USERRA Leave and Reinstatement Rights: What Employers Must Do Before, During and After Military Service

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An employee tells you on Thursday that she has orders and leaves Monday for nine months. She does not have paperwork yet. Her manager wants to know whether he can post the job, whether she has to burn her vacation first, and whether "we'll see what's open when you get back" is an acceptable answer.

Under USERRA, the Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. 4301 to 4335), the answers are mostly no. USERRA has no employee-count threshold and no minimum length of service, and its reinstatement rule can require you to put the returning employee in a better job than the one she left. This guide walks through what the statute and the Department of Labor regulations at 20 CFR Part 1002 require at each stage.

Who USERRA Covers

Employers

The statute defines "employer" as any person or entity that pays salary or wages for work performed or that has control over employment opportunities, including the federal government, states, and successors in interest. The Department of Labor describes this as virtually all employers, regardless of size. There is no 50-employee or 15-employee floor.

Service

"Service in the uniformed services" means duty performed on a voluntary or involuntary basis under competent authority. The definition in 38 U.S.C. 4303(13) includes:

- Active duty, active duty for training, and inactive duty training (drill weekends)
- Full-time National Guard duty, and State active duty for 14 days or more or in response to a presidentially declared national emergency or major disaster
- Fitness-for-duty examinations and funeral honors duty
- Certain federal disaster-response appointments (FEMA intermittent personnel and National Urban Search and Rescue Response System members)

The "uniformed services" include the Armed Forces, the Army and Air National Guard, the Commissioned Corps of the Public Health Service, and the commissioned officer corps of NOAA,

among others. Note the word voluntary: an employee who volunteers for orders is protected exactly as one who is involuntarily called up.

The Conditions for Reemployment

An employee has reemployment rights when the following are met:

1. **Advance notice.** The employee, or an appropriate officer of the service, gave advance written or verbal notice of the service.
2. **Five-year limit.** Cumulative service absences with that employer do not exceed five years, not counting the exempt categories below.
3. **Timely return.** The employee reports back or applies for reemployment within the statutory deadline.
4. **Character of service.** The employee was not separated with a dishonorable or bad conduct discharge, or under other than honorable conditions (section 4304).

The employer defenses in section 4312(d) are narrow, and the employer carries the burden of proof on each: changed circumstances that make reemployment impossible or unreasonable (such as a reduction in force that would have included the employee), undue hardship in qualifying or accommodating the person, or a job that was brief and nonrecurrent. "We hired a replacement" is not on the list.

Notice Is Notice, Not a Request

Notice may be oral. No particular form is required, and under 20 CFR 1002.87 the employee does not have to ask for or get your permission to leave. No notice is required at all if military necessity prevents it or if giving notice is otherwise impossible or unreasonable under the circumstances. A handbook rule requiring supervisor approval is not enforceable as a condition of USERRA rights (section 4302).

The Five-Year Limit and Its Exceptions

The five years are cumulative and are counted per employer. A new employer starts a new clock. More important, many common kinds of service do not count toward the limit at all. Section 4312(c) excludes service:

- Required beyond five years to complete an initial period of obligated service
- During which the person could not obtain release orders before the five-year point through no fault of their own
- Performed for required reserve and National Guard training (regular drills and annual training), or additional training certified in writing as necessary for professional development or skill training
- Performed under orders to, or retention on, active duty under specified statutory authorities (largely involuntary call-ups), or because of a war or national emergency declared by the

President or Congress
- In support of an operational or critical mission, as determined by the Secretary concerned
- By National Guard members called into federal service or ordered to certain full-time duty in a declared national emergency

A reservist with years of drill weekends, annual training, and involuntary mobilizations may have used little or none of the five years. Do not conclude from your own attendance records that someone has "run out" of protection; get advice before denying reemployment on this ground.

Return-to-Work Deadlines by Length of Service

The employee's deadline to come back depends on how long the service lasted (section 4312(e)).

