

## **Number 18, November 2000: USERRA and Employer Policies**

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Q: I enjoyed reading "Law Reviews" Numbers 4 12, concerning the Uniformed Services Employment and Reemployment Rights Act (USERRA). [Law Reviews Numbers 2 16 are now available on the ROA Web site at [www.roa.org](http://www.roa.org).] My employer has a written personnel policy on "military leave" that seems to contradict USERRA in several important respects. What is the relationship between USERRA and written employer policies?

A: You can find USERRA in Title 38 of the United States Code. It starts at section 4301 and runs through section 4333 (38 U.S.C. 4301-4333). USERRA supersedes any employer policy (written or otherwise) that purports to limit the rights granted by this statute or to impose additional eligibility criteria upon the exercise of those rights. 38 U.S.C. 4302(b).

On the other hand, USERRA does not supersede an employer policy that provides greater or additional rights. 38 U.S.C. 4302(a). Many employers treat Reservists and veterans far better than the law requires. If your employer is one of them, you can nominate your employer for an award through the National Committee for Employer Support of the Guard and Reserve (NCESGR), which is part of the Department of Defense. You can reach NCESGR at 1-800-336-4590.

Q: Is it possible to sue my employer to make it bring its written policy into compliance with USERRA?

A: No. There are probably tens of thousands (if not hundreds of thousands) of written employer policies that are not fully consistent with USERRA. We cannot make a "federal case" out of the conflict until an actual case arises and the employer violates USERRA by following its own written policy.

This is not to say that I am not concerned about the conflict. Since your employer is a large corporation with tens of thousands of employees, it is likely that intermediate supervisors will follow the written policy and thereby violate federal law. I am also concerned that affected employees (Reservists, National Guardmembers, and veterans) will not complain about statutory violations because the way they have been treated is in accordance with the employer's written policy.

I suggest that you bring your employer's written policy to the attention of NCESGR. On behalf of DoD, NCESGR will point out to your employer how its policy is inconsistent with federal law and suggest how the policy might be amended.

Q: Under my employer's written policy, the employer will pay the difference in salary for up to 90 days of service, but this entitlement is limited to full-time employees with more than 90 days of service with the company. Is this limitation lawful?

A: That depends. The employer is not required to pay you if you don't work. USERRA gives you the right to re-employment following service, if you meet USERRA's eligibility criteria. (Those criteria are set forth in Law Reviews 5 & 7.) The employer can lawfully limit the extra-statutory benefit (making up the difference in pay) to full-time employees with more than 90 days of company service.

On the other hand, part-time employees and brand-new employees are covered by USERRA. If you meet USERRA's eligibility criteria, you are entitled to re-employment even if you were brand-new or part-time when you left. In this respect and several others, your company's written policy is poorly written and ambiguous. Your company's personnel office could benefit from NCESGR's drafting assistance.

Q: The employer's written policy says that if my period of military service exceeds 90 days my job will be "terminated" and I will receive a "severance payment" of one month of salary. I am currently about 65 days into a 179-day period of active duty for special work (ADSW). What will happen when I pass the 90-day threshold next month? Is my employer violating the law?

A: That depends upon what the employer means by "terminated." Under USERRA, your period of service in the uniformed services (cumulative with that employer) can be up to five years, and even longer in some circumstances. I invite your attention to Law Review Number 6. Your employer certainly cannot reduce the five-year period to 90 days. On the other hand, you do not have the right to re-employment until you meet all five of USERRA's eligibility criteria. Those criteria include being released from service under honorable conditions. At the time you pass the 90-day threshold, you will not yet have been released from duty, and you will not yet have the right to re-employment. In the final analysis, it doesn't really matter how the employer refers to your status until you return from service and meet USERRA's eligibility criteria.

Q: When I pass the 90-day threshold next month, the employer will probably mail me a "severance pay" check equal to one month's salary. If I cash the check, am I waiving the right to re-employment?

A: Probably not. There is case law (court decisions) to the effect that any waiver of the right to re-employment must be clear and unambiguous. Also, it has been held that you cannot waive rights that you do not yet have. (Upon request, I can provide copies of these court decisions.) Because your right to re-employment is not "ripe" until you complete your 179-day ADSW period, you cannot waive the right to re-employment at this time. Nonetheless, as a matter of prudence I suggest that you ask the employer to clarify the purpose and effect of the "severance" check before you cash it. You could send your employer a certified letter, along with a copy of this letter