



michigan municipal league

## Law Enforcement Action Forum Newsletter



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### Veterans' Laws Regulate Employers In Hiring, Job Actions, and Granting Time Off

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Michigan is in a time of unprecedented economic hardship. In response, public employers are making every effort to be fiscally responsible while maintaining a workforce adequate to provide essential services. At the same time, this country is engaged in two protracted wars that have caused a deployment of Reserve and National Guard Troops not seen since the Korean War. As a result, many public employers have had to accommodate employees who are, have been, or are related to someone, who either is in or has been called to duty in the Uniformed Services. Accommodating the needs of these employees and their families has added to the employers' hardship in maintaining a sufficient workforce.

When we use the word "accommodate," it usually means that employers have to adjust their practice in response to some need or action. This is the case when discussing how employers manage employees that fall under the protections of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the Family Medical Leave Act ("FMLA"), the corresponding Michigan Veterans' Preference Act ("VPA"), and other related Michigan Acts. Each of these laws require some action by employers in giving preference and/or accommodation through hiring, leave, job or medical considerations to



individuals that are currently serving or have served in the Uniformed Services and their family members.

The Uniformed Services Employment and Reemployment Rights Act of 1994 is very specific in outlining what employers must do when managing employees associated with the Uniformed Services. Problems arise when the employer either does not understand the requirements of the law or chooses not to follow them. Either way, the outcome can result in costly litigation that employers could have prevented by implementing practices and protocol to assure statutory compliance.

The purpose of this Newsletter is to provide the reader a basic understanding of the legal issues relating to employees involved in the Uniformed Services. Throughout the remainder of the Newsletter, reference is made to several statutes and relevant case law. Where appropriate, language comes directly from the statute or case. However, it is important that those responsible to hire or manage covered employees go to the cited examples and read the information in its entirety.

## Covered Employees

The USERRA, VPA and other Michigan Acts are similar in their definitions of whom the law covers and what requirements the employer and employee must meet. The key to complying with the regulations is to ensure that the people who hire, supervise, and ultimately deal with a job know the requirements of the acts. Of particular note is that both the Federal and Michigan Acts include employees active in the Public Health Service in their definitions for leave and reemployment. The *Public Health Security and Bioterrorism Response Act of 2002* establishes the criteria for who is eligible and mandates that certain disaster response work (and authorized training for such work) is considered "service in the uniformed services."

## Michigan Veteran Defined: M.C.L.A. § 35.61(a)

(a) "Veteran" means a person, who served in the active military forces, during a period of war or who received the armed forces expeditionary or other campaign service medal during an emergency condition and who was discharged or released therefrom under honorable conditions. "Veteran" also includes a person who died in active military forces.

## Michigan Leaves; Reemployment Protection Act: M.C.L.A. § 32.273(7)(e)

(e) "Uniformed service" means the armed forces, the reserve component, the national guard in active service or active state service, the commissioned corps of the public health service, and any other category of persons designated by the president or governor in time of war or national emergency.

## USERRA: 38 U.S.C.A. § 4303 - Definitions— Employment and Reemployment Rights of Members of the Uniformed Services

(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty,

active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(16) The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

## Hiring Under The Michigan Veterans Preference Act

The State of Michigan adopted the Veterans Preference Act in 1897 (M.C.L.A. § 35.401 et. seq.) and it has undergone numerous amendments. The Michigan Court of Appeals wrote a concise analysis of the U.S Legislatures' intent for passing the VPA in *Valentine v. McDonald*, 371 Mich. 138; 123 N.W.2d 227 (1963). In *Valentine*, the court held, "The Veterans' Preference Act was enacted for the purpose of discharging, in a measure, the debt of gratitude the public owes to veterans who have served in the armed services in time of war, by granting them a preference in original employment and retention thereof in public service."

Michigan-VPA, M.C.L.A. § 35.401(1) provides:

In every public department and upon the public works of the state and of every county and municipal corporation of this state, an honorably discharged veteran, as defined by 1965 PA 190, MCL 35.61 to 35.62, shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment that does not, in fact, incapacitate, does not disqualify them.

If it is necessary to fill by appointment a vacancy occurring in an elective office, the appointment is within this act. The applicant shall be of good moral character and shall have been a resident of the state for at least 2 years and possess other requisite qualifications, after credit allowed by the provisions of any civil service laws.

