

**Employer Support
of the Guard and Reserve**




USERRA
**Uniformed Services Employment and
Reemployment Rights Act**
38 U.S.C. 4301-4334



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AGENDA



- 1. Introduction to USERRA**
- 2. Eligibility Criteria**
- 3. Entitlements**
- 4. Assistance and Enforcement**

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USERRA



- **Encourages All-Volunteer Uniformed Service**
- **Prohibits Discrimination Against Those Who Serve or Have Served**
- ***Applies to Voluntary As Well As Involuntary Service***

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U.S. SUPREME COURT RULING



- Courts have followed the Supreme Court’s admonition that: *“This legislation is to be liberally construed for the benefit of those who left private life to serve their country. . .”*

[Fishgold v. Sullivan Drydock and Repair Corporation (1946)]

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APPLICABILITY TO EMPLOYERS



- Applies to Federal Government, state and local governments, and private employers *regardless of size.*
- Applies to all employers in U.S. *except* foreign embassies and international organizations, Indian tribes, and religious institutions.

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RELATION TO OTHER LAWS, POLICIES & PRACTICES



- USERRA Does Not Supersede Other Provisions That Provide Greater or Additional Rights – **38 U.S.C. 4302(a)**
- USERRA Does Supersede Other Provisions That Restrict Your Rights – **38 U.S.C. 4302(b)**
- USERRA is the “Floor, Not the Ceiling”

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Eligibility Criteria
"The Six Gates"

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**LEAVING
 EMPLOYMENT**

Gate 1

Must Be an Employee

38 U.S.C. 4303(3)

- Need not be "Permanent" or "Regular" Job
- Job Offers Covered

Gate 2

Leave for Military Service

38 U.S.C. 4303(16)

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PRIOR NOTICE

Gate 3


You Must Give Prior Notice

38 U.S.C. 4312(a)(1)


- Verbal Notice is Fine – Written is Better
 - An *Appropriate Officer* Can Give Notice
 - Not Required if Precluded by Military Necessity; or Impossible
 - DoDI 1205.12 – DoD "**Strongly**" Encourages Advance Notice *in Writing*
- How Much Advance Notice Must You Give?**

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FIVE-YEAR LIMIT



Gate 4


Service Must Not Exceed A Cumulative Period of Five Years

38 U.S.C. 4312(c)


- Period of Service, *Not Absence*
- Cumulative with Current Employer
- New Employer: New 5-Year Limit
- Exemptions from 5-Year Limit:
 - Involuntary Call-up, Volunteer for Critical Mission; War

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HONORABLE DISCHARGE CONDITIONS




Gate 5

No Right to Reemployment After Punitive or Other Than Honorable Discharge


38 U.S.C. 4304

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TIMELY RETURN TO WORK



Gate 6

Notify Employer When You Will Return To Work Within The Legally Prescribed Time Frame

38 U.S.C. 4312(e)

- **Service < 31 Days** – Report Next Day After Discharge Date Allowing for Safe Return To Home; + 8 Hours of Rest
- **31-180 Days** – Report Within 14 Days of DD-214 Date
- **> 180 Days** – Report Within 90 Days of DD-214 Date
- **+ 2 Years** - for Hospitalization or Convalescence

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DOCUMENTATION



- Only Required if Service is 31 Days or More and if Employer Requests to Confirm You Reported to Work Within Legal Time Frame; and To Determine Discharge Status
- Employer Must Promptly Reinstate Service Member Pending Availability of Documentation
- *Issue*
 - Tied to Receiving Benefits

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Entitlements



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PROMPT REINSTATEMENT



38 U.S.C. 4313(a)

- If Service Was 30 Days or Less – Immediate Reinstatement
- > 30 Days – Prompt Reinstatement - “Days or Weeks; Not Months or Years”

Cannot Make Servicemember Wait for a Vacancy, “Red Tape” Paperwork or Budget Approval

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CONTINUOUS SENIORITY

38 U.S.C. 4316(a)

- Escalator Principle – Applies to Benefits, Pay, Status, Etc.
- Seniority - Longevity in Employment & Accrued Related Benefits
- Benefits - Privileges, Status, Pension, Stock Plans, Medical or Health Insurance, Bonuses, Vacation Rate & the Opportunity *to Select Hours & Work Location*

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NO CHANGE OF STATUS

38 U.S.C. 4313(a)(2)

- Position, Responsibilities, Location, Hours of Employment, Opportunity for Promotion, Etc.
- When Reinstated, Service Member's Status Should Be What He or She *Would Have Earned if Continuously Employed*

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TRAINING

38 U.S.C. 4313(a)

- Entitled to Training Service Member Would Have Received if He or She Had Been Continuously Employed

