

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), located at [38 U.S.C. §§ 4301 - 4335](#), was signed into law on October 13, 1994. USERRA clarifies and strengthens the Veterans' Reemployment Rights (VRR) statute. The purposes of USERRA are:

- To encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.
- To minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt re-employment of such persons upon their completion of such service.
- To prohibit discrimination against persons because of their service in the uniformed services.

USERRA applies to virtually all employers, regardless of size, including the federal government.

Note: The U.S. Office of Personnel Management has issued regulations that apply specifically to federal executive agencies.

Employment and Re-Employment Rights

USERRA provides for the employment and re-employment rights for all uniformed service members.

Eligibility

Re-employment rights extend to persons who have been absent from a position of employment because of service in the uniformed services. **Service in the uniformed services** means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty and active duty for training.
- Initial active duty for training.
- Inactive duty training.
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above-listed types of duty.
- Funeral honors duty performed by National Guard or reserve members.
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Health and Human Services, when activated for a public health emergency, and approved training to prepare for such service.

Uniformed services consist of the following:

- Service in the U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard.
- Service in the U.S. Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve.
- Service in the U.S. Army National Guard and Air National Guard.
- Service in the Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

Advance Notice

The law requires employees to provide their employers with advance notice of military service, with some exceptions. Notice may be either written or oral. It may be provided by the employee or by an

appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required when either:

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

Military necessity means a mission, operation, exercise, or requirement that is classified, or a pending or ongoing mission, operation, exercise, or requirement that may be compromised or otherwise adversely affected by public knowledge.

Duration of Service

USERRA re-employment rights apply if the cumulative length of service that causes a person's absences from a position does not exceed five years. Most types of service will be counted in the computation of the five-year period.

Exceptions

Eight categories of service are exempt from the five-year limitation. These include:

1. Service required beyond five years to complete an initial period of obligated service. Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.
2. Service from which a person, through no fault of his or her own, is unable to obtain a release within the five-year limit. For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea. Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in the Global War on Terror.
3. Required training for Reservists and National Guard members. The two-week annual training sessions and monthly weekend drills mandated by statute for Reservists and National Guard members are not counted toward the five-year limitation. Also excluded are additional training requirements certified in writing by the secretary of the service concerned to be necessary for individual professional development.
4. Ordered to involuntary service, or retained on active duty during domestic emergency or national security related situations. For example, as a result of the attacks on the World Trade Center in New York City, President Bush declared that a national emergency existed and members of the Ready Reserve were called to active duty.
5. Ordered to service, or to remain on active duty (other than for training) because of a war or national emergency declared by the President or Congress. This category includes service not only by persons ordered to involuntary active duty, but also service by volunteers who receive orders to active duty. For example, since September 11, 2001, Reservists were involuntarily called to active duty under federal orders for Operations Noble Eagle, Enduring Freedom, and Iraqi Freedom. Additionally, Reservists and retirees (who were not called) volunteered for active duty.
6. Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent. Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under 10 U.S.C. § 12304. This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons ordered to involuntary active duty for operational missions would be covered by the fourth exemption.

7. Service by members who are ordered to active duty in support of a “critical mission or requirement” of the uniformed services as determined by the secretary. The secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.
8. 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.

Disqualifying Service

The following four circumstances disqualify a person from asserting USERRA rights:

1. Separation from the service with a dishonorable or bad conduct discharge.
2. Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered “other than honorable.”
3. Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war.
4. Dropping an individual from the rolls when the individual has been absent without authority (UA) for more than three months or is imprisoned by a civilian court.

Reporting Back to Work

To qualify for USERRA’s protections, a service member must be available to return to work within certain time limits. These time limits for returning to work depend (with the exception of fitness-for-service examinations) on the duration of a person’s military service.

Service of One to 30 Days

The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an eight-hour rest period. For example, an employer cannot require a service member who returns home at 10 p.m. to report to work at 12:30 a.m. (two and half hours later). However, the employer can require the employee to report for the 6 a.m. shift the next morning.

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 after the expiration of the eight-hour period.

Fitness Exam

The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the requirement for persons who are absent from one to 30 days. This period will apply regardless of the length of the person’s absence.

Service of 31 to 180 Days

An application for re-employment must be submitted to the employer no later than 14 days after completion of a person’s service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible on the next day when submitting the application becomes possible.

Service of 180 or More Days

An application for re-employment must be submitted to the employer no later than 90 days after completion of a person's military service.

Disability Incurred or Aggravated

The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of an injury or illness incurred or aggravated during the performance of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused Delay

A person's re-employment rights are not automatically forfeited if the person fails to report to work or to apply for re-employment within the required time limits. In such cases, the person will be subject to the employer's established rules governing unexcused absences.

Documentation Upon Return

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing all of the following:

- The person's application for re-employment is timely.
- The person has not exceeded the five-year service limitation.
- The person's separation from service was not for a disqualifying reason.

Unavailable Documentation

If a person does not provide satisfactory documentation because it is not readily available or does not exist, the employer still must promptly re-employ the person. However, if, after re-employing the person, documentation becomes available that shows one or more of the re-employment requirements were not met, the employer may terminate the person and any rights or benefits that may have been granted.

