

USERRA

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USERRA

The Uniformed Services Employment And Reemployment Rights Act

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to state requirements that extend beyond the scope of this booklet.

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he Uniformed Services Employment and Reemployment Rights Act (USERRA) became law in 1994. Enacted following the Persian Gulf War, the Act's purpose was to expand the rights of employees returning to work from uniformed service by entitling them to positions with their pre-service employers, complete with all of the seniority, status, pay and benefits that they would have accrued had they never left.

In an effort to bring the laws regarding military leave up to date with the realities of military service and modern workplace law in general, Congress created in USERRA a broad, pro-employee statute, significantly restricting a company's treatment of employees who also perform uniformed service. Although similar to the Family Medical Leave Act in some respects, it is unique in many others, including the creation of a presumption in favor of the complainant.

OVERVIEW OF THE ACT

Under the Act, a person cannot be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of membership, application for membership, performance of service, application for service, or obligation for service in the armed forces.

USERRA also generally requires covered employers to provide eligible employees with up to five years of unpaid leave for uniformed service during the life of their employment. Throughout this period, the employee's seniority, health care and pension benefits must be maintained. Further, returning service members have a virtually unfettered right to reemployment by their pre-service employer upon their timely application for return to work.

USERRA became law on October 13, 1994, and its reemployment provisions apply to all members of the uniformed services seeking civilian reemployment on or after December 12, 1994. Although USERRA initially received little attention, it has gained new prominence for legislators and employers alike since the terrorist attacks on the United States in 2001. The attacks and U.S. military response prompted a renewed interest in USERRA, and in today's political climate, one can expect vigorous federal enforcement of the law's requirements. On December 19, 2005, the U.S. Department of Labor (DOL) issued final regulations governing all USERRA issues.

ARE YOUR EMPLOYEES ENTITLED TO USERRA BENEFITS?

The first step toward evaluating your employees' rights and obligations under USERRA is to determine whether your organization is covered by the Act. If covered, you must then determine whether the employee is eligible for benefits under USERRA. Unlike many other federal laws, the coverage tests under USERRA for both employers and employees are quite broad, and bring most employment situations within its reach.

A. Are You Covered?

You are a covered employer if you pay to an employee salary or wages, or if you have control over employment opportunities. This includes public or private sector:

- individual employers;
- institutions;
- organizations;
- Native American tribes and their business enterprises;
- potential employers;
- persons or entities to whom the employer has delegated employment responsibilities; and
- any successor in interest to the employer.

In addition, there are no exceptions to coverage based on your type of organization, or the number of employees you employ. That means you are covered under USERRA even if you have only one employee. You are also responsible for an eligible employee even if that employee has more than one employer.

B. Is The Employee Eligible?

1. Employees Covered

Under USERRA, an “employee” is any person employed by an employer. This includes full- and part-time workers, as well as prospective and former employees. As with employers, both private and public sector employees are covered by the Act, although there are some special provisions for federal employees. There is no exception for executive, managerial or professional employees. Temporary employees, i.e., those that are not reasonably expected to continue employment indefinitely, fall outside of the law’s protections *only* with respect to reemployment rights (as

will be discussed below). That means that temporary or seasonal employees are entitled to USERRA benefits if you already employ them, or are thinking about hiring them.

Employees who are laid off with recall rights, on strike, or on leave of absence remain “employees” for USERRA purposes. If employees are laid off before or during their uniformed service, however, and you would not have recalled them during that period, you are not required to reemploy them following their period of service simply because they are covered employees. This is because reemployment rights under USERRA are not designed to put employees in a better position than if they had remained in civilian employment.

2. “Uniformed Services” Covered

USERRA applies to those who have served in one of the “uniformed services.” These include:

- U.S. Army;
- U.S. Navy;
- U.S. Air Force;
- U.S. Marines;
- U.S. Coast Guard;
- Army or 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;
- a cadet or midshipman attending a service academy (the United States Military, Naval, Air Force and Coast Guard Academies); or
- those specially designated by the President as “uniformed service” members.

