

Number 105, December 2003: USERRA: Frequently Asked Questions

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The Uniformed Services Employment and Reemployment Rights Act (USERRA) is codified in Title 38, United States Code, sections 4301-4333 (38 U.S.C. 4301-4333). This article is a review of USERRA, with references to past Law Review articles that have dealt with USERRA.

A person who leaves a civilian job for voluntary or involuntary "service in the uniformed services" is entitled to re-employment in the civilian job (with accrued seniority) if he or she meets the following eligibility criteria:

- Must have left the job for the purpose of performing service in the uniformed services [38 U.S.C. 4312(a); Law Review 5.]
- Must have given prior oral or written notice to the civilian employer [38 U.S.C. 4312(a)(1)]. Prior notice is not required if it is precluded by military necessity or otherwise impossible or unreasonable [38 U.S.C. 4312(b); Law Review 5.]
- Cumulative period or periods of service in the uniformed services, relating to that particular civilian employment relationship, must not have exceeded the five-year limit. All involuntary service and some voluntary service are exempted from the five-year limit [38 U.S.C. 4312(c); Law Review 6].
- Must have been released from the period of service, without having been "dropped from the rolls" or having received a punitive or other-than-honorable discharge [38 U.S.C. 4304; Law Review 6].
- Must have reported back to work in a timely manner, or have submitted a timely application for reemployment [38 U.S.C. 4312(e)(1); Law Review 7].

Frequently Asked Questions

1. What are the uniformed services?

USERRA defines the uniformed services as the Army, Navy, Marine Corps, Air Force, Coast Guard, and the commissioned corps of the Public Health Service. The Army National Guard and Air National Guard qualify when performing active duty for training, inactive duty training, or full-time National Guard duty. Finally, during a period of war or national emergency the president can designate any other category of persons to be a "uniformed service" for purposes of USERRA. [38 U.S.C. 4303(16); Law Reviews 45, 46, 52]. Congress has also accorded re-employment rights under USERRA to Intermittent Disaster Response Appointees [Law Review 100].

2. What is "service in the uniformed services"?

"The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent

authority and includes active duty, active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person for any such duty, and a period for which a person is absent from a position of employment for the purpose of performing funeral honors duty as authorized by section 12503 of Title 10 or section 115 of Title 32." [38 U.S.C. 4303(13) (emphasis supplied); Law Reviews 45, 46, 50, 51.]

3. Does USERRA apply to voluntary service?

Yes. Please see the italicized language above [Law Review 30].

4. How much notice am I required to give to my employer before a period of service?

I recommend that Reservists and National Guard members give as much advance notice as possible. USERRA, however, does not specify any minimum period of notice. Circumstances arise, especially in a mobilization scenario, when the individual has very little advance notice from military authorities.

USERRA's legislative history indicates that Congress intended that the lateness of the notice to the civilian employer should not defeat the right to re-employment, especially when the individual had little or no notice from the military [Law Review 5].

5. Am I required to provide my employer a copy of my military orders when I give notice of an upcoming period of service?

No. USERRA imposes no such requirement. I recommend that you give your employer a copy of your orders if you have a copy to provide [Law Review 91].

6. I take a lot of time off for military training and service. Now, I have been asked to perform service at a time that is particularly inconvenient for my employer. Is my employer permitted to veto my request for military leave?

No [38 U.S.C. 4312(h)]. You are only required to give your employer notice, not to obtain your employer's permission. As a matter of courtesy, however, I recommend that you phrase your notice as a request for permission. The employer has no right to veto the timing, frequency, duration, etc. of your military training and service. However, the employer is permitted to contact your commanding officer. It is Department of Defense (DoD) policy that the commanding officer should work with your employer to resolve conflicts of this kind. The commanding officer will accede to your employer's reasonable request to reschedule military training, unless doing so would detract from unit readiness and mission accomplishment [Law Review 30].

If the timing of this training period presents a real problem for your employer, the commanding officer will try to adjust the schedule, but please understand that such rescheduling must be kept to a minimum. National Guard and Reserve units train together, and they must go to war together. The training periods are scheduled so that the unit can be trained together. If you perform training at a different time, you may miss important training that the rest of the unit received. As a result, you may not learn how to perform some critical task, resulting in additional casualties and endangering the accomplishment of the mission.

7. Is my employer permitted to make me find a replacement for the time that I will be away from work performing service?

No. You are responsible for giving the employer advance notice, if possible, but not for rearranging your schedule or finding a replacement.

8. Is my employer permitted to make me use vacation for my military training or service?

No. If you want to use vacation, you have the right to do so, but it is unlawful for your employer to make you use vacation [38 U.S.C. 4316(d); Law Reviews 26, 59].

9. Is my employer required to pay me for the period that I am away from work performing military training or service?

USERRA does not require an employer to pay an individual for time not worked due to service. Another federal law (5 U.S.C. 6323) gives federal civilian employees the right to 120 hours per fiscal year of paid military leave (Law Reviews 33, 71). About 40 states have similar laws for state and local government employees.

If you are exempt from the Fair Labor Standards Act (FLSA) overtime rules (because you are a manager, for example), the employer is not permitted to make a deduction for a part of a week missed because of temporary military leave. See 29 Code of Federal Regulations 541.118(4). This is an FLSA requirement, not a USERRA requirement.