The Act establishes that an honorably discharged veteran who meets the established criteria shall be given preference for appointment and employment. The problem is how the "preference" is defined. In *Carter v. Ann Arbor City Attorney*, 271 Mich. App. 425; 722 N.W.2d 243 (2006) the Court of Appeals of Michigan held:

While the VPA clearly states that veterans shall be given a preference for appointment and employment, it does not describe the nature or strength of the preference. Further, the VPA provides that a veteran is not entitled to the preference unless he or she meets the residency requirements and possesses "other requisite qualifications." However, the VPA neither defines "other requisite qualifications" nor mandates who is responsible for determining what the requisite qualifications are and whether an applicant possesses those qualifications.

In *Carter*, the court cited the Michigan Supreme Court ruling in *Patterson v. Boron*, 153 Mich. 313; 116 N.W. 1083 (1908) to help define the issue of "other requisite qualifications". In *Patterson*, the plaintiff, an honorably discharged Union soldier, sought a writ of mandamus compelling the defendant mayor to appoint him as a city attorney. The plaintiff based his right to the appointment on the VPA as set forth in 1907. The Michigan Supreme Court clearly held that to be entitled to the veteran's preference, a veteran must possess

the requisite qualifications for the position, as determined by the hiring authority.

The Court of Appeals went on to say that, "We further clarify that the veteran's preference is not absolute. Although the veteran's qualifications need not be equal to the qualifications of a nonveteran to trigger the preference, his or her qualifications must be at least comparable."

The Court ruled in *Carter v. Ann Arbor City Attorney*, that although the veteran's qualifications need not be equal to the qualifications of a nonveteran to trigger the preference, the veteran's qualifications must be at least comparable in the estimation of the hiring authority. The veteran's preference does come into play until the veteran can establish that he or she possesses the requisite qualifications for the position. The VPA does not preclude a public employer from hiring a nonveteran applicant if the employer reasonably believes that the nonveteran applicant is substantially better qualified than the veteran.

If a municipal entity has a Civil Service Commission, the issue of veteran's preference in hiring should be outlined in the Ordinance. Many entities follow the criteria as outlined by the Federal Civil Service Commission, which is reflected in the Michigan Civil Service Commission Rules. In these cases, points are added by virtue of qualifying under the Act. The points do not have a specific negative effect because the candidate must reach the final level of the hiring process to become eligible for employment.

### **Notice of Leave**

USERRA, 38 U.S.C.A. § 4312(a)(1), requires employees to give an advance verbal or written notice of the need for leave in order to preserve their eligibility for reemployment rights. However, it also recognizes that sometimes military necessity precludes notice or, giving notice, under all of the relevant circumstances, is otherwise impossible or unreasonable. The Act does not specify any minimum period of advance notice.

The Sixth Circuit Court of Appeals addressed the issue in *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (6<sup>th</sup> Cir. 1988). Burkart was on National Guard duty for two weeks in June, 1983, and was offered the opportunity to volunteer for additional duty to commence on July 9, 1983. Although he returned to work July 5, 1983, with the hope of accepting the volunteer position, Burkart did not formally notify the military unit that he would be attending the camp until Thursday, July 7, 1983 and did not notify his employer until 4:45 p.m. Friday, July 8, 1983.

In this case, the Court said that a fifteen minute notice of a three-week leave was so blatantly detrimental to his employer that Burkart had to know it would trigger his employer's subsequent decision to demote or even terminate him. The Court concluded that Burkart's notice was inadequate since there were sufficient options available for him to give adequate notice. They went on to say that the "Veterans' Act was drafted with the intent to shield a serviceman from discrimination by his employer, not to arm him with a sword to punish his employer for some perceived wrong unconnected to his status."

This excerpt from the U. S. House of Representatives Committee on Veterans' Affairs, Legislative History House Report NO. 103-65, 103d Cong., page 26 (April 28, 1993) gives clear guidance of the legislative intent in the area of notice.

The Committee believes that the employee should make every effort, when possible, to give timely notice. The issue of timely notice should be considered on a case by case basis. In the event that an employee is notified by military authorities at the last minute of impending military duty, resulting short notice given to the employer should be considered timely. On the other hand, last minute notice, which could have been given earlier by the employee but was unjustifiably not given, and which causes severe disruption to the employer's operation, should be viewed unfavorably.

Lack of a timely notification, which does not result in harm to the employer, should not be a sufficient basis to deny reemployment rights.

The Michigan Reemployment Protection Act M.C.L.A. § 32.273(3)(1), also has an advance notice requirement of leave to preserve job rights. Although this section does not stipulate to the timeliness or fashion of notice, the intent is that, in a dispute, the requirements for timely notice to prevent severe disruption to the employer would prevail.

