

## **MILITARY LEAVE PROCEDURE**

### **THE FEDERAL UNIFORMED SERVICES EMPLOYMENT RIGHTS ACT (USERRA):**

The Federal Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, prohibits employers from discriminating against any employee or prospective employee because of past, present, or future application for, or membership in, a uniformed service (38 USC Chapter 43) The law covers all public and private employers. Under USERRA, employees have the right to leave for uniformed service, protection of benefits during service, and reinstatement after service is completed.

#### **Uniformed Services Defined:**

Under the USERRA, the term “uniformed services” means the performance of duty on a voluntary or involuntary basis in the:

- Army, Navy, Marine Corps, Air Force, or Coast Guard
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve
- Army National Guard or Air National Guard
- Commissioned Corps of the Public Health Service
- Any other category of persons designated by the President in time of war or emergency (38 USC 4303)

Service may include active duty, active duty for training, and initial duty for training, inactive duty training, full time National Guard duty, and absence from work for an examination to determine a person’s fitness for any type of duty.

#### **Notice of Military Leave:**

Employers have the right to receive advance notice of service, unless conditions make it impossible for the employee to provide notice. The notice may be either written or oral. Employers may not insist on knowing exactly when the employee will return to work; however, the employee can be asked to furnish the employer with the approximate beginning and concluding dates of his or her training. When the person completes his or her period of service, the notice required to return to work depends on the length of time of military service, (38 USC 4312(e)(1)).

#### **Limit on Length of Military Duty:**

Under USERRA, an employee may take a maximum of five years leave for military service. The five years is the maximum cumulative length of absence for all absences (38 USC 4312(a)(2)). There are limited exceptions to the 5-year limit that may increase the maximum leave time allowed. These exceptions include: service required beyond five years; service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit, nor involuntarily retained beyond the expiration of their obligated service date; the time consumed by

difficulty in obtaining release from service; the time for necessary training; and the time an employee is ordered to stay in active duty under certain federal laws (38 USC 4312(c)).

**Benefits While on Military Leave:**

**Wages:** Employers are not required to pay employees who are on military leave. Those companies that do provide for continuing an employee's pay during short periods of military service quite often pay only the difference between the employee's regular salary and the military pay, if they pay any amount at all. In computing military pay, food and other allowances given to officers are usually excluded.

**Health Insurance:** The law requires employers to offer those on military leave and their dependents the right to continue in the group health plan for up to 18 months of service (similar to the Consolidated Omnibus Budget Reconciliation Act – COBRA). Employees may be required to pay up to 102% of the full premium for insurance; except if on leave for 31 days or less, then they may not be charged more the amount they would have paid if still employed (38 USC 4317(a)(1)(b)).

**Vacations:** The law makes specific mention of “vacation” as one of the employee rights to be protected. In effect, this prohibits employers from forcing an employee to use vacation for military training or summer encampment, although it permits an employer and employee to agree to combine these two periods, if the employee so desires. Employees returning from military service must be permitted to use any vacation that had been accrued before the beginning of their military service (38 USC 4316(d)).

Computing the vacation entitlement of returning military service personnel has been the subject of confusing interpretations by the Courts, *Foster v. Dravo*, 431 US581 (1977). Generally, if the vacation entitlement is based on seniority, then military service should be counted; if the vacation entitlement is based on compensation for work performed, military service may not necessarily be counted (e.g., the “rate” of accrual may change, if based on seniority, but the employee does not accrue vacation while on leave).

**Pension Benefits:** Under USERRA: no break in employment is considered to have occurred because of military service, no forfeiture of benefits already accrued is allowed, and there is no need for an employee to re-qualify for participation in the pension plan because of absence for military service (38 USC 4318). In addition, employers are required to make any contribution to the pension plans on behalf of a returning employee that the employer would have made if the employee had not been absent for military service.

For defined contribution plans, which offer benefits only when the employee makes contributions, returning employees will have up to three times their length of service – up to a maximum of five years – to make contributions that may have been missed while the employee was in service. The employer must make matching contributions only to the extent that the re-employed service member makes the required employee contribution to the plan. Employers are not required to credit the employee with any interest that would have been earned.

**Reemployment of Service Personnel:**

USERRA requires that upon returning from service, members of the armed services and its reserve components must be reinstated to their private civil jobs without loss of ranking, or benefits and without any break in service for pension purposes (USERRA 4316(a), 38 USC 4301 *et seq.*) Employers must provide refresher training, and any training necessary to update a returning employee's skills unless it causes undue hardship to the employer. The law's protections extend to all military personnel, including those who perform weekend drills, summer encampment, or similar types of training duty. The employer is obliged to re-schedule the worker, if possible, to avoid conflicts between work and Reserve or Guard training so the employee may work a full week.

