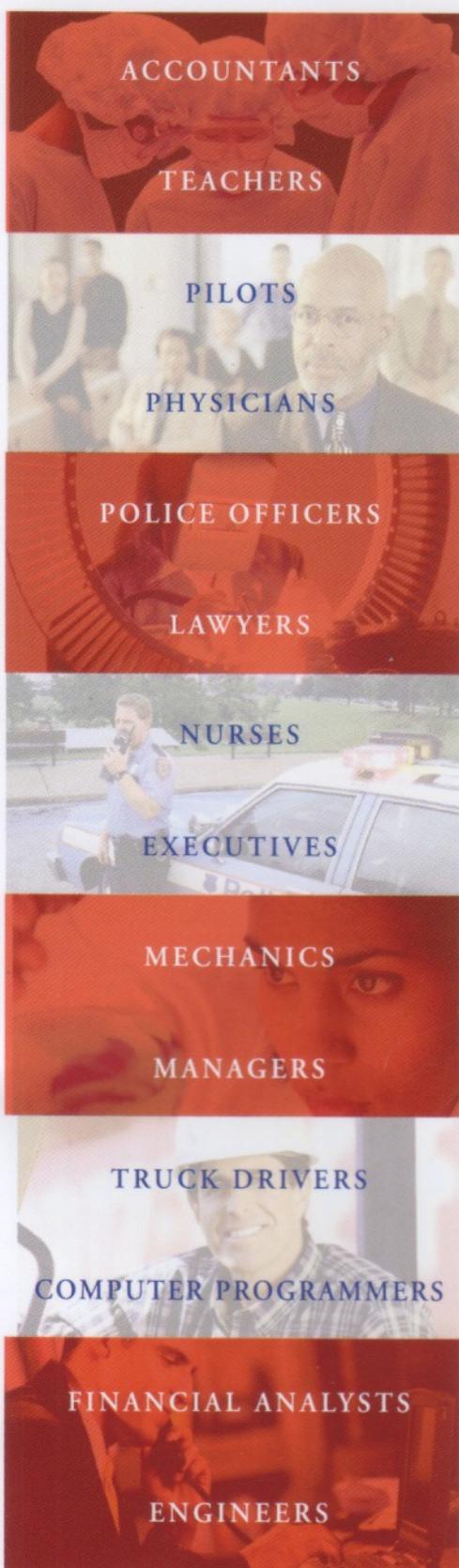


# Employer Resource Guide

FOR BUSINESS LEADERS



ESGR can help you manage employees who are members of the National Guard and Reserve. This guide contains valuable information about the rights, responsibilities and benefits of employing a member of the Reserve components.

1-800-336-4590 [www.esgr.com](http://www.esgr.com)

# Welcome!

Employers of America's National Guard and Reserve are inextricably linked to a strong National Defense. ESGR continues to bring business and military leaders together to increase support for the men and women of the finest Reserve force in the World.



Welcome!

## Employer Resource Guide

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## The Mission of the National Committee for Employer Support of the Guard and Reserve

is to gain and maintain active support from all public and private employers for the men and women of the National Guard and Reserve as defined by demonstrated employer commitment to employee military service.

## ESGR Mission

ESGR has a national and local organizational structure to support our mission through the following functions:

- ✦ Operate a proactive program directed at employers, employees and communities that ensures understanding and appreciation of the role of the National Guard and Reserve in the context of the DoD Total Force Policy.
- ✦ Encourage and assist employee participation in National Guard and Reserve training programs and on military duty without civilian job impediments of any kind, to include encouraging voluntary compliance with federal and state statutes governing employment and reemployment rights of Reserve component members.
- ✦ Recruit and develop volunteer leaders at the national and local levels to promote the development of employer personnel policies and practices that accommodate and facilitate employee participation in National Guard and Reserve activities.
- ✦ Encourage interaction between National Guard and Reserve units and their communities to promote public understanding of the National Guard and Reserve and encourage partnerships between civilian organizations and military units in the community.
- ✦ Assist in preventing, resolving or reducing employer and/or employee problems and misunderstandings that result from National Guard or Reserve membership, training or duty requirements through information services and information mediation.
- ✦ Assist in educating National Guard and Reserve members regarding their obligations and responsibilities to employers.
- ✦ Use the military chain of command to promote better understanding of the importance of maintaining positive working relations between employers and their Reserve component employees, in order to sustain National Guard and Reserve participation.
- ✦ Solicit the assistance of military agencies, military training schools and military and civilian associations in educating the Reserve forces about their rights and responsibilities regarding terms and conditions of civilian employment, as stipulated in the Uniformed Services Employment and Reemployment Rights Act (USERRA).
- ✦ Promote civilian and military personnel practices that encourage membership in the National Guard or the Reserve. (DoD Directive 1250.1)



