Military Status and Benefits Rights

# Introduction

Employment discrimination against veterans is prohibited by both the Uniformed Services Employment and Re-Employment Rights Act (USERRA) and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). USERRA applies to all employers, both public and private. VEVRAA applies to federal employers, federal contractors, and recipients of federal assistance.

# USERRA

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service. USERRA also prohibits employers from discriminating against past and present members of the uniformed services and applicants to the uniformed services. Uniformed services include the following:

- Army, Navy, Marine Corps, Air Force, and Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve.
- Army National Guard and the Air National Guard.
- Commissioned Corps of the Public Health Service.
- Certain disaster response work (and authorized training for such work) per the Public Health Security and Bioterrorism Response Act of 2002.
- Any other category designated by the President in time of war or emergency.

USERRA covers voluntary or involuntary uniformed service and includes time spent in any of the following:

- Active duty, initial active duty training, and active duty for training.
- Inactive duty training.
- Full-time National Guard duty.
- Funeral honors duty performed by the National Guard and reserve members.
- Absence from a position of employment for the purpose of an examination to determine fitness to perform any such duty.
- Certain types of service in the National Disaster Medical System.

## Basic Requirements

The preservice employer must re-employ service members returning from a period of service in the uniformed services if those service members meet five criteria:

- The person must have held a civilian job.
- The person must have given notice to the employer that they were leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable.
- The cumulative period of service must not have exceeded five years.
- The person must not have been released from service under dishonorable or other punitive conditions.
- The person must have reported back to the civilian job in a timely manner or have submitted a timely application for re-employment.

USERRA establishes a five-year cumulative total on military service with a single employer, with

certain exceptions allowed for situations such as call-ups during emergencies, reserve drills, and annually scheduled active duty for training.

Employers are required to provide to persons entitled to the rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA.

USERRA also allows an employee to complete an initial period of active duty that exceeds five years (for instance, enlistees in the Navy's nuclear power program are required to serve six years).

## Notice Requirements

### *Employer Notice Requirements*

According to 38 U.S.C.A. § 4334, all employers are required to provide notice of USERRA protections to persons who are entitled to such protections.

The employer-provided notice must also inform the applicable individuals of their rights, benefits, and obligations under USERRA, as well as the employer's obligations. The U.S. Secretary of Labor will provide employers with the text of the required notice. Additionally, employers who post the notice where other notices for employees are customarily placed meet the USERRA notice requirement.

### *Employee Notice Requirements*

With exception, employees are required to provide their employers with reasonable advance notice of military service. Notice may be either written or verbal. The employee or an appropriate officer of the branch of the military in which the employee will be serving may provide the notice.

No notice is required under either of the following circumstances:

- Military necessity prevents the giving of notice.
- The giving of notice is otherwise impossible or unreasonable.

## Prohibited Discrimination and Retaliation

The following individuals of the uniformed service are protected from discrimination and retaliation by employers:

- Past or present members.
- Applicants for membership.
- Those obligated to serve.

However, persons who have received dishonorable discharges or were separated from the uniformed service under other than honorable conditions are not protected by USERRA.

USERRA prohibits employers from denying any of the following based on membership, application for membership, performance of service, application for service, or obligation in the uniformed services:

- Initial employment.
- Re-employment.
- Retention in employment.
- Promotions.
- Any other employment benefit.

An employer may not discriminate in employment or take any adverse employment action against any person because such person:

- Acted to enforce a protection afforded any person under USERRA.
- Testified or otherwise made a statement in or in connection with any proceeding under USERRA.
- Assisted or otherwise participated in an investigation under USERRA.
- Exercised a right provided by USERRA.

These retaliation protections apply regardless of whether a person has performed service in the uniformed services or not.

## Re-Employment Rights for Veterans

An employee absent from work due to service in the uniformed services is entitled to prompt re-employment, as soon as practicable under the circumstances, if any of the following apply:

- The employee has given either written or verbal advance notice of service to the employer, unless giving notice is prevented by military necessity or is otherwise impossible.
- The cumulative length of all absences because of service does not exceed five years, unless the employee is required or ordered to remain in service beyond five years. Eight categories of service are exempt from the five-year limitation. These include the following:
  - Service required beyond five years to complete an initial period of obligated service.
  - Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit.
  - Required training for reservists and National Guard members.
  - Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations.
  - Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress.
  - Active duty (other than training) by volunteers supporting operational missions for which Selected Reservists have been ordered to active duty without their consent.
  - Service by volunteers who are ordered to active duty in support of a critical mission or requirement in times other than war or national emergency and when no involuntary call up is in effect.
  - Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.
- The person reports to, or submits an application for re-employment to, their employer in accordance with the law.