**Timing:** The amount of time a returning employee has to re-apply for work depends on how long he or she was away on duty (38 USC 4312(e)(1)). Individuals who serve more than 180 days must re-apply for work within 90 days of completing service. Those who serve for 31 to 180 days must apply for re-instatement within 14 days of the end of service. Individuals who serve for 30 days or less must report to their employer at the start of the next regularly scheduled shift following eight hours of returning directly home, but have no protected period. These time limits may be extended for up to two years if an individual is hospitalized or convalescing from an injury caused by active duty. Employers are not required to re-employ an individual whose employment prior to military service was for a brief, non-recurrent period, with no reasonable expectation that it would continue indefinitely.

**Position:** An employee who serves 90 days or less must be re-employed in a position that he or she would have attained if continuously employed. If not qualified for that position, the employer must make reasonable efforts to qualify the employee, or the employee must be re-employed in the position he or she left (38 USC 4313(a)). The pattern is similar for individuals who serve 91 days or more, with the additional option that a position of like ranking, status, and pay may be offered. If not qualified for a similar job, the employer must make reasonable efforts to qualify the employee, or the employee must be re-employed in any other position of lesser status and pay for which he or she is qualified, with full seniority.

**Ranking (Seniority):** Returning service personnel are to be regarded as having been on a leave of absence or furlough during their period of military service. Upon return, they are eligible for like ranking, status, and pay. Specifically this means that returning service personnel will count their period of military service as part of their total length of employment, ranking, and status within the company for such benefits as pension eligibility and long-service vacation. Similarly, across-the-board increases, improvements in insurance, or other benefits, and all the other rights or benefits that would probably have been derived from continued employment must be given to them on the same terms as if they had been working for the company during the military service period (38 USC 4316(a)). The returning employees shall be entitled not only to no ranking (seniority) rights and benefits available at the time they left for military service, but also those that became effective during their service.

**Disability:** USERRA provided that an individual with service-connected disabilities who is not qualified for employment in the position he or she would have attained if continuously employed (even after reasonable accommodation as required by the Americans with Disabilities Act of 1990

(ADA) must be re-employed promptly in any other position of similar ranking, status, and pay for which he or she is qualified or would become qualified with reasonable efforts by the employer (38 USC 4313(a)(3)). As with the ADA, the employer is not required to re-employ the disabled individual, if doing so would be of such difficulty or expense as to constitute an undue hardship (38 USC 4312(d)(1)(B)).

**Termination:** Individuals who serve more than 180 days cannot be discharged without cause for 12 months after re-employment (38 USC 4316(c)). Those who serve for 31 to 180 days cannot be discharged without cause for six months after re-employment. Individuals who serve for 30 days or less have no protected period.

**Exceptions:** USERRA (38 USC 4312(d)) provides that an employer may not be required to re-employ a person after military service:

- If the employer's circumstances have so changed as to make such re-employment impossible or unreasonable, e.g., a reduction in force occurred during the person's absence that would have terminated the person's employment.
- Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."
- The employment from which the person leaves to serve in the military services is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.
- Reasonable notice of the desire to return was not given and the employer's established policies are violated by failure to give reasonable notice (38 USC 4312(e)(3); *McGuire v. United Parcel Service*, 7<sup>th</sup> Cir. No. 97-3455 (8/10/98)).

**Retaliation:** Employers are prohibited from retaliating against anyone who files a complaint of discrimination under USERRA or testifies, assists, or otherwise participates in an investigation or proceeding under the law – regardless of whether that person has performed military service (38 USC 4311(b)).

**Enforcement:** The USERRA is enforced by the U.S. Department of Labor (DOL). The Veterans' Employment and Training Service (VETS) of the DOL provides re-employment assistance, investigates complaints of discrimination under USERRA, and attempts to resolve them. Filing of complaints with VETS is optional (38 USC 4322).

Individuals may also file private court actions to enforce USERRA under certain circumstances. A court may order an employer who fails to comply with the law to pay back wages, lost benefits, and attorneys' fees. If a court determines that violation was "willful", it may order double damages of back pay or lost benefits.

**ADDITIONAL INFORMATION:**

For additional information, VETS has established a helpful advisor system on its Internet home page at [www.dol.gov/dol/vets/](http://www.dol.gov/dol/vets/) that will answer specific questions regarding USERRA. VETS may also be reached at:

Veterans/ Employment and Training Service  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210  
(202)-219-9116



**LEGAL REFERENCE:**

Uniformed Services Employment and Reemployment Rights Act  
38 USC Chapter 43, amended by the Veterans Benefits Improvement Act of 2004 (PL 108-454,  
§ 201(a))  
Reemployment Rights Act 38 USC 2021, *et. seq.*  
Idaho Code, Title 65, *et. seq.*

**ADOPTED:** May 18, 2004

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**Note:** Eligible veterans are entitled to preference in the initial hiring process. See Policy 400.20, entitled “Veteran’s Preference Policy,” for details regarding the district’s obligation in such cases.