

## **Illinois Service Members Employment and Reemployment Act (ISERRA)**

By William H. Phillips, Esq.<sup>2</sup>

1.18: USERRA and Other Laws

2.0: Paid Leave

On 1 January 2019, the Illinois Service Members Employment and Reemployment Act (ISERRA) became effective. See 330 ILCS 61/1 et. seq. ISERRA consolidates and clarifies Illinois military employment law into a single statute covering a host of issues relevant to military members. ISERRA is a law designed to protect the common public interest in safeguarding and promoting military service by achieving several objectives:

- Minimizing disadvantages to military service in civilian careers,
- Providing for prompt reemployment protections for service members in a manner that minimizes disruption to their lives, their employers, and their co-workers,
- Prohibiting discrimination against and interference with military service, and
- Ensuring that public entities are model employers of reserve components by providing additional benefits. *See 330 ILCS 61/1-5(1).*

Like the Federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA), ISERRA provides a foundational, or minimum, level of protections afforded to service members who are employed in the State of Illinois. As a result, employers are free to establish benefits which are more favorable to their service member employees than those required by the Act. *See 330 ILCS 61/1-5(2).*

Like USERRA, ISERRA provides protections for employees who take leaves of absence connected to military service. ISERRA provides a more expansive definition of military service than USERRA, covering:

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find approximately 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. In our "state laws" section, we have an article for each state about the state laws that grant paid military leave and other benefits, over and above USERRA, to employees of the state and (often) to employees of the state's political subdivisions.

<sup>2</sup> Mr. Phillips is an Assistant Attorney General of the State of Illinois. Please note that this summary represents the opinion of the author and is not an official legal opinion of the Office of the Attorney General. No content in the above article is intended to reference any active case or controversy.

- Service in the Armed Forces of the United States, the National Guard of any state or territory regardless of status, and the State Guard,
- Service in any federally recognized auxiliary of the US Armed Forces when performing official duties in support of military or civilian authorities as a result of an emergency, and
- Any employee who is absent from employment to receive medical care provided by the Department of Defense for a condition, injury, or illness they sustained while they were engaged in military service. *See 330 ILCS 61/1-10.*

ISERRA applies only to employees--not independent contractors. Six factors are used to differentiate between employees and independent contractors:

- The extent of the employer's right to control the manner in which the individual's work is to be performed,
- The opportunity for profit or loss that depends upon the individual's managerial skill,
- Any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers,
- Whether the service the individual performs requires a special skill,
- The degree of permanence of the individual's working relationship, and
- Whether the service the individual performs is an integral part of the employer's business.

No single factor is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor. *See 330 ILCS 61/1-20.*

ISERRA incorporates several sections of USERRA into Illinois law. These sections provide the right to reemployment as long as five conditions are met. *See 330 ILCS 61/5-5.* Employers must reemploy service members returning from a period of service if they meet the following criteria:

- Their absence was on account of military service
- The service member gave advance notice of their absence
- The cumulative period of qualifying service with the same employer is less than five years
- The service member was not released from service under dishonorable or other punitive conditions
- The service member reported back to the civilian employer in a timely manner or submitted a timely application for reemployment.

Each of these reemployment conditions are nuanced and should be examined closely before a determination is made regarding eligibility for reemployment.

Military leave is a right, not a benefit of employment. As a result, employers may not impose additional restrictions or requirements regarding military leave. For example, it would not be appropriate for an employer to require that an employee provide a work-shift replacement for their service-connected absence. *See 330 ILCS 61/5-5(2).*

ISERRA incorporates USERRA's benefits regarding pensions and healthcare into Illinois law. *See 330 ILCS 61/5-5 incorporating 38 USC 4317 and 38 USC 4318.*

ISERRA also protects the integrity of performance evaluations for service member employees. When a service member employee is absent on military leave, they may not receive a performance rating lower than the average of their ratings for the last three years. Additionally, a service member's performance rating cannot be lower than the rating they received in the performance review issued immediately prior to the rated period that includes their military absence. *See 330 ILCS 61/5-5(3).*

One of the essential components of ISERRA is the expanded protections it provides to public employees. A public employee is defined as "any person classified as a full-time employee of the State of Illinois, a unit of local government, a public institution of higher education as defined in Section 1 of the Board of Higher Education Act, or a school district, other than an independent contractor." *See 330 ILCS 61-10.* ISERRA provides public employees with paid military leave and expanded healthcare coverage.