Although prompt reinstatement may be as soon as practicable under the circumstances, the general rule requires employers to reinstate an employee within two weeks after the employee reapplies for employment.

## Length of Service

Employees must report to employers or apply for re-employment within specified time periods to be eligible for re-employment. The time periods for such reporting or applying depend upon the length of the employee’s uniformed service.

Employers may require that employees be timely in submitting documentation with their application, that they have not exceeded their service limitations, and that their separation from the uniformed service was under honorable conditions.

The following lengths of service and employee obligations apply:

- **Service of 1 to 30 days:** Must report to the employer by the beginning of the first regularly scheduled workday that would fall eight hours after the end of the calendar day. If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.
- **Service of 31 to 180 days:** Must submit an application for re-employment (in writing or verbally) within 14 days after the completion of service. If submission of a timely application is impossible or unreasonable through no fault of the employee, the application must be submitted no later than the next full calendar day after it becomes possible to do so. If the 14th day falls on a day when offices are not open or there is no one available to accept the application, the time extends to the next business day.
- **Service of 181 or more days:** Must submit an application for re-employment within 90 days after the completion of service. If the 90th day falls on a day when offices are not open or there is no one available to accept the application, the time extends to the next business day.
- **Fitness-for-service exam:** Same obligations as employees who are absent 1 to 30 days. This period of time applies regardless of the length of the person's absence.

If an employee is hospitalized or convalescing from an illness or injury related to their period of service, the employee must report to the employer or submit an application once the recovery period has ended. The recovery period may not exceed two years unless circumstances beyond the employee's control make reporting or applying within two years impossible or unreasonable.

Importantly, re-employment rights are not automatically forfeited where an employee fails to report to work or apply for re-employment within the required time limits. However, the individual will then be subject to the employer's rules governing unexcused absences.

## Application Format

Per USERRA, a re-employment application does not need follow any particular format. The employee may apply verbally or in writing. The employee should indicate that they are a former employee returning from service in the uniformed services and that they seek re-employment with the preservice employer. The employee is permitted but not required to identify a particular re-employment position in which the employee is interested.

### *Documentation*

Upon the employer's request, a person who submits an application for re-employment must provide the employer with documentation to establish all of the following:

- The person's application is timely.
- The person has not exceeded the service limitations, except as permitted.
- The person's entitlement to benefits has not been terminated.

With exception, the failure of a person to provide such documentation is not a basis for denying re-employment if the failure occurs because such documentation does not exist or is not readily available at the time of the employer's request.

If, after re-employment, documentation becomes available that establishes that the person did not meet one or more of the requirements for re-employment, the employer may terminate the employment of the person and the provision of any rights or benefits afforded the person under USERRA.

An employer who re-employs a person absent from a position of employment for more than 90 days may require that the person provide the employer with the aforementioned documentation before beginning to treat the person as not having incurred a break in service for pension purposes. However, an employer may not delay or attempt to defeat a re-employment obligation by demanding documentation that does not then exist or is not then readily available.

## Exceptions to the Right of Re-Employment

An employer is not required to re-employ an employee upon completion of uniformed service if the employer proves any one of the following:

- The employer's circumstances have so changed as to make re-employment impossible or unreasonable. For example, if an employer has closed the plant at which the employee formerly worked, re-employment would not be required.
- The initial employment was for a brief, nonrecurring period with no reasonable expectation that it would continue indefinitely or for a significant period. For example, if an employer hires extra employees only for the holiday shopping rush, re-employment would not be required.
- The employee was disabled during the period of service and is no longer qualified to resume their prior position even with reasonable accommodation, and additional training or effort by the employer would impose an undue hardship.

Additionally, under any of the following circumstances an employee's uniformed service may be disqualified from the USERRA protections:

- The employee was separated from the service with a dishonorable or bad conduct discharge.
- The employee was separated from the service under other than honorable conditions.
- The employee was a commissioned officer who was dismissed from service in certain situations involving a court martial or by order of the President in a time of war.
- The employee was dropped from the rolls because they were absent without authority for more than three months or was imprisoned by a civilian court.

## Positions upon Re-Employment

With exception, the position into which a person is reinstated is based on the length of the individual's military service.

### ***Service 1 to 90 Days***

An employee whose military service lasted 1 to 90 days must be promptly re-employed in the following order of priority:

- The job the person would have attained with reasonable certainty if the person remained continuously employed, assuming they are qualified for that job.
- In the position of employment in which the person was employed on the date of the commencement of military service.
- After reasonable employer efforts, if the employee cannot become qualified for the prior position the person is then to be re-employed in a position that is most similar to the prior position where the person is actually able to perform the job requirements, with full seniority.

