Military Leave for Municipal Employees

Alabamians have traditionally supported a strong military and backed this support with a willingness to serve. In terms of total numbers, Alabama has one of the largest National Guards in the country.

Many guardsmen and reservists are also municipal employees and officials. Events of recent years have resulted in an increase in employees and officials entering military service. Of course, these individuals already serve the public, often in positions which cannot easily remain vacant. When they take time off to serve in the armed forces, losing them – even on a temporary basis – creates hardships for the municipality. Often, the municipality has to hire replacements.

With the withdrawal of troops across the globe, many of these employees and officials will be returning home and seeking reemployment. This article examines state and federal laws regarding military leave to which municipal employees and officials are entitled.

Elected and Appointed Officials

Sections 36-8-1 to 36-8-6, Code of Alabama 1975, govern the temporary replacement of elected or appointed officials who are on active duty status. Pursuant to these sections, an official who is serving in the military at any time during an existing state of war or when a national emergency has been declared by the President does not vacate his or her office. It doesn't matter whether the official volunteers for service or is called involuntarily. Service in the United States Department of Homeland Security, constitutes "military service" for purposes of Section 36-8-2 of the Code of Alabama, such that the official's office shall not be deemed vacated by reason of the service. AGO 2011-018.

Section 36-8-3 gives the person or entity with the power to fill vacancies in the office the authority to temporarily appoint an acting official to serve while the regular official is gone. The regular official must notify the appointing authority in writing that he or she will enter military service and wishes to have an acting official appointed. If there is no written notice, the authority may temporarily fill the vacancy itself.

The official who is temporarily vacating the position may recommend a successor to the appointing authority. The temporary official has all the powers, duties and authority of the regular official. If the temporary replacement official enters into active duty, the appointing authority may fill the vacancy temporarily once they are notified in writing. If the temporary official does not notify them within 30 days of entering service, the appointing authority may fill the office with another temporary official.

The temporary acting official serves during the absence of the regular official and until 30 days from the date the regular official provides written notice that he or she intends to return to office.

Employees and Officers Granted 168 Hours Paid Leave to Serve

Section 31213, Code of Alabama 1975, provides that all municipal employees and officers who are active members of the National Guard, any reserve unit of the military, the Civil Air Patrol or the National Disaster Medical System are entitled to 168 hours of paid leave of absence per calendar year, in order to attend training sessions. Absences cannot be deducted from the employee's vacation or sick leave time, nor can they affect the employee's efficiency rating. Public entities cannot refuse an employee the right to join the reserve or guard or interfere in his or her membership in the reserves or guard. AGO 2002-090. Pursuant to Section 31-2-13 of the Code of Alabama, all employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, are entitled to paid military leave for 168 working hours every calendar year. AGO 2006-135. The Attorney General's Office has opined that this statue also applies to employees of a gas district incorporated pursuant to Section 11-50-390 of the Code of Alabama, 1975. AGO 2017-032.

In short, Section 31213, Code of Alabama 1975 guarantees employees and officers 168 hours each year in order to serve in Reserve branches of the military or the Guard without the leave counting against them. Job performance ratings, seniority,

or any other job benefits may not be reduced due to the absence of the employee.

For purposes of this provision, it doesn't matter that the employee voluntarily joined or re-enlisted in the Reserve or Guard. AGO 1981-309 (to Hon. W. H. Bendall, April 2, 1981). The legislative intent behind Section 31213 was to encourage employees of public agencies to join military units. *Britton v. Jackson*, 414 So.2d 966 (Ala.Civ.App.1981). A municipality may not pass an ordinance providing that an employee on military leave will receive the difference between the employee's salary and military base pay. Employees and officers are entitled to receive pay for both their military service and their jobs as municipal employees. AGO 1996188.

State Active Service Duty

In addition to leave for military training purposes, Section 31213 grants employees another 168 hours "at any one time while **called by the governor** to duty in the **active service of the state**." (emphasis added).

In interpreting Section 31-2-13, the Attorney General stated in AGO 2002-090, that a qualifying individual is entitled to 168 hours of leave with pay while in federal status per calendar year ***and an additional*** 168 hours of leave with pay while in the active service of the state by the governor. The opinion goes on to hold that a member who has used only a portion of his or her federal status hours of leave with pay may use the remainder of federal leave status with pay when called into federal service in the war on terrorism. If there is a question as to how an official or employee was called to active duty, the League recommends checking with his or her commanding officer.

Citing AGO 1991-140 (where the Attorney General opined that Troy State University could not pay the difference in an employee's military pay and his normal pay provided by the university), the Attorney General went on to hold that because Section 31-2-13 caps military leave with pay at 168 hours per calendar year, public entities may not pay for additional military leave with pay beyond 168 hours per calendar year.

