MEMORANDUM

TO: Senior Vice President and Executive Vice Chancellor
    Senior Vice Presidents and Chancellors
    Senior Vice Presidents
    Vice Presidents
    State Director of Vocational Education
    Deans and Directors

FROM: Peggy S. Hoag
      System Director of Human Resources

SUBJECT: Military Leave

The Department of Human Resources Development (DHRD) has just recently provided a revised copy of the previously distributed memorandum relating to Military Leave (copy attached).

A complete copy of DHRD's memorandum has been posted to the Office of Human Resources' Home Page which may be found on the World Wide Web at the following address:

http://www2.hawaii.edu/dhmr/hor/welcome.html

Attachment

c: Board Secretary Ishii
   President and Chancellor Mortimer
STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANA STREET
HONOLULU, HAWAII 96813-2437

June 17, 1996

TO: Personnel Directors
    City and County of Honolulu
    County of Kauai
    County of Hawaii
    County of Maui
    Administrator Director of the Courts

FROM: James H. Takushi
      Director of Human Resources Development

SUBJECT: MILITARY LEAVE, UNIFORMED SERVICES EMPLOYMENT AND
        REEMPLOYMENT RIGHTS ACT (USERRA) OF 1994

The USERRA expands and clarifies reemployment rights and benefits for veterans and
members of reserve components that were previously provided under the Veterans
Reemployment Rights (VRR) law.

The attached materials on the USERRA -- a fact sheet, a question and answer information
sheet, and a reemployment eligibility checklist -- were recently obtained from the Honolulu
Office of the U.S. Department of Labor. We found these materials enlightening and much
easier to understand than the federal act and regulations, which set forth the rights, benefits,
and obligations under the USERRA.

Since the USERRA supersedes any law or contract that reduces, limits, or eliminates any
rights under the USERRA or that establishes additional prerequisites to the exercise of such
rights, we are sharing these materials to ensure that we as employers are in compliance with
the USERRA. Please feel free to duplicate these materials for information and use by your
managers and supervisors as you deem necessary.

cc: Departmental Personnel Officers
    Unions -- HGEA, UPW, HFFA,
    HSTA, and UHPA
    DHRD-AAD
    DHRD-LRD
JOB RIGHTS FOR NON-CAREER MILITARY SERVICEMEMBERS
(The Uniformed Services Employment and Reemployment Rights Act of 1994)

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) clarifies and strengthens the veterans' reemployment rights (VRR) law as first enacted in 1940. Over the years, the VRR law had become a confusing patchwork of statutory amendments, interpreted in over 1,000 different court decisions. It became difficult for employees and employers to understand their various entitlements and responsibilities, and hampered the Department of Labor’s ability to resolve VRR claims quickly.

USERRA continues the protection of civilian job rights and benefits for veterans and members of Reserve components. However, USERRA makes major improvements in the protection of rights and benefits by clarifying the law, improving enforcement mechanisms, and providing Federal Government employees Department of Labor assistance in processing claims.

The new law also expands to 5 years the cumulative length of time that an individual may be absent for military duty and retain reemployment rights (the old law provided 4 years of active duty, plus an additional year if the additional time was for the convenience of the Government). Similar to the old law, there are important exceptions to the 5 year limit. These include initial enlistments lasting more than 5 years, periodic training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency. USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual’s service.

USERRA also provides for enhanced protection for disabled veterans, such as the requirement that employers make reasonable efforts to accommodate the disability. Servicemembers convalescing from injuries received during service or training may have up to two years to return to their jobs (as opposed to the one year provided by the old law).

As under the old law, USERRA provides that returning service-members be reemployed in the job that they would have attained had they not been absent for military service (the long-standing “escalator” principle), with the same seniority, status and pay, as well as other rights and benefits determined by seniority. However, USERRA also requires that reasonable efforts be made (such as training or retraining) that would enable returning servicemembers to refresh or upgrade their skills so that they might qualify for reemployment. It clearly provides alternative reemployment positions if the servicemember cannot qualify for the “escalator” position. USERRA also reaffirms and clarifies that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the non-seniority rights accorded other individuals on non-military leaves of absence.

Health and pension plan coverage for servicemembers is clarified under USERRA. Individuals performing military duty of more than 30 days may elect to continue employer-sponsored health care for up to 18 months; however, they may be required to pay up to 102 percent of the full premium. For military service of less than 31 days, health care coverage is provided as if the servicemember had never left. USERRA clarifies pension plan coverage by making explicit that all pension plans which are a
The application period after military service is now based on time spent on military duty not on the category of service performed. For service of less than 31 days, the service member must return at the beginning of the next regularly scheduled work period on the first full day after release from service, taking into account 3 days travel time plus an 8-hour rest period. For service of more than 30 days but less than 181 days, the service member must submit an application for reemployment within 14 days of release from service. For service of more than 180 days, an application for reemployment must be submitted within 90 days of release from service.

