



UNIFORMED SERVICE EMPLOYMENT & REEMPLOYMENT RIGHTS ACT (USERRA)

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OVERVIEW

- USERRA's Purpose
- USERRA's Coverage
- Notice Posting Obligations for JATCs and Contractors
- USERRA's Requirements and Entitlements
- Enforcement
- Resources

Purpose

- USERRA enacted in 1994, expanding upon and consolidating existing laws dating back to 1940.



Purpose

USERRA has three purposes:

1. To encourage non-career military service by reducing the disadvantages to civilian careers that result from such service;
2. To minimize disruption to service members' civilian lives by providing for prompt reemployment; and
3. To prohibit discrimination against persons because of past, present, or future military service.

Coverage– Uniformed Service

- Most Types of Military Service Covered:
 - Voluntary or Involuntary
 - Peacetime or Wartime
 - Active and Reserve
 - Fitness-for-Service Exam
 - Funeral Honors
- Service in the National Disaster Medical System
- **BUT** National Guard service performed under **state**, rather than federal, authority is not protected by USERRA

Coverage– Employers

- Virtually all U.S. employers are covered.
- Includes “any person, institution, organization, or other entity that pays salary or wages for work performed *or that has control over employment opportunities.*”
- Unlike other employment discrimination laws – Title VII, FMLA – no number-of-employees threshold for coverage.

Coverage– Employers

- Includes:
 - Private employers;
 - States;
 - Local governments;
 - Federal employers;
 - Successors in interest to employers; and
 - Pension plans and other entities **to which employers have delegated employment-related responsibilities.**

Coverage– Employers

- Employers in the Construction Industry Include:
 - Individual contractor
 - Multi-contractor group
 - Local union operating a hiring hall (Probably)
 - JATC
 - Pension and Benefit Funds

Notice posting requirement



Notice Posting Requirement

- All employers, including all contractors, unions, apprenticeship committees, and benefit funds, must post a notice informing employees of their rights under USERRA.
- Must be posted:
 - In employer offices for own employees;
 - Job Sites – Contractors;
 - Hiring Hall Areas – Local Unions;
 - Training Halls – JATCs;
 - Funds – Fund Offices
- Key to informing employees of rights.

Notice Posting Requirement

Notice
has five
sections

- Reemployment Rights;
- Right to be Free from Discrimination and Retaliation;
- Health Insurance Protection;
- Enforcement; and
- Contact Information for DOL VETS

USERRA's Requirements and Entitlements

Four Key Periods and Events with USERRA Coverage

Before a
Service
Member is
Hired

While a Service
Member is
Employed

While a Service
Member is
Absent

When a
Service
Member
Returns from
Service

USERRA's Requirements and Entitlements

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When a Service Member Returns from Service

Before a Service Member is Hired/Accepted into Apprenticeship Program

- USERRA's anti-discrimination provision bars discrimination because of any military service obligation – past, present, or future.
- Applies to Applicants; Temporary Employees; Persons in the Delayed Entry Program; and Retired Service Members.
- Employer's only defense to discrimination charge is that it would have taken the same action in the absence of a candidate's past, present, or future military service.

Before a Service Member is Hired/Accepted into Apprenticeship Program

For Hiring Halls:

- Cannot honor employer's request not to refer applicant who is about to be called for military service;
- Cannot honor employer's request not to refer veterans.

Before a Service Member is Hired/Accepted into Apprenticeship Program

▪ For JATCs:

- Cannot deny entry in to the program because of past, present, or future military service.
- Cannot honor employer's request not to send apprentice for OJT who is about to be called for military service
- If an applicant would have received an indenture offer, but is currently unavailable due to military service, the JATC must offer the applicant a position to fill upon his or her return.

