



Final USERRA Rules Issued

The *proposed* regulations on the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) were published on September 20, 2004. The U.S. Department of Labor (DOL) has now *finalized* these rules which were made effective on **January 18, 2006**. The protections granted to uniformed service members through USERRA are basically three-fold:

1. Prohibition on **employment discrimination**
2. Grant of **reemployment rights**
3. **Benefit continuation rights**

Generally speaking, USERRA protects *any employee* who needs to be absent from civilian employment in order to serve in the country's uniformed services. This protection is extended regardless of how long the employee has been employed, the size of the employer or whether the employee is probationary, permanent, part-time or full-time. Following is a summary of the final regulations:

I. Employment Discrimination

USERRA protects employees from discrimination based on their *actual* or *potential* service in the military. As an employer, you may not deny initial employment, promotion, retention, or any other benefit of employment based on an individual's membership, application for membership, performance of service, or obligation for service in the military.

II. Reemployment Rights

Eligibility for Reemployment

Under the final regulations, a returning service member is eligible to be reemployed by your company provided that:

1. the employee was in uniformed service during their absence from your employment;
2. you, as the employer, received advance notice of the employee's uniformed service;
3. the employee had no more than five years of cumulative uniformed leave away from your employment;
4. the employee returns to work or applies for re-employment in a timely manner compliant with the final rules; and
5. the employee must not have received a disqualifying discharge or other-than-honorable separation from service.

Timing of Reemployment

USERRA generally provides that the eligible employee must be reemployed within 2 weeks of their application and must be reinstated to the position and pay the employee would have held if continuous employment hadn't been interrupted by their military service. Employees who have served 180 days or fewer must

generally seek reemployment within 14 days of their return from service. Employees who have served more than 180 days have 90 days to seek re-employment.

Terminations

USERRA also provides that employees returning from military service of between 31 days and 180 days duration can't be terminated from your employment, without just cause, for six months. If their military service exceeded 180 days, their protection from termination is extended to one year. The employer bears the burden of proving that the employee's discharge was reasonable. In addition to conduct-based discharge, the regulations do allow for terminations arising from other legitimate and non-discriminatory reasons, such as workforce down-sizing.

III. Benefit Continuation Rights

Terms of Coverage

If your employee's military leave is less than 31 days, they must be permitted to continue participation under your plan under the same terms and conditions as an active employee. If their leave exceeds 31 days, they may continue their coverage at the **102%** COBRA rate for **24 months**.

Dependent Coverage

Under USERRA, dependents do NOT have independent elections rights and can only continue coverage under your plan if the employee does so. Retirees and dependents covered under your plan who themselves are performing military service do NOT have any continuation rights under USERRA.

Coordination with TRICARE

Employees that enter military service can obtain coverage for themselves and their dependents under the military's TRICARE plan if they are serving at least 31 days. If the employee chooses to continue coverage under the employer's health plan, as well as TRICARE, the employer's plan will be the primary payer.

Administration of Continuation Coverage

The final USERRA regulations permit an employer to establish COBRA-like rules for termination of health coverage upon an employee's failure to elect continuation or failure to pay for that coverage. Such rules must permit *exceptions* to timely elections depending on the circumstances surrounding an employee's military activation and allow for retroactive reinstatement of benefits when the employee's deployment prevented the timely election. Employers are best served by adopting and documenting reasonable rules for electing and paying for USERRA continuation coverage based on when the employee's notice of service is given. These procedures should be detailed in the employer's summary plan description and employee handbook. An employer's failure to have written guidelines puts the employer at risk of having to reinstate an employee's coverage who is on military leave at any time during the 24 months.

Pension Benefits

USERRA provides that upon reemployment, employees must be treated as not having had a break in service for pension plan purposes including vesting and accrual of benefits for the period of absence. Employers are not required to make contributions until the employee is reemployed, but then must contribute no later than 90 days after the date of reemployment, or when plan contributions are normally due for the year, whichever is later. Employees are allowed to make up missed contributions or elective deferrals for up to three times the length of the absence, up to a maximum of five years. Employer contributions that are attributable to the employee's makeup contribution must be made according to the

plan's requirements for employer matching contributions. As with health care benefits, many employers will need to consult with benefits counsel before amending pension plans to comply with the new regulations.

IV. Notification - USERRA Poster

The DOL also published a final version of the notice that employers must post informing employees of their rights, benefits and obligations under USERRA. Posting on this notice in a common employee area will fulfill the employer's notification rights.

http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf

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