

## Legal Q&A

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**Q: What is the Uniformed Services Employment and Reemployment Rights Act?**

A: The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law that was enacted in 1994 to: (1) encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian employment that can result from such service; (2) provide for prompt reemployment of persons returning to civilian jobs from military service; (3) prohibit discrimination against individuals because of their service in the uniformed services; and (4) prohibit retaliation against an individual who has taken an action to enforce a protection afforded under USERRA. 38 U.S.C. §§ 4301; 4311(b).

**Q: Does USERRA apply to my city?**

A: The provisions of USERRA apply to all employers, including cities, regardless of size. 20 C.F.R. § 1002.34(a); 1002.39. The protections of USERRA extend to members of the uniformed services and to individuals who have applied for membership, have performed service, have applied for service, or are obligated to serve in the uniformed services. 38 U.S.C. § 4311(a); 20 C.F.R. § 1002.18. An employee's rights under USERRA are not diminished because the employee holds a temporary, part-time, probationary, or seasonal position, or because the employee is an executive, a manager, or a professional employee. 20 C.F.R. §§ 1002.41; 1002.43.

**Q: What are the “uniformed services”?**

A: Uniformed services include the armed forces (Army, Navy, Air Force, Marine Corps, and Coast Guard), the Army National Guard and the Air National Guard, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency. *Id.* §§ 1002.5(o); 1002.5(l); 1002.59. While service in the Texas state military forces is not considered “service in the uniformed services” under USERRA, state law provides that individuals serving in the state military forces have the same protections in employment, reemployment, and retention in employment as provided by USERRA. *Id.* § 1002.57 (b); TEX. GOV'T CODE § 431.017.

**Q: What “service” qualifies for USERRA protections?**

A: USERRA protects an individual who voluntarily signs up to perform uniformed service, as well as an individual who is involuntarily called up. *Id.* § 1002.5(l). Service also includes active duty for training, inactive duty training, or full-time National Guard duty. It also covers a period of time when an employee is absent from work for an initial or recurring military fitness examination or to perform authorized funeral honors duty. *Id.* §§ 1002.54; 1002.55.

**Q: Is an employee required to provide notice of service to a city?**

A: With certain exceptions, an employee or an appropriate military official must provide advance notice to the employer (as far in advance as is reasonable) that the employee intends to leave employment to perform service. *Id.* § 1002.85(a). This notice can be either verbal or written. *Id.* §1002.85(c). An employee is excused from providing notice if the employee is prevented from doing so by military necessity, or if it is impossible or unreasonable under all circumstances to do so. *Id.* § 1002.869(a). An employee does not need to provide notice to the employer of intent to return to work after completing uniformed service. *Id.* § 1002.88. An employee's reemployment rights are still protected, even if the employee tells the employer before entering or completing uniformed service that he/she does not intend to seek reemployment after completing service. *Id.*

**Q: What criteria must the employee meet to be eligible for reemployment after service in the uniformed services?**

A: In general, an employee who has been absent from a position due to service is eligible for reemployment if the employee meets the following criteria: (1) the employer has received advance notice of the employee's service; (2) the employee's service is for a cumulative period of five years or less; (3) the employee timely returns to work or applies for reemployment; and (4) the employee's separation or dismissal from service does not disqualify the employee. *Id.* 1002.32.

**Q: How long does an employee returning from service have to apply for reemployment?**

A: Returning service members have a set period of time in which to report back to work to preserve their USERRA reemployment rights. Service members who were in service for more than 180 days must submit an application for reemployment (written or verbal) within 90 days after completing service. *Id.* § 1002.115(c). If the employee's service was for more than 30 days (but less than 181 days), the employee is required to submit an application for reemployment within 14 days after completing service, unless it is impossible or unreasonable for the employee to do so, in which case the employee must submit the application not later than the next full calendar day after it becomes possible to do so. *Id.* § 1002.115(b). Service members gone less than 30 days must submit an application not later than the beginning of the first full, regularly scheduled work period after a period of eight hours for safe transportation. *Id.* § 1002.115(a).