USERRA also requires that service members provide advance written or verbal notice to their employers for all military duty. Under the old law, notice was only required for training duty. Additionally, for the first time, service members will be able (but are not required) to use accrued vacation or annual leave while performing military duty.

Under USERRA, the Department of Labor, through the Veterans' Employment and Training Service (VETS), must provide assistance to all persons having claims under USERRA, including Federal and Postal Service employees.

If resolution is unsuccessful following an investigation, the service member with a claim against a State government or against a private sector employer may have their claims referred to the Department of Justice for consideration of representation in the appropriate District Court, at no cost to the claimant. For the first time, if violations under USERRA are shown to be willful, the court may award liquidated damages.

Federal and Postal Service employees may have their claims referred to the Office of Special Counsel for representation consideration before the Merit Systems Protection Board (MSPB). Individuals who pursue their own claims in court or before the MSPB may be awarded reasonable attorney and expert witness fees if they prevail.

Service members employed by Intelligence Community agencies, such as the Central Intelligence Agency, are provided similar assistance through the agency's Inspector General.

If you have questions or require assistance regarding VRA rights and obligations, contact the VETS office nearest you (in the telephone book under Federal Government, U.S. Department of Labor) or call 1-800-424-3838 (VETS).
REEMPLOYMENT RIGHTS UNDER USERRA

GENERAL REQUIREMENTS

1. Is there a law governing reemployment rights after military training or service?

   Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR) law. The VRR law was codified at 38 U.S.C. 4301-4307. On October 13, 1994, President Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law No. 103-353, 108 Stat. 3149, a complete rewrite of and replacement for the VRR law. Most of USERRA's provisions go into effect on December 12, 1994 (60 days after the date of enactment). Most of USERRA will be codified at 38 U.S.C. 4301-4333.

2. Am I eligible for reemployment rights under USERRA?

   Yes, provided you meet five conditions:

   a. You must hold a civilian job.
   b. You must give notice to your civilian employer that you will be leaving the job for military training or service (discussed further below).
   c. You must not exceed the five-year cumulative limit on service (discussed further below).
   d. You must be released from service under "honorable conditions" (discussed further below).
   e. You must report back to your civilian job in a timely manner or submit a timely application for reemployment (discussed further below).

3. Don't my rights depend upon the type of military training or service that I am to perform (e.g., active duty versus active duty for training)?

   Not any longer. Under the VRR law, the rules were different based on the type of military training or service. Under USERRA, all types are treated as "service in the uniformed services" and the rules depend upon the duration of the service.

4. Do I have reemployment rights following voluntary military service?

   Yes. Like the VRR law, USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime.
5. The agreement between my union and the employer does not provide for reemployment rights for returning veterans. Does that defeat my rights?

No. Section 4302(b) of USERRA provides that this law supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates any rights under USERRA or that establishes additional prerequisites to the exercise of such rights.

On the other hand, your union agreement can confer additional benefits. Section 4302(a) of USERRA provides that this law does not supersede any other Federal or State law, local law or ordinance, contract, agreement, practice, etc. which confers greater or additional rights on persons who are serving or who have served in the uniformed services.

LEAVING THE CIVILIAN JOB--NOTICE REQUIREMENT

6. Doesn't my civilian job have to be an "other than temporary" job?

Not necessarily. Under the VRR law, holding an "other than temporary" job was an eligibility criterion, but this is not so under USERRA. Under the new law, even persons holding "temporary" jobs can have reemployment rights unless "the employment ... is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." [Section 4312(d)(1)(C)] This is an affirmative defense for which the employer bears the burden of proof. [Id.]

7. When is prior notice to my civilian employer required? How is such notice to be given?

Under USERRA, it is necessary that the person who is to perform service in the uniformed services or an appropriate officer of the uniformed service in which the service is to be performed give advance written or verbal notice to the employer. [Section 4312(a)(1)] Under the VRR law, advance notice to the employer was required only in the case of active duty for training or inactive duty training, but under USERRA the notice requirement applies to all categories of training or service.

No notice is required if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense and shall not be subject to judicial review. [Section 4312(b)] It is reasonable to expect that situations where notice is not required will be rare.

