

# Military Leave Issues

Military leave continues to be an important issue, especially as controversy stirs over the "double pay" collected by state and municipal police officers serving in the Massachusetts National Guard while on leave from their state jobs. Much of the confusion caused by military leave stems from the complex web of state and federal laws governing military leave.

Federally, the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4301-4334 ("USERRA") protects the rights of employees who leave their employers to perform military service. These rights fall into three categories: the right of the employee to take leave for military service, the right of the employee to any benefits accrued in their absence, and the rights of the employee regarding health insurance. The first category includes the most basic of the protections: an employee who, as the result of voluntary or involuntary military service, requires a leave of absence must be allowed to take that leave and must be allowed to return. The leave may be unpaid, but all employees are entitled (not required) to use accrued vacation time to continue their pay. Employment benefits such as step increases or job upgrades follow the "escalator" principle: if the employee would have received benefits while away, he or she receives them upon returning. This does not include promotions (unless all similarly situated employees were promoted), but can include allowing an employee to make up a test for promotion. Time served in the military also counts towards retirement, and to the extent retirement contributions by employer and employee are required, those contributions must be made up within a set period of time after the employee returns.

Regarding health insurance, USERRA mandates that employees are entitled to a continuation of health insurance in their first 30 days of military leave. While the military provides direct medical care to members and dependents and makes health insurance available, many times employees with families would rather keep coverage through their employers. USERRA requires employers to make available to the employee group health insurance, provided that the employee pays the full premium for the coverage (this coverage is similar to COBRA, and the employer may also charge a 2% administrative fee if it elects to do so). If public employers wish to continue health insurance for employees on military leave (with the employees contributing their usual percentage), the municipality must adopt G.L. c. 32B, § 9I. Municipalities that are continuing health insurance coverage for these employees should check to make sure they have adopted § 9I.

G.L. c. 33, § 59 [Effect of military service on salary or vacation allowance of public employees], governs the effect military service has on a municipal employee's compensation. It is a local acceptance statute, so it is important to verify whether it has been adopted in a given municipality. It lists several types of leave which qualify for compensation by municipalities. The most common is the annual training, which usually lasts about two (2) weeks. When compensating for training, employers should simply remember that for each annual training tour, an employee is entitled to be paid for regularly scheduled workdays during the first seventeen (17) calendar days of the training leave. Other types of leave included in G.L. c. 33, § 59 occur when the Governor activates the National Guard for certain types of duty, such as emergency assistance to local officials.

In regard to compensation, the statute states that employees on qualifying military leave are entitled, "...to receive pay therefor, without loss of his ordinary remuneration as an employee...of the...city or town..." While there is no Massachusetts case law on what "without loss of ordinary remuneration" means, other states have interpreted it to mean that the employee is entitled to his/her full municipal pay in addition to military pay. While this double pay is not overly taxing when applied to the two (2) weeks of annual training, it becomes a problem in conjunction with a new type of hybrid military service that is increasingly being ordered. Ordered by the Governor, but paid for with federal funds and in support of a federal mission, this type of military leave has recently come under scrutiny because it allows for double pay for those National Guard members serving in-state, but not those serving overseas.

Central to this debate is Chapter 137 of the Acts of 2003 [An Act Relative To Public Employees Serving In The Armed Forces Of The United States], a local-acceptance statute provides that municipalities pay only the difference between military pay and municipal pay for National Guard or Reserve members serving overseas in combat theatres. It is unlikely that the legislature intended for municipalities to pay the difference in salary to National Guard members who are in combat, while providing double pay for those who stay in Massachusetts in support of the federal mission.

Finally, a relatively unknown law, Chapter 708 of the Acts of 1941, protects civil service employees on leave for military service. For instance, if a candidate for original appointment appears on a certified list but is unavailable due to military service, the appointing authority cannot bypass the candidate based in any way on his military status. Before any civil service action is taken which might affect an employee (or potential employee) who is away in the military, labor counsel and the Commonwealth's Human Resources Division should be contacted.

Military leave for public employees in Massachusetts is a complex issue and is filled with pitfalls, especially for the municipal employer. Employers should seek advice from labor counsel when faced with any uncertainty about a military leave question. In such a circumstance, an ounce of prevention might just be worth a pound of cure.