



# USERRA 101

VERSION 02-27-17



# Background

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## ESGR AND VETS PARTNERSHIP

The Secretary of Labor administers and interprets the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The Secretary of Labor also provides assistance to protected persons and investigates complaints brought under the statute. The Secretary has delegated these USERRA duties to the Veterans' Employment and Training Service (VETS), an agency within the U.S. Department of Labor (DOL).

Section 4321 of USERRA provides that the Secretary of Labor (through VETS) will provide assistance to any person concerning his or her USERRA rights. In providing such assistance, the Secretary may request the assistance of other Federal or State agencies and utilize the assistance of volunteers. The primary partner of VETS in providing USERRA assistance for members of the National Guard and Reserve is the U.S. Department of Defense (DOD) National Committee for Employer Support of the Guard and Reserve (ESGR).

## NVTI

The National Veterans' Training Institute (NVTI) was established in 1986 to further develop and enhance the professional skills of veterans' employment and training service providers throughout the United States. The program is funded by DOL VETS, and administered by Management Concepts, with training conducted in Dallas, Texas and at selected regional sites. The materials contained herein have been designed and created specifically for ESGR and VETS by NVTI.

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### **Disclaimer**

DOL VETS and DOD ESGR maintain this server to enhance public access to VETS and ESGR information and programs. This site is updated and revised as needed.

The user should be aware that, while every attempt is made to keep information timely and accurate, there will often be a delay between official publication of the materials and their appearance or modification on these pages. Therefore, we make no express or implied guarantees. The information provided does not constitute legal advice.

# Welcome and Course Overview

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## WELCOME TO USERRA 101

USERRA 101 is a course designed for ESGR Ombudsmen and VETS employees.

The purpose of this course is to learn the basics of USERRA law. It is intended for ESGR and VETS staff for knowledge and to receive certification in Basic USERRA 101.

We are also inviting other interested individuals to use this site to learn about USERRA and become better informed about this law. They are not required to take the course assessments but we welcome those who wish to do so.



**NOTE:** Complete participation and optimal learning of the USERRA 101 course is best experienced via the e-learning course. As a courtesy, you can download this material as a reference to USERRA and as a training tool.

You can use this as a reference to USERRA and as a training tool if you need to facilitate USERRA.

## COURSE OVERVIEW

USERRA is a law which establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services, and/or take action to enforce, assist with, testify about, or exercise a right under USERRA.

This course is set up in 'simulation' style, using service members and/or employers in a variety of USERRA situations, while helping the service member make the best decision and communicate the law to the employer. You will meet your client via a scenario situation.

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## Discrimination in Hiring

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**Introduction:** James is the top candidate for a position in which he has been interviewing. In this assignment you will learn that James feels discriminated against by the employer because of the employer's concern about James' military commitment. Your goal is to help James make the best decisions and help him communicate USERRA information to the employer.



James: "I went on my third interview with a warehouse management company. I'm going for the shift supervisor's job.

And after all these interviews they offered me the job. But at this 'acceptance' interview the employer informed me that with this position, I'm required to work every single Saturday – and he asks me if this is going to be a conflict.

I've been in the reserves now for two years and I have weekend drill once a month. Yes, this will absolutely present a conflict. But it's a great job offer. I don't want to lose this opportunity for this job. I don't know if I should tell them now or just take the job and wait until it comes up. I just don't know what my best option is for letting the employer know. He's going to be upset after all these interviews."

With the job offer being made James must decide what to tell the employer about his reserve commitment. James is faced with two options:

*Option One:* Accept the job offer and don't mention the conflict presented by the reserve duty. Deal with it when it comes up.

If James accepts the job and does not inform the employer of his weekend drill, and his reserve duty becomes a conflict, he could be fired for being dishonest in the interview. James has made a poor decision.

*Option Two:* Be honest with the employer and inform him about his reserve commitment. Good choice!

The best decision for the service member is to be honest with the employer. This way there are no surprises when a drill or other reserve commitment comes up. If James misleads or lies to the employer, it could result in his termination.

This situation may be uncomfortable, but informing the employer up front and keeping an open line of communication is the safest and best way to respond to this situation. Chances are if an employer is informed early about the reserve commitment, under normal circumstances the employer will be willing to work around it.



James: "I did what I thought was the right thing. I was honest with the employer about my reserve commitments, but I didn't get the final job offer. They didn't offer it to me. So what happened?"

This is where it gets sticky. The employer's decision could be based on one of the following factors.

*Option One:* James was not hired because of his drill commitment.

If James was NOT HIRED specifically because of his drill commitment, this is a direct violation of USERRA under the discrimination provision. James should look at pursuing his USERRA rights at this time.

*Option Two:* James was not hired because another candidate was more qualified.

As a general matter, an employer may hire the most qualified candidate for a position. However, in this case, this could be difficult for the employer to prove, especially since James was on his third interview, the acceptance interview.

