# USERRA

## A Guide to the Uniformed Services Employment and Reemployment Rights Act

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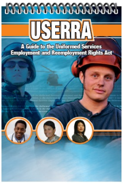
USERRA
A Guide to the Uniformed Services Employment and Reemployment Rights Act

**INTRODUCTION**

The U.S. Department of Labor’s Veterans’ Employment and Training Service (VETS) administers the Uniformed Services Employment and Reemployment Rights Act (USERRA). Subject to the rules and exceptions discussed below, USERRA guarantees an employee returning from military service or training the right to be reemployed at his or her former job (or as nearly comparable a job as possible) with the same benefits. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

USERRA applies to virtually all employers, regardless of size, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal, State and Local Government employers. Specific questions should be addressed to the State director of the Veterans’ Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive system, The USERRA Advisor, answers many of the most-often-asked questions about the law. It can be found in the “elaws” section of the Department of Labor’s home page at www.dol.govhttps://webapps.dol.gov/elaws/userra.htm.

The National Committee for Employer Support of the Guard and Reserve (ESGR) is a Department of Defense agency that provides free USERRA education, consultation and, if necessary, informal mediation services. ESGR has Ombudsmen available to answer USERRA questions and respond to employment disputes related to military service. Call 1-800-336-4590 or visit https://www.esgr.mil/.

**Disclaimer**

This guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding, nor should they be considered a substitute for the language of the statute or regulations. This is not a publication of the U.S. Department of Labor.

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## Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994, enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4335, Public Law 103-353), as amended, provides for the employment and reemployment rights for all uniformed service members.

### Who's Eligible for Reemployment?

### "Service in the Uniformed Services" and "Uniformed Services" Defined (38 U.S.C. Section 4303, 13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty and active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty
- Absence from work for an examination to determine a person's fitness for any of the above types of duty
- Funeral honors duty performed by National Guard or Reserve members
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Health and Human Services, when activated for a public health emergency, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). See Title 42, U.S. Code, Section 300hh-11(d).

The "uniformed services" consist of the following [20 CFR 1002.5 (o)]:

- Army, Navy, Marine Corps, Air Force and Coast Guard
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve and Coast Guard Reserve
- Army National Guard and Air National Guard
- Commissioned Corps of the Public Health Service
- Any other category of persons designated by the President in time of war or emergency

### Disclaimer

This USERRA QuickSeries reference guide is intended primarily for non-Federal employees and employers. The U.S. Office of Personnel Management has issued regulations that apply specifically to Federal executive agencies. See 5 CFR Part 353.

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## Advance Notice

Section 4312 (a) (1) / 20 CFR 1002.85

The law requires employees to provide their employers with advance notice of military service, with some exceptions.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- Military necessity prevents the giving of notice; or
- The giving of notice is otherwise impossible or unreasonable.

"Military necessity" for purposes of the notice exception is defined in regulations of the Secretary of Defense as "a mission, operation, exercise or requirement that is classified, or a pending or ongoing mission, operation, exercise or requirement that may be compromised or otherwise adversely affected by public knowledge." See 32 CFR 104.3.

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## Duration of Service

Section 4312 (c) / 20 CFR 1002.99 - .103

USERRA reemployment rights apply if the cumulative length of service that causes a person's absences from a position does not exceed five years. Most types of service will be counted in the computation of the five-year period.

Exceptions – Eight categories of service are exempt from the five-year limitation. These include:

**1. Service required beyond five years to complete an initial period of obligated service – Section 4312 (c) (1).** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

**2. Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit – Section 4312 (c) (2).** For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea. Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in the Global War on Terror.

**3. Required training for Reservists and National Guard members – Section 4312 (c) (3).** The two-week annual training sessions and monthly weekend drills mandated by statute for Reservists and National Guard members are not counted toward the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

**4. Ordered to involuntary service, or retained on active duty during domestic emergency or national security related situations – Section 4312 (c) (4) (A).** For example, as a result of the attacks on the World Trade Center in New York City, President Bush declared that a national emergency existed and members of the Ready Reserve were called to active duty.