### **Returning Service Members Under Userra & The Michigan Reemployment Protection Act**

The purpose of USERRA is to protect service members from discrimination in employment. Under USERRA, if employees are past or present members of the uniformed service, have applied for membership in the uniformed service, or are obligated to serve in the uniformed service, the employer cannot deny them initial employment, reemployment, retention in employment, promotion or any benefit of employment because of the status. Employers cannot retaliate against anyone who assists, testifies, or makes statements in a proceeding involving USERRA rights. Furthermore, employees have the option to continue their employer health care plan for their dependents for up to 24 months and employers cannot deny them reinstatement in the plan upon return from military service.

USERRA requires employers to give returning employees an opportunity to return to their former jobs if employees left their jobs to serve in the Uniformed Services and meet the following:

- Gave the employer advance written or verbal notice of their service
- Have five years or less of cumulative service in the uniformed services while with that particular employer
- Are returning to work or have applied for reemployment in a timely manner after conclusion of service

- Have not been separated from service with a disqualifying discharge or under other than honorable conditions

If employees are eligible for reemployment, employers must restore them to the jobs and benefits they would have attained if not for their absence due to military service. In some cases, employers may offer a comparable job. USERRA also provides limited circumstances under which an employer may need to reemploy the returning employee. These circumstances are specific and the burden of proof is on the employer.

The Michigan Military Leaves; Reemployment Protection Act 133 (1955), M.C.L.A. § 32.273, was amended in 2008 to strengthen USERRA in Michigan. This Michigan act requires employers to reemploy employees without any exceptions, thus eliminating the limited circumstances found in USERRA. The Act lays out the status, benefit, and rank criteria that the employer must follow. The Act also establishes the conditions that must be present before employers can deny reemployment to public employees.

The Reemployment Protection Act has other differences. It expressly extends coverage to those who serve in the National Guard. It also allows employees who have served more than 180 days to report to work within 90 days of the completion of service eliminating the requirement to reapply within 15 days as in the past. Michigan extends the reemployment rights up to five years of continuous, uninterrupted service from the USERRA requirement of five years of combined length of the non-exempt periods of uniformed service.

Employers also need to be aware of M.C.L.A. § 35.402a. This statute allows covered employees who were in public employment prior to and at the time of entering military service to add the time spent in military service to the period of employment if the employees return to the same or similar public employment following discharge from military service. This statute has an impact if there is a need for workforce reduction.

M.C.L.A. § 35.353, affects the “at-will” status of returning employees by defining their retention period. Under the Act employees shall not discharge returning employees from such position without cause within one (1) year after such restoration unless all employees in the same classification with less seniority are first laid off. Employer must consider these employees as having been on furlough or leave of absence during their period of military duty. Therefore, employers must restore them to their positions without loss of seniority, including, upon promotion or other advancement following completion of any period of employment required for a seniority date in the advanced position. This puts them ahead of all employees who were previously junior to the returning employee and had advanced to the position during their absence in the armed forces. This statute also will have an impact on promotions and in identifying employees who are subject to workforce reduction.

The Michigan Act also has a civil remedy for employees who feel their rights have been violated, and although the Act does not entitle the employee to lost wage and benefits, it does provide that the employee may be awarded “reinstatement and reasonable attorney’s fees.” USERRA also allows for these damages.

It is very important for Michigan employers to recognize that the Michigan Reemployment Protection Act, as amended in 2008, has a potential criminal sanction. Any individual who commits a violation shall be guilty of a misdemeanor.

This is where Veterans’ Reemployment can get complicated; USERRA has authority unless the State law is more advantageous to employees. Employers who have employees who are taking leaves for service in the U.S. Armed Forces, National Guard and/or Uniformed Services and will be returning to employment must become familiar with both USERRA and the Michigan Acts to stay out of trouble.

## Discipline and Discharge Under The VPA

When it comes to situations where the employer may have to place sanctions or take action against a covered employee, M.C.L.A. § 35.351 et. seq., is very specific. LEAF sought guidance from its Legal Advisor, Audrey Forbush. She pointed to the LEAF Newsletter published in June, 2006 titled, *Tips for Successful Employee Discipline and Discharge* that provides an outline for the discipline process (found at: mml.org, Insurance, Pool or Fund, left side of page Risk Resources, Law Enforcement Newsletters). Things have not changed a lot in this area.

However, even though a municipal entity may have a Charter, contracts, or rules that stipulate employees are “at will,” under the VPA that status changes when employees are covered veterans. The VPA provides that discipline and discharge actions must be “for cause,” and the Act outlines specific criteria, notices and hearings, independent of the contract (*Jackson v Detroit Police Chief*, 201 Mich. App. 173; 506 N.W.2d 251 (1993)). The VPA mandates the type of offenses when employers may discipline covered employees and outlines the types of offenses for employers may terminate them. Forbush’s opinion is that if an employee falls under the VPA as defined in M.C.L.A. § 35.61(a), the department should contact legal counsel before initiating termination proceedings.