*Option Three:* James was not hired for unspecified reasons.

If the service member's commitment was not brought up as a reason for not hiring, this can be a difficult case to prove.

Any one of these scenarios is cause for USERRA assistance or an investigation. There are several options.

James can pursue to attempt to resolve this possible employer discrimination. Which is the best for James?

*Option One:* Talk to the employer himself.

If James knows his rights and the location of accessible USERRA information, he could discuss the situation with the employer face to face, in a professional manner to determine why he was not hired.

If James does find out that his rights were indeed violated, he could inform the employer of the law. In many cases it may be a miscommunication or lack of understanding of the law. The employer might at this point change the hiring decision and follow the law.

However, if someone was hired into the position he was seeking due to his military commitment, and the employer is unwilling to change the hiring decision, James most likely does have the law on his side. But it could be a difficult case to undertake on his own.

*Option Two:* Contact an ESGR Ombudsman to represent him.

If James is uncomfortable with, or intimidated by, the employer, or not knowledgeable in the law, he could have an ESGR representative contact the employer to handle the situation for him.

This is probably the best route since the ESGR representative knows the USERRA law better than James and could articulate it to the employer.

The ombudsman would have to look into the timing of the offer, the revealing of the reserve commitment, and the timing of the removal of the job offer. In many cases, the employer just does not understand the law and will cooperate once presented with the provisions of the law. For information on USERRA issues, service members can contact an ESGR Committee representative or call (800) 336-4590 and ask for Ombudsman Services for help.

A possible discrimination issue that cannot be easily resolved by an Ombudsman can be referred to VETS, which will begin an investigation upon receipt of a completed 1010 complaint form. The investigation would include reviewing the employer's hiring procedures, job descriptions, all other candidate applications, and interview information. The investigator may need to speak to the interviewers and get all documentation concerning previous job interviews.

Please note, an ESGR representative cannot file a complaint on behalf of a service member. A VETS USERRA investigation can only be initiated by the reservist or guardsman through the process of filling out a 1010 form.

*Option Three: Hire a lawyer.*

The decision to hire a lawyer right off the bat may be premature and costly. Unlike hiring a lawyer, ESGR's mediation services and VETS' investigative services are available without cost. ESGR and VETS personnel are familiar and experienced with the USERRA law and regulations. ESGR representatives are also experienced in explaining the requirements of the law to employers in a non-threatening way, avoiding the potential for damage to the employment relationship.

When an employer is contacted by an employee's attorney it can be difficult to avoid creating an adversarial situation. If the employee is dissatisfied with ESGR's efforts or the outcome of the VETS investigation, he or she can always consult an attorney at that time.

Compliance with USERRA is most likely where there is open communication between informed employers and employees.



**NOTE:** When private counsel is brought into a USERRA case as the service member's representative against the employer and interferes with ESGR's ombudsman efforts or VETS' investigation, the private counsel becomes the sole representative and ESGR and VETS will no longer be involved in the case at that point.

*Option Four: James does nothing.*

If James takes no action and just moves on, then everyone loses. The employer may not get the best person for the job and James does not get the job he wants. USERRA compliance is enhanced when there are open lines of communication.

If the employer is presented with the facts, then the situation can often be resolved in a professional and informal manner.



James: "Under USERRA, I have the right to fair employment. If I'm offered a job and the employer rescinds the offer because of my reserve commitments, then I have USERRA on my side. It is the duty of an ESGR Ombudsman to communicate the law to me as a candidate and to the employer to ensure that USERRA has not been violated. Thanks for helping me out!"

## Advance Notice

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**Introduction:** Randy has a military commitment coming up and will need to give his employer notice. There are basic guidelines of when an employed service member needs to give the employer advance notice, and by which means.

This scenario is presented from the employer's point of view.



Employer: "I'm the Chief Administrator for our company. We have about 75 employees working here, several of which are veterans. And we like having them here on our staff.

I have one particular employee, Randy, who is a great, well respected member of our staff. He's also a member of the National Guard. He has his two-week military commitment coming up soon, but he hasn't informed me about it yet. How soon does he need to let me know? I'm getting a little concerned. We have a big project coming up and I've got to prepare for his absence."

The employer is aware of Randy's military commitment but is unsure of when it's scheduled. It is Randy's responsibility to inform the employer when he is scheduled to go for his two-week training.



**NOTE:** Although notice will usually be given to the employer by Randy, it may also be given by a commissioned, warrant, or non-commissioned officer from Randy's Guard unit who has authority to give such notice.

See 20 C.F.R. § 1002.85(b):

(b) The Department of Defense USERRA regulations at 32 C.F.R. § 104.3 provide that an "appropriate officer" can give notice on the employee's behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

When should Randy inform his employer of his upcoming two-week military training commitment?

