

RISK COMMUNIQUÉ

The Uniformed Services Employment and Reemployment Rights Act (USERRA)/Military Leave – Management Liability/Risk Management for Employment Practices

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects members' reemployment rights when returning from a period of serving in uniform, including those called up from the reserves or National Guard, and prohibits employer discrimination based on military service or obligation. This Communiqué provides entities with analysis and risk management guidelines for adhering to the USERRA.

Facts about USERRA

The Uniformed Services Employment and Reemployment Rights Act significantly strengthens the Veterans' Reemployment Rights Statute and expands the employment and reemployment rights of all uniformed service members. The Department of Labor, through the Veterans' Employment and Training Service, provides assistance to all persons having claims under USERRA. The law covers all employers, regardless of size, status, or business. The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve
- Army National Guard or Air National Guard
- Commissioned Corps of the Public Health Service
- any other category of persons designated by the President in time of war or emergency

Under USERRA, employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- Hiring
- Promotion
- Reemployment
- Termination
- Benefits

USERRA prohibits employers from retaliating against anyone who:

- files a complaint under the law
- testifies, assists in, or otherwise participates in an investigation or proceeding under the law
- exercises any right provided under the law

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Additional Provisions of USERRA

Additional provisions of USERRA include requiring that:

- the cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights is not to exceed five years (with certain exceptions)
- service members to provide advance written or verbal notice to their employers for all military duty unless giving notice is impossible, unreasonable, or precluded by military necessity
- the returning service member be placed in the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer
- returning service members be reemployed in the job that they would have attained had they not been absent for military service (the long-standing "escalator" principle) with the same seniority, status and pay, as well as other rights and benefits determined by seniority
- the person report back to the civilian job in a timely manner or have submitted a timely application for reemployment (time requirements are dependent upon length of military service)
- the person was released from military service with a non-disqualifying discharge (i.e., he or she would not be eligible under USERRA if separated from military service with a dishonorable or bad conduct discharge)
- protection be provided for disabled veterans and requiring employers to make reasonable efforts to accommodate the disability

What Entity Leaders Need to Do to Adhere to USERRA

It is recommended that entity leaders:

- Create and implement a personnel policy specifically regarding USERRA/Military Leave.
- Post USERRA notices in the workplace and either mail out the notice or distribute the notice via electronic mail.
- Rely on outside legal counsel with experience in labor and employment matters when addressing military leave scenarios.
- Train those with supervisory authority and all other personnel on USERRA/Military Leave and all its provisions by utilizing internal resources or an outside third-party consultant and/or attorney.