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Military Leave

Dear Reader:

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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 county 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 CTAS website material.

Sincerely,

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Military Leave

Reference Number: CTAS-1013

County officers and employees who are called to active military duty are entitled to military leave and to re-employment and restoration of benefits under both state and federal law upon their return from active duty. County employers must provide the benefits mandated by these statutory provisions to returning employees. The rights and benefits provided for in the two statutes are similar but not identical.

Following is a summary of the provisions of the state and federal laws:

- Employment discrimination because of past, current or future military service is prohibited.
- Employers are required to grant employees a leave of absence for the period necessary to perform military service. Employees cannot be required to use accrued leave or vacation time, but if the employee requests annual leave or paid vacation the employer must allow it.
- Employees returning from military service are entitled to restoration of employment with seniority, status and pay rate as if continuously employed.
- Employees on leave of absence for military service do not continue to accumulate vacation or sick leave. However, if the employer allows accrual of vacation or sick leave for employees who are on furlough or leave of absence, then an employee who is absent for military service is entitled to the same benefit.
- Employees on military leave are entitled to elect to continue their health insurance for up to 18 months and may be required to pay the employee's share of the premium. And, an employee may be required to pay the employee cost of any other continued funded benefit to the extent other employees on furlough or leave of absence are required to do so.
- State law grants paid military leave, for up to 20 working days in any one calendar year, to county officers and employees while they are performing military service. After the 20 working days of full compensation, any public employer may, but is not required to, provide partial compensation to its employees while under competent orders.

Federal Law-USERRA

Reference Number: CTAS-1014

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301 - 4333, protects the rights and benefits of employees who are absent from work because of service in the armed forces. This federal law prohibits employment discrimination because of past, current, or future military obligations, which includes hiring, promotion, reemployment, termination, and benefits.^[1]

USERRA does not apply to the state call-up of National Guardsmen.^[2] State call-up of National Guardsmen is addressed by state law.^[3]

Under USERRA, re-employment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." USERRA applies to persons who perform duty, voluntarily or involuntarily, in the "uniformed services."^[4] The "uniformed services" include the Army National Guard and Air National Guard, in addition to the Army, Navy, Marine Corps, Air Force, Coast Guard, and the reserve components of each of these services.^[5]

Any person whose absence from a position of employment is necessitated by service in the uniformed services is entitled to USERRA reemployment rights and benefits if:

- The person gave notice to the employer that he or she was leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable;^[6]
- The period of service did not exceed five years;^[7]
- The person reported back to the civilian job in a timely manner or submitted a timely application for re-employment; and^[8]
- The person was not released from service under dishonorable or other punitive conditions.^[9]

The employee returning from service must notify the employer of his or her intent to return to work within

a specific time period that depends on the length of time the employee was in service. These time periods are:

Less than 31 days of service: The employee must report to the employer by not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or as soon as possible after the expiration of the eight-hour period referred to above, if reporting within the period referred to above is impossible or unreasonable through no fault of the person.^[10]

31 to 180 days of service: The employee must submit an application for re-employment with the employer not later than 14 days after the completion of the period of service or if submitting the application within that time period is impossible or unreasonable through no fault of the employee, the next first full calendar day when submission of such application becomes possible.^[11]

181 days or more: The employee must submit an application for re-employment with the employer not later than 90 days after the completion of the period of service.^[12]

With a service-connected injury or illness: Reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing.^[13]

Under USERRA, the position into which a returning employee is reinstated is also based on the length of military service. These rules are:

Less than 91 days of service: The employee must be re-employed and placed in the position in which the person would have been employed if continuous employment had not been interrupted by such service, and which the person is qualified to perform; or, if the person is not qualified to perform the duties of the position after reasonable efforts by the employer to qualify the person, the employee must be re-employed in the position in which the person was employed on the date of the commencement of the service in the uniformed services.^[14]

91 days of service or more: The employee must be re-employed in the position in which the person would have been employed if continuous employment had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or, if the person is not qualified to perform the duties of former position after reasonable efforts by the employer to qualify the person, the employee must be re-employed in the position which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.^[15]

Service-related disability: If a person has a disability incurred in, or aggravated during, military service, and after reasonable efforts by the employer to accommodate the disability, is not qualified because of the disability for the position in which the person would have been employed if employment had not been interrupted by military service, the person must be placed in another position which is equivalent in seniority, status and pay, the duties for which the person is qualified or would become qualified with reasonable efforts by the employer, or the person must be placed in a position which is the nearest approximation to such a position in terms of seniority, status, and pay consistent with circumstances of the person's case.^[16]

A re-employed employee is entitled to seniority and other rights and benefits that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits the person would have attained if the person had remained continuously employed.^[17] A re-employed employee cannot be discharged, except for cause, within one year after the date of re-employment, if the person's period of service before the re-employment was more than 180 days; or within 180 days after re-employment if the person's period of service before the re-employment was more than 30 days but less than 181 days.^[18]

