



# USERRA 102

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# 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.

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## Welcome and Course Overview

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### WELCOME TO USERRA 102

The basic tenets of USERRA are taught in the USERRA 101 course and it is important that you complete that course first. The USERRA 102 course will further expand and build upon that knowledge base. ESGR and VETS receive a certificate for USERRA 102.



**NOTE:** Complete participation and optimal learning of the USERRA 102 course is best experienced via e-learning. As a courtesy, you can download this material as a reference to USERRA and as a training tool.

### 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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# Understanding USERRA – The Basics

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## UNDERSTANDING USERRA

Let's take a brief review of USERRA and why it was enacted, the requirements for eligibility and the important guiding principles of the law.



Host: "As we look at understanding USERRA, it's important to know that this law was enacted to prohibit discrimination in employment against individuals because of their participation in the uniformed services. It also provides for prompt reemployment as well as other employment rights and benefits for employees who have been absent due to military service or training.

These men and women have sacrificed their time to proudly serve and defend their country. We honor their dedication and patriotic service and should do our part to help these individuals transition smoothly back into their civilian lives and the workforce."

## USERRA ELIGIBILITY

USERRA requires that the service member meet the requirements below in order to be eligible for reemployment following service. Detailed information on these requirements, including exceptions, can be found in the DOL regulations, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>. This information must be reviewed before deciding if an individual has met the eligibility requirements. Per Subpart C–Eligibility for Reemployment, the service member must meet five general criteria in order to establish eligibility for reemployment:

1. That the service member be absent from a position of civilian employment by reason of service in the uniformed services;
2. That the service member's employer be given advance notice of the service;
3. That the service member have five years or less of cumulative service in the uniformed services with respect to a position of employment with a particular employer;
4. That the service member return to work or apply for reemployment within timelines specified under the law after conclusion of service; and
5. That the service member not have been separated from service with a disqualifying discharge.

## GUIDING PRINCIPLES

After eligibility is determined, it is important to be aware of the two important principles that were established in a landmark decision by the Supreme Court. These two guiding principles are still in place and should be kept in mind whenever applying USERRA to actual situations. They are:

1. Liberal construction. For more information, see page 75246 of 20 C.F.R. Part 1002, Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>
2. Escalator principle. For more information, see 20 C.F.R. Part 1002.191, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

## LIBERAL CONSTRUCTION

Concerning the reemployment rights law, the principle of liberal construction was best expressed by the Supreme Court in the 1946 *Fishgold v. Sullivan Drydock* decision when it said, “This legislation is to be liberally construed for the benefit of those who left private life to serve their country....”

Simply put, liberal construction can be thought of as a “tie-breaker.” Where a genuine question exists concerning USERRA entitlements, the law should be interpreted to favor those it is intended to protect.

In the legislative history that accompanied USERRA, Congress expressed its intention that this principle remains applicable in interpreting the law. Similarly, DOL, in the preamble to its USERRA regulations, made it clear that the principle applies with full force in interpreting those regulations.

Click here for more information about liberal construction and scroll to page 75246. ([www.dol.gov/vets/regs/fedreg/final/2005023961.pdf](http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf))

## Escalator Principle

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The escalator principle is the starting point in determining the proper reemployment position. Basically, the reemployment position is the one the service member would have attained if his or her continuous employment had not been interrupted due to uniformed service. It encompasses what his or her seniority, status and pay rate would be had there been no absence for military service.

For example, if an individual leaves for active duty for two years and would have received a cost of living raise each year, along with one day of additional vacation for every two years of employment, he or she would receive two cost of living raises and one additional day of vacation upon returning to employment. This is covered in detail in the Escalator Principle Assignment. More information is available at <https://www.dol.gov/vets/usc/vpl/usc38.htm#4313>.

### ESCALATOR PRINCIPLE EXAMPLE

Nicole is having lots of difficulty at her place of employment. She was called to active duty and when she returned to her job, she discovered that major changes had been made to her employment situation.



Nicole: “My situation at work is a complete mess. I am a contracted high school math teacher, been doing it for eight years. I am also a member of the Army Reserve. I was called up for active duty late last year and of course, the school had to find a replacement for me since I was going to be gone for the entire school year.

Now that I’m back, I not only don’t have my old job back, but I’ve been reassigned to the junior high school, and my commute is now a lot longer. And I’m not even on the math department. But that’s not the kicker. The district is going through a staffing reduction, and I’m on that list! They say the person who was my junior by six months before I left, is now my senior by six months. Just because I left for service. I feel I’m really getting the run-around here.”

Host: “Wow, let’s see if we can help Nicole out.

First, it’s important to review the escalator principle and how it works. When a service member returns from active duty and is eligible for reemployment under USERRA, must the employer always give the returning service member the pre-service job back? Not necessarily.

The USERRA law and regulations provide that, in general, the returning service member is entitled to reemployment in the position he or she would have attained, with reasonable certainty, if not for the absence due to service. This is known as the escalator position. In some cases, the employer has other options.

It’s a bit complicated, so let’s take it one step at a time.”

## THE POSITION

If a service member leaves a civilian job to perform service and the employer needs to have that position filled during their absence, the employer can hire a person to temporarily fill in for the service member. Once that service member reports back from military service, the employer has to hire the service member back.

When interpreting the escalator principle, as a general rule, the employee is entitled to reemployment in the position that she would have attained with reasonable certainty if not for the absence due to uniformed service. The principle behind the escalator position is the service member should not suffer any disadvantage, or necessarily realize any special advantage in employment simply because of military service.

## REEMPLOYED IN POSITION

The escalator principle requires that the employee be reemployed in a position that reflects, with reasonable certainty, the pay, benefits, seniority, and other job prerequisites, that she would have attained if not for the period of service.

Under USERRA, a person who meets the eligibility requirements shall be promptly reemployed. (Eligibility requirements are found in Subpart C—Eligibility for Reemployment at <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>)

Prompt reemployment means as soon as reasonably possible under certain circumstances of each case. For example, prompt reemployment after a short military commitment, such as a weekend National Guard duty, generally means the next regularly scheduled workday. For a longer commitment, the DOL USERRA regulations provide that absent unusual circumstances, reemployment must be within two weeks. See 20 C.F.R. §1002.181 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>) for more about prompt reemployment.