Before a Service Member is Hired/Accepted into Apprenticeship Program

- **BUT** applicant not entitled to enter a class already in progress -- the applicant must be permitted to enter the next class following return from uniformed service.
- JATC need not give special consideration to a service member who was not ranked high enough to be selected (BUT your own direct entry procedures may require special consideration);
- May apply same non-discriminatory rules to service members and non-service members.

USERRA's Requirements

Four Key Periods and Events with USERRA Coverage

Before a Service Member is Hired

While a Service Member is Employed

While a Service Member is Absent

When a Service Member Returns from Service

While a Service Member is Employed/Indentured

- USERRA provides that an employer shall not deny retention in employment, promotion, or any benefit of employment because of past, present, or future military service.
 - “Benefit of Employment” includes any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of employment.
 - Employer adverse action with respect to any of these benefits that is motivated by the employee’s exercise of rights protected by USERRA constitutes prohibited discrimination, unless the employer can show that it would have taken the action absent the USERRA-protected status or activity.

While a Service Member is Employed/Indentured

USERRA also includes a broad anti-retaliation provision that prohibits an employer from taking adverse employment action against an individual because the individual has:

- Taken action to enforce a USERRA right or entitlement;
- Testified or otherwise made a statement in or in connection with a proceeding under USERRA;
- Assisted or participated in a USERRA investigation; or
- Exercised a right provided for by USERRA.

USERRA's Requirements

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While a Service Member is Absent

- A service member who is absent for covered military service is deemed to be on a leave of absence (though the service member is permitted to use his/her paid leave).
- Absent service member is entitled to all benefits available to employees having similar seniority, status, and pay who are also on a leave of absence.
 - Holiday Bonus
 - Production Bonuses

While a Service Member is Absent

- Absent service member is also entitled to continue health coverage.
 - For absence of less than 31 days – the employer is obligated to continue paying its share of health coverage, if any.
 - For absence of greater than 30 days – the employee can elect to continue employer-sponsored benefits, but may only do so at own expense. Coverage lasts for up to 24 months; employer can charge up to 102%.

While a Service Member is Absent

- What about “banked” hours?
 - Employee who wishes to continue coverage has two options:
 - 1. Employee may expend banked hours to pay for coverage. If banked hours depleted, employee must be permitted to pay for continued coverage.
 - 2. Employee may pay for continued coverage in order to maintain intact his/her banked hours.
- What if he/she returns to empty bank?

USERRA's Requirements

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When a Service Member Returns from Service

- Service member has reemployment rights when:
 - **Gives advance notice of service;**
 - Performs qualifying service; and
 - Timely requests reemployment.

When a Service Member Returns from Service

- Advance Notice
 - FORM: Verbal or Written (written notice provides proof that the service member gave notice, but it's not required).
 - CONTENT: No magic words, but must give notice of service or intent to serve.
 - TIMING: Must be as far in advance as is reasonable under the circumstances, but there is no specific time limit. DOD recommends 30 days when feasible.

When a Service Member Returns from Service

- Advance Notice
 - In construction industry, an apprentice who is working should, at a minimum, give the notice to his/her current contractor.
 - An apprentice who is on an out-of-work list when entering service should give notice to his/her last contractor and the JATC.
 - Encourage apprentices to give written notice to contractors, JATC, and benefit funds.

When a Service Member Returns from Service

- Service member has reemployment rights when:
 - Gives advance notice of service;
 - **Performs qualifying service;**
 - Timely requests reemployment.

When a Service Member Returns from Service

- What is qualifying service?
 - Must be “service in the uniformed services”
 - Discharge must not be under “other than honorable conditions”
 - General discharge is adequate.
 - JATC/Union/Contractor may request copy of DD-214 to confirm discharge status.
 - Service may not exceed 5 years.

When a Service Member Returns from Service

- Five-Year Rule - A service member can be absent for up to five years and still have reemployment rights.
 - The five-year period is a cumulative total that includes past and present military service.
 - The five years is generally counted per employer.
 - **BUT** in our multi-employer groups, it applies collectively to all contractors in the group.
 - Many exceptions to five-year rule, so be careful.

