

USERRA

What is the Uniformed Services Employment and Reemployment Rights Act?

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination against employees because of their service in the Armed Forces, the Reserves, or the National Guard. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for future membership, performance of service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after an absence due to military service, testing, or training.

Who does USERRA protect?

USERRA potentially covers every individual who has served or will serve in the uniformed services, and applies to all employers in the public and private sector, including federal employers. The law seeks to minimize disruption to the lives of servicemembers by ensuring that they are able to retain their civilian employment and benefits while serving their country, and by providing protection from discrimination because of their service. USERRA protections apply to all military service, whether voluntary or involuntary. State call-up of National Guardsmen is not covered by USERRA, but most states have enacted laws similar to USERRA to protect servicemembers recalled under state authority. USERRA does not protect members discharged or separated from the service under other than honorable conditions.

What are the obligations of an employer to a returning servicemember seeking reemployment?

There are four basic entitlements that must be provided by the employer:

- Prompt reinstatement. Depending on the length of absence, the servicemember must be reemployed promptly. This will generally be a matter of days rather than weeks.
- Accrued seniority. Servicemembers must be permitted to accrue seniority as if continuously employed. This entitlement applies to rights and benefits determined by seniority, and is especially important where seniority determines status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
- Training or retraining and other accommodations. The employer is obligated to train or retrain the servicemember for the job returned to. This is particularly important in the case of a long period of absence or a service-related disability.
- Special protection against discharge, except for cause. The employer may not discharge the reemployed servicemember for 180 days following periods of service of 31-180 days, or for one year where the member's service lasted more than 181 days.

What are the obligations of the servicemember seeking reemployment?

The servicemember is responsible for giving the employer notice of the possibility of an absence before active service begins. Notice is not required where prohibited by military necessity or where it would be unreasonable, but members are strongly encouraged to provide written notice to their employers, 30 days in advance if possible. Notice may also be provided to the employer by the member's command. The servicemember should also make reasonable efforts to maintain records that may be helpful upon return from an absence, including copies of signed orders, any relevant correspondence, and employer contact information. Depending on the length of absence, the member will be required to report back to work or apply for reemployment within a specified period of time, either two weeks for absences of 31-180 days, or 90 days for absences of 181 days or more.

What if a returning servicemember is disabled?

USERRA requires that the employer make "reasonable efforts" to accommodate persons with a disability incurred or aggravated during military service. If a person returns from military service suffering from a disability that cannot be accommodated by the reasonable efforts of the employer, the employer must reemploy the person in another position that is the "nearest approximation" of the position to which the person is otherwise entitled and qualified for, in terms of status and pay, with full seniority. A disability need not be permanent to confer rights under USERRA. For example, if a person breaks a leg during annual training, the employer may have an obligation to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg has healed.

What happens if an employer discriminates against a servicemember?

USERRA provides that a denial of employment or an adverse action taken by an employer is unlawful if a member's connection with a service is a motivating factor (not necessarily the only factor) in the denial of reemployment or other adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership ... or obligation."

What remedies are available?

Remedies to a claimant under the law may flow from two different processes. The first is the administrative route (handled by the United States Department of Labor, VETS). The second is the litigation route (handled by the U.S. Attorney General or the Office of Special Counsel). Remedies may differ depending on which route is chosen. Remedies available through the administrative route can include: return to a position, back pay, restored benefits, restored promotional opportunities, retroactive seniority, pension adjustments, corrected personnel files, and restored vacation.

In a court action, possible remedies include all those available administratively. The claimant can only recover dollar-for-dollar losses. Where violation is found to be willful, the court may double any amount owed to the claimant as liquidated damages. The court may not, however, impose any punitive damages under USERRA.

What is the procedure for filing a claim?

The Department of Labor, through the Veterans' Employment and Training Service (VETS) provides assistance to all persons with claims under USERRA. If the dispute is not resolved following an investigation, the servicemember may have his or her claim referred to the Department of Justice for consideration of representation in the appropriate District Court, at no cost to the claimant. Claims of Federal and Postal Service employees may be referred to the Office of Special Counsel for consideration of representation before the Merit Systems Protection Board (MSPB). Individuals who pursue their own claims in court or before the MSPB may be awarded reasonable attorney and expert witness fees if they prevail. Questions or assistance regarding rights and obligations under USERRA should be referred to the nearest Veterans' Employment and Training Service office listed in the phone book under U.S. Government; Labor Department. You can also get the phone number of the nearest VETS Office by making a Legal Assistance appointment.

Family and Medical Leave Act (FMLA). National Guard and reservists returning to civilian occupations should have their active duty time counted towards their eligibility to take time off from work under FMLA. FMLA is a Federal law that provides eligible employees of a covered employer the right to take up to 12 workweeks of unpaid, job-protected leave, during any 12 months, for the birth and care of a newborn, adoption or foster care, or a serious health condition of the employee or certain family members. An eligible employee is one who meets certain requirements specified in the statute.

The Department of Labor has issued a memorandum that clarifies its position on the rights of returning uniformed service members to family and medical leave under USERRA. USERRA entitles returning service members to all the benefits of employment that they would have obtained if they had been continuously employed. Under ordinary circumstances, a worker becomes eligible for leave under the FMLA after working for a covered employer for at least 12 months, during which he or she completed at least 1,250 hours of work. The memorandum says that employers should count the months and hours that reservists or National Guards would have worked if they had not been called up for service towards FMLA eligibility.

- DOL Policy Memorandum: <http://www.dol.gov/vets/media/fmlarights.pdf>
- DOL News Release: <http://www.dol.gov/vets/media/fmlr.pdf>
- DOL FMLA Compliance Assistance: <http://www.dol.gov/esa/whd/fmla/index.htm>
- USERRA/FML Questions & Answers: <http://www.dol.gov/vets/media/fmlaq-a.pdf>