



## USERRA

### **About Military Service Leave (USERRA Leave)**

USERRA – which stands for the Uniformed Services Employment and Reemployment Rights Act – is a federal statute that provides job protections and benefits for service members returning to civilian employment after a military service leave.

USERRA protects employees who are absent from work due to “service in the uniformed services” for up to five years. Military service leave may be consecutive or intermittent.

As an employer, your obligation is to comply with USERRA’s re-employment rights and benefits protections, as well as provide employees information regarding their rights, benefits, and obligations under USERRA by posting this [notice](#) in your workplace.

You can find more information about USERRA on the U.S. Department of Labor (“DOL”) [website](#).

### ***Who is eligible for Military Service Leave?***

All employees in Uniformed Service are eligible for USERRA or “Military Service Leave,” including:

- Service in the U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard.
- Anyone in the Reserves for each of the branches listed above.
- Service in the U.S. Army National Guard and Air National Guard.
- Service in the Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

Service may be voluntary or involuntary on the part of the employee, including:

- Active duty;
- Active duty for training;
- Initial active duty for training;
- Inactive duty training;
- Full-time National Guard duty;
- Examinations to determine a person’s fitness of duty;
- Funeral honors duty performed by National Guard or reserve members; or
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), when activated for a public health emergency, & approved training to prepare for such service.



## ***Do employees need to provide advance notice before taking Military Service Leave?***

Generally yes. The law requires employees (or an appropriate military branch officer) to provide either written or oral notice, unless they are prevented from doing so:

- Because of military necessity (i.e., the mission or operation is classified or may be compromised by public knowledge)
- Because giving notice is otherwise impossible or unreasonable.

## ***What is the duration of Military Service Leave?***

USERRA re-employment rights apply if the cumulative length of service that causes a person's absences from a position does not exceed five years. Most types of service will be counted in the computation of the five-year period, although there are many exceptions that do not count toward the five years. You can find more information and the exceptions under "Duration of Service" on the [DOL website](#).

## ***What are the re-employment rights?***

USERRA provides that returning service-members must be promptly reemployed in the job that they *would have attained* had they not been absent for military service. (This is referred to as the "escalator" principle.) This means that you must take into account whether the employee would have been promoted and reinstate the employee with the same seniority, status and pay, as well as other rights and benefits.

The reinstatement rights apply even if the employee did not initially state their intent to return to work after military service. The employee cannot waive reemployment rights.

Additionally, USERRA requires that reasonable efforts be made to enable returning service members to qualify for a position they would have attained absent military service (i.e., through training or retraining). If the service member cannot qualify even after reasonable efforts are made, the employer is still obligated to provide an alternative position.

"Prompt" reemployment generally means within two weeks of the individual seeking reemployment, but may depend on the duration of the military service leave.

Note: You are **not** required to reemploy someone returning from military service leave if:

- Your business circumstances are so different that reemployment is now impossible or unreasonable;
- Providing an accommodation to a disabled individual would pose an undue hardship; or



- The employment prior to the military service leave was for a brief, non-recurrent period, and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

*However, the employer bears the burden of proving these exceptions. Consult counsel before denying any service member reinstatement.*

If the employee's military service lasted longer than 180 days, you may not terminate them (except for cause) for a period of one year after reinstatement. If the employee's military service lasted 31-180 days, you may not terminate them (except for cause) for a period of 180 days after reinstatement.

### ***What are the benefits protections?***

Individuals performing military duty in excess of 30 days may elect to continue employer sponsored healthcare through COBRA (for up to 24 months) or Cal-COBRA (for up to 36 months), as applicable. You may require the employee to pay up to 102% of the full premium for coverage.

For military service of 30 days or fewer, healthcare coverage continues and you cannot require the employee to pay more than the normal share of any premium.

All pension plans are protected under USERRA. This means that you must count the period of military service as continued employment for purposes of retirement plan eligibility, vesting, and benefit accrual. You are not required to make contributions to an employee's 401(k) while they are on military service leave.

Employees are permitted to use vacation, PTO, or other personal time off during a military service leave, but you cannot require them to do so.

You must count the period of military service as time worked for determining eligibility for FMLA and CFRA leave. For example, you must combine the months and hours the employee *would have worked* if not engaged in military service and add that with actual time worked to determine if they satisfied the 1250 hour requirement.

### ***Is the employee required to provide notice or documentation before returning to work after military service leave?***

Yes. The amount of notice required depends on the length of service:

- Less than 31 days of service or fitness for duty exam: The service member must return at the beginning of the first full regularly scheduled work period on the first full calendar day after release from service, taking into account safe travel home plus an eight-hour rest period.



- 31-180 days of service: The service member must submit an application for reemployment within 14 days of release from service.
- More than 180 days of service: The service member must submit an application for reemployment within 90 days of release from service.

If returning to work or submitting an application in the above time frames is impossible or unreasonable due to no fault of the individual, then they must return to work/submit the application as soon as possible.

You may require the individual to provide documentation establishing that they have sought reemployment in a timely fashion, have not exceeded 5 years of service, and did not receive a dishonorable discharge from service.

***Are there any additional protections under California law?***

Yes. The California Fair Employment and Housing Act protects employees and applicants from harassment or discrimination based on “military and veteran status.”

Additionally, employees who are members of the Reserve, National Guard, or Naval Militia are entitled to up to 17 calendar days of unpaid leave per year for military service activities. Members of the National Guard are also entitled to job protections and return rights in certain circumstances. Employees must apply for reinstatement within 40 days after they are discharged, and cannot be terminated without cause for one year.

California also provides military spouse leave for covered employers with 25 or more employees.