

USERRA

OVERVIEW

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”)¹ is a federal law that provides broad reemployment rights to employees leaving civilian employment, in either the private or public sector, for “duty” in the “uniformed services.”

USERRA protects all employees including part-time, seasonal, and temporary employees for absences to perform voluntary and involuntary duty, including active duty, training, weekend drills and fitness-for-duty examinations. USERRA does not apply to independent contractors.

Employees performing military service are considered to be on statutory leave of absence and have the same rights accorded by the employer to employees on mandatory leave for other purposes.

DUTY REQUIREMENT

The “duty” requirement includes voluntary and involuntary active duty, active duty for training, initial active duty for training, inactive duty training, and full-time National Guard duty. It also includes any absence needed for an examination to determine whether a person is fit to perform military duty.

UNIFORMED SERVICES

The “uniformed services” are the Army, Navy, Air Force, Marine Corps, Coast Guard, and their reserves; the Army and Air National Guards, including periods of training; the Public Health Service commissioned corps; and other categories designated by the President in times of emergency.

Effective since 2022, the “CREW Act²” extended employment protections under USERRA to Federal Emergency Management Agency (FEMA) reservists who deploy to major disaster sites.

PROTECTIONS

USERRA also protects returning veterans from discharge without cause for a period of time after reemployment:

- ❖ Veterans with less than 31 days of military service do not have protection against discharge without cause, but like other returning veterans, they are protected from discrimination based on military service or a continuing service obligation.
- ❖ If the returning veteran’s military service lasted between 31 and 180 days, the veteran may not be terminated without cause for 180 days after the date of reemployment.
- ❖ If the veteran’s period of military service was more than 180 days, this protection applies for one year after reemployment.

¹ [USERRA](#)

² [CREW Act](#)



NOTICE TO EMPLOYER

Employees must provide employers advance written or oral notice of their need for military leave. Additionally, employers cannot require specific written orders for active duty; the advance notice can be written or oral in no particular format. USERRA does not specify how much notice must be given. Notice is not required if military necessity prevents the giving of the notice, or it would be unreasonable or impossible to give the notice.

REEMPLOYMENT RIGHTS

In general, USERRA eligible employees have the right to be reemployed to their civilian job if they leave that job to perform service in the uniformed service and the employee:

- ❖ Has five years or less of cumulative service in the uniformed services while with that particular employer;
- ❖ Gives their employer advance written or verbal notice of their service;
- ❖ Return to work or apply for reemployment in a timely manner after conclusion of service; and
- ❖ Has not been separated from service with a disqualifying discharge or under other than honorable conditions.

If the employee is eligible to be reemployed, they must be restored to the job and benefits they would have attained if they had not been absent due to military service or, in some cases, a comparable job.

5 Year Duration

Reemployment rights apply only to veterans whose cumulative period of uniformed service does not exceed five years while employed by the same employer. However, in computing the cumulative five-year period, employers may not count time spent in National Guard and reservist training.

Furthermore, employers may not count involuntary extensions of service that result from the following:

- ❖ An order to remain on active duty because of a war or national emergency (unless the extension is for training);
- ❖ The veteran's inability to obtain release orders before expiration of the five-year period through no fault of their own;
- ❖ An obligation to complete an initial period of service that is beyond five years;
- ❖ An order to fulfill additional training requirements certified in writing by the Secretary of Defense;
- ❖ A call into federal service as a member of the National Guard; or
- ❖ An order to active duty, as determined by the Secretary of Defense, in support of certain operational or critical missions.

Moreover, to be eligible for reemployment rights, an employee must leave work for the purpose of undertaking duty in the uniformed services. An employee rejected for military service will have reemployment rights. An employee who quits and later decides to enter the uniformed services, however, may not have reemployment rights.



Notice to Employer for Reemployment

On completion of the period of military service, the returning veteran must notify their pre-service employer that they intend to return to employment. The length of time that the veteran has to contact the employer depends on the amount of time spent in service, as follows:

- ❖ Service of 30 days or less.
 - The returning veteran must report to the employer on the first full regularly scheduled work period on the first full calendar day following completion of the service, plus eight hours. If it is impossible or unreasonable for the veteran to report within that period through no fault of their own, the veteran must report as soon as possible. This reporting period also applies to an employee who is absent from work for an examination to determine their fitness for military service.
- ❖ Service of 31 to 180 days.
 - The veteran must apply for reemployment no later than 14 days after military service ends, or, if it is impossible or unreasonable for the veteran to report within that period through no fault of their own, on the next calendar day on which it is possible.
- ❖ Service of more than 180 days.
 - The returning veteran must apply for reemployment within 90 days of the end of the military service.
- ❖ Service-incurred or aggravated injury.
 - If the returning veteran is hospitalized for, or convalescing from, an illness or injury that was incurred in or aggravated by the period of service, the above reporting deadlines may be extended for up to two years for any period of recovery.

