

**USERRA:
Legal Aspects of Re-Integrating Citizen Soldiers into the
American Workforce**



By Josh Cantrell

*Legal Counsel
Texas Municipal League
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
512-231-7400*

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Introduction

Since well before an unknown militiaman fired the first shot at Lexington (the proverbial “Shot Heard Round the World”), America has (primarily) depended upon the idea of an all-volunteer military. Historically, volunteer forces have proven to be significantly more efficient and effective than those comprised of conscripts or other individuals drafted for compulsory service. Civilizations such as the Spartans, Romans, and British (from whom our own tradition is descended) have relied heavily on citizen-soldiers to defend their people and their resources. While the United States has periodically implemented a military draft (The Civil War, both World Wars, the Vietnam conflict), it has looked, even in these conflicts, to its volunteer forces to shoulder the most difficult tasks. During the Civil War, the members of every major cavalry unit on both sides were volunteers, as were the men of the First Army who landed on the beaches of Normandy in 1944. The forces of the United States military serving in the Middle East today are made up exclusively of volunteers, both regular and reserve. However, unlike regular troops who have devoted themselves for a period of time exclusively to military service, reservists are not full time soldiers. In times of conflict, volunteer military forces have traditionally relied heavily upon reservists. They are called away from family and jobs for long stretches of time in far-off places and asked to perform work that is both physically and psychologically demanding. Once the conflict is over, reservists leave military service and return home. The Uniformed Services Employment Reemployment Rights Act (USERRA) was enacted to help insure a) a smooth transition back to civilian life for reservists and b) encourage reserve service in the military by protecting employment rights after serving on active duty.

Purpose

In October, 1994, Congress enacted the Uniformed Services Employment Reemployment Rights Act (USERRA). See 38 U.S.C. § 4301, et. seq. USERRA is intended to address three Congressionally stated purposes: “(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civil careers and employment which can result from such military service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.” See 38 U.S.C. § 4301 (a)(1)-(3).

Protections

1) Leave of absence

- An employer is required to allow an employee a leave of absence to fulfill qualified military obligations. See 38 U.S.C. § 4316 (b)(1)(A). While the employee is on such a leave of absence, the employer is not required to continue paying the employee.

However, a given employment relationship could be subject to certain agreements, policies, or state or local laws that require the employer to continue paying salaries or other benefits to an employee on leave under USERRA.

2) **Re-Employment Rights**

- USERRA requires that employers offer eligible employees returning from qualified military leave their previous job with the same pay, benefits, rank, and seniority they would have accrued had they not been called away for military duty. See 38 U.S.C. § 4312-4313 (a)(1)-(2).

- Because the purpose of the Act is to reinstate uniformed service personnel “as if they had never been away”, USERRA requires that employers make reasonable efforts to provide refresher training to returning employees when necessary. Employers are also required to make a reasonable effort to assist an employee in upgrading their skills to qualify for a given position. This is especially important if the employee returns from military service disabled or injured in such a way that they are unable to return to their previous job. The employer is still required to provide reasonable accommodations and re-employ the individual in a position that is as close as possible in pay, rank, and seniority as the original position. See 38 U.S.C. §4313 (a)(3).

- Employees returning from military service are protected from discharge without cause for a period of time that varies depending on the length of their military leave. See 38 U.S.C. § 4316(c). Employees returning after active duty military service of 180 days or more may not be discharged without cause for a period of one year after re-employment. See 38 U.S.C. § 4316(c)(1). Those returning after an absence of more than 30 days, but fewer than 180 may not be discharged without cause for six months. See 38 U.S.C. § 4316 (c)(2). Finally, employees returning from military service are explicitly protected from discrimination based on that service. See 38 U.S.C. § 4311.

- To qualify for re-employment, employees must report to their employers within a specified period of time based on their duration of their military service. See 38 § 4312(e). If the employee has been away for military service less than 31 days, they must return to work at the start of the first scheduled workday on the first full calendar day following their service, transportation home, and a break of at least eight hours. See 38 U.S.C. § 4312 (e)(1)(A)(i). Employees absent for military service more than 30 days but fewer than 180 days have 14 days to apply for re-employment. See 38 U.S.C. § 4312(e)(1)(C). Those absent for more than 180 days have up to 90 days to apply. See 38 U.S.C. § 4312 (e)(1)(D). Finally, an employee will be permitted adequate time to recover from any injuries incurred or aggravated during military service- this recovery time will be extended as needed. Only when the employee has recovered from their injuries will the timeframes for re-employment application begin. See 38 U.S.C. § 4311.

- Employees will lose all rights under USERRA if they are dishonorably discharged from military service. See 38 U.S.C. § 4304.