When a Service Member Returns from Service

- Service member has reemployment rights when:
 - Gives advance notice of service;
 - Performs qualifying service;
 - **Timely requests reemployment.**

When a Service Member Returns from Service

What is a timely request for reemployment?

Service of less than 31 days

Employee must report to work by the beginning of the next shift. Employee must be afforded time to return home and 8 hours rest.

Service between 31 and 180 days

Employee has 14 days to request reemployment.

Service more than 180 days

Employee has 90 days to request reemployment.

When a Service Member Returns from Service

- Upon reemployment, the service member must notify the employer that his/her return is from military service.
- In Construction:
 - Give written notice to the employer, hiring hall or JATC, and the pension and welfare funds.
 - First re-employer has obligation to notify pension & welfare, but returning service member should also provide notice.
 - Recommendation: Amend referral slips.

When a Service Member Returns from Service

- After complying with these requirements, a service member is entitled to:
 - **Prompt reinstatement to the same job and status;**
 - Credit for continuous accumulation of seniority;
 - Protection from termination for a period based on service length, except for just cause;
 - Retraining;
 - Accommodation for disability caused or aggravated by military service;
 - Reinstatement of health care benefits; and
 - Reinstatement of pension benefits.

When a Service Member Returns from Service

- How do you promptly reinstate a construction journeyworker or apprentice to the same job and status?
 - If the job is ongoing, the service member is entitled to a position on that job, even if another worker is displaced.
 - If the job is over, the service member is entitled to a place on the out-of-work list.

When a Service Member Returns from Service

- Location on the list depends on length of service:
 - If absent for a long time, service member is placed at the top of the list.
 - If absent for a shorter period of time, service member is placed on the list near those individuals who were working on the same job with the service member when he/she left, and who have not already been referred to another job.
- Bottom Line: Get service member as close as you can to where he/she would have been in the absence of service.

When a Service Member Returns from Service

- What about placement in the apprenticeship program?
 - If, for example, a second year apprentice is absent for military service for two years, must she be classified as a fourth year apprentice when she returns?
 - No. Program does not have to credit missed training time. The courts have long held that "A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period." *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964).

When a Service Member Returns from Service

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 - Prompt reinstatement to the same job and status;
 - **Credit for continuous accumulation of seniority;**
 - Protection from termination for a period based on service length, except for just cause;
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 - Reinstatement of health care benefits; and
 - Reinstatement of pension benefits.

When a Service Member Returns from Service

- Credit for accumulation of seniority works on the escalator principle:
 - Service member must be treated as if “continually moving on an escalator” during entire absence.
 - *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946).
 - Examples:
 - Entitled to any seniority-based salary increase;
 - Entitled to any opportunity for promotion that would have occurred if employee had not been absent.

When a Service Member Returns from Service

- BUT Goes both ways: Ex. If seniority would have resulted in lay off during absence, then service member may be reinstated to laid off status.

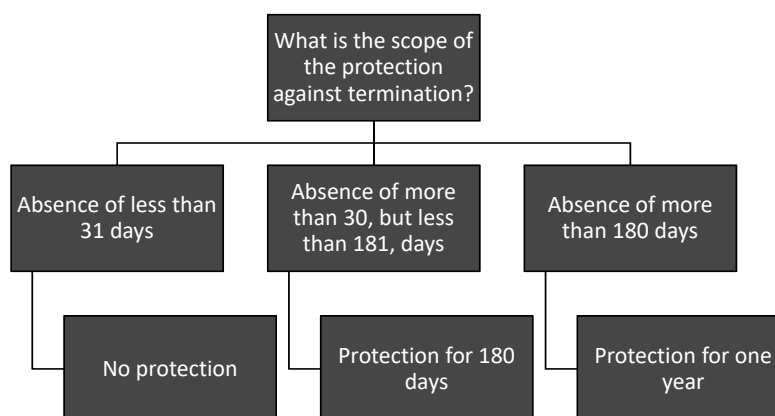
When a Service Member Returns from Service

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 - Credit for continuous accumulation of seniority;
 - **Protection from termination for a period based on service length, except for just cause;**
 - Retraining;
 - Accommodation for disability caused or aggravated by military service;
 - Reinstatement of health care benefits; and
 - Reinstatement of pension benefits.

