

Section Five: Leaves of Absence

Types of Leaves of Absence

Jury Duty

Texas law prohibits a private employer from firing or otherwise discriminating against an employee because the employee has been called to jury service, unless the employer can demonstrate that its circumstances have so changed during the period of jury service that reemployment is impossible or unreasonable. Jury duty is unpaid leave.

Time Off to Vote

The Texas Election Code requires employers to allow employees to miss work **with pay** in order to vote, unless the polls are open for voting on election day two consecutive hours outside the employee's working hours.

Responding to Subpoenas

The Texas Labor Code prohibits employers from firing or otherwise disciplining an employee for complying with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding.

Military Duty

Employee leave to enter military duty is governed by the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Act provides military veterans with two categories of rights: employment rights and reemployment rights. For a more detailed discussion, see the following section.

Personal Leave

With the exception of leave required for larger organizations pursuant to the Americans with Disabilities Act and the Family and Medical Leave Act, there is no requirement that Texas employers provide their employees with "personal" leave. Employers who do provide personal leave should be sure that such leave is awarded without regard to race, ethnicity, sex, religion, national origin, age, or any other protected category.

Bereavement Leave

There is no requirement that Texas employers provide their employees with "bereavement" leave (although it is a best practice to provide such leave).

Pregnancy Leave

Whether an employer is required to provide pregnancy leave can be complex and depends on the size of the employer, whether the pregnancy qualifies as a disability, and the other types of leave that the employer provides employees. Employers must hold open a job for pregnancy-related absences for at

least the same length of time jobs are held open for employees on sick or disability leave. For further discussion, see the section below on the Family and Medical Leave Act and Section One for an overview of the Americans with Disabilities Act.

Family and Medical Leave

The Family and Medical Leave Act (FMLA) applies to larger organizations (50+), and requires that leave be granted to care for newborns, serious illnesses, and to care for sick parents and children. For a more detailed discussion, see the next section.

Disability Leave

The Americans with Disabilities Act (“ADA”) applies to employers who have **15** or more employees, including part-time employees, working for 20 or more calendar weeks in the current or preceding calendar year. The requirements of the ADA are more fully described in Section One.

Workers’ Compensation Leave

The Texas Labor Code provides leave for work-related injuries or illnesses. In addition, the code strictly prohibits employers from discharging or discriminating against employees for filing workers’ compensation claims, hiring an attorney to pursue a claim, or participating or testifying in a workers’ compensation proceeding. Therefore, it is critical that no adverse action be taken against an injured employee as a result of the employee’s participation in the workers’ compensation system.

Family and Medical Leave

Congress enacted the Family and Medical Leave Act (“FMLA”) to address concerns about the ability of families to participate in the care of their infant children or their seriously ill family members. In addition, the FMLA was intended to address concerns raised by the failure of some employers to adopt policies accommodating employees who wished to take time off from work for the purpose of caring for sick or “newly-acquired” family members.

What Employers are Covered by the FMLA?

The FMLA applies to all employers with **50** or more workers within a 75-mile radius of each other.

What Employees are Protected by the FMLA?

To be eligible for leave under the FMLA, an employee must:

- have been employed by the employer for at least twelve months; and
- have worked at least 1,250 hours during the preceding twelve months. Salaried employees are *presumed* to have worked the minimum number of hours required to establish coverage.

What Circumstances are Grounds for FMLA Leave?

An eligible employee may take FMLA leave in the following situations:

- to care for a newborn child;
- following the placement of a child obtained through adoption or state-sponsored foster care;
- to care for a spouse or parent (parent does not include in-laws) with a serious health condition;
- to care for a son or daughter with a serious health condition (does not include adult children unless they are incapable of self-care due to of mental or physical disability that limits a major life activity); and
- for the employee’s own serious health condition that prevents the employee from being able to perform the essential functions of the employee’s position.

What Is a Serious Health Condition?

