

# An Updated Look at USERRA

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## History:

The Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. 4301-4334) became law on 13 October 1994. It was enacted to protect the rights of persons who voluntarily or involuntarily leave employment positions for military service. USERRA authorized the Secretary of Labor (with the Secretary of Defense) to prescribe rules implementing the provisions to states, local governments, and private employers.

In December 2005, the Department of Labor issued final regulations to implement the USERRA and provide guidance on its enforcement.

## Definitions:

Under USERRA, “military service” is defined as duty on a voluntary or involuntary basis in a uniformed service (active duty, active and inactive duty for training, National Guard duty under federal statute, and performance of funeral honors duty). USERRA coverage also applies to service as a disaster response appointee of the National Disaster Medical System (NDMS), the commissioned corps of the Public Health Service (PHS); and attendance at a military service academy. Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC will not be protected under USERRA unless they are receiving active duty or inactive duty training service credit with their unit. USERRA also does not protect individuals serving in the National Oceanic and Atmospheric Administration (NOAA); Civil Air Patrol; or Coast Guard Auxiliary.

USERRA’s definition of employer includes a person, institution, organization, or other entity that has denied employment (initial or post-deployment) to an individual because of his/her membership, application for membership, or application or performance of service in the military. An employer will also be liable if it denies employment based on the individual’s action to enforce a protection afforded to any person under USERRA, and in addition, if an employer withdraws an offer of employment because an individual is called to fulfill his/her military obligation.

USERRA classifies a member’s period of service as a “furlough” or “leave of absence” from his/her civilian employer. During this period, an employer may provide a member greater rights and benefits than USERRA requires, but may not refuse to provide any right or benefit guaranteed by USERRA. USERRA supersedes any state law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA.

## Protection from Employer Discrimination and Retaliation:

Initial employment, reemployment, retention, promotion, or any benefit of employment may not be denied a member because of his/her membership or application for membership in the service. An employer is prohibited from retaliating against an individual because of his/her taking any action (testifying, verbal or written statement, or assisting in the investigation) to enforce this protection. The discrimination and retaliation prohibitions apply to all employers, potential employers, and employment positions (full-time, brief, nonrecurrent, or no reasonable expectation that the employment position will continue indefinitely or for a significant period).

If discrimination or retaliation should occur, the member has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him/her. Once this burden is met, the employer has the burden to prove it would have taken the action anyway.

## Eligibility for Reemployment:

A member who has been absent from civilian employment (public or private employer in the United States) by reason of service is eligible for reemployment under the following criteria: (1) Employer receipt of advance notice of the employee’s service; (2) Five or less years of cumulative service during employment relationship with the employer; (3) Timely return to work or application for reemployment; and, (4) Not separated from service because of a disqualifying discharge or under other than honorable conditions. The USERRA provisions also include an employer’s successor in interest.

USERRA rights are not diminished when a member holds a temporary, part-time, probationary, or seasonal employment position. Employment is not required if the employment was for a brief, nonrecurrent period with no reasonable expectation of continued employment. Similarly, an employee laid off with recall rights, on strike, or on a leave of absence is protected under USERRA, while an independent contractor is not eligible for protection under USERRA.

## Protection against Discharge:

If the member’s period of service was more than 30 days but less than 181 days, he/she must not be discharged for 180 days after the date of reemployment. If the member’s period of service

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was more than 180 days, he/she must not be discharged for one year after the date of reemployment. However, the member may be discharged for cause based either on conduct or the application of other legitimate nondiscriminatory reasons (job is eliminated, placed on layoff status, etc.). Under either scenario, the employer will bear the burden of proof.

### **Requirement of Notice:**

A member, or an appropriate officer of the service (32 C.F.R.104.3) in which he/she serves, while not required to ask permission must notify the employer (all, if more than one) that he/she intends to leave the employment position to perform service. The notice may be either verbal or written and does not need to follow any particular format.

The member is also not required to decide in advance of leaving the employment position whether he/she will seek reemployment. In addition, a member will not forfeit the right to reemployment if he/she advises the employer, before entering or during service, that he/she does not intend to seek reemployment.

### **Period of Service:**

A member is entitled to a leave of absence for up to five years with each employer. With multiple employers, a separate five-year period runs for each one independent of the other. Exceptions to the five year limit: (1) Service required to complete an initial period of obligated service; (2) Employee unable to obtain orders releasing him/her from service before the expiration of the five-year period; (3) Service performed to fulfill periodic National Guard and Reserve training requirements; (4) Ordered to or retained on active duty; and (5) Service performed in support of an operational mission.

### **Application for Reemployment:**

Upon completion of service, the member must notify the employer of his/her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. The length of service determines the time required to report to back to work or to submit a timely application for reemployment: (1) Period of service less than 31 days, the member must report back to the employer not later than the beginning of the first full regularly scheduled work period following the completion of service after an eight-hour period for safe transportation home; (2) Period of service more than 30 days but less than 181 days, the member must return or apply for reemployment (written or verbal) not later than 14 days after completion of service; or (3) Period of service more than 180 days, the member must return or apply for reemployment

(written or verbal) not later than 90 days after completion of service. A hospitalized or convalescing member must report to or submit an application for reemployment to the employer at the end of the period (not to exceed two years) necessary for recovering from the illness or injury.

The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. If documentation is received after reemployment that shows the member is not entitled to reemployment, the employer may terminate the employment and any rights or benefits he/she were granted.

