



The Uniformed Services Employment and Reemployment Rights Act (USERRA)

Resource Document #1
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The USERRA resource document is jointly developed by NSBA's Office of General Counsel, Advocacy, and Federation Member Services departments.

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The Uniformed Services Employment and Reemployment Rights Act (USERRA, 38 U.S.C. §§ 4301-4334) was enacted in October 1994, and updated in October 1996 and 1998 and December 2004. The purpose of the Act is twofold: to prohibit discrimination against employees because of their military service, and to minimize workplace disruption to employers, fellow employees, and communities. USERRA outlines the rights and responsibilities of employees performing military service and prohibits discrimination in initial hiring and reemployment. Virtually all employers are subject to the provisions of USERRA. School districts must ensure that their employment and reemployment policies and practices accommodate the rights of United States service members.

USERRA spells out the minimum protections for employees on military leave. Should a state provide additional protections, the employer is obligated to meet both federal and state requirements. State legal requirements about military leave may vary, so be sure to consult with your school board attorney and the appropriate state school boards association when developing policies.

Key Points

■ ***Who is protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA)?***

USERRA applies to all public and private employers in the U.S. regardless of size.

“Service in the uniformed services” is voluntary or involuntary duty in the uniformed services including: active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, absence from work for a fitness exam for any of the above types of duty, and funeral honors duty by National Guard or Reserve members. National Guard members may perform service under either Federal or State Authority, but only Federal National Guard service is covered by USERRA. Active and inactive duty training service credit participation by National Guard and Reserve members in a college Reserve Officers’ Training Corps (ROTC) programs are considered “service in the uniformed services.” Pursuant to the Public Health Security and Bioterrorism Preparedness Act of 2002, “service in the uniformed services” also includes service performed as an intermittent disaster-response appointee upon activation of

the National Disaster Medical System or participation in an authorized training program, even if the individual is not a member of the uniformed services.

The “uniformed services” are: Army or Army Reserve, Navy or Naval Reserve, Marine Corps or Marine Corps Reserve, Air Force or Air Force Reserve, Coast Guard or Coast Guard Reserve, Army or Air National Guard, Commissioned Corps of the Public Health Service, and “any other category of persons designated by the President in time of war or emergency.” Attending a military service academy constitutes “uniformed service” under USERRA.

■ ***What non-discrimination and non-retaliation protections does USERRA provide?***

Previously only Reservists and National Guard members enjoyed protection from employment discrimination and retaliation. USERRA now protects all “persons with past, current, or future obligations in all branches of the military.”

To prove discrimination or retaliation, an employee must show that the employer’s action was motivated by one

of the following:

- Membership or application for membership in a uniformed service;
- Performance of service, application for service, or obligation for service in a uniformed service;
- Action taken to enforce a protection afforded any person under USERRA;
- Testimony or statement made in or in connection with a USERRA proceeding;
- Assistance or participation in a USERRA investigation;
- Exercise of a right provided by USERRA.

In the event an employee proves in a lawsuit that the employer's adverse action was based on one of the above motives, the employer may still prevail if the employer proves it would have taken the action regardless of the employee's USERRA protected status or activity.

■ ***What kind of advance notice is required of employees?***

Employees must provide either written or oral notice of impending military service to employers. Notice should be provided as far in advance as is reasonable under the circumstances. The employee or an appropriate officer of the branch of the military in which the employee will serve may provide the notice. The employee is not required to receive permission from the employer before leaving for military service, nor is the employee required to inform the employer whether he or she intends to seek reemployment upon completing military service. In fact, even if the employee informs the employer he or she does not intend to seek reemployment, the employee does not forfeit the right to reemployment.

No advance notice is required if "military necessity" prevents notification, or if giving notice is otherwise impossible or unreasonable. "Military necessity" is defined by the Secretary of Defense and is immune from court review. Impossible or unreasonable circumstances include when the employer or a representative is unavailable, or if the employee is required to report for uniformed service in an extremely short period of time.

