

# Military Leave & USERRA: Compliance Without Confusion



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# Agenda



About This  
Workshop



USERRA Basics



Table  
Discussions



Pay for  
Short-Term  
Military Leave



Putting It All  
Together



Resources



# About This Workshop



Sit at a table with a number



Designate a speaker and a scribe



Review and discuss scenario



Answer questions



**Goal:** Apply USERRA basics and advanced nuances through practical examples



# USERRA Basics

- Uniformed Services Employment and Reemployment Rights Act
- Applies to all employers (no size requirements)
- Applies to all employees and applicants
- For voluntary and involuntary service in the uniformed services
- Four primary components:
  - Prohibits discrimination and retaliation
  - Provides reemployment rights
  - Uses the escalator principle
- Includes seniority and non-seniority rights; health benefits; pension benefits
- DOL VETS investigates complaints; DOJ litigates claims; the Office of Special Counsel litigates claims regarding federal employees
- No statute of limitations



# Table Discussions



# 5-Year Service Limit



# Scenario One – Background

- Alex is a salaried individual contributor with a steady tenure progression who has been with the company for 9 years.
- Over that time, Alex has taken multiple military leaves for active duty, training, and emergency activations related to National Guard service, totaling 5 years, 4 months.
- HR notices that Alex's total time away appears to exceed 5 years and raises concerns about whether USERRA protections still apply.
- Alex has notified the company of another upcoming deployment.



# Scenario One – Table Questions

- Is the employee eligible for USERRA protection for the upcoming deployment? Why or why not?
- How does the 5-year cumulative limit apply here?
- Which types of service may be excluded from the 5-year calculation?
- What documentation can the employer request — and when?
- How should the employer proceed before concluding USERRA protections no longer apply?



# USERRA 5-Year Limit: What Counts

- Employees may take up to **5 cumulative years** of military leave with the same employer
- **Exceptions include** (see Handout for full list):
  - Initial service obligations that exceed 5 years
  - Required drills and annual training
  - Service performed during a **National Emergency**, including post-9/11 activations
- Many employees exceed 5 years **legitimately due to exemptions**



# Tracking Service Time (Basics + Exceptions)



Maintain a **cumulative log** of service periods and whether each is exempt



Confirm details **only when needed**, and may request documentation after **30+ days of service**



Over-reliance on the 5-year cap can lead to **misclassification of unprotected vs. protected service**



# Scenario One – Table Answers

- **Is the employee eligible for USERRA protection in this scenario?**  
It depends on the duration of the military leaves for training and emergency activations.
- **How does the 5-year cumulative limit apply here?**  
It likely won't include the durations for training and any emergency activations.
- **Which types of service may be excluded from the 5-year calculation?**  
See 38 U.S.C. § 4312(c) for exclusions beyond training and emergency activations.
- **What documentation can the employer request — and when?**  
An employer can request documentation when the service member is returning from leave in excess of 30 days. Documentation may include copies of military orders, a Certificate of Release or Discharge from Active Duty (DD-214), a statement from a military authority or contacting the employee's military chain of command. The military may not always issue orders such as for routine drill periods.
- **How should the employer proceed before concluding USERRA protections no longer apply?**  
Evaluate each period of leave and determine whether it falls into an exclusion. Rely on the employee's written statement if official records are not available.



# Reemployment: Escalator Principle



# Scenario Two – Background

- Jordan was a high-performing employee, before leaving for an 18-month voluntary active-duty deployment, and was eligible for a promotion.
- During Jordan's absence, peers in similar roles were promoted and received pay increases as part of a restructuring.
- When Jordan returned within 90 days after completion of deployment, the employer offers reemployment in the same role held before deployment, at the same pay rate.



# Scenario Two – Table Questions

- Is the employee eligible for USERRA reemployment protection?
- Does the escalator principle apply in this situation?
- How should the employer determine the correct reemployment position?
- What if the promotion was not automatic or guaranteed?
- What steps should the employer take if the employee needs training for the escalator position?