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

### *Service 91 or More Days*

Employers must promptly re-employ persons returning from military service of 91 or more days in the position that the employee would have attained with reasonable certainty if the person had remained continuously employed, or a position of like seniority, status, and pay. However, if the employee is not qualified for the position, then reinstatement must occur in the position held when the service began or one with like seniority, status, and pay.

### *Employees with a Disability*

Employers are required to re-employ persons with disabilities incurred or aggravated while in military service. Employers must make reasonable efforts to accommodate a person's disability so that the person may perform the position that would have been held with continuous employment.

If, despite reasonable accommodation efforts, the person is not qualified for their previous position due to disability, the person must be employed in a position of equivalent seniority, status, and pay, as long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer. If the person does not become qualified for the position, re-employment must be met through placement in the closest position with comparable terms of seniority, status, and pay.

### *Nonqualified Employees with a Disability*

If an employee is not qualified to perform the duties of the position to which they are entitled due to a disability incurred or aggravated during service, then the employee must be placed in a position of equivalent seniority, status, or pay if the employee can perform the duties of the position.

### *Nonqualified Employees without a Disability*

If an employee is not qualified to perform the duties of the position to which they are entitled for any reason other than disability and cannot become qualified with reasonable effort, then the employee must be placed in any other position with lesser status and pay in which they are qualified to perform and must be given full seniority.

## Employment Benefits

### *Seniority Based Employment Benefits*

Upon re-employment, employees are entitled to all of the seniority-based employee benefits they had when their uniformed service began plus any additional benefits they would have accrued had they remained continuously employed. For example, if vacations are determined by the number of years of service, the period spent in uniformed service would count in determining the number of vacation days employees receive upon their return.

### *Nonseniority Based Employment Benefits*

Employees are entitled to benefits not determined by seniority according to the employer's general policy for employees who are on leaves of absence. Departing service members must be treated as if they are on a leave of absence. Consequently, while employees are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid.

Employees may choose, but cannot be required, to use accrued vacation or similar leave with pay during the period of uniformed service. Additionally, returning employees are entitled to nonseniority rights and benefits available at the time they left for military service and those that became effective during service

### *Health Care Benefits*

USERRA provides for health benefit continuation for people who are absent from work to serve in the military, even when COBRA does not cover the employer. Under USERRA, all employer-sponsored health care plans are required to provide COBRA-type coverage for up to 24 months after the employee's absence begins due to military service or for the period of uniformed service. Specifically, the maximum period of coverage for such an employee and their dependents is the lesser of 24 months beginning on the date the employee's absence began or the day after the date on which the employee failed to apply for or return to a position of employment. Additionally, employees or dependents who elect this coverage may be required to pay a premium similar to COBRA (no more than 102 percent of the full premium under the plan, plus 2 percent for administrative cost). However, a person who performs military service for less than 31 days may not be required to pay more than the employee share, if any, for such coverage.

Upon re-employment, employees and their dependents are entitled to restoration of the coverage they had prior to their uniformed service leave. Employers are prohibited from imposing exclusions and waiting periods, such as for pre-existing conditions, except for injuries or illnesses found to be service-related by the Veterans' Administration.

### *Pension Benefits*

USERRA obligates employers to credit employees with years of service while on uniformed service leave and to fund both defined benefit and defined contribution plans for those years. Contributions to defined contribution plans are based upon the rate of pay that employees would have received for that period or for the employees' average compensation during the 12 months preceding the period of service. However, employees are not entitled to earnings or forfeitures that would have been added to their accounts during the leave.

Employees must also be allowed to make up elective deferrals and required employee contributions. In addition, the employer must make any matching contributions required by the plan. Employees have three times the length of their leave (a maximum of five years) to make these contributions.

### *Pension Protection Act of 2006*

The Pension Protection Act of 2006 (PPA) provides that, for individuals called to active military duty for at least 179 days, early withdrawals from a 401(k) plan, § 403(b) plan, or similar arrangement can be made without paying the 10 percent excise tax on early distributions. The PPA also permits individuals who received "qualified reservist distributions" to make an after-tax contribution to a qualified retirement plan up to the amount of the qualified reservist distribution that had been received. The contribution may be made for up to two years after the end of active duty; however, it is not deductible. This provision applies to all individuals called to active duty after September 11, 2001, and before December 31, 2007.