*Option One:* Wait until the last minute.

If Randy waits until the last minute to inform his employer of when his military training will be starting, he may be taking a risk.

Although USERRA does not require a certain amount of notice of upcoming duty to an employer, if a service member does deliberately withhold information until the last minute and it causes serious disruption to the employer, it is conceivable that a court could find an employer to be within his or her rights to terminate the service member's employment.





**NOTE:** Ombudsmen should offer this caution to service members who might be considering withholding notice to the last minute as a means of retaliating against an employer they believe is not supportive of their military membership, or for other purposes.

DOL's USERRA regulations address timeliness of advance notice at 20 C.F.R. §1002.85(d).

*Option Two:* Inform the employer any time before his duty begins.

Randy could inform his employer any time before his duty is scheduled to begin, but "any time" could be a few minutes or a few months. USERRA does not require a service member to give their employer a certain amount of notice of an upcoming duty. However, it is in the uniformed service members' best interest to be considerate of the employer. The employer may need to adjust or re-assign Randy's workload, and the sooner the employer knows, the better he can prepare for his absence.

DOL's USERRA regulations cite DOD guidance concerning the timeliness of notice. See 20 C.F.R. § 1002.85(d).

*Option Three:* Inform the employer 30 days or more before his military duty begins.

Thirty days or more notice is recommended. When the service member is aware of upcoming duty, this amount of time is recommended by the DOD under 32 C.F.R. §104.6(a)(2)(i)B. Note that under 20 C.F.R. § 1002.85, USERRA does not specify how far in advance the service member must give the employer notice.

The best choice is always to be a responsible employee and considerate of the employer's situation. By giving the employer adequate advance notice, the employee continues the good working relationship he or she has established with their employer and company.



Employer: "Thirty days' notice gives me plenty of time to prepare for Randy's absence. It gives me time to hire and train a temporary worker if I need to, or train someone else already on our staff or even divide Randy's workload."

When Randy does give his employer notice, the notice can be:

*Option One:* Written Notice

Written Notification is a preferred means to notify employers of impending military service. This way, both employee and employer have documentation of the agreed upon time and amount of leave needed. See 20 C.F.R. § 1002.85(c).

*Option Two:* Verbal Notice

Although not preferred, legally, oral notification satisfies USERRA's notice requirement. See 20 C.F.R. §1002.85(c).

USERRA does not require written documentation be provided prior to the beginning of the military absence. However, the employer may request a copy of Randy's orders or some other documentation from his military unit, if available. By complying with the employer's request, Randy would enhance his relationship with the employer.

There are two circumstances under which an employee is not required to provide advance notice to the employer:

- **Military Necessity:** An example of Military Necessity would be a classified mission which could be jeopardized by advance disclosure. See 20 C.F.R. § 1002.86(a).
- **Advance Notice Is Impossible Or Unreasonable:** For example, a service member could be required to report for duty on extremely short notice when the employer is not available to be contacted. See 20 C.F.R. § 1002.86(b).

To increase communication and rapport, the ideal situation, whenever feasible, is to provide notice to the employer of his/her guard/reserve duty as soon as it is known to the service member.

In Randy's case, he is a well-respected employee and informing his employer of his military duty is being considerate of the employer. It makes for a healthy relationship on both fronts.



Employer: "I understand that under USERRA, there is no obligation that an employee must inform an employer 30 days or even longer before a military commitment begins. But I appreciate the fact that Randy gave me as much notice as possible of his upcoming two-week military duty. Having this much time really helps me prepare to fill the duties of such an important employee."

For more information, go to the USERRA regulations to assist you in these types of cases. See 20 C.F.R. §§ 1002.85 – 1002.88.

## Termination of Employment

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**Introduction:** Linda left her job to join the Air Force. After four years of active duty, she went back to her employer to get her old job back. After using USERRA to be reinstated into her previous position, she was subsequently fired soon thereafter.



Linda: “I worked as a graphic designer at an advertising agency for just over a year. I informed my employer that I was going to have to quit the job because I wanted to serve my country and join the Air Force. I didn’t leave on bad terms and I gave them plenty of notice that I was quitting to join the Air Force.

Four years later after leaving my job, I was honorably discharged. A few days after arriving home, I went back to my old employer at the advertising agency and asked for my old job back. And to my surprise, he wasn’t going to hire me back. I couldn’t believe it! I was shocked! I thought they had to hire me back....

So, I went immediately to speak with an ESGR representative and worked with them on arranging a meeting between us and my past employer. We wanted to inform him about USERRA in order to help resolve the situation.

After our meeting, I was reinstated and have been working back at the advertising agency ever since. But I gotta tell ya, it’s a very uncomfortable situation. I know my employer has resented the fact that he felt legally bound to rehire me and bring me back.

