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Uniformed Services Employment and Reemployment Rights Act

July 24, 2018

SHRM

Thanks for joining us today. I'm Amber Clayton of SHRM, and I am the moderator of today's chat on the Uniformed Services Employment and Reemployment Rights Act.

Joining us today are several SHRM HR Knowledge Advisors who are here to help you with your questions.

Comment From Kelly

What kind of training is weekend drill considered to be? Annual, special, etc?

Advisor - Theresa:

According to the Department of Justice resource to follow, all training is included under USERRA leave.

Source: <https://www.justice.gov/usa...> -- page 3

What types of military service are covered by USERRA?

Comment From Mellisa

Hello, what if an employee volunteers for extra military training. Are we required to let them have off of work?

Advisor-Bob:

Hi, Melissa. Please see the following Q and A item. Does an employee have reinstatement rights following voluntary military service?

Source of the following: <https://www.esgr.mil/Employ...>

Does USERRA apply to voluntary service?

Yes. USERRA applies to voluntary and involuntary service in the uniformed services.

Comment From Cindy

Can we replace an employee with a subcontractor while he/she is on military leave per business demands?

Advisor - Nora:

An employer can find a replacement but a person on military leave still has reinstatement rights. SHRM Toolkit: Managing Military Leave <https://www.shrm.org/resour...> "Getting the work done While an employee is on military or military family leave, the work continues and the regular job must be done. Some employers use the services of temporary employees to meet their immediate needs, whereas others hire regular replacements. Organizations that perform sensitive or classified work may be unable to use temporaries if the work requires a security clearance. In these cases, the employer may simply have to increase the workload of the remaining employees or temporarily reassign employees to meet the unfilled requirements."

Comment From Mellisa

are we required to obtain paperwork showing the dates of leave?

Advisor-Bob:

Hi again, Melissa. There is no requirement, per se, for an employer to obtain paperwork showing the dates of leave. Here is additional guidance on documentation issues.

Source of the following: U. S. Department of Justice (DOJ)

<https://www.justice.gov/sit...>

---see pages 20-21---

"Can an employer require an employee to apply for military leave of absence or otherwise submit official documentation for approval of military leave of absence?

No. As stated previously, an employer may not require documentation for notification prior to military duty. Further, an employer does not have a "right of refusal" for military leave of absence, so long as the employee has not exceeded the 5 years of cumulative service provided under USERRA."

"When may an employer require an employee to provide documentation of military service?

After periods of military leave of absence for more than 30 days, the employer has the right to request such documentation, which can be used to establish the employee's basic eligibility for protection under USERRA. All National Guard and Reserve members are encouraged to provide a copy of orders, the annual drill schedule, or other type of documentation to employers as soon as available and, if possible, before the commencement of military duty."

"What if the employee cannot provide satisfactory documentation for military service in excess of 30 days?

The employer must promptly reinstate the employee pending their availability. The employer may contact the military unit if necessary"

Comment From Natalie

Most of our employees resign before they go into the military. HR does not necessarily know until after they have left. Is it only necessary to make sure they were eligible IF they return?

Advisor - Nora:

As noted in this resource, an employee who resigns still has USERRA rights.

Leave Benefits: Military: If an employee voluntarily resigns to join the uniformed service, does USERRA still apply?

<https://www.shrm.org/resour...>

Comment From Camden

As employers, are we under any obligation to verify the information our employees give us? For example, verify their training schedules (these are on paper) or dates of deployment?

Advisor-Pattie:

Generally, an employer is not required to verify an employee's military duty. Here is a resource that may be helpful. "What are valid military orders?"

All written or verbal orders are considered valid when issued by competent military authority. A military member in receipt of official orders is obligated by federal statute to execute them. The recurring requirement to perform inactive duty training (drill) is an example of when written orders may not be formally issued." <https://www.justice.gov/sit...>

Comment From Kelly

What components do you suggest should be included in an employer's military leave/re-employment policy?

Advisor - Liz:

Although USERRA does not require an employer create a written policy, many employers will add a policy to be consistent with how they have other leave of absence policies addressed. SHRM did not have an article specific to what to include, but I do have a sample policy to share as well as our How To Guide on Administering military leave that may provide ideas if you wish to create a leave procedure as well.

Military Leave of Absence Policy

<https://www.shrm.org/resour...>

How to Develop and Administer Military Benefits

<https://www.shrm.org/resour...>

Comment From If an employee is ...

If an employee is out due to deployment and returns, how do you recommend we "make them whole" for annual performance reviews (when they were gone over 6 months, etc)?

Advisor - Regan Gross:

Thank you for your question. Generally performance reviews would be based on time while employed prior to or in exception to any time away for military related activities. As for performance oriented bonus pay, it can depend on the type of bonus and whether it is discretionary or non. Here is an article

we have that may help: Are companies required to pay bonuses to returning military service employees?

<https://www.shrm.org/resour...>

Comment From yupin

I have a full-time exempt employee who has to report in for Active Training days as a Guard member. Two part question: If the person has worked at the start of the work week but then has Active Training days for the remainder of the work week, they still receive their regular wages for the week correct? And if at the start of the week where no work is done for the employer and the employee is on Active Training we are not required to pay their wages for that week correct?

Advisor - Nora:

As noted in the resource below, exempt employees receive full salary if on military leave in the same workweek work was performed. If no work is performed in workweek, then no pay is required. Step-by-Step Guide to Complying with White-Collar Exemptions

<https://www.shrm.org/resour...>

..".Are pay deductions allowed for absences due to jury duty, witness service and temporary military leave?

