

**RE: Uniformed Services Employment and Reemployment Rights Act (USERRA)
Final Regulations***
FROM: Mary Ann Vitale
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On December 19, 2005, the U.S. Department of Labor (DOL), Veterans' Employment and Training Service (VETS), issued final regulations implementing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), as amended [20 CFR Part §§ 1002.1-1002.314 at 70 Fed. Reg. 75246 (12/19/05)]. The final USERRA regulations are effective as of January 18, 2006.

USERRA is a federal law that establishes employment and reemployment rights for employees who voluntarily or involuntarily leave their civilian jobs to perform military service. While USERRA covers a wide range of employment issues and benefits, this memorandum focuses primarily on USERRA's reemployment and retirement provisions.

BACKGROUND

In 1994, Congress enacted USERRA to protect the rights and benefits of military service members upon their return to civilian life and to prohibit discrimination by employers against veterans, members of the military services and applicants for military service. Military service includes service within the five branches of the U.S. armed forces (Army, Navy, Air Force, Marine Corps and Coast Guard) as well as in the military reserves and the National Guard. Based on their military status, individuals are protected from discrimination in employment with regard to hiring, retention, promotion, reemployment, termination and benefits.

USERRA applies to all private and public sector employers, regardless of size, including foreign employers doing business in the United States.¹ Under USERRA, an employer is defined as "any person, institution, organization, or other entity that pays salary or wages for work performed, or has control over employment."² USERRA's protections are applicable to all employees including those who are full-time, part-time, seasonal, laid off, on strike, or on leave of absence (but excludes independent contractors since they are not considered employees).

FINAL REGULATIONS

Earlier USERRA guidance covered the specific rules related to pension benefits for returning military service members. Overall, the final regulations differ only slightly from the proposed regulations, but provide comprehensive guidance in a question-and-answer format on significant employer and employee obligations and rights under USERRA. In addition to protection from discrimination based on military service, employees who leave work to serve in the military have two sets of rights:

- 1) military leave rights; and
- 2) reemployment rights (including rights to health care and retirement benefits).

It is important to note that USERRA does not preempt more generous state laws. USERRA establishes a minimum standard for employment and reemployment rights and supersedes any state or local law, contract, agreement, policy, plan, or practice that reduces, limits or eliminates any right or benefit provided under USERRA. However, USERRA does not supersede any law, contract, etc., that is more beneficial to affected plan participants or is offered as an additional benefit not provided under USERRA.³

^{*}The author of this memorandum is not an attorney and the information provided is not intended as legal advice or opinion. Governmental employers and retirement plan officials should consult with qualified legal counsel to ensure compliance with applicable laws and regulations.

¹ Final Regs. Preamble indicates that USERRA applies to Native American tribal governments when they act as employers. However, application of the USERRA provisions to Native American tribal employers is complicated and heavily fact-dependent which, if raised in a USERRA proceeding, will be resolved by the courts on a case-by-case basis.

² Final Regs. Sec. 1002.5

³ Final Regs. Sec. 1002.7

Rights to Military Leave

Employers must grant military leave for service members, but do not have to provide paid military leave. Upon an employee's request, an employer must allow an employee to use any accrued vacation, annual or similar leave with pay during the period of service. However, the employee is not entitled to use accrued sick leave unless other employees on leave of absence are allowed to use accrued sick leave.⁴

Employees are not required to obtain permission from their employers before reporting for military service. However, to protect their rights under USERRA, employees are required to provide employers with written or oral advance notice of pending service within a reasonable time, although no specific period has been established. The advance notice requirement may be excused due to military necessity or facts and circumstances that would have made notice to the employer unreasonable or impossible.

During the period of military service, an employee is deemed to be on furlough or leave of absence from the employer. As such, the employee is entitled not only to the rights and benefits provided through USERRA, but also to rights provided by the employer to other employees who are on furlough or leave of absence. For example, under USERRA, vacation time accrual is considered to be a type of benefit that must be provided to employees on military leave, but only if the employer provides it to similarly situated employees on comparable leaves of absence.⁵

Rights to Reemployment and Benefits

An employee who returns from military service must be reemployed promptly in the same position that he or she would have attained if not for the intervening absence due to military service. The final regulations refer to this as the "escalator position."⁶ Under USERRA's escalator principle, the position must include the same status, pay, seniority and benefits (such as retirement, health and other benefits) that the employee would have attained "with reasonable certainty" if not for the period of military service.⁷

Notwithstanding the escalator principle, an employer is not required to reinstate a returning service member if the employee is not qualified for the reemployment position. "Qualified" means that the employee has the ability to perform the essential tasks of the position.⁸ However, the employer must make reasonable efforts to help the employee become qualified for the escalator position, pre-service position or nearest approximate position possible.⁹

