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SHORT FACTS

QUESTIONS AND ANSWERS ABOUT MILITARY LEAVE

vary from case to case, it allows employees who suffer an "undue delay" in reinstatement to make a claim for lost wages.

- Q:** If an employee was on layoff status prior to being activated, can the employee be returned to such status?
- A:** Yes, so long as the employee would have been laid off had he or she not been called to duty. If an employee is on military leave and the company experiences a layoff that would have included that employee, he or she may be returned to layoff status. The seniority of a member of the uniformed services must be honored during any lay-off and call-back procedures.
- Q:** If an employee is on strike when called up and the strike is settled while the worker is on military leave, is the employee entitled to be re-employed?
- A:** Generally, yes, if the employee would have gone back to the job when the strike ended. If the strike was settled while the worker was on military leave, it is presumed that the employee would have chosen to return to the job.
- Q:** How soon must an employer reinstate a returning employee's health insurance?
- A:** Once an employee is reinstated after military service, there should be no lapse in health insurance coverage, no waiting period, and no exclusion for pre-existing conditions, either for the employee or his or her dependents.
- Q:** Must an employer re-employ a member of the uniformed services who has gotten into legal trouble while on military duty?
- A:** If such an employee receives a certificate of satisfactory service or is honorably discharged from military service, the employee is considered qualified to return to work. If the individual has a less than honorable or bad conduct discharge, it may be possible for the employer to deny re-employment. In this event, the employer should always seek legal counsel before taking adverse personnel action.
- Q:** How might a bankruptcy proceeding or the sale of a company affect a reservist's re-employment rights?
- A:** An employer that goes into bankruptcy

proceedings has obligations to re-employ a returning reservist if the employer still has a payroll. If a company is sold while an employee-reservist is on active duty, the new owner inherits the predecessor's obligations to the reservist.

Protection Against Discharge

- Q:** Are members of the uniformed services protected from termination without cause?
- A:** Yes, if their service lasts more than 30 days. Specifically, employees who serve for 31 to 180 days cannot be discharged without cause for six months following their return, while employees who serve more than 180 days are protected for one year.

Legal Action

- Q:** What can the legal ramifications be if an employer fails to comply with the law?
- A:** An employer can be ordered to compensate the employee for any loss of wages or benefits due to noncompliance with the law, plus liquidated damages if a court determines that the violation was "willful."

HR-News



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OSHA'S REVISED RECORDKEEPING REQUIREMENTS COMING SOON

If you missed the Occupational Safety and Health Administration's (OSHA) news release earlier this year on their revised workplace injury and illness record keeping regulations, you still have time to get up to speed on the changes. The new regulations go into effect on January 1, 2002 and will affect approximately 1.3 million establishments. Many of you are likely familiar with the

OSHA 200 log and summary although you may never have completely understood all of its idiosyncrasies. According to OSHA, the revisions to the original record keeping rule, which was promulgated in 1971, improve employee involvement, provide clearer regulatory requirements, create simpler forms and allow employers more flexibility for using computers to

meet OSHA requirements. Time will tell if employers agree! OSHA's record keeping requirements provide the source data for the Bureau of Labor Statistic's (BLS) Occupational Injury and Illness Survey, which many employers are asked to participate in each year. This data is used to develop information concerning workplace injuries and illnesses that the BLS publishes.

Inside this issue:

	1
Shortfacts	4

QUESTIONS AND ANSWERS ABOUT MILITARY LEAVE

With the September 11th tragedy, our phones have been ringing off the wall with questions on military leave. Following are some of the most frequently asked questions about employers' obligations regarding the leave, benefits, and re-employment rights of veterans and members of the uniformed services. The information presented here is from the Bureau of National Affairs and is derived primarily from a reading of federal law and fact sheets. Employers also should make a point of reviewing any obligations they may have under state law. We have also placed additional information regarding military leave on our website (www.hr-onesource.com). We are always available by phone if

you have any questions. Please call 515-221-1718.

Employment Status

- Q:** Can an employer replace an activated reservist?
- A:** A replacement may be assigned to the reservist's job, but that assignment is temporary only.

Compensation and Benefits

- Q:** Are employers required to continue paying employees who are activated for military service?
- A:** No. While on active duty, members of the uniformed services are paid by the military according to their rank. There is no federal law that requires employers to continue salary payments, although

Iowa law does contain provisions on compensating public employees.

As a matter of policy, many employers either continue to pay activated members of the uniformed services their full regular pay in addition to military pay, or pay the difference between regular pay and military pay. Typically, the duration of payment depends on length of service with the company. Some employers provide pay only for unused vacation and/or sick leave.

NOTE: Employers with specific policy or contractual provisions that address pay and benefits issues are obligated to abide by those provisions.