■ ***Is an employer required to give notice to employees of the rights, benefits, and protections afforded by USERRA?***

Yes. The Veterans Benefits Improvement Act of 2004 requires employers to provide persons entitled to rights and benefits under USERRA a notice of their and the employer's rights, benefits, and obligations under USERRA. The Department of Labor (DOL) has created posters providing the required USERRA notice, which may be downloaded from DOL's website at http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal. Employers may provide such notice by posting it where they customarily place employee notices or by distributing the notice by hand, mail, or e-mail

■ ***How long may an employee be gone?***

Cumulatively, an employee's absence may not exceed five years, which includes only time spent actually performing military services and not, for example, time between completing military service and reporting back to work. However, nine categories of military service are exempt from the five-year limit:

1. Service that requires more than five years to complete the initial obligation. For example, some military specialties require an initial active service obligation greater than five years.
2. Service from which a person is unable to obtain a release within the five-year limit. For example, service members may be involuntarily retained on active duty beyond their obligated military service date.
3. Required training for reservists and National Guard members.
4. Involuntary orders to serve or be retained on active duty during a domestic emergency or national security related situation.
5. Ordered to active duty service during a war or national emergency declared by the President or Congress.
6. Ordered to active duty to support “operational missions” without the consent of the voluntary service member.
7. Ordered to active duty to support a “critical mission or requirement” when no involuntary call up is in effect.
8. National Guard federal service as ordered by the President to “suppress an insurrection, repel an invasion, or to execute the laws of the United States.”
9. Service performed to mitigate economic harm where the employer is in violation of its employment obligations to the employee.

An employee is not required to accommodate his or her employer’s interests regarding the timing, frequency, or duration of uniformed service. However, the employer is permitted to bring these concerns to the attention of the appropriate military authority.

Reemployment of Uniformed Service Personnel

■ *When do members of the uniformed services have to report back to work?*

Upon completing military service, a service member must notify his or her employer of his or her intent to return to work either by reporting to work or by submitting a timely application for reemployment. An application for reemployment may be done orally or in writing. The time limits for an applicant's notice of intent to work depend on the length of the employee's military service. The standard military service length and reporting times are:

- *1 to 30 days of military service:* employee reports to the employer by the beginning of the first scheduled work day that falls at least eight hours (plus safe travel time) after the end of the last calendar day of military service. This means that a service member who returns home at 10:00pm can be required to report for a 6:00am shift the following day, but not to a 12:30am shift that night. This same guideline applies to an employee who has been ordered to take a fitness-for-service examination regardless of the length of the service member's absence.
- *31 to 180 days of military service:* employee must submit a verbal or written application for reemployment no later than 14 days after completion of service in the armed forces. If the 14th day falls on a day when the employer's offices are not open or available to accept a reemployment application, the time extends to the next business day.
- *181 days or more of military service:* employee must submit a verbal or written application for reemployment no later than 90 days after completion of military service. If the 90th day falls on a day when the employer's offices are not open or available to accept a reemployment

application, the time extends to the next business day.

- *Cases of disability:* employees who are hospitalized or recovering from a disability that was incurred or aggravated during the period of military service have up to two years from the time their service is complete to submit an application for reemployment.

There is an exception to these guidelines for those employees who, through no fault of their own, find themselves in a situation that makes it impossible or unreasonable to meet the required timetables. In those cases the employee must return to work as soon as possible. An employee does not forfeit his or her right to reemployment if the employee also seeks employment elsewhere as long as he or she makes a timely reemployment application.

■ *What happens if an employee fails to meet these deadlines?*

The employee does not automatically forfeit his or her reemployment rights, but is subject to the employer's rules governing unexcused absences.

