FAQ’s - USERRA Military Leave

Q. Which agency administers and enforces USERRA's leave provisions?

A. The federal Department of Labor's Veterans' Employment and Training Service administers and enforces the federal Uniformed Services Employment and Reemployment Rights Act. More specifically, VETS investigates and resolves complaints of USERRA violations.

Q. Can we fire employees who take military leave under USERRA?

A. The federal Uniformed Services Employment and Reemployment Rights Act protects employees who serve in any branch of the federal military forces from being discharged or fired for taking military leave. Employers must reemploy these employees when they return from military service if they provided proper notice of leave and properly applied for reemployment.

Q. Who is eligible for military leave under USERRA?

A. Under the federal Uniformed Services Employment and Reemployment Rights Act, virtually all employees are eligible for military leave to perform service in the uniformed services. USERRA's protections extend to employees who are:
   - Full-time, part-time, probationary, or seasonal employees;
   - Temporary employees unless they have no realistic expectation of ongoing employment; or
   - Laid off with recall rights, on strike, or on leaves of absence.
   Independent contractors aren't covered by USERRA.

Q. Which employers are covered by USERRA's leave provisions?

A. All public and private employers, regardless of size, as well as foreign employers with workplaces in the United States, are covered by the federal Uniformed Services Employment and Reemployment Rights Act's leave provisions. U.S. employers that do business in foreign countries are covered under USERRA unless compliance would violate the law of the country where they're located.

Q. Must we keep paying employees while they're on military leave?

A. Under the federal Uniformed Services Employment and Reemployment Rights Act, you aren't required to continue paying employees on leave for military service. While you must permit employees to substitute accrued paid annual, vacation, or similar leave for unpaid military leave, you can't require them to use such leave.
Employees can’t use sick leave that accrued during a period of military service unless you allow employees to use sick leave for any reason or allow other similarly situated employees on comparable leaves of absence to use accrued paid sick leave.

Q. Are employers required to provide employees with leave for military service?

A. Yes, the federal Uniformed Services Employment and Reemployment Rights Act requires all employers to allow employees to take leave for military duty. It also provides job restoration, benefits, and nondiscrimination protections to employees returning from military service. In addition, many states have military leave laws that provide comparable or greater rights.

Q. Under what circumstances are employees who take military leave entitled to reemployment?

A. Employees who serve in the uniformed services generally are entitled to reemployment rights and benefits under the federal Uniformed Services Employment and Reemployment Rights Act if:

- Employees or an officer of the service gives employers advance written or verbal notice of military service,
- The cumulative length of the absence and all previous absences from employment due to uniformed service doesn’t exceed five years,
- Employees report to or submit an application for reemployment within the required time frame, and
- Employees are honorably discharged from military service.

Q. How long do employees have to report back to work after they complete their military service?

A. Under the federal Uniformed Services Employment and Reemployment Rights Act, employees must report to their employers or apply for reemployment within certain time frames, which depend on the length of their uniformed service:

- For service of 30 days or less (or for a period of any length if leave is taken for fitness examinations), employees must report to work no later than the beginning of the next work period following the end of service plus eight hours or as soon as possible after the end of the eight-hour period if reporting earlier is impossible through no fault of employees.
- For service of 31 days to 180 days, employees must apply for reemployment either within 14 days after the end of service or the next full calendar day if applying for reemployment within that time frame is impossible through no fault of employees.
- For service of 181 days or more, employees must apply within 90 days following the end of service.
- If employees are hospitalized or are convalescing from injuries that were received during uniformed service, the period of service is extended until their recovery or
two years, whichever is shorter. The two-year period can be extended by the minimum time necessary to accommodate circumstances beyond employees' control that make reporting within the time period impossible or unreasonable.

Employees who fail to notify employers of their intent to return within the time frames don't automatically forfeit their rights. Instead, they must be treated as other employees absent from scheduled work.

**Q. What constitutes service in the uniformed services for purposes of military leave?**

**A.** Under the federal Uniformed Services Employment and Reemployment Rights Act, service in the uniformed services means duty performed on a voluntary or involuntary basis in a uniformed service, including:

- Active duty,
- Inactive and active duty training,
- Full-time National Guard duty,
- Time spent undergoing fitness-for-duty examinations,
- Funeral honors duty, and
- Duty performed by intermittent employees of the National Disaster Medical System in training exercises or in response to public health emergencies.

Uniformed services include:

- The armed forces and reserves,
- The Army National Guard and Air National Guard,
- The Commissioned Corps of the Public Health Services, and
- Any other category of persons designated by the president in time of war or emergency.

Employees who serve as intermittent disaster response appointees of the National Disaster Medical System and are federally activated or attending authorized training are considered to be engaged in service in the uniformed services although they aren't members of the uniformed services as defined by USERRA.

**Q. Is there a limit to the number of years of military leave employees can take and still be eligible for reemployment?**

**A.** Under the federal Uniformed Services Employment and Reemployment Rights Act, employees who serve in the uniformed services are entitled to reemployment rights if the cumulative length of the absence and all previous absences from employment due to uniformed service don't exceed five years.

The five-year service limit only includes the time employees actually spend performing military service—for example, the time employees spend submitting applications to return to work doesn't count toward the five-year limit.

The five-year service period doesn't include:

- Service that's required beyond five years to complete an initial period of obligated service;
- The period during which employees are unable to obtain orders of release, through no fault of their own, before the expiration of the five-year period;
- The period that’s needed to fulfill periodic National Guard and Reserve training requirements;
- The period that’s needed to fulfill additional training requirements as certified in writing by the Secretary of Defense to be necessary for professional development or completion of skill training; or
- The period during which members of the uniformed services are ordered to active duty during a war or national emergency as declared by the president or Congress or other active duty orders.

Q. Are there any circumstances that would make employees ineligible for reemployment after military leave?

A. Under the federal Uniformed Services Employment and Reemployment Rights Act, employees aren't entitled to reemployment rights if they're:

- Not honorably discharged from military service;
- Commissioned officers who are dismissed by court-martial or order of the president; or
- Commissioned officers who are dropped from military service rolls because of unauthorized absences of three months or more, confinement related to a court-martial, or imprisonment in a federal or state correctional institution.

Q. Are service members' families entitled to take leave?

A. The federal Family and Medical Leave Act governs leave for service members' families. Under FMLA, employers must provide eligible employees up to 12 workweeks of unpaid leave because employees' circumstances qualify for leave due to spouses, children, or parents being called up for or on active duty in the Armed Forces. Employers also must provide up to 26 weeks of unpaid leave to eligible employees to care for service members who are employees' spouses, children, parents, or next of kin and veterans with a serious injury or illness that was incurred in the line of duty while on active duty in the Armed Forces (or existed before the beginning of active duty and was aggravated by service in the line of duty while on active duty in the Armed Forces) and manifested itself before or after service members became veterans. Veterans must have been members of the Armed Forces at any time during the five-year period preceding the date of the serious injury or illness for which they are receiving medical treatment, recuperation, or therapy.

Q. Do we have to pay employees the difference between their military pay and their regular wages?

A. Under the federal Uniformed Services Employment and Reemployment Rights Act, employers aren't required to pay employees while they're on military leave. However, some employers provide such pay as full pay or the difference between military pay and regular wages.

Differential pay refers to employer payments made to employees during a period of active military duty lasting more than 30 days and typically represent all or part of the wages employees would receive from employers if employees were at their jobs. Under the federal Heroes Earnings Assistance and Relief Tax Act, military differential payments made after Dec. 31, 2008, are considered wages and subject to income tax withholding but not to Social Security, Medicare, or unemployment tax withholding.