- if the person is not qualified for the above by reason of the disability, a position that is in nearest approximate to the equivalent position, consistent with the circumstances of the employee’s case, in terms of seniority, status, and pay.

Applications for reemployment need not follow any particular format. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer.

20 C.F.R.
§1002.118

Deadlines for Reemployment Applications Extended Due to Military Injury

38 U.S.C. § 4312
(e) (2)

If an employee is hospitalized for, or convalescing from an illness or injury incurred in, or aggravated during, the performance or service, the deadlines are extended for up to two (2) years.

Reemployment May Not Be Required If:

- the employee would be on lay-off status, if not on military leave;
- the employer's circumstances have changed so much as to make employment impossible or unreasonable; or

20 C.F.R. §
1002.42

any accommodation, training or effort referred would impose an undue hardship on the employer;

38 U.S.C. § 4312
(d)(1)(C)

- or employment was for a brief, non-recurrent period and no reasonable expectation that employment that employment will continue indefinitely or for a significant period.

Although reemployment may or may not be required, the employer may have to pay any severance the employee would have otherwise received.

38 U.S.C. § 4313

Failure to Report Back to Work

When the employee fails to report back to work within these time frames, he/she does not necessarily forfeit his/her employment rights, but it does make the employee subject to the employer's policies on unauthorized absence from work.

38 U.S.C. § 4312
(e) (3)

Termination Protections after Re-employment

USERRA provides returning employees a period of time where they are protected from being terminated from their jobs. When an employer terminates an employee during that period, the employer has the burden to show that the employee was discharged for cause. The period of protection depends on the employee's length of military service.

38 U.S.C. § 4316

- Up to 30 days: no protection period
- Between 31 and 180 days: 180 days
- Over 180 days: one year

Note: It is important to remember that USERRA prohibits discrimination and retaliation based on an employee's military service status. Under the Minnesota

Veterans' Preference Act and Minnesota case law, a qualified veteran can only be terminated for misconduct or incompetence or if the job is eliminated in good faith.

Retirement/Pension

Upon reemployment, the employee will be treated as having been in continuous service of the employer for purpose of participation, vesting and accrual of benefits. The employer is not required to make its contribution until the employee is reemployed. Such contributions must be made no later than 90 days after the date of reemployment. Extra time may be afforded if such payment is impossible or unreasonable.

20 C.F.R.
§1002.262

If the employee is enrolled in a contributory plan, the employee may or may not elect to make such contributions. If the employee chooses not to contribute, the employer is not required to provide matching funds. The employee may choose to partially fund his past retirement obligations. The employee does not have to pay interest on any missed payments while on leave. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three (3) times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five(5) years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer.

The employee's right to pension benefits will be determined by the type of pension plan. In a non-contributory defined benefit plan, the employees benefit will be the same as if he/she had been continuously employed. In a contributory defined benefit plan, the employee will need to make his/her contributions in order to receive full benefits. In a defined contribution plan, the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period(s) of service.

20 C.F.R.
§1002.265

Enforcement of USERRA

An employee has the right to file a complaint with the Veterans' Employment and Training Service of the U.S. Department of Labor (VETS) to enforce USERRA. VETS will investigate and attempt to resolve complaints against employers. If VETS cannot resolve a complaint, the case could be referred to the Department of Justice for representation by the attorney general or alternatively, the employee may file a civil action in federal district court. Possible remedies for violations of USERRA are an award of lost wages and benefits and if the failure to comply was willful, a similar amount as liquidated damages. The federal court can also use injunctions and restraining orders.

Additional State Military Leave Laws

USSERA is a floor to military leave rights, meaning that employers and state regulations can afford more benefits, but may not offer less benefits than those outlined in USSERA. Below are a few state regulations that provide for greater benefits than those articulated in USSERA.

Authorized Paid Leave

Employees who are members of the National Guard or the officers' reserve corps, the enlisted reserve corps, the Naval Reserve, the Marine Corps reserve, or any other reserve component of the military or naval forces have the right to a leave of absence without loss of pay, seniority status, efficiency rating, vacation, sick leave or other benefits for all the time when engaged with such organization or component in training or active service ordered up to 15 days a year.

(Minn. Stat. §
192.26

To be eligible for the paid leave the employee must return to the public position immediately after being relieved, unless:

- the employee is prevented from returning due to a physical or mental disability or other cause not due to the officer's or employee's fault or
- the employee is required by proper authority to continue in such military or naval service beyond the 15 days.

Authorized Pay Differential

A public entity may pay a salary differential to an employee who is a member of the National Guard or Reserve who are ordered to active military service.

- The qualifying criteria for an employee are:
 - Payment may be made only to a person whose base active military pay is less than the salary the employee would have received as an employee of the public subdivision.
 - The difference in pay includes any adjustments the member would have received if not on a leave of absence.
 - Payment must not extend four (4) years from the date that the employee reported for active service.
- An employee has the option to use accrued vacation during the leave, but may not be required to use it.

Minn. Stat. §
471.975

Leave of Absence Benefit Rights

Employees, who engage in active service in the time of war or other emergency declared by the proper authority and for which leave is not otherwise allowed by leave, are entitled to a leave of absence. The leave of absence may not extend beyond four (4) years (plus any additional time as such individual may be legally required to serve). If the benefits under this state statute are less than those granted by USSERRA, the USSERRA benefits control.