And wouldn’t you know, after eight months of employment, I was notified by my employer that I was going to be terminated. I was outraged! I think that because my employer felt “legally bound” to hire me back, that he’s seeking revenge, and that’s why I was terminated. I’ve obviously been targeted by the employer because of my military service since the day they rehired me. I just don’t know how I can prove such allegations.”

Since Linda’s period of service was more than 180 days, she is protected from discharge, except for cause, for one year following reemployment. She does not need to show that the termination was motivated by her military service or by her effort to enforce her USERRA rights by going to the ESGR Ombudsman. Rather, the employer bears the burden to prove that the termination was for cause.

There are situations or events which might be reasons for termination:

**Habitually Late:** Being late isn’t necessarily justification for termination. An ESGR representative may need to look into the rule for all employees when reporting late. If employees are allowed to be late 10 times before termination takes place, or if there is a requirement for corrective procedures to take place (a list of documented infractions), etc., these considerations need to be explored before proceeding further.

Refer to 38 U.S.C. § 4316(c) and 20 C.F.R. § 1002.248 for further information.

**Reduction in Force (RIF):** More questions need to be answered to determine how RIF employees were designated. Was Linda the only employee to be RIF'd? Even if she was, that may not be unlawful. Investigating this would require looking at seniority, RIF procedures, and departmental structures.

Refer to 38 U.S.C. § 4316(c) and 20 C.F.R. § 1002.248 for more information.

- **Reorganization or Sale of Business:** Just because an employer reorganizes or sells its business does not necessarily relieve it of USERRA obligations. In the case of a sale of the business, the successor-in-interest is considered the employer for USERRA purposes. See 20 C.F.R. § 1002.35 for supporting data.
- In the case of a reorganization, an investigator would have to look at how the reorganization was conducted, how all employees were affected and what happened to the department/area the member was employed in prior to, during and after the reorganization. The goal is to determine what would have happened to the service member if he or she had never left employment to perform the military service.
- **Improper Work Habits** (i.e., incomplete projects, poor documentation, etc.): Terminating Linda for poor work habits will require more exploration. The corrective action procedures of the company for employees who are non-productive or who have poor work habits would have to be researched. Even if all policies were followed and handled properly with Linda, the employer may or may not have cause for termination.
- When considering whether a performance-based termination is permissible under USERRA, one must be mindful that USERRA's provisions establishing the periods of special protection from discharge after reemployment were established to ensure the service member has a reasonable chance to get used to the reemployment position following an extended absence. An employer would have to prove that a performance-based termination, particularly one that occurs shortly after reemployment, is based on cause.
- Linda must not initially be held to the same performance standard as someone who had been working all along while Linda was away performing service.
- See 38 U.S.C. § 4316(c) and USERRA regulations 20 C.F.R. § 1002.248 for further explanation.
- **Theft:** Terminating Linda for proven theft, not just suspected theft, may be cause for termination. Proven crimes against the employer are generally legitimate reasons for termination.
- Go to 38 U.S.C. § 4316(c) and USERRA regulations 20 C.F.R. § 1002.248 for more information.
- **Decline in Business:** More examination of the facts would need to be conducted to determine how employees were designated to be "let go." Was Linda the only employee to be terminated? Even if she was, that may not be unlawful. Checking into this would require looking at seniority, lay-off procedures, and departmental structures.

- Refer to 38 U.S.C. § 4316(c) and USERRA regulations 20 C.F.R. § 1002.248.
- **Job was Seasonal:** Under USERRA, persons holding seasonal jobs can have reemployment rights if there was a reasonable expectation that the job would be available at the next season. For example, if Linda was employed every summer from April to September in a bicycle shop and she was continually employed summer after summer, then she had a reasonable expectation that the job was available the following season. Linda would probably have reemployment rights to that seasonal position.

More information is found in 38 U.S.C. § 4316(c) and 20 C.F.R. § 1002-241.

As mentioned previously, Linda's case involves termination during a period of special protection from discharge, except for cause. However, even if a person is terminated outside of a period of special protection, it could be a USERRA violation. If the termination in question is motivated, even in part, by the employee's prior military service, current military obligations, or intent to serve in the uniformed services, it is a violation of USERRA's anti-discrimination provision. See 38U.S.C. § 4311(a)

If the termination is in retaliation for the employee's action to enforce a USERRA right, assistance in a USERRA investigation, or testimony in a USERRA court action, it would violate USERRA's anti-retaliation provision, even if the employee has no military connection. See 38 U.S.C. § 4311(b) When looking into reasons for possible employer discrimination or retaliation, there are several things to consider. Was the uniformed service member the only employee affected by a lay-off, RIF, or termination? Or was the entire division, department, unit or company affected?

In any case, the employer's actions can be questioned and a variety of issues may need to be researched.



**NOTE:** Only VETS not ESGR, conducts USERRA investigations. These investigations are conducted at no charge to the service member. Find a VETS contact.

