

Know the employment rights of returning military

By Kathleen Driscoll

At Work

"We have an employee who's returning from 18 months on active duty in the Army Reserves. He's been to Iraq and lived through things that I can't even imagine. I know that I'm supposed to rehire him but my problem is what do I do with the employee who's been doing an excellent job for us in the position that he held before his deployment? I don't want to fire her. But in a small business like ours, there are no 'extra jobs.' Any advice?"

Well, you're in a really tough spot on this one. And we are hearing more and more about issues like this because of President Bush's call for more troops in Iraq.

The area of the law that applies to this is the Uniformed Services Employment and Reemployment Rights Act, which was signed into law in October 1994, and applies to individuals who either voluntarily or involuntarily serve in the "uniformed services." That could include those in the U.S. Marine Corps, Army, Navy, Air Force, Coast Guard and the reserve components of each of these, as well as the Army National Guard or Air National Guard. Others added to this in 2002 include individuals doing disaster response work under the Public Health Security and Bioterrorism Response Act of 2002.

Under this law, according to lawyer Steve Modica of Modica and Associates of Rochester, someone called for military duty must be rehired if he or she gave proper notice and the cumulative length of the military leave of absence—including the most recent one—does not exceed five years and the individual promptly reports to work or applies for the job in a timely way.

Employers can deny re-employment under certain circumstances but it's very difficult to do, says Patrick DiLaura, founder and president of the Providium Human Resource Group LLC, a local human resource consulting firm.

"The circumstances would have to be pretty extraordinary to make that argument successful such as your business closed down. Short of something that extreme, you'd have a hard time proving it," he says.

Nonetheless, the law states that an employer may deny re-employment if the circumstances have changed that they "make re-employment unreasonable," Modica says. The law also allows denial of re-employment if it would pose "an unreasonable hardship" on the employer, the position occupied before the military leave was for a "brief, non-recurrent period" and there was no expectation that the position would continue indefinitely or the employer had "legally sufficient cause" to fire the employee at the time he or she began military service.

The "undue hardship" exception is very similar to the Americans With Disabilities Act in that an employer is not required to provide an accommodation that causes "an undue hardship," he says.

But unlike the ADA and the Family and Medical Leave Act, the USERRA does not make any exceptions for the size of the business.

"That is a huge difference, given the question in this case," DiLaura says. "You could be an employer with just two or three people and this law would apply equally. It can impose a hardship."

In addition to rehiring, the USERRA law requires employers to reinstate the individual at full pay and benefits, including vacation and other benefits that accrued during the leave. "All that kicks in as though the person never left," he says.

So this can be very difficult for a small employer. You could claim that you are exempt from the re-employment requirement, Modica says, but there is a risk that you will be investigated by the U.S. Department of Labor or, in the worse case, sued.

"If you are found liable, you could have to pay lost wages and benefits, penalties (amount equal to the lost wages), attorney fees and other expenses incurred by the former employee.

"While it would be disappointing to have to let the (replacement) employee go, you may have no other choice," he says.

A small business that doesn't have financial "maneuvering room" really has to be clear when hiring that it's a temporary replacement position for someone called to active duty who will return, DiLaura says.

"But you don't want to demotivate the worker, so you would want to say that 'if you perform as we both expect you will, every effort will be made to retain you in some capacity.'

"It's important to set expectations so there isn't a surprise or disappointment at the end when the person does return."

Perhaps you could consider trying to preserve some type of employment relationship, DiLaura says, maybe by hiring the person on an on-call basis until something opens up or piecing together another position that would address other needs in the company.

"You want the person to understand that you're making the effort to retain them. You're saying, 'I'm committed to a longer term relationship with you and willing to be creative. If you step into this new role, you'll be positioned to take advantage of any new opportunities.'

"The last thing you want is a person feeling bad about your company and out there spreading the word. It's a combination of openness and honesty on the front end and making every effort possible to find alternatives on the back end," he says.

For additional information on the USERRA, consult this Web site:
www.dol.gov/compliance/guide/userra.htm.

Managers at Work is a bimonthly column exploring the issues and challenges facing managers. Contact Kathleen Driscoll with questions or comments by phone at (585) 249-9295 or by e-mail at kadriscoll@aol.com.

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