

Employee out on military leave: How long must we hold his position?

By Jan Hensel

Q. How long am I required to hold a position open for an employee who needs a leave due to military service?

A. The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) governs military leaves. It requires an employer to offer re-employment to returning service members who meet certain eligibility requirements.

To be eligible, the employee must have been absent from work because of “service in the uniformed services,” which includes active duty, active and inactive duty for training, National Guard service under federal (but not state) authority, absence for fitness-for-duty exams, service in the Public Health Service and service as a disaster-response appointee upon activation of the National Disaster Medical System.

The employee must give notice of impending military service. That notice can be written or oral, and the employee should provide notification as far in advance as is reasonable under the circumstances.

An employee who is qualified for leave under USERRA is entitled to leave for up to five years. With a few limited exceptions, after five years, the employee loses his or her re-employment rights. The service member must return to work or apply for re-employment in a timely manner after the conclusion of military service. The timing depends upon the length of deployment.

An employer is not required to re-employ a returning service member if the employer’s circumstances have so changed enough to make re-employment impossible or unreasonable. For example, if the employer has undergone a reduction in force that would have included the service member, re-employment is not required. The employer cannot, however, refuse to re-employ the service member just because another employee was hired temporarily during the service member’s absence.

Generally speaking, re-employment must occur within two weeks of application. Furthermore, under the “escalator principle” of USERRA, the employee must be placed back in employment in the position that he or she would have attained with reasonable certainty if not for the interruption in employment.