Pension Contributions

If a person has been absent for military service for 91 or more days, an employer may delay treating the person as not having incurred a break in service for pension purposes until the person submits satisfactory documentation establishing re-employment eligibility. However, such contributions have to be made promptly for persons who are absent for 90 or fewer days.

Re-Employment Position

Length of Service

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

One to 90 Days

A person whose military service lasted from one to 90 days must be promptly re-employed in the following order of priority:

1. In the job:
 - The person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; **or**
 - In which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to above after reasonable efforts by the employer to qualify the person.
2. If the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person must be re-employed in a position that is the nearest approximation to the positions described above (in that order) that the person is qualified to perform, with full seniority.

91 or More Days

The law requires employers to promptly re-employ persons returning from military service of 91 or more days in the following order of priority:

1. In the job:
 - The person would have held had the person remained continuously employed, or a position of like seniority status and pay so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; **or**
 - In the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to above after reasonable efforts by the employer to qualify the person.
2. If the employee cannot become qualified for either position above, in any other position that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

Escalator Position

The re-employment position with the highest priority in the re-employment schemes reflects the “escalator” principle that has been a key concept in federal veterans’ re-employment legislation. The escalator principle requires that each returning service member be re-employed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, depending on economic circumstances, reorganizations, layoffs, etc., the position could be at a lower level than the one previously held, could be a different job, or could conceivably be in layoff status.

Qualifying for the Re-Employment Position

Employers must make reasonable efforts to qualify a returning service member for the re-

employment position. Employers must provide refresher training, and any other training necessary to update a returning employee's skills so that he or she has the ability to perform the essential tasks of the position.

If the employee has a disability incurred or aggravated during the performance of uniformed service, the employer must make reasonable efforts to accommodate the disability and to help the employee become qualified to perform the duties of the re-employment position. If the disabled person cannot become qualified for the re-employment position despite reasonable efforts by the employer to accommodate the employee, and qualify him or her to perform the duties of the position, the employee must be re-employed in a position according to the following priority:

1. A position that is equivalent in seniority, status, and pay to the escalator position.
2. A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case. Such a position may be a higher or lower position, depending on the circumstances.

Prompt Re-Employment

Returning service members must be "promptly re-employed." **Prompt re-employment** means as soon as is practicable under the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require reassigning or giving notice to an incumbent employee who has occupied the service member's position.

Disabilities Incurred or Aggravated While in Military Service

The following three-part re-employment scheme is required for persons with disabilities incurred or aggravated while in military service.

1. The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the duties of the re-employment position.
2. If, despite reasonable accommodation efforts, the person is not qualified for the position in (1) due to his or her disability, the person must be re-employed in a position of equivalent seniority, status, and pay to the escalator position. The employee must be qualified to perform the duties of this position or be able to become qualified to perform them with reasonable efforts by the employer.
3. If the employee cannot become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay. Such a position may be a higher or lower position, depending on the circumstances.

Conflicting Re-Employment Claims

If two or more persons are entitled to re-employment in the same position, the following procedure applies:

- The person who first left the position has the superior right to that position.
- The person without the superior right is entitled to employment with full seniority in a position that provides similar seniority, status, and pay in the order of priority that normally determines a re-employment position.

Defenses to Re-Employment

Employer defenses to re-employment are affirmative ones and the employer carries the burden of proving them by a preponderance of the evidence.

Changed Circumstances

Re-employment of a person is excused if an employer's circumstances have changed so that re-employment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue Hardship

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities only when doing so would be of such difficulty or expense as to cause undue hardship.

Exception for Brief Nonrecurrent Positions

An employer is not required to re-employ a person if the pre-service position was for a brief or nonrecurrent period and there was no reasonable expectation that employment would continue indefinitely or for a significant period.

Employee Rights and Benefits

Seniority Rights

Re-employed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of employment. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is made available without regard to length of employment.

Rights Not Based on Seniority

During a period of service, the employees must be treated as if they are on a furlough or leave of absence. Consequently, during their period of service they are entitled to participate in any rights and benefits not based on seniority that are available to employees on comparable nonmilitary leaves of absence, whether paid or unpaid. If there is a variation in benefits among different types of nonmilitary leaves of absence, the service member is entitled to the most favorable treatment so long as the nonmilitary leave is comparable.

Employees are entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that become effective during their service and that are provided to similarly situated employees on furlough or leave of absence.

Waiver of Rights

If, prior to leaving for military service, an employee knowingly provides clear, written notice of an

intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority. At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. The employer bears the burden of proving that the person knowingly waived entitlement to the specific rights and benefits.

A notice of intent not to return can waive only leave-of-absence rights and benefits. It cannot surrender other rights and benefits that a person would be entitled to under the law, particularly re-employment rights after service.

Funding of Benefits

Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence are so required.

