

**Uniformed Service Employment and Reemployment
Rights Act (USERRA) Frequently Asked Questions**
A Guide for Human Resources Specialist



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FREQUENTLY ASKED QUESTIONS

UNIFORMED SERVICES EMPLOYMENT AND EMPLOYMENT RIGHTS ACT (USERRA) OF 1994

Q1. What is USERRA?

A1. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was signed into law on October 13, 1994. The Act prohibits employment discrimination against persons because of their absence from their civilian employment due to military service or training in the Armed Forces Reserve, the National Guard, or other uniformed services. It protects the rights of Veterans, Reservists, National Guard members, and certain other members of the Uniformed Services.

Q2. If I am employed overseas, am I covered under USERRA?

A2. An employee covered by USERRA IAW Title 20, 1002.5(c) is any person who is a citizen national or permanent resident alien of the United States who is employed in a workplace in a foreign county by an employer that is an entity incorporated or organized in the United States, or that is controlled by an entity organized in the United States is covered.

Q3. Where can I find the USERRA regulations?

A3. USERRA regulations are located: 5 C.F.R. §1208-- Practices and procedures for appeals under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act; 5 C.F.R. § 353—Restoration to Duty from Uniformed Services of Compensable Injury; 20 C.F.R. § 1002 Regulations under the Uniformed Services Employment and Reemployment Rights Act of 1994; 38 C.F.R. Pensions, Bonuses and Veterans' Relief; and 38 U.S.C Veterans' Benefits.

Q4. Who is eligible for reemployment rights under USERRA?

A4. Civilian employees returning from uniformed service are eligible for reemployment if:

- they gave advance written or verbal notice of military training or;
- their cumulative service did not exceed 5 years;
- they were released from service under conditions other than dishonorable; and
- they report back to their civilian job in a timely manner.

Q5. Are there any exceptions to the five year limit?

A5. Yes, under title 38 U.S.C. 4312(c) there are specified types of service that do not count toward the 5-year limit such as obligated service, required training, involuntary service, support of a war, contingency, etc.

Q6. Do USERRA reemployment rights apply to voluntary military service?

A6. Yes, USERRA applies to voluntary as well as involuntary military service.

Q7. Do temporary and term employees have reemployment rights under USERRA?

A7. An employee on a time-limited appointment is entitled to finish out any unexpired portion of his or her appointment upon reemployment. The military activation period does not extend the civilian appointment
5 CFR 353 & 209(b).

Q8. What personnel action should I take when an employee is absent for military service?

A8. Unless the employee notifies you *in writing* that he or she does not intend to return after military service, you should place the employee on Absent – Uniformed Service.

Q9. Do I need to have written documentation of the employee's enlistment or call to active duty to process an Absent – Uniformed Service personnel action? Do I need proof of an enlistment contract or is the employee's word sufficient that they are entering military service?

A9. No. While it is appropriate to ask for a copy of the employee's orders, the employee's word must be accepted if that is all they can provide. Advance notice should be given as far in advance as is reasonable. Written documentation of service will be required before restoration (5 CFR 353.204).

Q10. How do I process personnel actions for an employee on Absent – Uniformed Service?

A10. Any time a personnel action normally would be due an SF-52 should be completed and filed on the right side of the OPF. Chapter 16 of the Guide to Processing Personnel Actions discusses the necessary actions to take to restore an individual to duty status. Table 16-A, Rule 2-3, explains how to process the restoration action and other actions that would have occurred while the individual was performing duty with the uniformed services.

Q11. While on Absent – Uniformed Service, an employee applied and was selected for promotion. What effective date should I use for the promotion action?

A11. When the individual is restored, you would process the promotion action with the same effective date that would have been used had the employee never left for uniformed service.

Q12. How are employees on Absent – Uniformed Service treated during a reduction in force?

A12. An employee on military duty is not a competing employee for reduction in force. He or she may not be separated or demoted except for cause. If the employee's position is abolished during his or her absence, you must reassign the employee to another position of like status and pay (5 CFR 353.209(a)).

Q13. When an employee asks for restoration, should I ask for proof that military duty was actually performed?

