

Q & A on UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

INTRODUCTION:

The Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38 United States Code §§ 4301-4333, was passed by Congress to provide protection for servicemembers' employment and reemployment rights. Should you have a question regarding the applicability of USERRA to your individual situation please do not hesitate to seek advice from your local military legal assistance office.

QUESTIONS AND ANSWERS:

Q. AM I ELIGIBLE FOR REEMPLOYMENT RIGHTS IF I PERFORM MILITARY SERVICE?

A. Yes. Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), you are eligible. If you satisfy the following five criteria:

- a. You must hold a civilian job. (Jobs that are held for a brief period and not expected to last indefinitely do not qualify for protection.)
- b. You must give notice to your civilian employer that you will be leaving the job for military training or service.
- c. You must not exceed the five-year cumulative limit on period of service (see below).
- d. You must be released from service under honorable conditions.
- e. You must report back to your civilian job in a timely manner or submit a timely application for reemployment.

Q. DO I HAVE REEMPLOYMENT RIGHTS FOLLOWING VOLUNTARY MILITARY SERVICE?

A. USERRA applies to voluntary as well as involuntary military service, in peacetime as well as in time of war.

Q. WHAT KIND OF NOTICE MUST I GIVE MY CIVILIAN EMPLOYER?

A. Generally speaking, you must give advance written or oral notice to your employer. This is not required, however, if giving such notice is impossible, unreasonable, or prohibited by DOD regulations. The law does not say how much advance notice is required but you should give your employer as much lead time as possible.

Q. HOW IS THE FIVE-YEAR LIMIT COMPUTED?

A. There is a five-year limit on total military service under USERRA. Your military service after December 12, 1994, counts toward the cumulative five-year limit of service. However, when you start a new job with a new employer, you receive a fresh five-year entitlement. The five-year limit does not apply if:

a. You are unable (through no fault of yours) to obtain orders releasing you from service in excess of five years to fulfill an initial period of obligated service. This is generally imposed on aviators or others who undergo extensive initial training in certain technical military specialties.

b. Your required drills, annual training and other training duties are certified by the military to be necessary for professional development or training/retraining.

c. Your service was performed during time of war or national emergency or for other critical missions.

Q. I AM A FEDERAL EMPLOYEE, AND I RECEIVE 15 DAYS OF PAID MILITARY LEAVE EACH YEAR. MAY I TAKE TIME OFF FROM WORK BEYOND THIS 15 DAYS?

A. Yes. When you have exhausted your right to paid military leave, you still have the right to use your accrued civilian leave or to take an unpaid leave of absence.

Q. CAN I BE REQUIRED TO USE MY EARNED VACATION WHILE PERFORMING MILITARY SERVICE?

A. No. You may not be forced to use earned vacation. You are entitled to earned vacation or leave in addition to time off taken to perform military service. An exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and your period of military service happens to coincide with that period.

Q. HOW LONG DO I HAVE TO REPORT BACK TO WORK OR APPLY FOR REEMPLOYMENT?

A. For periods of service of up to 30 consecutive days, you must report back to work for the first full regularly scheduled work period on the day following the completion of the period of service and safe transportation home plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of your own, you must report back as soon as possible after the end of the 8-hour period.

After a period of service of 31-180 days, you must submit an application for reemployment, either written or oral, with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of your own, you must submit it as soon as possible thereafter.

After a period of service of 181 days or more, you must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines can be extended up to two years to accommodate a period during which you were hospitalized for or recovering from a service-connected injury or illness.

Q. WHAT IF I AM LATE IN REPORTING BACK TO WORK AND I DON'T HAVE A VALID EXCUSE?

A. You do not automatically forfeit your right to reemployment, but you will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

Q. DO I HAVE THE RIGHT TO EMPLOYEE BENEFITS DURING MY MILITARY TRAINING?

A. Yes. USERRA gives you the right to elect continued health insurance coverage for yourself and dependents during periods of military service. For periods of up to 30 days of training or service, the employer can require you to pay only the employee share of the cost of such coverage. For longer tours, the employer is permitted to charge you up to 102 percent of the entire premium. If you elect coverage,

your right to that coverage ends on the day after the deadline for you to apply for reemployment or 18 months after your absence from your civilian job began, whichever comes first.