# Top Ten Reasons Employers Support the Guard and Reserve

- Leadership**  
Military-employees are trained to be leaders and managers—no additional seminars required.
- Professionalism**  
Military-employees know the importance of integrity and respect; respect that gives your team a winning edge.
- Responsibility**  
Military-employees know what it means to be accountable for valuable human and material resources.
- Mission-Critical Skills**  
Military-employees undergo trade-related and technical training that often relates directly to civilian jobs.
- Physical Conditioning**  
On the battlefield or in the workplace, military-employees know the value of being in top physical condition and drug free.
- “Can-Do” Attitude**  
Whatever the situation, military-employees carry and apply a positive attitude to get the job done.
- Calm Under Fire**  
Handling stress is all in a day’s work for military-employees. You can count on them to be steady, cool and collected.
- First-Class Image**  
You’ll never have to remind military-employees to get a haircut. Whether in uniform or a business suit, they know how to dress for success.
- On Time, All The Time**  
In a military operation or in the business world, every second counts. Military-employees will be there on time.
- Global Perspective**  
From Europe to the Far East, military-employees are tuned into the forces and events that shape the global market.



Each employer is inextricably linked to a strong national defense..

Today, the National Guard and Reserve are an integral part of our defense forces. Nearly half of the men and women serving in our armed forces are members of the National Guard and Reserve. Their performance must meet the same standards as their active-duty counterparts. However, since they do not serve full time, the cost to the government is far less.

Contact Us:

Local Committees:

Contact information on  
[www.esgr.com](http://www.esgr.com)

National Headquarters:

Toll Free: 800-336-4590

Direct: 703-696-1386

## Tips for Civilian Employers

As an employer, you are vital to enabling your employees who are members of the National Guard and Reserve to serve their country. Moreover, your active support and encouragement are key to their success.

Here are some suggestions on how to help them help us all:

- ✦ Learn more about the role of the National Guard and Reserve. Attend open houses and public functions at local military units. Talk about the National Guard and Reserve with military and civilian leaders in your community. Ask your employees what they do and how they fit into the “big picture” of national defense.
- ✦ Get to know your employees’ military commanders and supervisors. Ask them to provide you with advance notice of your employees’ annual military duty schedules and work out conflicts as early as possible. If you would like an introduction, contact your local ESGR representative to make arrangements for you to meet them.
- ✦ Put your support in writing by signing a “Statement of Support” for the National Guard and Reserve. Display this patriotic certificate prominently for all your employees and visitors to see. These certificates can be obtained from the ESGR Headquarters or through your local ESGR Committee. You can also request a certificate on our web site ([www.esgr.com](http://www.esgr.com)).
- ✦ Look at your personnel policies to see how they accommodate and support participation in the National Guard or Reserve. For example, do they include provisions for military leave of absence, exclusive of earned vacation time? Do they ensure job opportunities and benefits equivalent to those of other employees? We would be happy to provide you with information on what other businesses are doing to accommodate National Guard and Reserve members in their workplace.
- ✦ Get your entire management team to promote your support of the National Guard and Reserve. Explain your position and address problems or concerns they may raise.
- ✦ Encourage employee participation in the National Guard and Reserve. Recognize and publicize their dedication and commitment to your business and the nation. Apply the training they receive from military duty. You’ll be surprised to realize how much it enhances their job performance and adds value to your organization.
- ✦ Accept that there may be occasional conflicts or concerns with your employment of “citizen soldiers” and their requirement to perform military duty. Seek to resolve them as

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## Tips for Civilian Employers (Continued)

soon as they arise. Discuss with your employees their service requirements before problem situations arise, and keep an open dialogue to prevent them.

- ✦ Seek assistance from your local ESGR Committee or from the ESGR Headquarters, (800) 336-4590. Ask to speak to an Ombudsman. Ombudsmen serve as confidential, neutral liaisons for employers and employees who seek assistance or clarification regarding their rights and responsibilities. Most of the calls they receive are resolved to the satisfaction of everyone involved. ESGR Ombudsmen work closely with the Veterans' Employment and Training Service (VETS) / Department of Labor (DOL) and will refer to them if formal assistance is needed.