# The Escalator Principle Explained

Return to the position the employee would have attained had they remained continuously employed

Applies to pay, seniority, promotions, layoffs, and training opportunities

Works clearly in seniority-driven environments; requires judgment in non-seniority systems



# Reemployment Eligibility Quick Rules

## Employees must:

Give advance notice  
(verbal or written)

Serve no more than 5 cumulative  
years (minus exceptions)

Return and apply for  
reemployment on time



If not qualified for escalator position, employer must provide training or retraining



If still not qualified, place in the nearest equivalent role with full seniority



# Scenario Two – Table Answers

- **Is the employee eligible for USERRA reemployment protection?**

Yes, for service of more than 180 days, the returning service member must apply for reemployment within 90 days of completing service.

- **Does the escalator principle apply in this situation?**

Yes, for absences of more than 90 days, an employee must be qualified for reemployment (1) in the escalator position, (2) a position of like seniority, status and pay, (3) a position in which the person was employed on the start date of service, or a position of like seniority, status, and pay with duties the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in (1) or (2) after reasonable efforts by the employer to qualify the person.

- **How should the employer determine the correct reemployment position?**

If the employee applied for reemployment timely, the employer should determine if the employee's position was subject to a layoff, reorganization/merger, job elimination or reduction in force during the leave. The employer should evaluate the employee's last job title and classification along with pay rate/pay structure, whether there is a seniority vs. merit-based progression, whether the position had an automatic career path vs. a competitive selection. Seniority-based benefits are automatic vs. non-seniority-based benefits which require more judgment. The employer should consider whether promotions that occurred during the leave were automatic or competitive, the employee's performance history and how similarly situated peers were promoted during the same period.



# Scenario Two – Table Answers (Cont.)

- **What if the promotion was not automatic or guaranteed?**

The escalator can move up or down. The standard is based on if the person would have been promoted with reasonable certainty had the person not been absent. Depending on economic circumstances, reorganizations, layoffs, etc., the position may be a lower level than the one previously held or a different job.

- **What steps should the employer take if the employee needs training for the escalator position?**

The employer must make reasonable efforts to qualify the employee for the reemployment position, to include any refresher training and any other necessary training to update the employee's skills to perform the essential tasks of the position.



# Documentation, Verbal Notice & Orders



# Scenario Three – Background

- Taylor, an entry-level EE employed for 20 months, verbally informs their manager that they will need time off for National Guard training starting in two weeks.
- No written notice or military orders are provided.
- The manager asks HR whether they can delay approval until Taylor submits official documentation.
- Taylor leaves for training as scheduled without providing written confirmation.



# Scenario Three – Table Questions

- Is the employee eligible for USERRA protection based on verbal notice alone?
- Can the employer require military orders before approving leave?
- When, if ever, may the employer request or require documentation?
- How should the employer document the leave internally?
- What risks arise if the employer delays or denies the leave?



# Notice Requirements: What Employers Can Ask For

- Employees may give verbal notice; no special format required
- Employers cannot require orders before granting leave
- Retroactive or delayed orders are common and do not invalidate leave
- For IDT (weekend drills), orders are not issued



# When Documentation Is Appropriate



Employer cannot delay leave if documentation is not immediately available



After 30+ days of continuous service, ERs may request documentation at reemployment, including:

- Drill schedules
- Unit contact info



Avoid unnecessary or repeated contact with military supervisors



# Scenario Three – Table Answers

- **Is the employee eligible for USERRA protection based on verbal notice alone?**

Yes, to maintain USERRA eligibility, the employee must provide verbal/written notice of military leave when possible.

- **Can employer require orders before approving leave? When may the employer request documentation?**

No, if the employee has a period of service of 31+ days, employer may request documentation at reemployment.

- **How should the employer document the leave internally?**

The employer should document the branch/category of military service, type of service, estimated leave duration, whether orders were requested/provided, if contact is made to the military command, who made such contact and when, whether the employee is eligible for pay or has elected to use accrued paid time off/vacation, the employee's entitlement to health benefits or the right to continue health benefits based on duration (along with any impact to employee's dependents), along with any release dates and return to work/reemployment information.



# Scenario Three – Table Answers (Cont.)

- **What risks arise if the employer delays or denies the leave?**

The employer may violate USERRA. USERRA does not require intent or bad faith. Well-intentioned delays or misunderstandings may result in a violation. The employee may seek to require the employer to comply with USERRA, compensate for loss wages/benefits because of noncompliance and pay additional damages. USERRA has no statute of limitations.



