

Pension ANALYST

Important Information

Plan Administration and Operation

February 2006



DOL Publishes Final USERRA Rules

WHO'S AFFECTED These rules apply to qualified defined benefit and defined contribution plans that are subject to ERISA, including multiemployer plans and to ERISA 403(b) plans. They also apply to plans that are not subject to ERISA, such as governmental plans, nonelecting church plans, non-ERISA 403(b) programs, and section 457(b) plans. In addition, these rules apply to all types of nonqualified deferred compensation arrangements.

BACKGROUND AND SUMMARY The Uniformed Services Employment and Reemployment Rights Act (USERRA) was signed into law on October 13, 1994. USERRA grants certain reemployment and benefits rights to an employee who is absent from his job due to his duty in uniformed military service. The Small Business Job Protection Act of 1996 (SBJPA) added the application of USERRA rules to pension plans.

On September 20, 2004, the Department of Labor (DOL), published proposed regulations to provide guidance to employers and employees concerning their rights and obligations under USERRA. On December 19, 2005, the DOL issued final USERRA rules, which are effective January 18, 2006. The DOL final USERRA rules cover many areas including reemployment rights, employer-provided "welfare" benefits (e.g., medical, cafeteria plans) and retirement issues. This *Pension Analyst* discusses select retirement issues and reemployment rights as they relate to retirement plans.

ACTION AND NEXT STEPS Plan sponsors should review the information in this publication to determine how it affects their plans. If you need more information regarding USERRA provisions as they relate to your plan, please contact your Prudential Retirement representative.

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President Clinton signed USERRA into law on October 13, 1994. USERRA grants certain reemployment and benefits rights to an employee who is absent from his job due to his duty in uniformed service. Although this law has been in effect for more than ten years, it was not until September 20, 2004, that the DOL issued proposed rules to provide guidance concerning employee rights and employer obligations. These proposed rules were finalized on December 19, 2005, and are effective January 18, 2006.

On the same day the final rules were issued, the DOL also issued a [notice of USERRA rights](#). Employers must provide this notice to employees who are entitled to USERRA protection. It describes employee rights and benefits and employer obligations under USERRA. Employers can post this notice where they customarily post notices for employees or they can distribute the notice to all employees. This notice should be used beginning January 18, 2006.

Applicability of These Rules

USERRA applies to all public and private employers, regardless of their size. It also applies to governmental entities, including state and local governments. In addition, USERRA applies to foreign employers doing business in the United States.

Eligibility for USERRA Rights

USERRA grants reemployment and benefits rights to any member of the uniformed services. The “uniformed services” include the Army, Navy, Air Force, Marines, Coast Guard, Reserves, Army and Air National Guards, the commissioned corps of the Public Health Service, and any other persons designated by the President in time of war or national emergency. For USERRA purposes, service with the National Disaster Medical System is also considered uniformed service. Covered service includes both voluntary and involuntary military duty. However, an individual loses USERRA rights if he does not receive an honorable discharge.

USERRA protects temporary, part-time, probationary and seasonal employees. However, an employer is not required to reemploy an employee if the employment was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period of time.

USERRA applies to all employees, including executive, managerial and professional employees. However, it does not apply to an individual who acts as an independent contractor.

Employee Notice Requirements

The final rules require an employee to provide advance notice to his employer that he will be serving in the uniformed services. The notice may be either verbal or written. It may be informal and does not need to follow any particular format. An appropriate representative of the military service may give notice to the employer on the employee’s behalf. If an employee is employed by more than one employer, he must provide notice to each employer. In certain occupations, a hiring hall operated by a union or employer association may be considered an individual’s employer.

When possible, an employee should give 30 days’ notice of the need for military leave. However, the final rules recognize that there are circumstances when it may be impossible or unreasonable for an employee to provide advance notice.

The rules confirm that an employee is not required to get his employer's permission before leaving to perform service in the uniformed services. In addition, he is not required to tell his employer, before he leaves, that he intends to seek reemployment after completing uniformed service.

Return from Military Service

To protect his USERRA reemployment rights, a returning employee must make a timely return to, or application for reinstatement in his employment position after completing uniformed service. A rehired employee must be given certain rights with respect to an employer sponsored pension plan. The final rules define "pension plan" to include any pension plan covered by ERISA and certain pension plans not covered by ERISA, including governmental plans, church plans, non-ERISA 403(b) programs and nonqualified deferred compensation plans.

A reemployed employee's period of uniformed service is not considered a break-in-service for purposes of plan participation, vesting or benefit accrual. The entire period of absence due to or required by the uniformed service must be treated as continuous service with the employer for pension purposes. This period includes any time taken off before the period of uniformed service. *For example, an employee may need additional time to take care of personal business before he reports for military service.* USERRA does not impose a limit on the amount of time that may elapse between the date the employee leaves his position and the date he enters the service.

The final rules also provide that, depending on the length of his uniformed service, an employee is entitled to a period from one to 90 days following the period of service before reporting back to work for the employer. This period must also be treated as continuous service with the employer. If an employee is hospitalized for, or is convalescing from an illness or injury incurred in, or aggravated during, uniformed service, he is entitled to a two-year period that will be considered continuous service with the employer.

Employer and Employee Contributions

An employee who returns from uniformed services is entitled to make up employee pre-tax and post-tax contributions that he would have been able to make if he had remained employed instead of entering the uniformed services. If the employee is covered by a defined contribution plan, including a 403(b) plan, the employer is required to make up employer contributions that the employee would have received during this period. For purposes of determining the amount of make-up contributions, the reemployed service member is treated as though he had remained continuously employed. If the employee is covered by a defined benefit plan, his accrued benefit must be increased to reflect his period of uniformed service.

