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Important New Law for Military Families Affects Civilian Employers

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

President George W. Bush signed into law the Heroes Earnings Assistance and Relief Tax Act (HEART Act) on June 17. As Public Law 110-245, this new statute has many important provisions that will be most helpful to those who serve or have served our nation in uniform, and for their families and survivors.

This article deals with one specific section of this massive act, section 104, which amends section 401(a) of the Internal Revenue Code (IRC) and interacts with the Uniformed Services Employment and Reemployment Rights Act (USERRA).

USERRA provides valuable benefits for employees who leave their civilian jobs for voluntary or involuntary military service, serve honorably, and return to work for their pre-service employers after release from service. Section 104 now requires civilian employers and pension plans to extend at least some of these valuable benefits to the families of those who do not return to their pre-service civilian employers because they were killed in action or because they were so seriously disabled in military service that they cannot return to work, even with reasonable employer accommodations for their disabilities.

Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. For 68 years, federal law has required civilian employers to reemploy individuals who have left civilian jobs for voluntary or involuntary military service, in peacetime and in wartime. USERRA applies to essentially all employers in this country, including the federal government, state and local governments, and private employers, regardless of size.

In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held, "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).

Section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies the escalator principle in the current reemployment statute. Section 4318 (38 U.S.C. 4318) applies the escalator principle to pension benefits, including both defined benefit plans and defined contribution plans. Generally speaking, the person who leaves a job for service and meets the USERRA eligibility criteria is entitled to be treated *as if he or she had been continuously employed by the civilian employer* during the time that the individual was away from work for voluntary or involuntary military service.

To have the right to reemployment under USERRA, an individual must have left a civilian job for the purpose of performing uniformed service and must have given prior oral or written notice to the civilian employer. The individual's cumulative period or periods of service, with respect to that particular civilian employer, must not have exceeded five years. *All* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit. The individual must have been released from the period of service under honorable conditions and must have made a timely application for reemployment with the pre-service employer after release from the period of service.

The reemployment statute has always applied to the *survivors*—those who are called to the colors and return more or less unscathed, so that they can return to the civilian jobs they left behind. *Until now,* no provision has been made for those who cannot return to their jobs because they were killed in action or because they were so seriously

disabled they cannot return to work, even with reasonable employer accommodations. Section 104 of the HEART Act will give some benefits to these seriously disabled veterans, as well as to the families of those who made the ultimate sacrifice.

To understand how section 104 applies in conjunction with USERRA, let us discuss three hypothetical but entirely realistic employees of the XYZ Corporation in Albany, N.Y. Let's call them Mary Adams, Joe Baker, and Charles Cox. Ms. Adams and Mr. Baker were members of the New York Army National Guard, and Mr. Cox was a member of the Marine Corps Reserve. All three were called to active duty in late 2006 and deployed to Iraq.

Ms. Adams served on active duty from December 2006 until December 2007. She gave prior notice to XYZ, and she served honorably. She was released from active duty on Dec. 15, 2007, and applied for reemployment two weeks later. She returned to work at XYZ on Jan. 2, 2008.

Under USERRA, XYZ must treat Ms. Adams as if she had been continuously employed by XYZ during the whole time she was away from work for service. If the pension plan at XYZ is contributory (individual employees contribute), Ms. Adams has three years (three times the period of service) to make up the employee contributions that she missed, without interest. XYZ is required to pay the employer matches, as if Ms. Adams had been continuously employed. Ms. Adams will not lose out as to the date when she qualifies for XYZ retirement or as to the amount of her monthly XYZ retirement check, because of the 13 months that she was away from work answering our country's call.

Mr. Baker was a member of the same Army National Guard unit as Ms. Adams. On Feb. 15, 2007, he was traveling in a convoy when his vehicle was destroyed by an improvised explosive device and Mr. Baker was killed instantly.

Under the new requirement, a tax-qualified pension plan must now provide that, in the case of a pension plan participant who dies while performing qualified military service, the survivors of the participant must be entitled to any additional benefits that would be provided under the plan had the participant resumed employment with the employer maintaining the plan and then terminated employment on account of death. Thus, if a plan provides for accelerated vesting, ancillary life insurance benefits, or other survivor benefits that are contingent upon a participant's termination of employment on account of death, the plan must provide such benefits to the beneficiary of a participant who dies during qualified military service.

Mr. Cox was seriously wounded in Iraq on Feb. 22, 2007. He lost both legs and an arm and has suffered traumatic brain injury. Section 4313(a)(3) of USERRA [38 U.S.C. 4313(a)(3)] requires the pre-service employer to make reasonable efforts to enable the returning disabled veteran to return to the job he or she would have attained if continuously employed (usually the job that the individual left). If the disability cannot be reasonably accommodated in that particular position, the employer must reemploy the returning disabled veteran in some other position for which he or she is qualified, or can become qualified with reasonable accommodation, and that provides like seniority, status, and pay, or the closest approximation consistent with the circumstances of the case.

For purposes of this discussion, we shall assume that Mr. Cox's disabilities are so severe that he cannot reasonably return to work at XYZ or with any employer, in any position. Under section 104, XYZ must treat Mr. Cox as "deemed rehired" and accord to him benefits similar to the benefits provided to Joe Baker's beneficiary.

This new provision applies to deaths and disabilities that occurred on or after Jan. 1, 2007. Each pension plan *must now be amended* to comply with this provision. The deadline for making those amendments is the last day of the plan year that begins on or after Jan. 1, 2010.