

A Primer On Employment Rights And Responsibilities Of Military Personnel



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Introduction

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") applies to all public and private employers and their employees. Unlike other employment statutes, USERRA has no minimum size threshold before employers come under the purview of that law. USERRA protects the employment rights of uniformed servicemembers, including those who serve in the Army, Navy, Marine Corps, Air Force, Coast Guard, National Guard, and Public Health Service commissioned corps—as well as the reserve components of each.

Protected service members shall be promptly reinstated with "the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed."¹

I. Prerequisites for Employees to be Fully Covered by USERRA

In order to receive complete protection under USERRA, employees taking leave must provide adequate notice, must not already have taken more than 5 years of service leave with the employer, must depart service on honorable terms, and must timely apply or report for employment upon return.

A. An Employee Must Give Advance Notice Unless Not Possible For National Security Reasons

USERRA does not specify how much advance notice is required, but the Department of Defense "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."² National security reasons will excuse an employee's failure to provide advance notice.³ An employee's notice may be either oral or written and need not take any particular form.⁴

B. An Employee Must Have 5 Years Or Less Of Total Service-Related Leave During His Or Her Employment With The Employer At Issue And Depart From Service Under Honorable Conditions

The law recognizes that service-related leave can impose significant burdens on employers, so USERRA will not apply to employees who have taken service-related leave of more than 5 years while employed by the relevant employer.⁵ For obvious reasons, the law does not protect employees who depart from their service via a dishonorable discharge or similar designation.⁶

C. An Employee Must Timely Report Or Apply For Employment

Employees must promptly apply or report for employment after departing service.⁷ What constitutes timely depends on the length of the leave:

- Service of less than 31 days (or any length of time for the purpose of a fitness examination): an employee must report back to the employer not later than the beginning of the first full and regularly scheduled work period on the first full calendar day following the completion of the service period, and the expiration of 8 hours after a period allowing for safe transportation from the place of that service to that employee's residence (20 C.F.R. §1002.115(a));
- Service of more than 30 days but less than 181 days: an employee must report back to the employer verbally or in writing no later than 14 days after completing service (20 C.F.R. §1002.115(b)); and
- Service of 180 days or more: an employee must report back to the employer verbally or in writing no later than 90 days after completing service (20 C.F.R. §1002.115(c)).

The USERRA time periods may be extended if the returning employee is hospitalized for, or convalescing from, an illness or injury sustained or aggravated during service.⁸

Importantly, an employee does not forfeit all protections under USERRA if he or she fails to comply with the timelines. If an employee fails to comply in this regard, an employee "becomes subject to the conduct rules, established policy, and general practices of the employer pertaining to an absence from scheduled work."⁹

II. Employer Obligations to Employees Covered by USERRA

USERRA requires a number of actions by employers concerning employees that come within the scope of the statute, including the prompt reinstatement of employees to the same or equivalent job possessed before departing for leave, the preservation of seniority and related rights during leave, the maintenance of health benefits during leave, and the provision of retirement benefits during leave as if the employees were working for the employers.

A. An Employer Must Reinstatement An Employee Promptly Upon That Employee's Application Or Report For Employment After Returning From Service

Timely reinstatement for purposes of USERRA means "as soon as practicable under the circumstances of each case."¹¹ Generally, prompt reinstatement means within 2 weeks of an employee's application for reemployment. Employees returning from a weekend of National Guard duty, however, should be reinstated on the next business day. Significantly, an employee must be reinstated after service, even if he or she announces an intent not to return to the employer after service.¹²

B. An Employer Must Reinstatement An Employee In the Same Or Equivalent Job With The Accompanying Seniority And Seniority-Based Rights Upon Return From Service

USERRA mandates that a returning employee be placed in "the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service."¹³ In other words, the absence due to service is not considered a break in employment. If an employee cannot perform the essential job functions even after retraining and reasonable accommodation, however, the employer need not reinstate that employee.¹⁴

In connection with reinstatement, a returning employee shall receive the seniority and seniority-based rights and benefits he or she had when service began plus any seniority and seniority-based rights and benefits he or she would have

accrued but for the service-related absence.¹⁵ In other words, pursuant to the escalator principle, a returning employee shall receive "the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement."¹⁶ An employee's status for purposes of the escalator principle includes "agreements, policies, and practices in effect at the beginning of the employee's service, and any changes that may have occurred during the period of service" as well as "opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location."¹⁷

Notably, under the escalator principle, the returning employee may also be laid off or terminated if that is what would have happened had he or she not been absent due to the service leave.¹⁸