**5. Ordered to service, or to remain on active duty (other than for training) because of a war or national emergency declared by the President or Congress – Section 4312 (c) (4) (B).** This category includes service not only by persons ordered to involuntary active duty, but also service by volunteers who receive orders to active duty. For example, since September 11, 2001, Reservists were involuntarily called to active duty under Federal orders for Operations Noble Eagle, Enduring Freedom and Iraqi Freedom. Additionally, Reservists and retirees (who were not called) volunteered for active duty.

**6. Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent – Section 4312 (c) (4) (C).** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304.
This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons ordered to involuntary active duty for operational missions would be covered by the fourth exemption.

**7. Service by members who are ordered to active duty in support of a "critical mission or requirement" of the uniformed services as determined by the Secretary involved – Section 4312 (c) (4) (D).** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

**8. Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States – Section 4312 (c) (4) (E).**

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## Disqualifying Service

Section 4304 / 20 CFR 1002.134 - .135

When would a person's service disqualify him or her from asserting USERRA rights? The statute lists four circumstances:

1. Separation from the service with a dishonorable or bad conduct discharge.

2. Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

3. Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war. (Section 1161 (a) of Title 10.)

4. Dropping an individual from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court. (Section 1161 (b) of Title 10.)

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## Reporting Back to Work

Section 4312 (e) / 20 CFR 1002.115

To qualify for USERRA's protections, a service member must be available to return to work within certain time limits. These time limits for returning to work depend (with the exception of fitness-for-service examinations) on the duration of a person's military service.

### Service of 1 to 30 Days

The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.

If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible after the expiration of the 8-hour period.

### Fitness Exam

The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

### Service of 31 to 180 Days

An application for reemployment must be submitted to the employer no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible on the next day when submitting the application becomes possible.

### Service of 180 or More Days

An application for reemployment must be submitted to the employer no later than 90 days after completion of a person's military service.

### Disability Incurred or Aggravated

Section 4312 (e) (2) (A) / 20 CFR 1002.116

The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of an injury or illness incurred or aggravated during the performance of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

### Unexcused Delay

Section 4312 (e) (3) / 20 CFR 1002.117

A person's reemployment rights are not automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits. In such cases, the person will be subject to the employer's established rules governing unexcused absences.

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## Documentation Upon Return

Section 4312 (f) / 20 CFR 1002.121

An employer has the right to request that a person who is absent for a period of service of 31 days or more provides documentation showing that

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under Section 4304.

### Unavailable Documentation

Section 4312 (f) (3) (A) / 20 CFR 1002.122

If a person does not provide satisfactory documentation because it is not readily available or does not exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person and any rights or benefits that may have been granted.

### Pension Contributions

Section 4312 (f) (3) (B)

If a person has been absent for military service for 91 or more days, an employer may delay treating the person as not having incurred a break in service for pension purposes until the person submits satisfactory documentation establishing reemployment eligibility. However, such contributions have to be made promptly for persons who are absent for 90 or fewer days.

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## Reemployment Position

### Length of Service

Section 4313 (a) / 20 CFR 1002.196

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

### 1 to 90 Days

Section 4313 (a) (1) (A) & (B) / 20 CFR 1002.196

A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

1. (A) In the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; Section 4313 (a) (1) (A), or

(B) in the job in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person. Section 4313 (a) (1) (B).

2. If the employee cannot become qualified for either position described in (A) or (B) above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person must be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is qualified to perform, with full seniority. Section 4313 (a) (4).

91 or More Days

Section 4313 (a) (2) / 20 CFR 1002.197

The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

1. (A) In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; Section 4313 (a) (2) (A), or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person. Section 4313 (a) (2) (B).

2. If the employee cannot become qualified for either position described in (A) or (B) above: in any other position that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority. Section 4313 (a) (4).

### “Escalator” Position

20 CFR 1002.192

The reemployment position with the highest priority in the reemployment schemes reflects the “escalator” principle that has been a key concept in federal veterans’ reemployment legislation. The escalator principle requires that each returning service member be reemployed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, depending on economic circumstances, reorganizations, layoffs, etc., the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status. In other words, the escalator can move up or down.