It's always beneficial to have witnesses to possible USERRA violations. A witness is anyone that may have information about a USERRA issue that could help an investigator determine the merits of a case.

If a person serves as a witness, they are protected under USERRA. Refer to 38 U.S.C. § 4311(b).



Linda: "You know, being terminated in employment can sometimes be an extremely hard type of USERRA issue to resolve, as I have found. You need to have as much evidence as possible because I was told it helps the VETS investigator conduct a thorough case investigation. I'm happy to say that once my employer understood how USERRA worked and we communicated together, things have been just fine."

## Reemployment Rights

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**Introduction:** Heather left her job to join the Navy. Upon her return from active duty, her employer informed her that she would not get her old job back. Since her leave, another employee has taken over her duties. See how USERRA can apply in these situations.



Heather: “I worked at a small newspaper as a printing press operator. I did it for three years. It’s pretty outdated equipment. But I have a lot of extensive training and experience on it, and there’s not a whole lot of people who can do what I do. I couldn’t even take a day off without the place getting way behind schedule. My boss thought I was irreplaceable. The thing is, I made the decision to join the Navy and serve my country.

When I met with my boss and told him about my decision he was incredibly furious. I realized it was gonna be difficult to replace me, and I felt bad about having to leave, but this was something I really felt I needed to do. Well, he told me he had no choice but to replace me with a full-time, qualified person. And he told me when I got back he wasn’t gonna rehire me.

Well, it’s been four years and I’m back from serving honorably in the Navy. And I’ve decided to try and apply for reemployment with my pre-service employer. We’ll see how it goes.”

In order to try to get her old position back, Heather **MUST** apply for reemployment: How soon after completion of her service must Heather report back to the employer or apply for reemployment? Look at the options below and choose the correct answer.

*Option One:* Within 1 day after completion of her service.

This is incorrect. According to USERRA, a person who served in the uniformed services less than 31 days must report back to the employer no later than the beginning of the first full regularly scheduled work period on the first day following their completion of service. See 38 U.S.C. § 4312(e)(1)(A). Allowance must be made for safe travel home from the service and 8 hours rest. Heather served for more than 30 days.

*Option Two:* 14 days after completion of her service.

This is incorrect. According to USERRA, a person who serves in the uniformed services more than 30 days, but less than 181 days must submit application no later than 14 days after their completion of service. See 38 U.S.C. 4312(e)(1)(C). Heather served for more than 180 days.

*Option Three:* Within 90 days after completion of her service.

This is correct. USERRA states that if a person serves in the uniformed services more than 180 days, the applicant must submit an application for reemployment no later than 90 days after the completion of service, per 38 U.S.C. § 4312(e)(1)(D). Heather served for more than 180 days. There also can be exceptions to the 90-day rule for necessary hospitalization or recuperation. See 38 U.S.C. § 4312(e)(2)(A) and 20 C.F.R. §1002.116 for more information.

*Option Four:* At any time. Her application period is unlimited.

This is not correct. Timely application is an eligibility requirement of USERRA. The service member risks losing USERRA rights if he or she does not report to work or apply for reemployment within the applicable time limit. Different time periods are established based on the duration of a person's service in the uniformed services. However, a person who fails to report or apply for reemployment does not automatically forfeit USERRA rights, but is subject to the employer's conduct rules, policies, and practices relating to absences from scheduled work. See 38 U.S.C. § 4312(e)(3).



Heather: "My employer is frustrated with the whole situation. But after talking with him he'd like me to come back and work for him. But before rehiring me, he asked if I have any documentation on my military service. Is he within his rights to request documentation?"

Is the employer within his rights to request documentation?

**Yes:** The employer is within his rights to request documentation of Heather's military service. An employer can ask for documentation to establish the service member's eligibility for reemployment when he or she returns from 31 days or more of military service. Failure of a person to provide documentation shall not be a basis for being denied reemployment if the documentation does not exist or is not available. However, if after reemployment, documentation becomes available that shows the service member is not eligible for reemployment, the employer may terminate that person. See 38 U.S.C. §§ 4312(f)(4) and 4312(f)(3)(A).

Also, if the period of service was more than 90 days, the employer may delay reinstating the person's pension benefits until the requested documentation is received. See 38 U.S.C. § 4312(f)(3)(B)

**No:** The employer is not within his rights to request documentation of Heather's military service. Actually, an employer can ask for documentation following service of 31 days or more. If documentation does not exist or is not readily available when the employer request is made, the employee must be reemployed prior to receiving documentation. See 38 U.S.C. §§ 4312(f)(3)(A) and 4312(f)(4).

Also, if the period of service was more than 90 days, the employer may delay reinstating the person's pension benefits until the documentation is received. 38 U.S.C. §4312(f)(3)(B).

Documents that can meet the documentation requirement are listed in the DOL USERRA regulations at 20 C.F.R. § 1002.123.