- ✦ Don't hesitate to call on your employee's military commander or supervisor if you have a conflict. They face some of the same challenges you do in their "business" and know that it is in everyone's best interest to work together. Quite often, they can offer alternatives to meet individual needs. By taking a more active role in supporting the members of the National Guard and Reserve who work for you, you'll improve the quality of life for all your employees, you'll directly enhance the success of

your organization, and you'll provide an invaluable service to the nation.

For more detailed information about specific employment rights and responsibilities, see the ESGR "Ombudsman Services and USERRA" section of this guide.



When the end of the draft was initially anticipated, defense planners foresaw a potential issue with the nation's Reserve service members and their civilian employers. Long accustomed to National Guard and Reserve membership as an alternative to compulsory active-duty service, it was believed that employers might question the necessity of service in a purely voluntary military system. The planners concluded that some employers might not be supportive of their workers serving voluntarily in uniform.

## ESGR Background: Who We Are

The National Committee for Employer Support of the Guard and Reserve (ESGR) is an agency within the office of the Assistant Secretary of Defense for Reserve Affairs. It was established in 1972 to promote cooperation and understanding between Reserve component members and their civilian employers and to assist in the resolution of conflicts arising from an employee's military commitment.

Today, more than 4,200 volunteer executives, senior government representatives, educators, business people, community leaders and military personnel serve on local ESGR Committees within each state, the District of Columbia, Guam, Puerto Rico, the Virgin Islands and Europe. Through this network, ESGR can reach out to all employers, large and small, in cities, towns and rural areas. With the help and resources from the ESGR Headquarters in Arlington, Virginia, the 55 ESGR Committees conduct employer support programs serving both employers and military service members. They include:

- **Employer Statement of Support Signings.** To underscore the important role that the National Guard and Reserve play in our national defense, the National Committee for Employer Support of the Guard and Reserve (ESGR) developed the Statement of Support Certificate. Employers of Reserve

component service members sign a full color certificate that is pre-signed by the Secretary of Defense and National Chair of ESGR. It can be displayed prominently at the employers' offices or work sites to demonstrate to all employees and visitors that supporting our National Defense is their "way of business."

- **Employer Awards and Recognition.** All employer recognition and awards originate from nominations by individual Reserve component members recognizing their employers for supportive employment policies and practices. Depending on the degree of support, the level of recognition rises to the "Employers' Support Freedom Award," given by the Secretary of Defense. Employer awards include:

- **"Patriot" Certificate of Appreciation.** This certificate is awarded by ESGR on behalf of the Department of Defense. The awardee receives a certificate and a Patriot lapel pin. All members of the National Guard and Reserve are eligible to nominate their employers for the "Patriot" certificate.

- **The Committee "Above and Beyond" Chair Award.** This award is given in limited numbers and presented annually by each local ESGR Committee. It is designed to recognize those employers who have gone above and beyond the legal requirements for supporting their employees' military duty.

□ The PRO PATRIA Award.

This is presented to those employers who demonstrate exceptional support for our National Defense by adopting personnel policies that make it easier for employees to participate in the National Guard and Reserve. This award is given once annually by each of the 55 committees.

□ Employer Support Freedom Award. This award is ESGR's most prestigious. The Secretary of Defense presents it annually to the top five employers who have provided unconditional support to their employees in supporting the National Defense. The winners of this award are invited to Washington, DC for a formal ceremony.

□ Bosslifts. Bosslifts transport employers and supervisors to military training sites where they observe National Guard and Reserve members on duty as part of the Total Force. This provides the employer a better understanding of what their Reserve component members do when they are away from their civilian occupation for duty with their military units.

□ Employer Briefings. Employer briefings provide an informal forum in which employers, unit commanders, ESGR members, and community leaders meet to network and discuss issues that may arise from employee

participation in the National Guard and Reserve.

□ Military Unit Training. This program provides a direct link between the local ESGR Committee and each National Guard and Reserve unit to provide information and assistance should employment problems develop. The Unit Liaison volunteer visits Reserve and National Guard units at least once annually to provide support for the unit's Uniformed Services Employment Reemployment Rights Act (USERRA) training program and their Employer Recognition Program.

□ Ombudsman Services. Ombudsman Services is comprised of a specially trained team of experts in the field of reemployment rights for members of the National Guard and Reserve. Questions about the law, problems with individual supervisors or employers and inquiries about specific personnel practices can all be addressed. The service is available to employers as well as to members of the National Guard and Reserve. Every local committee has trained volunteers to assist community employers and employees in understanding and applying the law. Most local ESGR Committee ombudsmen are business leaders and they understand both sides of the problem to help mediate any employer/employee issues.

