

# Can we refuse to hire member of National Guard because she lacks weekend scheduling flexibility?

**Q. Can we refuse to hire a qualified applicant who has told us her National Guard duty conflicts with some of the weekends she would be required to work? Employees in this job bid for rotating scheduled weekends under a union contract seniority system. The applicant's schedule for Guard duty is not flexible.**

**A.** Probably not. There is no known legal precedent addressing this issue, and it would be risky to deny employment to the applicant on this basis.

The Uniformed Services Employment and Reemployment Rights Act (USERRA)—the federal law requiring military leave—prohibits an employer from denying initial employment to a person on the basis of her “membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services .”

Although you might argue that you would be denying employment because this person can't work the available hours—and not because of her military service—that probably won't win the day if the applicant seeks to enforce her USERRA rights.

Under the law, you will probably be expected to rearrange the rotation to accommodate the woman's service obligations. The better practice here would be for you to talk with the other employees in the weekend rotation (and their union) to rearrange the schedule to avoid any conflict with the Guard service.