No. An employee who works any time at all during the week and spends the rest of the week on court or military obligations must be paid the full week's salary. However, employers are allowed to offset against salary amounts paid as jury fees, witness fees and military pay, and do not have to pay for any week in which no work is performed. "

Comment From Anthony

USERRA discusses a 5 year limit for service members to be away on mobilizations and deployments. However, it also discusses that certain mobilizations and deployments do not count toward this 5 years. Can you please get into some detail on this?

Advisor-Bob:

Hi Anthony. Here is information from the U.S. Department of Labor that addresses the five year limit exceptions.

U.S. Department of Labor (DOL)

<https://webapps.dol.gov/ela...>

"USERRA establishes a five-year cumulative total of military service with a single employer, with certain exceptions allowed for situations such as call-ups during emergencies, reserve drills, and annually scheduled active duty for training. USERRA also allows an employee to complete an initial period of active duty that exceeds five years."

Comment From Jennifer

What are the notification requirements for an employee to notify an employer of military leave?

Advisor-Pattie:

An employee generally is required to provide prior written or oral notice of an upcoming military leave. Below is an overview of notice requirements that I hope you find helpful.

"The law requires employees to provide their employers with advance notice of military service, with some exceptions.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

Military necessity prevents the giving of notice; or
The giving of notice is otherwise impossible or unreasonable."

<https://www.dol.gov/vets/pr...>

Comment From Jessica

When returning from deployment, how long can an employee wait before letting you know if they will return to work?

Advisor - Theresa:

The USERRA regulations have a specific timeframe an employee must reapply depending on the length of military service. See section: "Application for Reemployment"

§ 1002.115 Is the employee required to report to or submit a timely application for reemployment to his or her pre-service employer upon completing the period of service in the uniformed services?

<https://www.dol.gov/vets/re...>

Comment From Anne B

In the electronic age, military organizations resort to digital role sheets and may not be able to provide signed copies of attendance rosters. What kind of attendance rosters are acceptable and do they still require signatures?

Advisor - Regan Gross:

Hello Anne and thank you for your question. Employees returning from military activities may be asked for documentation. This may not be possible in all circumstances, such as in emergency call to duty situations. The law doesn't require employees to provide specific documents to employers. There is probably a way to obtain a screenshot or image capture of call to duty paperwork in the event that is the only option. The law doesn't mention this issue. see pages 20-21 for information on documentation <https://www.justice.gov/sit...>

Comment From Questions from Emily

How long are employers required to keep a job for an employee on military leave (Indiana resident)

Advisor - Theresa:

An employee on USERRA leave is entitled to up to five years leave for military service. See the DOL resource below.

U.S. Department of Labor (DOL)

<https://webapps.dol.gov/ela...>

“USERRA establishes a five-year cumulative total of military service with a single employer, with certain exceptions allowed for situations such as call-ups during emergencies, reserve drills, and annually scheduled active duty for training. USERRA also allows an employee to complete an initial period of active duty that exceeds five years.”

Comment From Natalie

How much paid leave does a company have to provide for annual military training? Is an employer able to factor in military pay and calculate the differential for employees on military leave? Also, how long is a company able to continue benefits for an employee on leave?

Advisor - Nora:

USERRA does not require pay for military leave. While employers cannot require, employees may use paid leave. According to this resource, employers may offset military pay under certain circumstances. Leave Benefits: Military: Do I have to pay an employee on military leave? Can I require him or her to use paid time off/vacation time?

<https://www.shrm.org/resour...>

Here is the benefit requirements as it depends on the amount of military leave taken: How to Develop and Administer Military Benefits <https://www.shrm.org/Resour...> Managing Military Leave and Military Family Leave

<https://www.shrm.org/resour...>

U. S. Department of Justice (DOJ)

<https://www.justice.gov/usa...>

“What health plan coverage must the employer provide for the employee under USERRA? If the employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below: When the employee is performing military service, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the employee to elect to continue coverage for a period of time that is the lesser of: 1. The 24-month period beginning on the date on which the employee's absence for the purpose of performing service begins; or, 2. The period beginning on the date on which the employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of reemployment. USERRA does not require the employer to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage. USERRA does not require the employer to permit the employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage. In a multi-employer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions? Liability under a multi-employer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.”

Comment From Brittany

How should a multi-state employer handle Military benefits if the state law is richer than the federal law?

Advisor-Pattie:

Generally, an employer would follow the law that is most beneficial for an employee. A multi-state employer may want to implement a policy that offers the most generous benefits to all employees, or have a policy that outlines the military benefits by state.

Comment From Jo Ann

Where can I find training materials to aid in training supervisors on the requirements we need to follow?

Advisor - Karen:

Here are some compliance and training resources that can be used for training internally and may be great as a resource when creating internal PowerPoint training for supervisors.

DOL Compliance and Training Resources

<https://www.dol.gov/vets/pr...>

Veterans' Employment and Training Service (VETS)

<https://www.dol.gov/vets/>

You may also find these resources helpful.

How to Develop and Administer Military Benefits <https://www.shrm.org/resour...>

Managing Military Leave and Military Family Leave <https://www.shrm.org/resour...>

Comment From Brandi Bourquin

Do drill weekends and annual leave count towards the cumulative 5 years ?

Advisor - Nora:

Here is what I was able to locate: See page 7: <https://www.justice.gov/sit...>

"Five-year limit Exception.

USERRA sets a cumulative limit of 5-years on the amount of military leave you can perform and retain reemployment rights with a given employer. If you get a new employer, you get a new 5-year limit.

Exceptions to the 5-year limit:

Drills (inactive duty training), annual training, involuntary active duty extensions (including training certified as necessary by your service), and recalls due to a war or national emergency are not counted in the 5-year cumulative total."