■ *Under what conditions would a member of the uniformed services be disqualified from returning to work?*

There are four conditions that disqualify an employee from exercising his or her right to reemployment after military service:

- a dishonorable or bad conduct discharge imposed by court marshal
- an administrative separation from the service under "other than honorable conditions"

- a commissioned officer's dismissal via court martial or by order of the President
- when a service member has been dropped from the rolls for being absent without authority or for civilian imprisonment

If a military review board retroactively upgrades discharge status, reemployment rights are restored and the service member may seek reemployment. However, back pay and other benefits need not be restored for the period between the discharge and the status upgrade.

■ **What documentation must a returning service member provide to the employer?**

For periods of service exceeding 30 days, upon return, the employer may request that the employee provide documentation establishing that:

- The employee submitted a timely application for reemployment;
- The employee's length of military service has not exceeded the five-year limitation; and
- The employee's separation from the military service does not disqualify him or her from reemployment.

If the employee cannot provide this documentation because it is not readily available or does not exist due to administrative delays, the employer is still required to promptly reemploy the returning service member. The employer may terminate the employee should documentation become available that shows the employee did not qualify for reemployment. The termination would be effective immediately, but cannot operate retroactively.

■ **How soon after applying for reemployment must a returning service member be reemployed?**

A returning service person must be "promptly reemployed" after applying for reemployment. "Prompt reemployment" means as soon as practicable under the circumstances. If the period of service is less than 31 days, returning employees simply report back to work. For periods of service 31 days or more, absent unusual circumstances, reemployment must occur within two weeks of an employee's application for reemployment.

■ **In what job is a district obligated to place the returning service member?**

As a general rule, employees returning from military service must be reemployed in the job that they previously held, or would have attained had they not been absent for military service, called the "escalator position." If the employee was disabled while on military duty, or a disability was aggravated by military service, the employer must make reasonable efforts to accommodate the disability.

The following length of military service provisions govern reemployment obligations:

- *1 to 90 days of military service:* employee must be "promptly reemployed" in the following priority:
 - o first, to the job the employee would have held had that person remained continuously employed, provided the employee is qualified or can become qualified with reasonable effort on the part of the employer;
 - o to the position the employee held on the date that the military service began, provided the employee is

- qualified or can become qualified with reasonable effort on the part of the employer;
 - o if the employee cannot become qualified in either case (except due to a disability incurred during military service), he or she must be reemployed in a position that the employee can perform and which most closely approximates the positions above, with full seniority.
- *91 days or more of military service*: employee must be “promptly reemployed” in the following priority:
 - o first, to the job the employee would have held had that person remained continuously employed, or a position of like seniority, status, and pay, provided the employee is qualified or can become qualified with reasonable effort on the part of the employer;
 - o to the position the employee held on the date that the military service began, or a position of like seniority, status, and pay, provided the employee is qualified or can become qualified with reasonable effort on the part of the employer;
 - o if the employee cannot become qualified in either case (except due to a disability incurred during military service), he or she may be reemployed in a position of lesser seniority, status, and pay, that the employee can perform, but that most closely approximates the positions above, with full seniority.

■ ***How does seniority, or the “escalator principle,” relate to reemployment after military service?***

The escalator principle requires employers to place returning service members back onto the “seniority escalator” at the position it is reasonably certain the employee would have occupied had he or she remained continuously employed. This does not necessarily mean the same job the employee previously held. If, for ex-

ample, an employee was offered a more senior position, but was unable to assume the position due to military service, he or she is entitled to the more senior position upon reinstatement. Likewise, if an employee on military leave would have been laid off had he or she been continuously employed and the layoff is still effective at the time of reemployment, reemployment would reinstate the employee to layoff status. Also, any seniority benefits that an employee would have accrued (e.g. FMLA, salary step increases, sick leave, etc.) must be granted upon reemployment.

■ ***How does a probationary period affect reemployment rights after military service?***

If the probationary period is a bona fide period of observation and evaluation and not merely a time-in-grade requirement, a returning employee may be restored to the position that reflects both the experience and training the employee received *prior* to military service. For example, if a first year probationary teacher leaves for military duty at the end of the first year of teaching and the probationary period is five years, when the teacher returns to work he or she will have four years remaining as a probationary period, assuming the probationary period involves actual training and/or observation. Once the probationary period is completed, the employee’s pay and seniority should reflect both pre- and post-service time in the probationary period plus time served in the military.

