

An Overview for Employers of the Uniformed Services Employment and Re-employment Rights Act

By Ronald L. Fano

As the present military call-up continues, it is becoming increasingly common for employers to be faced with one or more employees having to temporarily leave their employment to fulfill a military obligation. As such, it has become increasingly more important for employers to be aware of and to appropriately implement the federal law that governs the rights and obligations of employers and employees in such situations. That law is the Uniformed Services Employment and Re-employment Rights Act (USERRA) found at 38 U.S.C.A. § 4301, *et seq.* The failure to follow USERRA can have serious consequences for employers, and therefore, all employers should make sure that their current policies, handbooks and most importantly, their current practices when dealing with an employee called to fulfill his/her military obligation, are in compliance with USERRA. The following is an overview of some of the provisions of USERRA that employers should be aware of and adhere to:

Who is Required to Comply with USERRA: USERRA applies to all civilian employers (public and private) regardless of size.

When does USERRA Apply: USERRA applies any time an employee has been called to fulfill his/her military obligation. The employer is entitled to request and see the service orders and the employee is required to give advanced written or verbal notice unless the giving of such notice is precluded by the circumstances. In such instance, notice must be given as soon as practicable. USERRA provides protection for military leaves that last up to 5 years.

What does USERRA Obligate an Employer to Do:

1. **Pay:** There is no obligation to pay the employee during the term of the military leave (leave under USERRA is "unpaid"). However, an employer certainly can adopt a policy that provides otherwise and can adopt a policy that off-sets any military pay from the amount to be paid the employee by the employer during the leave. An employee can elect to use any accrued vacation time during the leave and thus be paid as he/she would have been for that time. An employee cannot be forced to use vacation time during the period of military leave.

2. **Health Insurance Benefits:** The employee may elect to continue health insurance coverage during the period of leave under COBRA like terms (i.e. the employee stays enrolled on the plan but pays the premium). However, if the leave is for less than 31 days, the employer cannot require payment from the employee of more than the individual's actual share of the premium. If leave is for 31 days or more and the employee wants to continue health insurance coverage, the employer can require payment from the employee of not more than 102% of the actual premium cost. But, if the employer has a policy governing other types of leave (i.e. non-military leave) that requires the employee to pay only their actual share of the health insurance premiums, than the military leave of 31 days or more must be treated the same.

3. **Pension Benefits:** The first and most basic rule is that benefits under a defined pension plan that have accrued prior to the employee's period of military service cannot be forfeited during the leave. Further, when the employee returns from duty, the period of military service must be credited for all pension plan purposes (e.g. eligibility, vesting, accruals). The employer cannot require requalification of the returning employee and, upon the employee's return, must resume making the regular contributions to the pension plan in the amounts equal to that which the employee would have been eligible for had the leave not occurred.

4. **Re-employment:** An employer is obligated to re-employ the employee (assuming he/she has been honorably discharged) in the job that the employee would have had/obtained but for the military absence, with the same seniority, status, pay, rights and benefits. Reasonable efforts to qualify the employee for such position must be taken, and if such efforts are unsuccessful, then the employee is entitled to the position he/she had prior to the leave. If the leave is for more than 90 days, the employer has the option of offering the returning employee a different position of like seniority, status and pay. The obligation to re-employ may not exist if the employer's circumstances have so changed as to make such re-employment impossible or unreasonable. If the employee returns to work and is disabled as a result of the leave and cannot perform the duties of the job he would have had but for the leave, the employer must reasonably accommodate that disability by finding a job of like seniority, status and pay that the employee can perform. If no such position exists, the employer must find a position that the disabled person can perform that is nearest in approximation to the position he/she would have had but for the leave. This obligation is excused if the employer can demonstrate that doing so creates an "undue hardship."

Notice of Intent to Return to Work: The employee on military leave has certain obligations to provide the employer with notice of his/her intent to return following fulfillment of the military obligation. The timing of this notice requirement depends on the length of the leave:

Leave less than 31 days	Must report back to work on the next workday/shift they would be scheduled to work following the leave.
Leave 31-180 days	Must submit application for re-employment within 14 days after discharge and return to work within that 14 day period.
Leave 181 days or more	Must submit application for re-employment within 90 days after discharge and must return to work during that time frame.

Limitations on the Right to Terminate: Depending on the length of the leave, USERRA provides certain restrictions on an employer's right to terminate an employee following the return from leave. The restrictions are as follows:

Leave of 30 days or less	No restriction, but termination shortly after a return from leave may create a presumption of discriminatory treatment prohibited under the Act.
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Leave of 31-180 days

Cannot fire the returning employee for 180 days except for cause.

Leave of 181 days or more

Cannot fire the returning employee for 1 year except for cause.

What Happens in Cases of a Violation of USERRA: USERRA provides an employee who believes his/her rights have been violated with the right (but not the obligation) to file a claim with the United States Department of Labor. If such claim is denied or otherwise not resolved, the employee may request that the claim be referred to the United States Attorney General or he/she can proceed directly to a private lawsuit. The employee can by-pass these steps entirely and proceed directly to a private lawsuit if he/she so chooses. If a violation of USERRA has occurred (and depending on the nature of the violation), the remedies can include injunctive relief, an award of back pay and lost benefits, possible punitive damages (equal to the amount of back pay and lost benefits), and recovery of attorneys fees and costs incurred by the employee in pursuit of the action. Conversely, no fees or costs may be charged or taxed against the employee if the action is unsuccessful.

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