U.S. Department of Labor (DOL)

<https://webapps.dol.gov/ela...>

"USERRA establishes a five-year cumulative total of military service with a single employer, with certain

exceptions allowed for situations such as call-ups during emergencies, reserve drills, and annually scheduled active duty for training. USERRA also allows an employee to complete an initial period of active duty that exceeds five years." You may want to consult ESGR to your particular circumstance for annual leave as I was unable to locate specifics - <https://www.esgr.mil/About-...>

Comment From Melissa

I recently received a MEMORANDUM FOR RECORD, Official Notification of Required Military Duty for an employee. The type of duty states Additional Duty Operational Support (ADOS). Is this active duty and is this counted against the 5 year limit?

Advisor - Regan Gross:

Hello and thank you for your question. There are some exceptions to the 5 year limit which could extend the length of USERRA protected leave. This includes some types of training. I'm pasting that information here, however you may need to consult an attorney to determine if this applies to your situation. Sec. 1002.103: USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and, (ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining;

<https://www.dol.gov/vets/vm...>

Comment From Chrystal H

If we supplement military pay, and the leave is only one day (say for weekend drills), are we required to pay them for that day or does supplement suffice?

Advisor-Bob:

Hi, Chrystal. In general, supplementing military pay is not required by regulation. It may be required by a collective bargaining agreement or an employment contract, or voluntarily by employer policy. When it comes to paying an employee for military leave, a Non-Exempt employee does not have to be paid for a day of military leave on which the employee does not work for the employer. An employee who is Exempt from the overtime requirements of the Fair Labor Standards Act cannot have salary reduced for a day of military leave, IF the employee performed work elsewhere in the work week because of the "salary basis" requirement for exemption. The U.S. Department of Labor addresses this matter in the following:

Jury Duty, Military Leave and Serving as a Witness

<https://webapps.dol.gov/ela...>

Comment From Melissa

For training (e.g. drill or annual training), is there a limit to the amount of leave the associate can take per calendar month and/or year? Note: if I understand correctly this does not count towards the 5 year limit for active duty.

Advisor - Theresa:

I am unable to find any resources indicating an annual or monthly limit related to training. According to the SHRM resource "training" is included protected USERRA leave. .

Leave Benefits: Military: Do USERRA regulations cover reserve duty, voluntary service and training?

<https://www.shrm.org/resour...>

Comment From Natalie

not sure if my question was posted because I do not see it but I wanted to know at point do we need to honor USERRA leave? A lot of our employees resign due to joining the military and then HR is not aware until they are gone. Do we just need to make sure that they were eligible and honor the leave IF they return so we can apply the escalator principle?

Advisor-Pattie:

Generally, an employer should ensure that a candidate and an employee is aware of the USERRA regulations by posting the required USERRA posters, and informing an employee of the rights under the law. USERRA regulations would generally still apply to an employee who has resigned due to a military leave. Here is our Q&A that may be useful. Leave Benefits: Military: If an employee voluntarily resigns to join the uniformed service, does USERRA still apply?

<https://www.shrm.org/resour...>

Comment From Meghan

Can we require that an employee provide a copy of their orders before accommodating the leave?

Advisor-Bob:

Hi, Meghan. In short, an employer may not require documentation prior to accommodating leave. Here is a resource containing information that addresses this question.

Can we require they provide documentation of each military leave?

Source of the following: U. S. Department of Justice (DOJ)

<https://www.justice.gov/sit...>

---see pages 20-21---

"Can an employer require an employee to apply for military leave of absence or otherwise submit official documentation for approval of military leave of absence?"

No. As stated previously, an employer may not require documentation for notification prior to military duty. Further, an employer does not have a "right of refusal" for military leave of absence, so long as the

employee has not exceeded the 5 years of cumulative service provided under USERRA."

"When may an employer require an employee to provide documentation of military service?

After periods of military leave of absence for more than 30 days, the employer has the right to request such documentation, which can be used to establish the employee's basic eligibility for protection under USERRA. All National Guard and Reserve members are encouraged to provide a copy of orders, the annual drill schedule, or other type of documentation to employers as soon as available and, if possible, before the commencement of military duty."

"What if the employee cannot provide satisfactory documentation for military service in excess of 30 days?

The employer must promptly reinstate the employee pending their availability. The employer may contact the military unit if necessary"

Comment From Kelly

I'm trying to decide what kind of pay we owe an employee for weekend drill as as lot of our employees work weekends. Do they get full pay as though it was an annual training, or is it an offset as "other training or duty required?"

Advisor - Nora:

USERRA does not require pay for military leave unless an exempt employee has performed work in the same workweek. Employers should determine if a non-exempt or exempt employee has performed work to determine pay. In addition, organizations should review their practices if they provide military pay (i.e. offset). You may want to check with your state's Attorney General Office or Wage & Hour for any state law on military pay. Here are resources for your review. Leave Benefits: Military: Do I have to pay an employee on military leave? Can I require him or her to use paid time off/vacation time?

<https://www.shrm.org/resour...>

"There is no requirement under USERRA to pay the employee for the military related absence. In addition, an employer is prohibited from requiring the employee to use their paid time off benefits for the military absence; however, the employer must allow the use of paid time off if the employee requests it"

Comment From Is an employer obl...

Is an employer obligated to reinstate the employee if he/she has been away on duty for more than 3 years?

Advisor-Pattie:

Under the USERRA regulations, an employer is required to re-employ an employee returning from military leave up to 5 years. (It may be longer in some instances.) ection 4312 (c) / 20 CFR 1002.99 - .103

"USERRA reemployment 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." <https://www.dol.gov/vets/pr...>

Advisor - Liz:

User the USERRA regulations, an employer is required to re-employ an employee returning from military leave up to 5 years. (It may be longer in some instances.) Section 4312(c)/20 CFRA 1002.99-1002.103

Comment From What resources are...