By increasing public awareness of the role of the employer in our National Defense, these programs facilitate a dialogue among employers, the ESGR committees, and local National Guard and Reserve unit commanders. Service members also provide valuable feedback to the Office of the Secretary of Defense to point out regional or national trends that affect recruiting, retention and training of the National Guard and Reserve.

Currently, nearly 50 percent of the nation's total available military manpower (excluding retirees) is comprised of the Reserve components. Our Reserve forces will spend more time away from the workplace defending the nation, supporting a demanding operations tempo and training to maintain their mission readiness.

The Department of Defense (DoD) tasks ESGR to "...promote both public and private understanding of the National Guard and Reserve in order to gain U.S. employer and community support through programs and personnel policies and practices that shall encourage employee and citizen participation in the National Guard and Reserve programs." (DoD Directive 1250.1)



Even with the best of communication and partnership between employers and their employees who are members of the National Guard or Reserve, questions and concerns do arise related to the adverse consequences of military service.

## ESGR Ombudsman Services

The Ombudsman Services Program provides information, informal mediation and referral service to resolve employer conflicts. ESGR is not an enforcement agency and does not offer legal counsel or legal advice. Most of the requests for assistance are resolved in this informal process without requiring referral to the Department of Labor for formal investigation.

Each of the 55 ESGR committees has trained, volunteer Ombudsmen ready to assist you. Many of them are local business leaders whose stature in the community contributes to their effectiveness in mediation. See the U.S. Department of Labor Veterans' Employment and Training Services (DVETS) Contacts section for a list of state DVET contacts, and the ESGR Resources page of the ESGR web site ([www.esgr.com](http://www.esgr.com)), Committee Contacts section, for a local ESGR Ombudsman.

If you have a conflict with your employee, your first approach should be to meet with your employee. Most often, a calm, objective discussion can lead to an acceptable solution if it is conducted in an atmosphere of mutual respect and cooperation. If you can't come up with a workable solution, contact the ESGR Ombudsman Services through the local ESGR committee. ESGR Ombudsmen are qualified to help, sympathetic to the needs of both the

employers and employees, and are committed to remaining impartial in their counsel.

As an alternative, the ESGR Headquarters has full-time staff in its Ombudsman Services Directorate available throughout the business week. See the ESGR web site ([www.esgr.com](http://www.esgr.com)), "Our Staff" section, or use our toll-free number, (800) 336-4590 and ask for Ombudsman Services.



## Ombudsman Services and USERRA

Congress provided clear protection for all members of the uniformed services (including noncareer National Guard and Reserve members, as well as active duty personnel) in October 1994 with the passage of the Uniformed Services Employment and Reemployment Rights Act (USERRA), Chapter 43, U.S. Code.

ESGR provides education and training resources for employers, HR professionals, and military personnel to help all understand their rights and responsibilities. The Department of Labor (DOL) is the enforcement authority for Uniformed Services Employment and Reemployment Rights Act (USERRA). DOL processes all formal complaints of violations of the law. Major sections of the law include:

- ✦ Expanding coverage to specifically include the Public Health Service, the Coast Guard and others designated by the President in time of war or emergency.
- ✦ Placing a 5-year limit (with some exceptions) on the cumulative length of time a person may serve in the military and remain eligible for reemployment rights with the pre-service employer.
- ✦ Requiring individuals to give written or verbal notice to their employer prior to departure for military service.
- ✦ Establishing time limits for

reporting back to work, based on the length of time in the uniformed service, rather than on the type of service, and requiring documentation of such service, if available.

- ✦ Providing for the continuation of employer-provided health insurance (at the service member's request) for an 18-month period, with payment of up to 102 percent of the full premium by the service member.
- ✦ Requiring that an employee's military service not be considered a break in employment for pension benefit purposes, and providing that the person's military service must be considered service with an employer for vesting and benefit accrual purposes.
- ✦ Providing that the U.S. Department of Labor Veterans' Employment and Training Service (DVETS) shall assist all employees, including federal government workers.
- ✦ An employee is not required to request permission to be absent for military leave, but rather



## Ombudsman Services and USERRA (Continued)

provides notification of pending military service.