C. An Employer Must, On Request, Maintain Healthcare Coverage For An Employee And Dependents For Up To 2 Years

When asked, and for up to 24 months from when an employee's absence begins or the day after that employee fails timely to request reinstatement (whichever is sooner), the employer must continue to provide healthcare coverage to an employee and any dependents.¹⁹ If an employee's service is fewer than 31 days, however, the employer may require that employee to continue paying the employee share, if any, of the healthcare premium.²⁰ If an employee's service is 31 days or more, the employer may lawfully require that employee to pay up to 102% of the full healthcare premium beginning on the first day of service.²¹

In the event that an employee's service has exceeded 24 months, the employer must immediately reinstate healthcare coverage for that employee and dependents when reinstating that employee to his or her position upon return from service.²² In other words, the employer may not impose an exclusion or waiting period before providing healthcare coverage to an employee returning from service.²³

D. An Employer Must Provide Non-Seniority-Related Benefits To Employees

continued on next page

¹³⁸ U.S.C. §4316(a).

³² C.F.R. §104.6(a)(2)(i)(B).

²⁰ C.F.R. § 1002.32(a)(1); 20 C.F.R. § 1002.86.

⁴⁰ C.F.R. § 1002.85(a).

⁵⁰ C.F.R. § 1002.32(a)(2).

⁶⁰ C.F.R. § 1002.32(a)(4).

⁷⁰ C.F.R. § 1002.32(a)(3).

⁸⁰ C.F.R. §1002.116.

⁹⁰ C.F.R. §1002.117(a).

¹⁰⁰ C.F.R. §1002.181.

¹¹ *Id.*

¹²⁰ C.F.R. §1002.88.

¹³⁰ C.F.R. §1002.191.

¹⁴⁰ C.F.R. §1002.198.

¹⁵⁰ C.F.R. § 1002.210.

¹⁶⁰ C.F.R. §1002.193(a).

¹⁷⁰ C.F.R. §1002.193(a).

¹⁸⁰ C.F.R. § 1002.194.

¹⁹³⁸ U.S.C. § 4317(a)(1)(A).

²⁰³⁸ U.S.C. § 4317(a)(2).

²¹ *Id.*

²²³⁸ U.S.C. § 4317(b)(1).

²³ *Id.*

²⁴²⁰ C.F.R. §1002.150(c).

²⁵²⁰ C.F.R. § 1002.150(b).

²⁶ *Id.*

²⁷²⁹ U.S.C. §§ 1001, et seq.

²⁸³⁸ U.S.C. §4318(a)(2)(A)-(B); 20 C.F.R. §1002.259.

²⁹³⁸ U.S.C. §4318(b)(1).

³⁰²⁰ C.F.R. §1002.247.



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On Leave For Service Consistent With How The Employer Provides Such Benefits To Other Employees And, As Applicable, With ERISA

Employees who take service leave must be treated as to benefits like employees who take any other kind of leave. That is, if an employee who takes a leave of absence for other reasons would continue to receive a particular benefit, then an employee on service leave must receive the same benefit. Conversely, if an employee on other leave would not receive a specific benefit, then an employee on service leave need not receive the same benefit either. More concretely, accrual of vacation leave must be provided by an employer to an employee on a service leave only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.²¹

Importantly, if the employer maintains different policies or benefits for different kinds of leave, an employee on service leave must receive "the most favorable treatment accorded to any comparable form of leave."²⁵ Leave duration is the most significant factor for determining comparability, but the purpose of the leave and the ability of an employee to choose when to take the leave should also be considered.²⁶

When employers establish pension plans under the Employee Retirement

Income Security Act ("ERISA"),²⁷ they will be subject to additional ERISA-related requirements under USERRA. An employee covered by an ERISA pension plan who takes service leave under USERRA shall be treated as not having a break in service with the employer for purposes of participation, vesting, and accrual of benefits.²⁸ Employers shall also be responsible for funding any obligation to provide pension benefits and must allocate the amount of the employer contribution for an employee on service leave in the same manner and to the same extent the allocation occurs for other employees during the period of service.²⁹

Conclusion

In sum, employers must promptly reinstate employees returning from service leave to the same position with the same seniority and related rights and, during the service leave, maintain healthcare coverage for up to 24 months and provide non-seniority based benefits consistent with the provision of the same to other employees.

Last, but certainly not least, employees returning from leave of more than 30 but less than 181 days cannot lawfully be discharged without cause during the first 180 days after reinstatement; employees absent for more than 180 days cannot be lawfully discharged except for cause during the first year after reinstatement.³⁰ ¶

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