Can we require that the employee provide a copy of their orders?

Advisor - Karen:

The Uniformed Services Employment and Reemployment Rights Act (USERRA) does not make proof of orders to be provided to an employer as a requirement under the Act. However, when an employee receives their order, they are only required to provide their employers with verbal and/or written notification, when possible. Here is some guidance that addresses this concern.

U. S. Department of Justice (DOJ)

<https://www.justice.gov/usa...>

"Is the employee required to get permission from his or her employer before leaving to perform military service?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform military service. The employee is only required to give the employer notice of pending service."

"Is the reservist or National Guard member required to provide me a copy of his or her military orders, when he or she gives me notice of an upcoming period of service?

No. USERRA imposes no such requirement. We (ESGR) recommend that National Guard and Reserve personnel provide to their employers such documentation as is readily available. If you have any questions, you may call the member's commanding officer. If the member will not provide you that information, please call us (ESGR) at 1-800-336-4590." Source: <https://www.esgr.mil/Employ...>

Comment From Melissa

Does military school (attendance of former training school) count towards the 5 year limit associated with USERRA or is this an exception to the rule and treated like drill or annual training?

Advisor - Regan Gross:

Hello and thank you for your question. Training generally counts towards the 5 year limit, with some exceptions. See under Are there Any Exceptions to the ..the 5 year Limit : Service performed to fulfill periodic Guard and Reserve training requirements and includes service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining. This includes weekend drills and annual training. <https://www.esgr.mil/USERRA...>

Comment From Dianne

If an employee works the night shift from 10 pm to 6 am and has to report to military duty shortly after his shift ends, should the employer give him the night shift off and post military leave for the night shift or post his annual leave?

Advisor - Liz:

The DOL addresses the requirements for reinstatement that require an employer provide time for commute back from military service and an 8 hour rest period after the end of military service. Unfortunately the DOL does not address the requirement to provide time off prior to the start of military service as directly although there may be case law that has provided clarification. An employer may want to consider the health and safety of employees and may want to talk with legal counsel prior to requiring use of vacation or denial of leave.

JOB RIGHTS FOR VETERANS AND RESERVE COMPONENT MEMBERS

<https://www.dol.gov/vets/pr...>

Comment From Melissa

If someone goes out on military service leave and does not inform us in writing whether or not they want to continue health benefits, can we continue these without their written authorization?

Advisor - Nora:

Employers should review their procedures for continuation of coverage during military or other leave. The Department of Labor states below that organizations should establish reasonable procedures. You may want to consult an attorney for legal advice on your specific situation. Uniformed Services Employment and Reemployment Rights Act of 1994, As Amended [12/19/2005]

<https://www.dol.gov/vets/re...>

... "Sec. 1002.167 What actions may a plan administrator take if the employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an employee's continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage...."

Comment From WHAT benefits mus...

What benefits must we continue while on LOA and give them upon return?

Advisor - Theresa:

According to the SHRM resource to follow, entitlement to benefits can include health insurance and retirement plans as well as other benefits. See the section: Benefits Issues found

here: <https://www.shrm.org/resour...>

Comment From Brandi

Hi - Do drill & annual leaves count towards the cumulative 5 years

Advisor-Pattie:

Generally, drills do not count towards the USERRA's 5 years cumulative leave. "3. Required training for Reservists and National Guard members – Section 4312 (c) (3). The two-week annual training sessions and monthly weekend drills mandated by statute for Reservists and National Guard members are not counted toward the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development. Additional information on the 5 years of service can be found at this link under the heading "Duration of Service." <https://www.dol.gov/vets/pr...>

Comment From Melissa

I have employee that sometimes wants and voluntarily chooses to work intermittently during military service periods, if we allow them to do so voluntarily, does this violate USERRA?

Advisor-Bob:

Melissa, I am not aware of any provision of USERRA that would prohibit an employee from voluntarily performing work while an employee is on USERRA covered leave. The regulation would prohibit an employer from requiring an employee to perform work while on USERRA-covered leave or otherwise interfering with or retaliating against an employee who is on such leave.

Comment From Melissa

I understand that an employee needs to be given sufficient time to travel to the place where military duty is to be performed. However, if an employee asks off for a week or more prior to a military service period to prep for service, address personal obligations, etc. does this count as USERRA protected time? Is there a limit to the amount of time that they can request prior to service under USERRA?

Advisor - Regan Gross:

Hello Melissa. Thank you for your question. The DOL appears to have indicated that there is not a definitive time frame for time to prepare...it depends on the facts involved.

See: <https://www.dol.gov/vets/re...> "the Department received two comments suggesting this provision could be subject to abuse. One commenter suggested that the Department should restrict the time off to prepare for military service solely to travel or to a prescribed time period. The second commenter requested that the Department state that USERRA permits time off from employment to put one's affairs in order only immediately and seamlessly before the military service itself and not on an intermittent or periodic basis during the weeks prior to military service. The final commenter was more concerned that employees facing an extended period of military service are ensured an adequate period of time to prepare for service, so requested that the rule provide that an employee is entitled to a minimum of one week off from employment prior to service. The Department is averse to placing in this provision the limitations or specific time frames suggested by these commenters. The amount of time that an employee may need to prepare for military service will vary, and will depend on the facts of each case. In addition, employees may need intermittent time off from work prior to military service for brief but repeated periods to put their affairs in order, and such periods may be necessary to, for example, interview child care providers, go to meetings with bank officers regarding financial matters, or seek assistance for elderly parents. Although the Department is disinclined to include the commenter's

limitations in section 1002.74, the Department has revised the text of the provision to reflect that the duration of the military service, the amount of notice supplied to an employee called to military service, and the location of the service are all factors that influence the amount of time an employee may need in order to rest and/or put his or her affairs in order."