These reporting timelines are extended for service members who are hospitalized for, or convalescing from, an illness or injury incurred or aggravated during military service. *Id.* 1002.116. Those individuals have an additional two years from the date of completion of service to apply for reemployment. *Id.* This time can be extended to accommodate circumstances beyond the employee's control that make reporting impossible or unreasonable. *Id.*

**Q: What reemployment rights does USERRA provide?**

A: If an employee meets the eligibility criteria for reemployment, an employer is required to promptly reinstate the employee when the employee returns from a period of uniformed service. *Id.* § 1002.180. Prompt reemployment generally means as soon as practicable and, absent any unusual circumstances, must occur within two weeks of the employee’s application for reemployment. *Id.* § 1002.181.

Generally, an employee is entitled to reemployment in the position that the employee would have attained with reasonable certainty if not for the uniformed service, including the seniority, status, and rate of pay that the employee would have ordinarily attained in that position (known as an “escalator position”). *Id.* §§ 1002.191; 1002.193. The employee must be qualified for the reemployment position, and the employer is required to make reasonable efforts to help the employee become qualified to perform the duties of the position. *Id.* § 1002.198.

Disabled employees have special rights with respect to the position in which they are reemployed after returning from uniformed service. Individuals who have a disability that was incurred in, or aggravated during, the period of service are entitled to the “escalator position.” *Id.* § 1002.225. An employer is required to make reasonable efforts to accommodate the disability and help the employee become qualified to perform the duties of the position. *Id.* If the employee is unable to perform the duties of the position after reasonable accommodation efforts by the employer, the employee must be reemployed in a position that the employee is able to perform and that is equivalent in seniority, status, and pay to the “escalator position.” *Id.*

**Q: What protections does a reemployed service member have from being discharged from employment?**

A: USERRA protects employees who are reemployed after uniformed service from discharge by an employer. An employee whose period of service in the uniformed service was for more than 30 days (but less than 181 days) may not be discharged, except for cause, for 180 days after the employee’s date of reemployment. *Id.* § 1002.247(a). If an employee’s period of service was for more than 180 days, an employer may not discharge an employee, except for cause, for one year after the employee’s date of reemployment. *Id.* § 1002.247. Discharge “for cause” includes discharge based on an employee’s conduct or for other legitimate nondiscriminatory reasons, such as the elimination of an employee’s position or laying off an employee. *Id.* § 1002.248.

**Q: Is a city required to pay an employee who is serving in the uniformed services?**

A: While some employers have taken the commendable act of fully or partially paying employees performing service in the uniformed services, there is no requirement under USERRA for a city to pay an employee who is serving in the uniformed services. *Id.* § 1002.151. Under state law, an employee who is a member of the state military forces or the armed forces is entitled to a paid leave of absence of up to fifteen working days for authorized training or duty. TEX. GOV’T CODE § 431.005.

**Q: How does USERRA protect health care benefits?**

A: USERRA does not require a city to establish a health plan or provide any particular health coverage. *Id.* § 1002.164(b). If a city provides coverage under a health care plan, an employee who is performing service in the uniformed services is entitled to continued health care coverage (and coverage for dependents, if the health plan offers dependent coverage) for up to 24 months after the absence begins or for the period of military service, whichever is shorter. *Id.* § 1002.164(a). Also, when an employee is reemployed, coverage generally must be reinstated without a waiting period or pre-existing condition exclusions. *Id.* § 1002.168. For periods of up to 30 days of training or service, the city can require an employee to pay only the employee's share of the cost, if any, for coverage. *Id.* § 1002.166(a). For longer tours, the city is permitted to charge the employee up to 102 percent of the entire premium. *Id.*

**Q: Are employees who have family members in the military entitled to time off?**

A: On January 28, 2008, the United States Congress enacted House Resolution 4986, the National Defense Authorization Act of FY 2008 (NDAA), which grants family and temporary medical leave for certain employees who have relatives in the military. H.R. 4986, 110th Cong. (2008). This legislation amends the Family and Medical Leave Act (FMLA) to grant employees who are eligible for leave under the FMLA to 12 workweeks of leave during a twelve-month period because of any "qualifying exigency" arising out of the fact that the spouse, child, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces. *Id.* The statute also grants an FMLA-eligible employee who is the spouse, child, parent, or next of kin of a service member who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness to a total of 26 weeks of leave during a twelve-month period to care for the service member. *Id.* The U.S. Department of Labor has published proposed rules implementing this regulation. The rules can be found at <http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>.