Under USERRA, an employee who is absent from employment due to service in the uniformed services is deemed to be on furlough or leave of absence while performing such service and is entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.^[19] However, an employee deemed to be on furlough or leave of absence under USERRA is not entitled to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed. And, the employee may be required to pay

the employee cost, if any, of any continued funded benefit to the extent other employees on furlough or leave of absence are so required.^[20]

An employee who is performing military service is permitted, upon request, to use any accrued vacation, annual, or similar leave with pay, but the employer cannot require an employee to use vacation, annual, or similar leave.^[21] Like the state statute, USERRA does not provide for the accumulation of vacation or sick leave while a covered employee is on military leave. However, if the employer allows accrual of vacation or sick leave for employees who are on furlough or leave of absence, then an employee having similar seniority, status, and pay who is absent for military service is entitled to the same benefit.

USERRA also provides for the continuation of health insurance benefits. An employee who is performing military service may elect to continue such coverage. The maximum period of coverage of a person and the person's dependents under such an election is 18 months. An employee who elects to continue health-plan coverage may be required to pay not more than 102 percent of the full premium under the plan. However, if the employee's military service is less than 31 days, that person cannot be required to pay more than the employee share, if any, for such coverage.^[22] USERRA also protects pension plan benefits that accrued during military service.^[23]

A non-technical resource guide to USERRA may be downloaded from the Department of Labor. Additional assistance is available from ESGR (Employer Support of the Guard and Reserve). Part of ESGR's mission is to assist in preventing, resolving, or reducing employer and/or employee problems and misunderstandings that result from National Guard or Reserve membership, training, or duty requirements through information services and informal mediation. To contact an ESGR representative call (615) 313-0657 or access the ESGR website.

[1] 38 U.S.C. § 4311(a).

[2] Although USERRA applies to National Guard duty assignments under federal authority, it does not apply to National Guardsmen called to duty under state authority, such as disaster relief or riot control.

[3] See T.C.A. §§ 8-33-101 *et seq.*, and 58-1-106.

[4] 38 U.S.C. § 4303 (13).

[5] 38 U.S.C. § 4303 (16).

[6] 38 U.S.C. § 4312 (a)(1) and (b).

[7] 38 U.S.C. § 4312 (a)(2) and (c).

[8] 38 U.S.C. § 4312 (a)(3) and (e).

[9] 38 U.S.C. § 4304.

[10] 38 U.S.C. § 4312 (e)(1)(A).

[11] 38 U.S.C. § 4312 (e)(1)(C).

[12] 38 U.S.C. § 4312 (e)(1)(D).

[13] 38 U.S.C. § 4312 (e)(2)(A).

[14] 38 U.S.C. § 4313 (a)(1)(A) and (B).

[15] 38 U.S.C. § 4313 (a)(2)(A) and (B).

[16] 38 U.S.C. § 4313 (a)(3)(A) and (B).

[17] 38 U.S.C. § 4316 (a).

[18] 38 U.S.C. § 4316 (c).

[19] 38 U.S.C. § 4316 (b)(1)(A) and (B).

[20] 38 U.S.C. § 4316 (b)(3) and (b)(4).

[21] 38 U.S.C. § 4316 (d).

[22] 38 U.S.C. § 4317 (a)(1) and (2).

[23] 38 U.S.C. § 4318.

State Law

Reference Number: CTAS-1015

In addition to the federal law, state law found at T.C.A. § 8-33-101 *et seq.* provides protections for employees in military service.^[1] Pursuant to T.C.A. § 8-33-109, all county officers and employees who are, or may become, members of any reserve component of the armed forces of the United States, including members of the Tennessee army and air national guard, are entitled to a leave of absence from their jobs, without loss of time, pay, regular leave or vacation, impairment of efficiency rating, or any other rights or benefits to which they are otherwise entitled, for all periods of military service during which they are engaged in the performance of duty or training in the service of this State, or of the United States, under competent orders. When performing military service, the officer or employee is entitled to

receive his or her full salary or compensation for up to, but not exceeding, 20 working days in any one calendar year. After the 20 working days of full compensation, any public employer may, but is not required to, provide partial compensation to its employees while under competent orders. Also, after the 20 working days of compensation reservists may use up to 5 days of sick leave in lieu of annual leave for the purpose of not having to take leave without pay.

