



Can-U-SERRA?

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History of USERRA



The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law that protects military service members and veterans from employment discrimination on the basis of their service and allows them to regain their civilian jobs following a period of uniformed service.



The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was signed into law on October 13, 1994. USERRA clarifies and strengthens the Veterans' Reemployment Rights (VRR) Statute. The Act itself can be found in the United States Code at Title 38, Part III, Chapter 43.



USERRA basics – employer size

Unlike other employment laws, USERRA is broadly defined to include all public and private employers. This includes successors-in-interest.

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.

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.



USERRA basics – employee eligibility

- An employee who misses work due “service in the uniformed services” must be reinstated to their job upon their return
- “Service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service, including, but perhaps not limited to:
 - 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



Notes on the National Disaster Medical System

- The National Disaster Medical System (NDMS) partners with health care facilities to ensure a network is in place to provide care for American citizens and/or military casualties requiring additional or complex care unavailable within an area affected by a natural, man-made disaster, military health emergency, or other public health emergency. In the event of a public health emergency, they manage the medical evacuation from areas impacted by a disaster to designated reception facilities within the NDMS health care facility network.
- NDMS responders serve on an intermittent basis. When NDMS team members aren't responding to disasters, many of them work as physicians, registered nurses, dentists, paramedics, and other medical and support professionals in our communities.



The CREW Act

On September 29, 2022, President Biden signed into law S. 2293 – otherwise known as the “Civilian Reservist Emergency Workforce Act of 2021” or the “CREW Act”. The “CREW Act” extends employment protections under the Uniformed Services Employment and Reemployment Rights Act (USERRA) to Federal Emergency Management Agency (FEMA) reservists who deploy to major disaster sites.



What is “uniformed services”?

- 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



Five-year cumulative total

- USERRA reemployment rights apply if the cumulative length of service that requires the employee'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
- In the next few slides, we will list the exceptions
- The list of exceptions can also be found at 20 CFR § 1002.103



Five-year total exceptions

1. Service required beyond five years to complete an initial period of obligated service – Section 4312 (c) (1)
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)
3. Required training for Reservists and National Guard members – Section 4312 (c) (3)
4. Ordered to involuntary service, or retained on active duty during domestic emergency or national security related situations – Section 4312 (c) (4) (A)



Five-year total exceptions continued

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)
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)
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)
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)



Notice requirements

- The law requires employees to provide their employers with advance notice of military service. There are 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
- Although notice is required, employers cannot require copies of orders in order to approve leave under USERRA



Before service begins, what does the employee need to provide?

Does the employee even have to tell their employer that they intend to reapply for their position when they return?

- **No.** The employee is not required to tell the civilian employer that they intend to seek reemployment after completing uniformed service.
- In fact, even if the employee tells the employer before entering or completing uniformed service that they *do not* intend to seek reemployment after completing the uniformed service, the employee still does not forfeit the right to reemployment after completing service.
- The employee is not required to decide in advance of leaving the civilian employment position whether they will seek reemployment after completing uniformed service.

Is the employee required to have their employer's permission to begin their service requirement?

- **No.** The employee is not required to ask for or get their employer's permission to leave to perform service in the uniformed services.
- The employee is only required to give the employer notice of pending service.

When can documentation be requested or required?



When the employee returns from their period of service



The employee is required to notify their pre-service employer of their intent to return to their job by either reporting to work or submitting a timely application for reemployment



The timing of when the documentation is due is based on the period of service



When can documentation be requested?

Period of service less than 31 days or for a period of any length for the purpose of a fitness examination

The employee must report back to the employer not later than the beginning of the first full regularly-scheduled work period on the **first full calendar day following the completion of the period of service**, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee's residence

Period of service more than 30 days but less than 181 days

The employee must submit an application for reemployment with the employer not later than **14 days** after completing service

Period of service more than 180 days

The employee must submit an application for reemployment not later than **90 days** after completing service



The employee fails to submit documentation – what now?

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

What documents satisfy the requirement?

DD (Department of Defense)
214 Certificate of Release or
Discharge from Active Duty

Copy of duty orders prepared by
the facility where the orders were
fulfilled carrying an endorsement
indicating completion of the
described service

Letter from the commanding
officer of a Personal Support
Activity or someone of
comparable authority

Certificate of completion
from military training school

Discharge certificate
showing character
of service

LES – Leave's and Earning
Statement (a copy of extracts
from payroll documents showing
periods of service)

Letter from National Disaster
Medical System (NDMS) Team
Leader of Administrative Officer
verifying dates and times of NDMS
training or federal activation

The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.



Employment status during military service

- Furlough or leave of absence
- The employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence

Reinstatement

The “escalator” principle

- When an employee returns from military leave, they are entitled to reinstatement to the position they would have attained with reasonable certainty if they had remained continuously employed and not gone on military leave.





Reinstatement – fewer than 91 days of military service

The escalator position

The position the employee had prior to their period of service

Any other position that is the nearest approximation first to the escalator position and then to the pre-service position

Reinstatement – 91 days or more

The escalator position or a position of like seniority, status, and pay

The position the employee had prior to their period of service or in a position of like seniority, status, and pay

Any other position that is the nearest approximation first to the escalator position and then to the pre-service position

Case study – the police officer and his jerry can

*Jerry can
not pictured*





Character of discharge

USERRA does not require any particular form of discharge or separation of service

However, reemployment rights are terminated if the employee is:

- Separated from uniformed service with a dishonorable or bad conduct discharge;
- Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;
- A commissioned officer dismissed as permitted under 10 U.S.C. 1161 (a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,
- A commissioned officer dropped from the rolls under 10 U.S.C. 1161 (b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution



Training and other ways to help your returning service member

What does it mean to make “reasonable efforts” to help the employee become qualified to perform the duties of a position?

- Actions, including training provided by an employer, that do not place an undue hardship on the employer

Undue hardship

- Financial considerations
- Type of operation or operations of the employer



Training and other ways to help your returning servicemember

What makes an employee qualified for a position?

- The employee can perform the essential tasks of the position
- If the employee cannot perform one or more of the non-essential tasks, it does not make them qualified

Essential tasks – some examples of factors to consider

- Written job descriptions
- Amount of time performing the job function
- Work experience of past incumbents in the job

Service-related disabilities



The escalator principle still applies



The employer must make reasonable efforts to accommodate the service-related disability and to help the employee become qualified to perform the duties of their reemployment position

Case study – lift no more





Protections from discharge

USERRA protections include prohibitions from discharge except for cause

- Employees reemployed after a military leave of more than 30 days but less than 181 days may not be discharged without cause for **180 days** after the date of reemployment
- Employees reemployed after a military leave of more than 180 day may not be discharged without cause for **one year** after the date of reemployment



Termination for cause

The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons

- Conduct - the employer bears the burden of proving that it is reasonable to the employee for the conduct in question, and that the employee had received notice the conduct would constitute cause for discharge
- Other legitimate nondiscriminatory reasons – the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off



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QUESTIONS AND ANSWERS