



# SPECIAL Alert

## In This Issue

*In this second Special Alert for 2006, we discuss the recently finalized USERRA regulations. USERRA was enacted to protect the employment rights of employees called to active duty in the military.*

*The final regulations aggregated recent legislation addressing USERRA, feedback from various organizations and the outcomes of various court cases. The final regulations do not include any global changes to the administrative requirements of USERRA. USERRA may affect different areas of your organization. This Special Alert discusses the impact of USERRA on your group health plan.*

*We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGrawWentworth web site at [www.mcgrawwentworth.com](http://www.mcgrawwentworth.com).*

## “Final USERRA Regulations”

In late 2005, the Department of Labor released final regulations for the Uniform Services Employment and Re-employment Rights Act or USERRA. Proposed regulations for USERRA were released in 1994. The final regulations clarify certain gray areas of the initial USERRA regulations.

The final regulations are effective January 18, 2006. The effective date is quickly approaching. The good news is the final regulations compile feedback from organizations, other legislative actions (Veterans’ Benefit Improvement Act of 2004) and the results of various court cases. If you have kept up with various legislation affecting USERRA, your organization will have little to change in order to comply with the final regulations.



- Introduction
- Anti-discrimination and anti-retaliation provisions
- Return to work requirements
- Rights, benefits and obligations of the service member called to duty
- Rights, benefits and obligations of the service member returning from active duty

The majority of USERRA addresses employment and re-employment rights of military service members. For the purposes of this Special Alert, we will address how the final regulations address the employee benefit plan requirements related to USERRA.

### Employer Obligations for Health Coverage

The final USERRA regulations require employers to meet two health plan requirements for employees called to active duty:

1. Post a Notice of USERRA Rights
2. Offer Health Plan Coverage Continuation

### Overview

USERRA was enacted to protect the rights of persons who voluntarily or involuntarily leave employment to undertake military service. USERRA affects employment, re-employment and retention in employment when an employee serves or has served in the uniform services. The regulations have five major sections:

## Notice of USERRA Rights

The final regulations require employers to provide each person entitled to rights and benefits under USERRA a notice of the rights, benefits and obligations of employees called to active duty in the uniformed services. This notice can be provided by posting the notice in a common area where similar employment notices are posted. Employers can provide the notice in other ways as well, by mailing the notice or delivering the notice electronically.

The government has indicated the employer has flexibility in the manner the notice is provided, however the content of the notice must include all the information that the government includes in their model notice.

The government has drafted two model notices:

- **Private Sector and State Government:** [http://www.dol.gov/vets/programs/userra/USERRA\\_Private.pdf](http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf)
- **Federal Government:** [http://www.dol.gov/vets/programs/userra/USERRA\\_Federal.pdf#Federal](http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf#Federal)

These notices have been modified slightly from the ones the government issued in March, 2005.

Your organization should use the notice applicable to your situation and develop a process for distributing the notice that would insure receipt if your organization decides not to post the notice in a common area.



## Offer Health Plan Coverage Continuation

Employers must be aware of several requirements relating to health plan coverage that may need to be addressed if an employee is called to active duty:

1. If the employee performs service in the uniformed services for less than 31 days, the employer must allow the employee to maintain coverage under the group health plan and only pay the contribution required of similarly situated actively working employees. In other words, the employee can continue their coverage and only be required to pay their normal employee contribution.
2. If the leave extends beyond 31 days, the employer must offer continuation coverage under USERRA and the employee cannot be required to pay more than 102% of the total premium to continue coverage.
3. If an employee returns to work after a period of service in the uniformed services, and follows the appropriate procedures for returning to work, the group health plan coverage must be reinstated upon return to employment. The employer cannot require a new hire waiting period, if coverage was terminated as a result of service in the uniformed services. If the health plan imposes any pre-existing condition limitations,

they must be waived for a member of the uniformed services returning from their duty, providing the pre-existing condition limitation would not still apply to the individual had he or she not been called to active duty. In other words, the health plan must credit time served during active duty toward satisfaction of any pre-existing condition limitations, even if the individual did not elect continuation coverage. USERRA does, however, allow a health plan to impose an exclusion or waiting period on illnesses or injuries determined to have occurred or been aggravated in the performance of service to our country.