A returning service member is eligible for reemployment if the following requirements are met:¹⁰

- 1) The employee must have been absent from a position of civilian employment (including employment with private employers as well as federal, state and local governments) due to uniformed service.
- 2) The employee must have provided the employer with advance notice ("as is reasonable under the circumstances") of military service.
- 3) The employee must have five years or less of cumulative military service during employment with the particular employer. If a service member changes employers, reemployment rights are retained for a full five years of uniformed service with the new employer. (The five-year threshold only includes actual service rather than time off prior to leave or a rest period upon returning from service.)
- 4) The employee must have received an honorable discharge from military service.
- 5) The employee must return to work or apply for reemployment on a timely basis, which varies depending on the employee's length of military service as indicated in Table 1 on page 3. Exceptions are allowed for a period of recovery due to injury, illness, or disability incurred during military service. However, this period may not exceed two years from the date of completion of

⁴ Final Regs. Sec. 1002.153

⁵ Final Regs. Sec. 1002.150

⁶ Final Regs. Sec. 1002.191

⁷ Final Regs. Sec. 1002.191

⁸ Final Regs. Sec. 1002.198

⁹ Final Regs. Sec. 1002.196-197

¹⁰ Final Regs. Sec. 1002.32

military service (except in circumstances beyond the employee's control). The time spent recovering is included in the continuous service with the employer.

Table 1

Length of Military Service	Time Frame to Report to Work or Submit Reemployment Application after Completion of Military Service¹¹
Less than 31 days	Next work period beginning at least 8 hours after arriving home
31 – 180 days	Within 14 days (or, if not possible, then next full day after it becomes possible)
Over 180 days	No later than 90 days

A returning service member is protected from discharge, except for “just cause,” for up to six months after reemployment for those who served between 31 and 180 days. For those who served more than 180 days, the protection period is one year. “Just cause” can be based on an employee's conduct or other legitimate nondiscriminatory reasons, such as elimination of the employee's position or layoff.¹²

When an employee complies with USERRA's reinstatement procedures, the employee will not forfeit reemployment rights if he or she terminates employment with one employer and begins working for another employer. For example, if an employee has 60 days of military service and submits a timely reemployment application to the pre-service employer within 14 days after completion of military service, the employee may seek or obtain employment with another employer during the 14-day period without relinquishing reemployment rights with the pre-service employer.¹³

Disabled Employees

A service member who incurred a disability during military service is entitled to the same reemployment rights as other returning veterans. Thus, the employer must make reasonable efforts to accommodate an employee's disability and help the employee become qualified to perform the duties of the escalator position, if possible. However, if the employee is unable to perform essential functions of the position, the employer must make reasonable efforts to reemploy the employee in any other position that is similar to the escalator position.¹⁴ The final regulations adopt the Americans with Disabilities Act's standards to determine a job's essential functions.

Pension Plan Benefits

USERRA covers both ERISA and non-ERISA pension plans, including those sponsored by a state or local government entity, or church plan.¹⁵ According to the final rule, upon reemployment with an employer maintaining a pension plan, an employee is treated as not incurring a break in service due to military service for purposes of plan eligibility, vesting and benefit accruals. This period of absence includes preparation time prior to service and time following completion of service within which a person may apply for reemployment or recover from injury or illness incurred during military service.

Whether or not the employee chooses to be reemployed after leaving military service, any vested accrued benefit in the pension plan that the employee was entitled to before military service remains intact.

Employer Contributions

Generally, an employer is liable to fund any obligation of the pension plan to provide benefits attributable to the employee's period of military service. However, the employer is not required to make any contribution to a defined benefit or defined contribution plan until the employee is reemployed.¹⁶

¹¹ Final Regs. Sec. 1002.115-116

¹² Final Regs. Sec. 1002.247-248

¹³ Final Regs. Sec. 1002.120

¹⁴ Final Regs. Sec. 1002.225

¹⁵ Final Regs. Sec. 1002.260

¹⁶ Final Regs. Sec. 1002-262

In a defined benefit plan, the employee's accrued benefit will be increased for the period of service upon reemployment and, if applicable, the employee has repaid any withdrawn amounts or made any employee contributions required under the plan.¹⁷

With regard to defined contribution plans, USERRA compliance is more complicated. Generally, after reemployment, the employer is obligated to allocate any employer "make-up contributions" for the period of military service. The contribution is based upon the employee's compensation (using one of the calculation methods described on page 5) for the appropriate plan year or years of active duty and the contribution rate for other participants during that time period. If applicable, the employer must also allocate any employee make up or elective deferral contributions in the same manner as for other employees.