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DISABILITIES

38 U.S.C. 4313(a)(3)

- **Employer Must Make Reasonable Accommodations for Disabled Veteran - Changes in Equipment, Methods, etc. to Enable Disabled Veteran to Perform**
- **Alternatively...Right to Another Job**




HEALTH PLAN REINSTATEMENT

38 U.S.C. 4317(b)


- **Right to Reinstatement of Coverage Upon Reemployment**
- **No Waiting Period**
- **No Exclusion of "Pre-existing Conditions"**
- **Binding on Employer and Insurance Company**



Assistance and Enforcement



CHAIN OF ASSISTANCE & ENFORCEMENT



- Unit Representative/Chain of Command
- **ESGR Ombudsman Service**
- US Department of Labor – VETS Office
 - Can Conduct Formal Investigation
- US Department of Justice, Office of Special Counsel – US DOL Will Refer if Necessary
- Private Counsel (*Generally* Out of Pocket Expense for Service Member)

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Serving Our Nation - Together




Thank You!

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Thank you for your support of our Servicemembers!

Our Team is dedicated to providing you...
the Best Service and Support.



For Employers

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

Yes.

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

No.

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

Yes.

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

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

Yes.

6. What are valid military orders?

written or verbal orders are considered valid

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

more than 30 days



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

promptly

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.

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

No.

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

No.

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

No.

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

Yes.



7. What if an employee does not return in a timely manner to work?

subject to the personnel policies

8. How does military service affect employee status or seniority in the workplace?

not to have been absent

allowed to contribute to the pension plan

reinstated with privileges and status

9. What are the rules on contribution to the pension or thrift savings plan for periods of military leave of absence?

3 times the length of service

10. Can an employee contribute to the pension plan when on military leave of absence?

no burden

11. What are the rules for entitlement to health insurance?

Health insurance must be reinstated

12. Does an employee accrue vacation or medical/sick days from the employer while on military leave of absence?

No.

13. Does an employee have the right to make up periods of work missed due to drill or military leave of absence?

No.



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

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

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?

1 to 30 days 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

31 to 180 days

181 or more days

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?

as soon as possible

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

up to 2 years

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

of 1 to 90 days **Service**

Service of 91 or more days

Note

USERRA: Non-Technical Resource Guide

The Department of Labor's Veterans' Employment and Training Service provides this guide to enhance the public's access to information about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in various circumstances. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

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USERRA: Non-Technical Resource Guide

USERRA applies to virtually all employers, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal employers. Specific questions should be addressed to the State director of the Veterans' Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive system, "The USERRA Advisor," answers many of the most-often asked questions about the law. It can be found in the "E-Laws" section of the Department of Labor's home page. The Internet address is <http://www.dol.gov>.

Disclaimer

This user's guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the actual statute or the official USERRA Handbook.

A NON-TECHNICAL RESOURCE GUIDE TO THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

The U.S. Department of Labor
 Veterans' Employment and Training
 Service

April 1999

Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353), significantly strengthens and expands the employment and reemployment rights of all uniformed service members.

Who's Eligible for Reemployment?

"Service in the uniformed services" and "uniformed services" defined. (38 U.S.C. Section 4303 (13 & 16))

Reemployment 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.
- 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 per-

son's fitness for any of the above types of duty.

- Funeral honors duty performed by National Guard or Reserve members.

The "uniformed services" consist of the following:

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

"Brief Nonrecurrent" positions. Section 4312(d)(1)(C)

The new law provides an exemption for preservice positions that are "brief or nonrecurrent and that cannot reasonably be expected to continue indefinitely or for a significant period."

Advance Notice. Section 4312(a)(1)

The law requires all employees to provide their employers with advance notice of military service.

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 if:

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

USERRA: Non-Technical Resource Guide (Continued)

"Military necessity" for purposes of the notice exemption is to be defined in regulations of the Secretary of Defense. These regulations will be immune from court review.

Duration of Service Section 4312(c)

The cumulative length service that causes a person's absences from a position may not exceed 5 years.

Most types of service will be cumulatively counted in the computation of the 5-year period.

Exceptions. Eight categories of service are exempt from the 5-year limitation. These include:

- (1) Service required beyond 5 years to complete an initial period of obligated service (Section 4312 (c)(1)). Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond 5 years.
- (2) Service from which a person, through no fault of the person, is unable to obtain a release within the 5-year limit (Section 4312(c)(2)). For example, the 5-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 Operations Desert Shield and Storm.

(3) Required training for Reservists and National Guard members (Section 4312(c)(3)). The 2-week annual training sessions and monthly weekend drills mandated by statute for Reservists and National Guard members are exempt from the 5-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) Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).

(5) Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress (Section 4312(c)(4)(B)). This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to 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 (Section 4312(c)(4)(c)). 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 Title 10, U.S.C. Section 12304. The recent U.S.

military involvement in support of restoration of democracy in Haiti ("Uphold Democracy") was such an operational mission as is the current (as of 1998) operation in Bosnia ("Joint Endeavor").