Comment From Are we required to...

Are we required to accrue PTO hours for an employees out on military leave?

Advisor - Theresa:

According to the Justice Department resource to follow, an employee is not entitled to accrue PTO while on military leave.

Source: <https://www.justice.gov/sit...>

Does an employee accrue vacation or medical/sick days from the employer while on military leave of absence?

No. However, as in the previous question, an employer may choose to offer accrual of vacation or medical/sick days as an additional benefit. An employer is not required under USERRA to provide any paid benefit when an employee is not working at the worksite.

Comment From Brandi

If the employee is in a "probationary period" of employment where they would normally not be able to utilized accrued vacation under USERRA do we have to allow them the option to utilize their time before they would become eligible under other policies?

Advisor - Regan Gross:

Hello Brandi and thank you for your question. There is not a requirement to make an exception to an employer's paid time off eligibility provisions during a probationary period, unless an employer does so for other situations. In other words, an employer would need to treat military servicemembers the same in what exceptions they may make to their PTO eligibility provisions.

Comment From Natalie

following up to the employee resign question - so it does not matter if the employer designates the leave or not like FMLA/CFRA....just that if someone seeks reemployment coming back from the military that we follow USERRA guidelines?

Advisor-Pattie:

As outlined in the Q&A, an employee is protected under the USERRA and may still be eligible for re-employment rights even if they resigned. An employee does not forfeit any rights under the USERRA based on a resignation to perform military duties. An employer would not need to designate a leave under USERRA as it generally would under FMLA/CFRA. <https://www.shrm.org/resour...>

Comment From Jo Ann

The regulations state the job should be held for a period of 5 years for all military service. Is that from the date employee started employment or following the date of the first deployment?

Advisor - Liz:

According to the regulations the five year limit is cumulative of military leave. For example an employee who takes leave for one year and then returns to work and takes another 6 months two years later would have 1.5 years of military service unless the time is one of the exceptions. The five year duration of service is actual time in military service. See page 3 at <https://www.dol.gov/vets/wh...>

Comment From Jennifer

Regarding notification requirements, can an employee wait until just days prior to military service to notify the employer or are there time notification requirements?

Advisor - Theresa:

According to the Justice Department resource to follow, an employee should give as much notice as possible but a specific time frame is not required.

Source of the following: U. S. Department of Justice (DOJ)

<https://www.justice.gov/sit...>

see pg. 20 Is prior notice to the employer required for leave of absence for military duty?

Comment From angelica

Are employers required to continue paid leave accruals while the employee is on an unpaid military leave?

Advisor-Pattie:

Generally, an employee should be reinstated with benefit accruals the same as if an employee had not been out on a leave of absence. Leave Benefits: Military: How must benefits be reinstated for an employee returning from a long-term military leave?<https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/militaryleavebenefitsreinstatement.aspx>

In addition to what I mentioned above, below is additional information that may be helpful.

According to the Justice Department resource to follow, an employee is not entitled to accrue PTO while on military leave.

Source: <https://www.justice.gov/sit...>

Does an employee accrue vacation or medical/sick days from the employer while on military leave of absence?

No. However, as in the previous question, an employer may choose to offer accrual of vacation or medical/sick days as an additional benefit. An employer is not required under USERRA to provide any paid benefit when an employee is not working at the worksite."

Comment From Guest

Are we required to accrue PTO hours for an employees out on military leave?

Advisor - Liz:

"Does an employee accrue vacation or medical/sick days from the employer while on military leave of absence?

No. However, as in the previous question, an employer may choose to offer accrual of vacation or medical/sick days as an additional benefit. An employer is not required under USERRA to provide any paid benefit when an employee is not working at the worksite. " Source: <https://www.justice.gov/sit...>

Comment From Anthony

According to USERRA there is a 5 year limit on active duty that an employer needs to honor. However, there appers to be an exception to this if the deployment or mobilization is in support of certain contingency operations. Meaning there could be more then 5 years away from the employer. Is this correct?

Advisor - Karen:

There are certain military duties that are not applicable to the 5 – year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA), therefore, there can be some circumstances where an employee’s service may exceed that limit. Here is some guidance that speaks to this topic that you may find helpful.

U.S. Department of Labor (DOL) - Exceptions to the Five-Year Limit

<https://www.dol.gov/vets/vm...>

See page 7: <https://www.justice.gov/sit...>

Five-year limit Exception.

USERRA sets a cumulative limit of 5-years on the amount of military leave you can perform and retain reemployment rights with a given employer. If you get a new employer, you get a new 5-year limit.

Exceptions to the 5-year limit:

Drills (inactive duty training), annual training, involuntary active duty extensions (including training certified as necessary by your service), and recalls due to a war or national emergency are not counted in the 5-year cumulative total.

Comment From Chrystal H

Once an employee returns from military leave, how quickly does the employer have to begin 401(k)/Retirement catch-up contributions? Is there a requirement to reach out to the employee to inquire whether they want to take advantage of this benefit?

Advisor - Nora:

I was unable to locate any requirement, but it is practical for organizations to inform an employee. Here is information on 401(k) catch up contributions: The Internal Revenue Service

(IRS)<https://www.irs.gov/retirem...> How long does an employer have to make these makeup contributions? (use the link for additional guidance on this topic.) How to Develop and Administer Military Benefits

<https://www.shrm.org/Resour...> Employees are entitled to all accrued pension benefits they would have received had they continued to be employed. This requirement applies to defined benefit pensions, defined contribution plans and profit sharing plans, as well as to single-employer and multiemployer plans. The employer is not required to continue to make contributions to the employee's 401(k) plan while the employee is deployed on military service. Although, no later than 90 days after the date of re-employment, the employer must make up any contributions attributable to the employee's period of service "unless it is impossible or unreasonable to do so, and then the employer must make the contributions as soon as practicable."