In general, employers must allocate employer make-up contributions and any made-up employee contributions or elective deferrals to a defined contribution plan (including a 403(b) arrangement) in the same manner that contributions were made on behalf of other employees during the individual's period of uniformed service. However, an employer is not required to allocate lost earnings or forfeitures that occurred during the period of uniformed service to the reemployed employee. [Special rules apply to multiemployer plans.](#)

With respect to a defined benefit plan, a reemployed employee's accrued benefit must be increased for his period of uniformed service once he has repaid any amounts previously paid to him from the plan and made any required employee contributions. The final rules confirm that cash balance plans are treated as defined benefit plans for USERRA purposes.

The employer is not required to make its contribution to the plan until the employee is reemployed. If a plan does not require or permit employee contributions, the employer must make its USERRA make-up contribution by the later of the 90th day following the individual's reemployment, or the date plan contributions are normally due for the year in which the uniformed services were performed.

Example: Employer contributions for a particular calendar year are made on February 15 of the following year. An employee leaves the employer to perform military service on May 1, 2004, and completes service in early 2005. He is reemployed on February 10, 2005. Pension contributions attributable to the period of absence in 2004 (May 1-December 31) would be due 90 days after February 10, 2005, the date of reemployment because that date is later than February 15, 2005, the date contributions are normally made. Pension contributions attributable to the period of absence for military service in 2005 (January 1 – February 9) would be due on February 15, 2006 because that date is later than the date that is 90 days following reemployment.

In a contributory plan, the employee may make missed employee post-tax contributions or elective deferrals. These make-up contributions must be made by the end of the repayment period, which can be up to three times the length of the employee's uniformed service, but cannot exceed five years. If the employee does not elect to make up these contributions, he will not receive any related employer match or employer-funded benefit accrual that is contingent on him making contributions. Any employer contributions that are related to the employee's make-up contributions must be made according to the plan's matching contribution provisions.

An employee does not have to make up the entire amount of employee contributions or elective deferrals that he missed during his period of uniformed service. An employee may partially make-up employee contributions or elective deferrals. Furthermore, an employee is not required or permitted to pay interest on make-up contributions or elective deferrals.

Finally, a plan may not reduce the amount of a participant's vested accrued benefit or account balance earned before he entered uniformed service even if he is not reemployed by the employer upon discharge.

Repayment of Prior Distribution

The final rules provide that an employee, who received a distribution of all or part of his accrued benefit from a defined benefit plan in connection with his leave to enter the uniformed services, may repay the distribution upon reemployment. This repayment must include interest on the distributed amounts. The employee must be allowed to repay the distribution during a period starting with the date of reemployment and continuing for up to three times the length of the employee's period of uniformed service. The repayment period cannot exceed five years (or a longer period agreed to between the employer and the employee). Distributions received from defined contribution plans, including 403(b) arrangements and section 457(b) plans, may not be repaid.

Compensation for Plan Purposes

In many pension plans, the employee's compensation determines the amount of his contributions or benefit accrual. In general, an employee's pension plan compensation during uniformed service is based on the rate of pay that he would have received if he had not taken the leave of absence. If the rate of pay cannot be determined (e.g., where compensation is based on commissions or tips), the employee's average rate of compensation during the 12-month period immediately preceding the start of his uniformed service must be used. If the employee's rate of pay cannot be determined and the employee was employed for less than 12

months before his period of uniformed service began, the average rate of compensation is calculated using the actual period of employment.

Differential Pay

Some employers provide employees with full or partial civilian pay while the employee is absent from employment to perform military service. This compensation is “differential pay.” USERRA does not require differential pay. In proposed regulations issued by IRS in May 2005, National Guard and Reserve members are specifically permitted to continue to contribute to their employer’s retirement plan while on active duty based on differential pay. The IRS has indicated that employers may rely on these proposed rules and allow these service members to contribute to pension plans.

Special Rules for Multiemployer Plans

The final rules clarify that unless a multiemployer plan document provides otherwise, the last employer that employed the employee before the period of uniformed service is responsible for making the employer make-up contribution when the employee is reemployed. If the last employer no longer exists, the plan must provide coverage to the service member.

A service member does not have to be reemployed by the same employer for whom he worked prior to his period of uniformed service in order to be reinstated in a multiemployer plan. If an employee’s pre-service and post-service employers are different contributing employers, the employee is entitled to the same employer contribution as long as the employers share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

A returning service member should notify his post-service employer that he is returning to work under the USERRA rules. That employer must also provide written notice of reemployment to the plan administrator within 30 days following the individual’s reemployment. This notice is required because a multiemployer plan administrator may not be aware that a contributing employer has reemployed a person who may be entitled to USERRA rights. The 30-day period does not begin until the employer has knowledge of an employee’s reemployment.

Next Steps

Plan sponsors should carefully read the information contained in this publication to determine how it affects their plans. Some of this information may result in changes in plan administration. Since the “GUST” qualified plan restatements generally contained a reference to the USERRA reemployment rights required under Internal Revenue Code section 414(u), plan amendments should not be needed to reflect these rules. However, plan sponsors must comply with the USERRA notice requirements. While Prudential Retirement is prepared to provide information on these new rules, plan sponsors should discuss any legal matters (including the impact of federal and state laws) with their own legal counsel.

Pension Analyst by Prudential Retirement

The Pension Analyst is published by Prudential Retirement, a Prudential Financial business, to provide clients with up-to-date information on current legislation and regulatory developments affecting qualified retirement plans. This publication is distributed with the understanding that Prudential Retirement is not rendering legal advice. Plan sponsors should consult their attorneys about the application of any law to their retirement plans. Prudential Financial is a service mark of The Prudential Insurance Company of America, Newark, NJ and its affiliates.

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