### *Heroes Earning Assistance and Relief Tax Act of 2008*

According to the Heroes Earning Assistance and Relief Tax Act of 2008 (HEART), an employer's

retirement plan is permitted, but not required, to treat an individual who dies or becomes disabled while performing qualified military service as if the individual had resumed employment on the day before their death or disability and then terminated employment on the date of death or disability. Essentially, an employer may treat an employee who dies or becomes disabled in military service as though they worked until death or disability for benefit accrual purposes. If a plan sponsor includes this provision in its plan, all individuals who die or become disabled while performing military service must be credited with service and benefits on reasonably equivalent terms.

USERRA also provides that a returning employee is entitled to accrued benefits that are derived from employee contributions or elective deferrals that the employee makes up upon their return from active service. HEART provides that for an employee who dies or becomes disabled in active military service, the amount of contributions and elective deferrals for this purpose is determined based on the individual's average actual contributions or elective deferrals for the 12-month period of service with the employer immediately before the qualified military service, or the actual length of continuous service, if less.

These provisions (including the survivor benefit plan qualification requirement) apply with respect to deaths and disabilities occurring on or after January 1, 2007. Plan amendments must be made by the end of the last day of the first plan year beginning on or after January 1, 2010 (2012 for governmental plans). A plan will be treated as operating under its terms as long as the plan is amended retroactively and operated in accordance with the amendment from its effective date.

### *Differential Wage Payments*

Under § 105 of the HEART Act, differential wage payments are treated as wages for income tax withholding purposes. According to the IRS and applicable to all payments made after December 31, 2008:

- A person receiving a differential wage payment should be treated as an employee of the employer making the payment.
- The differential wage payment should be treated as compensation.
- Contributions or benefits based on a differential wage payment will not cause a plan to violate the nondiscrimination rules.

Additionally, § 111 of the HEART Act adds § 45P to the Internal Revenue Code, which provides that eligible small business employers that make differential wage payments to qualified employees who are on active duty in the uniformed services for more than 30 days (after 2008 and before 2010) may take a credit against its income liability based on the eligible differential wage payments. The amount of eligible differential wage payments that may be taken into account for the taxable year is limited to $20,000 per qualified employee, resulting in a maximum credit for a taxable year of $4,000 per qualified employee.

An employee is a ***qualified employee*** if they have been an employee of the taxpayer for the 91-day period immediately preceding the period for which differential wage payments are made. An employer is an ***eligible small business employer*** if it employed an average of fewer than 50 employees on business days during the taxable year and provides differential wage payments under a written plan to every qualified employee.

## Termination of Employment

USERRA limits employers' ability to terminate employees after re-employment from uniformed service. Persons who serve more than 30 days may not be discharged, except for cause, as follows:

- Within 180 days after the date of re-employment, if the person’s period of service before the re-employment was more than 30 days but less than 181 days.
- Within one year after the date of re-employment, if the person’s period of service before the re-employment was more than 180 days.

Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

### *Discharged for Cause*

An employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.

In a discharge action based on conduct, the employer bears the burden of proving all of the following:

- The reasonableness of discharging the employee for the conduct in question.
- The employee had notice, which was express or could be fairly implied, that the conduct would constitute cause for discharge.

If, based on the application of other legitimate nondiscriminatory reasons, the employee’s job position was eliminated or the employee was placed on layoff status, either of these situations would constitute cause for purposes of USERRA.

The employer bears the burden of proving that the employee’s job would have been eliminated or that the employee would have been laid off.

# VEVRAA

The Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) requires employers doing business with the federal government to take affirmative action to recruit, hire and promote categories of veterans covered by the law, including disabled veterans and recently separated veterans. Under VEVRAA, it is also illegal for these federal contractors and subcontractors to discriminate against protected veterans when making employment decisions on hiring, firing, pay, benefits, job assignments, promotions, layoffs, training and other employment related activities.

## Mandatory Job Listings

The Office of Federal Contract Compliance Programs (OFCCP) administers and enforces the affirmative action provisions of VEVRAA, which require Federal contractors and subcontractors to employ and advance in employment qualified covered veterans. To implement the affirmative action requirement, VEVRAA and the implementing regulations at 41 CFR Part 60-300 issued by OFCCP require federal contractors and subcontractors to list most employment openings with the appropriate employment service delivery system and each such employment service delivery system is required to give covered veterans priority in referrals to such openings. Executive and senior management positions, positions to be filled from within the contractor's organization, and positions lasting three days or less are exempt from the mandatory job listing requirement. Listing jobs with the State workforce agency job bank or with the local employment service delivery system where the opening occurs will satisfy the requirement to list job openings with the appropriate employment service delivery system.