When a Service Member Returns from Service

- Service member's protections from termination depend on length of service.
 - If applicable, service member may be terminated only for cause during protected period.

When a Service Member Returns from Service



When a Service Member Returns from Service

- After complying with these requirements, a service member is entitled to:
 - Prompt reinstatement to the same job and status;
 - Credit for continuous accumulation of seniority;
 - Protection from termination for a period based on service length, except for just cause;
 - Retraining;
 - Accommodation for disability caused or aggravated by military service;
 - **Reinstatement of health care benefits;** and
 - Reinstatement of pension benefits.

When a Service Member Returns from Service

- How are health benefits reinstated in a multi-employer group?
 - If apprentice still has banked hours, the apprentice may resume usage of the banked hours upon return.
 - If apprentices exhausted banked hours by continuing coverage during deployment, the plan may require the employee to pay the cost until he earns sufficient credits.

When a Service Member Returns from Service

- After complying with these requirements, a service member is entitled to:
 - Prompt reinstatement to the same job and status;
 - Credit for continuous accumulation of seniority;
 - Protection from termination for a period based on service length, except for just cause;
 - Retraining;
 - Accommodation for disability caused or aggravated by military service;
 - Reinstatement of health care benefits; and
 - **Reinstatement of pension benefits.**

When a Service Member Returns from Service

- How are pension benefits reinstated in a multi-employer group?
 - Starts with the escalator principle, which means that the service member must be treated as though there is no break in service.
 - Ex. If absent for 3 years and properly returns, the service member must be credited with those three years.
 - Applies to both vesting and benefit accrual.

When a Service Member Returns from Service

- The pension obligation must be funded upon the service member's return. How?
- In a multi-employer group, there are three options.

When a Service Member Returns from Service

1. Liability can be allocated as the "sponsor maintaining the plan shall provide."
 - Ex. Plan documents equally allocate contributions among participating employers.
2. If plan is silent, last employer to employ the service member before the military service is liable.
 - Means a 3-day job could turn into 5 years of pension obligations for an employer.
3. If last employer is out of business, the plan itself is responsible for the contributions.

When a Service Member Returns from Service

- First employer to reemploy the service member must notify plan within 30 days of notice of service member's return.
 - So the employee should be sure to notify the employer that this is his/her first position after return from service.
- Union, JATC, and service member should also provide notice as a backup, though not required.

When a Service Member Returns from Service

- Other pension issues:
 - Employee must be allowed the opportunity to make up missed contributions.
- Some Loss of Benefit is Permissible:
 - Employer not required to make contributions until the employee returns, which means that an employee may lose some investment income and forfeiture allocations.

Enforcement

- Informal Process
 - National Committee for Employer Support of the Guard and Reserve (ESGR 1-800-336-4590)
 - Contact information is on the USERRA notice.
- Formal Process
 - Service members may sue in federal court; or
 - Service members may file complaint with DOL, which may then sue in federal court.
 - No statute of limitations, so suits may come at any time.

Resources

- Best to resolve these – and most – disputes informally, if possible.
- Employers, JATCs, and Unions can get compliance assistance from Employer Support of the Guard and Reserve
 - (ESGR) 1-800-336-4590
 - www.esgr.mil/USERRA
- Resources:
 - FAQs: (1) Employer; (2) Service Members
 - Checklists for Service Members: (1) Pre-Mobilization; and (2) De-Mobilization
 - On-line request for information form

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QUESTIONS?