### **Character of Service:**

A member eligible for reemployment will be disqualified under the following circumstances: (1) Separated with a dishonorable or bad conduct discharge; (2) Separated under other than honorable conditions; (3) Commissioned officer dismissed by sentence of a general court martial; or, (4) Commissioned officer dropped due to absence without authority (at least three months); confinement adjudged by a court martial; or, confinement in a federal or state penitentiary or correctional institution. A military review board has the authority to upgrade prospectively or retroactively (obtain reinstatement) a disqualifying discharge or release. Back pay and other benefits (pension plan credits) are not required to be restored to the member.

### **Health Plan Coverage:**

A health plan (insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement) covered member must be permitted to elect to continue the coverage. The plan must allow the member to elect to continue coverage for a period of time that is the lesser of: (1) A 24-month period beginning on the date the member begins service; or (2) The date the member begins service, and ending on the date he/she fails to return from service or applies for reemployment. The plan criteria is as follows: (1) *Performance of fewer than 31 days of service*, member may not be required to pay more than the regular employee share, if any, for health plan coverage; and (2) *Performance of 31 or more days of service*, member may not be required to pay more than 102 percent of the full premium under the plan (employer and employee share plus two percent for administrative costs).

USERRA does not require an employer to establish a health plan if there is no coverage in connection with the employment. It also does not require an employer to allow the employee to initiate new health plan coverage at the beginning of a period of service. However, health plan coverage terminated due to service must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement upon reemployment.

### Reemployment Position:

A member returning from active duty is entitled to reemployment (as soon as practicable under the circumstances) in the job position that he or she would have attained with reasonable certainty if not for the absence due to service (the “escalator position”). Prompt reinstatement means the next regularly scheduled working day after a Reserve or National Guard weekend or several weeks for a member returning from several years of active duty (employer may have to reassign or give notice to another employee who occupied the returning employee’s position). The position must reflect the pay, benefits, seniority, and other job prerequisites (prospects for future earnings and advancement) that he or she would have attained.

USERRA also does not prohibit lawful adverse job consequences that result from the member’s restoration on the seniority ladder. The escalator principle may cause a member to be reemployed in a higher or lower position, laid off, or even terminated.

Member must be reemployed according to the following priority: (1) The escalator position (if qualified for the position); (2) If not qualified, in the position in which he or she was employed on the date service began; and (3) If not qualified for preservice position, in any other position that is the nearest position. If two or more members are entitled to the same position and both have applied for reemployment in that position, the member who first left the position for service has priority to the position.

A disabled member is also entitled to reemployment to the escalator position. The employer must make reasonable efforts to accommodate the disability and help the member become qualified to perform the duties of the position. If the member is not qualified for the position as a result of the disability, he/she is to be employed according to the following priority: (a) Equivalent position of seniority, status, and pay; or (b) Position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee’s case, in terms of seniority, status, and pay.

### Pension Plan Benefits:

On reemployment, by reason of his/her period of services, the member must be treated as not having a break in service for purposes of participation, vesting, and accrual of benefits. The

period between leaving service and reporting to work or applying for reemployment must also be treated as continuous service with the employer. If a member is hospitalized or convalescing from an illness or injury (incurred or aggravated during service), the time period necessary for him/her to recover will be treated as continuous service with the employer for participation, vesting, and accrual of pension benefits under the plan.

USERRA covers ERISA and state, government entity, or religious organization sponsored pension plans. USERRA does not cover the Federal Thrift Savings Plan.

An employer will not be required to make any plan contribution until the member is reemployed. Upon reemployment, the employer is liable to fund any plan obligation attributable to the member’s period of service. In a defined contribution plan, the employer must allocate the amount of makeup contributions or elective deferrals in the same manner and extent that it allocated the amounts for other employees during the period. With a defined benefit plan, the member’s accrued benefit will be increased for the period of service upon payment of any member contributions required to be made under the plan. With a contributory plan, the member is allowed (but not required) to make up missed contributions or elective deferrals. The makeup contributions or elective deferrals must be made between the date of reemployment and for up to three times the length of the employee’s immediate past period of service (not to exceed five years). A member’s makeup contributions or elective deferrals may only be made during this period and while employed with the post service employer. The employer contributions must be made not later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service was performed.

### Compliance, Assistance, Enforcement and Remedies:

The Secretary of Labor, through the Veterans’ Employment and Training Service (VETS), provides assistance to any person or entity with respect to rights and benefits under USERRA. This assistance includes responding to inquiries; conducting USERRA briefings and Web casts issuing news releases; and, maintaining the laws. ↴

## Naval Reserve Association 2006 Conferences

**Spring 2006 Conference – Washington, DC  
Sheraton Crystal City; 20-22 April 2006**

**Fall 2006 Conference – Portland, OR  
Benson Hotel; 5-7 October 2006**

## DoD Deployment Health and Family Readiness Library

*By CAPT Tom McAtee*

This unique library provides service members, families, veterans, and health care providers an easy way to find quickly deployment health and family readiness information. Within this library, you will find access to fact sheets, guides, and other products on a wide variety of topics published by the services and organizations that serve you. You will also find additional Web site links to other organizations and resources devoted to the health and welfare of the service member and his/her family.

To access the library, go to:

**<http://deploymenthealthlibrary.fhp.osd.mil/home.jsp>**

## Attention Florida Business Owners

*By CAPT Tom McAtee*

Any Florida business that pays wages to an employee who is a Florida resident actively serving in the U.S. Armed Forces Reserves or FL National Guard may be reimbursed for up to 50 percent of supplemental wages paid to their employees. Businesses will be reimbursed 50 percent of the difference between the employee's monthly wage and the employee's active duty base pay and applicable allowances. Funding is limited and available on a first come, first served basis.

For more details, call the Agency for Workforce at:

**1-800-342-3450**

**or**

**log on to**

**[www.floridajobs.org/citizen\\_soldier/index.html](http://www.floridajobs.org/citizen_soldier/index.html)**