In Nicole's case, she was a teacher on active duty for a year. She should be promptly reemployed into a position with the status, seniority and pay rate that she would have attained with reasonable certainty. If the school is on an academic break during which teachers are not paid, the school district should still reemploy promptly so benefits are restored and then resume her pay at the end of the academic break. Would she have been transferred, with reasonable certainty, to the junior high school? It seems unlikely. Certainly, she would not have forfeited any seniority.

Let's see how the escalator principle works to determine what options are available for Nicole.

**If the period of service was less than 91 days**, the employee must be reemployed into the escalator position. He or she must be qualified\* to perform the duties of the job and the employer will need to make reasonable efforts\*\* to help the employee become qualified to do this new job.

If it turns out that the employee is not and cannot become qualified to perform the duties of the escalator position, the employee should be reemployed back into the same position he or she held prior to leaving for military service. Again, the employee must be qualified to do this job and the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

If the employee cannot perform the duties of either position, the employer must reemploy that person into any other position that is closest to first, the escalator position, and then to the pre-service position (see 20 C.F.R. §1002.196, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).

**If the period of service was more than 90 days**, the employee must be reemployed into the escalator position or a position with like seniority, status and pay. She must be qualified\* to perform the duties of the job and the employer will need to make reasonable efforts\*\* to help the employee become qualified to do this new job.

If the employee is not qualified to perform the duties of the escalator or like position, the employee must be reemployed in the position she held prior to leaving for military service. Again, the employee must be qualified to do this job and the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position or a like position.

But if the employee cannot perform the duties of any one of these positions, the employer must reemploy that person into any other position that is closest to first, the escalator position, and then to the pre-service position (see 20 C.F.R. §1002.196, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).



\* **“Qualified”** means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

\*\*The employer must make **“reasonable efforts”** to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position. Only after the employer makes reasonable efforts, as defined in 20 C.F.R. §1002.5(i), may it determine that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

## STATUS

In general, the term “status” means the attributes of an employment position other than the position’s seniority and rate of pay. While the specific components of status will vary from job to job, the term often includes the job’s rank and responsibility, its duties, location, working conditions, opportunities for advancement, and other rights or attributes attached to the position. If any changes in an employee’s job status take place during that employee’s absence for military service, the service member is to be reemployed with the new status in accordance with

the escalator principle. For instance, before leaving to perform service, the service member had a private corner office with a mountain view. Upon reemployment, the person had to share an office in the basement with three other employees. This is clearly a lower status and may be a violation of USERRA unless the employer can show that the same thing would have happened if the person had remained continuously employed during the period of military absence.

## DEPARTMENT OF LABOR REGULATIONS

Determining the proper reemployment position for a person returning from a period of military service can be complicated, especially when the period of service was a lengthy one. The DOL regulations provide detailed guidance on the reemployment position, seniority, status, pay rate and special provisions for employees returning with a disability. Please refer to 20 C.F.R. §§1002.191 to 1002.236 for escalator principle information. (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).



Nicole: “I spoke with my ESGR representative and he worked with the district and got me back into a high school teaching position. He also helped clarify that my seniority with the district is not affected by my absence for military service. Still they want to place me in the district’s other high school and in the special education department instead of math. My commute would be longer and I haven’t worked in special education in four years. They said they are putting me in this position because my replacement was an outstanding teacher — as if to say I wasn’t a great teacher?”

I just want my old job back. Along with that, they also replaced me with a new head coach of our ladies volleyball team. They’re having a winning season and I don’t want to mess with their success, but I still would like to be on the coaching staff. The situation is a little better, but it still isn’t all that great.”

Host: “Has the employer met all of its obligations in reemployment?”

## HAVE EMPLOYER OBLIGATIONS BEEN MET?

Not likely as they have not re-employed Nicole in a position of like status. It appears the employer does not fully understand Nicole’s entitlement to reemployment in the position that reflects with reasonable certainty the pay, benefits, seniority, and other job prerequisites, that she would have attained if not for the period of service.

The employer believes that by placing Nicole into a job that is close to her original one, they are abiding by the law. Not quite. If not for military service, Nicole would likely still be teaching her math students at the high school she left. The district is obligated to re-employ in that position. Perhaps her replacement can be assigned another position within the district. But the service member must be placed back into the escalator position, if that position still exists, or a like position.

In this case, Nicole’s position exists and she is qualified to come back into the position she left, or a like position.

## USERRA REQUIREMENT

By law, the employer is required to place the service member back into the position the member would have attained (or, in this case, a position of like seniority, status and pay), regardless of the outstanding performance of the replacement employee. In a case such as this, there could be room for compromise on both sides that works to the benefit of both the service member and the employer. If the employee is willing to take another position, at the same pay rate and with similar status, it is possible the parties can work together to achieve a harmonious outcome. Any such compromise must be informed; however, meaning both the parties must understand the employee's full legal entitlements before agreeing on a position that may provide the employee a slightly different status.



Nicole: "Thanks for helping me out. This was a really tough situation for me. When I'm teaching, I give my students my very best. When I'm called to serve my country, I do offer the military my very best, serving my country with honor and pride. When I got back home I just didn't expect something like this to happen to me. I did get my original position back along with all of the seniority and benefits I would have attained had I remained continuously employed. I even got back on the volleyball team's coaching staff!

Thank you for helping me work with my district to get back to my teaching assignment."

## Service-Connected Disability

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In this module, we'll meet Erik, a police officer who was called to active duty. While serving, Erik was severely injured. What happens now that he is ready to return to his former position?



Host: "What happens when a service member gets injured or wounded during military service, returns home and requests reemployment with the pre-service employer? What is the employer's responsibility?"

Let's take a look and see what happened with Erik.

He was a police officer when he received orders for 18 months of active duty. While serving on that active duty assignment, his convoy was hit with an explosive device and Erik was severely injured. He is missing his right arm. Several months were spent recovering and rehabilitating in a military hospital. He is now reporting back to his pre-service employer."

