

Military Duty

Navigating the Benefits Maze

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As of April 30, 2004, nearly 1.5 million American workers were on active military duty — among the highest figures in modern history. With military deployments to the Middle East showing no signs of abatement, there has been a corresponding surge of interest in how companies can and should properly facilitate compliance with special employment and benefits rules applicable to these employees.

There are some general rules and guidelines under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the primary law that addresses employment and benefits rights of military reservists called to active duty. USERRA's intent is to minimize disruption caused by military service to civilians and their employers by providing for prompt re-employment upon (honorable) discharge, and to prohibit discrimination.

Who Is Covered

USERRA applies to all U.S. employers, and to full- and part-time employees who are honorably discharged from military service. USERRA rights are available to anyone who completes service in one of the "uniformed services," including the Army, Navy, Air Force, Marines, Coast Guard and their reserve complements (including active duty training, inactive duty training or full-time National Guard duty), as well as the commissioned corps of the Public Health Service. Also, the president is authorized to expand the categories

of covered services during a time of war or national emergency.

Return from Service: Responsibility Requirements

Individuals must provide advanced written or verbal notice to their employers of all military duty, unless giving notice is impossible, unreasonable or precluded by military necessity. However, employers cannot prevent an employee from taking military leave just because the notice is not provided before the employee leaves. The individual has to make application for re-employment or report back to work within a specific timeframe, based on length of military service. For service of:

- **Thirty Days or Less:** The service member must return at the beginning of the first regularly scheduled work period on the first full calendar day after release from service (taking into account safe travel home plus an eight-hour rest period).
- **More than 30 Days, But Less than 180 Days:** The individual must apply for re-employment within 14 days.
- **More than 180 Days:** A re-employment application must be submitted within 90 days.

Re-employment Rights

Returning service members must be re-employed in the job they would have attained had they not been absent for military service, with the same seniority, status, pay and any other rights or benefits determined by seniority. Again,

the type of job that must be offered is dictated by the individual's length of military service.

If military leave is less than 90 days, the employee is entitled to:

- A position in which he or she would have been employed had employment not been interrupted, if he or she is qualified to perform the duties of that position, or
- The position the individual held when military service began if he or she is not qualified to perform the duties of the more senior position and the employer has made reasonable efforts to make the individual qualified for the more-senior position.

If military service is more than 90 days, the employee is entitled to:

- A position in which he or she would have been employed had employment not been interrupted, or a position of like seniority, status and pay, the duties of which the employee is qualified to perform, or
- The position the employee held on the date military service began, or a position of like seniority, status and

QUICK LOOK

- ⇒ There are some general rules and guidelines that employers need to follow under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).
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- ⇒ Employers cannot prevent an employee from taking military leave just because proper notice is not provided before the employee leaves.

pay if he or she is not qualified to perform the more senior position and the employer has made reasonable efforts to make the employee qualified.

If an employer hires a replacement to fill the vacancy left by an employee called to duty, the returning worker must be re-employed in that position, even if it requires reassigning or terminating the replacement worker.

Situations Precluding Re-Employment

An individual may not have USERRA re-employment rights if:

- The employer's circumstances have changed to the degree that re-employment is impossible or unreasonable.
- The individual has a disability that was incurred or exacerbated by military service and re-employment would create an undue hardship for the employer.

Retaining Employees

Re-employed individuals may not be discharged from their positions (except for cause) for certain time periods, as follows:

- For a period of six months if the service period was from 30 to 180 days
- For a period of one year if the service period was 181 days or more.

If Someone Is Disabled

There is enhanced protection for disabled veterans. Employers are required to make reasonable efforts to accommodate the disability. Veterans convalescing from service-related injuries may have up to two years to return to their jobs.

Most Benefits Stay Intact

While performing military service, an individual is deemed to be on a furlough or leave of absence and is entitled to the nonseniority rights accorded other individuals on nonmilitary leave of absences as they relate to vacation, pension vesting and company matching in 401(k)s and other similar benefits

plans. Re-employed individuals may make up after-tax contributions and elective contributions that otherwise would have been made during their military absence over a period of equal to the lesser of three times the length of military service, or five years.

As re-employed individuals make up their elective contributions, employers must give them any matching contributions due on those elective contributions, as if the elective contributions had been made during the individual's absence. USERRA contributions are not entitled to the earnings credits before the contributions are made, or to forfeitures allocated during military service.

Similarly, in a pension plan with five-year vesting, an individual who worked for the employer for two years and was on military leave for two years would become vested after returning to work for one year. Any unused vacation must be restored upon rehire.

The Ins and Outs of Health Benefits


For military service of 30 days or less, health care coverage is provided as if the service member had remained employed. It is not clear, however, what effect any "war" clauses in a civilian health policy may have if the individual is injured during deployment. Individuals on active duty for more than 30 days (and their dependents) are covered by the military health plan, TriCare, from their first day of service. TriCare becomes the primary carrier for the individual and the secondary carrier for the family if it has civilian coverage. Similarly, if the family continues to be covered by civilian health care, then that coverage would be secondary for the individual and primary for the family.

An individual on military duty for more than 30 days may elect USERRA continuation coverage, allowing him or her to continue employer-sponsored health care for the lesser of 18 months or the period

ending the day after he or she is due to return to work after military service.

Employers that are required to provide COBRA coverage must also offer COBRA to individuals on military leave and provide a COBRA notice. Employees often may have a choice between COBRA and USERRA continuation coverage.

Caveat, Employer

Employers ignore USERRA regulations at their own risk. Individuals who experience difficulty with USERRA claims may report problems to the Department of Labor's Veterans' Employment and Training Service. If resolution is unsuccessful after an investigation, the claim may be referred to the U.S. Attorney General for consideration and representation in federal court at no cost to the individual. An individual also may retain private counsel and sue for relief, with the likelihood that the courts will interpret USERRA broadly and in favor of the returning individual. 

Author's Note: Information contained herein is general in nature and based on authorities that are subject to change.

Applicability to specific situations is to be determined though consultation with a tax adviser.

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