The continuation requirements were just recently amended by Veterans' Benefits Improvement Act of 2004. It may make sense to review the key features of the health plan continuation requirements of the USERRA:

- If an employee has coverage under an employer-sponsored group health plan, the plan must permit the employee to continue the health insurance coverage if called to active duty in the uniformed services. The continuation requirement applies to the employee as well as any dependents covered on the plan. The continuation period required is the lesser of the period of the leave of absence for military service or 24 months.
- These regulations do not compel employers to offer coverage if they do not sponsor a group health plan. In addition, if the employee is

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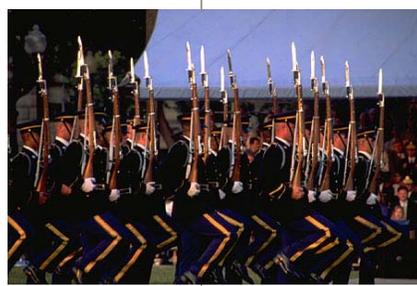
not covered by the employer's group health plan prior to deployment to active duty, the employer does not need to allow the employee the opportunity to elect coverage.

- The employer is required to develop reasonable administrative procedures for managing this continuation requirement. Unlike COBRA, USERRA does not dictate election and payment timeframes. The regulations state that health plan administrators must develop "reasonable" administrative requirements. Employers can use COBRA timeframes, however, if an employee's specific situation makes it impossible or unreasonable to elect continuation coverage in a "reasonable" timeframe, employers must provide additional time.
- The employer can charge the employee up to 102% of the premium to continue coverage. The employer must determine a "reasonable" grace period for the payment. If an employee deployed to active service does not pay premiums within the determined grace period, the employer can terminate coverage. However, if the employee's extenuating circumstances make it impossible or unreasonable to pay in a timely manner, the employer must reinstate coverage if a late payment is received.
- Offering continuation coverage required by USERRA does

not replace any obligation your organization has to offer COBRA coverage.

- If your employee called to active service covers dependents on your plan, the USERRA continuation coverage must be made available to dependents but only if the employee elects coverage. Under USERRA, dependents do not have independent election rights. If the employee does not elect USERRA continuation, the employer does not need to extend USERRA continuation coverage to any dependent.

These requirements may be affected by your organization's leave of absence policies. USERRA requires an employer to view the time spent in military service as a furlough or leave of absence from the civilian employer. USERRA guarantees the floor of rights an employer must extend. The employee is entitled to the non-



seniority rights and benefits that are generally provided to other employees with similar seniority, status and pay that are on a leave of absence. If the benefits available to employees vary by type of leave, the employee must be given the most favorable treatment according to any comparable form of leave during their time of service. If your organization offers to continue medical coverage for an individual for up to six months of a personal leave of absence, then the employer must continue medical coverage for an employee called to active duty for six months, in the

same manner as it does for a personal leaves of absence.

The new regulations also clarify a cafeteria plan issue. If the employee is eligible to compensation from the employer while on active duty (either by using accumulated vacation time or the employer provides the compensation as an employee benefit), health plan premiums can be deducted pre-tax from pay and the employee can continue to contribute to his or her flexible spending account.

### Conclusion

USERRA is a complex piece of legislation. Many aspects of USERRA extend beyond our area of expertise. The new final regulations are fairly straightforward and written in a question/answer format. If you have any questions about the re-employment or non-discrimination requirements of USERRA, it may be beneficial to read the final regulations. A copy of the final regulations can be found at <http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>.

If you have not developed the notice procedure and administrative policies for USERRA continuation rights, this should be a priority. The final USERRA regulations are effective January 18, 2006.

If you have any questions regarding these final regulations, please contact your McGraw Wentworth Account Manager. **MW**

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