Under USERRA, “service in the uniformed services” applies to both voluntary and involuntary activities. These activities include all types of military training and service, as well as the time needed away from work for an employee to undergo an examination to determine his fitness to perform these activities.

3. Notice Requirement

The majority of the employee rights secured by USERRA deal with the virtually automatic entitlement to reemployment upon return from service. These rights are discussed in the section entitled “Rights and Obligations Upon Return From Duty.” To maintain eligibility for these rights, a covered employee must provide you with written or verbal notice of his or her need for leave to the extent possible.

You may be notified personally or in writing by either the employee, or by an officer of the appropriate uniformed service branch. But realize that the employee is *not* required to notify you in advance if such notice is not possible or reasonable. If an employee fails to notify you of service, and the notice would not have been impossible or unreasonable, he or she will forfeit the protections of USERRA.

Employees will also lose USERRA protection if they notify you that they are leaving, but fail to say that they are doing so because of military duty. This notice requirement is designed to be just that—*notice*. An employee is not required to seek your permission before leaving for uniformed duty. This also means that an employee need not take into consideration your concerns or interests regarding timing, duration or frequency of a uniformed service obligation.

In addition, this requirement *does not* obligate employees to notify you at that time when, if ever, they expect to return to work. There is also no limit on the amount of time that may elapse between the date the employees leave, and the date on which they actually enter uniformed service.

4. Cumulative Length Of Absence

Even if an employee provides you with proper notice, he or she is not automatically entitled to all of the protections of USERRA. In order to be entitled to reemployment, the employee's current leave, plus all past military leave while employed by you, cannot exceed five years. This five year limit includes uniformed service leave taken before the effective date of USERRA's reemployment provisions (December 12, 1994). The following types of service, however, are excluded from this calculation:

- service required beyond five years to complete an initial period of obligated service;
- service from which the employee, through no personal fault, was unable to obtain release orders before expiration of the five years;
- service that was performed for the purpose of obtaining additional training demanded by the Department of Defense;
- service that was performed because of special orders by the President, the Secretary of Defense, the Secretaries of the individual military services, or because the National Guard was called into federal service; or
- involuntary active duty in a variety of circumstances.

Examples of these service obligations include:

- Naval service for which service obligations expire while the individual is at sea;
- special call-ups for service under a declaration of war or national emergency by the President or Congress; or
- voluntary or involuntary active service in support of an operational mission, other than during a war or national emergency.

5. Discharge Requirements

An employee is only entitled to the rights provided under USERRA if the military service ends honorably. Thus, you are not required to provide USERRA benefits to an employee if the separation or discharge from uniformed service is:

- dishonorable;
- based on bad conduct;
- on grounds less than honorable;
- due to absence without leave; or
- the result of a conviction under court martial.

YOUR RIGHTS AND OBLIGATIONS DURING LEAVE

A. Continuation Of Benefits And Premium Payments

Under USERRA you are required to make immediate provision for continuing health care coverage to employees and their dependents where:

- they participated in the plan immediately prior to the leave; and
- the employee's leave was due to uniformed service.

While USERRA health benefits are often likened to those under COBRA, more employers are covered by USERRA than COBRA. Under USERRA, you are required to provide coverage under *all* health plans, rather than just “group health plans.” That means that unlike COBRA, the USERRA benefit is available even where the employer has fewer than 20 employees and where the health care coverage is being provided through a non-ERISA benefit plan. Further, you are required to provide coverage for employees for the greater of the length of their uniformed service, or 24 months. If you are an employer covered by COBRA, however, it is important to realize that these two laws co-exist, and so COBRA rules with regard to other provisions (such as extended coverage for disabled persons) continue to apply.

If an eligible employee elects to continue health coverage, you may require payment of up to 102% of the full premium for the coverage elected (the premium is calculated using the COBRA formula). However, if the leave of absence is less than 31 days, you may not collect more than the applicable employee share on that coverage, if any.