- ✦ Except for the 5 year limit, there is no longer any differentiation between voluntary and involuntary military service.
- ✦ An employee cannot be required to use earned vacation or similar leave days for military leave of absence.
- ✦ Military service will not be counted as time away from the employer for retirement purposes. (Federal employees should review the Code of Federal Regulations, series 5 CFR 353.201-210 for details related to their employment.) Also, Federal employees can use their military leave days for their weekend drills and/or annual training period.

The Act seeks to ensure that members of the uniformed services are entitled to return to their civilian employment upon completion of their service. They should be reinstated with the seniority, status and rate of pay they would have obtained had they remained continuously employed by their civilian employer. The law also protects individuals from discrimination in hiring, promotion and retention on the basis of present and future membership in the armed forces.

Key features of the Uniformed Services Employment and Reemployment Rights Act (USERRA):

USERRA, enacted in October 1994, provides reemployment protection and other benefits for veterans and employees who perform military service. It clarifies the rights and responsibilities of National Guard and Reserve members, as well as civilian employers. USERRA was significantly updated in 1996, 1998 and 2000. It applies almost universally to all employers – including the federal government – regardless of the size of their business.

**Federal law.** No law, policy, practice, etc. that would diminish the rights established in USERRA takes precedence over the provisions of USERRA. Conversely, USERRA does not supersede, nullify or diminish any federal or state law, or company policy, union agreement, practice or contract that provides greater rights or benefits to service members.

**Applicability.** USERRA applies to all employers, regardless of the size of their business. It protects part-time positions, unless the employment is for a brief, non-recurring period and is not expected to last indefinitely or for a significant period. USERRA does not protect independent contractors and others considered to be self-employed.

**Definitions.** Section 4303 contains a number of definitions that must be kept in mind when applying the law to a civilian employment rights scenario. For example, the law protects persons who perform service in the uniformed services. “Service” includes active or inactive

duty under federal authority, but does not include state call-ups of members of the Army or Air National Guard. (The term “employer,” as it applies to National Guard technicians on other than active or inactive duty for training, are considered to be state employees and are not afforded protection under USERRA.) “Uniformed services” includes the active and Reserve components of the Armed Forces, the Army and Air National Guard, the Commissioned Corps of the Public Health Service and any other category of persons designated by the President in time of war or emergency.

**Discrimination.** USERRA prohibits discrimination in hiring, retention, promotions, or other benefits of employment against a person because that person “is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform services in a uniformed service....” In addition, employers are prohibited from reprisal against anyone who exercises USERRA rights or anyone who assists in the exercise of those rights by testifying or otherwise participating in an investigation, even if that person has no military connection.

**Eligibility.** To qualify for reemployment rights following military service, employees must meet the following 5 eligibility criteria: employees must have left a civilian job; employees must have given notice that they were leaving to perform military service; the cumulative period of service must

## Ombudsman Services and USERRA (Continued)

not have exceeded 5 years (there are exceptions); employees must have been released from service under honorable or general conditions; and, employees must have reported back to work or applied for reemployment within time constraints prescribed by law.

**Notice.** Under USERRA, the employee (or an officer from his/her military unit) must give the employer advance notice (either written or verbal) of upcoming military service of any type. Otherwise, the employee will not be eligible for reemployment protection following the period of military service. The only exceptions to the notification requirement would be if the giving of notice is precluded by military necessity (e.g., a classified recall) or if it is otherwise impossible or unreasonable to give notice. These exceptions to the notice requirement are expected to be very rare. It is best for the employee to give an employer as much advance notice as possible.

**5-year limit.** USERRA sets a 5-year cumulative limit on the amount of military leave an employee can perform and retain reemployment rights with a given employer. If an employee gets a new employer, the employee gets a new 5-year limit. There are some important exceptions for the 5-year limit. If an employee is unable to obtain release or if service is required to complete an initial period of obligated service, that time of service is exempt. For example, an initial enlistment may last more than 5 years, such as for nuclear

power training. In this case, an employee retains reinstatement rights with the employer. In addition, if an employee was hospitalized for or is convalescing from an illness or injury incurred in, or aggravated during military service, the limit may be extended up to an additional 2 years. Drills (inactive duty training), annual training, involuntary active duty extensions (including training certified as necessary by the employee's service) and recalls due to a war or national emergency are not counted in the 5-year cumulative total.

USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration or nature of an individual's service. USERRA 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 nonseniority rights accorded other individuals on non military leaves of absence.

If an employee were employed by the same employer both before and after USERRA's effective date of December 12, 1994, duty that the employee performed under the previous law will count against the USERRA 5-year limit.

