

New USERRA Regulations. What Do You Know About Military Leave?

The long awaited Department of Labor (DOL) regulations interpreting the Uniformed Services Employment and Reemployment Rights Act (USERRA) have finally been issued. USERRA prohibits employment discrimination because of uniformed service and provides for benefit continuation and reemployment rights. The regulations take effect on January 18, 2006 and attempt to clarify the DOL's position and address some of the confusion among employers. The regulations can be found at www.dol.gov/vets. A revised USERRA notice poster may also be found there.

Before you read and savor the new regulations you may want to test your knowledge of military leave by taking the short quiz below.

Take The Military Leave True or False Quiz

1. **Employers with 15 or more employees must comply with the federal military leave law, USERRA.**
2. **USERRA requires that employers grant a leave of absence for up to 3 years.**
3. **Both full and part-time employees are protected under USERRA.**
4. **Temporary and seasonal employees as well as independent contractors are not protected by USERRA.**
5. **Although employer permission for leave is not required, written notice must be given at least 30 days in advance.**
6. **An employee who volunteers for extra training not required by the military is not covered by USERRA.**
7. **Federal law requires that military leave must be paid.**
8. **An employer may require an employee on military leave to use accrued leave (e.g., vacation or personal leave).**
9. **An employee's paid leave (sick, vacation, etc.) must accrue during his/her military leave period.**
10. **Health plan coverage does not need to be continued for an employee on a military leave.**
11. **An employee must inform his employer about his intent to return to work after military service.**

12. **A company is not required to reinstate an employee returning from military leave if his/her position has been filled or it no longer exists.**
13. **Disabled returning employees need not be reinstated to their jobs.**
14. **State law does not address military leave issues.**
15. **Time served in the military counts when calculating FMLA eligibility.**
16. **An employee must apply for re-employment (i.e. provide notice to the employer of intent to return to work) within 5 days after release from service.**
17. **Returning employees must be reinstated to the positions they held before entering service or to similar positions.**
18. **Returning veterans have greater protection from discharge than other employees.**
19. **Retirement plan eligibility, accrual and vesting must continue as if no break in service has occurred.**
20. **Individual managers and supervisors may be liable under the Act.**

Answers

1. **False.** The Act applies to all employers regardless of size.
2. **False.** The Act generally requires granting leaves of up to 5 years.
3. **True.** Part-time employees are covered regardless of the number of hours worked.
4. **False.** Temporary and probationary employees are protected from USERRA's anti-discrimination and anti-retaliation provisions. However, an employee need not be reemployed if the employment was for a brief period and there is no expectation that it would have continued for a significant period. Independent contractors are not covered.
5. **False.** It's true that an employer's permission is not required, however notice may be informal, oral or written, and should be given as far in advance as is practical. Thirty days notice is suggested but not required.
6. **False.** Voluntary and involuntary activities are protected.
7. **False.** Federal law does not require that a military leave be paid. However, exempt employees must be paid in accordance with Fair Labor Standards Act (FLSA) requirements (i.e., paid their full salary for any week in which they both work and take a military leave). Note, that some states, particularly regarding public sector employees, may require payment.

8. **False.** An employee may (but may not be required to) use accrued vacation or personal leave (but not sick leave) while on Military Leave. Employees who choose not to use their accrued leave must be entitled to use those days at a later time.
9. **False.** Upon reinstatement, an employee is entitled to use leave that was accrued before military service. However, USERRA does not require that the employee accrue additional leave while on military service unless other employees on leave may do so.
10. **False.** Although employees who enter military service receive health benefits, they may also continue their company-sponsored coverage (if applicable). Coverage may continue up to 24 months.
11. **False.** Additionally, reemployment rights cannot be waived. Even if the employee tells the employer before entering or completing uniformed service that he or she doesn't intend to seek reemployment, the employee does not forfeit the right to be reemployed.
12. **False.** 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 a company's circumstances have changed (e.g. reduction in force) such that reemployment is impossible, unreasonable, or that qualifying the individual for employment would cause an undue hardship on the company. However, proceed with extreme caution and with the advice of legal counsel if you seek to take advantage of this exception.
13. **False.** USERRA provides enhanced protection for disabled veterans, requiring employers to make reasonable efforts to accommodate disabilities. Service members convalescing from injuries received during service or training may have up to 2 years to return to their jobs.
14. **False.** State law regarding military leave varies considerably. Some states simply follow federal requirements, while others impose additional obligations beyond the federal USERRA. Many states provide additional protections to public sector employees only. A few states extend coverage to private sector employees as well. Some state coverage extends to National Guard service only, while others include any uniformed service. Remember, that where federal and state law conflict or overlap, the law which is most beneficial to the employee prevails.
15. **True.** An employee is entitled to the seniority and seniority based rights that she had when her service began, plus any she would have had if she had remained employed.
16. **False.** The period individuals have to make applications for re-employment or to report to work after military service is generally based on the time spent on military duty and may extend up to 90 days or longer if injured or disabled during service, or due to circumstances beyond their control.
17. **False.** USERRA employs the "escalator" principle, meaning that employees must generally be placed in the jobs that they would have attained had they not been absent for military service. Placement could include the escalator position, the preservice position, or comparable positions depending upon the employees' length of service and

- other circumstances. Further, employers are required to make reasonable effort to train or retrain returning service members so they qualify for re-employment.
18. **True.** A returning employee who serves from 31-180 days may not be discharged without cause for 180 days after re-employment. Protection extends to 1 year after re-employment for longer service.
19. **True.** For the purposes of calculating retirement benefits, reemployed service members are treated as if they were continuously employed.
20. **True.** USERRA has a broader definition of "employer" than is used in other discrimination acts. Very few people know anything about military leave requirements. To avoid discrimination charges, managers need training and must understand the basics.

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