Example: An employee who pays \$50 a month for health coverage cannot be required to pay more than \$50 for any month in which he is absent for a 14-day reserve duty obligation.

B. Notice Requirements

Unlike COBRA, you are not required to provide employees with notice of a continued entitlement to health care coverage under USERRA. In addition, USERRA does not specify how an employee must notify you that he or she intends to continue health care coverage. Therefore, your health plan administrators may develop requirements addressing how continuing coverage may be elected, con-

sistent with the terms of the plan and the Act's exceptions to the requirement that employees give advance notice of uniformed service in certain situations.

C. Duration Of Benefits

You are required to provide continued health coverage for the lesser of:

- 24 months beginning on the day that the uniformed service leave commences (18 months for those elections made before December 10, 2004); or
- a period ending on the day after the employee fails to return to employment within the time allowed by USERRA (set forth below).

USERRA does not require you to establish a health plan if one is not currently offered to your employees in connection with their employment. In addition, you are not required to allow a uniformed service members to initiate new health coverage at the beginning of their service obligation if they did not previously have such coverage.

YOUR RIGHTS AND OBLIGATIONS UPON RETURN FROM DUTY

A. Reapplication Procedures

1. Timeliness Of Reporting And Reapplying

In order to be eligible for reemployment under USERRA, a uniformed service member must report to you (orally or in writing), or submit an application for reemployment, in a timely manner. Nonetheless, employees who fail to timely report or apply for reemployment do not automatically forfeit rights under USERRA. Instead they become subject to your standard conduct rules, established policy and general principles pertaining to absence from scheduled work. The time period during which a returning service member must report varies depending upon the duration of leave.

- **Uniformed service of less than 31 days:** must report no later than the beginning of the first full regularly-scheduled work shift starting at least eight hours after the employee has been safely transported home, or as soon as possible after the eight hour period if reporting by that time is impossible or unreasonable through no fault of the individual. Employees must be given a reasonable amount of time to arrive back at their residence, to rest, and to travel to the place of employment.

Example: An employee arriving home at 10:00 p.m. is required to report for work beginning at 6:00 a.m. the next day. An employee arriving home at 10:00 p.m., however, is not required to report for a shift beginning at 11:30 p.m. that same night.

These rules also govern employees who are absent from work for any length of time for a fitness for duty examination.

- **Uniformed service of more than 30 days but less than 181 days:** returning service members must apply for reemployment no later than 14 days after completing their period of uniformed service, or, if this is not possible or reasonable through no fault of the individual, on the next calendar day when submission becomes possible.
- **Uniformed service of more than 180 days:** returning service members are required to submit an application for reemployment not later than 90 days after completion of the uniformed service. However, a returning service member is not required to remain idle during this 90-day period and may, in fact, perform work for someone other than you during that time.

- **Injured or ill employees:** where the employee is hospitalized or convalescing from an injury or illness that occurred or was aggravated while out on leave, he or she is required to submit an application for reemployment to you at the end of the recovery period. However, this period may not exceed two years from the date of the completion of the employee's uniformed service (not counting the minimum time necessary to accommodate circumstances beyond the employee's control that make reporting within the period impossible or unreasonable).

2. Required Documentation

If a service member is returning from leave in excess of 30 days, you may request documentation demonstrating that:

- the application for reemployment is timely;
- the uniformed service has not exceeded the five year limit; and
- the uniformed service has ended under honorable circumstances.

But note that an individual's failure to provide you with this documentation cannot be the basis for denying reemployment if the documentation does not exist, or is not readily available at the time you request it. In this event, you are required to promptly reemploy the individual. You may demand proper documentation before treating the individual as not having incurred a break in service for purposes of your pension obligation under USERRA.

If, after reemployment, documentation becomes available that shows that the individual *does not* meet the criteria discussed above, you may terminate the individual, along with any employment rights or benefits that had been granted under the Act.