- Q:** May activated reservists take paid vacation time that they
- Continued on page 3*

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice.

OSHA'S REVISED RECORDKEEPING REQUIREMENTS COMING SOON

Like the current rule, employers with 10 or fewer employees are exempt from most requirements of the new rule, as are a number of industries classified as low-hazard such as retail, service, finance, insurance, and real estate sectors. The new rule updates the

Continued on page 2

Continued from page 1

list of exempted industries to reflect recent industry data. However, all employers covered by the OSH Act must continue to report any workplace incidents resulting in a fatality or the hospitalization of three or more employees.

One of the least understood concepts of record keeping has been restricted work; the new rule clarifies the definition of restricted work or light duty and makes it easier to record those cases. Work-related injuries are also better defined to ensure the recording only of appropriate cases while excluding cases clearly unrelated to work. Examples of excluded cases include, eating and drinking of food and beverages, common colds and flu, blood donations, and voluntary participation in wellness programs. Privacy concerns of employees have also been addressed; the former rule had no privacy protections covering the log used to record work-related injuries and illnesses. The new rule prohibits the employer from entering the employee's name for certain "privacy concern" cases (e.g., sexual assaults, HIV infections, mental illnesses, etc.). A separate confidential list of case numbers and employee names must be kept for these cases. An employee representative can access only part of the information from the form, and the employer must withhold the remainder of the information when providing copies.

Highlights of OSHA's Record keeping Rule include:

- Updates three record keeping forms:
- OSHA Form 300 (Log of Work-Related Injuries and Illnesses); simplified and printed on smaller legal-sized paper.
- OSHA Form 301 (Injury and Illness Incident Report); includes more data about how the injury or illness occurred.
- OSHA Form 300A (Summary of Work-Related Injuries and Illnesses); a separate form updated to make it easier to calculate incidence rates.
- Eliminates different criteria for recording work-related injuries and work-related illnesses; one set of criteria will be used for both. (The former rule required employers

- to record all illnesses, regardless of severity.)
- Requires records to include any work-related injury or illness resulting in one of the following: death; days away from work; restricted work or transfer to another job; medical treatment beyond first aid; loss of consciousness; or diagnosis of a significant injury/illness by a physician or other licensed healthcare professional.
- Includes new definitions of medical treatment, first aid, and restricted work to simplify recording decisions.

- Requires a significant degree of aggravation before a preexisting injury or illness becomes recordable.
- Clarifies the recording of "light duty" or restricted work cases. Requires employers to record cases when the injured or ill employee is restricted from their "normal duties," which are defined as work activities the employee regularly performs at least once weekly.
- Requires employers to record all needle-stick and sharps injuries involving contamination by another person's blood or other bodily fluids.
- Requires employers to record standard threshold shifts (STS) in employees' hearing. (An STS is an adverse change in an employee's hearing threshold, relative to his/her most recent audiogram). Provides a separate column on the OSHA Form 300 to capture statistics on hearing loss.
- Applies the same recording criteria to musculoskeletal disorders (MSDs) as to all other injuries or illnesses. Employer retains flexibility to determine whether an event or exposure in the work environment caused or contributed to the MSD.

Forms include columns dedicated to MSD cases.

- Includes separate provisions describing the recording criteria for cases involving the work-related transmission of tuberculosis or medical removal under OSHA standards.
- Eliminates the term "lost workdays" and focuses on days away or days restricted or transferred. Also includes new rules for counting that rely on calendar days instead of workdays.
- Requires employers to establish a procedure for employees to report injuries and illnesses and tell their employees how to report. Employers are prohibited from discriminating against employees who do report. For the first time, employee representatives will have access to those parts of the OSHA 301 form relevant to the employees they represent.
- Requires the annual summary to be posted for three months instead of one. Requires certification of the summary by a company executive.
- Changes the reporting of fatalities and catastrophes to exclude some motor carrier and motor vehicle accidents.

OSHA is currently reconsidering two provisions in the final rule. First, they are proposing that the criteria for recording work-related hearing loss not be implemented for one year pending further investigation into the level of hearing loss that should be recorded as a "significant" health condition. The Department had received comments pointing out that the medical community and State workers' compensation systems do not support the current rule's hearing loss standard. Second, they are proposing to delay for one year the record keeping rule's definition of "musculoskeletal disorder" (MSD) and the requirement that employers check the MSD column on the OSHA Log. This delay is due to OSHA rescinding the final Ergonomics Program Standard.

Look for multiple instructional seminars by various business association groups and the Iowa Safety Council over the next few months. An excellent overview of the new rules and required forms are available at <http://www.osha-slc.gov/recordkeeping/OSHArecordkeepingforms.pdf>.

