



THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

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WHAT MY PARENTS THINK I DO



WHAT AMERICANS THINK I DO



WHAT MY WIFE THINKS I DO



WHAT I THINK I DO



WHAT I REALLY DO
IN 12 HOURS



...I'LL HAVE 12 HOURS LEFT

USERRA PRESENTATION OUTLINE

- * Background
- * Prerequisites to coverage
- * USERRA Protections
- * Employer Defenses
- * Enforcement of USERRA

USERRA BACKGROUND

USERRA GENERALLY

1-Prohibits employment discrimination based on past, current, or possible future military service;

2-Protects reemployment rights for persons absent from employment because of military service; and

3-Preserves benefits for persons absent from employment because of military service.

PREREQUISITES FOR COVERAGE

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REQUIREMENTS:

- 1-Civilian Employment;
- 2-Absence due to military service;
- 3-Advance notice to employer;
- 4- Military service cannot exceed 5 years;
- 5-Separation under Honorable Conditions;
and
- 6- Report back in a timely manner.

PREREQUISITES FOR COVERAGE— Civilian Employment

CIVILIAN EMPLOYMENT:

- 1-Any employment that “pays salary or wages for work performed or that has control over employment opportunities.”
- 2-Very broad and includes governmental entities, but does NOT include independent contractors.
- 3-Includes “successors in interests,” even if the successor in interest is not aware of potential claim. The test is a multi-factor case by case test.

PREREQUISITES FOR COVERAGE— Absence due to Military Service

Absence due to military service:

- 1-Basically covers all categories of military training and service.
- 2-Includes voluntary military service.
- 3-Includes drill weekends and annual training.
- 4-Purely State Active Duty would not qualify, but see state law.

PREREQUISITES FOR COVERAGE— Advance Notice to Employer

ADVANCE NOTICE TO EMPLOYER:

- 1-Notice can be given verbally or in writing. Does not need to be in any specific format.
- 2-No time frame specified in the statute, but DoD recommends at least 30 days prior.
- 3-Military Necessity Exception: No notice required if precluded by military necessity or giving notice is unreasonable or impossible. (Not subject to judicial review)

PREREQUISITES FOR COVERAGE— Service Cannot Exceed 5 Years



SERVICE CANNOT EXCEED 5 YEARS:

For each employee/employer relationship, the military member's cumulative period of service cannot exceed 5 years. However, there are lots of exceptions.

PREREQUISITES FOR COVERAGE— Common Exceptions to 5 Year Calculation

COMMON EXCEPTIONS TO 5 YEAR CALCULATIONS:

1. Drill weekends and annual training requirements;
2. Involuntary active duty during war time, national emergency, in support of an operational mission, or in support of a critical mission. Example: If called up during the operations in Iraq or Afghanistan, the time period would not have counted.
3. Period where individual is unable to obtain orders releasing them from period of service before expiration of period through no fault of the service member.

PREREQUISITES FOR COVERAGE— Character of Service

No USERRA Rights if:

- Service member was separated with a dishonorable or bad conduct discharge; or
- Service member was separated with an under other than honorable conditions.

PREREQUISITES FOR COVERAGE— Timely Reporting Back

If gone 30 days or less

- Must report to first full regularly scheduled work period following completion of period of service + travel time + 8 hours for rest (time can be extended).

If gone between 31 days and 180 days

- Application for reemployment within 14 days after completion of period of service (time can again be extended).

If gone more than 180 days

- Application for reemployment within 90 days after completion of period of service.

PREREQUISITES FOR COVERAGE— Timely Reporting Back

APPLICATION FOR REEMPLOYMENT:

- 1-If gone 31 days or more, must apply for reemployment.
- 2-Application can be verbal or written.
- 3-Application should indicate: (1) employee is a former employee (2) returning from service, and (3) that he or she is seeking reemployment.

PREREQUISITES FOR COVERAGE— Timely Reporting Back

EXAMPLE:

*Soldier drills at
Camp Williams
in Riverton
Utah, 4 hours
away from St.
George.

*Soldier
finishes drill
Sunday night at
10:00 p.m.

*Soldier is in
the Utah
National Guard
and lives in St.
George Utah.

*Soldier's full
time job is in St.
George and his
schedule is
Mondays thru
Fridays, 8-5.

WHEN DOES
THE SOLDIER
NEED TO
REPORT TO
WORK BY?

PREREQUISITES FOR COVERAGE— Timely Reporting Back

EXAMPLE:

*Soldier is deployed
to Afghanistan for
180 days.

HOW MANY DAYS
DOES HE HAVE TO
SUBMIT AN
APPLICATION FOR
REEMPLOYMENT?

PREREQUISITES FOR COVERAGE— Timely Reporting Back

FAILURE TO REPORT TIMELY: If the service member fails to report timely, the service member does not lose all of the USERRA rights, but rather it is treated as any other unauthorized absences under the civilian employment policies.