B. Reemployment

1. Position Entitled

Generally, you are required to reemploy returning service members in the position that they would have attained with reasonable certainty if not for their absence due to military service. This is known as the “escalator principle,” which means essentially that returning employees step onto the pay, benefits and seniority escalator at the precise step that they would have occupied if their employment had been continuous and they had never left for service.

As noted earlier, however, USERRA is not designed to place returning service members in a better position than they would have held had they been continuously employed. You are not required to treat returning employees differently from continuous employees in the same seniority rank. Therefore, the escalator principle may cause returning employees to be reemployed at a lower position, laid off, or even terminated.

Example: If a returning employee’s seniority would have resulted in being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status.

Example: The status of a returning service member’s reemployment position allows you to assess such factors as opportunity for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. Thus, the returning employee’s reemployment position may involve transfer to another shift or location, more or less strenuous

working conditions, or changed opportunities for advancement. The actual priorities for reemployment position vary with the duration of an employee's absence.

- **Absence of less than 91 days:** returning employees must be qualified to perform the duties of the position (as dictated by the escalator principle). If they are not so qualified, you must make reasonable efforts to help them become qualified. If they are still not qualified, they must be reemployed in the position that they occupied upon leaving for uniformed service. However, if they are not qualified to perform their pre-service position (after your reasonable efforts to qualify them), they must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position.
- **Absence of more than 90 days:** a returning employee must be qualified for reemployment in the escalator position *or* a position of like seniority, status and pay. Your obligations with regard to qualifying the employee for this or other positions are the same as if he or she was absent for less than 91 days (above).

2. Timing Of Reemployment

Absent unusual circumstances, you are generally expected to reemploy returning service members immediately if they have been absent for 30 days or less. If they have been absent for more than 31 days, you are expected to reemploy them within two weeks after they apply for reemployment. Whether this time period is reasonable

for you, however, depends on a variety of factors, including, for example, the length of the service member's absence or intervening changes in the circumstances of your business. Nonetheless, you cannot delay or deny reemployment because you have filled the service member's pre-service position and no comparable position is vacant, or because a hiring freeze is in effect.

3. Fitness For Duty

Before you make a decision as to whether or not returning employees are qualified for the job position to which they are entitled (pursuant to the above guidelines), you are required to provide refresher training to that individual, along with any other training that they would have received had they remained on the job. But, if they are still not qualified to perform the job duties, you are not required to reemploy them in that position.

4. Multiple Applicants For Reemployment

If two or more persons are entitled to reemployment in the same position because both are returning from unformed service, the person who left employment first will have the prior claim on that position. Remaining applicants for reemployment will be entitled to reemployment in a position similar to that in which they would have been reemployed according to the rules that normally determine a person's reemployment position (set out above).

5. Reemployment Exceptions

You are required to reemploy a returning service member in all cases *except*:

- if your circumstances have changed so as to make it impossible or unreasonable for you to reemploy the individual. (Note that this standard is narrowly construed);

- if the returning service person is no longer qualified for reemployment despite reasonable efforts to requalify that person, and reemployment would impose an undue hardship (“reasonable efforts” include training that does not impose an undue hardship on you);
- if the position the employee held before service was for a brief, non-recurrent period and there is no reasonable expectation that employment would have continued indefinitely for a significant period.

C. For Cause Protection

Once reemployed, a returning service member may only be discharged for cause. This protection extends for six months if the service period was for more than 30 days; or one year if the service period was for more than 180 days. These periods begin only after the returning service person has been reemployed in full compliance with USERRA. However, an employee may be discharged under the same policies as your other, civilian employees following this protected period. Moreover, this provision does not insulate the employee from the consequences of applying the escalator principle. In other words, returning service members are not entitled to preferential treatment if the escalator principle results in a legitimate layoff or in the elimination of the job position itself, provided that they would have faced the same consequences had they remained continuously employed.

D. Benefit Rights

1. Seniority Based Benefits

Upon reemployment, former service members are entitled to all seniority based benefits and rights to benefits that they had at the time they left for uniformed service. Former service members are also entitled to all seniority

based benefits and rights to benefits that they would have accrued had they remained employed with you for that entire period. “Seniority” means longevity in employment, and “seniority-based benefits” includes any benefits of employment that accrue with, or are determined by, longevity in employment.

