



Uniformed Services Employment and Reemployment Rights Act (USERRA)

Who, What, Why . . .

Who does it apply to: Every employer who receives an application for employment from a service member, employs a service member, or may reemploy a service member.

What is the purpose of the law: It is designed to prevent discrimination by employers against service members based on their service, and protect the rights of service members upon return from service to return to their jobs.

Who are considered “service members”: Any person on active duty, active duty training, inactive duty training, or an applicant for one of these categories in one of the following organizations: Army, Navy, Air Force, Marines, Army National Guard, Air National Guard, Coast Guard, or the Public Health Service corps.

How does the discrimination protection work: Employers are not permitted to discriminate against a service member based on the fact that they are a service member in any significant aspect of employment.

What are a service member’s rights when they go on leave: Service members are entitled to return to work upon completion of up to five years of service (unless extended due to war or other action) and they are entitled to up to 18 months of health coverage while absent on military leave. Reservists are entitled to return to work upon completion of annual training exercises.

What happens when the service member returns from leave: Employers must: (1) return the service member to work within two weeks of application for reemployment; (2) immediately return them to any company benefit plans including health insurance; and (3) place the service member in whatever position they reasonably could have been expected to “escalate” to if they had never left for service. Additionally, an employer cannot fire a returning service member without “cause” within 180 days after a service stint of 180 days or less, or one year if the service member’s stint was longer than 180 days.

How does this “escalate” principle work: Upon return, employers must place the service member in the position that represents

the level to which the service member would have risen if they had been with the company the entire time they were gone. This includes pay raises, additional vacation, employee benefits, job title, job location, assignment, rank, responsibility, etc. It may also be either an upward or downward movement in position. If you had to cut back, and the service member would have been demoted, that is the position they get upon return. If the employer finds the service member lacks the skills for the new position, the employer must make reasonable efforts to bring the service member up to the skill level before considering any reduction below the position to which the service member would have escalated.

Are there circumstances under which an employer does not have to reemploy a service member: Yes, if the service member: (1) left service without leave, was dishonorably discharged, or court martialled in certain circumstances; (2) failed to provide adequate notice before leaving for service; (3) fails to timely apply for reemployment; (4) failed to return to work after application for reemployment – subject to the employer’s abandonment rules; or (4) is disabled in such a way that they cannot perform the job duties and all attempts failed to find an alternative solution. Alternatively, if reemployment would cause an undue hardship on the employer, they can avoid reemployment. However, this is a very limited exception. It is not considered an undue hardship if the service member’s job is filled or if there are no openings at that time.

When does the service member have to return to work after returning from service: For service less than 31 days or for a fitness examination, the employee must return to work the next business day beginning more than eight hours after arriving home. For service of 31 – 180 days, the service member must usually apply for reemployment within 14 days. For service over 180 days, the service member must usually apply within 90 days. After receiving an application for reemployment, an employer must return the service member to work within two weeks.

Common Situations:

Employee disappears to begin service: Phil Flyboy simply does not show up for work one Tuesday morning. His employer, Pioneer Aviation, learns that he has left for active duty service and knew for two months before leaving. Is Pioneer obligated to reemploy Phil when he returns? Probably not. Service members are obligated to tell their employers as soon as reasonably possible when they will leave for service. The notice can be written or oral and must be delivered to the owner or a person of authority. If Phil had provided very little notice, Pioneer would still probably be obligated to reemploy him unless it could show that Phil's short notice caused substantial hardship or severely disrupted its business at the time Phil left.

Looking for greener pastures: Suzy Soldier returns from four years of service and immediately begins looking for a job with someone other than, the employer she left for active duty service. Is Suzy barred from application for reemployment within 90 days as provided by the law because she is looking for a new job? Simply put: no. The service member can seek alternative employment without losing their reemployment rights.

Unsure return: Sal Sailor submits an application for reemployment but is vague about when he got back. His employer, Tommy Toughnuts, requests documentation about the timing and condition of his return to prove Sal's application for reemployment is timely. Sal dilly-dallies with the information and Tommy is approaching the two week deadline to put Sal back to work without the information. Is Tommy allowed to put Sal's return on hold or refuse to reemploy him? Tommy is entitled to the information, but must take Sal back even if he can't produce

confirmation before the two week deadline. If Sal: (1) fails to produce the information when it becomes available; (2) was untimely in applying for reemployment; or (3) was dishonorably discharged, Tommy can let him go afterward.

New hire madness: After searching to find the perfect CEO for his company, Frank Friday decides upon Shawn Gunny. He is perfect for the job. In the final interview, Shawn tells Frank that he will soon be called up to active military service for a 2 years. Frank reverses his plans and hires someone else. Shawn is heartbroken and Frank will soon be financially broken by Shawn's lawyer. Frank cannot discriminate in a hiring decision – even if it means losing his new hire right after he starts.

What should I do:

Good: Post the notice required by law and watch out for potential issues.

Better: In addition to posting notice, teach supervisors to be on the lookout for discrimination against service members so they can stem the tide of any discrimination. Maintain a policy against discrimination against service members and a method for reporting that discrimination.

Best: In addition to the items above, maintain a record of any absent service members and what raises they might have accrued during time off. If you perform employee evaluations, prepare a note for service members on duty with what their raise might have been at the same time you review other employees. Also collect records on any returning service member to verify they were honorably discharged and made application for reemployment in a timely manner.



Michael Kelsheimer is a Shareholder in the employment law section at Looper Reed & McGraw where he is joined by a number of employment law attorneys with experience in all areas of employment and labor law. Michael recognizes that the cost and expense of litigation makes resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@lrmlaw.com or by phone at 214.237.6346