Likewise, employees can make up their 401(k) plan contributions over a period of time equal to three times their periods of service or five years, whichever ends first. The employer is obligated to make matching contributions based on these catch-up contributions. Also, an employee on active duty may designate an individual, such as a spouse, with power of attorney to authorize changes in investment allocations, participant loans and hardship withdrawals to the 401(k) or other defined contribution plan."

This is from the IRS on 401(K) catch up rules, unfortunately the IRS website is not currently working on this source -<https://www.irs.gov/retirem...> . The Knowledge Center can provide more information to provide further guidance as copyright rules will not allow Live Chat to provide here.

Comment From Rae

At our company, for a salaried employee, who has reservist duty during the week it is our policy that since they weren't physically here they are not to get their salary pay in addition to their military pay. What items off the LES should we be looking at, to deduct from their pay when we are figuring out the difference in pay?

Advisor-Bob:

Unfortunately, this is a difficult question to answer in this forum. Here is a resource from the Defense Finance and Accounting Service that speaks to this topic. You may also wish to contact the SHRM knowledge center for additional assistance with this inquiry. Here is the resource found: <https://www.dfas.mil/milita...>

Comment From Brandi

If state laws require that you pay the protected employee up to so many days annually then this would trump federal law that has no requirement to pay the employee, correct?

Advisor - Theresa:

Generally, an employer must comply with both state and federal law, if applicable. Generally, the law with the greater benefits for employees will be applied. To get more specific guidance on the state requirements, please contact the SHRM Knowledge Center.

Comment From Daniece

How should matching retirement plan contributions be handled when the deployed employee isn't paid, therefore doesn't make a contribution that the employer can match? Thank you.

Advisor - Nora:

According to the SHRM resource provided below, employers do not need to make a matching contribution until an employee has made a contribution. There is however, a catch-up provision applied when an employee returns from military leave with a timeline to do so for both employee and employer - see below: How to Develop and Administer Military Benefits <https://www.shrm.org/Resour...>

"Likewise, employees can make up their 401(k) plan contributions over a period of time equal to three times their periods of service or five years, whichever ends first. The employer is obligated to make matching contributions based on these catch-up contributions."

Comment From Krietia

Hi! We have an employee that just returned from 18 months of deployment 2 weeks ago. We didn't have a position open in the same department that they left at the time that they returned, so we put them in a department that they had previously worked in prior to leaving. We of course put them same rate of pay. There is a very good possibility that there is going to be an opening in the next 2 months in the department they left (due to an internal position being filled) and have already expressed interest in returning to that department. As the employer, am I obligated to place them in that position or would they need to reapply the same as everyone else?

Advisor-Pattie:

Generally, USERRA requires an employer to return an employee to the same position an employee held prior to military leave, even if a position was filled by another individual. Under the regulations, an employer would also have an obligation of preparing an employee returning from military leave to return to a re-employment position. Unfortunately, the regulations do not specifically address this particular situation, but I hope the following is helpful when making a decision in this situation. "20 CFR 1002.192

Legal Trends <https://www.shrm.org/hr-tod...> "Be careful not to apply this exception too expansively. The regulatory preamble is clear that an employer cannot lawfully fail to reinstate an employee solely by showing that it hired another person to fill the veteran's vacated position—even if reinstatement requires terminating the replacement employee."

Qualifying for the Reemployment Position 20 CFR 1002.198 Employers must make reasonable efforts to qualify a returning service member for the reemployment position. Employers must provide refresher training, and any other training necessary to update a returning employee's skills so that he or she has the ability to perform the essential tasks of the position." Source: <https://www.dol.gov/vets/pr...>

Comment From Brandi

If an employee is out on USERRA leave and doesn't pay their health premiums is their a requirement on how long they have to pay or does the employer have an termination of benefit rights?

Advisor - Theresa:

According to the regulations, "(c) Election of continuation coverage

without timely payment: Health plan

administrators may adopt reasonable

rules allowing cancellation of coverage

if timely payment is not made. Where

health plans are covered under COBRA,

it may be reasonable for a health plan

administrator to adopt COBRA compliant

rules regarding payment for

continuing coverage, as long as those

rules do not conflict with any provision

of USERRA or this rule" see pg. 75306 § 1002.167

What actions may a plan

administrator take if the employee does not

elect or pay for continuing coverage in a

timely manner? found here: <https://www.dol.gov/vets/re...>

Comment From If an employee is ...

When the employee returns from service and back to work, are we obligated to return them to the exact same position they had when they left?

Advisor - Nora:

There are some exceptions to the reinstatement to the exact position as noted below:

see the section called "Re-Employment"

Managing Military Leave and Military Family Leave

<https://www.shrm.org/resour...>

U.S. Department of Labor (DOL)

<https://www.dol.gov/vets/pr...>

"Escalator" Position

20 CFR 1002.192

"The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, depending on economic circumstances, reorganizations, layoffs, etc., the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status. In other words, the

escalator can move up or down"

Leave Benefits: Military: Can we lay off an employee who is on military leave under USERRA?

<https://www.shrm.org/resour...>

Comment From Meghan

What is the best practice for handling an employee review if they have been on a voluntary military training for 10 out of 12 months?

Advisor - Regan Gross:

There isn't an exception for situations where an employee only worked a short duration of time, unfortunately. Employers are generally required to only consider actual employment time aside from protected leaves of absence. The time spent on military related leave may in no way adversely affect a performance review.

Comment From Kelly

To determine how much we owe to the employee for a differential, we use the appropriate branch's compensation chart that is based rank and years of service. Is this appropriate?

