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MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

Summer (July) 2016

MILITARY LEAVE

Vacation Accrual: A Collective Bargaining Agreement (CBA) maintains that vacation leave is awarded in consideration for a year of actual service to the employer. What if the employee spends part of that year on military leave? Does the employer need to credit an employee for year(s) he/she is absent on military active duty?

The Uniformed Services Employment and Reemployment Rights Act (USERRA) entitles an employee returning to employment after qualifying military leave to the "seniority and other rights and benefits determined by seniority" that the person had on the date they left employment for military service, plus the additional seniority and rights and benefits they would have attained if they remained continuously employed. 38 U.S.C. 4316(a). The USERRA regulations state that "as a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided to an employee on military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence." 20 C.F.R. 1002.150(c).

Based on that regulation, the dispositive inquiry is whether vacation leave would be provided to an employee who was on a leave of absence. This is determined by examining whether the right is provided to "similarly situated employees by employment contract, agreement, policy, practice or plan in effect…" 20 C.F.R. 1002.150(a). Let's say an employer's CBA maintains that a person on voluntary leave of absence (regardless of the reason) does not accrue vacation leave as if he worked during that time. In that case, the employee would not be due the vacation leave which he/she would have accrued during the time absent on military leave.

An employee on military leave must be credited with the seniority he/she would have earned if they had remained employed for purposes of determining the amount of leave he/she is due upon return. If the CBA provides a schedule for vacation leave, the employee should receive leave on that schedule based on their years of actual service plus those years they were on military leave. A CBA may state that employees get 5 days of vacation leave each year for 1-7 years of service, and then 10 days per year for 8-10 years of service. An employee who worked for five years and then went out on military leave for three years, would be entitled to 10 days of service when he/she returns from military leave.

If there are any circumstances in which vacation leave benefits are afforded to an employee on any type of leave, the employer should be sure to determine whether this leave is "comparable" to military leave. Rregulation 20 C.F.R. 1002.15 provides further guidance on how to identify the "comparable" type of leave to be used for comparison. If vacation leave accrual is a benefit provided to employees on comparable types of leaves of absence, then vacation leave accruals are also due to those employees on military leave. Analysis of CBA language and past practice will be necessary to make a determination as to when such leave accruals must be provided under USERRA.

Health Insurance Buyout: The Employer provides for a health insurance "buyout" for a full-time employee who, after submission of proof of alternate health insurance coverage, elects to not take the Employer offered health insurance. The Employer then pays that employee a monthly amount as a "thank you" for using alternate insurance. This is often referred to as a health insurance "buyout."

An active military duty member must be covered by insurance at all times during military service. If active duty is less than thirty (30) days, a member can choose to be covered either by the military health care, TRICARE, or through an employer's insurance. If active duty service is for more than thirty (30) days, the military requires the member to enroll in TRICARE, and while other health insurance cannot be used during active service, enrollment in a military health plan does not preclude a member's participation in other health care plans, if one was willing to pay.

Under New York Military Law, for an absence of less than

thirty-one (31) days, the Employer must continue health insurance coverage as if the employee were still working. N.Y. Mil. L. § 316. For absences that exceed thirty (30) days, an Employer must continue health insurance coverage for up to eighteen months, if requested by the employee. Id.

Both the federal Consolidated Omnibus Budget Reconciliation Act (COBRA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA) allow individuals who leave work for military service to continue coverage for themselves and their dependents under an employment-based group health plan. Under COBRA, a military leave employee is entitled to eighteen (18) months of coverage, with further extensions for certain events. USERRA, which applies to all employers, provides for twenty-four (24) months of coverage. Additionally, the Health Insurance Portability and Accountability Act (HIPPA) may give the military leave employee rights to enroll in other group health plan coverage if it is available to said employee (e.g. if a spouse's employer sponsors a group health plan).

Under USERRA, "an employee who is absent from employment for military service is . . . entitled to such rights and benefits . . . generally provided by the employer to employees." Rogers v. City of San Antonio, 392 F.3d 758, 769 (2004). Further, an employer is required to treat employees on military leave "equally with employees having similar seniority, status, and pay" under a contract or practice that is in effect at any time during that uniformed service. Id.

USERRA was enacted to protect service members from disadvantages to their civilian careers as a result of their service. 38 U.S.C. § 4301 et seq. Accordingly, the anti-discrimination provision of the USERRA provides that an active duty member or reservist "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer" on the basis of their service. (emphasis added) 38 U.S.C. § 4311(a). Specifically, the USERRA broadly defines "benefit" of employment to mean the terms, conditions, or privileges of employment, including "any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under . . . a health plan." 38 U.S.C. § 4303(2). Moreover, New York Military Law provides that absence of military service is not considered to be a break in service; a returning employee is entitled to all benefits he or she would have received if he or she had remained as a regulate employee for the period of absence. N.Y. Mil. L. § 242(2).

Withholding a buyout option to an employee on military leave denies said employee a benefit of employment in violation of USERRA because doing so provides military employees with fewer benefits. Crews v. City of Mt. Vernon, 567 F.3d 860, 866 (reasoning that denying a military employee a benefit that is generally available to all employees will be actionable under 38 U.S.C. § 4311 compared to a preferential benefit that is not available to everyone). Pursuant to 38 U.S.C. § 4311, if a military leave employee is electing not to be on the Employer's plan, said employee is entitled to the same rights and benefits that are generally provided by the Employer to other employees, i.e. the monthly "thank you" or buyout payment.

Further, inasmuch as the required military health plan requires nothing out-of-pocket for the employee, the buyout option still must be offered as the employee could in fact elect to participate in and pay for an alternate plan (e.g. through a spouse's employer). It would seem counterintuitive to offer a buyout option when a military leave employee elects to use a spouse's insurance but not when that same employee is forced to use military insurance simply because his or her active service will exceed thirty days. In either scenario, where the Employer is not having to pay for an employee to be on their plan, the law requires equal treatment of a military employee to a non-military employee.

PAID FAMILY LEAVE: NOTE: This recently enacted State Law (with a 2018 effective date) does not automatically apply in the public sector. A Union can seek to opt-in to this law. It is a mandatory subject of negotiations.

$15.00/Hour MINIMUM WAGE: Note: This recently enacted State Law (with a multi-year phase-in) does not apply at the local government level; that is, there is no state-imposed mandate to reach any of the goals set in the legislation. Wages remain a mandatory subject of bargaining.

NYSPELRA: The New York State Public Employer Labor Relations Association Annual Training Conference is set for July 20-22, 2016 in Saratoga Springs, New York. Registration is now open.

New FLSA "White Collar" Exemption Rules: Memo to follow.

WELCOME: RWGM extends a warm welcome to the Labor Team's Law Clerk, Alyssa R. Rodriguez, a student at the Albany Law School.