Like the veteran's rights under USSERRA upon reemployment, the employee is entitled to the equivalent "escalator" position.

- Employee also has right to:
 - accrued sick leave;
 - accrued vacation time;

- other benefits, such as seniority, that the officer or employee would have had had the employee actually been employed during the leave; and
 - the accrual of leave time must be without regard to regulations limiting the number of days which may be accumulated.
- Reinstatement is not required if:
 - the position has been abolished;
 - the employee is not physically or mentally able to perform the duties of the position;
 - the employee was dishonorably discharged; or
 - the employee fails to make a timely application for reemployment.

Minn. Stat. §
192.261

Any person who is reinstated under this provision shall not be discharged from the position unless for cause, after notice and hearing, within one (1) year after reinstatement.²

Authorized Leave for Training

Initial period of active duty for training of not less than three (3) consecutive months shall be entitled to reinstatement upon reemployment within 31 days after that employee's

- release from active duty for training after satisfactory service; or
- discharge from hospitalization incident to that active duty for training.

Any person who is reinstated under this provision shall not be discharged from the position unless for cause within six (6) months after reinstatement.

The employee shall be entitled to all reemployment rights and benefits.

Any other training for active duty or inactive duty shall entitle the employee to reinstatement with all reemployment rights and benefits. He/she must report for work on the next regularly scheduled working period after release from training (including any necessary travel time).

Minn. Stat. §
192.261, subd. 5

Retirement and Pension Rights

Employees have a right to continued employment and retirement benefits, including increases, as if they were not on leave if payment of contributions or assessments continues to occur. If an employee elects to purchase PERA service credit, the employer is obligated to provide the employer contribution.

Minn. Stat. §
192.262

Filling Vacancies

If it is determined that the work performed by the employee is necessary and in the public's interest, a government entity has the authority to fill a vacancy until the employee returns or the term of the position expires.

Minn. Stat. §
192.263

² Public Sector employers may only discharge Veterans for cause pursuant to the Minnesota Veterans Preference Act.

Employment Leave for Family Members of an Injured or Killed Soldier³

Public employers must grant an unpaid leave of absence of up to ten (10) days to an employee whose immediate family member is injured or killed while serving anywhere in active military service.

- Immediate family is defined as a deceased service member's parent, child, grandparent, sibling or spouse.
- Active Service is defined broadly to include both federal and state active military for any purpose, including training.
- Independent contractors are included in the definition of employee.
- The employee must give the employer as much notice as is practicable before taking leave.
- The employer may reduce the unpaid leave by any period of paid leave provided for the employee.
- The employer may provide leave benefits in addition to those provided in this section.

Minn. Stat. §
181.947

Employment Leave for Family Members to Attend Military Ceremonies

Employers must grant an unpaid leave of absence to an employee whose immediate family member has been ordered into active service in support of a war or other national emergency.

- Leave does not have to be granted if it unduly disrupts the operations of the employer.
- The employer may limit the amount of leave to the actual time necessary to attend a send-off or homecoming ceremony not to exceed one day's duration in any calendar year.
- Independent contractor is NOT included in the definition of employee.

Minn. Stat. §
181.948

Employer must not discharge from employment, take adverse employment action against or otherwise prevent an employee from attending the employee's spouse, parent, or child and to which the employee is invited or otherwise called upon to attend by proper military authorities:

- departure and return ceremonies for deploying or returning military personnel or units;
- family training or readiness events sponsored or conducted by the military; and
- events held as part of official military reintegration programs.

The employee must provide reasonable notice. The employee's right to leave may not exceed two (2) consecutive days or six (6) days in a calendar year. The employee is allowed to but may not be compelled to use accumulated but unused vacation.

Minn. Stat. §
192.325

³ For an injured employee, an employer may also have an obligation to grant leave to the employee under the provisions of the Family Medical Leave Act (FMLA).

Professional Licenses or Registration

Any person that is required by Minnesota law to be licensed or registered with the state in order to perform a practice or trade who enters into active military service does not have to file or pay filing fees for the renewal of the license or certificate. Their present license or certificate remains in effect until six (6) months after active military service has ended.

Minn. Stat. §
326.56

Enforcement of Minnesota State Laws

To enforce state military leave and rights laws, an employee can contact the Minnesota Department of Labor and Industry or bring a state court action. The employee can also contact the Commissioner of Veterans Affairs. Possible remedies could include lost wages, benefits, costs and injunctions or restraining orders.

Civil Relief Laws

The Federal Service members Civil Relief Act provides protections relating to civil law actions of military members. 50 USC App. § 501 et seq. This law applies to soldiers in active service. The law temporarily suspends civil legal proceedings “which may prejudice the civil rights of persons” actively participating in the military. This law could apply to any employment related actions involving these employees. The Minnesota legislature extended the federal protections to Minnesota soldiers in 2002 with Minn. Stat. §190.055. The state law applies to soldiers in state active service or federally funded state active service.

50 USC App. §
501 et seq.

Minn. Stat.
§190.055

Conclusion

MCIT does not extend coverage for claims arising out of failure to comply with the Veterans’ Preference Act or USERRA. However, MCIT recognizes the risks in complying with these regulations exist for its members. This publication has attempted to provide general risk management advice on complying with the various state and federal regulations. If you have specific questions related to this topic contact your county attorney, labor attorney or employment attorney.