Qualifying for the Reemployment Position

20 CFR 1002.198

Employers must make reasonable efforts to qualify a returning service member for the reemployment position. Employers must provide refresher training, and any other training necessary to update a returning employee’s skills so that he or she has the ability to perform the essential tasks of the position.

If the employee has a disability incurred or aggravated during the performance of uniformed service, the employer must make reasonable efforts to accommodate the disability and to help the employee become qualified to perform the duties of the reemployment position. If the disabled person cannot become qualified for the reemployment position despite reasonable efforts by the employer to accommodate the employee, and qualify him or her to perform the duties of the position, the employee must be reemployed in a position according to the following priority: (a) a position that is equivalent in seniority, status, and pay to the escalator position, or (b) a position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee’s case. Such a position may be a higher or lower position, depending on the circumstances. See 20 CFR 1002.225.

“Prompt” Reemployment

Section 4313 (a) / 20 CFR 1002.181

Returning service members must be “promptly reemployed.” “Prompt reemployment” means as soon as is practicable under the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require reassigning or giving notice to an incumbent employee who has occupied the service member’s position.

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### Disabilities Incurred or Aggravated While in Military Service

Section 4313 (a) (3) / 20 CFR 1002.225

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in military service.

1. The employer must make reasonable efforts to accommodate a person’s disability so that the person can perform the duties of the reemployment position.

2. If, despite reasonable accommodation efforts, the person is not qualified for the position in (1) due to his or her disability, the person must be reemployed in a position of equivalent seniority, status, and pay, to the escalator position. The employee must be qualified to perform the duties of this position or be able to become qualified to perform them with reasonable efforts by the employer.

3. If the employee cannot become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person’s case, most nearly approximates the position in (2) in terms of seniority, status, and pay. Such a position may be a higher or lower position, depending on the circumstances.

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### Conflicting Reemployment Claims

Section 4313 (b) (1) & (2) (A) / 20 CFR 1002.199

If two or more persons are entitled to reemployment in the same position, the following procedure applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in a position that provides similar seniority, status, and pay in the order of priority that normally determines a reemployment position.

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### Defenses to Reemployment

Section 4312 (d) (1) / 20 CFR 1002.139

Employer defenses to reemployment are affirmative ones and the employer carries the burden of proving them by a preponderance of the evidence.

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### Changed Circumstances

Section 4312 (d) (1) (A) / 20 CFR 1002.139 (a)

Reemployment of a person is excused if an employer’s circumstances have changed so that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

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**Undue Hardship**

Section 4312 (d) (1) (B) / 20 CFR 1002.139 (b) / 20 CFR 1002.5 (n)

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities only when doing so would be of such difficulty or expense as to cause “undue hardship.”

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**Exception for “Brief Non-Recurrent Positions”**

Section 4312 (d) (1) (C) / 20 CFR 1002.139 (c)

An employer is not required to reemploy a person if the pre-service position was for a brief or non-recurrent period and there was no reasonable expectation that employment would continue indefinitely or for a significant period.

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**Employee Rights and Benefits**

**Seniority Rights**

Section 4316 (a) / 20 CFR 1002.193

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of employment. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is made available without regard to length of employment.

**Rights Not Based on Seniority**

Section 4316 (b) / 20 CFR 1002.149-150

During a period of service, the employees must be treated as if they are on a furlough or leave of absence. Consequently, during their period of service they are entitled to participate in any rights and benefits not based on seniority that are available to employees on comparable nonmilitary leaves of absence, whether paid or unpaid. If there is a variation in benefits among different types of nonmilitary leaves of absence, the service member is entitled to the most favorable treatment so long as the nonmilitary leave is comparable.

Employees are entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that become effective during their service and that are provided to similarly situated employees on furlough or leave of absence.

**Waiver of Rights**

Section 4316 (b) (2) (A) / 20 CFR 1002.152

If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority. At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. The employer bears the burden of proving that the person knowingly waived entitlement to the specific rights and benefits.

A notice of intent not to return can waive only leave-of-absence rights and benefits. It cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights after service.

**Funding of Benefits**

Section 4316 (b) (4)

Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence are so required.

