

## **Federal Military Leave**

Federal military leave law is complex and imposes significant requirements on employers. Many states have established additional provisions. Obviously, it's important for human resource departments to understand the law. But it's just as important that managers are familiar with the law's basics. A few of the key federal requirements are briefly summarized below. Contact your attorney or the appropriate governmental agencies for more complete information.

### **USERRA and its Basic Requirements**

The Uniformed Services Employment & Reemployment Rights Act (USERRA) of 1994 protects members of the uniformed services and veterans. It clarified and strengthened the earlier Veterans' Reemployment Rights Act (VRR). USERRA is administered by the U.S. Department of Labor, through the Veterans' Employment and Training Service (VETS). They can be reached for questions at [www.dol.gov/vets/](http://www.dol.gov/vets/) or at 1-866-4-USA-DOL.

A military leave of absence must be granted if a full or part-time employee enters any branch of the Armed Services, Reserves, National Guard, Public Health Corp or is called to duty or for training, for a period generally not to exceed 5 years. Employees returning from military leave possess reinstatement, seniority, compensation, benefits, and other rights. Additionally, applicants and employees may not be discriminated against in any area of employment because of past, current, or prospective military service.

### **Employers & Employees Covered**

USERRA basically applies to all employers, regardless of size, in both the public and private sectors. Part-time and full-time employees (regardless of the number of hours worked) are covered. Temporary employees generally are excluded.

### **Military Service Defined**

Military service can be voluntary or involuntary and includes: active duty, active duty for training, initial active duty for training, National Guard duty, absence for an exam to determine fitness for duty, and funeral honors duty.

### **Military Service is Treated as a Leave of Absence.**

Employees on military leaves must be provided the same benefits and rights as are provided to employees on other types of leaves. Additionally, employees returning from military leave must receive any benefits determined by seniority that they would have accrued if continuously employed. (e.g., If a vacation accrual policy is based on seniority, the employee must be credited with the years he/she was on military leave to determine how many vacation weeks should be received.). Note also, that time served in the military counts when calculating FMLA eligibility.

### **Compensation and Benefits**

Federal law does not require that a military leave be paid. However, exempt employees must be paid in accordance with Fair Labor Standards (FLSA) requirements. Note that some states, particularly regarding public sector employees, may require payment.

An employee may (but may not be required to) use accrued vacation or personal leave while on military leave. Upon reinstatement, an employee is entitled to use previously accrued leave. However, USERRA does not require that the employee accrue additional leave while on military service unless other employees on leave may do so.

Although employees who enter military service receive health benefits, they may also continue their company-sponsored coverage (if applicable). Employees on military leave may continue coverage for themselves and dependents for up to 18 months.

Military service is considered "company service" for purposes of an employee's retirement plan where length of service is a factor. Retirement plan accrual and vesting must continue as if no break in service has occurred.

### **Notice**

USERRA requires that service members provide advance written or verbal notice to their employers for all military duty unless giving notice is impossible, unreasonable, or precluded by military necessity. However, the law does not specify how much notice must be given.

Upon return from service, the period an individual has to make application for reemployment or to report to work after military service is based on the time spent on military duty, unless injured or disabled during service, or due to circumstances beyond their control.

### **Reemployment Rights**

USERRA provides that returning service members be reemployed in the jobs that they would have attained had they not been absent for military service (the so-called "escalator" principle), with the same seniority, status, and pay, as well as other rights and benefits determined by seniority. With the exception of those disabled due to military service, the position into which a person must be reinstated is based on the length of military service.

The law also requires that reasonable efforts (e.g., training or retraining) be made to enable returning service members to refresh or upgrade their skills to help them qualify for reemployment. USERRA also provides for alternative reemployment positions if the service member cannot qualify for the "escalator position."

Reemployment rights are strictly enforced. It is not a sufficient excuse that another employee has been hired for the position or that no position is available. A very limited exception may exist if circumstances have changed such that reemployment is impossible (e.g., because of a RIF), unreasonable, or would cause an undue hardship. However, proceed with extreme caution and with the advice of legal counsel if you seek to use this exception.

### **Termination Without Cause**

In addition to reinstatement rights, returning service members are, in some instances, temporarily protected from termination without cause. The length of the protection depends upon the time of service.