Employer: "Erik was an outstanding police officer, one of the best. And we are all very supportive and proud of him for serving as an Army Ranger. But now he's back and he can't do the main tasks of the job anymore. We're welcoming him back, but I don't know all the rules. Do I put him in a less physically demanding job and pay him the same, or do I have to create a new job that didn't exist before, with higher pay?"

Now, we want to do the right thing, but I guess I just don't know enough about all of the things regarding reemployment rights to make the right decision."

Host: "Stories such as Erik's can and do occur. Service members suffer disabilities during peacetime training as well as during combat. Typically, the pre-service employers in these cases are left with the same questions as Erik's employer. Let's look into this situation and try to achieve the best outcome for both Erik and his employer."

### REEMPLOYMENT IN POSITION

Like any other returning employee, Erik is entitled first to reemployment in the position he would have attained if he had remained continuously employed, which we call the escalator position.

In Erik's case, the escalator position is police officer. Unfortunately, Erik can no longer perform the duties of police officer and cannot become qualified by reasonable efforts by the employer to accommodate the disability.

USERRA provides that the employer still has an obligation to reemploy unless reemployment is impossible or unreasonable or imposes an undue hardship on the employer.



**NOTE about “undue hardship:** If accommodating a disability or helping a returning service member become qualified for reemployment causes the employer undue hardship, the employer may not be obligated to go through with the change.

Undue hardship is defined in USERRA law at 38 U.S.C. §4303(15)(A)-(D) and in 20 C.F.R. §1002.5(n). However, the employer does have options. Let’s look into those options:

- **Escalator Position:** Because of the physical demands of the police officer position (e.g., driving a squad car, making arrests, active public service, etc.) the escalator position is not an option in Erik’s case.
- **A position equivalent to the escalator position in terms of seniority, status and pay:** This would be a very good option, if such a position is available. Moving Eric into an equivalent position may involve training and other accommodations, but ultimately the employer will keep an experienced, valued team member.
- **A position in nearest approximation to the equivalent position:** If there is a position, one which the employer does not have to create, then the employer can place Erik into this position whether or not it is already encumbered by another employee. Again, the employer must make reasonable efforts to accommodate the disability and to help him become qualified to perform the duties of the position. It is important to note that the “nearest approximation” position may be a higher or a lower position. The key is that the employer considers all reasonable options.



Employer: “If Erik had never left, he would have been eligible to be considered for our Deputy Director position. We believe he’s got the experience to be successful, and the other officers and people around here respect him a great deal.

Under the district’s guidelines, this new position, Deputy Director, is a higher status position, and comes with a higher salary. However, he’ll need to go through quite a bit of training before he’ll be qualified to do that job. He should do well in this job since it is similar to what he was doing in the military. But how much time am I obligated to provide for this training?”

Host: “One of the factors that may come up when a service member returns with a disability is that it could potentially cause an undue hardship for the employer. Maybe the employee needs extensive training. Or possibly there’s a need for the employer to accommodate the disability like perhaps purchasing a new device the employee needs in order to perform the main tasks of the job.

What is the employer required to do in these conditions?

Let’s look into several dynamics which may come into play because of a disability incurred in or aggravated during service.”

## TRAINING/RE-TRAINING FOR NEW POSITION

If the position requires training or continuing education, the employer must provide this opportunity for the employee. This could consist of learning the new equipment, software or complexities of the job and could range from a few days of training to several months.

## ACCOMMODATION

An employer is required by USERRA to make reasonable efforts to accommodate a disability a returning employee incurred in or aggravated during service. Accommodation may include modifying technology, installing equipment, revising work practices or shifting job functions.

The term reasonable efforts means actions, including training provided by the employer that does not place an undue hardship on the employer. If accommodating a disability or helping a returning service member become qualified for reemployment causes the employer undue hardship, the employer may not be obligated to go through with the change. Undue hardship is defined in USERRA law at 38 U.S.C. § 4303(15) ([www.dol.gov/vets/usc/vpl/usc38.htm#4303](http://www.dol.gov/vets/usc/vpl/usc38.htm#4303)).

As noted previously, the existence of undue hardship depends on several factors and must be determined on a case-by-case basis.



Employer: "I've worked with my district and we are offering Erik the Deputy Director position. He'll make around \$10,000 more a year than he did as a police officer. One thing which may be a problem is his on-going rehab. He has to go into the city which is about four hours away and sometimes he might need to stay overnight.

I know we have to allow for his time off, but what about mileage, staying at a hotel, and that type of thing. I'm just not too sure how much we're in for with all of this."

## REASONABLE EFFORTS

The employer is required to make reasonable efforts to accommodate the disability.

Allowing time off for treatment is considered an accommodation. However, the employer is not required by USERRA to cover any travel or lodging expenses.

Medical treatment for disabilities incurred in or aggravated during military service is generally provided by the government. The service member might want to look into VA medical benefits (<https://www.va.gov/HEALTH/index.asp>).

## SERVICE-CONNECTED DISABILITY WHICH MANIFESTS LATER

(e.g., post-traumatic stress disorder)

What if illnesses or injuries incurred during a period of service do not manifest until after reemployment, for example post-traumatic stress disorder or the effects of a traumatic brain injury?

The law allows up to two years recuperation/recovery time before making application for reemployment or returning back to work. However, this entitlement does not apply after reemployment.

If the service member is unable to perform the duties of his or her reemployment position because of a disability incurred during service, but discovered after reemployment, the employer must go through the reemployment process again, this time using USERRA's provisions for disabled employees.

## **REINTEGRATION**

### ***Disabilities Diagnosed After Reemployment***

If a disability is discovered after the service member returns to work and it interferes with his or her job performance, then the reinstatement process should be restarted under USERRA's disability provisions. See page 75277 of the USERRA regulations ([www.dol.gov/vets/regs/fedreg/final/2005023961.pdf](http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf)) for further information.

What if the returning service member has already reported to the employer and a service-related medical condition arises, which necessitates absence from work? The extension of time for recuperation and recovery applies only to the period in which the employee has to report back or apply for reemployment. It does not apply after the person is reemployed. For more information, see 20 C.F.R. §1002.116 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>)

### ***Disability***

For regulations regarding time periods for reporting back, see 20 C.F.R. §1002.116 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).

For regulations regarding disability benefits, see 20 C.F.R. §§1002.225 and 20 C.F.R. 1002.226 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).



