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Military Personnel in a Civilian Workforce: Top 5 Frequently Asked USERRA Questions

Article By:

Amy Quick Glenos

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a federal law that protects the civilian employment of active and reserve component military personnel and veterans. USERRA is a straightforward law with a central objective: to not penalize service members for their service. While most employers have probably handled numerous leave requests related to pregnancy, disability, or illness, employers are perhaps less likely to encounter requests for USERRA leave. Less than one percent of the population serves in the United States military, with approximately 1.3 million active duty personnel and 802,248 active reserve component members from all branches combined. Still, the number of military personnel in the civilian workforce is substantial enough that employers are likely at some point to receive a military leave request or USERRA-related question.

Here are five USERRA-related questions employers are likely to face.

1. Is an employer required to accommodate leave for military duty when an employee does not have orders?

Yes. Reserve component soldiers have routine drill periods known as inactive-duty training (IDT) in addition to 14 days (or more) of annual training (AT) per year, though the number of AT days is variable depending on the branch of service. Leave for IDT and AT is covered by USERRA. Although drill periods are typically reserved for the weekend, unit commanders may occasionally schedule three or four-day drills—for example, on a Thursday, Friday, Saturday, and Sunday.

The military does not issue orders for routine drill periods, so a request for orders will find the employee (and employer) empty-handed. In lieu of orders, units typically provide drill schedules for each fiscal year for IDT periods. The employee's drill schedule should also have a point of contact (POC) so that the employer may reach out to the unit with any questions. If the drill schedule does not identify a POC and the employer has reason to question the employee's service obligation, the employer may consider asking the employee to provide information as to whom in the military reporting chain the employer can direct questions.

Employers that have reasons to question employees' service obligations—for example, if the employee is unwilling to produce a drill schedule or to provide any additional information concerning

the leave period—may be justified, under USERRA, in contacting the employee's military chain of command. Conversely, employers that don't have good cause to question the service obligation but nevertheless contact the employee's commander may be at risk of a claim of harassment or discrimination under USERRA (especially if the employer reaches out repeatedly).

The military will issue orders for a service member's AT requirement. Often, the AT period is at a designated location, such as on a military base or installation, for a consecutive period. Some units do not conduct a consolidated unit AT. In this situation, the employer may be faced with sporadic requests for leave throughout the year in order for the service member to fulfill the AT obligations. This type of AT may even be conducted remotely on occasion from the service member's home. These various scenarios may raise questions for the employer as to the legitimacy of the leave. If orders are issued—and they always are for AT days—the leave is legitimate.

Finally, some orders are issued retroactively (after the training period is completed). USERRA does not require a service member to produce orders to his or her employer in advance of leave if doing so is precluded by military necessity, or otherwise impossible or unreasonable. The unavailability of orders on the front end of leave is one such example of "impossibility" that often plays out in reality and is not a basis for denying leave under USERRA.

2. Does an employee continue to accrue vacation leave while on military leave?

No, unless the employer provides that benefit to other employees on comparable leaves of absence. Section 1002.150 of USERRA states that"[t]he non-seniority rights and benefits to which an employee is entitled during a period of service are those the employee provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace."

3. Is an employer required to accommodate leave for *voluntary* deployments?

Yes. USERRA requires employers to accommodate even voluntary deployments. USERRA expressly defines "service in the uniformed services" as "the performance of duty on a voluntary or involuntary basis." This is true regardless of the burden that the service may impose on the civilian employer and regardless of whether the deployment is "high speed" (such as special forces frontline operations) or "not so high speed" (for example, office work far away from the battlefield).

USERRA does not consider the relative burden to the employer to be relevant when determining whether the employer may grant or deny leave. USERRA provides as follows:

In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirement established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

Those limitations include the cumulative five-year period and notice requirements. The U.S. Department of Labor's regulations further amplify the service member's right to *volunteer* for military service and state that "[t]he employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service."