ISERRA's additional healthcare benefit afforded to public employees augments USERRA's civilian healthcare protection by allowing a service member employee to retain their healthcare coverage while paying only their portion of the premiums (as opposed to the entirety of the cost of the plan plus administrative fees, as is required by USERRA). *See 330 ILCS 61/5-10(c).*

Paid military leave falls into two categories: concurrent compensation and differential compensation. Concurrent compensation allows service members to receive full compensation as a public employee for up to 30 days per calendar year. Concurrent compensation is ONLY required when an employee is on annual training orders. *See 330 ILCS 61/5-10(a).* Annual training is defined as "any active duty performed under Section 10147 or 12301(b) of Title 10 of the United States Code or under Section 502(a) of Title 32 of the United States Code." *See 330 ILCS 61/1-10.* In the rare instance in which a service member performs more than 30 days of annual training in a calendar year, they are entitled to differential compensation for the remainder of their orders. *See 330 ILCS 61/5-10(b)(3).*

ISERRA provides differential compensation to public employees while they are on paid military orders. Employees on "voluntary" orders are entitled to up to 60 days of differential compensation each calendar year; employees on "involuntary" orders are entitled to differential compensation for the complete duration of their orders. *See 330 ILCS 61/5-10(b).* Whether an order is classified as voluntary or involuntary is determined by identifying the statutory authority used to bring the service member into active service. These authorities are frequently found on military orders and abbreviated as: "auth." The most commonly used

authorities are found under Title 10 or Title 32 of the US Code. Once the statutory authority is identified, it should be compared to the list of authorities found in ISERRA. *See 330 ILCS 61/1-10(1) and (2)*. When orders are issued under an authority code not found in either of ISERRA's lists, the orders are considered involuntary. Note that language contained in military orders which describe them as voluntary or involuntary does not change the status of an order as long as a complete authority code is present.

Differential compensation is calculated on a daily basis and only applies to days in which the employee would have otherwise been scheduled or required to work as a public employee. *See 330 ILCS 61/1-15*. First, determine the employee's daily rate of pay as a public employee by dividing their regular compensation as a public employee during the pay period by the number of workdays in the pay period. Next, determine the military daily rate of pay by dividing the employee's base pay for the applicable military service by the number of calendar days in the month the service member was paid by the military. For purposes of inactive duty, the daily rate of compensation for military service is calculated in accordance with the applicable drill pay chart issued by Defense Finance and Accounting Services. Finally, after deriving both daily rates, subtract the daily rate of compensation for military service from the daily rate of compensation as a public employee and the resulting number is the daily rate of differential compensation. This amount will be paid to the service member for each workday they missed as a result of paid military service during the pay period.

Note that ISERRA is silent regarding when differential compensation must be paid. This allows employers to request Leave and Earnings Statements (LES) to assist in their calculation of differential pay. Furthermore, public employees may choose to use accrued vacation, annual, or similar leave with pay in lieu of differential compensation during any period of military leave. *See 330 ILCS 61/5-10(b)(3)*.

Finally, the ISERRA creates the position of ISERRA Advocate who is tasked with:

- Providing training and education to employers and service members,
- Preparing educational materials and programs,
- Responding to informal inquiries made by members of the public and public bodies,
- Preparing an ISERRA notice for employers,
- Investigating allegations of violations of ISERRA on behalf of the Illinois Attorney General, and
- Preparing an annual report on ISERRA for the Attorney General.

The current ISERRA Advocate is Assistant Attorney General Thomas Banning. The Attorney General's Military and Veterans Rights Bureau can be reached via their helpline at 1-800-382-3000.

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### **Access the Illinois Code on Your Own**

We do our best to keep these state law articles up-to-date and provide the most relevant sections of the applicable statute for you to review. Nonetheless, we still recommend you consult the most recent version of the law to make sure nothing has changed from what we discussed in this article. You can find a public version of the entirety of the Illinois Code for yourself online, for free, at <https://www.ilga.gov/legislation/ilcs/ilcs.asp>. To directly access ISERRA, follow this link:

<https://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=3912&ChapterID=33>.

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<sup>3</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

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<sup>4</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).