Keeping in mind the definition of a veteran, pursuant to M.C.L.A. § 35.402 Sec. 2 provides:

No veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries holding an office or employment in any public department or public works of the state or any county, city, or township or village of the state; except heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers **may be removed or suspended, or, without his**

**consent, be transferred from such office or employment, only except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency;** (Emphasis Added)

**and the veteran may not be removed, transferred or suspended for any of these reasons except after a full hearing** (Emphasis Added) before the Governor, if a state employee, or before the prosecutor, if a county employee, or before the mayor of any city or the president of any village, or before the commissions of any city or village, if an employee of a city or village, or before the township board, if a township employee;

**and, at the hearing, the veteran has the right to be present, to be represented by counsel, and to defend himself against the charges.** (Emphasis Added)

**Further, the veteran is entitled to a notice in writing stating the cause for removal, transfer, or suspension at least 15 days before the hearing;** (Emphasis Added)

**and any removal, suspension, or transfer may be imposed only upon written order** (Emphasis Added) of the Governor, prosecutor, mayor, commission, or township board, **and the hearing must be held within 30 days of the filing of the notice.** (Emphasis Added)

Ms. Forbush points out that this section of the Act does not cover all veterans and encourages employers to avoid pitfalls by determining who in the organization is a covered employee under the VPA. Specifically the Act does not apply to heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter,

and first deputies of such heads of departments, heads of institutions, and officers.

It is important to avoid violating the rights afforded employees under the VPA. In *Jackson v Detroit Police Chief*, Michigan's Court of Appeals said that the Act entitles a veteran to notice and a hearing before his employer may take any action against him with respect to his employment. Forbush states that this means the court would look at whether the actions of the employer give rise to a violation of due process and whether the employee has a property interest in continued employment (*Egan v. Detroit*, 150 Mich. App. 14; 387 N.W.2d 861 (1986)). To avoid this outcome, employers should follow the specific rights to representation, written notice, written order and hearings as outlined in the Act.

However, if an employer removes a veteran from employment in violation of the act, the employee must file a written protest within thirty days of this action or the law will deem him to have waived the benefits and privileges of the Act. In *Grant v. Meridian Charter Township*, 250 Mich. App. 13; 645 N.W.2d 79 (2002), the petitioner failed to protest timely the lack of a hearing before his discharge, and thus he waived any right to relief.

Even when employees have no property right to their job, in all cases involving termination on sensitive issues that may seriously damage employees' reputations, including the ability to obtain future employment, employers should try to minimize the circulation of any information pertaining to the action. Sometimes public distribution of the reasons for the discipline is unavoidable, so employers may want to offer employees an opportunity to have a hearing to clear their names.

### **Family Medical Leave Act Changes Under The National Defense Authorization Act Of 2008 & 2010**

Public employers, regardless of how many people they employ, are required to comply with the Family Medical Leave Act (29 CFR Part 825, § 825.104). The Act, under §825.220(a), also states

that employers may not deny leave if the requesting employees are "eligible" employees who have met the FMLA's notice and certification requirements and have not exhausted their FMLA leave entitlement for the year.

Under the 2008 changes to the FMLA, eligible employees have gained additional benefits. For example, eligible employees can take up to twelve weeks of leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on "covered active duty." Qualifying exigencies are defined as short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and any other service-related activity that the employer and employee agreed was a qualifying exigency.

Under the Amendments, eligible employees may also take twenty-six workweeks of leave during a single 12-month period to cover the care of spouse, son, daughter, parent, or next of kin to the employee who are veterans and are undergoing medical treatment, recuperation or therapy for serious injury or illness incurred in the line of active duty during the five-year period preceding the date of treatment, recuperation, or therapy. This includes care for an illness such as post-traumatic stress disorder that manifests itself after separation from service as well as for a pre-existing injury or illness that active duty aggravated.

Employment law is rapidly evolving and employers need to ensure they are aware of changed requirements and have made policy changes to comply with the regulations.

Handling employment issues can be complicated and the risk of making a mistake or not following established protocol is high. Discipline and discharge can be very emotional, and, sometimes, it can be difficult to be objective and focused. Because of the issues involved and the cost of making an error, the MML, LEAF and Audrey

Forbush all recommend that before undertaking the process, seek guidance and assistance from a Human Resource Professional or Legal Counsel skilled in the area of employment practices.

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LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

*While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.*

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund  
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