8. Am I required to "request" a leave of absence?

No. The VRR law referred to reservists requesting leaves of absence for active duty for training and inactive duty training, but this was really a notice requirement, because the employer had no right to deny the request. Under USERRA, you are only required to give notice. As a
matter of courtesy to your employer, you may wish to phrase your notice in terms of a request for permission to be absent from work for military training or service.

9. Under what circumstance would the giving of notice be considered to be "precluded by military necessity" or "otherwise impossible or unreasonable"?

A classified recall would be an example of a situation in which giving prior notice would be precluded by military necessity. If your military commander directs you to report for active duty and not to disclose the fact that you are being recalled, then prior notice will not be required, and the courts will not have the authority to review the reasonableness of such military need for the secrecy. It is envisioned that this will be a rare situation, but military authorities could determine that a potential adversary might be able to infer the plans of our military from the fact of your activation, based upon your unit's mission or capabilities, so it might be necessary to classify the fact of your recall.

If you are recalled to active duty on very short notice, and if the telephone system has failed, it might be "impossible or unreasonable" for you to give prior notice to your civilian employer. This will be a very rare exception to the notice requirement because notice can be given in any number of ways (in person, by telephone, by mail, by telegram, etc.).

10. How much advance notice is required?

The law does not specify how much advance notice is required, but our advice would be that you give your employer as much advance notice as possible. The legislative intent of this provision is explained in a report of the House Committee on Veterans' Affairs, and that report states that if the employee receives notice from military authorities at the last moment, the employee should not be penalized for the lateness of the notice to the civilian employer, but if the employee has notice of an impending period of service in the uniformed services and unjustifiably withholds notice to the civilian employer, this should be viewed unfavorably, especially if the lateness of the notice "causes severe disruption to the employer's operation." H.R. Rept. 103-65, 103d Cong., 1st Sess., page 26 (April 28, 1993). See also Burkart v. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988) (VRR case upholding hiring of National Guard member who withheld notice of active duty for training until the last moment).

11. Must the notice be in writing?

No. Section 4312(a)(1) refers to "advance written or verbal notice." Our advice would be that you give written notice if possible, because written notice tends to avoid misunderstandings and proof problems. It would be prudent for you to retain a copy of your written notice, in case a question arises upon your return as to whether you had provided advance notice.
12. Can my Commanding Officer or someone else give notice on my behalf?

Yes. Section 4312(a)(1) provides that the notice may be given by the person who is to perform service in the uniformed services or by "an appropriate officer of the uniformed service in which the service is to be performed." Our advice is that you should give personal notice to your employer and not depend upon your Commanding Officer or someone else to do this for you.

13. What if I left my civilian job to enter active duty prior to December 12, 1994 and did not give prior notice to my employer? Am I out of luck?

No. Section 8(a)(4) of USERRA (part of the "Transition Rules and Effective Dates") provides that in such a circumstance you will have reemployment rights if you meet the VRR law's eligibility criteria with respect to notice. Under the VRR law, reservists were required to request leaves of absence prior to active duty for training or inactive duty training, but not prior to active duty or initial active duty training.

LIMIT ON DURATION OF SERVICE

14. How is the five-year limit computed?

Only service in the uniformed services that you have performed "with respect to the employer relationship for which [you] seek reemployment" counts toward the five-year limit. [Section 4312(c)] In other words, military service that you performed before you began working for your current employer is irrelevant for reemployment rights purposes.

15. Is the limit cumulative?

Yes. so long as you remain employed by the same civilian employer. When you start a new job with a new employer, you receive a fresh five-year entitlement.

16. Do all kinds of military training or service count toward the cumulative five-year limit?

No. The cumulative five-year limit does not count certain kinds of duty or training.

Note: Several of USERRA's exceptions to the five-year limit refer to sections in Title 10, United States Code. The Reserve Officer Personnel Management Act, enacted on October 6, 1994 (one week before USERRA), renumbered some of these sections. In the discussion that follows, the old Title 10 cite is stated, along with the new cite in italics.
The following categories of training or service in the uniformed services are excluded in computing the five-year limit:

a. Service that you performed "during which [you were] unable to obtain orders releasing [you] from a period of service in the uniformed services before the expiration of the five-year period and such inability was through no fault of [you]." [Section 4312(c)(2)]

b. Service that you performed as required pursuant to section 270 (10147) of Title 10, under section 502(a) or 503 of Title 32, in order to fulfill additional training requirements determined and certified in writing by the Secretary of the Army, in the case of members of the Army Reserve] to be necessary for professional development or for completion of skill training or retraining. [Section 4312(c)(3)] [This exception includes most periodic and special Reserve and National Guard training.]