Under USERRA and its enforcing regulations, the voluntary or involuntary nature of a leave is irrelevant, and the burden to the employer does not provide a justification to discharge or refuse to reemploy the service member. In sum, at this time, a so-called “USERRA abuse” defense is not readily available to employers.

4. May an employer permit an employee to continue working in a full- or part-time status while on military orders? Note: This scenario is perhaps on the rise due to the COVID-19 pandemic, as both civilian employers and the military are increasingly permitting telework.

This may not be the recommended course of action. While there is no per se prohibition on outside employment for reserve component service members who are placed on active duty orders, there are myriad legal, ethical, and practical concerns that may militate against permitting such an arrangement, particularly under USERRA. A primary purpose of USERRA is to protect service members who *leave* their civilian jobs to perform uniformed service. If an employee never leaves his or her civilian job, an employer’s USERRA obligations are unclear. Under the circumstances, it is possible that USERRA protections would be triggered if the employee were subject to discipline for job performance, and it is possible that the employee could subsequently claim that the discipline was due to the service obligation. The employer would likely have a defense that the employee was not entitled to USERRA protection in the first place, but nothing would prevent the employee from pursuing a claim alleging USERRA discrimination if confronted with an adverse employment action in the civilian job while on military orders.

In addition to USERRA concerns, this scenario presents issues for the employee/service member related to potential violations of the Uniform Code of Military Justice or applicable state codes of military justice. When performing military duty, a service member is required to prioritize military duty over other work. Although the U.S. Department of Defense’s Joint Ethics Regulation allows outside employment with the permission of the service member’s commander, this carve-out is typically for active duty soldiers who seek to take on moonlighting jobs for extra pay. A reserve component service member on full-time military orders does not get time off, in theory. Even if a service member has downtime during the duty day, that service member is still in a duty status.

It is hard to imagine a scenario in which an employee could perform a full-time civilian job without creating conflicts. An example of a potential conflict might be if an employee suffered an injury (say, carpal tunnel) during the period of dual military and civilian employment. The employer would have to determine if the injury was caused on the job for workers’ compensation purposes. The military, meanwhile, would be tasked with determining whether the injury was service connected and sustained in the line of duty. Determining the precise origins of the injury in this scenario could be a near-impossible task for both the military and the civilian employer because the employee was working for both entities simultaneously.

5. Does USERRA cover temporary employees?

Yes, but a temporary employee’s reemployment rights are conditional based on the intended length and scope of the temporary position. As a starting point, the regulations provide that an employee’s USERRA rights “are not diminished because the employee holds a temporary, part-time, probationary, or seasonal employment position.” This means that employers may not discriminate or retaliate against temporary employees because of their uniformed service.

However, the *reemployment* protections under USERRA are not absolute. An employee does not have reemployment rights if the civilian employment was for a brief, nonrecurrent period, and there was no reasonable expectation that the employment would have continued indefinitely or for a significant period. Neither the statute nor the applicable regulations adequately define what constitutes a "significant period." In addition, the regulations arguably are unclear as to whether the "reasonable expectation" of continued employment is a belief held by the employee or the employer.

Finally, the denial of USERRA rights on the basis of temporary employment is an affirmative defense that the *employer* has the burden of proving. If there is any expectation at all (by the employee or employer) that the employment would have continued absent the military leave, the employee is likely entitled to reemployment upon conclusion of the military leave period.

Key Takeaways

Although uniformed service members represent a small segment of the total workforce, most employers will eventually encounter USERRA leave requests. According to the Congressional Research Service, 1,007,061 reserve component service members have been called to active duty in the last 20 years. Presumably, these calls to active duty have resulted in a great many USERRA leave requests, and understanding the basic requirements of USERRA may help employers prevent costly litigation.

USERRA is still evolving as a federal law, and it was amended as recently as January 15, 2021, to include coverage for National Guard soldiers called to "state active duty" by their states' governors. The legislation amending USERRA was passed in response to the COVID-19 pandemic.

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