

The Solution

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New Regulations: Uniformed Services Employment and Reemployment Rights Act (USERRA) 6 Pages

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The information contained in *The Solution* primarily reflects national trends, federal compliance issues and State of Texas positions. You are encouraged to inquire as to whether or not your particular state has a position different from those expressed in *The Solution*.

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New Regulations: Uniformed Services Employment and Reemployment Rights Act (USERRA)

Action Point: Share this material with ALL managers and supervisors of employees.

Action Point: Identify any current employees or service veterans these rights might apply to who are out on “qualified service” in any of the uniformed services.

This past December 16, 2005 the Department of Labor announced the publishing of new regulations. The new regulations were published in the Federal Register on December 19, 2005. The regulations became effective 30 days later, on January 15, 2006.

The regulations explain and clarify the Uniformed Services Employment and Reemployment Rights Act frequently referred to as USERRA. Although the law was enacted more than a decade ago in 1994, these are the first clarifying regulations.

To get a grasp on why these are so important, one must understand some important facts. We have been living in a post-9/11 world for a few years now and may have become numb to some startling realities.

Almost half of our national defense relies on the guard and reserve. Since 9/11/01 more than 525,000 men and women have been mobilized to fight the war on terror. More than 390,000 people have been released from active duty. According to Secretary of Labor Elaine L. Chao, “this is the largest deployment of the Military Reservists and National Guard since World War II.” For those of us who served in Vietnam, this is an amazing realization.

In addition to the clarifying regulations the DOL announced that it finalized the mandatory notice that employers must post in their workplace. The final version of the poster can be downloaded from the DOL on the web at <http://www.dol.gov/vets>. To ensure you have the final version of the poster, the date on the bottom right hand corner should read “Publication Date – January 2006.”

Although we are going to spend a few weeks looking in depth at the regulations, it is helpful to briefly summarize what they accomplish. The regulations generally explain and clarify the following:

- Require employers to reinstate employees returning from “qualified service” within a specified time period once they apply for reemployment.
- Such returning employees must receive the same seniority, status and pay that they would have attained if they had remained continuously employed; this is known as the “escalator principle.”
- Require employers and employees to follow specific timetables and procedures when the employee reports back to work.
- A disability incurred during the employee’s “qualified service” does not impede the right to reinstatement at the same seniority, status and pay.
- Employees have specific rights for continued coverage of their employer’s health care and pension plans.
- Employees gone for 30 days or more for “qualified service” enjoy a period of time upon their reinstatement to employment in which they can only be terminated “for cause.”
- Explains returning employee’s rights to immediate coverage of the Family and Medical Leave Act benefits.

The regulations are written in question and answer format and contain more than 200 specific topics.

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USERRA: New Regulations Applying for Reemployment

Sections 1002.115-123 deal specifically with the process and issues of a person in the uniformed services that returns and wants to reapply for their prior civilian job.

The law requires a person to reapply for their prior job within specific time frames. The law states the person must reapply by "...either reporting to work or submitting a timely application for reemployment. Whether the employee is required to report to work or submit a timely application depends upon the length of service...."

These time frames are sort of a sliding scale based on the time period the person was absent from work. The critical time frames are:

- An absence of less than 31 days.
- A period of any length for the purpose of a fitness examination.
- An absence if at least 31 days but less than 181 days.
- An absence of greater than 180 days.

If the uniformed service member is absent from work for less than 31 days, the person must "...report back to the employer not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee's residence." Further, in case the employee can not report back to work in this time period, at no fault of their own, they must report to work as soon as possible after the expiration of the 8-hour period.

Note that the rule above applies to any required period of absence for a member to obtain an examination to determine his/her fitness to perform service.

For an employee who is gone longer than 30 days but less than 181 days, such a person must "...submit an application for reemployment (written or verbal) with the employer not less than 14 days after completing service." If this 14 day period is impossible or impractical, at no fault of the employee's, then they are required to submit the application for reemployment no later than the next full calendar day after it is possible to do so.

When an employee is gone from work longer than 180 days they must submit an application for reemployment no less than 90 days after completing their service requirement.

One other absence scenario needs to be addressed. This is for the members of the uniformed services who unfortunately require being hospitalized or are convalescing. Persons needing hospitalization or convalescing time are supposed to return for reemployment when their time needed for recovering ends.