Affected employers should continue to follow the current guidelines for recording work-related injuries and illnesses. You will begin following the revised rules on January 1, 2002.

QUESTIONS AND ANSWERS ABOUT MILITARY LEAVE

Continued from page 1

have already earned during their military service period?

A: Yes. Employers cannot, however, require that the accrued paid leave be used.

Q: Does seniority continue to accrue to activated members of the uniformed services?

A: Yes, seniority continues just as though an employee were still on the job.

Q: Are activated members of the uniformed services entitled to continue accruing vacation leave?

A: Vacations that depend solely on length of service continue to accrue. Entitlement to vacations or vacation pay that is not seniority-based depends on the company policy; generally, any eligibility requirements stipulated in the policy must be met.

Q: What effect does an emergency call-up have on activated members' health care benefits?

A: Under USERRA, an employee who performs military service can request to be covered through the employer's health care insurance for up to 18 months, similar to the continuation of coverage under COBRA. An employee requesting continuing insurance coverage may be required by the employer to pay the entire cost of the benefit, unless the service is for 30 days or less. In the case of short tours under 31 days, the employer is required to continue the insurance coverage, and the employee may only be required to pay the employee share, if any.

The government provides health care through military hospitals and the Civilian Health and Medical Program for Uniformed Services (CHAMPUS), for which reservists' dependents automatically become eligible when a call-up is for more than 30 days.

Q: Must employers credit employees for pension vesting and benefit accruals for the period of active military duty?

A: Time spent in the military must be counted for vesting and benefit accrual purposes under defined benefit plans, defined contribution plans, and profit-sharing plans.

Q: Do the benefits of employee stock ownership accrue to an activated reservist?

A: Yes.

Q: Does a call-up have any effect on an activated reservist's outstanding loan from a 401(k) plan?

A: Under the federal Soldiers' and Sailors' Civil Relief Act, the interest rate charged on an outstanding participant loan incurred prior to the start of military service may be lowered to a cap of 6 percent during the period of active duty. The waived interest (the amount in excess of 6 percent) does not constitute taxable income to the reservist. (See IRS Notice 90-142, November 21, 1990.) Following release from military service, the initial interest rate can be charged.

Re-employment Rights

Q: Are returning members of the uniformed services entitled to re-employment in the same positions they vacated when called to active duty?

A: Employers are required to reinstate returning members of the uniformed services in their former positions or jobs with the same pay, rank, and seniority the employees could have expected had their employment not been interrupted by military service.

Q: Are employees who were on probationary status at the time of their call-up eligible for reinstatement?

A: Yes. Similarly, reinstatement rights extend to those who may have worked only a few days or weeks before being called up, provided they occupied non-temporary positions.

Q: May employees with probationary status be returned to such status?

A: An employee returning from military duty need not complete a probationary period that was simply a length-of-service requirement. Such an employee may, however, be required to complete probation if the probationary period was a training period.

Q: How long must jobs be held open?

A: Jobs must be held open for at least five years — the "service limitation" period established by law.

Q: Must employers keep open the jobs of members of the uniformed services who extend active duty through their own choosing?

A: Yes. Employers must keep open the jobs of such employees for as long as five years.

Q: Must a job be held open if a member of the uniformed services is injured while on duty and unable to return to work immediately?

A: Yes. A job must be held open for up to a two years if a member of the uniformed services has been hospitalized or injured during military service. If the employee has sustained a service-connected disability that makes it impossible to return to the original job, the employer must offer a position the employee can perform that is comparable in pay, rank, and seniority.

Q: Suppose an employee was promoted or promised a pay raise just before call-up. Is the employee entitled to the promotion (or an equivalent job) or raise upon return from military duty?

A: Yes.

Q: Is a returning reservist entitled to back pay?

A: Federal law does not provide for entitlement to back pay upon re-employment.

Q: Can employers require members of the uniformed services to return to work immediately following their release from active duty?

A: No. In general, members of the uniformed services who have been on duty for less than 31 days must return to work at the beginning of the next regular workday after completion of service plus eight hours (to provide time for transportation); employees on duty between 31 days and 181 days must return no later than 14 days following completion of service; and employees on duty over 180 days must return to work no later than 90 days following completion of service.

Employers should request a copy of military orders showing the date of release from duty and ask to see the certificate showing satisfactory performance of duty.

Q: How is an application for re-employment handled?

A: The returning employee may contact someone in authority by phone or in person, making it clear that he or she wants to return to work. Once an employee applies for re-employment, the employer must put the individual back to work as soon as possible.

Q: If an employee returns to work the day after release from military duty, can the employer delay putting the worker back on the payroll?

A: Generally, USERRA requires "prompt" reinstatement of returning members of the uniformed services. While the law recognizes that "prompt" reinstatement will