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**Pension/Retirement Plans**

Pension plans (Section 4318), which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- Section 4318 (a) (2) (A) / 20 CFR 1002.259. A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan.
- Section 4318 (a) (2) (B) / 20 CFR 1002.259. Military service must be considered service with an employer for vesting and benefit accrual purposes.
- Section 4318 (b) (1) / 20 CFR 1002.261. The employer is liable for funding any obligation of the plan to provide required benefits.
- Section 4318 (b) (2) / 20 CFR 1002.262. The reemployed person is entitled to any accrued benefits contingent upon employee contributions only to the extent that the person repays the employee contributions.

**Covered Plan**

Section 4318 / 20 CFR 1002.260

A “pension plan” that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees upon the termination of employment or later. Defined benefit plans, defined contribution plans, and profit-sharing plans that are retirement plans are covered.

**Multi-Employer Plans**

Section 4318 (b) (1) / 20 CFR 1002.266

In a multi-employer pension plan, the sponsor maintaining the plan may allocate the liability of the plan for pension benefits accrued by persons who are absent for military service. If no allocation or cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person’s reemployment. Section 4318 (c).

**Employee Contribution Repayment Period**

Section 4318 (b) (2) / 20 CFR 1002.262 (b)

Repayment of employee contributions or elective deferrals attributable to the period of service can be made over three times the period of military service but no longer than five years from the date of reemployment.

**Calculation of Contributions**

Section 4318 (b) (3) / 20 CFR 1002.267 (a) - 267 (b) (1)

For purposes of determining an employer’s liability or an employee’s contributions under a pension benefit plan, the employee’s compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service. If the employee’s compensation was not based on a fixed rate, or the determination of such rate is not reasonably certain, the employee’s compensation during the period of service is computed on the basis of the employee’s average rate of compensation during the 12-month period immediately preceding the employee’s period of military service (or, if shorter, the period of employment immediately preceding such period).

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## Vacation Leave

Section 4316 (d) / 20 CFR 1002.153

Service members must, at their request, be permitted to use any vacation leave that had accrued before the beginning of their military service instead of unpaid leave. However, service members cannot be forced to use vacation time for military service.

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## Health Benefits

Section 4317 / 20 CFR 1002.164 / 20 CFR 1002.166

The law provides for health benefits continuation for persons who have coverage under a health plan in connection with their employment who are absent from work to serve in the military.

If a person’s health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 24 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter.

The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

### Exclusions/Waiting Periods

Section 4317 (b) / 20 CFR 1002.168

In the event a person’s coverage under a health plan was terminated because of military service, a waiting period or exclusion cannot be imposed upon reinstatement of health coverage of the reemployed service member or any eligible dependents if one would not have been imposed had the person not been absent for military service. However, a health plan is permitted to impose an exclusion or waiting period for coverage of disabilities determined by the Secretary of Veterans’ Affairs (VA) to be service-connected.

### Multi-Employer

Section 4317 (a) (3) / 20 CFR 1002.170

In connection with USERRA’s health plan provisions, liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person’s military service or, if that employer is no longer functional, to the plan.

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## Protection from Discharge

Section 4316 (c) / 20 CFR 1002.247

Under USERRA, a reemployed employee may not be discharged without cause: (1) For one year after the date of reemployment if the person’s period of military service was for 181 days or more; (2) For 180 days after the date of reemployment if the person’s period of military service was for 31 to 180 days.

Cause for discharge may be based on conduct or the application of legitimate nondiscriminatory reasons. Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

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## Protection from Discrimination and Retaliation

### Discrimination

Section 4311 / 20 CFR 1002.18 - .23

Section 4311(a). Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- Hiring
- Promotion
- Termination
- Benefits

### Persons Protected

Section 4311 (a) / 20 CFR 1002.18

The law prohibits discrimination against past members, current members, and persons who apply to be a member of any of the branches of the uniformed services.

### Standard/Burden of Proof

Section 4311 (c) / 20 CFR 1002.22

If an individual’s past, present, or future connection with the service is a motivating factor in an employer’s adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual’s connection with the service. The employer bears the burden of proving that it would have taken the adverse action in the absence of the person’s service connection or exercise of any USERRA right.