Host: "Erik obviously has a great working relationship with a great employer. As we have seen, there are many dynamics which have to be considered when dealing with the reemployment rights of a person who has incurred or aggravated a disability while performing service. The key is to consider all reasonable re-employment options available.

As a USERRA representative, you can help the service member by making the employer aware of the options to make the best decision for everyone involved."

## Discrimination

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Matt feels he's being treated unfairly at his place of employment because of his National Guard commitment. He's been passed over for promotions and those with less seniority have been made shift manager ahead of him. His employer demands a high level of availability and frankly feels Matt can't give that.



Host: Service Member: "Hey Sharon...you got a minute?"

Employer: Just a minute. "I'm a little busy. What's up?"

Service Member: "I just spoke with Webster and he was all apologetic about being promoted to shift manager. I guess he thought I knew about this. Look, I've been assistant manager here two years longer than he's been around and I've had good reviews from National. I don't understand how this is possible! How can I be overlooked for promotion again? Every assistant manager here is promoted to manager."

Employer: "Well, Matt, it's because Webster's always here. He's not taking every other weekend to run off here and there."

Service Member: "We've been over this before, Sharon. I'm gone one weekend a month and that's the only conflict I have...I even stick around town when I'm on vacations so I'll be available if you need me. I hardly ever get sick. I have one year of military duty and it'll be all over."

Employer: "Well, maybe we can talk about it then but for now I need my managers here at all times. They need to be available every weekend and on call every day. I don't have that in you. You're gone frequently. You can't do both. You got to choose between one or the other. This is a full time job and frankly, you're gone a lot and for a manager's job, that's not acceptable. Look, you're a great worker Matt, really you are, but I can't use you as a shift manager. You're gonna have to stay as an assistant manager until you can commit to the job full time. I'm sorry, but that's the way it's gotta be."

Host: "In this module we're going to discuss an important USERRA issue—discrimination and retaliation. These cover a lot of ground. Basically, discrimination occurs when an employer takes an adverse employment action because of a person's military affiliation. Retaliation is when an employer takes an adverse employment action against an employee for acting to enforce any person's USERRA rights.

USERRA protects employees from such discrimination and retaliation. Discrimination in employment varies from situation to situation, but it is something many service members face and often an investigation is needed.

Let's look closer at discrimination and determine how USERRA applies to these situations."

## CHAIN OF ASSISTANCE

It can be difficult to determine if an employer is discriminating against an employee because of the person's military commitment. Service members who believe they are being discriminated against have several options they can take to resolve the issue. They are encouraged to work through the chain of assistance to help them to find resolution. The chain of assistance is as follows:

- Employer's Internal Human Resource Manager or Legal Counsel
- Military Base Representative
- Employer Support of the Guard & Reserve (ESGR)
- U.S. Department of Labor - Veterans' Employment & Training Service (VETS)
- Private Counsel/Lawyer

The selections below explain how the first three resources work. The remaining options will be explored later.

**Employer's Internal Human Resource Manager or Legal Counsel:** The first step toward resolving issues is meeting with the human resource department manager or other human resources liaison at the place of employment. Larger companies often employ legal counsel, who are also available to help with USERRA questions.

**Military Base Representative:** The next option is for the service member to contact their military unit. There is someone on each installation who will know about USERRA and can provide direct assistance or refer service members to the proper channels (of resolution).

**Employer Support of the Guard & Reserve (ESGR):** In most cases, the first course of action would be contacting Employer Support of the Guard and Reserve or ESGR by calling 1-800-336-4590, via e-mail [USERRA@osd.mil](mailto:USERRA@osd.mil), or the web [www.esgr.mil](http://www.esgr.mil) to submit a USERRA Complaint form.

ESGR has volunteer ombudsmen who can assist with USERRA issues such as Matt's. Once ESGR is involved, they discuss the situation with the service member and then either have the service member approach the employer, or the service member can ask ESGR to speak with the employer.



Attorney: "Hi, my name is Robert Brown. I'm an attorney with the legal office of the state national guard headquarters. I'm here to speak with you about Matt Ward. He is concerned that his military service is being used as a reason not to promote him."

Employer: "Oh, Matt. He's the one who contacted you?"

Attorney: "Yes. Matt feels he's being overlooked for promotions because of his military obligations. He expressed his concerns to his unit commander who contacted our office."

Employer: “Don’t get me wrong. I’m totally on board with what Matt’s doing. I just need someone who’s going to be here when he’s supposed to be.”

Attorney: “I appreciate the support you give Matt for his military training obligations and I recognize that the time he needs off for his military training and service can sometimes be difficult for both of you to balance. But in a very real way, our nation’s defense depends on volunteers like Matt, their families, and their employers to be willing to make these sacrifices for our country. I understand Matt has favorable reviews from the National division and is considered a good employee?”

Employer: “Yeah... you could say that.”

Attorney: “He must be doing a pretty good job of balancing his military obligation with the obligations of his employer. Is that correct?”

Employer: “I guess. Why do you ask? Am I in trouble here?”

Attorney: “No, Mrs. Williams. Part of my job is to help employers and guard members understand their rights and responsibilities under USERRA. Are you familiar with USERRA?”

Employer: “No, not really.”

Attorney: “USERRA is a federal law that provides reemployment rights for service members following their military service. It also protects them from job discrimination on account of their military obligations. Going forward, I’d like to refer you to an excellent source of information about USERRA. The National Committee for Employer Support of the Guard and Reserve, or ESGR. They’re a Department of Defense organization whose mission includes educating employers and service members about USERRA and mediating disputes when they come up. I recommend you check out the web site where you’ll find lots of employer resources on USERRA. It might be helpful for you as you are balancing Matt’s need for time off and making employment decisions about Matt, to include his eligibility for promotions.”

Employer: “I support Matt’s service in the military. Really, I do. But, if I promote him to manager, I need to be able to count on him to cover on-call shifts and that includes weekends. He often needs time-off on weekends for his military training. I don’t know.... “

Host: “Most cases are resolved satisfactorily by an ESGR Ombudsman. ESGR offers an alternative dispute resolution process to mediate and resolve conflict and at the lowest level. Let’s continue with the chain of assistance.”

