

Military Leave Invokes Three Amigos: COBRA, USERRA, and FMLA

by Rich Glass, JD

When an employee is called to active military duty, an employer must be active as well. Three laws come into play in these situations:

1. COBRA – Consolidated Omnibus Budget Reconciliation Act
2. USERRA – Uniformed Services Employment and Reemployment Rights Act
3. FMLA – Family and Medical Leave Act

Of course, the 9/11 aftermath made military call-ups a more common experience. Since then, more than 500,000 men and women have been activated, according to Pentagon reports. When you stand COBRA and USERRA side-by-side, employees are entitled to the best of both worlds.

An employer must also be aware of an expansion to FMLA because of a law enacted in January 2008. The National Defense Authorization Act (NDAA) broadened FMLA protections to families of active military service members. Recently proposed FMLA regulations will likely change the rules even further when finalized. An employer needs to understand nine aspects of this time-off trio.

1. Applicable Employers and Plans

- COBRA excludes small employers (who regularly employ less than 20 employees), church plans, and governmental entities.
- USERRA applies to all employers.
- FMLA applies to employers including any public agencies that employ 50 peo-

ple or more for at least 20 weeks of the current or prior calendar year.

Under COBRA, employers have a limited duty to offer continuation coverage of health flexible spending accounts (FSAs). Employers do not have to offer the Health FSA under COBRA at all if the health

only applies to employers with 50 or more employees in the previous or current year.

2. Employee's Advance Notice Requirement

Under USERRA, the employee or a military officer must give the employer advance notice of the leave. No time frame is required, but the Defense Dept. recommends 30 days. The notice can be oral. The requirement is waived if it is not possible due to military necessity or if it is otherwise unreasonable or impossible under the circumstances. COBRA has no such advance notice requirement for employees who take off for military leave.

When the need for FMLA leave is foreseeable, the employee must provide 30 days of advance notice or provide notice as soon as practicable.

3. Employer's Notice and Disclosure Requirements

Employers must notify employees of their rights under all three laws. Under USERRA, an employer must post the Dept. of Labor's model notice where the employer usually puts employee notices, such as the break room or another common area.

Under COBRA, employers must send a general notice with required content to all covered beneficiaries, generally within the first 90 days of coverage. This notice is typically sent to the employee's home via first class mail. There are also COBRA content requirements for summary plan descrip-



FSA meets certain requirements and is an HIPAA-excepted benefit. However, if the account balance is under spent, the Health FSA must only continue until the end of the plan year. This is not so with USERRA or FMLA. Employers must offer Health FSA coverage in every case and for subsequent plan years (if any). FMLA



tions. While there is no specific USERRA or FMLA requirement for a summary plan description, prudent employers address some issues in that document. Under FMLA, employers must post a model notice in conspicuous places where employees work and include written FMLA guidance in their policies or employee handbook.

4. Election Rights

Under COBRA, each qualified beneficiary has an independent right to elect coverage. Under USERRA, the employee has the sole right to continue health plan coverage. Sometimes, an employee who leaves in a hurry does not have time to elect USERRA and a family member will want to make an election on the employee's behalf. This is typically permissible if the family member has the authority to make decisions on the employee's behalf (through a power of at-

torney, for example). Under FMLA, the employee must make a request to elect coverage. This request does not have to mention FMLA *per se*. It only needs to give the employer enough information to trigger the employer's awareness of a need for FMLA.

5. Reasonable Election and Payment Procedures

USERRA does not have specific time frames for elections, payment, and cancellation of coverage like COBRA does. The Dept. of Labor has given employers some relief. Employers can adopt reasonable procedures that mirror those for COBRA. In fact, those procedures often clarify that the election is for both COBRA and USERRA.

For FMLA, an employee's group health plan coverage continues unless the em-

ployee fails to pay the premiums. There is a 30-day grace period, just as with COBRA. Also, an employer must provide another 15-day notice before canceling coverage for nonpayment.

6. Who Can Be Covered

COBRA is only available to the employee, spouse, and dependent children who were covered the day before the qualifying event. Others may become qualified beneficiaries through HIPAA's Special Enrollment rules. COBRA is not available to domestic partners, relatives, or dependent adults unless they were added to coverage during an open enrollment.

USERRA coverage is available to all dependents. Depending on how a plan defines the "dependants," it may have to offer continuation coverage beyond the usual COBRA group.

FMLA health plan coverage is available on the same basis in which the leaving employee had coverage before the leave. Of course, the employee must work within a 75-mile radius of at least 50 employees, have worked at least one year with the employer, and have worked at least 1,250 hours in the past 12 months with that employer.

7. Duration of Coverage

Until 2004, the applicable coverage periods for USERRA and COBRA were 18 months. A federal law, which passed in December 2004, extended the maximum USERRA period to 24 months. Of course, the 18-month COBRA period can be extended by secondary events, such as divorce or legal separation. However, this can cause some tricky administration issues for disability extensions.

The standard FMLA period is 12 weeks per 12-month period for any of five reasons:

1. Birth of a child.
2. Adoption of a child.
3. Serious health condition of the employee.
4. Serious health condition of the employee's immediate family member.
5. Qualifying exigency. This has not yet been defined. Some likely reasons would be predeployment activities, seeing a servicemember off or welcoming them home.

The last reason is new with the NDAA. Another new reason is to care for an immediate family member or next of kin on return from active duty. The duration is up

to 26 weeks per 12-month period.

8. Cost of Coverage

The COBRA rule is very simple: It is 102% of the applicable premium except during a disability extension when it is 150% of the applicable premium (If the disabled person is not covered, it is 102%).

USERRA follows the 102% rule with one exception. The employer must continue to pay its share of the premium cost for leaves of less than 31 days. With a disability extension, the cost continues to be 102% unless the USERRA leave ends. The employee gets the best of both worlds. The FMLA rule is simplest of all – the employee pays the same rate as before the leave began.

9. Early Coverage Termination Reasons

USERRA permits early coverage termination in the following circumstances:

- Non-payment of premiums (if permitted in the employer's procedures).
- Failure to return to work after the leave ends.

- The leave ends with a dishonorable discharge or is due to other undesirable conduct.
- While not addressed, USERRA would presumably permit coverage termination for an employer stopping providing group health plan coverage and for cause as defined by the plan.

COBRA permits early coverage termination in seven circumstances:

- Non-payment of premiums.
- Employer ceasing to provide group health plan coverage.
- The employee has other group health plan coverage without an applicable pre-existing condition exclusion.
- Medicare entitlement.
- The employee is no longer disabled during a disability extension.
- For cause under the plan.
- Expiration of Coverage

Employers must provide a COBRA termination notice in each of these circumstances. USERRA has no such requirement.

FMLA allows employers to terminate coverage for nonpayment of premiums. Employers may also terminate coverage

during FMLA for the same class of employees to which the FMLA employee belongs (e.g., discontinuing coverage for all hourly employees). Finally, employers may terminate coverage during FMLA if the employer discontinues coverage all together.

There are other nuances in administering health benefits during military leaves. There are enough employee protections among COBRA, USERRA, and FMLA to motivate employers to make sure that they manage military leaves in a compliant fashion. □

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