## Affirmative Action

OFCCP regulations implementing VEVRAA also require certain Federal contractors and subcontractors to develop and maintain a written affirmative action program (AAP). The AAP sets forth the policies and practices the contractor has in place to ensure that its personnel policies and practices do not limit employment opportunities for covered veterans. The AAP also spells out the steps the contractor will take to recruit, train, and promote covered veterans.

## Reporting Requirements

VEVRAA requires federal contractors and subcontractors covered by the Act's affirmative action provisions to report annually to the Department of Labor's Veterans' Employment and Training Service (VETS), using the VETS-4212 Form, the number of employees in their workforces, by job category and hiring location, who are qualified covered veterans. VEVRAA also requires federal contractors and subcontractors to report the number of new hires during the reporting period who are qualified covered veterans.

## Recordkeeping

## Personnel Records

Federal contractors are required to maintain any personnel or employment records made or kept by the contractor. Examples of records that must be maintained include:

- Job descriptions.
- Job postings and advertisements.
- Records of job offers.
- Applications and résumés.
- Interview notes.
- Tests and test results.
- Written employment policies and procedures.
- Personnel files.

Federal contractors and subcontractors with fewer than 150 employees or a contract of less than $150,000 must keep records for one year from the date of the making of the personnel record or personnel action, whichever occurs later.

Federal contractors and subcontractors with 150 or more employees or who have a government contract of $150,000 or more must keep employment records for two years from the date of the making of the personnel record or personnel action, whichever occurs later.

For any record contractors maintain, they must be able to identify the gender, race, and ethnicity of each employee and where possible, the gender, race, and ethnicity of each applicant or Internet applicant, whichever is applicable to the particular position.

The Internet Applicant regulations address recordkeeping and the use of the Internet and electronic data technologies in contractors' recruiting and hiring processes. This rule includes soliciting data on the race, gender, and ethnicity of applicants.

## Additional Records

To enable contractors to assess the effectiveness of their outreach and recruitment activities over

time, certain types of records must be maintained for three years. These records are:

- Evaluations of outreach and recruitment efforts;
- Records pertaining to the data collection of comparisons regarding applicants and employees; and
- Records related to the hiring benchmark requirement.

### Affirmative Action Program

Federal supply and service contractors and subcontractors who employ 50 or more persons and have a contract of $50,000 or more (or have government bills of lading which in any 12-month period total or can reasonably be expected to total $50,000 or more; or serves as a depository of government funds in any amount; or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount) must develop and annually update a written affirmative action program (AAP) for each of their establishments. The OFCCP provides a Sample Affirmative Action Plan (PDF).

A contractor establishment required under E.O. 11246 to develop and maintain an AAP must preserve its AAP and documentation of its good faith efforts to affirmatively recruit and promote women and underrepresented individuals in accordance with its AAP for the immediately preceding year, unless the contractor establishment was not then covered by the AAP requirement.

Covered construction contractors and subcontractors are not required to develop a written AAP. However, they must maintain documentation of the actions they took to meet the contract specifications.

As a part of affirmative action, federal contractors and subcontractors are required to list with the local state employment service all employment openings except for the following:

- Executive and top management jobs.
- Jobs which the contractor expects to fill from within.
- Jobs lasting three days or less.

## State Laws

Some state also prohibits discrimination against persons who have served in the uniformed services. Illinois, for example, prohibits discrimination in employment against persons who have received an unfavorable military discharge. Under Illinois law, an unfavorable military discharge is one which is less than honorable, but not dishonorable.

## Practical Pointers

An employer **may**:

- Refuse to reinstate an employee who received a dishonorable discharge.
- Allow an employee to use vacation time when taking leave to serve in the uniformed services.
- Require an employee to submit documentation to establish that their application for re-employment is timely, that they have not exceeded the length of service limitations, or that their separation from service was honorable.
- Refuse to reinstate an employee if circumstances have changed to make reinstatement unreasonable, such as a reduction in force that would have encompassed the employee's job.
- Provide a reinstated employee with nonseniority based benefits according to the employer's policy

for employees who take leaves of absence.

An employer **may not**:

- Refuse to hire an applicant because of their prior uniformed service.
- Discharge an employee who will be absent from work for five years or less because of uniformed service.
- Discharge an employee after re-employment from uniformed service, except for just cause, within a set time (depending on length of service) after re-employment.
- Require an employee to use vacation time while on uniformed service leave.
- Impose exclusions or waiting periods for health care benefits upon re-employment, except for an employee who has sustained service-related injuries.
- Deny a re-employed employee seniority-based benefits that would have accrued had the employee remained employed.