

USERRA: An Employer's Guide to Military Leave Law

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Military reservists are drilled on their employment rights, so employers need to be prepared as well. This special report from HR Specialist outlines the main federal law that provides job protection to reservists and National Guard troops. It's known as the Uniformed Services Employment and Reemployment Rights Act (USERRA). Because some [states](#) have their own, more-generous military leave laws, check with your state labor department before making any decisions on military leave.

USERRA is intended to minimize the disadvantages to reservists and National Guard troops who need temporary leave from their civilian jobs to serve in the military. The law is intended to encourage noncareer uniformed service so the U.S. military can continue to be staffed by qualified people, while maintaining a balance with the needs of private and public employers who depend on those people.

At its basics, the law says that if an employee's military-related absence is less than five years, you must re-employ that worker at his old job or one with similar status, seniority, benefits and pay.

The law, signed on Oct. 13, 1994, can be found in the United States Code at Chapter 43, Part III, Title 38. The U.S. Labor Department administers the law through the Veteran's Employment and Training Service (VETS), www.dol.gov/vets. The law also prohibits companies from discriminating in hiring, firing, promotion or benefits based on an employee's past, current or future military obligations. All companies, regardless of size, must comply with USERRA. Here are more specifics on the law:

Who is eligible?

To qualify for re-employment rights following military service, employees must meet the following five eligibility criteria:

- Left a civilian job.
- Gave notice that they were leaving to perform military service.
- Participated in a cumulative period of service of less than five years (there are exceptions).
- Released from service under honorable or general conditions.
- Reported back to work or applied for re-employment within time constraints prescribed by law.

Must employees give you notice?

Yes. Under USERRA, employees must give their employers advance notice (either written or verbal) of upcoming military service of any type. Otherwise, they will not be eligible for reemployment protection following their

military service.

The only exceptions to the notification requirement would be military necessity (e.g. a classified recall) that precludes an employee from giving notice. These exceptions are rare.

How does the five-year limit work?

USERRA sets a five-year cumulative limit on the amount of military leave employees can perform and still retain reemployment rights with a given employer. When employees change employers, they start a new five-year limit. However, that five-year rule isn't absolute. USERRA sets eight different exceptions that allow employees to participate in military service beyond five years yet still retain their reemployment rights.

Among those exceptions: service due to national emergencies or war, and service that requires the person--through no fault of his or her own--to remain on active duty beyond five years. If an employee is hospitalized for or is convalescing from an illness or injury incurred in, or aggravated during military service, the limit may extend up to an additional two years. Drills (inactive duty training), annual training, involuntary active duty extensions (including training certified as necessary by their service), and recalls due to a war or national emergency do not count toward the five-year cumulative total.

Must you continue paying a reservist on leave?

USERRA does not require employers to pay employees while they perform uniformed service. However, employers are free to do so if they want. Reservists earn military pay while on active duty, but the pay often doesn't reach their typical on-the-job salaries.

A Reserve Officers Association survey in early 2003—during the build up for the war with Iraq—found that nearly two-thirds of Fortune 500 companies make up the difference in reservists' pay, more than twice as many as two years ago.

Must employees receive pay raises while on leave?

Returning service members are entitled to all general across-the-board pay raises that they would have received if they weren't away on military duty. It does not matter if the raises result from a collective-bargaining agreement or employer policy. When the pay rate is an attribute of position, the returning service member is entitled to the current rate of the entitled position, including all the changes that occurred in his or her absence.

When you base pay raises on factors such as increased skill, qualifications or merit, you may have to extend raises to absent reservists on their return, as well. For example, if you've consistently awarded "merit" increases to nearly all employees, then the raises would be considered seniority-based, and returning service members would be entitled to the raise as well.

What about health benefits?

USERRA says employers must provide COBRA-like benefit continuation for people who leave work to serve in the military, even when the employers are not covered by COBRA. If an employee's health coverage would terminate because of an absence due to military service, the employee may elect to continue the coverage for up to 18 months after the absence begins, or for the period of service, whichever is shorter.

For the first 30 days of reservists' service, you can't require them to pay more than their normal share of health insurance premiums. But after that (as with COBRA), you can require that they pay up to 102 percent of the full premium during their leave. Note: Reservists are covered under the government's health plan after 31 days of active duty.