The Attorney General, though, did determine that Section 31-2-13 does not cap other benefits that a municipality may provide to those who are on active military duty. Section 31213 constitutes the minimum to which an employee is due. In other words, a municipality could grant additional benefits to encourage its employees to participate in the Guard or Reserve, if it chose to do so. For instance, in AGO 1991-140, the Attorney General held that Troy State could continue to pay its share of an employee's insurance benefits while the employee was on active duty, and to allow the employee to remain eligible for all insurance benefits to which they would normally be entitled.

In *Birmingham v. Hendrix*, 58 So.2d 626 (Ala. 1952), the court addressed whether employees of the city of Birmingham were entitled to credit for annual vacation and sick leave accumulated while on absence for extended duty as members of the United States Naval Reserve. The employees claimed they were due one day of leave for each month they were on active duty. The court disagreed, stating that Birmingham's personnel policy clearly indicated that no vacation or sick leave was to accumulate while an employee was on military leave. The court found nothing in Section 31213 to contradict this, stating that this section requires only that the employee be allowed military leave "without loss" of vacation or sick leave. To the court, this meant that the employee could not be forced to use sick leave or vacation time for military leave. The court applied Birmingham's policy on accumulation of sick leave and vacation time.

Other Allowable Benefits

Chapter 12, Title 31, of the Code of Alabama 1975 provides additional benefits for employees of the State of Alabama. While these benefits are generally mandatory for state employees, adoption of these benefits are optional for municipal and county governments.

Section 31-12-6 of the Code allows any municipality, at the option of the municipal governing body, to provide an employee who is called into active duty during the war on terrorism which began in September, 2001, to receive the difference between active duty military pay and the higher public employment salary he or she would have received if not called into active duty. If a municipality elects to become subject to this provision, the Attorney General has opined that military pay under this provision means basic pay as set forth in Chapter 3 of Title 37 of the United States Code and does not, therefore, include the special and incentive pay set forth in Chapter 5 nor the allowances set forth in Chapter 7 of Title 37 of the United States Code. AGO 2002-270.

Sections 31-12-7 and 31-12-8 provide additional benefits for public employees. Again, in the League's opinion, these provisions are optional for municipalities. Section 31-12-7 allows employees to continue their insurance coverage (individual and dependent) and have the premiums deducted from their salary. As required by this code section, an employee must be receiving compensation from the employing entity to be eligible for these benefits. Thus, the only way a municipal employee would be receiving pay under this Section is if the municipality has adopted a policy to continue paying a salary pursuant to Section 31-12-6 of the Code.

Section 31-12-8 allows the reinstatement of any leave an employee used as a result of being called into active duty. In AGO 2002-270, the Attorney General also opined that Section 31-12-8 of the Code requires the state of Alabama to reinstate the annual leave that a reservist/public employee felt compelled or was required to take under the circumstances and in the exercise of his or her independent judgment as a result of being called to active duty in the war against terrorism. Again, the League feels that this provision is optional for municipalities because it applies only to an employee who is covered by Section 31-12-7.

NOTE: In the League's opinion, if a municipality elects to grant benefits pursuant to either Sections 31-12-6, 31-12-7 or 31-12-8, they must also grant the additional benefits provided in each of these other sections as well. In other words, a municipality cannot grant an employee the pay difference permitted in 31-12-6 without also granting their employees the rights protected by Sections 31-12-6 and 31-12-8. A municipality may, however, refuse to grant any of these benefits. If they do grant any of these benefits, though, they must grant them all.

Federal Reemployment Rights

Federal law also provides job security for employees who leave their jobs for military service. Chapter 43 of Title 38, United States Code, commonly known as the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, preserves the reemployment rights of these employees.

Courts have held that the protection of veteran's reemployment rights is a legitimate exercise of the congressional power to raise armies. *Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir.1979). The act clearly applies to municipal employees, although courts must consider local legislation in determining the rights returning veterans are due. *Smith v. Little Rock Civil Service Commission*, 218 S.W.2d 366 (Ark. 1949). Local legislation can increase the benefits a service member may receive, but it cannot reduce those benefits and rights.

In *Peel*, cited above, the court held that the act provides a floor for the protection of veteran's rights. The Act does not preempt state laws which provide greater or additional rights (such as Section 31-2-13, Code of Alabama 1975). 38 U.S.C. Section 4302(a). However, laws which conflict with rights granted under the act are invalid. 38 U.S.C. Section 4302(b).

