

# USERRA Facts, Questions and Answers for Employers



## **1. Is an employee protected from unlawful discrimination by an employer based on military affiliation?**

**Yes.** USERRA provides protections for initial hiring and adverse employment actions by an employer if the action is motivated even in part by the employee's military service. This protection also extends to witnesses who assist or testify in a USERRA investigation.

## **2. Can an employer refuse to allow an employee to attend scheduled drills or annual training?**

**No.** Employees must be excused from work to attend inactive duty training (drill) or annual training and the employer must reemploy the employee as if he or she has not been absent.

## **3. Is there a limit to the amount of military leave an employer must permit?**

**Yes.** Although there is no differentiation between voluntary and involuntary military duty, there is a 5-year cumulative service limit on the amount of voluntary military leave an employee can use and still retain reemployment rights.

## **4. What is not included in the 5-year cumulative total?**

The 5-year total does not include: inactive duty training (drills); annual training; involuntary recall to or retention on active duty; voluntary or involuntary active duty in support of a war, national emergency, or certain operational missions; or additional training requirements determined and certified in writing by the Service Secretary, and considered to be necessary for professional development or for completion of skill training or retraining.

## **5. Is prior notice to the employer required for leave of absence for military duty?**

**Yes.** Unless precluded by military necessity, advance notice must be provided either orally or in writing. The context for what constitutes timeliness of notification was not spelled out in detail by Congress under USERRA. However, employees who participate in the National Guard or Reserve should provide their employers as much advance notice as possible. Failure to provide notice could result in a denial of the protection of USERRA.

## **6. What are valid military orders?**

All written or verbal orders are considered valid when issued by competent military authority. A military member in receipt of official orders is obligated by federal statute to execute them. The recurring requirement to perform inactive duty training (drill) is an example of when written orders may not be formally issued.

## **7. When may an employer require an employee to provide documentation of military service?**

After periods of military leave of absence for more than 30 days, the employer has the right to request such documentation, which can be used to establish the employee's basic eligibility for protection under USERRA. All National Guard and Reserve members are encouraged to provide a copy of orders, the annual drill schedule, or other type of documentation to employers as soon as available and, if possible, before the commencement of military duty.

## **8. What if the employee cannot provide satisfactory documentation for military service in excess of 30 days?**

The employer must promptly reinstate the employee pending its availability and may contact the military unit if necessary.

## **9. Can an employer require an employee to apply for military leave of absence or otherwise submit official documentation for approval of military leave of absence?**

**No.** As stated earlier, an employer may not require documentation for notification prior to military duty. Further, an employer does not have a "right of refusal" for military leave of absence, so long as the employee has not exceeded the 5 years of cumulative service provided under USERRA.

## **10. Can an employee be required to find someone to cover his or her work period when military duty interrupts the work schedule?**

**No.** An employee is responsible for notification but not for altering the work schedule or finding a replacement.

## **11. Can an employer require an employee to reschedule drills, annual training, or any other military duty obligation?**

**No.** When military duties would require an employee to be absent from work for an extended period, during times of acute need, or when (in light of previous leaves) the requested military leave is cumulatively burdensome, the employer may contact the military commander of the employee's military unit to determine if the duty could be rescheduled or performed by another member. If the

military commander determines that the military duty cannot be rescheduled or canceled, the employer is required to permit the employee to perform his or her military duty.

**12. Is an employer required to pay an employee who is on military leave of absence?**

**No.** While many employers offer differential pay or a specific number of paid military leave days, an employer is not required to pay an employee on military leave of absence.

**13. Are there time limits for an employee to return to work after completion of military duty?**

**Yes.** There are three formats for reinstatement (application for reemployment), dependent on the duration of military service. Please refer to question 15 for a detailed breakdown of these formats. An employer should reinstate an employee within a matter of days of application, if not on the same day as the application is made.

**14. After completion of weekend drill, what is the time limit for an employee to return to work?**

An employee is to return to work following completion of weekend drill is the beginning of the next regularly scheduled work period on the first full day following completion of service and expiration of an 8-hour rest period following safe transportation home. For example, an employer cannot require a service member who returns home at 10 p.m. to report to work 2.5 hours later at 12:30 a.m. However, the employer can require the employee to report for the 6 a.m. shift, or scheduled work period, the next morning (after reasonable commute from military duty to home followed by 8-hours). Included in the 8 hour period is time for rest and the commute to work.

**15. What is the time limit for an employee to return to work after Annual Training or other types of extended military leave of absence?**

Service of 1 to 30 days: the beginning of the next regularly scheduled work period on the first full day following completion of service and expiration of an 8-hour rest period following safe transportation home.

Service of 31 to 180 days: application for reinstatement must be submitted not later than 14 days after completion of military duty.

Service of 181 or more days: application for reinstatement must be submitted not later than 90 days after completion of military duty.

**16. What if the employee has an accident, is delayed by lack of military transportation, or is otherwise unable to report back in a timely manner?**

The employee must report back to work as soon as possible. Unless the delay is through no fault of the employee, he or she is subject to the personnel policies and practices the employer would normally apply to employees with unexcused absences.

**17. What if an employee is injured or incurs a disability during military duty?**

The deadline for reinstatement may be extended for up to 2 years for persons who are convalescing due to a disability incurred or aggravated during military service, and employers must make reasonable accommodations for the impairment.

**18. What job position is an employee returned to after military leave of absence?**

Except with respect to persons whose disability occurred in or was aggravated by military service, the position into which an employee is reinstated is determined by priority, based on the length of military service. The rules are: Service of 1 to 90 days: (a) in the job the person would have held had he or she remained continuously employed (possibly a promoted position), so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer, or (b), if the person cannot become qualified, in the position the person was employed on the date of the commencement of the military service. Service of 91 or more days: (a) same as for service of 1 to 90 days, or a position of like seniority, status and pay, so long as he or she is qualified, or (b) if the person cannot become qualified, in the position the person was employed on the date of the commencement of the military service or which nearly approximates that position. Note: The reemployment position with the highest priority reflects the "escalator" principle, which requires that a returning service member steps back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed. USERRA specifies that returning employees must be "promptly reemployed." What is prompt will depend on individual circumstances. Reinstatement after 3 years on active duty might require two weeks to allow giving notice to an incumbent employee who might have to vacate the position.

**For more information contact:**

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