c. Service that you performed when ordered to or retained on active duty under section 672(a)(12301(a))[involuntary active duty in wartime], 672(g)(12301(g))[retention on active duty while in captive status], 673(12302)[involuntary active duty of up to 24 months for a national emergency], 673b(12304)[involuntary active duty for operational mission, up to 270 days, up to 200,000 members of the Selected Reserve], 673c(12305)[involuntary retention on active duty of critical persons during time of crisis or other specific condition], or 688 [involuntary active duty by military retirees] of Title 10 or under section 331 [involuntary active duty by retired Coast Guard officer], 332 [voluntary active duty by retired Coast Guard officer], 359 [involuntary active duty by retired Coast Guard enlisted member], 360 [voluntary active duty by retired Coast Guard enlisted member], 367 [involuntary retention on active duty of Coast Guard enlisted member], or 712 [involuntary active duty by Coast Guard Reserve member for natural or man-made disasters] of Title 14. [Section 4312(c)(4)(A)]

d. Service that you performed when ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress. [Section 4312(c)(4)(B)]

e. Service that you performed when ordered to active duty (other than for training) in support, as determined by the Secretary concerned [such as the Secretary of the Army, in the case of members of the Army Reserve], of an operational mission for which the President has ordered Reserve Component personnel to active duty under section 673b(12304) of Title 10. [Section 4312(c)(4)(C)] Note: This applies to both voluntary and involuntary service in support of such a mission.

f. Service that you performed when ordered to active duty (other than for training) in support, as determined by the Secretary concerned [such as the Secretary of the Army, in the case of members of the Army Reserve], of a critical mission or requirement of the uniformed services. [Section 4312(c)(4)(D)] Note: This applies to both voluntary and involuntary service in support of such a mission.
g. Service that you performed when called into Federal service as a member of the National Guard under chapter 15 of Title 10 or under section 5500(12406) or 8500(12406) of Title 10. [Section 4312(c)(4)(E)]

17. What about Reserve training and other categories of training or service which fit into one of the above exceptions? Is there any limit to the duration of such service?

No. Section 4312(h) expressly provides that the timing, frequency, duration, or nature of service in the uniformed services shall not be a basis for denying rights and benefits under USERRA unless the service exceeds the permissible limits under the rules discussed above.

18. I am a Federal employee, and I receive 15 days of paid military leave each year. My agency's personnel office has informed me that I have no right to time off from work for military training or service beyond this 15 days. Is that right?

No. As a Federal employee, you have the right to 15 days of paid military leave each fiscal year, under 5 U.S.C. 6323. Section 4302(a) of USERRA provides that this law does not supersede other Federal and State laws, ordinances, contracts, etc. which provide greater or additional rights. Accordingly, USERRA does not negate your right to this period of paid leave. When you have exhausted your right to paid leave under 5 U.S.C. 6323, you still have the right to unpaid military leave under USERRA, because USERRA applies to the Federal Government as well as all other civilian employers. If you wish to continue your civilian pay uninterrupted, and if you have annual leave on the books, you may wish to use that annual leave for your military training or service. Section 4316(d) of USERRA gives you the explicit right to do this. This is your option, not the employer's. It is unlawful for the employer to require you to use annual leave or vacation for military training or service.

The result would probably be the same if you were employed by a State or local government. Most States grant such employees a few days of paid military leave. When you have exhausted your paid leave, USERRA gives you the right to unpaid military leave.

19. What would be an example of a situation in which I might be unable to obtain orders releasing me from service, such that the service would not count toward the five-year limit?

You can normally expect to be released from active duty on your Expiration of Active Obligated Service (EAOS) date if you want to be released, but there are circumstances in which your EAOS date may be involuntarily extended. If you are assigned to a ship at sea, your EAOS date may be extended until the ship returns to the United States, or at least until the ship reaches port. If you are suspected of a military criminal offense, the military may retain you on active duty involuntarily for purposes of court martial. If you are tried and acquitted, or if the military authorities decide not to proceed to trial, you may have reemployment rights even if the involuntary extension puts you beyond the five-year limit.
20. I am in the Navy's nuclear power program. When I chose that program and entered active duty in 1989, I had to agree to serve on active duty for six years. I expect to leave active duty in 1995, at the end of my six-year tour. Will I have reemployment rights?

Yes, provided you meet USERRA's other eligibility criteria. Section 4312(c)(1) provides that the five-year limit does not count service "that is required, beyond five years, to complete an initial period of obligated service." Your situation is exactly the sort of situation that the drafters had in mind when they wrote this subsection.