10. Is my employer required to provide me other benefits of employment while I am away from work performing service?

If and to the extent that your employer provides benefits to employees who have been furloughed (laid off) or to employees on some kind of non-military leave (jury leave, educational leave, etc.), your employer must provide similar benefits to employees who are away from work performing service in the uniformed services [38 U.S.C. 4316(b); Law Reviews 41, 58].

An employee who is away from work performing service in the uniformed services is entitled to elect continued health-plan coverage through the civilian job. If the period of service is fewer than 31 days, the employer is permitted to charge the employee only the employee share (if any) of the cost of the coverage. If the period of service is 31 days or more, the employer is permitted (but not required) to charge the employee up to 102 percent of the entire premium, including the part that the employer normally pays in the case of active employees [38 U.S.C. 4317(a); Law Review 10].

11. After a period of military training or service, how quickly am I required to return to work?

That depends upon the duration of the period of service from which you are returning. If the period of service is fewer than 31 days, you are required to report for work "not later than the beginning of the first regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence." [38 U.S.C. 4312(e)(1)(A)(i).] If reporting at that time is impossible or unreasonable through no fault of yours (e.g., automobile accident on return trip), you are required to report for work as soon as possible thereafter [38 U.S.C. 4312(e)(1)(A)(ii); Law Review 5].

If the period of service was 31–180 days, you are required to submit an application for re-employment within 14 days after the end of the period of service [38 U.S.C. 4312(e)(1)(C)]. If the period of service was 181 days or more, you must submit the application for re-employment within 90 days [38 U.S.C. 4312(e)(1)(D)]. These deadlines can be extended by up to two years if you are hospitalized for or convalescing from a service-connected injury or illness [38 U.S.C. 4312(e)(2)(A); Law Review 5].

12. Does that mean that I must wait 90 days to get my job back?

No. The 90 days belong to you, not the employer. If you are anxious to get back on the payroll as quickly as possible, you should submit your application for reemployment right away. If you need time to readjust to civilian life, you should wait to submit your application. Once you apply, you are in effect saying that you are ready, willing, and able to return to work. Do not submit the application until that is the case [Law Review 77].

13. If I am one day late in reporting for work or submitting my application for re-employment, do I lose the right to the job?

Not necessarily. "A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits provided in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to

explanations and discipline with respect to absence from scheduled work." [38 U.S.C. 4312(e)(3).] If you were one day late in reporting back to work, and if your employer's usual sanction for one day of unexcused absence is a two-week suspension without pay, you would be entitled to the job but would be subject to the two-week suspension.

14. What does it mean to "submit an application for re-employment"?

No particular form is required. The message is: "I used to work here. I left for service. Now, I am back from service, and I want my job back." Your employer must not treat you as if you were applying for a new job.

I recommend that you make an explicit written application for re-employment. Law Review 77 contains a sample application for re-employment, but the application for re-employment can also be made orally, or even by implication.

15. How quickly am I entitled to return to work?

If the period of service was less than 31 days, and you show up for work at 8 a.m. on the next workday, you must be put back on the payroll immediately. If the period of service was 31 days or more, your employer is required to act promptly upon your application for re-employment. This should be a matter of days, not weeks or months [Law Reviews 8, 77].

The right to re-employment is not contingent upon the existence of a vacancy. Sometimes it is necessary for the employer to displace another employee in order to reemploy the returning veteran. Congress recognized that this law imposes burdens on employers, and that sometimes those burdens can be severe. Congress decided that imposing such burdens on employers is justified by the national defense needs of our nation [Law Reviews 8, 77, and 81].

16. I was the manager of a department, and I have been reinstated as the assistant manager of the same department. The assistant manager's salary was increased to equal that of the manager, but I am not satisfied. Have my rights been violated?

Yes. Even if the salary is the same, being the assistant manager is not of equal status to being the manager. See *Ryan v. Rush-Presbyterian-St. Luke's Medical Center*, 15 F.3d 697 (7th Cir. 1994).

17. Other than status and prompt reinstatement, what are my other entitlements as a returning veteran?

You are entitled to immediate reinstatement of your health-plan coverage, through the job, including coverage for family members. There must be no waiting period and no exclusion of "pre-existing conditions" (except

conditions that the U.S. Department of Veterans Affairs has determined to be service-connected) [38 U.S.C. 4317(b); Law Review 10, 85].

You must be treated, for seniority purposes, as if you had been continuously employed [Law Reviews 53, 59, 60]. You are also entitled to receive missed employer contributions to your pension plan, as if you had been continuously employed [Law Reviews 4, 9, 40, 74, 75, 76, 82].

18. At our company, employees (as well as the employer) contribute to the pension plan. Am I required to contribute that which I would have contributed if I had been continuously employed? Is there a deadline for making up missed contributions?

Yes to both questions. If you want to be treated as continuously employed during your period of service, you must make up the contributions you would have made if you had been continuously employed. After re-employment, you must make up the missed contributions within the period that amounts to three times your period of service, but not more than five years [38 U.S.C. 4318(b)(2) Law Review 76].

19. Does USERRA protect me from discrimination by an employer or prospective employer?

Yes. "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, re-employment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation" [38 U.S.C. 4311(a); Law Reviews 11, 64].

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.