Heather: "My old boss has agreed to hire me back into the company. But he told me he's spent a lot of time and money training my replacement. And he doesn't want to lose that staff person by reinstating me into my former position. But he has agreed to hire me back."

For proper reinstatement in accordance with the escalator principle, the employer can rehire Heather:

*Option One:* At a different position 50 miles away, making \$15,000 less a year than her previous position.

Not appropriate.

Heather's period of service was for more than 90 days.

She should be placed in the position she would have held if her employment had been continuous and had not been interrupted by her military service ("escalator position" 38 U.S.C. § 4313(a)(1)(A)) or a position of like seniority, status and pay, the duties of which she is qualified to perform.

If she cannot become qualified for one of these positions, she should be reemployed in her pre-service position, or a like position. If she cannot become qualified for any of these positions, after reasonable employer efforts to qualify her, she should be reemployed in a position that most clearly approximates the above positions, the duties of which she can become qualified to perform.

Also see the USERRA regulations at 20 C.F.R. § 1002.197.

Since the position pays \$15,000 less, it is clearly not one of "like" pay. Also, it does not have "like" status. The status of a job includes many of its attributes other than seniority and pay. The location of the job is an aspect of its status.

For information on seniority, status, and rate of pay, see 20 C.F.R. § 1002.193.

If Heather's duty had been 90 days or less, the employer would be required to put her into the escalator position. If she can't be qualified for the escalator position she should be placed in the pre-service position or in some other position for which she is qualified or can become qualified. For details see the USERRA regulations at 20 C.F.R. § 1002.196.

*Option Two:* In her "escalator position" and reassign the current employee to another department.

This is probably appropriate.

Heather's period of service was for more than 90 days. See 38 U.S. C. § 4313(a)(2) for more information.

The escalator position means rehiring Heather into a position as if her employment had been continuous and uninterrupted by military service.

The escalator position is further explained at USERRA regulations 20 C.F.R. § 1002.191. She is entitled to her escalator position or a position of like seniority, status and pay.

*Option Three:* In a position in which she is required to serve a probationary period prior to reinstating her benefits.

This is incorrect.

In general, Heather should have all employment rights and benefits reinstated immediately upon reemployment, as though she never left the position and had remained continuously employed throughout.

*Option Four:* In a different position as a journalist at the same office—just five doors down.

As long as the position is of like seniority, status and pay, this is acceptable since her period of service was greater than 90 days. See 38 U.S. C. § 4313(a)(2).



If Heather has an issue regarding the status of the position and the employer insists the position is of like status, the case may have to be looked into. Status is discussed in the USERRA regulations at 20 C.F.R. § 1002.193(a).

When an individual has served honorably in the uniformed services and is otherwise eligible, that person has a right to apply for reemployment and be promptly reemployed.

The eligibility requirements are listed in 20 C.F.R. § 1002.32(a). Detailed information on each of these requirements is contained elsewhere in the regulations, as explained in 20 C.F.R. § 1002.32(b).

If the eligible service member is denied reemployment or is improperly reemployed, the individual can seek help provided to them at no cost from several sources.

- **Private Counsel:** The decision to hire a lawyer right off the bat may be premature and costly. Unlike hiring a lawyer, ESGR's mediation services and VETS' investigative services are available without cost. ESGR and VETS personnel are familiar and experienced with the USERRA law and regulations. ESGR representatives are also experienced in explaining the requirements of the law to employers in a nonthreatening way, avoiding the potential for damage to the employment relationship.

When an employer is contacted by an employee's attorney it can be difficult to avoid creating an adversarial situation. If the employee is dissatisfied with ESGR's efforts or the outcome of the VETS investigation, he or she can always consult an attorney at that time.

It is important to note when private counsel is brought into a USERRA case as the service member's representative against the employer and interferes with ESGR's ombudsman efforts or VETS' investigation, the private counsel becomes sole representation and ESGR and VETS will no longer be involved with the case at that point.

- **ESGR Ombudsman:** An ESGR Ombudsman provides information and informal mediation services at no cost. ESGR may be reached at (800) 336-4590.

In the majority of the cases, USERRA issues are resolved at the local ESGR level. More than likely, the ESGR Ombudsman will call the employer directly and will sometimes need to make a personal visit to the employer. The Ombudsman will explain the reemployment provisions of USERRA to the employer and also demonstrate that the returning service member is protected under those provisions.

- **VETS State Director:** Some USERRA cases warrant an investigation, which is performed at the state level, typically by a Director of Veterans' Employment and Training (DVET) or an Assistant Director (ADVET) for the particular state. See DVET List.

This investigation and case processing is provided at no cost to the uniformed service member.

- **Department of Justice/Office of Special Counsel:** In those instances where VETS' efforts do not resolve a USERRA complaint, the case can be referred (upon request of the claimant) to the Department of Justice or the Office of Special Counsel for consideration of representation. The Department of Justice may represent claimants against private employers, state and local governments in Federal court.