21. I started to work for XYZ Corporation in 1986, and I left that job to enter active duty in the Army in 1988. I left active duty in 1992 and was reemployed by XYZ Corporation, in accordance with the VRR law. I still work for that company. Now that USERRA has been enacted, can I serve an additional five years of voluntary active duty under the new law and have reemployment rights again?

No. Section 8(a)(3) of USERRA, part of the "Transition Rules and Effective Dates," provides that military service performed prior to the effective date of USERRA will count toward the USERRA limits.

CHARACTER OF SERVICE

22. What kind of discharge from military service will disqualify me from reemployment rights?

You will not have reemployment rights if you receive one of the following:

a. A dishonorable discharge or bad conduct discharge [awarded by court martial to an enlisted member for serious misconduct].

b. A dismissal as provided by section 1161(a) of title 10 [awarded by court martial to a commissioned officer for serious misconduct].

c. A separation from service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

d. Dropping you from the rolls of the service pursuant to section 1161(b) of title 10.

Section 4304.
REPORTING BACK TO WORK OR APPLYING FOR REEMPLOYMENT

23. After military training or service, how long do I have to report back to work or apply for reemployment?

For periods of training or service of up to 30 consecutive days, you must report back to work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation ...from the place of that [military service to your] residence." [Section 4312(e)(1)(A)(i)] For example, if your training is over at 1630 on Sunday and it takes five hours for safe transportation from the place of the training to your residence, you are not required to report to work for a shift that starts at 0200 on Monday, because you have not had at least eight hours of rest.

If reporting back within this deadline is "impossible or unreasonable" through no fault of yours, you must report back as soon as possible after the expiration of the eight-hour period referred to above. [Section 4312(e)(1)(A)(ii)] For example, an automobile accident during your return trip could extend the deadline for you to report back to work.

After a period of training or service of 31-180 days, you must submit an application for reemployment with the employer not later than 14 days after the completion of the period of service. If submitting the application within that 14 day period is impossible or unreasonable through no fault of yourself, you must submit the application by the next first full calendar day when submission of such application becomes possible. [Section 4312(e)(1)(C)]

After a period of training or service of 181 days or more, you must submit an application for reemployment not later than 90 days after completion of the period of service. [Section 4312(e)(1)(D)]

Any of these deadlines can be extended by up to two years if you are hospitalized or convalescing for a service-connected injury or illness. [Section 4312(e)(2)(A)]

24. What if I am late in reporting back to work or applying for reemployment, although it was not impossible or unreasonable for me to report back or apply within the deadline?

In that case, you do not automatically forfeit your right to reemployment, but you will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work." [Section 4312(e)(3)]

25. Am I to "report back to work" or must I "submit an application for reemployment?"

After a period of up to 30 days of training or service, you must report back to work. After longer periods, you must submit an application for reemployment.
26. Is USERRA's treatment of short periods of service (up to 30 days) identical to the VRR law's treatment of active duty for training or inactive duty training?

The treatment is similar but not identical. The reference to "safe" transportation was intended to make clear that the reservist returning from a short tour is not required to drive all night in order to be timely in reporting back to the civilian job. The reference to the eight-hour period after returning home is intended to give the reservist a reasonable rest before returning to the civilian job.

27. What does it mean to "submit an application for reemployment?"

You must make it clear to the employer that you are a former employee returning from service in the uniformed services. You are not an applicant for new employment.

Following a period of training or service of 31 days or more, and upon request by the employer, you must provide documentation (e.g., a DD-214, an endorsed copy of your orders, or a letter from your Commanding Officer) to establish that your application for reemployment is timely, that you have not exceeded the service limitation (five-year limit discussed above), and that you are not disqualified for reemployment for having received an "other than honorable" discharge. [Section 4312(f)(1)] The Secretary of Labor will write regulations establishing precisely the kind of documentation that will be considered satisfactory. [Section 4312(f)(2)] If the required documentation does not yet exist or is not readily available to you, the employer cannot use the lack of such documentation to delay or defeat your right to reemployment. In such a situation, the employer must reemploy you promptly while awaiting such documentation. If the documentation, when it becomes available, establishes that you do not meet the eligibility criteria for reemployment rights, the employer is permitted to terminate your employment and any rights or benefits that you have been accorded under USERRA. [Section 4312(f)(3)] The employer is permitted to delay reinstating you in the pension plan until required documentation has been provided. [Section 4312(f)(3)(B)]

28. Must the application be in writing?

No, but a written application would be a good idea. Written applications tend to preclude misunderstandings and facilitate proof.
ENTITLEMENTS DURING SERVICE

29. Does USERRA give me the right to benefits from my civilian employer during my military training or service?

Yes. Section 4317(a) of USERRA gives you the right to elect continued health insurance coverage, through your civilian job, during service or training in the uniformed services. For periods of up to 30 days of training or service, including most Reserve and National Guard annual training periods, the employer can only require you to pay the employee share, if any, of the cost of such coverage. For longer tours, the employer is permitted to charge you up to 102% of the entire premium, including the part normally paid by the employer.