The Act is liberally construed for the benefit of returning veterans. *Coffee v. Republic Steel Corp.*, 447 U.S. 191 (1980). However, the Act is not unlimited in its protection of veteran's rights. *Smith v. Missouri Pacific Transport Co.*, 313 F.2d 676 (8th Cir.1963). For instance, the veteran has the burden of proving that he or she has satisfied the statutory requirements and is entitled to the protection of the Act. *Shadle v. Superwood Corp.*, 858 F.2d 437 (8th Cir.1988).

This burden, though, is not as difficult to meet as one might assume, because Section 4311(c) basically provides that an employer shall be considered to have discriminated against the service member if the military service was simply a motivating factor, rather than having to prove that military service was the *sole* motivating factor. As indicated below, if the service member meets this standard, the employer must then prove that the action would have been taken despite the employee's military service. Congress spells out the purposes of the Act in Section 4301. These are:

1. to encourage non-career service in the armed forces by eliminating civilian career barriers
2. to minimize the disruption to the lives of persons serving in the military
3. to prohibit discrimination against individuals as a result of military service.

The Act prohibits employers from discriminating against individuals who have served in the military. Discrimination is defined as any termination, denial of employment or reemployment, or refusal to grant a benefit motivated entirely or in part by the applicant or employee's military service. The burden is on the employer to demonstrate that its action would have been taken regardless of the person's military service.

Reemployment Rights

To be eligible for reemployment, a veteran must:

1. Give notice (does not have to be in writing) to the employer that he or she has been in the military, unless notice cannot be given for military necessity (notice can be provided by someone other than the individual); and
2. Apply for reemployment within the time frame set out in the act.

There is, though, a five-year cumulative service limit on the amount of voluntary military leave an employee can use and still retain reemployment rights. The five-year total does not include the following: inactive duty training (drills), annual training, involuntary recall to active duty or additional training requirements determined and certified in writing by the service secretary and considered to be necessary for professional development or for completion of skill training or retraining.

The time within which the individual must apply for reemployment varies depending on the length of the person's

military service. If the service was for less than 31 days, or for an examination to determine fitness for service, the veteran must simply report to work on the first full scheduled workday following the completion of service and the expiration of eight hours for travel. Veterans are also entitled to reemployment following the eight-hour transportation period if they fail to report on time due to no fault of their own, or if reporting on time is impossible or unreasonable.

If the term of service was for more than 30 days, but less than 181 days, the veteran must apply for reemployment within 14 days of completing service. If it is impossible or unreasonable for the veteran to apply within this time, the veteran must apply on the first full calendar day possible. If service was for more than 180 days, the veteran must apply within 90 days of completing service.

If the veteran is hospitalized for or convalescing from an illness or injury suffered during military service, the veteran must apply for reemployment at the end of the time needed for recovery. Again, the time within which the veteran must apply depends upon the length of service, as set out above. For example, a veteran who served less than 31 days but who is hospitalized following the 31-day period must report to the employer on the first full scheduled workday following the completion of service. As noted above, the veteran would be permitted eight hours for travel. The provisions dealing with impossibility or impracticality of reporting on time also apply.

The period necessary for the veteran to recover from the illness or injury may not exceed two years. However, a veteran may receive an extension for the minimum time required to accommodate circumstances beyond the veteran's control.

However, even if a veteran fails to apply for reemployment within the time required by the act, he or she does not lose the protections the act provides. Instead, the veteran merely becomes subject to the employer's rules and regulations regarding discipline and explanations for absences from scheduled work time.

Documentation

When a veteran applies for reemployment, the employer has the right to request documentation for the following purposes:

1. to prove that the employee's application is timely
2. to prove that the length of service did not exceed five cumulative years
3. to prove that the veteran's reemployment rights have not extinguished due to:
    a. a dishonorable discharge
    b. a court martial
    c. commutation of a court martial sentence
    d. being AWOL for three or more months or
    e. for having been dropped from the military rolls for serving time in a federal or state prison.

A veteran is not required to produce documentation if what is requested is not available or does not exist. However, if the appropriate documentation later comes available and establishes that the employee's military service ended for a reason that would extinguish the veteran's reemployment rights, the employer may terminate the veteran.

Reemployment Positions

If the military service was for less than 91 days, a veteran is entitled to return to the position he or she would have held had employment not been interrupted. If the veteran is not qualified for this position, the employer must take reasonable steps to try to qualify the veteran. If the veteran cannot be qualified, the employer must place the veteran in the position he or she had before serving in the military.

If the military service was for more than 90 days, the veteran must be placed in a position he or she would have held had employment not been interrupted, or to a position of like seniority, status and pay, if the veteran can reasonably be qualified for this position. If the veteran cannot be qualified, the employer must place the veteran in the position he or she held before serving in the military, or in a position of like seniority, status and pay.