Status Upon Reemployment

USERRA requires that any veteran who receives a certificate showing satisfactory completion of military service must be restored to their previous employment. The type of position to which the veteran must be reinstated depends on the period of service and on the veteran's abilities at the time of reinstatement. The following time frames apply:

- ❖ Service of 90 days or less.
 - The veteran must be reemployed in the position the veteran would have held if the veteran had continued in employment without interruption for military service, as long as the veteran is qualified for that position. If the veteran would have been promoted if they had continued in employment but cannot be qualified for that new position after reasonable efforts by the employer, the veteran may be employed in the position the veteran held when military service began.



- ❖ Service of 91 days or more.
 - The veteran must be reemployed in the position the veteran would have held except for the interruption for military service, or in a position of like-seniority, status, and pay, if qualified for that position. If the veteran would have been promoted if they had continued in employment but cannot be qualified for either that new position or an equivalent one despite the employer's reasonable efforts, the veteran must be reemployed in the position the veteran held when the period of service began or in a position of like-seniority, status, and pay.

- ❖ Veterans who cannot be qualified for the job.
 - If the veteran cannot be qualified for the job the veteran would have held or the position the veteran formerly held after the employer's reasonable efforts, and their inability to qualify is not related to a service-incurred or aggravated disability, the veteran must be reemployed in any position of lower status and pay for which the veteran is qualified, but with full seniority.

- ❖ A disabled veteran whose disability was incurred or aggravated by military service. If after reasonable accommodation by the employer, they still cannot perform the job they would have held, the disabled veteran must be reemployed in:
 - any other position of equivalent seniority, status, and pay for which the veteran is qualified or could become qualified through the employer's reasonable efforts; or
 - in the nearest approximation to an equivalent position consistent with the veteran's circumstances.

- ❖ Note that USERRA requires that returning veterans be "promptly reemployed." What is considered "prompt" generally depends on the circumstances of the case and how long the employee has been on military leave.

Nature of Discharge from Service

Reemployment rights are contingent upon satisfactory completion of duty in the uniformed services. A discharge, or release from service, characterized as "honorable," "general" or "under honorable conditions" is considered satisfactory.

BENEFITS

Medical Benefits

Although employees on extended military leave usually receive individual and family benefits through federal programs, many service members wish to continue their employer-sponsored coverage. USERRA requires that employees on military leave be permitted to continue employer-sponsored coverage for themselves and their dependents for up to 24 months. Specifically,

- ❖ Employees on military leave of less than 31 days who choose to continue employer health benefits can be required to pay the regular employee cost of the benefit.
- ❖ For employees serving more than 31 days, this coverage resembles COBRA coverage, and employees cannot be charged more than 102 percent of the normal premium.



When service members are reemployed, their health coverage must be resumed as if no break in employment had occurred. There should be no lapse in coverage, and employers cannot impose waiting periods or exclusions on pre-existing conditions for returning employees or their dependents.

Pension Benefits

When computing pension benefits, military leave counts as service with the employer. Pension plan accrual and vesting continue as if there had been no break in service. These requirements apply equally to defined benefit plans, defined contribution plans, and profit-sharing plans that reward length of service.

Retirement Benefits

Returning employees must generally be provided the same benefits and vesting status they would have had if continuously employed.

Oregon Family Medical Leave (OFLA) and Federal Family Medical Leave Act (FMLA)³

Under USERRA, active military leave counts as active employment in determining whether the employee has met the hours worked requirements of OFLA and/or FMLA.

If a reemployed service member was eligible for leave under OFLA prior to the date uniformed service began, OFLA's eligibility requirements are considered met.

Paid Leave

In 2023, the Ninth Circuit Court of Appeals held⁴ that USERRA may require employers to offer paid short-term military leave if they offer paid non-military leave for comparable short-term non-military absences. Accordingly, when Washington and Oregon employers have a USERRA request, they should consider the duration of the leave requested and review what paid leaves they offer to all employees. For example, if an employer offers a 30-day paid personal leave of absence, they should pay for 30 days of USERRA leave.

³ [839-009-0210](https://www.dhs.gov/839-009-0210); [FMLA Special Rules for Returning Military Members \(USERRA\)](#)

⁴ [Clarkson v. Alaska Airlines, Inc.](#)

