

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

CANNON LAW CENTER
2006



The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted in October 1994 (and significantly updated in 1996 and 1998), provides reemployment protection and other benefits for veterans and employees who perform military service.

Recently, the Department of Labor has released the much-anticipated final rules on the enforcement of the USERRA. The rules should clarify and increase enforcement of the law. The final rules were published in the CFR and will be effective on 18 Jan 06. For more information, please see the link below for the language of the final rule.
<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-23961.htm>.

The new regulations, drafted in question-and-answer format, explain how USERRA protects against discrimination and retaliation because of military service; prevents service members from suffering disadvantages due to performance of their military obligations, and affords them ample time to report back to jobs following completion of their service obligations.

USERRA PROTECTION APPLIES IF YOU MEET ALL OF THESE TESTS:

Job. You must have had a civilian job before you left to perform military service. USERRA applies to all private employers, the states, and the federal government. There is no exception for small employers.

Notice. You (or a responsible officer from your military service) must give advance notice to your employer that you are leaving before leaving for active duty. Notice can be oral or in writing, but written notice is best, and you should retain a copy of the letter.

Length of Service. Your service did not exceed the five-year cumulative limit

Character of service. USERRA protections apply if you are discharged with an Honorable or General discharge. You are not protected if your active duty ends with an Other Than Honorable Discharge, a Bad

Conduct Discharge, or a Dishonorable Discharge, or you are dropped from the rolls.

Prompt return to work. You must report back to your civilian job in a timely manner or submit a timely application for reemployment.

Once you return to your civilian employer after active duty, USERRA says that status, seniority, and most pension rights must be reinstated as if you never left. Your employer should reinstate your health benefits. You are also protected from termination other than for just cause for a period of time varying with the length of the active duty commitment.

TYPES OF MILITARY SERVICE COVERED

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as in time of war for all reservists and National Guard members performing federal service.

THE FIVE-YEAR LIMIT

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.

VACATION/LEAVE TIME

Some employers give employees paid military leave. For example, federal employees have a right to fifteen days of paid military leave each fiscal year. Such rights are independent of USERRA. Some employers prefer for employees to use vacation days or paid leave to perform military training. Employees have the right to use "vacation, annual, or similar leave with pay" before beginning military service. The decision whether to take such leave is the employee's. The employer cannot require the employee to do so.

WAIVER OF RIGHTS

An employer may ask a departing soldier to sign a statement saying the soldier does not intend to return to the civilian job, or a more limited waiver of the soldier's right to seniority and/or non-seniority benefits. Despite such a waiver, a soldier never gives up his or her rights to reemployment, nor the right to be treated as continuously employed for seniority purposes upon return to the job. A statement of non-return, however, does waive non-seniority benefits. To be effective, a waiver must be made with full knowledge of the rights the soldier is giving up, and the employer bears the

burden of proof on this issue. Signing such a waiver will almost never be in a soldier's best interest.

REPORTING BACK TO WORK OR APPLYING FOR REEMPLOYMENT

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.

EMPLOYEE BENEFITS DURING MILITARY SERVICE

USERRA gives you the right to elect continued health insurance coverage for yourself and dependents during periods of military service. While family members of Guard and Reserve members called to active duty for more than 30 days are eligible for TRICARE benefits the day their military sponsor mobilizes, TRICARE does not cover family members for tours of 30 days or less, so it makes sense for most soldiers with family members to continue private family member coverage for tours of up to 30 days.

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.

ENTITLEMENTS UPON REEMPLOYMENT

There are four basic entitlements to reemployment under USERRA:

Prompt reinstatement (generally a matter of days, not weeks, but this will depend on the length of your absence).

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.

Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.

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.

RETURNING TO YOUR OLD JOB

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.

RETRAINING IF NO LONGER QUALIFIED

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.

REASONABLE ACCOMMODATIONS IF INJURED OR DISABLED

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.

ASSISTANCE & ENFORCEMENT

The Veterans' Employment and Training Service (VETS), United States Department of Labor, will assist persons claiming rights under USERRA, including persons claiming rights with respect to the federal government as a civilian employer.

Employers can be ordered to comply with the law and to compensate you for lost pay, including interest. VETS can be reached at (877) 889-5627 or (202) 695-4701. VETS can be reached on-line at <http://www.dol.gov/dol/vets>.

The National Committee for Employer Support of the Guard and Reserve (ESGR), provides representatives who mediate re-employment issues between former military members and their civilian employers through its Ombudsmen Services Program. ESGR can be reached at (800) 336-4590 or (703) 696-1400. In addition, their Web site at <http://www.esgr.org> provides information for mobilizing personnel and for employers.

More USERRA information:

The VETS web site at <http://www.dol.gov/dol/vets>, has a Non-technical Resource Guide to USERRA.

Also from the Department of Labor, Small Business USERRA Handbook, <http://www.dol.gov/asp/programs/handbook/userra.htm>.

Mobilizing federal civilian employees will find useful information on the OPM web site. <http://www.opm.gov/oca/compmemo/2001/2001-09.htm>