On return from service, you must reinstate the employee's health insurance coverage without any waiting

period or exclusions for pre-existing conditions, other than waiting periods or exclusions that would have applied even without absence for uniformed service. This rule does not apply to any illness or injury that the secretary of Veterans' Affairs documents to have incurred in, or aggravated during, performance of service in the uniformed service.

How does military leave affect pension benefits and vacation leave?

USERRA requires that returning service members who meet the law's eligibility criteria must be treated as if they had been continuously employed for pension purposes, regardless of the type of pension plan the employer has adopted. This applies to vesting and benefit computation.

Absence for service is not considered a break in employment for pension purposes. Also, employees who would have become eligible to participate in a pension plan during their time in the service should be placed in the plan retroactive to the initial eligibility date. If the employer contribution is contingent on the employee's contribution, then the employee must make his or her contribution before the employer is obligated to make its contribution.

Vacation accruals, that is, the actual receipt of vacation time benefit, is often tied to seniority. For example, a person returning from three years of service may have passed a time benchmark where he is entitled to build vacation at an increased rate (e.g., from one week a year to two weeks per year), but that person would not return to find three years' back vacation waiting.

USERRA requires an employer to allow returning reservists to use earned vacation credits while absent for service, but they have to request it. An employer may not require the use of vacation for a service absence, unless the absence coincides with a period, such as a plant shutdown, when ALL employees are required to take vacation.

How does military leave time count toward FMLA eligibility?

Ordinarily, workers become eligible for job-protected leave under the Family and Medical Leave Act (FMLA) after they've worked at least 12 months at a company and clocked at least 1,250 hours during the 12 months leading up to the leave. However, when tallying up time for FMLA eligibility, employers should count the months and hours that military reservists or National Guard members would have worked if they hadn't been called for duty. Combine those "would have worked" hours with actual hours worked to see if the employees qualify for FMLA.

Can I ever refuse to rehire a returning reservist?

USERRA does not excuse employers from making efforts to qualify returning service members or from accommodating people with service-connected disabilities when doing so would create "undue hardship." But this exemption is difficult to claim, especially in time of war, when patriotic feelings run high. (See case below.) Also, the cost to prove your point in court would likely exceed the cost of reemploying the worker.

What if a returning reservist files a claim?

Remedies to employee-reservists under USERRA flow from two different processes. The first is the administrative route, which the United States Department of Labor Veterans Employment and Training Service (VETS) handles. Remedies available through the administrative route can include return to a job, back pay, lost benefits, corrected personnel files, lost promotional opportunities, retroactive seniority, pension adjustments and restored vacation.

The employee can recover only dollar-for-dollar what he or she lost, with no recourse to any penalty on the employer. The second route is through litigation, handled by the U.S. Attorney General or the Office of Special Counsel. Remedies available through the litigation route include everything available administratively. The difference: When a

violation is considered willful, the court can double any amount due as liquidated damages. The court may not, however, impose any punitive damages under USERRA.

Court bends over backward to support military leave. Now is not the time for your company to appear unpatriotic, in the public's eye or before a judge. As a recent court ruling shows, courts are going the extra mile to give returning military reservists their maximum rights in the workplace. And that means you'll face a nearly invincible foe if you challenge their reinstatement.

The case: Police officer Gary Lapine resigned after criticizing the department. He then started active duty with the Army Reserve. Two years later, while still on active duty, he asked to be reinstated to the police force. The police chief refused so Lapine sued under USERRA. A district court said Lapine was entitled to his old police job, and an appeals court agreed. The court said it didn't matter that Lapine received his order to report to active duty after he resigned from the force. Nor did it matter that he quit for personal reasons. He had applied for active duty prior to resigning, the court said, and that was enough to indicate he planned to perform military duty. (Lapine v. Town of Wellesley, No. 01-2054, 1st Cir.)

Online USERRA Resources

U.S. Department of Labor USERRA E-laws advisor: www.dol.gov/elaws/userra0.htm

U.S. Department of Labor Veteran's Employment and Training Service:
www.dol.gov/vets

Employer Support of the Guard and Reserve: www.esgr.org