■ **What are the district's obligations regarding reemployment of service members who incurred or aggravated disabilities during military service?**

There are three steps guiding reemployment of employees who incurred or aggravated disabilities during their period of military service:

- The employer must make reasonable efforts to accommodate the returning service member's disability so the employee can perform the job he or she would have occupied had he or she remained continuously employed;
- If, despite reasonable accommodation, the employee is not or cannot become qualified for the position described above, he or she must be employed in a position of equivalent seniority, status, and pay, so 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 employee does not become or cannot become qualified in either of the cases above, he or she must be employed in a position which most closely approximates in seniority, status, and pay, the position held just prior to military service.

■ **Does USERRA provide returning service members protection against termination?**

Yes, if an employee's most recent period of service was more than 30 days he or she cannot be discharged except for cause for certain periods of time after reemployment. If the period of military leave was between 31 and 180 days, the employee can only be discharged for cause within six months of reemployment. If the period of military leave was more than 180 days, the employee can only be discharged for cause within one year of reemployment.

An employer that discharges a recently returned service member must prove "cause" and that the same action would have been taken regardless of the individual's connection with the service. Typically, "cause" in a USERRA situation is the same as cause in other employment situations. Examples of cause include frequent unexplained absences from work, unsatisfactory job performance, theft, etc. Employees also should receive express or implied notice that their conduct would constitute cause for discharge.

■ **Are there any exceptions to these reemployment requirements?**

Yes, reemployment of a returning service member is not required under the following situations:

- If an employer's circumstances have changed so much that reemploying the employee would be impossible or unreasonable (e.g. a reduction-in-force that would have included the employee). The employer has the burden of showing reemployment to be impossible or unreasonable under the circumstances (e.g. having already filled the position with another employee does not classify as an impossibility or as unreasonable).
- An employee must only be reemployed in a position he or she is qualified for or may become qualified for after reasonable efforts by the employer. An employee is qualified if he or she can perform the essential tasks of a position. Whether a task is essential depends on a number of factors including but not limited to: the employer's judgment, the written job description, the amount of time spent performing the functions, the consequence of an employee not performing a function, the terms of a collective bargaining agreement, and the work experience of past incumbents in the job and similar jobs. Employers must make reasonable efforts, which do not cause an undue hardship, to assist the employee in

becoming qualified. Reasonable efforts include training and must be made at no cost to the employee. Undue hardship means action requiring significant difficulty or expense when considered in light of the nature and the cost of the action, the overall size and financial resources of the employer, and the type of operation.

- If the employee left an employment position that was for a “brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.”
- Employers are excused from efforts to qualify or accommodate returning employees with military service-related disabilities when doing so would be so difficult or expensive as to cause the employer “undue hardship.”

Benefits of Uniformed Service Personnel

During and After Active Duty

■ *Is the district required to pay salary to an employee on military leave?*

Federal law does not require an employer to pay the salary of an employee on military leave. However, some state laws do establish such requirements for some state and local government employees. In addition, some districts voluntarily offer a certain number of paid military leave days, differential pay, or even salary for employees on military leave.

Employees cannot be forced to use the paid vacation, annual, or similar leave time they accrued prior to military leave. However, should an employee request to use such leave time, the request must be granted. Employees are not entitled to use accrued sick leave during military leave unless the employer allows employees to use sick leave for any reason or allows employees to use sick leave on comparable leaves of absence.