USERRA gives you and your previously covered dependents the right to immediate reinstatement of your civilian health insurance coverage upon return to your civilian job. There can be no waiting period and no exclusion of preexisting conditions (other than for those conditions determined to be service-connected). This right does not depend on your having chosen to continue that coverage during your service.

To the extent that your employer offers other non-seniority benefits (e.g. holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you during your period of military service. If the employer's treatment of persons on leave of absence varies according to the kind of leave (jury duty, educational, etc.), then the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length.

Q. TO WHAT AM I ENTITLED UPON MY APPLICATION FOR REEMPLOYMENT?

A. You have four basic entitlements:

- a. Prompt reinstatement (generally a matter of days, not weeks, but this will depend on the length of your absence).
- b. Accrued seniority, as if you had been continuously employed. This applies to rights and benefits determined by seniority as well, such as job status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
- c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
- d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year.

Q. WHEN I RETURN FROM MILITARY DUTY WILL I GET MY OLD JOB BACK?

A. USERRA provides that, if your period of service was less than 91 days, you are entitled to the job you would have attained if you hadn't left, provided that you are still, or can become, qualified for that job. If you are unable to become qualified for a new job after reasonable efforts by your employer, you are entitled to the job you left.

For periods of service of 91 days or more, the employer may reemploy you in the position you would have attained or position you left, or in a position of "like seniority, status and pay" to the duties of your old job.

Even a temporary job may get USERRA protection provided there was a reasonable expectation that employment will continue indefinitely or for a significant period.

Q. WHAT IF I'M NOT QUALIFIED FOR MY OLD JOB? WHAT IF I'M INJURED OR DISABLED?

A. If you have been gone from your civilian job for months or years, your civilian job skills may have been dulled by a long period without use. You must be qualified to do the job in order to have reemployment rights, but the law requires the employer to make "reasonable efforts" to qualify you.

"Reasonable efforts", means actions, including training, that don't cause undue hardship to the employer. If you can't become qualified after reasonable efforts by your employer and you are not disabled, you must be employed in another position of lesser status and pay, the duties of which you are qualified to perform, with full seniority.

USERRA also requires the employer to make "reasonable efforts" to accommodate a service-connected disability. If upon your return from military service you are suffering from a service-connected disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy you in some other position that you are qualified to perform and which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status and pay.

A disability need not be permanent in order to confer rights under USERRA. For example, if you break your leg during your annual training, your employer may have an obligation to reasonably accommodate your broken leg, or to place you in another position, until your leg has healed.

Q. DOES THE NEW LAW PROTECT ME FROM DISCRIMINATION BY MY EMPLOYER OR A PROSPECTIVE EMPLOYER?

A. Yes. Section 4311(a) of USERRA states that service members "...shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer" on the basis of military service. The Act further provides protection against retaliation for exercising one's right under USERRA such as by testifying, initiating a complaint, or helping with an investigation.

Q. WHERE DO I GO FOR MORE INFORMATION OR FOR HELP?

A. You may contact your local legal assistance office with questions or concerns about your civilian job. Contacting a judge advocate for help may be the best step. Furthermore, if you believe your employer has violated your rights under USERRA and you wish to file a formal complaint, contact the Veterans' Employment and Training Service (VETS) of the United States Department of Labor.

You can call (800) 442-2838 to obtain the address and telephone number of the VETS office closest to you. VETS is required to investigate all complaints. Under the new laws, VETS will perform investigations for federal employees claiming reemployment rights, as well as employees of state and local governments and the private sector.

(Adapted, with prior permission, from the State of North Carolina Legal Assistance for Military Personnel Take 1 Handout.)