This period can be extended two years following the date of completion of their service. However the period "...may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond their control that make reporting within the period impossible or reasonable.

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USERRA: New Regulations Issues Determining Reemployment

Last time we discussed the time frames within which a uniformed service person must apply for reemployment. It is to be noted that if the person fails to apply for reemployment within those time frames they do not automatically lose their rights of reemployment and other benefits. Two issues could come into play at this point.

First, when the time frame for reporting for reemployment under the law has passed, the person becomes subject to the employer's own rules, policies and practices. These are considered the employer's conduct rules pertaining to absence from scheduled work time. Policies and past practices might allow the person to be reemployed.

Second, if reporting for reemployment was impossible or unreasonable, at no fault of their own, two rules apply. One, if the person was gone for less than 31 days, they must report as soon as possible. Two, if they were gone for more than 31 days, they must "...submit an application for reemployment to the employer by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the employee will be considered to have timely reported or applied for reemployment."

When the uniformed service person does report back or apply for reemployment such application for reemployment does not have to follow any particular format. The application may be accomplished either orally or in written form.

The application must simply show the following:

- the person is a former employee
- they are returning from service in the uniformed services
- they are seeking reemployment with the pre-service employer

The employee does not have to identify a specific position they are reemploying for, but they may do so.

In applying for reemployment the person must submit their request for reemployment to "...the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications." Such agents of the employer could be the human resource department or a first-line supervisor. In the case of a change in ownership during the uniformed services person's absence, their application for reemployment simply must go to the successor-in-interest.

If a person is gone beyond 30 days, and if the employer requests documentation for their absence, the uniformed services person must submit the documents. The law includes a listing of proper documents the employer must accept as valid. Such documents could include material to accomplish the following:

- prove the reemployment application is timely
- show the employee has not exceeded the five-year limit of service (subject to certain exceptions)
- their separation or dismissal from the uniformed service did not disqualify them for reemployment and other benefits.

During the time it takes the employee to produce such requested documentation, the employer must proceed to reemploy them. The employer must not delay or deny reemployment by demanding documentation that does not exist or is not readily available. If documentation, following reemployment, indicates the employee is not entitled to reemployment, the employer can terminate employment and all rights or benefits for the employee.

If the employee was absent for more than 90 days, the employer may require, for pension purposes, documentation that establishes the right to be treated as if no break in service occurred.

The uniformed services employee will be disqualified for benefits if their discharge or separation from service falls into one of the following four categories:

- Separation from uniformed service with a dishonorable or bad conduct discharge.
- Separation from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service.
- A commissioned officer dismissed by a sentence of a general court-martial; in commutation of a sentence of a general court-martial; or in time of war by order of the President.
- A commissioned officer dropped from the rolls due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or a sentence to confinement in a Federal or State penitentiary or correctional institution.

USERRA: New Regulations Escalator Clause & Job Qualifications

A returning uniformed services employee is supposed to be reemployed in the position they had upon their departure for service duty. But what if the returning employee is no longer qualified for the reemployment job?

Qualified for the job means "...the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more nonessential tasks of a position does not make him or her unqualified."

The essential tasks are determined on a job-by-job basis. The determination of essential depends on several factors. Below is a list of examples of some of the factors that determine the status of "essential:"

- (i) the employer's judgment as to which functions are essential;
- (ii) written job descriptions developed before the hiring process begins;
- (iii) the amount of time on the job spent performing the function;
- (iv) the consequences of not requiring the individual to perform the function;
- (v) the terms of a collective bargaining agreement;
- (vi) the work experience of past incumbents in the job; and/or
- (vii) the current work experience of incumbents in similar jobs.

The law also says that "...the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position." So what are considered "reasonable efforts" on behalf of the employer? The answer includes actions, including providing, taken by the employer to assist the employee to be job qualified. However, these actions do not have to include efforts that would place on the employer an undue hardship.

Only after the employer has made reasonable efforts to help the employee become qualified can the employer determine if the employee is not qualified for their reemployment position.

The reasonable efforts required on behalf of the employer are not allowed to cost the employee anything. All reasonable efforts must be provided at no cost to the returning employee.