This sixth exemption for the 5-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

- (7) Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect (Section 4312 (c)(4)(D)). 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 (Section 4312(c)(4)(E)).

Disqualifying Service Section 4304

When would service be disqualifying? The statute lists four circumstances:

- (1) Separation from the service with a dishonorable or bad conduct discharge.
- (2) Separation from the service under other than honorable

USERRA: Non-Technical Resource Guide (Continued)

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 (Section 1161(a) of Title 10).
- (4) Dropping an individual from the rolls when the individual has been absent without authority for more than 3 months or who is imprisoned by a civilian court. (Section 1161(b) of Title 10)

Reporting Back to Work Section 4312(e)

Time limits for returning to work now depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work day that would fall 8 hours after the end of the calendar day. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 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.

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 one above for persons who are absent for 1 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 reemployment must be submitted 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. If the 14th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service. If the 90th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to 2 years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The 2-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 2-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report

to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

Documentation Upon Return Section 4312(f)

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 that:

- the person's application for reemployment is timely;
- the person has not exceeded the 5-year service limitation; and
- the person's separation from service was other than disqualifying under Section 4304.

Unavailable documentation. Section 4312(f)(3)(A). If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

Pension contributions. Section 4312(f)(3)(B). Pursuant to Section 4318, if a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

USERRA: Non-Technical Resource Guide (Continued)

How to Place

Eligible Persons in a Job

Length of service. Section 4313(a) 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.

1 to 90 days. Section 4313(a)(1)(A) & (B). A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

(1) (Section 4313(a)(1)(A)) 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 to qualify the person; or, (B) in the position of employment 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 in subparagraph (A) 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 is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. (Section 4313(a)(4))

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. Section 4313(a)(2). The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

(1) Section 4313(a)(2)(A). 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 to qualify the person; or, (B) 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 the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) Section 4313(a)(4). If the employee cannot become qualified for the position either in (A) or (B) above: in any other position of lesser status and pay, but that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

Escalator position. The reemployment position with the highest priority in the reemployment

schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.

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, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in a situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation and

USERRA: Non-Technical Resource Guide (Continued)

pay that the person is qualified to perform (the third reemployment position in the above schemes).

Prompt reemployment. Section 4313(a). The law specifies that returning service members be "promptly reemployed." What is prompt will depend on 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 5 years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

Disabilities Incurred or Aggravated While in Military Service Section 4313(a)(3)

The following three-part reemployment 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 position that person would have held if the person had remained continuously employed.
- (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 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 rea-

- sonable efforts by the employer.
- (3) If the person does not 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.

The law covers all employers, regardless of size.

Conflicting Reemployment Claims Section 4313(b)(1) & (2)(A)

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Changed Circumstances Section 4312(d)(1)(A)

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

Undue Hardship Section 4312(d)(1)(B)

Employers are excused from making efforts to qualify returning

service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Rights of Reemployed Persons

Seniority rights. Section 4316(a). Reemployed 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 service. On the other hand, a right or benefit is not seniority based if it is compensation for work performed or is subject to a significant contingency.

Rights not based on seniority. Section 4316(b). Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the most favorable treatment so long as the nonmilitary leave is comparable. For example, a three-day bereavement leave is not comparable to a two-year period of active duty.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became

USERRA: Non-Technical Resource Guide (Continued)

effective during their service.

Forfeiture of rights. Section 4316(b)(2)(A)(ii). 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. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Funding of benefits. Section 4316(b)(4). 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 would be required to pay.

Pension/Retirement Plans

Pension plans. Section 4318, which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- Section 4318(a)(2)(A). A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;
- Section 4318(a)(2)(B). Military service must be considered service with an employer for

vesting and benefit accrual purposes;

- Section 4318(b)(1). The employer is liable for funding any resulting obligation; and
- Section 4318(b)(2). The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. Section 4318. A “pension plan” that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Multi-employer plans. Section 4318(b)(1). In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate among the participating employers the liability of the plan for pension benefits accrued by persons who are absent for military service. If no 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 reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person’s reemployment. (4318(c))

Employee contribution repayment period. Section 4318(b)(2). Repayment

of employee contributions can be made over three times the period of military service but no longer than 5 years.

Calculation of contributions. Section 4318(b)(3)(A). 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.

Section 4318(b)(3)(B). If the employee’s compensation was not based on a fixed rate, the determination of such rate is not reasonably certain, on the basis of the employee’s average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation Pay Section 4316(d)

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

Health Benefits Section 4317

The law provides for health benefit continuation for persons who are absent from work to serve in the military, even when their employers are not covered by COBRA. (Employers with fewer than 20

USERRA: Non-Technical Resource Guide (Continued)

employees are exempt for COBRA.) Section 4317(a)(1).

