

USERRA: Managing employees with military obligations

The Uniformed Services Employment and Reemployment Rights Act or USERRA can be the stealth bomber of employment laws. Few employers would list the USERRA law as a top concern. But in some ways, it provides broader employee protections than most federal employment laws. The USERRA Act's details can easily trip up employers resulting in poor morale, lost time, and legal liability.

USERRA Act basics

USERRA provides rights to both job applicants and current employees. Employers may not discriminate against or refuse to hire a qualified applicant because of his or her military obligation. Employees who get deployed are entitled to job-protected leave for up to five years while serving. This is separate from any paid military leave employers voluntarily provide.

Employer and employee obligations vary with the length of deployment. Generally, employees are required to notify employers of deployments as soon as practicable. For deployments of 31 days or less, the employee must report to work on the next regularly scheduled shift. Employers must allow the employee time to travel home safely and have an eight-hour rest period before reporting. Employers must maintain the employee's health coverage during deployments of 31 days or less.

For deployments of more than 30 days, but less than 181 days, the rules differ slightly. In those cases, the employee must submit an application for reinstatement within 14 days of release of service. Following longer deployments, the employee has 90 days from release to reapply.

Deployments of more than 30 days are triggering events for health coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). The employee may maintain employer coverage by paying 102% of the policy premium for up to two years.

The returning employee is entitled to be returned to the same job subject to the escalator clause. The escalator clause guarantees the employee the same job and benefits the servicemember would have received if not deployed. This means returning veterans are entitled to all promotions, benefits and retention rights they would have received absent deployment. The best way to track this is no list the service member as active and update her employee file regularly. Assume every individual taking military leave will return.

Disabled returning veterans

Servicemembers who become disabled while on military leave may take longer job-protected leave. Disabled servicemembers have two years from their release date to reapply for their prior position. This is regardless of the length of deployment. Employers are required to explore reasonable accommodations that would permit the disabled servicemember to resume the old job.

FMLA qualified exigency leave

The Family and Medical Leave Act (FMLA) provides exigency leave employees who are spouses, children, or parents of a servicemember. FMLA regulations, delineate seven categories of qualified exigencies into seven categories:

- **Short-notice deployment:** When service members are given seven or fewer days notice to report for active duty, the affected employee may take up to seven days of leave to deal with “any issue arising” from the deployment.
- **Military events and related activities:** Covered employees may take leave to “attend any official ceremony, program or event sponsored by the military and to attend family support and assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross” as long as it is related to the service member’s active duty or call to active duty.
- **Childcare and school activities:** Eligible employees may take leave to “arrange childcare or attend certain school activities for a biological, adopted, or foster child, a stepchild or legal ward of the covered service member” including any child for whom the service member stands in loco parentis. The child must under 18 or 18 and over and incapable of caring for his or herself.
- **Financial and legal arrangements:** Covered employees may take leave to address financial and legal arrangements related to the service member’s deployment such as executing financial and healthcare powers of attorney, signing signature cards for bank accounts or enrolling in the Defense Enrollment Eligibility Reporting System (DEERS).
- **Counseling:** Eligible employees may take leave for counseling for themselves, the service member or the service member’s dependent child or children to counseling services provided by someone other than a healthcare provider. The counseling must be related to the service member’s deployment.
- **Rest and recuperation:** Eligible employees may take up to five days to spend time with the service member while he or she is on short-term leave during the deployment period.
- **Post-deployment activities:** Eligible employees are entitled to take leave to “attend arrival ceremonies, reintegration briefings, and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member’s active duty and to address issues that arise from the death of a covered service member while on active duty” including funeral arrangements.

The regulations also allow employers to allow leave for “additional activities” where both the employer and employee agree on the timing and duration of the leave. The leave must be related to the service member’s active duty assignment.

Military caregiver leave

Military caregiver leave is available under the following conditions. The injury or illness must be a:

- continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the service member’s office, grade, rank, or rating; Or
- A physical or mental condition for which the covered veteran has received a Veterans Administration Services Related Disability (VASRD) rating of 50 percent or greater and such VASRD rating is base, in whole or in part, on the condition precipitating the need for caregiver leave; or
- A physical or mental condition that substantially impairs the veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or
- An injury, including psychological injury, on the basis of which the covered veteran has been enrolled in

the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

The FMLA allows servicemembers to designate a “next of kin.” The “next of kin” is permitted to take up to 26 weeks of military caregiver leave. The leave is unpaid and administered in the same way as other FMLA leave. Military caregiver leave is usable once per servicemember per injury. Employees must take it within a single 12-month period beginning the first day of the leave. This is true regardless of which calendaring method the employer uses for other FMLA leave.

The regulations define “next of kin” as the servicemember’s nearest blood relative, other than the covered servicemember’s spouse, parent, son, or daughter, in the following order of priority:

- Blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions,
- Brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA. If so, the designated individual shall be deemed to be the covered servicemember’s next of kin.
- The regulations provide that all family members sharing the closest level of familial relationship to the covered servicemember shall be considered the covered servicemember’s next of kin. In other words, there can be multiple persons who are ‘next of kin.’

USERRA retaliation

Like most employment laws, USERRA contains an anti-retaliation provision. Employers may not retaliate against servicemembers or their families for taking military leave. Some court cases have held that employees may file “hostile work environment” lawsuits under USERRA. Employees who are subject to verbal or physical abuse because of their military status may file USERRA lawsuits. Anti-military sentiment that disparages those who serve or have served can create that hostility.

Regular training on USERRA and military leave issues should be part of every employer’s training rotation. Managers should know how to handle requests for military-related leave. At least one person within the organization should be familiar with military leave rights and obligations. That individual should be the person monitoring the military leave process.