Example: If vacation pay is strictly tied to length of service (rather than to work produced or performed over a particular time period), so that it increases from two weeks to three weeks upon completion of five years of service, then a person who worked for two years, served two years on active service and then worked for one year after reemployment would be entitled to three weeks of annual leave.

2. Non-Seniority Based Benefits

A returning service member is entitled to all benefits and rights to benefits that are not based on seniority in the same manner as would any employee on furlough or leave of absence under policies and procedures that were in effect when the employee left to perform uniformed service. If you treat your employees differently based upon the type of leave they take (for example, you allow employees on family leave of absence to continue under the group life insurance plan, but do not allow the same for employees on educational leave), you must accord a returning service member the more favorable treatment. However, a returning service member is not entitled to any non-seniority based benefits or rights to benefits that you do not provide for others on leave or furlough.

If an employee provides you with written notice that he or she does not intend to return to employment after service and later reconsiders, you are not required to provide non-seniority based rights and benefits. But such individuals are still entitled to all other USERRA rights and benefits, including reemployment.

You are also required to allow an employee to use any accrued vacation, annual or similar leave with pay during the period of service. However, an employee is typically not allowed to use sick leave during a period of service.

3. Healthcare Benefits

When uniformed service members return to employment, you are required to provide them (and their dependents) with health care benefits immediately, and they are not subject to the same waiting periods that you might require for your new-hire employees. Returning service members and their dependents are not subject to a lapse in coverage, a waiting period, or exclusions for pre-existing conditions.

But, you are not required to provide health coverage for illnesses or injuries deemed by the Department of Veteran Affairs to have been service-connected. This means only that you must provide a returning service member with benefits immediately, and then seek recompense from the VA if it is determined that the returning service member's condition is service-related.

4. Pension Benefits

Except in the case of benefits under the Federal Thrift Savings Plan, the rights granted to returning service members under USERRA apply to any pension benefit plan, including those provided by state or federal law to government employees. With regard to your employees' pension benefit plans, you are obligated to:

- credit an employee with years of service while on uniformed service leave and to fund the plan for these years of service; and
- make contributions to the employee's defined contribution accounts for the period while the employee is on uniformed service leave of absence.

As with other benefits, USERRA requires you to treat an employee as if he never left his employment for ununiformed service. Thus, a reemployed person need not requalify for participation in the pension plan. But, if employees are absent for ununiformed service for more than 90 days, you may require documentation regarding the character of service before they are entitled to pension benefits with respect to the period of service.

Where your responsibility to make matching funding obligations is dependent on employee contributions, no funding obligations arise until the returning employee makes the required contribution. This rule is intended to protect your pension plan from incurring any liability for employees who do not return to their jobs following release from ununiformed service.

If your plan requires employee contributions, you must allow returning employees to make up any missed contributions over a time period equal to three times the period of ununiformed service, but not more than five years.

Example: An employee on a six-month training leave must be allowed 18 months following reemployment to pay the plan for missed elective deferrals or employee contributions. But, an employee on two-year active duty would be allowed no more than five years to make up missed contributions.

When calculating an employee's required contribution or elective deferrals, the employee's compensation during the ununiformed service leave is to be computed at either:

- a. The rate of pay that the employee would have received for that period had he or she remained employed, or
- b. Where the rate of pay under a) is not reasonably certain, on the basis of the employee's average rate of compensation for the 12-month period immediately preceding the leave. Where the prior employment was less than 12 months, then the entire period of employment immediately preceding the leave is used.

If a reemployed person has taken advantage of a plan rule that allowed withdrawal of all or part of the pension account, that employee must be allowed to repay the withdrawn amounts (plus interest) and receive the appropriate credit.