The employer contributions must be made to the plan before the later of:

- 90 days after the date of reemployment; or
- the date plan contributions are normally due for the year in which the employee performed military service.

If it is impossible or unreasonable for the employer to make the contribution within the established time period, the employer is permitted to make the contribution "as soon as practicable."¹⁸

Employee Contributions

The final rules specify that if an employee is enrolled in a contributory defined benefit or defined contribution plan, the employee is allowed, but not required, to make up missed contributions or elective deferrals without interest. An employee returning from military service is not permitted to pay interest when making up missed contributions or elective deferrals.¹⁹

If the employee makes up the missed contributions or elective deferrals, the employee will be entitled to the benefits that have accumulated during the period of military service. In a defined benefit plan with mandatory employee contributions, this means that the employee will be eligible for the accrued benefit attributable to the period of military service. In a defined contribution plan with employer matching contributions, the employee will be eligible for the employer's match.²⁰ The employer is required to make up contributions only to the extent that the employee makes up required contributions or payments to the plan.

Under USERRA, a reemployed individual may make up missed contributions over the period starting from the employee's reemployment date and continuing to the earlier of: (1) three times the length of the immediate past period of military service or (2) five years following reemployment. The final regulations state that the "makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer."²¹ Thus, if the employee leaves employment before the end of the make-up period, the make-up period would end at that time.

Repayment of Distributions Received Upon Leaving Employment for Military Service

USERRA's final regulations clarify that only defined benefit plans are required to permit a service member who received a distribution of all or part of an accrued benefit in connection with leaving employment for military service to repay the withdrawn amounts upon reemployment. The repayment must include any interest that would have accrued if the monies had not been withdrawn. The employee has a period of up to three times the length of the employee's immediate past period of military service, up to a maximum of five years to repay the amount borrowed, provided that the employee is employed with the post-service employer during this period.²² After reemployment, the employee's accrued benefit will be increased for the period of

¹⁷ Final Regs. Sec. 1002-261

¹⁸ Final Regs. Sec. 1002-262

¹⁹ Final Regs. Sec. 1002.263

²⁰ Final Regs. Sec. 1002.263(b)

²¹ Final Regs. Sec. 1002.262

²² Final Regs. Sec. 1002.264

service and, if applicable, the employee has repaid any plan distributions and made any required employee contributions.

Calculating Compensation

In general, an employee's compensation affects the amount of employer and employee contributions, as well as accrued benefits. The USERRA regulations include guidelines for determining an employee's compensation during a period of military service. An employer must calculate compensation by using either of the following methods:

- 1) "Usual benchmark method." The compensation the employee would have received if the employee had remained with the employer and not entered the military, if determinable with reasonable certainty.
- 2) "Alternate method." The employee's average compensation during the 12-month period (or entire period if less) immediately preceding military service.²³

Compliance with USERRA and Internal Revenue Code

The Internal Revenue Service and Treasury Department have indicated that a pension or health plan will be deemed "not to be in conflict" with applicable Internal Revenue Code requirements due to compliance with USERRA or its regulations.

Enforcement of Rights and Benefits

The DOL, through the Veterans' Employment and Training Service (VETS), is authorized to investigate and resolve complaints of USERRA violations. The regulations prohibit employers from taking any adverse action against employees or service members who attempt to enforce their rights and benefits under USERRA. However, the regulations do afford employers an "undue hardship" defense to any claim of discrimination under USERRA provided the employer can demonstrate the existence of qualified circumstances.²⁴

Employer Notice of USERRA Rights

Employers are required to inform employees of their rights and obligations under USERRA. The DOL has published a final notice for use by private sector and governmental employers regarding reemployment rights, discrimination protection, health insurance continuation, and enforcement. Employers should post the notice where other employee notices are customarily placed, or use an alternate means such as hand delivery, mail or email. The DOL advises employers to use their best judgment and discretion in determining the means by which to provide notices to employees of their rights under USERRA.

The USERRA notice is available at: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf

CONCLUSION

The final regulations interpret and clarify existing rights and responsibilities of returning military personnel and employers which may not have been explained previously in earlier guidance. The DOL has made significant revisions to the pension plan provisions (Sections 1002.259 through 1002.267) which require a comprehensive review of pension plan practices to ensure conformity with the new USERRA regulations. Employers are advised to consult with legal counsel for guidance regarding USERRA's employment protections.

The final USERRA regulations are available on the DOL website at:
<http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

²³ Final Regs. Sec. 1002.267

²⁴ Final Regs. Sec. 1002.5(n)