Length of service	What the employee must do	Deadline
Less than 31 days (or any length for a fitness examination)	Report to work	The first full regularly scheduled work period on the first full calendar day after service ends, plus time for safe travel home and eight hours of rest
More than 30 days but less than 181 days	Submit an application for reemployment	Within 14 days after completing service
More than 180 days	Submit an application for reemployment	Within 90 days after completing service

Two qualifications matter. If meeting the deadline is impossible or unreasonable through no fault of the employee, the first two deadlines extend to the next day reporting or applying becomes possible. And an employee who is hospitalized for or convalescing from an injury or illness incurred in or aggravated during service has until the end of the recovery period, generally up to two years, to report or apply.

For service of more than 30 days, you may ask for documentation of timeliness, the five-year limit, and character of service. If it is not readily available, you must still reemploy promptly. An application does not have to be a form; record the date of any clear statement that the person wants their job back.

The Escalator Position

FMLA restores an employee to the same or an equivalent job (see our overview of the Rules for FMLA Job Restoration). USERRA goes further. The reemployment position is the job the person would have held if continuous employment had not been interrupted by service. This is the

"escalator principle": the employee steps back on at the point the escalator would have carried them, with the seniority, status, and pay that go with it.

The escalator can move in either direction: a promotion or seniority-based raise the employee would have received with reasonable certainty counts, and so does a layoff or downgrade that would have reached them.

Section 4313 sets an order of priority:

Length of service	First priority	If not qualified after reasonable employer efforts
Less than 91 days	The escalator position	The position held when service began
More than 90 days	The escalator position, or a position of like seniority, status, and pay	The pre-service position, or a position of like seniority, status, and pay
Either, if still not qualified	—	The nearest approximation to those positions the person is qualified to perform, with full seniority

"Reasonable efforts" includes training on systems, certifications, or procedures introduced while the employee was gone, unless that would be an undue hardship.

Service-Connected Disability

If the employee has a disability incurred in or aggravated during service, you must first make reasonable efforts to accommodate it in the escalator position. If the employee still is not qualified, the next step is a position equivalent in seniority, status, and pay that the employee can perform or can become qualified to perform, and after that the nearest approximation. This runs alongside, not instead of, the ADA interactive process.

Timing

Reemployment must be prompt. Under 20 CFR 1002.181, that means as soon as practicable, and absent unusual circumstances within two weeks of the application. The fact that someone else now holds the job is not a defense.

Rights During the Absence

Leave Status

An employee on service is deemed to be on furlough or leave of absence and is entitled to the non-seniority rights and benefits you generally give to employees of similar seniority, status, and pay on other furloughs or leaves of absence (section 4316(b)). Whether a benefit given during other comparable leaves, including pay for short absences, must also be given during military leave is a fact-specific question; get counsel's view.

Vacation

The employee may choose to use accrued vacation or similar paid leave during service. You may not require it (section 4316(d)).

Health Coverage

Under section 4317, an employee may elect to continue employer health plan coverage for themselves and dependents for the lesser of 24 months from the start of the absence or the period of service (ending when the person fails to return or apply for reemployment). For service of fewer than 31 days, the employee cannot be charged more than the normal employee share. For longer service, the plan may charge up to 102 percent of the full premium.

On reemployment, coverage must be reinstated without an exclusion or waiting period that would not have applied absent the service, except for conditions the VA determines are service-connected. For how this fits with other continuation rules, see Managing Benefits Continuation During Extended Leave.

Pension and Retirement Plans

Under section 4318, a reemployed person is treated as having no break in service. The service period counts toward vesting and benefit accrual. The employer is liable for funding the employer contributions that would have been made. For contributory plans such as a 401(k), the employee may make up missed contributions over a period of three times the length of service, not to exceed five years, and any employer match generally follows those makeup contributions. Confirm the deadline for the employer's own makeup contributions in 20 CFR 1002.262 before specifying a number of days.

Protection From Discharge After Return

A reemployed service member is no longer an ordinary at-will employee for a period of time (section 4316(c)):

Length of service before reemployment	Protected period after reemployment
More than 180 days	One year

Length of service before reemployment	Protected period after reemployment
More than 30 days but less than 181 days	180 days

During that period the employee may be discharged only for cause. Under 20 CFR 1002.248, the employer bears the burden of proving that discharge was reasonable for the conduct in question and that the employee had notice, express or fairly implied, that the conduct was grounds for discharge. A layoff or job elimination can also be cause, but only if the employer shows it would have affected the employee regardless of service.