Advisor-Bob:

Hi Kelly. I am sorry, but we cannot declare that a given method for paying a differential is appropriate or not, per se. In general, paying a supplement or differential for military pay is voluntary on the part of an employer, although it may also be required by a collective bargaining agreement or other employment contract. So, in general, unless some method is required, an employer has discretion to determine how it will compute the differential pay amount. In addition to the method you mention above, some employers also base the differential on information on an employee's Leave and Earnings Statement for the military service period.

Comment From Is an employer obl...

Is an employer obligated to reinstate the employee if he/she has been away for over 3 years

Advisor - Regan Gross:

Generally speaking, USERRA requires reinstatement in employment if military related leave has been less than 5 years. See the guide below starting with Reporting Back to Work

at <https://www.dol.gov/vets/pr...>

Comment From Shannon

Is there a list of Military Orders that do not count towards the 5 Years? It can be difficult sometimes to determine which instances of Military leave count towards the five years and which do not. Can you clarify or provide a list of the orders that do no count towards the five years?

Advisor - Theresa:

There are eight exceptions to the five year rule. They are listed in the resource below: Duration of Service Section 4312 (c) / 20 CFR 1002.99 - .103 <https://www.dol.gov/vets/pr...>

Comment From Meghan

What resources are available to employers if we feel there is abuse of military time? For example, an employee's drill schedule changes constantly and with little notice.

Advisor - Liz:

Unfortunately for drills and training that are scheduled for less than 30 days, an employer cannot require an employee provide documentation of military service. Due to the nature of the military service an employer may not be in the loop and therefore unable to confirm the needs of the unit or service, but an employer can require prior notice as timely as possible. Unfortunately I was unable to locate a resource that addresses military leave abuse head on. You may want to talk with legal counsel for advice on how to handle a particular situation to avoid the potential of violating an employees rights under the law.

Comment From Can you provide cl...

Can you provide clarification regarding a resigning employee and reemployment rights? As an employer, why wouldn't we place the military member on leave instead of a separation?

Advisor - Karen:

Generally speaking an employee who resigns to join the military retains all the same reinstatement rights as other employees on military leave. Here is some guidance that speaks to this concern that I hope is helpful to you.

Leave Benefits: Military: If an employee voluntarily resigns to join the uniformed service, does USERRA still apply?

<https://www.shrm.org/resour...>

U. S. Department of Justice (DOJ)

<https://www.justice.gov/usa...>

v See page 4

What is the employee's status with his or her civilian employer while performing military service?

Comment From Jo Ann

Is the five year requirement to hold a job based on the employee's first deployment or the most recent one?

Advisor - Nora:

The 5 year requirement is based on cumulative years with the same employer that can include various military deployments as noted below:

Are there exceptions to the Five – Year Limit Rule?

See page 7: <https://www.justice.gov/sit...>

"Five-year limit Exception.

USERRA sets a cumulative limit of 5-years on the amount of military leave you can perform and retain reemployment rights with a given employer. If you get a new employer, you get a new 5-year limit.

Exceptions to the 5-year limit:

Drills (inactive duty training), annual training, involuntary active duty extensions (including training

certified as necessary by your service), and recalls due to a war or national emergency are not counted in the 5-year cumulative total."

Comment From Brittany

When military employees return from leave after 6 months, we only waive the waiting period for medical, dental, vision benefits. Should we also waive the waiting period for others such as short term disability and life insurance?

Advisor-Pattie:

While the USERRA regulations do not specifically address each benefit individually, an employer may need to determine if other benefit waiting periods should be waived based on the following excerpt: "Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed." <https://www.dol.gov/vets/pr...>

Comment From Natalie

My question was about the designation of the leave...FMLA/CFRA requires designation...is it the same for USERRA?

Advisor-Pattie:

Generally, there are no requirements under USERRA for an employer to designate military leave under USERRA as it would under FMLA/CFRA.

Comment From SwRI

Are there any disciplinary options available to an employer if they suspect misuse of military leave?

Advisor - Liz:

As stated in my response at 3:05 to Meghan, this law is very employee friendly. Generally an employer will want to tread carefully and obtain legal advice prior to taking any disciplinary action against an employee due to their military leave request to avoid USERRA discrimination or retaliation claims.

Comment From Karen

In reference to the documentation not being required, can we require benefit documentation to drop their coverage?

Advisor - Theresa:

Unfortunately, I am unable to find any resources indicating an employee can be required to provide benefit documentation to drop coverage. Therefore, you may consider consulting with legal counsel for clarification. You can find the regulations related to health insurance on pg. 75305 found here: <https://www.dol.gov/vets/re...>

Comment From Catherine

The USERRA 5 year rule does not start over regardless of how many years the employee has been with the company. For instance, if an employee has been with a company for over 15 years and their

cumulative leave is reaching or has reached the 5 year mark, they are no longer protected under USERRA when they pass that 5 year mark. Is that correct?

Advisor - Theresa:

I was not able to locate a reference to long term employees and any roll off of the cumulative time. USERRA provide a five year limit of leave with the same employer but there are a few exceptions as indicated in the Justice department resource to follow.

U.S. Department of Labor (DOL)

<https://webapps.dol.gov/ela...>

"USERRA establishes a five-year cumulative total of military service with a single employer, with certain exceptions allowed for situations such as call-ups during emergencies, reserve drills, and annually scheduled active duty for training. USERRA also allows an employee to complete an initial period of active duty that exceeds five years."

Comment From if an employee is ...

if an employee is on military leave during a promotional process, and the employee who is on leave would have been able to test for said promotion, do you as the employer have to hold another promotional process once they return specifically for that employee?

