

Austin Osborne

From: Rebecca Bruch <rbruch@etsreno.com>
Sent: Wednesday, November 28, 2018 5:17 PM
To: Austin Osborne
Subject: FW: Storey County USERRA Research

Hi, Austin. Here's Charity's research memo re your USERRA issue. I think it answers your question. If you want to talk about it, let me know. Thanks. Becky

From: Charity Felts [<mailto:cfelts@etsreno.com>]
Sent: Wednesday, November 28, 2018 3:53 PM
To: Becky Bruch
Subject: Storey County USERRA Research

Issue: Employee is going out on military leave and will be deployed for one year. Upon his return, will the employee be entitled to discretionary merit-based increases that would normally occur during the year?

Discussion: At issue in this situation is the protection afforded employees under USERRA. Employees are entitled to reemployment rights under USERRA if the following conditions are met: (1) the employer received advanced notice of the military service; (2) the cumulative military service does not exceed five years; (3) the employee returns to work or submits an application for reemployment in a timely manner; and (4) the employee was released from service under honorable conditions.

Employers must reemploy service members in the position they would have attained, with the same seniority, status, pay, rights, and benefits they would have achieved, had they not been absent from work for military service. This is known as the "escalator position." USERRA's regulations explain that the escalator position is generally the position the returning service member "would have attained with reasonable certainty if not for the absence due to uniformed service." See 20 C.F.R. § 1002.191.

Upon return the employer must also determine the employee's rate of pay. The rate of pay is also determined using the same escalator principles used to determine the reemployment position. See 20 C.F.R. § 1002.236. When the employee is reemployed, "the employer must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position." See 20 C.F.R. § 1002.236(a). Even if the employee is reemployed in the pre-service position or another position, and not an escalator position, "the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service." See 20 C.F.R. § 1002.236(b).

Even if merit increases are not guaranteed and discretionary on the part of the employer, the regulations require that the returning employee be considered for the merit increase and such an increase would be warranted if it would have otherwise been attained with reasonable certainty. The First Circuit addressed this concept in *Rivera-Melendez v. Pfizer Pharm., LLC*, 730 F.3d 49, 55 (1st Cir. 2013). In that case, the Court held that the escalator principle and reasonable certainty test under USERRA apply to non-automatic, discretionary promotions.

Conclusion: Considering the First Circuit case and 20 C.F.R. § 1002.236, I believe the escalator principle and reasonable certainty test would also apply to discretionary, non-automatic merit increases. The County must look at the returning employee's work history, history of merit increases, and history of increases for other employees in a similar position to determine the returning rate of pay. Outright denial of a merit increase amount simply on the basis that the amount is discretionary and non-automatic would likely violate USERRA and subject the County to liability.

Let me know if you need any additional research on this issue.

Charity



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