A13. Yes. In general, the following documents have been determined by the Secretary of Labor to satisfy proof of eligibility for reemployment: discharge papers, leave and earnings statements, school completion certificate, endorsed orders, or a letter from a proper military authority. However, reemployment may not be delayed if such documentation does not exist or is not readily available (5 CFR 353.206).

Q14. Is an employee whose discharge is characterized as “under other than honorable conditions” entitled to USERRA benefits and protections?

A14. USERRA protections do not extend to service members separated under other than honorable conditions, separated with dishonorable or bad conduct discharges, or commissioned officers dismissed or dropped from the rolls under title 10 U.S.C. 1161 (a) & (b) and title 38 U.S.C. 4304 (1) to (4).

Q15. One month ago it was five years from the date that an employee resigned to enlist in the military. He has just been discharged and has notified us that he wants to return to work. Is he still eligible for reemployment?

A15. If all of his service counts towards the 5-year limit, his eligibility has expired. However, certain types of service are excluded from the limit. You will need to subtract any periods of excluded service from the employee’s total service to determine whether he is still eligible for reemployment. Exceptions to the 5-year limit can be found at 5 CFR 353.203(a) and 38 U.S.C. 4312(c).

Q16. What is considered a timely return to work – are employees required to report back to work within certain timeframes?

A16. Generally, yes. The timeframes depend on the length of service and can be found in 5 CFR 353.205. After service of 181 days or more, the employee must submit an application for reemployment not later than 90 days after completion of the period of service. However, if reporting back within the deadline is impossible or unreasonable through no fault of the employee, he or she must report back as soon as possible. An employee who has been hospitalized or convalescent from a service-connected injury is allowed up to two years recovery time before reporting to duty.

Q17. Our employee did not report to work after discharge from military service within the timeframe established by USERRA. Has he forfeited his right to reemployment?

A17. If the required timeframes are not met, the employee does not automatically forfeit his right to reemployment, but is subject to agency established disciplinary policies and practices regarding absence from scheduled work (5 CFR 353.205(e)).

Q18. When an employee is returning from a military deployment of more than 180 days, do they have to notify us in writing prior to their ending date of their military orders that they plan to exercise the 90-day return rule?

A18. No, the employee does not have to advise the agency of his/her intent to exercise their restoration rights prior to the ending date of their military duty. Although the employee

should notify his/her supervisor of his or her plans to return as soon as possible, 5 CFR 353.205(c) provides 90 days for the employee to apply for reemployment.

Q19. I have a Defense Career Intern Program (DCIP) employee who plans on joining the reserves this summer and attending basic training and Officer's Candidate School. He estimates that it will take six months to complete. We understand that he will have restoration rights under USERRA. However, if he is gone for 6 months or more, it is very unlikely that he will be able to complete the training program in time to be converted as if he never left. Can we extend his DCIP appointment?

A19. Individuals may only hold a Federal Career Intern Program (FCIP/DCIP) appointment for 2 years. Extensions must be granted by OPM (5 CFR 213.3202(o) (2)). USERRA provides that individuals absent to perform uniformed service are generally entitled, upon restoration, to be treated as though they never left (5 CFR 353.107). Additionally, employees are entitled to be restored only for the unexpired portion of their time-limited appointment 5 CFR 353.209(b). If your DCIP program has very specific training requirements that the employee will miss and you are interested in allowing him to complete the program and training to be eligible for conversion, you will need to request an extension (through DCPAS) to cover the time he will be absent to perform uniformed service.

Q20. Where can I find more information about USERRA?

A20. The Department of Labor 's USERRA Advisor website, at <http://www.dol.gov/elaws/userra.htm>, provides information about employee eligibility and job entitlements, employer obligations, benefits and remedies under USERRA.

AN OVERVIEW OF BENEFITS UNDER USERRA

Civilian Federal employees who are members of the Uniformed Services and who are called to active duty military service (or volunteer for active duty) may be entitled to the following rights and benefits.

Q1. While in Absent – Uniformed Service to perform military service, will employees receive pay from their civilian employing agency?