# USERRA & FMLA Confusion Points



# Scenario Four – Background

- Morgan has been employed for 10 months and has completed 1,100 hours of service when they are called to active duty. Morgan tells employer they are unsure of leave length and may not return to work.
- Morgan's deployment ultimately lasts one year, and Morgan applies for reemployment.
- The employer tells Morgan their position was filled but hires Morgan to a different, less senior position.
- After working 3 months, Morgan requests FMLA leave to care for their father.
- The employer determines Morgan is not eligible for FMLA because they have not completed 12 months of service and denies the FMLA leave.



# Scenario Four – Table Questions

- Is the employee eligible for FMLA leave? Why or why not?
- How should the employer calculate the months of service and hours worked for this employee, with regard to FMLA eligibility?
- Should the employer have reemployed Morgan to their original position?
- Does the employee's uncertainty about returning change the employer's obligations?
- How should HR respond to the employee's statement that they "might not return"?



# USERRA vs. FMLA: Core Differences

Topic	USERRA	FMLA
<b>Purpose</b>	Protect reemployment	Protect leave/absences for qualifying reasons
<b>Eligibility</b>	All employees	12 months + 1,250 hours of service
<b>Return Rights</b>	Reemployment even if employee unsure about returning	Job protection only while eligible
<b>Documentation</b>	Verbal notice OK; no written requirement	Medical certification often required



# Reemployment Rights & Employer Obligations



Must reemploy promptly  
(typically within days, not weeks)



Time spent on USERRA leave counts  
toward hours worked/length of  
service for FMLA eligibility



Employer can request  
documentation after 30 days'  
service, but cannot delay leave



Voluntary service is fully  
protected



EE may still qualify for reemployment  
even if "not sure if returning"



# Scenario Four – Table Answers

- **Is the employee eligible for FMLA leave? Why or why not?**  
Yes, because time spent on military leave is considered continuous services for the purposes of calculating FMLA eligibility.
- **How should the employer calculate the months of service and hours worked for this employee, with regard to FMLA eligibility?**  
The employer needs to credit the employee with the amount of time they would have worked had they not gone on USERRA leave.
- **Should the employer have reemployed Morgan to their original position?**  
Yes, or depending on the circumstances, the escalator principle could have applied.
- **Does the employee's uncertainty about returning change the employer's obligations?**  
No, reemployment rights will depend on the employee's length of service and timely application for reemployment. See exception for temporary employees.
- **How should HR respond to the employee's statement that they "might not return"?**  
HR should inform the employee of their reemployment rights based on length of service and benefit impacts.



# Pay for Short-Term Military Leave



# Pay? What the Law Actually Says

- USERRA **does not require paid military leave**
- However, case law increasingly compares military leave to:
  - Jury duty
  - Bereavement leave
  - Other short-term paid leaves
- Courts analyze **comparability**:
  - Duration
  - Purpose
  - Employee control over timing



# Pay Obligations: Circuit Trends & State Laws

- Courts in multiple circuits have allowed comparability arguments
- Some states/localities mandate pay (e.g., **San Francisco Military Leave Pay Protection Act**)
- Safer employer practices:
  - If paying similar short leaves, consider paying short-term military leave
  - Review written policies for consistency
  - Work with your legal counsel



# Putting It All Together

- **5-year rule:** Track carefully + apply exceptions
- **Escalator principle:** Focus on where the employee would be
- **Documentation:** Verbal notice is enough; timing matters
- **USERRA ≠ FMLA:** Reemployment rights differ
- **Pay:** Comparability
- USERRA establishes a floor; state laws may have protections beyond USERRA



# Resources

- U.S. DOL A Guide to the Uniformed Services Employment and Reemployment Rights Act  
<https://www.dol.gov/agencies/vets/programs/userra/USERRA-Pocket-Guide>
- Employer Support of the Guard and Reserve: USERRA for Employers  
<https://www.esgr.mil/USERRA/USERRA-for-Employers>
- Office of Special Counsel: <https://osc.gov/Services/Pages/USERRA.aspx>
- Statute: <https://uscode.house.gov/view.xhtml?path=/prelim@title38/part3/chapter43&edition=prelim>
- Regulations: <https://www.ecfr.gov/current/title-20/chapter-IX/part-1002>
- FAQs: <https://www.esgr.mil/USERRA/Frequently-Asked-Questions>



**Questions?**