Paid leave is required under T.C.A. § 8-33-109 regardless of whether the employee is a full-time or part-time employee.^[2] The statute also applies to weekend National Guard drills when an employee must miss scheduled weekend work to attend these drills under orders issued by their unit commanders.^[3]

It is important to note that, while T.C.A. § 8-33-109 grants paid military leave for up to 20 working days in any one calendar year to county officers and employees while they are performing military service, the Attorney General has opined that this statute does not provide for the continued accumulation of vacation or sick leave while a covered person is on military leave. Rather, the purpose of the statute is to protect the rights and benefits that the military member has already earned, such as seniority and accrued leave time.^[4]

In addition to the provisions of T.C.A. § 8-33-109, sheriff's deputies, police officers, and firefighters, who served or serve on active duty in the armed forces of the United States during Operation Enduring Freedom or any other period of armed conflict prescribed by presidential proclamation or federal law that occurs following the period involving Operation Enduring Freedom, are entitled to receive the cash salary supplement provided pursuant to T.C.A. §§ 38-8-111 and 4-24-202, respectively, if their military service prevented or prevents them from attending an in-service training program.

Tennessee Code Annotated § 8-33-102 provides re-employment rights after discharge from military service. County employees who leave a position in order to perform military duty must apply for re-employment within 90 days after being released or discharged from military duty. An employee who makes the proper application, and was not dishonorably discharged, shall, "[i]f still physically qualified to perform the duties of such position, be restored to such position if it exists and is not held by a person with greater seniority, otherwise to a position of like seniority, status and pay."^[5] A county employee who is not qualified to perform the duties of his or her prior position due to a disability sustained during military service, "shall be placed in such other position, the duties of which such employee is qualified to perform as will provide the employee like seniority, status and pay, or the nearest approximation thereof consistent with the circumstances of the case."^[6]

Tennessee Code Annotated § 8-33-104 provides additional rights after re-employment following discharge from military service. Any person who is restored to a position in accordance with this law is considered as having been on furlough or leave of absence during the period of military duty. A restored employee cannot be discharged without cause within one year after restoration. The employee is entitled to be restored without loss of seniority (including, upon promotion or other advancement following completion of any period of employment required therefore, a seniority date in the advanced position that will place the person ahead of all persons previously junior to the person who advanced to the position during the employee's absence in armed forces). Upon reinstatement, the employee also is entitled to participate in insurance (including retirement, pension plans and medical insurance) and other benefits dependent on length of employment, including vacation privilege and severance pay. The employee is protected against reduction in seniority, status, or pay during employment, except as such reduction may be made for all employees whose employment situations are similar.

Under T.C.A. § 8-33-110, all officers and employees of this state, or any department or agency of state, or of any county, municipality, school district, or other political subdivision, all other public employees of this state, and all private sector employees who are members of the Tennessee army and air national guard, the Tennessee state guard, or civil air patrol and are on active state duty pursuant to § 58-1-106 are entitled to following protections subject to the eligibility requirements described below and in addition to the leave of absence provided in T.C.A. § 8-33-109.

1. An unpaid leave of absence from their respective duties, without loss of time, pay not specifically related to leave of absence time, regular leave or vacation, or impairment of efficiency rating for all periods of service during which they are engaged in the performance of duty or training in the service of this state under competent orders, including the performance of duties in an emergency; and
2. Equivalent protections regarding the right to reemployment to those protections afforded under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 U.S.C. § 4301 et seq.) to service members called to federal active service.

To be eligible for protections provided above, a person must satisfy the following conditions:

1. A person whose period of service in the uniformed services was 30 days or less must report for work to the person's employer not later than the first full regularly scheduled work period following a period of eight hours after the person has completed service and has been safely transported to the person's residence, unless reporting for work within that time period is not reasonably practicable through no fault of the person, in which case the person must report for work as soon as reasonably practicable;
2. A person whose period of service in the uniformed services was greater than 30 days but not more than 180 days must apply for reemployment with the person's employer within 14 days after completion of the person's period of service, unless doing so is not reasonably practicable through no fault of the person, in which case the person must apply for reemployment as soon as reasonably practicable; or
3. A person whose period of service in the uniformed services was greater than 180 days must apply for reemployment with the person's employer within 90 days after completion of the period of service.

Persons covered under T.C.A. § 8-33-110 must provide advance notice to their employer that they have been called to active duty unless doing so is impossible or unreasonable under the circumstances.

The chancery court for the jurisdiction for which the person is employed has jurisdiction and authority to enforce and order compliance with T.C.A. § 8-33-110.

[1] Under state law it is a Class E felony for any person, firm or corporation to refuse employment to any person for the sole reason that the person is a member of the Tennessee national guard or to terminate the employment of any such person for such reason or because of absence from employment while attending any prescribed drill, including annual field training. T.C.A. § 58-1-604.

[2] Op. Tenn. Att'y Gen. 00-093 (May 17, 2000).

[3] Op. Tenn. Att'y Gen. 98-155 (August 17, 1998).

[4] Op. Tenn. Att'y Gen. 92-12 (February 19, 1992).

[5] T.C.A. § 8-33-102(1).

[6] T.C.A. § 8-33-102(2).

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