A1. While in Absent – Uniformed Service status, employees performing active military duty will receive compensation from the Armed Forces in accordance with the terms and conditions of their military enlistment or appointment. They will not receive any compensation from their civilian employing agency *unless* they elect to use available military leave or annual leave.

Q2. When employees enter active military duty, what will happen to their accumulated annual leave?

A2. Employees who enter into active military duty may choose (1) use their annual leave or have it remain to their credit until they return from active duty, or (2) receive a lump-sum

payment for all accrued and accumulated annual leave. There is no requirement to separate to receive a lump-sum leave payment.

Q3. What are the provisions for an employee's health benefits coverage?

A3. Employees have immediate rights to reinstatement of coverage upon reemployment. Public Law 108-454 amended title 38 U.S.C. 4317(a)(1)(A) to allow employees who are covered by the Federal Employees Health Benefits (FEHB) Program and are called to active duty to continue their health benefits enrollment for a **total of 24 months** (as of December 10, 2004; prior to that it was 18 months). When the employee's military service is not in support of a contingency operation and he/she elects to continue FEHB coverage, the employee pays his/her share of the premiums and the agency is responsible for paying the government share for the first 12 months of coverage. Thereafter, the employee pays 102% of the full premium for the last 12 months. After the 24-month period, the employee is not entitled to Temporary Continuation of Coverage under the provisions of title 5 U.S.C. 8906(e) (3) (C).

P.L. 108-375 amended title 5 U.S.C. 8905a and title 5 U.S.C. 8906(e)(3) to allow agencies to pay both the employee's share and the government share of the FEHB premium for **up to 24 months** for employees called or ordered to active duty in support of a contingency operation on or after September 14, 2001, *if all* five of the following requirements are met: 1) the employee is enrolled in the FEHB program and elects to continue that enrollment; 2) the employee is a member of a reserve component of the armed forces; 3) the employee is called or ordered to active duty in support of a contingency operation as defined in title 10 U.S.C. section 101(a)(13), 4) the employee is placed on Absent – Uniformed Service or separated from service to perform active duty; and 5) the employee serves on active duty for more than 30 consecutive days.

Q4. What are the provisions for life insurance coverage?

A4. If an employee who is covered by the Federal Employees' Group Life Insurance (FEGLI) is placed in Absent – Uniformed Service or separates to perform military service in a nonpay status on the agency rolls, their FEGLI coverage will continue for **free up to 12 months at no cost** or until 90 days after military service ends whichever date comes first. Public Law 110-181, the Department of Homeland Security Appropriations Act authorizes the continuation of FEGLI coverage for up to 24 months for Federal employees who are called to active duty. However, the employee must pay both the employee and agency share of premiums for their Basic coverage, and pay the entire cost for optional insurance (there is no agency share) after the first 12 months.

Q5. Do employees retain their retirement benefits under USERRA?

A5. USERRA treats military time as if the employee had been continuously employed. An employee placed in Absent – Uniformed Service continues to be covered by the retirement laws. The period of military service is creditable subject to the normal rules for crediting military service (see section below on National Guard service). Death benefits will be paid as if he or she were still in the civilian position. If the employee becomes disabled during the Absent – Uniformed Service period and has the minimum amount of civilian service necessary for title to disability benefits (5 years for Civil Service Retirement System

(CSRS), 18 months for Federal Employees Retirement System (FERS)), the employee will become entitled to disability benefits under the retirement law. Upon eventual retirement from civilian service, the period of military service is creditable under either CSRS or FERS and subject to the rules for crediting military service. **In some cases it will be necessary to make a military deposit** for the period of military service in order for that period to be credited towards retirement eligibility and annuity computation.

If an employee separates to enter active military duty, he or she generally will receive retirement credit for the period of separation when the employee exercises restoration rights to his or her civilian position. If the separated employee *does not* exercise the restoration right but later re-enters Federal civilian service, the military service may be credited under the retirement system, subject to the normal rules governing credit for military service.

Q6. Is National Guard service creditable?