A “serious health condition” is an illness, injury, impairment or physical or mental condition that requires in-patient care or continuing treatment by a health-care provider.

What Protections Do Employees Have Under the FMLA?

- Eligible employees are allowed to take up to **12 weeks** unpaid leave.
- Upon return from the leave of absence, the employee is entitled to be placed in the same or substantially equivalent position occupied prior to the leave. The employee has no absolute right to be placed back in the *exact* position previously held.
- Upon return, the employee must receive equivalent employment benefits, pay, and other conditions of employment.

- The employer cannot discriminate against or discharge an employee for filing a charge or instituting proceedings under the FMLA or for testifying or otherwise participating in any proceeding under the FMLA.

What Rights Does the Employer Have Under the FMLA?

- Employers may require that employees requesting leave provide medical certification of any serious health condition. Employers may require a second opinion if there is reason to doubt the validity of an employee's certification.
- An employer has discretion to revoke an employee's eligibility for FMLA leave if she fails to submit the required medical certification and supporting documentation.
- Employees must give employers 30-day notice of any foreseeable leave. **Note:** When the need for leave is sudden and unforeseeable, the employee is only required to give as much notice as is practicable.
- Employers may require employees to periodically report their status and intent to return to work during the leave.
- Employers may require fitness-for-duty reports on or before the day that the employee returns to work.
- Employers may exempt "key employees" from certain protections of the FMLA. Key employees are salaried employees who are among the highest paid ten percent of all of employer's employees within 75 miles of the employee's worksite. Key employees cannot be denied leave; however, they need not be reinstated at the end of the leave period. Employers must, however, inform key employees of such status at or before the time the leave is requested.
- Employers may require their employees to first exhaust all paid vacation time, time off, personal leave, sick leave, and any other type of leave before the commencement of the unpaid leave under the FMLA. The time of the paid leave is included in the 12-week maximum leave period under the FMLA.
- Employees may elect to substitute any applicable paid leave to which they are entitled for any FMLA leave. The time of the paid leave is included in the 12-week maximum leave period under the FMLA.

What Happens If the Employee Is Unable to Return to Work Following the Expiration of 12 Weeks Leave?

- The FMLA does not require employers to extend leave beyond 12 weeks. If the employee cannot return to the same or similar position at the end of the leave period, the employer has no obligation under the FMLA to allow the employee to return to work at a later date or in a different position altogether. However, if at the end of the leave period, the employee cannot return to work because of a continuing disability, either mental or physical, an employee may have a right to return at a later date or in a different position under the

Americans with Disabilities Act. For employees requiring longer than three months leave, the employer must consider, under the ADA, whether granting leave would constitute a reasonable accommodation and whether it would cause an undue hardship on the employer.

FMLA Postings and Notice

Federal FMLA regulations require FMLA-covered employers to post a notice of FMLA rights; include a description of FMLA rights and obligations in any employee handbook or other written materials, and if no handbook, provide a copy of the FMLA “Fact Sheet” to each employee who requests an eligible leave; and provide a specific FMLA notice to each employee who takes FMLA leave.

The FMLA notice poster is available on the Department of Labor website:

<http://www.dol.gov/esa/regs/compliance/posters/fmla.htm>

The Notice of Rights is available at:

<http://www.dol.gov/esa/regs/compliance/whd/whdfs28.htm>

The FMLA Notice (Form WH-381) can be found at:

<http://www.dol.gov/esa/forms/whd/WH-381.pdf>

Summary

The FMLA is a complex area of the law. Employers should not take any adverse action against employees who request FMLA leave without seeking the advice of counsel.

Legal Rights of Veterans

Employees who are called to military service are entitled to basic rights regardless of the size or type of organization for which they work. Both federal and state laws offer certain protections to employees returning to employment after performing military service.

Are there any restrictions on an employers' actions regarding veterans?