It would probably be a good idea for you to make this election for short tours (up to 30 days) because your right to use the military health care system (including CHAMPUS) for your spouse and dependents only applies if you are under orders for 31 days or more of service. Moreover, coverage for these short tours costs you nothing, other than what you have paid if your civilian employment had not been interrupted by such a short tour of training or service in the uniformed services. Making this election for a longer tour (more than 30 days) makes sense only if there is some good reason why you cannot or do not want to use the military health care system. For example, if your daughter is seriously ill and is being treated by a doctor who is unwilling to participate in the CHAMPUS system, you may want to continue your civilian health insurance during your service in order to continue seeing that doctor.

If you elect coverage for a tour of more than 30 days, your right to that coverage ends on the day after the deadline for you to apply for reemployment (e.g., 90 days after a tour lasting 181 days or more) or 18 months after your absence from your civilian job began, whichever comes first. [Section 4317(a)(1)(A)]

Section 4317(b) of USERRA gives you the right to immediate reinstatement of your civilian health insurance coverage upon your return to your civilian job. There must be no waiting period and no exclusion of pre-existing conditions (other than those conditions which the Department of Veterans Affairs has determined to be service-connected). Your right to reinstatement of your health insurance coverage upon your return to civilian employment is not contingent on your having elected to continue that coverage during your service in the uniformed services.

Of course, USERRA does not require your employer to establish health insurance coverage. If your employer does not offer health insurance coverage to employees, the employer is not required to "continue" or to "reinstate" such coverage. If your employer's coverage applies to the families of employees, as well as employees themselves, your right to continue or reinstate your coverage applies to your whole family.
If and to the extent that your employer offers non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you, during your service or training in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (jury leave, educational leave, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length. You cannot compare a four-day jury leave with a four-year military leave. [Section 4316(b)]

ENTITLEMENTS UPON RETURN FROM SERVICE

30. If I meet USERRA's eligibility criteria, to what am I entitled upon my application for reemployment?

You have four basic entitlements:

   a. Prompt reinstatement.
   b. Accrued seniority, as if you had been continuously employed.
   c. Training or retraining and other accommodations.
   d. Special protection against discharge, except for cause.

31. What do you mean by "prompt reinstatement?"

Section 4313(a) provides that the returning servicemember or Reservist must be "promptly reemployed." The law does not define prompt, but this should generally be a matter of days, not weeks or months. Persons returning from periods of up to 30 days of training or service must report back to work instead of submitting applications for reemployment. Such persons are entitled to be put back on the payroll immediately upon reporting back to work.

32. Am I entitled to the exact job I left?

Section 4313(a)(1) provides that you are entitled to the exact job you left if your period of service did not exceed 90 days, provided that you are still qualified for that job. If your period of service was for 91 days or more, the employer has the option to reemploy you in another position of "like seniority, status and pay." [Section 4313(a)(2)]

33. What do you mean by "accrued seniority?"

Section 4316(a) provides as follows:

A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.
This subsection was intended to codify the "escalator principle" first enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). Section 4318 of USERRA deals with the application of the "escalator principle" to employee benefit pension plans.

34. What kind of training or retraining and other accommodations am I entitled to?

If you have been gone from your civilian job for months or years, you may find many changes when you come back. The employer may be using new equipment and methods with which you are unfamiliar. Even if equipment and methods have not changed, your civilian job skills may have been dulled by a long period without use. You must be qualified to do the job in order to have reemployment rights, but Section 4313(a)(2)(B) requires the employer to make "reasonable efforts" to qualify you.

Section 4313(a)(3) of USERRA also requires the employer to make "reasonable efforts" to accommodate a service-connected disability. "Reasonable efforts" are those actions which do not impose an "undue hardship" upon the employer. [Section 4303(10)] "Undue hardship" means actions required of an employer that require significant difficulty or expense when considered in light of several factors, including "the overall financial resources of the employer." [Section 4303(15)] For example, a "reasonable effort" might include lowering an assembly line by two feet so that a returning servicemember in a wheelchair could do the job.