As a general rule, the returning employee is entitled to reemployment in the position he or she would have held had employment not been interrupted. This is called the "escalator position." However, if the returning employee is not qualified for the escalator position and cannot become qualified with reasonable efforts by the employer, the employee is entitled to the job that he or she left, or a position of equivalent seniority, status and pay. If the employee is not qualified for that position for any reason other than service-related disability and cannot become qualified through reasonable efforts by the employer, the employee must be employed in any other position for which he or she is qualified and that most nearly approximates his or her former position. Reasonable efforts to render a returning veteran qualified for a position include providing training or

retraining. An employer is also obligated to reasonably accommodate returning employees with service-related disabilities. However, an accommodation requiring significant expense, considered in light of the nature of the business or operation and overall financial impact on the business or operation, may be considered an undue hardship on the employer and remove this obligation.

If a veteran is not qualified due to a disability suffered during military service, and the disability cannot be reasonably accommodated, the veteran must be placed in a position with like seniority, status and pay to the position he or she would have occupied had employment not been interrupted. If the veteran cannot be qualified for a position, the employer must place the veteran in a job which retains the nearest approximation to the seniority, status and pay the veteran would have had if his or her employment not been interrupted.

When Reemployment is Not Required

An employer is not required to reemploy a veteran if the employee's circumstances have changed to make reemployment impossible or unreasonable, or if reemployment would pose an undue hardship on the employer. Further, an employer has no duty to reemploy a veteran if the employee's position was for a brief, non-recurrent period without a reasonable expectation that employment would continue for an indefinite or significant period. The employer bears the burden of proving that any of these circumstances prevent rehiring a veteran.

At least one court has interpreted the predecessor to this provision. In *Mowdy v. ADA Board of Education*, 440 F.Supp. 1184 (D.C.Okla.1977), the court held reasonable the failure to immediately rehire a returning employee where reemployment would have required firing the replacement or the creation of a useless position.

Miscellaneous Provisions

If two or more veterans request reemployment for the same position, the veteran who left first must be reemployed. Section 4316(b) provides that an employee serving in the military is deemed to be on furlough or leave of absence and is entitled to all rights and benefits which are due to such employees pursuant to the rules and regulations of the employer. However, the employee's seniority rights are not affected by their absence. The employee may contribute to any funded benefit plan to the same extent as other employees or furlough or leave of absence.

Employees who serve in the military are entitled to continue participating in any health insurance plan as spelled out in 38 U.S.C. Section 4317. However, no waiting period or exclusion can apply to any veteran whose insurance was terminated by reason of military service unless the exclusion or waiting period would have applied had employment not ceased. Employees may continue participating in employee pension plans as set out in 38 U.S.C. Section 4318.

Questions frequently arise concerning retirement programs. For instance, if a municipality participates in a retirement program, whether it is the Alabama Employees Retirement System or some other system, is the municipality governed by federal or state law with regard to retirement credit for employees who are called into active military service? This issue is covered specifically by USERRA. The rights provided under USERRA to public employees serving in the military cannot be diminished in any way by state law.

So, what responsibilities does a municipality have with regard to retirement credit for municipal employees who are returning to work after being on active military duty? Under USERRA, a municipality must reemploy a person returning from active military duty and shall, with respect to the period of military service, be liable to the retirement system the municipality participates in for funding the employer's obligation to that system. With regard to retirement benefits, USERRA specifically provides the following:

1. A reemployed person must be treated as not having incurred a break in service with the employer
2. Military service must be considered service with an employer for vesting and benefit accrual purposes
3. The employer is liable for funding any resulting obligation
4. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

For purposes of determining an employer's liability or an employee's contribution for retirement credit, the employee's compensation during the period of his or her military service must be based on the rate of pay the employee would have received from the employer but for the absence during the period of service. If the employee's compensation is not based on a fixed rate such that the determination of such rate is not reasonably certain, then it must be based upon the employee's average rate of compensation during the 12-month period immediately preceding such period or, if shorter, the period of employment immediately preceding such period.

As far as a returning municipal employee's repayment of contributions, he or she has up to three times the length of military leave, up to a maximum of five years, to make any contribution payments he or she would have made to establish retirement credit without having to pay any interest. No such payment may exceed the amount the municipal employee would have been required to contribute had the person remained continuously employed by the municipality throughout the period of military service.

It should be noted, though, that a municipality does not have to pay the retirement credit for municipal employees who are on active military duty during the time the employee is serving. Instead, USERRA provides generous time periods for the payment of missed contributions without any interest penalties. Upon returning from active military duty, the employee would have to exercise his or her option of remitting any missed retirement contributions and not until that point would the municipality be obligated to pay its portion of any retirement benefits missed.

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