PROHIBITED ACTS

Under the Act, any person who:

- is a member of a uniformed service;
- applies to become a member of a uniformed service;
- performs a uniformed service;
- applies to perform a uniformed service; or
- has an obligation to perform uniformed service,

may not be denied:

- initial employment;
- reemployment;
- retention in employment;
- promotion; or
- any benefit of employment.

on the basis of that membership, application, obligation or performance of a uniformed service.

USERRA not only bars you from engaging in discrimination as discussed above, but it also bars you from taking any “adverse action” against any employee seeking to exercise a right under USERRA, or anyone who is assisting that employee, regardless of whether the assisting person has performed any uniformed service. These anti-retaliation provisions apply to persons who:

- take any action to enforce USERRA protection for a covered employee;
- testify or make statements in any proceeding under the Act;
- assist or participate in an investigation under USERRA; or
- exercise a right protected under USERRA.

In addition, this particular provision not only applies to part-time and full-time employees, but to temporary, prospective and former employees as well.

ENFORCE- MENT

USERRA is enforced by the Veterans Employment and Training Service (VETS). It authorizes the Secretary of Labor to investigate a service member’s complaint that an employer has failed or refuses to comply with the requirements of the law. It also authorizes the United States Attorney General or individual complainants to bring legal actions to enforce USERRA rights.

You cannot require that a returning service member resort to alternative dispute resolution processes (such as arbitration), or grievance procedures before bringing a USERRA claim. Even if a returning service member elects to take his or her case before an arbitrator, that arbitrator’s ruling will not be binding, and he or she will still have the right to initiate a lawsuit against you.

Returning service members who elect to file suit (either privately or through the Secretary of Labor) may do so in federal court, and may seek to require you to:

- comply with the provisions of the law;
- compensate them for any loss of wages or benefits as a direct result of noncompliance with the law; and
- pay additional liquidated damages in an amount not to exceed the lost wages and benefits.

A district court may award a returning service member additional compensation or damages above this, and may also award those who have retained private counsel reasonable attorneys' fees, expert witness fees, and other litigation expenses. However, you may not seek attorneys' fees or court costs from returning service members who do not prevail on their USERRA claims.

EFFECT ON OTHER LAWS AND AGREEMENTS

USERRA supersedes any State or local law, ordinance, contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA. This includes laws or regulations that establish prerequisites for obtaining USERRA benefits.

However, USERRA does not supersede, nullify or diminish any federal, state or local law, ordinance, contract, agreement, policy, plan, practice or other matter that establishes rights for returning service members that are *more* beneficial than those provided by USERRA. In addition, you may offer returning service members a benefit that is more beneficial than USERRA in one aspect, but you still may not reduce or limit other USERRA rights in another aspect.

THE PRACTICAL RESPONSE

USERRA was designed to ensure fair and adequate treatment of uniformed service members returning from voluntary and involuntary obligations to serve the citizens of the United States in a variety of capacities. Given the climate following the attacks of September 11, 2001, these are certainly goals that everyone supports. As the brief summary provided in this booklet demonstrates, however, the law's provisions are exceedingly complex, and even an innocent failure to comply could have serious ramifications.

Making matters even more difficult for employers is the employee-centered view of the law and regulations, making it difficult for even the most well-meaning employers to plan for employee absences, keep its work force at capacity and productive, and respond to employees who are not performing up to standards.

We urge you to consider *all* of your written and unwritten leave policies, as well as those provided under USERRA, to understand when and how members of the uniformed services can and must be treated differently from your civilian employees. Careful attention to those details will not only give assurance that you are in compliance, but will provide the opportunity for increased productivity and employee morale, as well as safeguard the important rights for members of the uniformed services that this law was designed to protect.

For further information about these contents, please contact any office of Fisher & Phillips, LLP or visit our website at www.laborlawyers.com

OTHER BOOKLETS IN THIS SERIES:

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Americans With Disabilities Act
(Employee Aspects)

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Business Immigration

COBRA

Employment Discrimination

Fair Labor Standards Act
(Exemptions & Recordkeeping)

Fair Labor Standards Act
(Wage & Hour Provisions)

Family Medical Leave Act

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