There are some disabilities which cannot be accommodated by reasonable efforts. For example, a blinded veteran cannot be a commercial airline pilot. If upon your return from service in the uniformed services you are suffering from a service-connected disability that cannot be accommodated by reasonable employer efforts, the employer is required to reemploy you in some other position that you are qualified to perform and which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status, and pay, consistent with the circumstances of your case. [Section 4313(a)(3)(B)]

A disability need not be permanent in order to confer rights under section 4313(a)(3). For example, if you break your leg during your annual training in the National Guard or Reserve, your employer may have an obligation to make reasonable efforts to accommodate your broken leg, or to place you in another position, until your leg has healed.

35. What is the period of special protection against discharge, except for cause?

If your period of service was for 181 days or more, the period of special protection is one year. [Section 4316(c)(1)] If your period of service was 31-180 days, the period of special protection is 180 days. [Section 4316(c)(2)] If your period of service was less than 31 days, you have no special period of protection, but you are still protected by Section 4311, which forbids discrimination.
If you are fired during the period of special protection, the employer has the burden of proof that you were discharged for cause. This gives you the sort of protection against arbitrary dismissal that union members frequently enjoy under collective bargaining agreements that limit discharges to "just cause." Carter v. United States, 407 F.2d 1238 (D.C. Cir. 1968).

PROTECTION FROM DISCRIMINATION

36. Does the new law protect me from discrimination by my employer or a prospective employer?

Yes. Section 4311(a) provides as follows:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Section 4311(c)(1) provides as follows:

An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter.

These two provisions provide a very broad protection against discrimination, much broader than the VRR law provided.

37. Who has the burden of proof in these discrimination cases?

Section 4311(b) provides that a denial of employment or an adverse action taken against you by an employer will be unlawful if your membership in a uniformed service, application for membership, service, obligation, etc. was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, performance of service, application for service, or obligation." [Emphasis supplied.] This section was intended to overrule Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988), which held that under the VRR law it was necessary to establish that the Reservist's military obligation was the sole reason for the discharge.
ASSISTANCE AND ENFORCEMENT

38. Where do I go for assistance in enforcing my rights under USERRA?

You should contact the Veterans' Employment and Training Service (VETS) of the United States Department of Labor. You can call 1-800-442-2VET to obtain the address and telephone number of the VETS office closest to you.

Under the new law [Section 4321], VETS will assist Federal employees claiming reemployment rights, as well as employees of State and local governments and private employers.

39. How are my rights under USERRA to be enforced?

VETS will contact your employer and explain your rights. In many cases, this is all that is required, because many employers are simply unfamiliar with the reemployment statute (old and new). VETS will conduct an investigation. If it appears to VETS that your case has merit, and if your employer still refuses to comply, VETS will refer your case to the Office of Special Counsel (OSC). If the claim is against a Federal agency as employer, or to the Attorney General (AG), if the claim is against any other employer. If "reasonably satisfied" that your claim has merit, the OSC or AG may act as your attorney, at no cost to you. [Sections 4322-4324]

A proceeding against a Federal agency will be filed in the Merit Systems Protection Board (MSPB). [Section 4324] Under USERRA, unlike the VRR law, the MSPB has explicit authority to order a Federal agency to comply with your rights under this law. [Section 4324(c)] Under the VRR law, certain categories of Federal employees, including those still in their probationary periods and employees of non-appropriated fund activities, had no forum to enforce their reemployment rights, but under USERRA all Federal employees have the opportunity to appeal to the MSPB to enforce their rights under this law.

A proceeding against a non-Federal employer will be filed in the United States District Court for any district in which a state or local government exercises authority or carries out a function or in which a private employer maintains a place of business. [Section 4323(b)]

If the OSC or AG declines to represent you, or if you do not request OSC or AG assistance, you may file suit directly in the MSPB or Federal District Court. [Sections 4323(a)(2) and 4324(b)] If you do proceed through private counsel and you prevail, the MSPB or the court can order the employer to pay your reasonable attorneys' fees and litigation expenses. [Sections 4323(c)(2)(B) and 4324(c)(4)] This new provision makes the option of proceeding through private counsel much more realistic.
40. What remedies are available under USERRA?

If the Federal District Court finds that a violation has occurred, the court can require the employer to comply with USERRA and require the employer to compensate you for wages and benefits lost because of the employer's violation. [Section 4323(c)(1)] If the court finds that the violation was willful, the court can order the employer to pay you double damages. [Section 4323(c)(1)(A)(iii)] The court is expected to use its equity powers, including injunctions and temporary restraining orders, to vindicate your rights fully. [Section 4323(c)(3)] The MSPB has similar authority in Federal-sector cases, but there is no provision for double damages in cases against Federal agencies as employers. [Section 4324(c)(2)]

41. Am I required to "exhaust remedies" through VETS before filing suit in court or in the MSPB?

No, but our advice would be that you contact VETS first. In most cases, VETS is able to obtain compliance without the need for litigation.