**Reemployment procedures.** The type of military duty performed does not relate to the employee getting his or her job back. Reinstatement is strictly based on the duration of the uniformed service. For periods of military service up to 30 days, an employee must report back to work

at the next regularly scheduled shift on the day following release from the military, safe travel home, and 8 hours of rest. For longer periods of service, reinstatement is not necessarily immediate, but should be within a matter of days or at most a few weeks. Following a period of service of 31-180 days, employees must apply for reemployment within 14 days following release. Following a period of service of 181 days or more, an employee must apply for reemployment within 90 days after release. In applying for reemployment, employees should identify themselves, state that they left that employer to perform military service, that they have completed the service and want to be reinstated. Failure to return to work or apply for reemployment within the specified time limits through the employee's own fault does not necessarily forfeit that employee's reemployment rights, but makes that person subject to the employer's rules concerning unauthorized absence from work.

**Reemployment position.** Employees returning from military service must be reemployed in the job that they would have attained had they not been absent for military service (the long-standing "escalator" principle) and with the same seniority, status and pay, as well as other rights and benefits determined by seniority. Reasonable efforts must be made to enable returning employees to refresh or upgrade their skills to enable them to qualify for reemployment. If refresher training is not successful, USERRA

## Ombudsman Services and USERRA (Continued)

provides that the employee must be reinstated in a position that most nearly approximates that position originally held. Employees who are disabled (temporarily or permanently) due to military service must also be accommodated in a position most nearly approximating the original position.

### Reemployment entitlements.

Following a period of military service, if the employee meets the eligibility criteria discussed above, he or she has a number of specific entitlements. The employee is entitled to prompt reemployment. The employee is entitled to seniority, seniority-related benefits (including pension), status and rate of pay as if he or she were continuously employed during the military absence. The employee is entitled to immediate reinstatement of health insurance for the employee and previously covered dependents, with no waiting period and no exclusion of preexisting conditions, except conditions determined by the government to be service connected. The employee is entitled to training or retraining by the employer if that is necessary to qualify the employee for the reemployment. If the employee was disabled while on military duty, or a disability is aggravated by military service, the employer must make reasonable efforts to accommodate the disability. If the period of service was 181 days or more, the employee is protected from discharge, except for cause, for one year. If the service was for 31-180 days, the period of protection from discharge is 180 days.

4 Documentation. Following a period

of service of 31 days or more, the employee must be prepared to provide documentation to the employer which establishes that: the application for reemployment was timely; the employee has not exceeded the cumulative 5-year limit; and the character of the service was "honorable" (i.e. the employee did not receive a punitive type of discharge). If the documentation is not readily available, or does not exist, the employer cannot deny the employee reemployment, but if documentation later becomes available that shows the employee did not qualify for reemployment, the employer may immediately terminate the employee. Suggested forms of documentation could include a DD 214, endorsed orders or a letter from the employee's military unit.

**Health care.** If the period of service is 30 days or less, the employee pays the normal employee cost, if any, of the coverage. USERRA provides that an employee may elect to continue employer-provided health insurance for a period up to the first 18 months of the employee's military service. If the period of service is 31 days or more, the employee could be required to pay up to 102 percent of the total premium. In addition to this special entitlement, the employee is entitled to any nonseniority-related benefits that the employer offers to employees on nonmilitary leaves of absence (e.g. jury duty).

**Pensions.** Under USERRA, all pension plans in which benefits are earned for length of service are protected.

**Vacations.** For a period of military service, an employee may elect to use any personal vacation accrued with the employer. The employer cannot require the employee to use vacation. The employee does not accrue civilian vacation during a period of military service unless the employer provides this as a benefit for employees on a nonmilitary, nonpay leave of absence of similar duration.

### Assistance and enforcement.

Situations that are complex or beyond the Ombudsman's scope of informal resolution will be immediately referred to the U.S. Department of Labor Veterans' Employment and Training Service (VETS), or you can contact them directly at your local listing.



A Sampling of Frequently Asked Questions for employers and their employees who participate in the National Guard and Reserve

## USERRA: Facts, Questions and Answers for Employers

### USERRA Facts, Questions and Answers for Employers

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

Yes. USERRA provides protections for initial hiring and adverse employment actions by an employer if the action relates even in part to the employee's military service. This protection also extends to potential witnesses of a discriminatory action on the part of the employer.

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

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

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

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

reemployment rights.

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

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

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

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

## USERRA: Facts, Questions and Answers for Employers (Continued)

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

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

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

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

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

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

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

No. As stated earlier, an employer may not require documentation for notification prior to military duty.