## CHAIN OF ASSISTANCE CONCLUDED

We've already explored the other parts of the chain of assistance —employer's internal human resource manager or legal counsel, military base representative and ESGR. If Matt's concerns have not been satisfactorily resolved utilizing those options, he has these additional resources at his disposal.

**U.S. Department of Labor/VETS:** The service member also has the option of filing a formal complaint with a representative at the Department of Labor. This would be someone at the VETS State Director's Office. Each state has at least one VETS office with personnel who are trained to handle resolution of USERRA claims. Go to <https://www.dol.gov/vets/aboutvets/regionaloffices/map.htm> for the VETS Staff Directory.



Lawyer: "Service members may also choose to hire private counsel to represent them at their own expense. This option is available to service members at any point during the process."

## USERRA DISCRIMINATION LAW

For anti-discrimination and anti-retaliation regulations, see Subpart B, Part 1002 of 20 C.F.R. (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>) Specific sections address the questions below:

SECTION	ADDRESSES
1002.18	What status or activity is protected from employer discrimination by USERRA?
1002.19	What activity is protected from employer retaliation by USERRA?
1002.20	Does USERRA protect an individual who does not actually perform service in the uniformed services?
1002.21	Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?
1002.22	Who has the burden of proving discrimination or retaliation in violation of USERRA?
1002.23	What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

Additionally, recognize individual supervisors or bosses by nominating them for ESGR's Patriot Award (<http://www.esgr.mil/Employer-Awards/Patriot-Award.aspx>), which recognizes support provided directly to the nominating service member and his or her family. Patriot Awards are awarded to individual supervisors, not to an entire staff or organization as a whole.



Host: "In Matt's case, a representative from the National Guard legal office helped explain USERRA and its anti-discrimination section to the employer. Once the employer reviewed the information available on-line at the ESGR site and better understood how her refusal to promote Matt because of his military obligations could be unlawful under USERRA, she dropped her objections and promoted Matt to manager.

Most of the time conflicts that come up between service members and their civilian employers are because of a basic misunderstanding over one another's rights and responsibilities under USERRA. That is why the majority of USERRA issues are satisfactorily resolved by ESGR volunteers. Once both sides understand their rights and their responsibilities under the law, they voluntarily comply.

In this case, Matt can even go the extra mile and express his appreciation by nominating his employer for ESGR's Patriot Award. This award recognizes outstanding employers who support their employees who serve in the Guard and Reserve."

## Resignation

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Mike left his position as a mechanic to enlist in the military. He wrote his boss a letter of resignation, which his boss accepted. Now it is four years later and Mike is out of the service and wants the old job back. Is he entitled to his old job? Let's find out.



Employer: "I own a small garage. There's just a few of us working here. A mechanic, a tech and myself. My old mechanic, Mike, left four years ago to enlist in the military. I even have his letter of resignation here. Let me read part of it for you:

*Nick, please accept my resignation. My plan is to join the Air Force and make it my career. Thanks for all your help and support.'* He quit.

Now, four years later he shows up asking for his old job back. He said having a military career wasn't what he thought. That's his problem. I hired my nephew out of high school to do this guy's job. And he's a darn good mechanic. Mike, not so much. Besides, he's been away from the business for so long. We have a whole bunch of new equipment here for diagnostic testing and such.

Sorry, Mike. Can't do it. Besides, I have your letter of resignation."

Host: "What our employer does not appreciate is that Mike's re-employment rights under USERRA do not fully mature until he has completed honorable service and makes a timely application for re-employment.

Mike went through the Transition Assistance Program on his base and there he learned about USERRA. He made a call to ESGR and discovered more information about his rights.

Mike couldn't find another job in town so he went back to his old employer and is trying to work things out there. So let's look into this tricky situation and find out if Mike is indeed entitled to his old job."

### RESIGNATION AND ELIGIBILITY

Even if a service member signs a letter of resignation to enlist in the military, the service member may still have reemployment rights under USERRA, provided he or she meets USERRA's eligibility requirements. Per Subpart C—Eligibility for Reemployment (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>) USERRA eligibility requirements are:

- Advance Notice
- Absent to Perform Unformed Service
- Five-Year Limit

- Apply for Reemployment or Return to Work in a Timely Manner
- No Qualifying Discharge

Once the eligibility requirements are successfully established, the employer has to grant prompt reemployment.

## PROMPT REEMPLOYMENT

Under USERRA, a person who meets the eligibility requirements shall be promptly reemployed into their position. Promptly reemployed, means as soon as practicable under certain circumstances of each case. The DOL regulations provide that reemployment must be within two weeks absent unusual circumstances.



**NOTE:** Prompt reemployment after a short military commitment, for example, weekend National Guard drill, generally means the next regularly scheduled workday. See 20 C.F.R. §1002.181.

While a letter of resignation does not cause a service member to lose the right to reemployment following qualifying service, it may cause the person to lose eligibility for certain employer-provided benefits during the period of service.

USERRA provides that if an employee provides the employer a written notice of intent not to return following a period of military service, the employee loses entitlement to the non-seniority benefits to which he or she would otherwise be entitled during the period of service. The employee must be aware of the rights to be lost in order for the written notice to be effective.

Again, however, the written notice does not cause the person to lose reemployment rights. If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

If employment is interrupted by a period of service in the uniformed services and the employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service (see 20 C.F.R. §1002.152, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>)



Employer: "This is not a very good situation at all. I knew a little bit about reemployment rights but I had no idea it covered someone who actually quit their job to join the military.

What Mike must realize is that I had to fill his old job. My nephew is head and shoulders a better mechanic than Mike ever was and I can't afford to lose him now. And now with all the new equipment that we had to purchase to work on new cars, Mike will be so far behind.

I can't take the time to train him on all this new stuff. But I want to do the right thing. I'll have to tighten some screws but I can bring him back, maybe cleaning up the garage or put him in charge of parts. But that's about all I can do at this point."

Host: "The employer is correct that at this point he must bring Mike back. He is mistaken about the training though.

He does, in fact, have to give the service member an opportunity to be trained on the duties of the position. He may have to rehire Mike into his old position and do something with his nephew.

Let's look into this further."