USERRA also has some new provisions intended to strengthen the role of VETS and the effectiveness of its assistance to claimants. For example, Section 4326 gives VETS subpoena power for the first time.

42. What is the role of the National Committee for Employer Support of the Guard and Reserve (NCESGR)?

NCESGR explains the law to reservists and their employers, but NCESGR is not an enforcement agency. Through public service announcements, "boslifs," and a network of more than 4,000 volunteers, NCESGR explains to employers the importance of the Reserve Components to our country, and the importance of "employer support" for members of those components. Many employers go beyond what the law requires, such as by making up the difference in your pay when you are away from your civilian job for military training or service. NCESGR operates an awards program for especially cooperative employers. You can reach NCESGR at 1-800-336-4590.
REEMPLOYMENT ELIGIBILITY CHECKLIST
(REEMPLOYMENT INITIATED ON OR AFTER DECEMBER 12, 1994, WITH PRIVATE OR STATE EMPLOYER)

This checklist can help you decide whether a person who's been absent from private or state employment because of military service is eligible for reemployment under the Uniformed Services Employment and Reemployment Rights Act of 1994. Use the checklist only for reemployments initiated on or after December 12, 1994. Check off any of the following boxes that apply to the employee's or employer's situation. If all the boxes are checked, the employee is most likely entitled to reinstatement, as well as to certain employment privileges and benefits.

☐ The employer is a private entity, a state, or an agency or political subdivision of a state. ("State" includes the District of Columbia or any of the territories of the United States.)

☐ The person's preservice employment with the employer was for more than a brief or nonrecurrent period and could reasonably be expected to continue for a significant period.

☐ There's been no change in the employer's circumstances that would make reemployment impossible or unreasonable.

☐ Check this box if one of the following applies:
  • Military service that began on or after December 12, 1994: written or oral advance notice of the service was given to the employer by either the employee or an appropriate officer of the employee's military branch.
  • Military service that began before December 12, 1994: the employee was a reservist or National Guard member who provided notice to the employer before leaving work for active duty for training or inactive duty training that began prior to December 12, 1994.

☐ The cumulative length of the person's service-connected absences from this employer does not exceed five years. Count all types of service, except for the following:
  • Service required beyond five years to complete an initial period of obligated service.
  • Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit.
  • Required training for reservists and National Guard members.
  • Active duty service (other than for training) during wars, domestic emergencies, or national security-related situations.
  • Service before October 13, 1994, that was any kind of service other than active duty service.

☐ Termination of the person's military service was under honorable conditions.

☐ Following military service that ended on or after December 12, 1994, the person timely reported back to work or applied for reemployment as follows:
  • Service of 1 to 30 days or absence for a fitness examination: the person reported back to work by the beginning of the first regularly scheduled work day that fell eight hours after the person returned home.
  • Service of 31 to 180 days: the person submitted an application for reemployment no later than 14 days after completion of the service. Or, if doing so was impossible or unreasonable, through no fault of the person, the person submitted the application as soon as possible.
  • Service of 181 or more days: the person submitted an application for reemployment within 90 days after completing the service.

☐ Check this box if one of the positions below is applicable:
  • Return from service of 1 to 90 days: The person is qualified for or could become qualified for (a) the job the person would have held if the person had never left; (b) the job the person held prior to leaving for military service, if the person could not become qualified for (a); or (c) any other position of lesser status and pay, if the person could not become qualified for (a) or (b).
  • Return from service of 91 or more days: The person is or could become qualified for (a) the job the person would have held if the person had never left, or a position of equivalent seniority, status, and pay; (b) the person's preservice position, or a position of equivalent seniority, status, and pay, if the person could not become qualified for (a); or (c) any other position of lesser status and pay, if the person could not become qualified for (a) or (b).

☐ Persons with service-connected disabilities: The person is qualified or could become qualified with accommodation of the person's disability for (a) the position the person would have held if the person had never left; (b) a position of equivalent seniority, status, and pay, if the person could not become qualified for (a); or (c) a position that, consistent with the circumstances of the person's case, would be the closest approximation (next best) to (b), if the person could not become qualified for (a) or (b).

☐ Check this box if one of the following applies:
  • The person is already qualified for reemployment in one of the positions described above, so that efforts to train the person or to accommodate any service-connected disability are unnecessary.
  • It would not be an undue hardship (significantly difficult or expensive) to train the person or to accommodate the person's service-connected disability in order to qualify the person for one of the employment positions described above.