Pension/Retirement Plans

Pension plans, which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- A re-employed person must be treated as not having incurred a break in service with the employer maintaining a pension plan.
- Military service must be considered service with an employer for vesting and benefit accrual purposes.
- The employer is liable for funding any obligation of the plan to provide required benefits.
- The re-employed person is entitled to any accrued benefits contingent upon employee contributions only to the extent that the person repays the employee contributions.

Covered Plan

A pension plan that must comply with the requirements of the re-employment law would be any plan that provides retirement income to employees upon the termination of employment or later. Defined benefit plans, defined contribution plans, and profit-sharing plans that are retirement plans are covered.

Multi-Employer Plans

In a multi-employer pension plan, the sponsor maintaining the plan may allocate the liability of the plan for pension benefits accrued by persons who are absent for military service. If no allocation or cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is re-employed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's re-employment, according to § 4318 (c).

Employee Contribution Repayment Period

Repayment of employee contributions or elective deferrals must be made by the end of the repayment period, which can be up to three times the length of the employee's uniformed service, but cannot exceed five years.

Calculation of Contributions

For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service. If the employee's compensation was not based on a fixed rate, or the determination of such rate is not reasonably certain, the employee's compensation during the period of service is computed on the basis of the employee's average rate of compensation during the 12-month period immediately preceding the employee's period of military service (or, if shorter, the period of employment immediately preceding such period).

Vacation Leave

Service members must, at their request, be permitted to use any vacation leave that had accrued before the beginning of their military service instead of unpaid leave. However, service members cannot be forced to use vacation time for military service.

Health Benefits

USERRA provides for the continuation of health benefit coverage for persons who are absent from work to serve in the uniformed services. If a person's employer-sponsored health plan coverage would terminate because of an absence due to uniformed service, then he or she may elect to continue that coverage for up to 24 months after the absence begins, or the period of absence, whichever is shorter.

Regarding payment of the premium for coverage:

- The person cannot be required to pay more than 102 percent of the full premium for the coverage.
- The person cannot be required to pay more than the normal employee share of any premium if the uniformed service was for 30 or fewer days.

On return from service, health insurance coverage must be reinstated without any waiting period or exclusions for preexisting conditions, other than waiting periods or exclusions that would have applied even if there had been no absence for uniformed service. However, this rule does not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed service.

USERRA and COBRA

The health benefit continuation required by USERRA does not substitute for federal Consolidated Omnibus Budget Reconciliation Act (COBRA) required coverage. Rather, the two obligations run concurrently; and generally, an individual starting a leave for uniformed service will be entitled to both COBRA and USERRA continuation. The [Internal Revenue Service \(IRS\)](#) also clarified that the USERRA and COBRA periods of continuation coverage run concurrently. According to [26 C.F.R. § 54.4980B-7](#), if health coverage is provided to a qualified beneficiary after a qualifying event without regard to COBRA continuation coverage (for example, as a result of another alternative coverage like USERRA), then the USERRA coverage will not extend the maximum coverage period but rather run concurrently with COBRA.

Unlike COBRA, USERRA requires **all** qualifying employers that provide health plans to offer continuation of coverage. There is no minimum size requirement for USERRA to be applicable as

opposed to COBRA which does not apply to employers with less than 20 employees. However, many states have laws like COBRA, including those that apply to health insurers of employers with less than 20 employees (mini-COBRA). Employers should be mindful of the laws applicable in their state. Lastly, under USERRA a **health plan** includes medical, dental, vision, health FSAs, health reimbursement arrangements, ERISA health plans, and non-ERISA plans such as governmental plans and church plans.

Brief Description of COBRA

COBRA gives workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for limited periods of time under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events. COBRA generally requires that group health plans sponsored by employers with 20 or more employees in the prior year offer employees and their families the opportunity for continuation coverage in certain instances where coverage under the plan would otherwise end.

Multi-Employer

In connection with USERRA's health plan provisions, liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from Discharge

Under USERRA, a re-employed employee may not be discharged without cause:

- For one year after the date of re-employment if the person's period of military service was for 181 days or more.
- For 180 days after the date of re-employment if the person's period of military service was for 31 to 180 days.

Cause for discharge may be based on conduct or the application of legitimate nondiscriminatory reasons. 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.

Protection from Discrimination and Retaliation

Discrimination

Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including hiring, promotion, termination, and benefits.

Persons Protected

The law prohibits discrimination against past members, current members, and persons who apply to be a member of any of the branches of the uniformed services.

Standard/Burden of Proof

If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service. The employer bears the burden of proving that it would have taken the adverse action in the absence of the person's service connection or exercise of any USERRA right.

Reprisals

Employers are prohibited from retaliating against anyone (whether or not they have performed military service) who does any of the following:

- Files a complaint under the law.
- Testifies, assists, or otherwise participates in an investigation or proceeding under the law.
- Exercises any right provided under the law.

Posting Requirements

Employers, regardless of size, are required to provide to persons entitled to the rights and benefits under USERRA, a notice of their rights, benefits, and obligations. Employers may provide the notice entitled *Your Rights Under USERRA* by posting it where employee notices are customarily placed. Employers are also free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice by email).