INTRODUCTION

State and federal law provide certain protections to employees who are serving in the uniformed service. This includes the right to military leave, continued insurance coverage, accrual of seniority, and reemployment rights. Additionally, veterans have additional protections under Minnesota relating to their discharge from employment.

This presentation will provide an overview of the legal framework for military leave issues under State and Federal law, and outline the process that school districts must follow when considering discharging a veteran.

LEGAL FRAMEWORK FOR MILITARY LEAVE UNDER FEDERAL LAW
Uniformed Services Employment and Re-Employment Act ("USERRA")

- Important Definitions under USERRA
  - Employer
  - Service in the Uniformed Services
  - Uniformed Service
- USERRA Purposes
- Interplay between USERRA and State military leave laws

Leave and reemployment under USERRA

- Who is considered an "employee"
- Type and amount of leave
- Pay during leave under State and Federal law
- Use of accrued vacation or sick leave
- Insurance Coverage
  - Time
  - Cost of coverage
  - Reinstatement of coverage upon reemployment
- Pension plans

Leave and reemployment under USERRA

- The following elements must be present for an employee to be eligible for USERRA reemployment:
  - The employee had advance notice of the employee's service;
  - The employee had five years or less of cumulative service with that particular employer;
  - The employee timely returns to work or applies for reemployment;
  - The employee has not been separated from service with a disqualifying discharge or under less than honorable conditions.
- Change in employer's circumstances
  - The type of position the employee is entitled to upon return to employment.
  - Seniority, status, and rate of pay.
- Reemployment of disabled veterans
  - Position
  - Accommodations
  - Inability to perform position
- Discrimination Protections under USERRA
Leave and reemployment under USERRA

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Recent Minnesota Court of Appeals Case Addressing Reemployment and Discrimination - Breaker v. Bemidji State University

- Facts
- Breaker’s Claims
- The Court of Appeals Decision in favor of Bemidji State
  - USERRA reemployment claim
  - USERRA discrimination claim

MINNESOTA’S MILITARY LEAVE STATUTE


Paid military leave

Minnesota employees in the military or National Guard are "entitled to leave of absence from public office or employment without loss of pay, seniority status, efficiency rating, vacation, sick leave, or other benefits for all the time when engaged with such organization or component in training or active service ordered or authorized by proper authority pursuant to law, whether for state or federal purposes, but not exceeding a total of 15 days in any calendar year." Minn. Stat. § 192.26, subd. 1.

- This generally means that school district employees are entitled to 15 days of paid military leave per calendar year.

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Paid military leave

- Leave requirements
- Eligible employees
- What is a "day" for purposes of the statute
- Eligibility for military pay
- Qualifying periods of military leave
- Leave extending over multiple calendar years

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The Veterans Preference Act

The Veterans Preference Act (VPA) provides additional protections and rights to qualified veterans. Qualified individuals are entitled to special treatment during the hiring process, with regard to disciplinary proceedings, and with regard to the termination of their employment.
Who is covered?

- A "veteran," as defined under the VPA, is a citizen or resident alien, separated from active duty under honorable conditions:
  - Who served 181 consecutive days of active duty;
  - Who is disabled as a result of an injury incurred while on active duty;
  - Who met the minimum active duty requirement in 38 CFR § 3.12, which generally means that the individual fulfilled the entire term of service for which they were called to active duty;
  - Who has certain active military service certified under federal law, 38 USC § 106 certifies numerous specific types of service as "active" for benefits purposes.

Positions Exempt from the VPA.

The VPA does not apply to the following positions:
- Private secretary;
- Superintendent of schools;
- One chief deputy of any elected official or head of a department;
- Any person holding a strict confidential relation to the appointing officer;
- Teacher; and
- Department head. See Minn. Stat. § 197.46(d).

Discipline under the Veterans Preference Act

May Require Initial Hiring Probationary Period. As of July 1, 2016 school districts may now require veterans to complete an initial hiring probationary period before the "removal" rights attach. See Minn. Stat. §§ 197.455, subd. 1(c); 197.46(a). Prior to this change, only veterans employed by the state could be subject to an initial probationary period.

Probationary Period Defined. The probationary period is defined to be no less than 30 days but no more than two years of full-time equivalent service. Minn. Stat. 43A.16, subd. 1.

Only an Initial Hiring Probationary Period. After serving an initial hiring probationary period for a school district, a veteran cannot be subjected to additional probationary periods, such as for a transfer or promotion. See Minn. Stat. §§ 197.455, subd. 1(c); 197.46(a).
“Removal” only for “incompetency or misconduct.” According to statute, veterans may only be removed from employment for incompetence or misconduct. Minn. Stat § 197.46. According to the Minnesota Supreme Court, the “incompetency or misconduct” standard is essentially the same as the “just cause” standard. Ekstedt v. Village of New Hope, 193 N.W.2d 821, 827-28 (Minn. 1972).

“Removal” includes termination and may include demotion. Each covered veteran is entitled to a hearing, prior to removal from employment, which may include demotion to a lower paid position. Minn. Stat. § 197.46.

Procedural requirements for “removal” under the VPA

- **Notice.** Minn. Stat. § 197.46 requires that employers provide veterans with specific notice of intent to dismiss. Such notice must include:
  - Statutory grounds for the proposed termination/demotion;
  - The factual basis for termination or demotion;
  - Notice of the right to request a hearing within 30 days of receiving notice;
  - That failure to request will waive the individual’s right to VPA protections; and
  - That any hearing will be held in front of an arbitrator.

Payment for the hearing

- **Hearing costs.** Minnesota Statutes section 197.46(e) requires the school district to bear all costs associated with the hearing, except for the veteran’s attorney fees.
- **Attorneys fees.** Section 197.46(e) also states that if the veteran prevails in a dispute heard by an arbitrator and the hearing reverses “the level of the alleged incompetency or misconduct requiring” discharge, the school district must pay the veteran’s reasonable attorney fees.
VPA vs. Grievance Procedures

• If veteran chooses the VPA procedures, not considered a grievance. If a veteran chooses to use the procedures of sections 197.46 to 197.481 of the VPA, the matters governed by those sections will not be considered grievances under a CBA.

• If veteran appeals through the VPA, may not appeal under CBA. If a veteran elects to appeal the dispute through those sections of the VPA, the veteran is precluded from making an appeal under the grievance procedure of the CBA.

Appeal

• Appeal to District Court. Either the school district or the veteran may appeal the arbitrator’s decision on the veteran’s discharge to the district court. The appeal must be in writing and state the grounds for the appeal. See Minn. Stat. § 197.46(d).

• Timing. The notice of appeal must be served upon the other party within fifteen days after notice of the arbitrator’s decision. See id. The original notice of appeal with proof of service must be filed with the district court administrator within ten days after such service.

Questions?

NOTE: These materials and the corresponding presentation are meant to inform you of interesting and important legal developments. While current as of the date of presentation, the information that is presented may be superseded by court decisions, legislative amendments, rule changes, and opinions issued by bodies interpreting the area of law. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts addressed in this outline or discussed in the presentation, you should consult with your legal counsel.