Yes. The primary federal law that governs the rights of employees who are called to or return from military duty is the Uniformed Services Employment and Reemployment Rights Act of 1994, "USERRA." USERRA prohibits discrimination by employers (including nonprofit employers) against employees who serve in the United States armed services. This means that an employer cannot deny employment, reemployment, promotions, or any benefits of employment based on a person's membership, performance, or application to serve in the armed forces.

Is an employer required to hire employees returning from military service?

Yes. USERRA also guarantees reemployment of those who left employment for up to five years to fulfill military duty. For purposes of job status, position, and amount of pay, USERRA treats time spent on military leave as if the absence never occurred. Upon returning from military service the employee must be reemployed in a position in which he or she would have held had there been no military absence as long as certain conditions are satisfied.

- The employee must have given notice to the employer that he or she was leaving for military service (unless notice is impossible or unreasonable due to military necessity);
- The cumulative military service must not have exceeded 5 years (though there are exceptions to this limit including initial periods of service that exceeds 5 years and employees are called to active duty because of war or national emergency);
- The employee must have been released under honorable (i.e. not punitive or dishonorable) conditions; and
- Upon completion of military service, the employee must have notified the employer of his or intent to return to an employment position within designated time periods which are based on the length of military service (from an 8-hour rest period to 90 days). A person who is hospitalized or recovering from a military service-related illness or injury may have up to 2 years after recovery to report or submit an application for reemployment to the employer. Even if the employee fails to report or reapply for reemployment within the specified time, the employee's rights to reemployment are not automatically forfeited.

What happens if the same position is not open when the veteran returns?

A returning veteran is entitled to return to the position that he or she would have held had the

military absence not occurred, including any promotions or changes in responsibility. Even if the nonprofit filled the position during the interim, the nonprofit must nevertheless reemploy the returning veteran.

If the veteran is not qualified to perform in the new position, the employer must make reasonable efforts to train the veteran so that he or she has the requisite skills to perform the job. If the veteran is still unqualified to perform the job, the employer may return the veteran to the same position he or she was in at the time the military service began. The employer may not, however, reemploy the veteran in a position of less pay or status.

What if the employee becomes disabled during the military service?

Employees with disabilities incurred in or aggravated by military service are protected on two levels: as a veteran under USERRA and as a disabled employee under the Americans with Disabilities Act (ADA).

Under USERRA, a nonprofit employer is obligated to make reasonable efforts to accommodate any disability a veteran incurs during the military service so that the veteran may be placed in the position he or she would have held but for the military absence. If after such accommodations the disabled employee is still unable to perform the job, the employer must place the employee in a position that is equivalent (or as equivalent as possible) in a seniority, status, and pay, and which the employee could perform with reasonable training efforts by the employer.

Furthermore, employers with 15 or more employees must comply with the ADA. The ADA prohibits discrimination on the basis of disability and requires the employer to make reasonable accommodations in order to give disabled employees equal employment opportunities. This could include making changes to the way job is performed, making changes to the work environment such as modifying doorways or other facilities, or changing other work policies and procedures.

What happens if a nonprofit merges with another organization?

Even if a nonprofit merges with another organization during an employee's military absence, the new combined organization will most likely assume the reemployment obligation to employees on military leave. The key issue is whether the employee would have still been employed but for the military service.

Are employers ever exempted from the rehire requirement?

Yes. An employer is exempt from these reemployment requirements if the reemployment would be impossible or unreasonable because:

- it would cause undue hardship for the employer; or
- the position the employee had before leaving for military duty was for a temporary position, and there was no reasonable expectation the employment would continue as a permanent position.

Even if an employee's job title is labeled "temporary," he or she may still have the right to reemployment upon returning from military service as long as the employee could have reasonably expected to have remained in that position but for the military call to duty. In these cases, the employer has the burden of proving the impossibility or unreasonableness, undue hardship or lack of reasonable belief that the employment would have continued had the military absence not occurred.

Does USERRA affect returning employees' rights and benefits?

