

Military Service FAQs

Q. Are there laws that provide protections or rights to employees called up to military service?

A. Yes. There are two federal laws that apply. The first is the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The second is the Solders and Sailors Civil Relief Act of 1940 (SSCRA).

Q. What type of military service is covered by these Acts?

A. USERRA covers employees on "qualified military service," which means service in "uniformed services" while on active or inactive Federal duty, including training periods. Uniformed services include the Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service Commission Corps, and the reserve components of those services as well as training or service in the National Guard or Air National Guard. Most private and government employers are subject to the Act. Unlike USERRA, SSCRA applies only to individuals entering or called to active duty, including the period for training or education under U.S. supervision before induction into military service.

Q. What are the basic differences between the two Acts?

A. USERRA applies to employers and regulates how long, and under what conditions, an employer must keep an employee's job available after the employee is called to military service. SSCRA provides qualified military personnel protections regarding outstanding loans and the amount of interest that can be charged on a loan while a person is called to active military duty.

Q. Do the Acts cover Weekend Reserve Duty?

A. Yes.

Q. What about the National Guard?

A. National Guard members sometimes perform federal service (e.g., during annual training) and sometimes perform state service (e.g., during some disasters). USERRA only applies to National Guard members performing federal service, but many state laws afford similar protection to individuals performing state service. To determine compliance obligations under these circumstances, employers should obtain a copy of the employee's orders and consult with an attorney.

Q. What protections does the USERRA provide to a qualified employee?

A. Depending on the employee's length of service, an employer must offer the employee his same job upon his return from military service. The employee is entitled to all rights of seniority and service as if he/she has been employed for the period of military service.

Q. What is the “escalator principle?”

A. Employers must treat returning service members as if they had remained continuously employed for purposes of the position as well as pay and benefits to which they return. For example, if similarly employed individuals who joined the company in 1996 currently earn \$15 per hour, then a similarly situated returning service member who joined the company in 1996 should be paid \$15 per hour even if he or she had been on active duty for extended periods during that time. As another example, if an apprentice electrician left the company for active military duty in 1999 and returned in 2001, the employee might be entitled to a position as a journeyman electrician.

Q. Must an employer pay an employee while he or she is on active duty?

A. USERRA does not require employers to pay employees while on military leave. Some employers voluntarily have policies that make up the difference between military pay and allowances and an employee’s regular pay. Employers should review such policies to ensure that the extent of these obligations is consistent with current business objectives. If an exempt employee works any part of a week, the salary for the entire week must be paid. Therefore, if an exempt employee works any part of a week, then spends the rest of the week in military service, the salary for the entire week must be paid. However, in that case the amount of the military pay for the week may be offset against the salary.

Q. For how long can an employer be required to keep a job open?

A. For up to five years. If the military service is less than 91 days, the employee must be reinstated to the same position. If the leave was for more than 90 days, the employer must reinstate the employee to the same or similar position the employee would have had if he/she was continuously employed.

Q. Is an employee required to provide his/her employer notice of an absence due to military service?

A. Yes. To be covered by USERRA, employees must give you notice of their impending military service as soon as possible after he/she receives orders.

Q. How long after discharge from the military must an employee report back to work in order to keep her job?

A. The time frame in which employees must return to work after discharge depends on the length of their military service:

- If the employees' military service was less than 31 days, they must return to work the first day after the completion of service.
- If their military service was more than 30 days but less than 181 days, they must submit for reemployment within 14 days after the completion of service.
- If their military service was more 180 days, they must submit for reemployment within 90 days after the completion of service.

- If the service person suffered a disability while on military duty, the period of time can be as long as two years.

Q. What documentation is required for reemployment?

- A. If the employee's period of service is more than 31 days, an employer MAY request documentation to establish that the reemployment application is timely or that the employee is eligible for reemployment; however, the lack of documentation, in and of itself, is not grounds to deny reemployment. If the documentation is not available at the time of application for reemployment, the employer must re-hire subject to receipt of proper documentation.

Q. What if an employee volunteers for military service?

- A. USERRA does not distinguish between volunteers and those ordered to perform military service. Employees are protected regardless of whether they volunteered or were ordered involuntarily to active duty.

Q. If the employee was a participant in a qualified plan, does the time spent on military duty count towards vesting?

- A. Yes. A plan sponsor must count military service as a time of employment for purposes of eligibility, vesting, and benefit accruals under your qualified plans. Don't treat their military leave as a break in service.

Q. What about eligibility under FMLA – does military service count?

- A. Yes.

Q. Can an employer require an employee to use earned vacation time while performing military service?

- A. No, employees are entitled use to earned vacation while on leave but generally may not be required to do so.

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