## **SERVICE MORE THAN 90 DAYS**

If the period of service was more than 90 days, as in Mike's case, the employee must be reemployed into the escalator position or a position of like seniority, status and pay. He or she must be qualified to perform the duties of the job and the employer will need to make reasonable efforts to help the employee become qualified to do this new job.

If the employee is not qualified to perform the duties of the escalator or like position, the employee must be reemployed in the position held prior to leaving for military service or a like position. Again, the employee must be qualified to do this job and the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. But if the employee cannot perform the duties of any one of these positions, the employer must reemploy that person into any other position that is closest to first, the escalator position, and then to the pre-service position.

Qualified means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

**Reasonable Efforts:** The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position. Only after the employer makes reasonable efforts, as defined in 20 C.F.R. §1002.5(i), it may be determined that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

For more information, see C.F.R. §1002.197  
(<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>)

## **SERVICE LESS THAN 91 DAYS**

If the period of service was less than 91 days, the employee must be reemployed into the escalator position. He or she must be qualified to perform the duties of the job and the employer will need to make reasonable efforts to help the employee become qualified to do this new job.

If it turns out that the employee is not and cannot become qualified to perform the duties of the escalator position, the employee must be reemployed in the position held prior to leaving for military service. Again, the employee must be qualified to do this job and the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

If the employee cannot do the duties of either position, the employer must reemploy that person into any other position that is closest to first, the escalator position, and then to the pre-service position. More information is found in 20 C.F.R. §1002.196 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>)

If the service member cannot be trained to the level required of any of the jobs mentioned above, the employer may be excused from the obligation to reemploy the person in some cases. Specifically, if the employer can prove that the effort required to qualify the service member imposes an undue hardship on the employer, the employer is excused from the obligation to reemploy.



**NOTE:** For the purposes of this learning exercise, employer efforts to qualify Mike for the proper reemployment position do not impose an undue hardship on the employer.

Refer to the Escalator Principle Assignment for detailed information on how to determine the proper reemployment position.



Employer: “Well, I want to do the right thing. I spoke with Mike and his ESGR representative and I’ve agreed to go ahead and bring him back and train him on the new equipment.

He’s a pretty sharp guy so he should pick it up rather quickly. If it does turn out that he’s just not getting it, then I’ll go ahead and find something meaningful for him to do...maybe as our parts guy for now. I’ll pay him the going rate for that type of job and continue the training on the new equipment.

If he does catch on, then I can budget for two top mechanics. Business is going pretty well and I probably need to hire another one anyway.”

Host: “Our employer just needed to be made aware of how USERRA applies to this situation. Hopefully you have learned that even if a service member resigns from a job, they still may be protected under USERRA.”

## Health Benefits

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Kyle is about to go on active duty for a 15-month commitment and needs to be sure his health benefits are in order for himself, as well as his family.



Kyle: “I’m very confused about my health plan benefits; what’s covered, what’s not and so forth. I’m going on active duty for 15 months and I want to make sure everything is completely covered before I leave next month.

So, do I have to pay premiums during that time or do I get cut off from my employer’s health plan benefits once I go overseas? My 5-year old daughter has special needs and I want her to continue using the same facility, same team and receive the same treatment for her specialized care. But I’m not sure if I can keep the current benefits that I have and, if so, at what cost?

And what if I get injured over there? I don’t know if I need to keep my medical benefits going through my employer or go with a new plan in the meantime. I’ve got a lot of questions, but not a lot of time.”

Host: “Let’s take this one step at a time. Kyle has several questions regarding his health plan.

While he prepares for military service, Kyle’s first concern is the continuity of care for his family, especially for his daughter who requires specialized care. He is also worried about his own coverage under the employer’s plan when he is re-employed. Naturally, he’d like to get everything in order prior to departing for his military service.

Let’s look at Kyle’s options regarding continuation of his employer’s health plan.”

### OPTIONS FOR HEALTH BENEFITS

Kyle has several options for his current employer-provided health benefits coverage.

USERRA at 38 U.S.C. § 4317 provides that a service member who leaves work to perform military service has the right to elect to continue his existing employer-based health coverage plan for a period of time while in the military.

In other words, when the employee is absent due to service in the uniformed services, he is entitled to continuing coverage for himself (and dependents if the plan offers dependent coverage) under a health plan which is provided in connection with employment (20 C.F.R. §1002.164, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).

Let's look at Kyle's options:

1. Kyle can elect to continue coverage for a specified period during his absence.

USERRA provides that the maximum period of continued coverage is the lesser of 24 months, or the period beginning on the date the absence begins and ending on the day after the service member has exceeded the time he or she has to apply for reemployment.

If the period of active duty is 31 days or more, he may be required to pay not more than 102% of the full premium under the plan, which represents the employer's share plus his own share, plus 2% for administrative costs. This way, he is protected and the family's medical service is not disrupted. Kyle and his family can keep the same doctors, medical facilities, prescriptions and so forth. Basically nothing changes except perhaps Kyle's share of the premium costs.

USERRA also requires that the employee and eligible dependents must, upon the service member's reemployment, be immediately reinstated in the employer's health plan without a waiting period or exclusion. For more information see 20 C.F.R. §1002.168 at <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>.

2. Kyle can elect not to continue his pre-service medical health benefits and enroll his family in Tricare benefits while on active duty.

Tricare is the health care program serving active duty service members, National Guard and Reserve members, retirees, their families, survivors and certain former spouses worldwide. As a major component of the Military Health System, Tricare brings together the health care resources of the uniformed services and supplements them with networks of civilian health care professionals, institutions, pharmacies and suppliers to provide access to high-quality health care services while maintaining the capability to support military operations.

To be eligible for Tricare benefits, you must be registered in the Defense Enrollment Eligibility Reporting System (DEERS). Tricare offers several health plan options to meet the needs of its beneficiary population. Additionally, Tricare offers two dental plans and several additional special programs.

Tricare is health coverage through the Department of Defense. Kyle would need to verify coverage under Tricare, but may find that his family could have the access to the same doctors and services that his employer's plan provides.

3. Kyle may purchase a health plan directly from an insurance provider.

The premiums for comparable coverage are typically much higher than an employer's group health plan or Tricare options however, it is an option.



