

# Military Leave of Absence

## A suggested employer policy guide for military leave based on the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)

To receive technical assistance on your military leave policy, contact Veterans' Employment & Training Services (VETS).

### Disclaimer

The following is a suggested outline for an employer policy on military leaves of absences. This policy reflects changes codified in the Uniformed Services Employment & Reemployment Rights Act of 1994 (USERRA). USERRA provides protection to members of the Uniformed Services, including Active Military, Reserve, and National Guard. It also protects the job rights of those making application to become members of the Uniformed Services. This policy guidance is not intended to be all inclusive. To the extent that policy may conflict with Federal statutes, the provisions of USERRA prevail.

### Giving of Notice

Employees must provide advance notice of military service to employers. 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.

### Length of Absence

The cumulative length of absence of an employee to serve in the uniformed services, after December 12, 1994, may not exceed five years. Exceptions to the cumulative 5-year limit will be made for :

Service required beyond 5-years to complete an initial period of obligated service.

Service from which an employee, through no fault of the person, is unable to obtain a release within the 5-year period.

Required training for members of the National Guard and Reserves.

Service under an involuntary order to active duty, or to be retained on active duty, during a domestic emergency or national security related situations.

Service under an order to active duty, or to remain on active duty, during a war or national emergency declared by the President or Congress.

Active duty (other than for training) by volunteers supporting "operational missions" for which selective reservists have been ordered to active duty without their consent.

Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.

## **Return to Work**

A person whose military service lasted from 1 to 30 days must report to his employer by the beginning of the first regularly scheduled work day that would fall eight hours after the person returns home from military service. Military service includes reasonable time for travel to and from the place of service.

A person whose military service lasts from 31 to 180 days must make application for reemployment no later than 14 days after completion of the period of military service.

A person whose military service lasts more than 180 days must make application for reemployment no later than 90 days after completion of the period of military service.

## **Reemployment Position**

A person serving from 1 to 90 days will be reemployed in the position the person would have held had the person remained continuously employed, so long as the person is qualified for the position or can become qualified after reasonable efforts by the supervisor to qualify the person.

A person serving 91 days or more will be reemployed in (1) the position the person would have held had the person been continuously employed, or (2) a position of equivalent seniority, status, and pay, so long as the person is qualified for the position or can become qualified after reasonable efforts to qualify the person. If the person cannot become qualified in (1) or (2), the person will be reemployed in any other position of lesser status and pay that the employee is qualified to perform with full seniority.

Employers may request that a person, who was absent for a period of service of 31 days or more, document the period of military service to show that the application for reemployment was timely, the person has not exceeded the five-year limitation, and the person's character of service was honorable. Even if documentation is unavailable, the employer must reemploy the person. However, if documentation becomes available that indicates that one or more of the reemployment requirements was not met, the individual may then be terminated. Where a person was absent for 91 days or more, employers may delay making retroactive pension contributions until the person submits satisfactory documentation.

## **Rights of Reemployed Persons**

Benefits will be continued during a military leave according to applicable state and Federal regulations. Upon reemployment, persons are entitled to all seniority related benefits as if they had remained continuously employed. Service members will be provided all rights and benefits not based on seniority to the extent that those rights and benefits are available to other employees on non-military leaves of absence, whether paid or unpaid. If there is a variation among different types of non-military leave, the most favored treatment will be accorded the service member.

If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to non-seniority leave-of-absence rights and benefits. The employee must be aware of the specific rights and benefits to be lost. If the employee lacks the awareness or is otherwise coerced, the waiver will be ineffective.

Notice of intent not to return to work can waive only non-seniority leave-of-absence rights and benefits. Service members cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Service members will be required to pay the employee cost, if any, of any funded benefits to the extent that other employees on leave-of-absence would be required to pay.

## **Non-Discrimination**

USERRA prohibits discrimination against person who serve in the uniformed services. The law also prohibits acts of reprisal against service members and those who would testify or witness to discrimination against uniformed service members. Non-discrimination clauses of the statute cover persons who are members of, who apply to be members of, performs, have performed, applies to perform, or have an obligation to perform service in a uniformed service.

## **Health Benefits**

Persons who have coverage under a health plan in conjunction with the person's position of employment may elect to continue such coverage. The maximum period of coverage of the person and the person's dependants shall be the lesser of (1) the 18 month period beginning on the date on which the person's absence begins, or (2) the day after the date on which the person fails to apply for or return to a position of employment within the specified time-frames required by the statute.

A person who elects to continue health-plan coverage may be required to pay not more than 102 percent of the full premium under the plan. A person whose health plan was terminated by reason of service in the uniformed services may not be required to complete a waiting period for reinstatement of coverage following reemployment.

## **Compensated Military Leave (Optional)**

USERRA does not require employers to compensate employees who are performing military service. An employer may, however, elect to provide "compensated" military leave to employees performing military service. Some employers elect to compensate for the difference between the military pay and what the employee would have received had they not performed military service. Other employers elect to pay full compensation for a specified of military service, e.g., 30 days paid military leave per calendar year.

In those instances where employers elect to compensate for military leave, it is a common practice that the employee is required to request "compensated" military leave over and above accrued vacation time. The employee is expected to provide prior notice of impending military leave and to provide copies of military orders or other documents which will validate such leave.