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Return to Work

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Reference Number: MTAS-873

38 U.S.C. § 4313(a)(1) provides that after military service of less than 91 days, the military service person is entitled to reinstatement in the “escalator position,” to the position in which he or she would have been employed if not for the interruption in employment. 20 C.F.R. § 1002.196(b) provides that the employer must make reasonable efforts to help the employee become qualified for that position. 20 C.F.R. § 1002.196(c) also provides that if the employee cannot become qualified for that position, the employee is entitled to the position in which he or she was employed when military service started. If the employee is not able to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employer, the employee must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position.

After military service of more than 90 days, an employee is entitled to reinstatement in the escalator position, however, 20 C.F.R. § 1002.191 provide that upon the specific circumstances the employer may have the option, or may be required, to re-employ the employee in a position other than the escalator position. The employer must make reasonable efforts to help the employee qualify for one of those positions. 20 C.F.R. § 1002.197(a). If the employee cannot become qualified, the employee is entitled to be placed in any other position that is the closest approximation to the escalator position. 20 C.F.R. § 1002.197(b). If there is no such position for which the employee is qualified, the employer must place the employee in any other position that is the closest approximation to the pre-service position. 20 C.F.R. § 1002.197(c).Note: The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position. 20 C.F.R. § 1002.198.

The Thompson Publishing Company article states that “employers may treat missed opportunities for promotions differently, depending on whether the promotions are automatic or, as with many white collar jobs, based primarily on the employer’s discretion.” If an opportunity for promotion or eligibility for promotion that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. 20 C.F.R. § 1002.193(b).

The Department of Labor (DOL) acknowledges that if a promotion is not based simply on seniority or other forms of automatic progression, but depends on the employer’s discretion, a re-employed veteran would have to demonstrate that it was reasonably certain that he or she would have received the benefit if he or she had remained continuously employed. 20 C.F.R. § 1002.194.

Employers must make “reasonable efforts” to allow the returning service member to qualify for the position to which the employee is entitled. “Reasonable efforts” include training and retraining that does not place an undue hardship on the employer. 20 C.F.R. § 1002.5(i). "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make the employee unqualified. The employer, however, is not required to re-employ an individual into a position that he/she is not qualified to perform.

An employee leaving a job for military service is not required to decide at that time whether he or she intends to return to the employer upon completion of military service but can defer that decision until after completing service. 20 C.F.R. § 1002.88. The employer may, however, prohibit the individual from seeking employment with a competitor. The burden of proving that the employee does not intend to seek re-employment with that employer following military service still rest with the employer. The individual must provide “clear, written notice” of their intent not to return to the employment of the organization. Even with such notice, the employee does not losses rights and benefits to re-employment after completing service.

Under USERRA, employee can obtain employment with a different employer while waiting for reinstatement without giving up re-employment rights with the first employer. But if this alternative employment during the application period violates the pre-service employer’s employment policies (such as a city’s prohibition against second jobs) to such a degree that it would be just cause for discipline or termination, then there is no right to re-employment. 20 U.S.C. § 1002.120. Additionally, a

returning employee loses his or her re-employment rights if he or she is discharged from military service for

- dishonorable or bad conduct,
- other than honorable conditions,
- dismissed by general court martial; in commutation of a sentence of a general court martial; or, in time of war, by order of the President, or
- dropped from the roll due to an absence for at least three months; separated by reason of a sentence to confinement adjudged by a court-martial; or a sentence to confinement in a Federal or State penitentiary or correctional institution. 20 U.S.C. § 1002.135.

USERRA establishes re-employment rights to a job but does not require that employers pay employees their regular pay while absent for military service, although employers may choose to do so. 20 U.S.C. § 1002.7(c). Some employers provide “differential pay,” which is the difference between the employee’s military pay and civilian pay. Differential pay is not required but it is “a generous show of support by employers for their employees who are in service to the nation. 20 U.S.C. § 1002.7(d) also provides that if an employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the act.

Under Tennessee state law, however, eligible service members are entitled to 20 days of paid leave per year for active duty. T.C.A. § 8-33-109. If an employee has not used his military leave during the year, he is entitled to the first 20 days of his service at full pay. Whether the organization supplements the difference between an employee’s military pay and regular pay is a decision the employer can make. T.C.A. § 58-1-109 also provides that reservists called to duty by the governor “... in case of invasion, disaster, insurrection, riot, attack, or combinations ...” shall be paid from appropriated funds by the military. No member shall receive less than $50 per day. No member shall receive less than $55 per day when called to active duty in cases of grave emergencies.

20 U.S.C. § 1002.149 provides that an employer must treat an employee during his or her period of military service as being on furlough or leave of absence. The employee is entitled to the non-seniority rights and benefits that the employer generally provides to other employees who are on furlough or leave of absence with similar seniority, status, and pay. The non-seniority rights and benefits are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan.