Kyle: "We had an ESGR representative come to our base to explain all of the things we need to know about USERRA prior to our departure. One of the things she spoke about was health coverage.

But when I went and talked with my employer about my family's health coverage, he told me that if I wanted to keep the same medical plan and

have it when I get back, I need to keep paying into my plan during my service. He said that if my coverage is interrupted because of my military service there would be a 30-day waiting period for me to have coverage reinstated when I get back.

I don't really have 30 days, since my daughter sees a specialist every week. And I can't afford those visits out-of-pocket."

## **SUSPEND OR KEEP HEALTH BENEFITS**

Service members who leave for active duty may choose to temporarily suspend enrollment in their employer-provided health plans while serving in the uniformed service. Upon reemployment, they are entitled to immediate reinstatement without waiting period or exclusion. More information can be found in 20 C.F.R. §1002.168 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>) and 38 U.S.C. §4317 (<https://www.dol.gov/vets/usc/vpl/usc38.htm#4317>)

If the health plan coverage for the service member was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion, or waiting period, may not be imposed in connection with the reinstatement of coverage upon reemployment, (if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service).

USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated.

## **REINSTATEMENT OF HEALTH CARE**

Because of the type of duty he is performing, Kyle is entitled to remain enrolled in Tricare during a transition period following his release from active duty. He wants to know if he can delay reinstatement of his employer-provided health plan for the duration of the period he is covered by Tricare even though that period extends well beyond the date of his reemployment. Of course, delaying the reinstatement of coverage also delays Kyle's requirement to pay the employee's share for that coverage.

Kyle should be made aware that he may forfeit his entitlement to immediate reinstatement without waiting period or exclusions if he delays reinstatement of his employer-provided health plan until a date after he is reemployed. USERRA requires the employer to immediately reinstate health plan coverage upon request at reemployment. USERRA permits but does not require the employer to allow the employee to delay immediate reinstatement of health plan coverage until a date that is later than the date of reemployment. See 20 C.F.R. §1002.169 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>)

The employer is required to reinstate health plan coverage without the imposition of exclusions or waiting periods at reemployment. A service member who chooses to give up this entitlement may be subject to additional conditions set by the employer in order to re-enroll in the health plan (e.g. wait until open enrollment period).

## HELP FROM EMPLOYERS

Many generous employers encourage service members to stay enrolled in their group health plan while in the service by continuing to pay the employer share of the premium as if the employee were still working.

As we have seen, a service member has several options available to them when it comes to health care coverage during an absence from work to perform service. For more detailed information on the options, please review 38 U.S.C. § 4317 (<https://www.dol.gov/vets/usc/vpl/usc38.htm#4317>) and 20 C.F.R. §§1002.163-1002 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>)



Host: “The second situation Kyle is faced with is determining what his health care entitlements would be if he incurs or aggravates an illness or injury while serving on active duty.

Does the employer health plan have to cover such an illness or injury?”

## ACTIVE-DUTY INJURY

If the returning service member incurs or aggravates an illness or injury while serving on active duty, the employer-provided health plan is not required to cover the service-related illness or injury upon reemployment.

The employer is, however, required to reinstate the remainder of the employee’s pre-service coverage. Coverage for injuries or illnesses that are not service-related (or for the employee’s dependents, if he or she has dependent coverage), must be reinstated upon reemployment.

The Federal Government provides coverage for service-related illnesses or injuries. The determination that the employee’s illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative.



Host: “It is important to know what health care options are available to you and what is best for you and your situation. Each situation is different for each service member.

You are encouraged to review your own company policies and plans along with all the other options that are available to you as you make preparations to serve on active duty.”

## Additional USERRA Issues

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### YEAR SERVICE LIMIT AND EXCEPTIONS

If a service member performs more than 5 years of cumulative service in a particular employer-employee relationship, he or she loses reemployment rights with that employer. However, under USERRA certain types of service do not count towards the 5-year limit. These exceptions are listed in the USERRA regulations at 20 C.F.R. §1002.103 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).



**NOTE:** The term “service in the uniformed services” includes both voluntary and involuntary duty and is covered under USERRA. 20 C.F.R. §§1002.54 through 1002.62 (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>)

1. Service by service members in military specialties that require that an individual serve more than five years as an initial period of obligated service.
2. Service performed where the service member was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and such inability was not the member’s fault;
3. Service performed to fulfill periodic National Guard and Reserve training requirements under 10 U.S.C. §10147 and 32 U.S.C. §§502(a) and 503; and training certified by the military service as necessary for professional development or skills training/retraining. See 20 C.F.R. §1002.103(a)(3) (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).
4. Service performed in a uniformed service if the person was ordered to or was retained on active duty under certain authorities. See 20 C.F.R. Part 1002.103(4), <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf> for more information.
5. Service performed in a uniformed service if the employee was ordered to serve because of a war or national emergency declared by the President or the Congress.
6. Service performed in a uniformed service if the employee was ordered to active duty to support an operational mission for which personnel have been ordered to active duty under 10 U.S.C. § 12304 as determined by a proper military authority.
7. Service performed in a uniformed service if the employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned

8. Service performed as a member of the National Guard if the employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.
9. Service performed to mitigate economic harm where a person’s employer is in violation of its USERRA obligations to him or her. See 20 C.F.R. §1002.103(b) (<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>).

## BEST PRACTICES FOR EMPLOYERS AND EMPLOYEES

### *Employer*

Employers need to create an environment that is supportive of person’s military membership. Some employers provide care packages to service members and their families and “welcome back” events when the service member returns. Other employers provide a continuation of benefits or a pay differential, above and beyond USERRA requirements.

Link to ESGR Statement of Support Program for more information (<http://www.esgr.mil/Employers/Statement-of-Support.aspx>).

### *Employee*

It is crucial that employees communicate with their employers before, during and after their service periods to promote a strong relationship with their employers. They should give as much advance notice as practical to their employer and provide timely application and documentation if requested. Employees/service members should also consider nominating their employers for awards through ESGR.

Information about ESGR awards: <http://www.esgr.mil/Employers/Employer-Awards.aspx>

## COVERAGE OF SERVICE – WHO/WHAT USERRA COVERS

What is considered “service in the uniformed services?”