Advisor-Bob:

Thank you for this question. Unfortunately, we are not able to address a specific circumstance such as this.

Even if we could, we may not be able to provide an answer that would always apply in every circumstance. The best answer that we can provide is the guidance that is provided in Act:

USERRA

A Guide to the Uniformed Services

Employment and Reemployment Rights Act

<https://www.dol.gov/vets/pr...>

See - Reemployment Position

"Escalator" Position

Qualifying for the Reemployment Position 20 CFR 1002.198 Employers must make reasonable efforts to qualify a returning service member for the reemployment position. Employers must provide refresher training, and any other training necessary to update a returning employee's skills so that he or she has the ability to perform the essential tasks of the position."

Comment From Keri C.

We have a National Guard employee who regularly misses payroll reporting deadlines (due to deployments) AND does not accurately record their work time on when they DO. What is our obligation to pay that person for unreported time? So far, we pay the employee if/when they report their hours.

Advisor-Pattie:

Under FLSA regulations, an employer is required to pay an employee for all hours worked, even if an employee is not recording work time according to company policy. An employer may discipline an employee for not following time reporting rules. Here's a resource that may be helpful. Can we hold a paycheck from an employee because he didn't turn in his timesheet? If not, how can we discipline this employee?<https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/holdingpaychecks.aspx>

Comment From if the companies p...

if the companies policy is to pay them for the first 30 days deployed. do you count that or do you consider it a benefit and not apart of the pay adjustment

Advisor - Theresa:

I hope I understand your question correctly. Many employers will count all eligible USERRA leave towards the five year limit to include employer paid USERRA leave.

Comment From Brandi

Does a covered employee get to forego all benefit premiums while on leave and then make up the premiums when they return?

Advisor - Liz:

During military leave an employee must be offered a COBRA-like continuation of benefits for military leaves of more than 30 days. If an employee does not select benefit continuation they are not obligated to continue to pay an employee's portion of premiums during military leave. But reinstatement of benefits must be on the day an employee returns from military leave (not the beginning of the next month).

Must an employer continue health care benefits for employees on military leave?

<https://www.shrm.org/Resour...>

Comment From Mellisa

How do we count the 5 years if they have a break in service? We had an employee that left and then was re-hired.

Advisor - Nora:

Generally, an employee has a cumulative total of 5 years of protected leave with the same employer. I was unable to locate any specifics to rehire situations and you may want to consult an attorney for further guidance.

Managing Military Leave and Military Family Leave

<https://www.shrm.org/resour...>

"The employee must not exceed five years of military leave with any particular employer (some exceptions apply). Annual training and monthly drills do not count against the cumulative total."

Comment From WHAT benefits mus...

Please clarify, we cannot ask for their "orders" when called to military duty or reserves?

Advisor - Karen:

It seems that a military employee is not required to provide proof of service when leaving to perform military duties under the Act. Here is some guidance that speaks to this topic.

Is the reservist or National Guard member required to provide me a copy of his or her military orders, when he or she gives me notice of an upcoming period of service?

No. USERRA imposes no such requirement. We (ESGR) recommend that National Guard and Reserve personnel provide to their employers such documentation as is readily available. If you have any questions, you may call the member's commanding officer. If the member will not provide you that information, please call us (ESGR) at 1-800-336-4590. Source: <https://www.esgr.mil/Employ...>

Comment From What benefits mus...

I know this is off subject but can you tell me how long this chat/blog with SHRM has been around? I never saw it before. thanks.

Advisor - Amber:

We held the Advisor live chats several years ago and recently reinstated them in 2017. They are typically held monthly however invitations to the live chats are not always sent to everyone. There are times where we may hold one specific to employers with employees based in California or we may hold one specific to non-SHRM members, for example.

Comment From Kim

If it is the companies policy to pay their salary for 30 days after deployment. Is that considered part of the companies benefit and should not be included in the payment calculations upon their return.

Advisor - Liz:

Kim, this seems like a unique question which needs a little more clarify prior to being able to respond, please contact the SHRM Knowledge Center directly at shrm.org/hrhelp for assistance with your question.

Comment From WHAT benefits mus...

Please confirm, you say that healthcare must be picked up the day the person returns. I do not see that reference in your link to the SHRM site. Can you point it out? thanks so much. "But reinstatement of benefits must be on the day an employee returns from military leave (not the beginning of the next month)."

Advisor - Karen:

According to the U.S. Department of Labor (DOL), health insurance coverage must be reinstated without any waiting period upon return from military duty. Here is guidance that speaks to this topic that you

may find helpful.

U.S. Department of Labor (DOL)

<https://webapps.dol.gov/ela...>

“On return from service, health insurance coverage must be reinstated without any waiting period or exclusions for preexisting conditions, other than waiting periods or exclusions that would have applied even if there had been no absence for uniformed service. This rule does not apply to the coverage of any illness or injury determined by the Secretary of Veterans' Affairs to have been incurred in, or aggravated during, performance of service in the uniformed service. See 20 CFR Part 1002.168.”

U.S. Department of Labor (DOL)

<https://webapps.dol.gov/ela...>

Health and pension plan coverage for servicemembers is also addressed by USERRA. Individuals performing military duty of more than 30 days may elect to continue employer sponsored health care for up to 24 months; however, they may be required to pay up to 102 percent of the full premium. For military service of less than 31 days, health care coverage is provided as if the servicemember had remained employed.

Comment From WHat benefits mus...

Thank you for clarifying the benefit wait period! This is helpful. When does this session end?

Advisor - Amber:

The session ended at 3pm ET. If you have any further HR-related questions and you are a SHRM member, please contact our Knowledge Center at 800.283.7476 or visit us at "HR Help" in the upper right-hand corner of www.shrm.org.