If a person's health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Section 4317(b). A waiting period or exclusion cannot be imposed upon reinstatement if health coverage would have been provided to a person had the person not been absent for military service. However, an exception applies to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service-connected.

Multi-employer. Section 4317(a)(3). 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

Persons returning from active duty for training were not explicitly protected under the old law. Under USERRA, a reemployed employee

may not be discharged without cause as follows:

- Section 4316(c)(1). For 1 year after the date of reemployment if the person's period of military service was for more than 6 months (181 days or more).
- Section 4316(c)(2). For 6 months after the date of reemployment if the person's period of military service was for 31 to 180 days

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. Section 4311.

Section 4311(a). 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;
- reemployment;
- termination; and
- benefits.

Persons protected. Section 4311(a). The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations

in all branches of the military are also protected.

Standard/burden of proof. Section 4311(c). 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 burden of proof is on the employer once a *prima facie* case is established.

The enacted law clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Both the standard and burden of proof now set out in the law apply to all cases, regardless of the date of the cause of action, including discrimination cases arising under the predecessor ("VRR") law.

Reprisals

Employers are prohibited from retaliating against anyone:

- who files a complaint under the law;
- who testifies, assists or otherwise participates in an investigation or proceeding under the law; or
- who exercises any right provided under the law.
- whether or not the person has performed military service (Section 4311(b)).

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How the Law is Enforced Department of Labor

Regulations. Section 4331(a). The Secretary of Labor is empowered to issue regulations implementing the statute. Previously, the Secretary lacked such authority. However, certain publications issued by the U.S. Department of Labor had been accorded “a measure of weight” by the courts.

Veterans’ Employment and Training Service. Reemployment assistance will continue to be provided by the Veterans’ Employment and

Training Service (VETS) of the Department of Labor. Section 4321. VETS investigates complaints and attempts to resolve them. Filing of complaints with VETS is optional. Section 4322.

Access to documents. Section 4326(a). The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. Section 4326(b). The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Government-Assisted Court Actions

Section 4323(a)(1). Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the

Service Member Checklist

Service Member Obligations	Yes	No	Comments	Reference
1. Did the service member hold a job other than one that was brief, nonrecurring? (Exception would be discrimination cases.)				Page 2
2. Did the service member notify the employer that he/she would be leaving the job for military training or service?				Page 2
3. Did the service member exceed the 5-year limitation on periods of service? (excludes exceptions identified in the law)				Page 3
4. Was the service member discharged under conditions other than disqualifying under section 4304?				Page 3
5. Did the service member make application or report back to the pre-service employer in a timely manner?				Page 4
6. When requested by the employer, did the service member provide readily available documentation showing eligibility for reemployment?				Page 4
7. Did the service member whose military leave exceeded 30 days elect to continue health insurance coverage? The employer is permitted to charge up to 102% of the entire premium in these cases.				Page 8

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Attorney General may file a court action on the complainant's behalf.

Private Court Actions Section 4323(a)

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double damages. Section 4323(c)(1)(A)(iii). Award of back pay or lost benefits may be doubled in

Employer Checklist

cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees. Section 4323(c)(2)(B). The law, at the court's discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also,

the law bans charging of court fees or costs against anyone who brings suit (4323(c)(2)(A)).

Declaratory judgments. Section 4323(c)(4). Only persons claiming rights under the law may bring lawsuits. According to the law's legislative history, its purpose is to prevent employers, pension plans, or unions from filing actions for declaratory judgments to determine potential claims of employees.

Employer Obligations	Yes	No	Comments	Reference
1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal.)				Page 2
2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used.				Page 6
3. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?				Page 5
4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations?				Page 6
5. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?				Page 4
6. Did the employer consider the timing, frequency or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?				Page 5

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Employer Checklist (continued)

Employer Obligations	Yes	No	Comments	Reference
7. Did the employer provide training or retraining and other accommodations to persons with service connected disabilities? If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?				Page 6
8. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority?				Page 5
9. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?				Page 7
10. Did the employer offer COBRA-like health coverage upon request of a service member whose leave was more than 30 days? Upon the service members election, did the employer continue coverage at the regular employee cost for service members whose leave was less than 31 days?				Page 7
11. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute?				Page 8
12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for military service?				Page 8
13. Did the employer satisfy the burden of proof where employment, reemployment or other entitlements are denied or when adverse action is taken when a service connection is the motivating factor in the denial or adverse action? Did the employer provide documentation that the action would have been taken in the absence of such membership?				Page 8

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Can't find an answer to your question?

Ask an expert. The phone numbers at right are for local branches of the U.S. Department of Labor Veterans' Employment and Training Service (DVETS).