TOPIC	DESCRIPTION	SECTION IN 20 C.F.R
Military fitness examinations	USERRA allows time for an employee to be absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services.	1002.54
Authorized funeral honors duty	USERRA allows an employee’s absence from employment for the purpose of performing authorized funeral honors duty.	1002.55
Types of service in the National Disaster Medical System (NDMS)	This includes service performed in the event of a national disaster or to receive authorized training for disaster relief (A covered NDMS member does not have to be a member of the uniformed services).	1002.56

TOPIC	DESCRIPTION	SECTION IN 20 C.F.R
Service under Federal authority as a member of the National Guard	The National Guard has a dual status. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA. See 20 C.F.R. §1002.5.	1002.57
Service in the commissioned corps of the Public Health Service	Under USERRA, service in the commissioned corps of the Public Health Service (PHS) is considered “service in the uniformed services.”	1002.58
Special categories	In time of war or national emergency, the President has authority to designate any category of persons as a “uniformed service” for purposes of USERRA.	1002.59
Attending a military service academy	Attending a military service academy is considered uniformed service for purposes of USERRA	1002.60
Reserve Officers Training Corps	Under certain conditions USERRA covers a member of the Reserve Officers Training Corps.	1002.61
Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary	USERRA does not cover members of these organizations. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a “uniformed service” for some purposes, it is not included in USERRA’s definition of this term	1002.62
Dependents.	As a general matter, USERRA does not cover employment or reemployment issues that a dependent might encounter because of a spouse’s or parent’s military service or obligations.	

## COVERED EMPLOYERS

### *Employer Size*

USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act. See 20 C.F.R. §1002.34(a), <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

### *Foreign Employers*

USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States. See 20 C.F.R. §1002.34(b), <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

## ***Companies Operating Overseas***

An American company operating either directly or through an entity under its control in a foreign country must also comply with USERRA for all its foreign operations, unless compliance would violate the law of the foreign country in which the workplace is located. See 20 C.F.R. §1002.34(c), <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

For explanations of USERRA coverage of other employers such as successors-in-interest, hiring halls, multiple employers and States, see 20 C.F.R. §§1002.35 through 1002.39, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

## **FAMILY MEDICAL LEAVE ACT**

A reemployed service member would be eligible for FMLA leave if the amount of time for which the service member was employed by the civilian employer, together with the amount of time for which the service member would have been employed by the civilian employer during the period of military service, meets FMLA's eligibility requirements. See 20 C.F.R. §1002.210, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

## **INDEPENDENT CONTRACTORS**

USERRA does not cover independent contractors. See 20 C.F.R. §1002.44, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf> for a list of factors to be considered in determining if an individual is an independent contractor.

## **RELATION TO OTHER LAWS, CONTRACTS, EMPLOYER POLICIES, ETC.**

USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA. See 20 C.F.R. §1002.7(b), <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA. See 20 C.F.R. §1002.7(a), <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

## **PENSION**

Pension information can be found at 20 C.F.R. §§1002.259 through 1002.267, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

Pension is regarded as a seniority based benefit. In general, a person who is reemployed under USERRA is entitled to be treated as not having had a break in employment for purposes of participation, vesting and accrual of benefits under a pension plan by reason of the person's military absence. See 20 C.F.R. §1002.259, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

The reemployed person is not entitled to earnings and/or forfeitures in defined contribution plans that occurred during the military absence. See 20 C.F.R. §1002.265(c), <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

Guidelines for making up missed contributions to pension plans can be found in 20 C.F.R. §1002.262, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>. Understanding USERRA's pension provisions can be challenging for individuals who lack experience and/or training in such matters. For assistance with USERRA pension issues contact your employer's benefits department, ESGR Ombudsman (<http://www.esgr.mil/contact.aspx>) or a VETS State Director (<https://www.dol.gov/vets/aboutvets/regionaloffices/map.htm>).

## **SENIORITY/NON-SENIORITY-BASED BENEFITS**

Seniority-based benefits are benefits that accrue with, or are determined by the length of time the service member has been employed by a particular employer. Seniority-based benefits may include the rate at which vacation is accrued, annual pay raises, the right to bid on overtime or a particular shift, and so on. Seniority-based benefits are generally subject to the “escalator principle.”

The escalator principle provides that a person who is reemployed under USERRA is entitled to the seniority-based rights and benefits he or she would have attained had employment been continuous. The escalator principle is explained at 20 C.F.R. §1002.191, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

The DOL USERRA regulations provide guidance on how to determine if a particular benefit is seniority-based at 20 C.F.R. §1002.212, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

Non-seniority-based benefits are not subject to the escalator principle. Rather, they are subject to what is known as USERRA's furlough or leave-of-absence provision. See 20 C.F.R. §1002.149. Generally, USERRA provides that a person absent from employment to perform service is to be considered on furlough or leave of absence. This person is entitled to the same non-seniority-based benefits that other employees receive when they are absent from work on a comparable non-military leave of absence. This entitlement is explained at 20 C.F.R. §1002.150, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

In cases where the employer's leave of absence policies vary, the person on military leave is generally entitled to the most favorable treatment given to other employees on a comparable non-military leave of absence. To determine how to compare various types of leave of absence, link to DOL's USERRA regulations at 20 C.F.R. §1002.150(b), <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

USERRA's furlough or leave of absence provision is set forth at 38 U.S.C. § 4316(b) (<http://www.dol.gov/vets/usc/vpl/usc38.htm#4316>). This provision applies to most non seniority-based benefits, but not to health plans. USERRA's coverage of health plans is contained exclusively in 38 U.S.C. § 4317 (<https://www.dol.gov/vets/usc/vpl/usc38.htm#4317>) and health plan entitlements do not depend on what the employer does for other employees on a non-military leave of absence.

## **TIME OFF PRIOR TO SERVICE**

A person entering military service generally needs a period of time to organize his or her personal affairs, travel safely to the site where the service is to be performed, and arrive fit to perform service. However, USERRA does not specify a maximum amount of time between the time/date the employee leaves his or her position and the time/date he or she actually enters service. The amount of time needed for these preparations will vary from case to case. See 20 C.F.R. §1002.74, <https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>.

## 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>