Further, an employer does not have a "right of refusal" for military leave of absence, so long as the employee has not exceeded the 5 years of cumulative service provided under USERRA.

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

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

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

No. When military duties would require an employee to be absent from work for an extended period, during times of acute need, or when (in light of previous leaves) the requested military leave is cumulatively burdensome, the employer may contact the military commander of the employee's military unit to determine if the duty could be rescheduled or performed by another member. If the military commander determines that the military duty cannot be rescheduled or canceled, the employer is required to permit the employee to perform his or her military duty.

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

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

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

Yes. There are three formats for reinstatement (application for reemployment), dependent on the duration of military service. Please refer to question 15 for a detailed breakdown of these formats. An employer should reinstate an employee promptly after application.

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

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

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

Time limits for returning to work depend on the duration of the orders. The rules are:

Service of 1 to 30 days: the beginning of the first regularly scheduled work period on the first full day following completion of service and



## USERRA: Facts, Questions Answers for Employers (Continued)

expiration of an 8-hour rest period following safe transportation home.

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

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

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

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

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

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

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

Except with respect to persons whose disability occurred in or was aggravated by military service, the position into which an employee is reinstated is determined by priority, based on the length of military service. The rules are:

Service of 1 to 90 days: (a) in the job the person would have held had he or she remained continuously employed (possibly a promoted position), so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer, or (b), if the person cannot become qualified, in the position the person was employed on the date of the commencement of the military service.

Service of 91 or more days: (a) same as for service of 1 to 90 days, or a position of like seniority, status and pay, so long as he or she is qualified, or (b) if the person cannot become qualified, in the position the person was employed on the date of the commencement of the military service or which nearly approximates that position.

Note. The reemployment position with the highest priority reflects the “escalator” principle, which requires that a returning service member steps back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.

USERRA specifies that returning employees must be “promptly reemployed.” What is prompt will depend on individual circumstances. Reinstatement after 3 years on active duty might require two weeks to allow giving notice to an incumbent employee who might have to vacate the position.



# 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)).



## USERRA: Non-Technical Resource Guide (Continued)

### 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



## USERRA: Non-Technical Resource Guide (Continued)

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

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 Checklist

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



USERRA: Non-Technical Resource Guide (Continued)

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



## Statement of Support Request Form

**Yes,**  
I/we pledge our support to our National Guard and Reserve members

Date \_\_\_\_\_

Company/Business Point of Contact:

Name \_\_\_\_\_

Title \_\_\_\_\_

Telephone \_\_\_\_\_

Fax \_\_\_\_\_

E-mail Address \_\_\_\_\_

Please have a local ESGR volunteer contact us to schedule a Statement of Support signing ceremony.

Send information and a Statement of Support certificate to:

Name of Business \_\_\_\_\_

Street Address \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_

Zip Code \_\_\_\_\_

County \_\_\_\_\_

Company Information:

Owner/CEO/President \_\_\_\_\_

Number of Employees \_\_\_\_\_

Number of Employees in the National Guard and Reserve \_\_\_\_\_

Number of Locations \_\_\_\_\_

Type of Industry (i.e., health care, financial, IT) \_\_\_\_\_

Company web site \_\_\_\_\_

How did you learn about ESGR? \_\_\_\_\_

Mail this form to:

Employer Support of the Guard and Reserve

ATTN: Employer Services

1555 Wilson Boulevard, Suite 200

Arlington, VA 22209

Fax this form to:

ATTN: Employer Services

(703) 696-1411



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).