The Office of Special Counsel may represent claimants against Federal executive agencies before the Merit Systems Protection Board.

Heather: "After a lot of hard work, talk, meetings, I finally got my job back. I'm doing a similar job, at the same place, making the salary I would have made if I never left. I appreciate what everyone has done to help me out. It was just a miscommunication and a lack of understanding of USERRA and its impact on my employer. But once we all sat down together and educated my employer about USERRA, we got it all resolved. Thank you for helping me out!"

## Employment Benefits

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**Introduction:** Andrew is leaving for one-year of active duty. Under USERRA the employer could be required to provide some benefits during his military commitment.



Andrew: “I’m gonna be leaving soon for active military duty for a year. I’ve been working things out with my employer, covering my different duties, responsibilities and so forth. She’s been great. But one of the big concerns we haven’t discussed yet, and I’m getting pretty worried about, is all of my benefits I’ve accrued since being here. You know, vacation, health insurance, even bonuses I get during the year. I don’t know how all that will play out.”



**IMPORTANT NOTE:** USERRA provisions relating to pensions, health plans, and other benefits can be very complex. Ombudsmen should not hesitate to ask for help from the ESGR headquarters staff or from the VETS State Directors’ offices when asked for information or assistance on these issues.

Employers offer a wide variety of benefits to employees. These benefits can include health, dental, vacation, sick leave, bonuses, a pension plan, and so on.

Depending on the type of benefit, the employer may be required by USERRA to continue some benefits while the individual is absent for military service, and reinstate others when the person is reemployed following the military service.

“Benefit” is defined in USERRA at 38 U.S. C. § 4303(2) as: “any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.”

Employment Benefits fall into two broad classes; those based on seniority and those not based on seniority:

- **Seniority-Based Benefits:** Seniority-based benefit accrue with or are determined by length of employment and may include rate of vacation accrual, automatic annual pay raises, the right to bid on overtime or a particular shift, and so on. Seniority based benefits are generally subject to what is referred to as the “escalator principle.”

The “escalator principle” is codified at 38 U.S. C. § 4316(a). It provides that a person who is reemployed under USERRA is entitled to the seniority that the person had on the date of the commencement of service in the uniformed services, plus any additional seniority and seniority-based rights and benefits that such person would have attained if the person had remained continuously employed.

The DOL USERRA regulations provide guidance on how to determine if a particular benefit is seniority-based at 20 C.F.R. § 1002.212.

- **Non-Seniority-Based Benefits:** Non-seniority-based benefits are not subject to the escalator principle. Generally USERRA provides that a person absent from employment to perform service is to be considered on a furlough or leave of absence. Such person is entitled to participate in non-seniority-based benefits to the extent that similarly-situated employees on non-military leaves of absence participate. The “furlough or leave of absence” provision is at 38 U.S. C. § 4316(b)(1).

Where the employer policy varies according to the type of non-military leave, the person on military leave is generally entitled to the most favorable policy, so long as the types of leave are comparable. Determination of comparability of various types of leave is addressed in DOL’s USERRA regulations at 20 C.F.R. § 1002.150(b).

38 U.S.C. §4316(b)(1) applies to most non-seniority-based benefits, but not to health plans. USERRA’s coverage of health plans is contained exclusively in section 4317 of USERRA and entitlements do not depend on what the employer does for other employees on a non-military leave of absence.

Let’s look at Andrew’s situation.

Andrew has stated that he is going on active military duty for a one-year period. He wants to find out where he stands on his benefits, both during the period of service and upon his return after completion of the service.

Let’s examine each of these benefits and get a better idea of what is and is not covered under USERRA.

### **Vacation**

Andrew received two weeks of vacation each year from his company. Under USERRA, during the year he is on active duty, Andrew:

*Option One:* Is entitled to receive the two-weeks’ vacation pay for the year he was gone.

Andrew does not lose the vacation time he had built up before leaving for active duty. However, he does not get the benefit of accruing vacation during his military leave, unless the employer has a policy that allows for accrual of vacation by employees on non-military leave of absence. See DOL USERRA regulations at 20 C.F.R. § 1002.150(c).

Also, he must be allowed, upon his request, to use his accrued vacation while performing military service, but cannot be forced by the employer to do so. The entitlement to use or not use vacation is covered in the USERRA regulations at 20 C.F.R. § 1002.153.

*Option Two:* Does not accrue vacation time during his military leave.

Andrew does not get the benefit of accruing vacation during his military leave, unless the employer has a policy that allows for accrual of vacation by employees on non-military leave of absence. See DOL USERRA regulations at 20 C.F.R. § 1002.150(c).