Yes. USERRA applies an "escalator" principle that entitles those returning to employment from military leave to the rights and benefits the person had and would have attained had he or she not left for military service.

Does an employee on military service accrue paid vacation or sick leave?

No. An employee on military leave will not accrue paid vacation or sick leave if employees on other types of leave do not accrue these benefits either.

How does USERRA affect pension and health benefits?

Time spent in military service is considered service with the employer for purposes of determining accrual of benefits under pension plans. If the employee has health coverage through his or her job, he or she may elect to continue coverage during the military leave for the lesser of two periods: either 18 months from the beginning of the military absence, or the day after the person fails to apply for or return to employment. If the employee does elect to continue health coverage, he or she may be required to pay up to 102 percent of the full premium under the health plan. Illnesses incurred in or aggravated during the military service are not covered.

Must employers pay employees on military leave?

No. Employers are under no federal obligation to pay employees on military leave as long as employees on other leaves of absence are not paid either. The law does, however, specifically permit employees to apply any accrued paid vacation to the military absence. Although Texas law entitles government employees to up to 15 days a year of paid leave during military service, there is no parallel provision for employees of nonprofit organizations.

Does USERRA affect an "Employment At Will" policy?

Yes. Once a person returning from military service or training is reemployed, the employee may not be discharged without cause for 180 days to a year, depending on the length of the military absence. Although, Texas's "at will" employment doctrine generally allows an employer to terminate an employee for any reason or no reason at all, USERRA states that, for a specified amount of time, the employer must have a reason for terminating an employee who is reemployed after returning from military service.

Does military service count toward eligibility for FMLA leave?

Yes. The Department of Labor has issued a memorandum clarifying the applicability of the Family and Medical Leave Act (FMLA) to employees returning from military service. Generally, employers who employ 50 or more employees are covered by the FMLA. These employers must give eligible employees up to 12 weeks of unpaid FMLA leave for the birth, adoption, or foster care of a child, to care for the serious health condition of a child, spouse, or parent, or because of the employee's own serious health condition.

In order to be considered eligible for FMLA leave, the employee must have worked for the employer for at least 12 months and 1250 hours, not including hours spent on paid or unpaid leave. Although those on military leave are treated as if they were on leave of absence (either paid or unpaid), the Department of Labor has stated that the time an employee in the armed forces would have worked but for the military duty counts toward the 12 month and 1250 hour requirement.

This means that, upon returning from military absence, an employee may immediately be eligible for FMLA leave even if he or she was deployed for the past year. For example, an employee returning after the military service who requires physical therapy sessions or other treatments that, if left untreated would result in incapacity of more than 3 days (considered a "serious health condition"), could be entitled to FMLA leave immediately upon his or her return to employment.

Does Texas have regulations regarding employees called to state military leave?

Yes. A member of the state military forces who is ordered to active state military duty (including the Texas National Guard and the Texas State Guard) is entitled to most of the same benefits and protections afforded to those serving in a national military capacity. Texas law, by reference to specific provisions of USERRA, applies most of the USERRA rights and benefits to those called to state military duties. These include: the prohibition against veteran discrimination, the veteran rehire requirement, the option to continue coverage under a health plan, the "escalator" principle for rights and benefits, and the exception to at-will employment.

What are the penalties for noncompliance with state or federal laws?

Possible penalties for USERRA violations include compensating the employee for lost wages and benefits, paying attorney's fees and other costs related to litigation, and paying liquidated damages for willful violations.

Texas law provides penalties for failure to comply with state reemployment and continued rights and benefits obligations. These penalties include reasonable attorney's fees and no more than six months of compensation at the rate at which the employee was paid when called to state military duty.

For more information, visit www.dol.gov/vets or contact your nearest Veterans Employment and Training Services (VETS) office. VETS is committed to educating employers in public and private sectors to avoid unintentional violations of statutes and has representatives in Austin, San Antonio, Houston, Fort Worth, and El Paso.