A6. Yes. USERRA covers National Guard duty performed under federal authority. Amendments to title 5 U.S.C. §§8331(13) make certain National Guard duty creditable.

The rules for crediting National Guard service (other than when ordered to active duty in the service of the U.S.) are that the service **MUST** meet all of the following conditions:

- It must interrupt civilian service creditable under CSRS or FERS
- Must be followed by reemployment in accordance with title 38 U.S.C. (chapter 43) that occurs on or after August 1, 1990;
- Must be full-time (and not inactive duty);
- Must be performed by a member of the Army National Guard of the U.S. or the Air National Guard of the U.S. in the member's status as a member of the National Guard of a state or territory, the Commonwealth of Puerto Rico, or the District of Columbia; and
- The individual must be entitled to pay from the U.S. (or have waived pay from the U.S.) for the service.

USERRA does not cover NG duty performed under state law (e.g., call-up by the Governor for a natural disaster).

*Note: Service in the National Guard (except when ordered to active duty in the service of the U.S.) **IS NOT CREDITABLE IF ANY OF THE ABOVE REQUIRMENTS ARE NOT MET.***

Q7. What are the provisions for using military leave?

A7. Under title 5 U.S.C. 6323(a), an eligible full-time employee accrues 15 calendar days of military leave each fiscal year. Employees who elect to use their 15 days of military leave will receive full compensation from their civilian position for each workday charged to military leave in addition to their military pay for the same period. Any unused military leave remaining at the end of the year, limited to 15 calendar days, is **carried forward** for use in addition to the 15 days credited at the beginning of the new fiscal year.

Under title 5 U.S.C. 6323(b), an employee who is a member of a Reserve Component or the National Guard and called to active duty in support of a contingency operation on and after October 23, 2003, is entitled to 22 days of military leave per calendar year. However, military leave under 6323(b) is subject to the provisions of title 5 U.S.C. 5519, which provides that military pay received for service for days on which civilian pay is also received must be offset.

Q8. Are employees entitled to use their accrued annual and sick leave?

A8. Employees who perform active military duty may request the use of accrued and accumulated annual leave to their credit. Requests for sick leave may be granted, if appropriate, under the normal requirements for such leave. Employees who use annual leave or sick leave will receive full compensation from their civilian position for all hours charged to annual or sick leave in addition to their military pay for the same period. Employees do not earn annual or sick leave while in an extended non-pay status.

Q9. Are post-56 military service deposits computed any differently under USERRA?

A9. Pursuant to title 38 U.S.C. (chapter 43), in any case where military service interrupts creditable civilian service and reemployment occurs **on or after** Aug 1, 1990, the deposit payable may not exceed the amount that would have been deducted and withheld from basic pay during civilian service if the employee had not performed the period of military service. In computing the amount of the military deposit, the agency must make two calculations (1) 3% or 7% of the military base pay, for FERS and CSRS respectively, and (2) an alternative calculation of what the CSRS or FERS employee contributions would have been for the civilian service had the individual not entered into the military. The employee's deposit is the lesser of the two. Employees should carefully review military deposit estimates provided by the personnel office. Interest begins to accrue yearly subsequent to a 2 year interest-free grace period. Employees can eliminate the additional interest cost of such a deposit by making the deposit during the interest free grace period.

Q10. What are the provisions for an employee's Thrift Savings Plan (TSP) under USERRA?

A10. For the purposes of the Thrift Savings Plan (TSP), **no** contributions can be made, either by the agency or the employee, for any time in an Absent – Uniformed Service status or for the period of separation. However, if the employee is subsequently reemployed or restored to a position covered by FERS or CSRS pursuant to title 38 U.S.C. chapter 43, they may make up missed contributions. FERS employees are entitled to receive retroactive Agency Automatic 1% Contributions, and retroactive employee contributions would be subject to applicable Agency Matching Contributions. An agency must give an employee at least two (not to exceed four) times the length of his/her military service to make up the contributions. The employee is allowed to contribute the maximum amount he/she would have been allowed to contribute, subject to statutory maximums. All TSP contributions must be made through payroll deductions. Lump sum payments or rollovers are not permitted.