However, he does not lose the vacation time he had built up before leaving for active duty. Also he must be allowed, upon his request, to use his accrued vacation while performing military service, but cannot be forced by the employer to do so. The entitlement to use or not use vacation is covered in the USERRA regulations at 20 C.F.R. § 1002.153.

## **Bonuses**

During Andrew's military leave, everyone in his department was awarded a monetary bonus because their unit produced the most newspaper editions since its inception.

They have produced 50% over last year's quota. Each person in the department will receive a 20% bonus at the end of the year.

Under USERRA, Andrew, who works in the same department:

*Option One:* Will not receive any part of the bonus.

If there is a bona fide work requirement to be eligible, Andrew would be entitled to participate only to the extent employees on comparable non-military leaves of absence participate. However, the manner in which the employer administers the bonus will determine Andrew's entitlement.

If the bonus is given to everyone on the payroll, Andrew may be entitled to it.

*Option Two:* Is entitled to receive the same 20% bonus.

The manner in which the employer administers the bonus will determine Andrew's entitlement. If the bonus is given to everyone on the payroll, Andrew may be entitled to it.

If, however, there is a bona fide work requirement to be eligible, Andrew would be entitled to participate only to the extent employees on comparable non-military leaves of absence participate.

## **Annual Raises**

If everyone in the company received an annual raise, for example, a cost of living allowance, and it is not based on productivity, then is Andrew entitled to receive his annual raise for the year he served in the military?

**Yes:** Andrew is entitled to the annual raises as if he had been continuously employed instead of performing his military service. Raises of this type are based on seniority and are governed by the escalator principle, which is codified at 38 U.S.C. § 4316(a).

## **Health Insurance**

Andrew has an employer-provided health insurance plan in which he pays half of his health insurance premium and his employer pays the other half.

Under USERRA, the employer does not have to continue Andrew's health insurance during his year of military leave.

Actually, this is up to Andrew.

If he elects to continue his health coverage he could be required to pay up to 102% of the full premium if the period of service is 31 days or more. For service of 30 days or less, he would only pay the normal employee share, if any.

Upon reemployment, coverage for Andrew and any previously covered dependents must be restored immediately if it was interrupted. No waiting period may be imposed and exclusions are prohibited except for conditions determined by the Department of Veterans Affairs to be service-connected.

USERRA's health plan provisions are contained in 38 U.S.C. § 4317. The DOL USERRA regulations address basic health plan entitlements at 20 C.F.R. § 1002.164. The provision addressing the service member's obligations with respect to payment for continuation coverage is 20 C.F.R. § 1002.166.

### **Pension**

Andrew has a 401(k) retirement plan where both he and the employer make contributions to the plan.

While he is away on military leave, is Andrew entitled to have the employer continue to have the fund being paid into without paying into the fund himself?

No. Andrew is not entitled to pension benefits until he is reemployed following service.

Upon reemployment, Andrew has up to three times the period of the military service (but not more than five years) to make up missed contributions. See 38 U.S.C. § 4318(b)(2).

He is not entitled, nor is the employer required, to make contributions to his 401(k) plan while he is performing military service. Andrew's pension entitlements do not mature until he is reemployed following service.



Andrew: "I'm glad I've got USERRA on my side to help me work things out. I can't imagine what it would be like without having this important law to protect the men and women who are serving their country. And people like the ESGR Ombudsman and VETS staff are a huge help in resolving USERRA issues. I'm glad they're there for us!"

## Resources

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- 38 U.S.C. §§ 4301-4334 , <http://www.dol.gov/vets/usc/vpl/usc38.htm>
- 20 C.F.R. Part 1002 – Regulations under the Uniformed Services Employment and Reemployment Rights, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>
- 1010 Form – <http://www.dol.gov/elaws/vets/userra/1010.asp>
- DOL Referral Line - 1-866-4USA
- DOL ESGR Homepage – <http://www.esgr.org/>
- ESGR National Headquarters - 1-800-336-4590, ask for Ombudsmen Services
- ESGR Employer FAQ, <http://www.esgr.mil/Employers/Additional-Resources/Employer-FAQ.aspx>
- USERRA Information – <http://www.dol.gov/vets/programs/userra/main.htm>
- USERRA Pocket Guide, <https://www.dol.gov/vets/programs/userra/USERRA%20Pocket%20Guide.html>
- USERRA Tutorial, <http://www.nvti.org/Training/Courses-Offered>
- VETS Homepage, <http://www.dol.gov/vets/>
- VETS Regional Offices, <https://www.dol.gov/vets/aboutvets/regionaloffices/map.htm>

## Quiz

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You may use the link below to access the course quiz. You must complete the quiz to gain access to your Certificate of Training.

[https://managementconcepts.co1.qualtrics.com/SE/?SID=SV\\_ezcyj2GZvXWYmDr](https://managementconcepts.co1.qualtrics.com/SE/?SID=SV_ezcyj2GZvXWYmDr)