■ *Does the district have to contribute to an employee's pension plan for the time he or she was on military leave?*

Yes, pension and retirement plans are considered a "seniority-related benefit" to which reinstated employees are entitled. If the service member does not contribute to the pension, the employer may elect to delay making retroactive pension contributions until the later of 90 days after the employee is reemployed or when pension contributions for the year are normally due. The following rules apply for the pension plans of service members on military leave:

- The employee must be treated as not having incurred an employment break with the employer;
- The period of active military service must be considered service with the employer for purposes of vesting and benefit accrual;
- The employer is liable for its pension plan funding obligation;
- The employee is only entitled to the accrued employee contributions to the extent that he or she repays those contributions;
- The employee can repay his or her employee contributions for a period of up to three times the period of military service, but not to exceed five years;
- The employer's and employee's contributions are calculated based on the rate of pay the employee would have received but for the absence to serve military duty;
- If the employee's rate of pay was not fixed and cannot be reasonably determined, the pension contributions will be based on the employee's average compensation rate for the 12-month period preceding military service.

■ *What are the requirements for continuing medical insurance for employees on military leave?*

Because employees on military leave must be treated as though they are on a leave of absence, health benefits must be offered to the extent they are available to other employees on leave. Under USERRA, an employee performing military service for 30 days or fewer cannot be required to pay more than the normal employee share of any health premium. If the employee's military service is for 31 days to 24 months, the employee may elect to continue health care coverage through the employer for up to 24 months after



the military leave begins or for the period of military service, whichever is shorter. In this situation, the employee usually pays the premium through the district. The cost of the insurance premium the district charges the employee cannot exceed 102% of the full premium. The employer's obligation to provide health benefits ends once an employee's military leave exceeds 24 months.

Health plan administrators may develop "reasonable requirements" addressing how employees elect to continue coverage. If an employee does not give advanced notice of service, the plan administrator may cancel the employee's health plan upon departure, but must retroactively reinstate it if the employee failed to give notice because it was impossible, unreasonable, or precluded by military necessity, and the employee pays all amounts due. If an employee gives advanced notice of service but does not elect to continue health insurance coverage, the plan administrator may cancel the employee's health plan upon departure. However, coverage must be retroactively reinstated if the plan administrator developed reasonable rules regarding the period in which employees may elect coverage and the employee elects coverage within that period and pays all amounts due. Likewise, if the plan administrator has not developed reasonable rules regarding when an employee must elect to continue coverage, the plan must allow retroactive reinstatement of coverage upon election and payment of amounts due anytime during the period in which the employee is eligible to elect to continue health insurance. Health plan administrators may adopt "reasonable rules" allowing cancellation of coverage if timely payment is not made.

If coverage was terminated during military service, it must be reinstated upon a service member's request at reemployment. A waiting period or exclusion cannot be imposed if health coverage would have been provided to the employee had he or she not been absent for military service.

■ *What about the accrual of other benefits?*

Employees on military leave are entitled to the same accrual of any "seniority related benefits"—benefits that are determined by length of service—that they would have received if they had not gone on leave. For example, a reemployed service member would be eligible for leave under the Family and Medical Leave Act if the number of months and hours worked for his or her civilian employer combined with the number of months and hours the employee would have worked for his or her civilian employer while on military service, meets the FMLA's eligibility requirement.

Employees on military leave also are entitled to the same non-seniority related benefits as are granted to other employees on comparable leave of absence. Vacation leave is a non-seniority benefit; likewise continued life insurance coverage might be a non-seniority benefit. If no non-seniority-related rights and benefits are provided to other employees on comparable leave, then none are required for those on military leave. If the non-seniority benefits which employees on leave may receive vary according to the type of leave, uniformed service members must be given the most favorable treatment accorded to any comparable form of leave. Even if the employer provides full or partial pay during military leave, the

employee is still entitled to other non-seniority rights and benefits granted to employees on leave of absence. Written notice of intent not to return to work after completion of military service discharges the employer from providing non-seniority benefits during the absence, but does not affect any other rights under USERRA, including the right to reemployment.

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Sample Policies

Most state school board associations can offer assistance with the preparation of school district policies. The NSBA National Education Policy Network also offers sample policies to federation members and national affiliate districts at: www.nsba.org.