Discrimination, Retaliation and Remedies

Section 4311 prohibits denying initial employment, reemployment, retention, promotion, or any benefit of employment because of a person's service, application for service, or service obligation. Service need only be a motivating factor; the employer then has to prove it would have taken the same action anyway.

USERRA was amended on January 2, 2025 by the Senator Elizabeth Dole 21st Century Veterans Healthcare and Benefits Improvement Act (Pub. L. 118-210). The changes employers should know:

- The retaliation provision now reaches "any adverse employment action or other retaliatory action" against a person who enforces, testifies about, assists with, or exercises USERRA rights.
- A court may award liquidated damages of the greater of $50,000 or the amount of lost wages and benefits plus interest where the employer knowingly failed to comply.
- Prejudgment interest on lost wages and benefits is set at 3 percent per year.
- A prevailing person who used private counsel is now entitled to reasonable attorney fees, expert witness fees, and litigation expenses (the statute says the court "shall award" them).

The Department of Labor's Veterans' Employment and Training Service (VETS) investigates complaints, and individuals may also sue directly.

How USERRA Fits With Other Leave Laws

- **FMLA.** A returning service member is credited, for FMLA eligibility, with the months and hours they would have worked but for the service (29 CFR 825.110 and 825.702(g)). An employee back from a year-long deployment may be FMLA-eligible on day one. See FMLA Eligibility Requirements.
- **ADA.** A service-connected disability triggers both the USERRA placement sequence and the ADA's accommodation duty. Apply both.

- **State law.** USERRA does not displace state or local laws, contracts, or policies that are more generous, and it overrides those that are less (section 4302). Many states have their own military leave statutes. Our Multi-State Leave Laws Compliance Guide covers the general approach.
- **Attendance policies.** Absences for service should never generate attendance points; see no-fault attendance policies and protected leave.

The cases that go wrong tend to be the ones where two or three of these laws apply to the same person at once. Our worked scenarios on overlapping leave laws show how to sequence the analysis, and the two-day Leave and Accommodation Management seminar covers USERRA's escalator position alongside FMLA, ADA, PWFA, workers' compensation, and state leave laws.

Frequently Asked Questions

Does USERRA apply to small employers?

Yes. USERRA has no minimum number of employees. The Department of Labor describes it as applying to virtually all employers regardless of size, including the federal government and the states.

Is military leave under USERRA paid?

USERRA itself does not require an employer to pay wages during service. It does require that service members receive the same non-seniority benefits given to employees on comparable leaves of absence, and some state laws and employer policies require or provide pay. Whether paid leave given for other short absences must also be given for short military absences is a fact-specific question; review it with counsel.

How long does an employee have to return to work after military service?

It depends on the length of service: the next scheduled shift (after travel time and eight hours of rest) for service under 31 days, 14 days to apply for service of 31 to 180 days, and 90 days to apply for service of more than 180 days. Recovery from a service-connected injury or illness can extend these deadlines, generally by up to two years.

What is the escalator position under USERRA?

It is the job the employee would have attained with reasonable certainty had they stayed continuously employed, including seniority, status, and pay. It can be higher than, the same as, or lower than the job they left, depending on what would have happened to that job in their absence.

The Bottom Line

USERRA rewards employers who treat a military absence as a leave to be administered, not a vacancy to be filled. Accept notice in whatever form it comes, keep benefits elections on schedule, and when the employee returns, ask one question before any other: where would this person be today if they had never left? That is the job they are entitled to, promptly, with seniority and pension credit intact.

Remember to post the Department of Labor's USERRA notice of rights, which section 4334 requires of every employer. Start with the Leave Management Guide, the Glossary of Leave Management Terms, and the Leave Management Compliance Checklist; compare state requirements in paid sick leave laws by state; and, if you handle complex cases, consider the advanced Leave and Accommodation Management seminar, which covers USERRA reinstatement together with the other federal and state leave laws.

This article is general education, not legal advice.