PREREQUISITES FOR COVERAGE— Timely Reporting Back

DOCUMENTATION:

- 1- Documentation is only required if the soldier is gone for more than 30 days.
- 2- Good practice for service member is to provide documentation even when less than 30 days.

PREREQUISITES FOR COVERAGE— Timely Reporting Back

DOCUMENTATION TO ESTABLISH:

- 1-The service member's application for reemployment is timely;
- 2- The service member has not exceeded the 5 year limitation; and
- 3-The service member has not been discharged with a dishonorable, bad conduct, or under other than honorable conditions.

PREREQUISITES FOR COVERAGE— Timely Reporting Back

EXAMPLES OF DOCUMENTATION:

Copy of Duty Orders (most common)

Leave and Earning Statement (shows dates)

Annual Drill Schedule (can be amended throughout year)

DoD 214, Certificate of Release or Discharge

Certificate of completion from military training school

Letter from commanding officer



USERRA PROTECTIONS

USERRA PROTECTIONS

1. Protection against Discrimination for Military Service
2. Reemployment Rights
3. Benefits

PROTECTION AGAINST DISCRIMINATION

USERRA PROTECTIONS—Protection against Discrimination

“A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.”

- 38 USCS § 4311(a)

USERRA PROTECTIONS—Protection against Discrimination

An employer has engaged in discrimination if the military service was a “motivating factor” in the employer’s action unless the employer can prove that the action would have been taken in the absence of the military service.

USERRA PROTECTIONS—Protection against Discrimination

Staub v. Proctor Hosp., 562 U.S. 411 (2011) Addressed the “Cat’s paw” liability theory for USERRA.

Held that if an employer takes adverse action against a service member based in part on someone else’s actions that are motivated by military animus, then the employer may be liable under USERRA even if the employer directing the action had no animus towards the military.

USERRA PROTECTIONS—Protection against Discrimination

Once a person is reemployed, there is a period of time where they cannot be discharged without cause:

- 1-For military service between 31 and 180 days, period is 180 days;
- 2-For military service more than 180 days, the period is 1 year.

REEMPLOYMENT RIGHTS


REEMPLOYMENT RIGHTS—

The Escalator Principle:


Upon returning, a service member is entitled to the position they would have attained with reasonable certainty if not for the absence due to military service. This position is known as the escalator position.

REEMPLOYMENT RIGHTS—Gone 90 days or less

Escalator Position: If employee can reasonably be qualified for the escalator position, then those efforts must be made and the service member must be given this position.



Previous Position: If employee cannot reasonably be qualified for the escalator position, then reasonable efforts must be made to qualify for service member for the previous position.

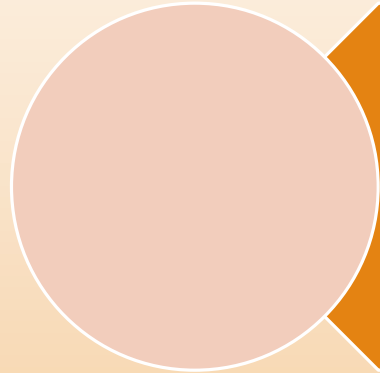


Nearest Approximation: If cannot reasonably be qualified for either of the above, then service member must be put in nearest approximate position qualified for to the escalator position first, and second, to the previous position.

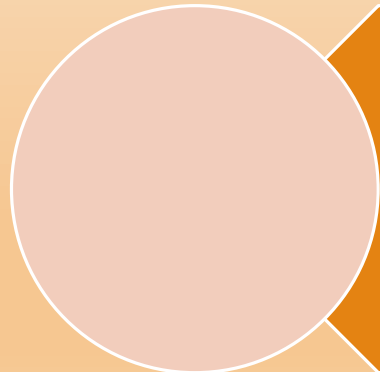
REEMPLOYMENT RIGHTS—

Adverse Consequences of Escalator: USERRA does not prevent adverse consequences under the escalator principle. For example, if the service member would have ended up in a position that was ultimately part of a layoff plan, the service member would be reinstated to layoff status.

REEMPLOYMENT RIGHTS—



Gone more than 90 days: Same analysis as less than 90 days except that you can substitute each stage position with a position of “like seniority, status, and pay.”



Disabled through service: A similar analysis that includes reasonable efforts to accommodate the disability.