3) No Discrimination

- USERRA prohibits discrimination against individuals who either are or have been members of the military and those individuals who may have only applied for military service. See 38 U.S.C. § 4311 (a). The following actions are specifically enumerated as discriminatory if based on an individual's actual or potential membership in the military:

Denial of:

Initial employment
Re-employment
Retention in employment
Promotion
Any other benefit of employment

See 38 U.S.C. §4311(a)

Employers are further prohibited from taking adverse action against persons who either attempt to enforce their own rights or the rights of another person under USERRA. See 38 U.S.C. § 4311(b).

- For an employer to violate the anti-discrimination provisions of USERRA, the actual or potential military membership, service, or obligations must have been “the motivating factor” behind an adverse action prohibited by the Act, such as denial of initial employment or re-employment. See 38 U.S.C. § 4311(c). The employer may establish a defense if it can prove that the adverse action would have been taken in the absence of the individual’s military service. See 38 U.S.C. § 4311 (c).

4) Accrual of Benefits

- Employees absent from work to perform military duty are automatically entitled to ongoing accrual of seniority and any rights based on seniority. See 38 U.S.C. 4316(a). Employers must extend non-seniority based benefits and rights to employees on military leave to the same extent these are given to other similarly situated (but non-military) employees. See 38 U.S.C. § 4316(b)(1)(B).

- Upon request of the employee, the employer must allow the employee to use any vacation or other leave that was accrued before commencing military service. The employer may not, however, require the employee to use such accrued time off while the employee is on military leave. See 38 U.S.C. § 4316(d).

5) Accrual of Pension Benefits

- Individuals re-employed after military service do not incur a break in service for pension purposes and, in fact, military service will count as credited service in determining accrued and vested benefits. See 38 U.S.C. § 4318(a)(2)(B). If the pension benefits are based on employee contributions, the returning employee is given benefits only to the extent of their contributions. USERRA provides that the employee must have an opportunity to make up any missed contributions over a period of time equal to three times the employees length of military service, not to exceed five years. See 38 U.S.C. § 4318(b)(2).

6) Continuation of Health Care Coverage

- USERRA requires that employers offer employees on military leave an opportunity to continue participation in an employer provided health benefit plan for up to 18 months. See 38 U.S.C. § 4317(a)(1)(A). For periods of military service lasting more than 30 days, the employee may be required to pay up to 102% of the cost of the premium. See 38 U.S.C. § 4317(a)(2). If the employee's coverage lapses while they are on military leave, they must be immediately re-instated upon returning to their job. See 38 U.S.C. § 4317(b)(1).

Who's Covered

1) Employees

- Individuals holding permanent, full, or part time positions of employment with a private industry, federal, state, or local government employer, who are members of the uniformed services while engaged in eligible service are covered by USERRA. Only employees holding temporary positions are exempt from USERRA. See 38 U.S.C. § 4312(d)(1)(C).

2) Employers

- “Any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including:
- (i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
 - (ii) the Federal Government;
 - (iii) a State; (including political subdivisions of the State)
 - (iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and
 - (v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.”

See 38 U.S.C. § 4303(4)(A).

Employee Notice Requirement

- An employee who volunteers or is called to perform active military service is required to give their employer as much written notice as possible. See 38 U.S.C. § 4312(a)(1). There may be situations in which it is impossible or impractical for the employee to provide such notice because of strategic or security concerns. See 38 U.S.C. § 4312(b).

Exceptions to USERRA

- An employer can be excused from re-employment obligations under USERRA if their circumstances have changed in a way that makes re-employment unreasonable or that presents “undue hardship”. See 38 U.S.C. § 4312 (1)(A)-(B).
- 38 U.S.C. § 4312 (15)(A) lays out a number of factors that may be considered in determining the legitimacy of a hardship claim. These include: the nature and cost of the required re-employment action; overall financial resources of the employer; the total number of persons employed; the financial or other impact the re-employment action will have on the employer; the overall size of the employer with respect to the number of its employees; the number, type, and location of its facilities; the type of operations of the employer, including the composition, structure, and functions of the work force of the employer.

Enforcement

- The Veteran's Employment and Training Service (VETS) is a division of the United States Department of Labor and is responsible for investigating all complaints under USERRA. See 38 U.S.C. § 4322. For more information, you can access the VETS website at www.dol.gov/vets/.

State Law

- Chapter 613 of the Texas Government Code provides public employees most of the same protections as USERRA. However, whereas USERRA is applicable to virtually any employee in any industry, Chapter 613 deals only with employees of the state, a state institution, or a local governmental entity.
- While some states have enacted legislation on this issue, USERRA is the most important law with regard to re-employment of military personnel. Many of the applicable state laws (Texas included) were enacted before USERRA and have become essentially pre-empted by the federal statute.