

Guidelines for USERRA and Returning Military Service Members

USERRA applies to nearly all employers in the United States, regardless of size. Unlike other federal laws that specify a minimum number of employees, size does not matter under USERRA. The Act is designed to protect service members by assuring job protection in return for serving their country. The statute's stated purposes are to encourage service in the uniformed military, minimize disruption by providing for the prompt reemployment of those who have served, and prohibit discrimination against those who serve or have served.

Employee Eligibility

The employee must serve or have served in the "uniformed services," which includes full-time and reserve components of the Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard, Commissioned Corps of the Public Health Service, and any other entity designated in time of war or emergency. USERRA also covers many types of uniformed services duty, including (but not limited to) active duty, active-duty training, initial active-duty training, inactive-duty training, and periods of absence for fitness-for-duty exams. It does not matter whether the employee's military service is, or was, performed on a voluntary or involuntary basis or in times of peace or war.

Five basic eligibility requirements for reemployment:

1. Employee left the job voluntarily or involuntarily to enter the uniformed services
2. Employee must have given notice (written or oral) to the employer before leaving (unless providing the notice was impossible or unreasonable)
3. Employee's length of absence cannot have been more than five years (with exceptions)
4. Employee must have been released from service without having received a punitive (by court martial) or other-than-honorable discharge



25% of the complaints involved allegations of improper reinstatement into civilian jobs following military service

1,328 unique USERRA complaint cases in FY 2013

5. Employee should be timely in reporting back to work or applying for reemployment

Note: Employers aren't required to reemploy employees if the employer's circumstances have so changed that reemployment is impossible or unreasonable (for example, if the employee's job was legally eliminated in a reduction in force).

Reemployment

Eligible employees must be reemployed "as soon as practicable under the circumstances," after they have applied for reemployment. As a general rule, employees must be reinstated within two weeks after submitting their application to return. However, the time frames vary depending on the length of military service provided by the employee.

The specific time frames and procedures for reporting back to work that service members should follow are:

- ▲ Up to 30 days absent. For absences of less than 31 days, the employee may simply report to work, if he does so promptly as defined by the regulations. Failure to report to work within the time frames laid out in the regulations may be excused if the employee was unable to do so through no fault of his own.
- ▲ 31 to 180 days absent. If the employee's leave was between 31 and 180 days, the employee must apply for reemployment within 14 days after completion of military service. If the employee cannot do so through no fault of his own, he must submit the application no later than the next full calendar day after it becomes possible to do so.

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- ▲ 181 or more days absent. For absences of more than 180 days, the employee has 90 days to apply for reemployment. There is no excuse allowed in the regulations for failing to meet this deadline.

Note: These timetables may be extended if the employee is recovering from a service-related illness or injury. Also, it's important to note that an employee's failure to comply with the deadlines may subject him to discipline under your regular policies and procedures, but does not necessarily entitle you to refuse to rehire him.

Obligations as an Employer

Timeline for Rehire

Service members eligible for reemployment must be put back to work promptly. For service lasting less than 31 days, that means immediately upon the employee's return. For service lasting for a longer period, that means within 14 days from the date of his application. If the service member's position has been filled in his/her absence, that service member's return may result in the employer terminating the vacancy hire. The law does not protect the replacement employee, but instead places a requirement on the employer to reinstate the returning service member.

Escalator Principle

One of the more difficult tasks for employers upon service member return is determining what job the employee is entitled to. This is especially challenging if the employee has been gone for a substantial length of time. Part of the Act provides that employees must be reinstated not just to the position they had before taking leave, but to the position they would have held had they never left the position to serve. Commonly, this is referred to as the "escalator" position and dictates that the employee is returned to a job that reflects (with reasonable certainty) the pay, benefits, seniority, and other perks that would have been attained if not for the period of military service.

There is some flexibility for employers to reemploy the service member in a different position from the individual's original job if: a) the period of service was 91 days or longer, and b) the position is one for which the employee qualifies and it provides like seniority, status, and pay. The company may need to provide "reasonable efforts" to retrain the employee to a position of like seniority.

Service-Connected Disability

If the employee becomes disabled during military service, the employer must provide reasonable accommodations to allow

him to perform the escalator position, an equivalent position, or the job that most closely approximates that equivalent position.

Benefits

The escalator principle also applies to benefits. This means that an employer must provide benefits that are: a) a reward for length of service, rather than a form of compensation for services rendered, and b) one the employee is reasonably sure they would have received had they been continuously employed.

Remember that USERRA is interpreted broadly in order to provide employees with maximum benefits. Employers should be prepared to give employees the benefit of the doubt when it comes to maintaining and restoring benefits, and work with experienced benefits counsel to stay on the safe side.

Health Insurance

When an employee returns from military service, the service member will be entitled to health insurance benefits as if they had not taken any leave at all—even if the individual didn't elect to continue coverage under your plan when leave commenced. Immediate reinstatement of health insurance coverage (including coverage for family members) must be provided without any waiting period.

Discrimination & Retaliation

An employee who is denied military leave, reemployment, or any of the other protections under USERRA is not required to prove that the denial was based on discrimination. An employer's failure to comply with those provisions is enough in itself, without any discriminatory intent, to make it liable. Also, the Act imposes that employees returning from service of more than 30 days cannot be discharged without cause for six months following the date of reemployment. Employees returning from service lasting more than 180 days cannot be discharged without cause for one year following the date of reemployment.

Conclusion:

Make sure that supervisors and human resource personnel maintain a basic understanding of the provisions under USERRA. If a service member submits a notice of return, immediate priority needs to be placed on reemployment efforts and proper position placement. Also, make sure to review company military leave policies and procedures for returning veterans, and have a plan of action for getting service members back to work.