## Contacts: U.S. Department of Labor DVETS

Alabama		Idaho	
Montgomery . . . . .	.334-223-7677	Boise . . . . .	.208-332-3570
Alaska		Illinois	
Juneau . . . . .	.907-465-2723	Chicago . . . . .	.312-793-3433
Arizona		Springfield . . . . .	.217-524-7769
Phoenix . . . . .	.602-379-4961	Grayslake . . . . .	.847-543-7400
Arkansas		Indiana	
Little Rock . . . . .	.501-682-3786	Indianapolis . . . . .	.317-232-6804
California		Iowa	
Anaheim . . . . .	.714-687-4845	Des Moines . . . . .	.515-281-9061
Fresno . . . . .	.559-445-5193	Kansas	
Pamona . . . . .	.909-392-2675	Topeka . . . . .	.785-296-5032
Pleasant Hills . . . . .	.925-602-1541	Kentucky	
Redlands . . . . .	.909-335-6763	Covington . . . . .	.859-292-6666
Sacramento . . . . .	.916-654-8178	Frankfort . . . . .	.502-564-7062
San Diego . . . . .	.858-689-6008	Louisiana	
Santa Monica . . . . .	.310-576-6444	Baton Rouge . . . . .	.225-389-0339
Suison . . . . .	.707-863-3583	Maine	
West Covina. . . . .	.626-960-5106	Lewiston . . . . .	.207-753-9090
Colorado		Maryland	
Colorado Springs . . . . .	.719-475-3750	Baltimore . . . . .	.410-767-2110
Denver . . . . .	.303-844-2151	Frederick. . . . .	.301-694-2185
Connecticut		Waldorf. . . . .	.301-645-8712
Wethersfield . . . . .	.860-263-6490	Massachusetts	
Delaware		Boston . . . . .	.617-626-6699
Wilmington . . . . .	.302-761-8138	Taunton. . . . .	.508-977-1414
District of Columbia		Michigan	
Washington . . . . .	.202-576-3070	Detroit . . . . .	.313-456-3182
Florida		Grand Rapids . . . . .	.616-361-3254
Fort Lauderdale . . . . .	.904-677-5818	Minnesota	
Jacksonville. . . . .	.904-798-0060	Duluth . . . . .	.218-723-4766
Orlando . . . . .	.407-741-5293	St. Paul . . . . .	.651-296-3665
St. Petersburg . . . . .	.727-893-2415	Mississippi	
Tallahassee . . . . .	.850-877-4164	Jackson . . . . .	.601-965-4204
Georgia		Missouri	
Atlanta . . . . .	.404-656-3127	Jefferson City . . . . .	.573-751-3921
Hawaii			
Honolulu . . . . .	.808-522-8216		

# Contacts: DVETS Continued

Montana	Philadelphia . . . . . 215-861-5390
Helena . . . . . 406-449-5431	Pittsburgh . . . . . 412-565-2469
Nebraska	Scranton . . . . . 717-963-4735
Lincoln . . . . . 402-471-9833	Puerto Rico/Virgin Islands
Nevada	Hato Rey . . . . . 787-754-5391
Carson City . . . . . 775-687-4632	Rhode Island
New Hampshire	Westerly . . . . . 401-528-5134
Concord . . . . . 603-225-1424	South Carolina
New Jersey	Columbia . . . . . 803-765-5795
Camden . . . . . 856-614-3163	South Dakota
Trenton . . . . . 609-292-2930	Aberdeen . . . . . 605-626-2325
New Mexico	Tennessee
Albuquerque . . . . . 505-346-7502	Clarksville . . . . . 931-572-1688
New York	Memphis . . . . . 901-543-7853
Albany . . . . . 518-457-7465	Nashville . . . . . 615-741-2135
Buffalo . . . . . 716-851-2748	Texas
Clarksville . . . . . 931-572-1688	Austin . . . . . 512-463-2814
New York . . . . . 212-352-6184	Dallas . . . . . 214-767-4987
Syracuse . . . . . 315-479-3381	Fort Worth . . . . . 817-335-0731
Utica . . . . . 315-793-2323	Houston . . . . . 713-767-2022
North Carolina	Longview . . . . . 903-758-1783
Newton . . . . . 828-466-5535	Lubbock . . . . . 806-771-3815
Raleigh . . . . . 919-733-7402	San Antonio . . . . . 210-684-1051
Washington . . . . . 252-946-2141	Utah
North Dakota	Salt Lake City . . . . . 801-524-5703
Bismarck . . . . . 701-250-4337	Vermont
Ohio	Montpelier . . . . . 802-828-4441
Cleveland . . . . . 216-787-5164	Virginia
Columbus . . . . . 614-466-2768	Richmond . . . . . 804-786-7270
Defiance . . . . . 419-782-6928	Roanoke . . . . . 540-561-7494
Warren . . . . . 330-399-8114	Woodbridge . . . . . 703-897-0433
Oklahoma	Washington
Oklahoma City . . . . . 405-231-5088	Olympia . . . . . 360-438-4600
Oregon	Seattle . . . . . 206-553-4831
Portland . . . . . 503-731-3478	West Virginia
Salem . . . . . 503-947-1490	Charleston . . . . . 304-558-4001
Pennsylvania	Wisconsin
Allentown . . . . . 610-493-1123	Madison . . . . . 608-261-8487
Chester . . . . . 610-447-3306	Wyoming
Harrisburg . . . . . 717-787-5835	Casper . . . . . 307-235-3281