



For your information

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Employment Protections Expand for Servicemembers and Veterans

Both the VOW to Hire Heroes Act of 2011 and the National Defense Authorization Act of 2012 amend USERRA to expand employment protections for members of the uniformed services and veterans. The recently enacted laws protect against a hostile work environment based on military service, extend reemployment rights to returning National Guard members mobilized for domestic emergencies, and provide new tax credits for hiring unemployed veterans.

Background

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) generally prohibits employers from discriminating against job applicants and employees because of their military obligations or status. USERRA also protects certain reemployment rights and benefits for members of the uniformed services (including veterans and members of the Reserve and National Guard) who are called to, or volunteer for, military service.

Federal antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA), safeguard protected classes of employees against a hostile work environment with respect to the terms, conditions, or privileges of their employment. By contrast, the only federal appellate court to decide whether USERRA provides similar protections [held](#) that USERRA's prohibition against denying "any benefit of employment" on the basis of military service did not protect servicemembers against a hostile work environment. Other courts have taken a different view.

VOW to Hire Heroes Act

The [VOW to Hire Heroes Act of 2011](#) (VOW Act), enacted on November 21, 2011, expanded protections against workplace discrimination on the basis of military status. By amending USERRA's definition of a "benefit of employment" to mirror the language in Title VII, the VOW Act ensures that veterans and military servicemembers have a cause of action for a hostile work environment based on their military service.

INSIGHT

Because employers may be liable for USERRA violations when an unbiased decision-maker bases an adverse employment decision in part on information

from a biased supervisor, employers will want to review and update their compliance training programs. (See our April 14, 2011 [For Your Information.](#))

The VOW Act also made changes to the Work Opportunity Tax Credit (WOTC), providing new tax incentives for businesses to hire certain unemployed veterans. Employers are eligible for an expanded WOTC for each “qualified veteran” who begins work on or after November 22, 2011 and before January 1, 2013. The credit is available to for-profit employers and, for the first time, to qualified tax-exempt organizations as well.

Generally, a “veteran” for WOTC purposes must have served on active duty (other than for training) in the armed forces for more than 180 days or been discharged or released from active duty for a service-connected disability, and cannot have been on extended active duty within 60 days of hire. A veteran is considered “qualified” if he or she is certified as any of the following:

- A member of a family receiving food stamps for at least a three-month period during the 12 months before hire
- Unemployed for a total of at least four weeks in the 12 months before hire
- Entitled to compensation for a service-connected disability and hired within one year after being discharged or released from active duty
- Entitled to compensation for a service-connected disability and unemployed for a total of at least 6 of the 12 months before hire.

Tax credits for-profit employers can claim are capped at \$2,400 for each qualified veteran on food stamps or unemployed for at least four weeks but less than six months in the prior year, \$5,600 for each qualified veteran unemployed for six months or more in the prior year, and \$9,600 for certain disabled veterans. The available credit will depend on a number of factors, including the category of veteran hired, number of hours the veteran works, veteran’s hire date, and veteran’s first-year wages. Businesses can claim the WOTC on [Form 3800](#) against their income tax as part of the general business credit.

Credits for Internal Revenue Code (IRC) Section 501(c) organizations that are exempt from taxation under IRC Section 501(a) are more limited, with a maximum credit of \$6,240 for certain qualified hires. A tax-exempt employer can claim the credit on new [Form 5884-C](#) against its share of Social Security tax liability on wages paid to all employees for the period for which the credit is claimed.

COMPLIANCE ALERT: In [Notice 2012-13](#), the IRS provides detailed guidance on how to obtain the necessary certification of a veteran’s qualifying status, determine wages for WOTC purposes, and claim the credit. The notice also provides certain transition relief to employers with regard to the certification requirements for veterans hired on or before May 22, 2012.

The VOW Act also increased the assistance available to veterans to transition military experience to civilian jobs. The law expanded federal retraining, educational, and employment assistance, as well as training, education, and transition-to-civilian-life programs.

National Defense Authorization Act of 2012

USERRA Reemployment Rights

The National Defense Authorization Act for Fiscal Year 2012 ([H.R. 1540](#)) (NDAA), signed into law on December 31, 2011, expands USERRA rights for members of the National Guard called up for national emergencies. The NDAA amends USERRA to ensure that National Guard members mobilized for domestic assignments, such as disaster emergencies, have the same USERRA reemployment protections as those serving overseas.

USERRA generally protects an employee's reemployment right for a cumulative five years of military service. Exceptions to the five-year limit include initial enlistments lasting more than five years, involuntary active duty extensions and recalls, and National Guard and Reserve training. The NDAA also exempts National Guard members called up for national emergencies from USERRA's five-year cumulative limit on military service.

OFCCP Coverage for TRICARE Providers

TRICARE is a Department of Defense health care program for active and retired servicemembers and their families. In a December 2010 directive, the Office of Federal Contract Compliance Programs (OFCCP) took the position that TRICARE's participating providers are government contractors subject to OFCCP's affirmative action and equal employment opportunity requirements. If adopted, recently proposed regulations would substantially enlarge federal contractors' affirmative action obligations. (See our February 3, 2012 [For Your Information](#).)

The NDAA effectively ended OFCCP's jurisdiction over TRICARE health providers. Section 715 of the NDAA excludes from the definition of federal subcontractor medical institutions, pharmacies, and other health care providers that participate solely in a health care provider network for TRICARE. Because the NDAA only exempts TRICARE participation, medical providers that also participate in programs such as Medicare Part C or Part D remain subject to OFCCP requirements.

Conclusion

With the ongoing deployment and return of troops, employers are likely to face USERRA issues for some time. Because USERRA, like Title VII and the ADA, now recognizes hostile work environment claims, employers will want to make sure that their antidiscrimination and harassment policies extend appropriate protections to civilian soldiers, members of the uniformed services, and veterans. For-profit businesses and certain tax-exempt organizations that hire unemployed veterans before January 1, 2013 will want to take advantage of the extended WOTC available to them.

Buck's consultants would be pleased to evaluate the impact of these changes on your employment policies and practices.

Buck Can Help

- Review and update employment practices, policies and processes that affect veterans and other employees with military service
- Review and update EEO and anti-harassment policies
- Update employee handbooks as needed
- Train and educate managers and supervisors on USERRA's antidiscrimination, military leave, and reemployment provisions as well as other antidiscrimination laws

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.
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