### Reprisals

Section 4311 (b) / 20 CFR 1002.19

Employers are prohibited from retaliating against anyone (whether or not they have performed military service) who:

- files a complaint under the law;
- testifies, assists or otherwise participates in an investigation or proceeding under the law; or
- exercises any right provided under the law.

whether or not the person has performed military service.

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## How the Law is Enforced

### Department of Labor Regulations

Section 4331 (a)

The Secretary of Labor issued USERRA regulations covering private and state employers written in a plain English question-and-answer format. (See 20 CFR Part 1002, 70FR75246, Dec. 19, 2005.)

### Veterans Employment and Training Service

Information and technical assistance is provided by the Veterans’ Employment and Training Service (VETS) of the Department of Labor (Section 4321). VETS investigates complaints and attempts to resolve them. Filing of complaints with VETS is optional; the employee may freely choose to pursue a claim with private counsel (Section 4322).

Access to Documents and Subpoenas

Section 4326 / 20 CFR 1002.289

The law gives VETS a right of access to examine and duplicate any documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview any persons with information relevant to the investigation.

The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

**Government-Assisted Court Actions**

Section 4323 (a) (1) / 20 CFR 1002.291-292

Persons whose complaints against a private employer or a State or Local Government are not successfully resolved by VETS may request that their complaints be referred to the Attorney General for possible representation.

If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

**Private Court Actions**

Section 4323 (a) / 20 CFR 1002.303-304

Individuals have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double Damages

Section 4323 (d) (1) (C) / 20 CFR 1002.312

Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but a violation is considered willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees

Section 4323 (h) / 20 CFR 1002.310

Awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel may be made at the court's discretion. No court fees or costs may be charged to anyone who brings suit.

**USERRA Notice/Poster**

Section 4334

Employers, regardless of size, are required to provide to persons entitled to the rights and benefits under USERRA, a notice of their rights, benefits and obligations. Employers may provide the notice "Your Rights Under USERRA" by posting it where employee notices are customarily placed. Employers are also free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice by e-mail).

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Service Member Checklist

| Service Member Obligations | Yes | No | Reference |
|---|---|---|---|
| 1. Did you hold a job other than one that was brief, nonrecurring? (Exception would be discrimination cases.) | | | See: Who's Eligible for Reemployment? |
| 2. Did you notify the employer that you would be leaving the job for military training or service? | | | See: Advance Notice |
| 3. Did you exceed the 5-year limit on periods of service? (Exclude exceptions identified in the law.) | | | See: Duration of Service |
| 4. Were you discharged under conditions other than disqualifying under section 4304? | | | See: Disqualifying Service |
| 5. Did you make an application or report back to the pre-service employer in a timely manner? | | | See: Reporting Back to Work |
| 6. When requested by your employer, did you provide readily available documentation showing eligibility for reemployment? | | | See: Documentation Upon Return |
| 7. Did your military leave exceed 30 days and did you elect to continue health insurance coverage? | | | See: Health Benefits |

Employer Checklist

| Employer Obligations | Yes | No | Reference |
|---|---|---|---|
| 1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal.) | | | See: Advance Notice |
| 2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used. | | | See: Vacation Leave |
| 3. Upon the timely application for reinstatement, did the employer promptly reinstate the service member to his/her escalator position? | | | See: Escalator Position |
| 4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status rate of pay, pension vesting, and credit for the period for pension benefit computations. | | | See: Seniority Rights |
| 5. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available? | | | See: Documentation Upon Return |
| 6. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities? If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority? | | | See: Disabilities Incurred or Aggravated While in Military Service |

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| 7. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority? | See: Disabilities Incurred or Aggravated While in Military Service |
| 8. Did the employer grant the reemployed person pension plan benefits that accrued during military service? | See: Pension/Retirement Plans |
| 9. Did the employer provide health coverage upon request of a service member whose leave was more than 30 days? Did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days? | See: Health Benefits |
| 10. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in enforcement of a protection afforded any returning service member under this Statute? | See: Reprisals |
| 11. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for military service? | See: Discrimination |

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**Veterans' Employment and Training Service**

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