USERRA Notification Poster

Department of Labor Veterans' Employment and Training Service (VETS):
http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal

Military Leave Assistance and Resources for Employers

Department of Labor Veterans' Employment and Training Service (VETS):
<http://www.dol.gov/vets/#userra>

Employer Support of the Guard and Reserve:
<http://www.esgr.org/employers/>

Full Text of the United States Code, Title 38, Part 3, Chapter 43:
<http://www.dol.gov/vets/usc/vpl/usc38.htm>

Full Text of USERRA final regulations, 20 C.R.F. Part 1002: <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-23961.pdf>

State Contacts for the Department of Labor Veterans' Employment and Training Service:

Alabama		
Montgomery	334-223-7677	
Alaska		
Juneau	907-465-2723	
Arizona		
Phoenix	602-379-4961	
Arkansas		
Little Rock	501-682-3786	
California		
Anaheim	714-687-4845	
Fresno	559-445-5193	
Pamona	909-392-2675	
Pleasant Hills	925-602-1541	
Redlands	909-335-6763	
Sacramento	916-654-8178	
San Diego	858-689-6008	
Santa Monica	310-576-6444	
Suison	707-863-5383	
Colorado		
Colorado Springs	719-667-3750	
Denver	303-844-2151	
Connecticut		
Wethersfield	860-263-6490	
Delaware		
Wilmington	302-761-8138	
District of Columbia		
Washington	202-724-7005	
Florida		
Fort Lauderdale	954-677-5574	
Orlando	407-897-2888	
St. Petersburg	727-893-2415	
Tallahassee	850-877-4164	
Georgia		
Atlanta	404-656-3127	
Hawai'i		
Honolulu	808-522-8216	
Idaho		
Boise	208-334-6163	
Illinois		
Chicago	312-793-3433	
Springfield	217-524-7769	
Waukegan	847-543-7400	
Indiana		
Indianapolis	317-232-6804	
Iowa		
Des Moines	515-281-9061	
Kansas		
Topeka	785-296-5032	
Kentucky		
Covington	859-292-6666	
Frankfort	502-564-7062	
Louisiana		
Baton Rouge	225-389-0339	
Maine		
Lewiston	207-753-9090	
Maryland		
Baltimore	410-767-2110	
Salisbury	410-334-6897	
Wheaton	301-929-4379	
Massachusetts		
Boston	617-626-6699	
Michigan		
Detroit	313-876-5613	
Grand Rapids	616-361-3254	
Minnesota		
Duluth	218-723-4766	
St. Paul	651-296-3665	
Mississippi		
Jackson	601-961-7588	
Missouri		
Jefferson City	573-751-3921	
Montana		
Helena	406-449-5431	
Nebraska		
Lincoln	402-437-5289	
Nevada		
Carson City	775-687-4632	
New Hampshire		
Concord	603-225-1424	
New Jersey		
Trenton	609-292-2930	
New Mexico		
Albuquerque	505-346-7502	
New York		
Albany	518-457-7465	
Buffalo	716-851-2748	
New York	212-352-6184	
Syracuse	315-479-3381	
Utica	315-793-2323	
North Carolina		
Newton	828-466-5535	
Raleigh	919-733-7402	
North Dakota		
Bismarck	701-250-4337	

Ohio

Cleveland 216-787-5660
 Columbus 614-466-2768
 Defiance 419-782-6050
 Warren 330-399-8114

Oklahoma

Oklahoma City 405-231-5088

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 Salem 503-947-1490

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 Chester 610-447-3350
 Harrisburg 717-787-5834
 Pittsburgh 412-565-2469
 Scranton 570-963-4735

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Hato Rey 787-754-5391

Rhode Island

Westerly 401-528-5134

South Carolina

Columbia 803-253-7649

South Dakota

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 Corpus Christi 361-882-3994
 Fort Worth 817-335-5111
 Houston 713-767-2022
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