I found the LT

BENEFITS

BENEFITS—Military Status while Absent

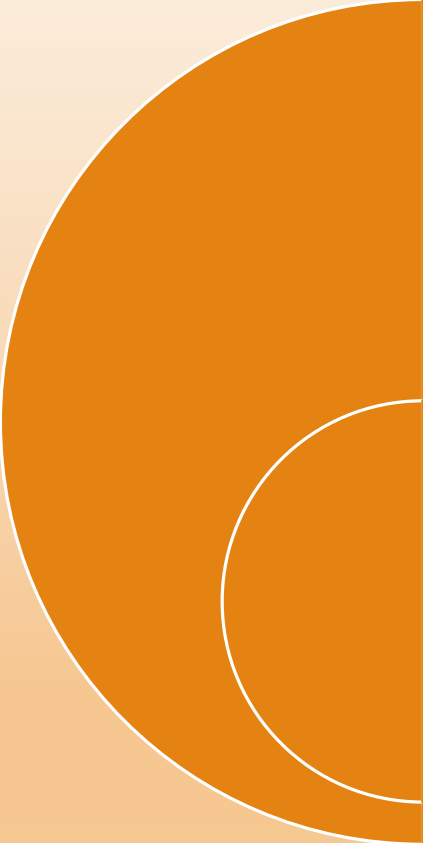
Military Status while Absent: Status shall be deemed to be on furlough or leave of absence and will be entitled to any rights or benefits as are generally provided by the employer to similarly situated persons who would be on furlough or leave of absence.

BENEFITS—Military Status while Absent

Military Status while Absent: If the benefit depends on the type of leave, then service member must be given the most favorable treatment accorded to any comparable form of leave. Duration of leave is critical in determining whether it is comparable.

Example: Company policy is if on jury leave, then employee receives holiday pay. Since jury leave is usually short, then a service member who is absent for a short time period would be entitled to holiday pay. A service member for an extended period would not be entitled to it.

BENEFITS—Military Status while Absent



Exception: If service member knowingly provides written notice of intent not to return to employer after military service is complete.

Burden on Employer: Employer has burden to show person knowingly provided clear written notice and was aware of the specific benefits that would be lost.

BENEFITS—Seniority Benefits

Seniority Rights and Benefits: Service member is entitled to the seniority and other rights and benefits determined by seniority that they would have had if they had remained continuously employed.

“Seniority” = longevity in employment.

BENEFITS—Military Status while Absent

Example:

VACATION BENEFITS: If the amount of vacation accrual is dependent on how long the employee has worked there, the time absent for military service needs to be included. However, whether the service member accrues vacation leave while gone is dependent on how similar employees are treated while on comparable leave.

BENEFITS—Health Insurance

Service less than 31 days: Person pays employee share to continue coverage.

Service 31 days or more: Person pays 102% of the full premium under the plan (employer share + employee share + 2% administrative cost)

BENEFITS—Pension Benefit Plan

Non-Contributory Defined Benefit Plan:
Service member's benefit will be the same as if he had been continuously employed.

Contributory Defined Benefit Plan: Service Member must make up contributions when they return to receive benefit as if they were continuously employed.

BENEFITS—Miscellaneous

Vacation: Service member can elect to use vacation time for military service, but cannot be required to. Normally cannot use sick leave unless it is normally allowed to be used for any purpose.

Notice of USERRA Rights: Each employer must provide a notice of USERRA rights. This can be done by posting it in the workplace.

Statute of Limitations: There is no statute of limitations for a USERRA claim, but laches may bar it.

Additional Benefits: An employer can always provide more benefits to the service member than USERRA requires. For example, many employers provide military leave to the service member, which is not required by the Act.

EMPLOYER DEFENSES

EMPLOYER DEFENSES

An employer is not required to reemploy a service member if:

- 1-Employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
- 2-Service member who is disabled or not qualified would pose an undue hardship on the employer (employer has burden of proof and it is fact-intensive inquiry); or
- 3-The employment position is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

ENFORCEMENT OF USERRA

USERRA ENFORCEMENT

Options for Enforcement:

- 1-ESGR (Employer Support of the Guard and Reserve): Can help try and mediate USERRA disputes and provide information.
- 2-Department of Labor, Veteran's Employment and Training Service (VETS): Service Member may file a complaint. Vets will conduct investigation and has subpoena power, but cannot order compliance.
- 3- Attorney General: If VETS is unsuccessful, service member can ask that it be referred to Attorney General and Attorney General may initiate legal action.
- 4-Private Action: Service Member can file a private cause of action. Not required to go through VETS before they file, but if they have initiated a complaint, they must wait for investigation to conclude.

STATE USERRA

Many States have their own USERRA, including Utah:

Utah Code 39-1-36:

- (1) Any member of a reserve component of the armed forces of the United States who pursuant to military orders enters active duty, active duty for training, inactive duty training, or state active duty shall upon request be granted a leave of absence from employment, but for not more than five years.
- (2) Upon satisfactory release from the training or from hospitalization incidental to the training, the member shall be permitted to return to the prior employment with the seniority, status, pay, and vacation the member would have had as an employee if he had not been absent for military purposes.
- (3) Any employer who willfully deprives an employee who is absent as a member under Subsection (1) of any benefits under Subsection (2) or discriminates in hiring for any employment position, public or private, based on membership in any reserve component of the armed forces, is guilty of a class B misdemeanor.

QUESTIONS?

