

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

SEP21 2009

FROM: JOHN BERRY, DIRECTOR

SUBJECT: Uniformed Services Employment and Reemployment Rights Act Training

The Veterans' Benefits Improvement Act of 2008, Public Law (P.L.) 110-389, October 10, 2008, contains a key provision requiring all Federal agencies to provide Uniformed Services Employment and Reemployment Rights Act (USERRA) training. The USERRA training is to be provided to "any personnel of the agency who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter with respect to employees of the agency."

P.L. 110-389 also requires all USERRA training be developed and provided in consultation with the U.S. Office of Personnel Management (OPM). To assist agencies in meeting their statutory obligations under P.L. 110-389, OPM developed the attached training. This training provides the essential elements necessary to fulfill the requirement for training on USERRA rights, benefits, and obligations of members of the uniformed services. Agencies that provide OPM's training satisfy the "consultation" requirement. If your agency wishes to modify the training or provide different content material, you must consult with OPM prior to developing and providing the training.

In accordance with P.L. 110-389, OPM requires agencies to deliver the initial USERRA training at least once during Fiscal Year 2009 and annually thereafter. Your agency should maintain documentation to indicate those requiring the USERRA training have received it.

OPM is available to assist your agency in meeting this training requirement. OPM can provide "train the trainer" sessions and/or be present when your staff delivers the training.

The attached training is also available on the OPM website under the Veterans Information tab. If you have any questions or need additional information, or would like OPM to provide a "train the trainer" session for your staff, please contact Scott Wilander, Ed.D., Human Resources Specialist, Center for Talent and Capacity Policy, by telephone (202) 606-3621 or email scott.wilander@opm.gov.

cc: Human Resources Directors

Attachment, Uniformed Services Employment and Reemployment Rights Act Training

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT
RIGHTS

(USERRA)

TRAINING

WORKING FOR AMERICA

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Overview

Uniformed Services Employment and Reemployment Rights Act (USERRA) is codified in 38 U.S.C. chapter 43

Purpose of USERRA

- Prohibits employment discrimination on basis of past military service or current or future military obligations
- Protects reemployment rights for 'non-career' Veterans, Reservists, and National Guard members
- Provides that a person alleging a violation may file a complaint with the Department of Labor Veterans' Employment and Training Services against a federal agency or file directly to the Merit Systems Protection Board

Basic Protections USERRA

- Prohibits discrimination

Initial hiring

Promotions

Retention in employment

Any advantage of employment

- Ensures benefits during service

Health plans

Other benefits

- Provides for prompt restoration to duty and benefits following uniformed service

Advantage of Employment

Any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement, or employer policy, plan, or practice, and includes rights and benefits under a pension plan, health plan, or employee stock ownership plan, as well as insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment

Employer Obligations

Agencies must tell employees of their USERRA entitlements, obligations, benefits, and appeal rights. In addition, agencies must

- Receive notification of upcoming uniformed service
- Approve the request – agencies must let them go
- Treat service as if on (non-paid) leave or furlough

Understand covered employees may ‘waive’ only non-seniority rights of employment, such as paid military leave and life insurance, even if the ‘waiver’ appears broader

- Allow employees to use accrued leave during absence
- Promptly reemploy
- Place returning employee in position he/she would have been in if continuously employed (Escalator Principle)

Employee Responsibilities

Employee obligations include

- Notifying the employer of upcoming uniformed service
- Returning timely to work or applying for reemployment based on length of absence
- Timeliness of application
- Providing oral or written notice of intent to return
- Notifying any manager or human resource person when returning from uniformed service
- Providing official documentation to agency when it becomes available from the uniformed services

Coverage and Applicability

Employees

- All employees, permanent and nonpermanent, in executive agencies, including the U.S. Postal Service, the Postal Regulatory Commission, and non-appropriated fund employees
- Employees in the intelligence agencies have basically the same rights but are covered under agency regulations rather than OPM regulations and have different appeal rights

Coverage and Applicability (cont.)

Uniformed Services

- All service, voluntary or involuntary, with the armed forces (including active duty, active duty for training, initial active duty for training, and absence for service fitness examination)
- National Guard when engaged in Federal active duty for training, inactive duty training, or full-time guard duty
- Commissioned Corps of the Public Health Service
- Other groups designated by the President in time of war or emergency

Reemployment Eligibility

To have restoration rights, the employee must

- Have left his/her job to perform uniformed service
- Have given the agency advance notice of uniformed service (except when prevented by military circumstances)
- Be released from the military under honorable conditions

Reemployment Eligibility (cont.)

To have restoration rights, the employee must

- Serve no more than a cumulative total of 5 years (exceptions are allowed for training and involuntary active duty extensions, and to complete an initial service obligation of more than 5 years)
- Apply for restoration within appropriate time limits

Agencies must carry an employee absent because of service in the uniformed services on leave without pay unless the employee

- elects to use other leave, or freely and knowingly provides written notice of intent not to return to a position with the agency, in which case the employee can be separated.

An employee covered by USERRA is entitled during the period of absence to the rights and benefits based on seniority and length of service that the employee would have been reasonably certain to obtain but for the absence and includes

- Within-grade increases,
- Career-ladder promotion
- Annual leave accrual rates.
- Under a new law effective March 15, 2009, members of the Reserve or National Guard who are called to active duty under certain provisions of law are entitled to a differential payment.

The supplemental payment is equal to the amount by which their civilian basic pay would have exceeded (if at all) military pay and allowances allocable to the given period. OPM is developing guidance and regulations in consultation with the Department of Defense (See CPM 2009-07, April 3, 2009)

Use of Leave

An employee performing uniformed service must be permitted, upon request, to use any accrued annual leave, military leave, earned compensatory time off for travel, or accrued sick leave (consistent with the statutory and regulatory criteria for using sick leave) intermittently with leave without pay

Agencies may not require an employee to use any particular type of leave during the period of uniformed service

An employee may be charged military leave only for hours that the employee would otherwise have worked and received pay

Use of Military Leave

5 U.S.C. 6323(a) provides 15 days per fiscal year for active duty, active duty training, and inactive duty training performed by a Reserve of the armed forces or a member of the National Guard.

Inactive duty training is authorized training performed by a member of a Reserve component not on active duty and consists of regularly scheduled unit training periods, additional training periods, and equivalent training

5 U.S.C. 6323(b) provides 22 workdays per calendar year for emergency duty as ordered by the President, the Secretary of Defense, or a State Governor

Use of Military Leave (cont.)

5 U.S.C. 6323(c) provides unlimited military leave to members of the National Guard of the District of Columbia for certain types of duty ordered or authorized under title 39 of the D.C. Code

5 U.S.C. 6323(d) provides that Reserve and National Guard Technicians are entitled to 44 workdays of military leave for duties overseas under certain conditions

Employee Benefits

Generally, employee benefits continue for employees covered by USERRA in the same way as they do for other employees on leave without pay

Under Federal Employees' Group Life Insurance (FEGLI) Program, employees may continue their life insurance for up to 12 months in non-pay status at no cost to the employee and for an additional 12 months of absence at the employee's expense

Under Federal Employees Health Benefits (FEHB) Program, benefits may be continued for up to 24 months

Employee Benefits (cont.)

Under 38 U.S.C. 4317, employees who are covered by an employer's group health plan and who enter uniformed service may elect to continue their coverage for up to 24 months after the date the absence to serve in the uniformed services begins

Federal Employee Health Benefits law provides for continued coverage for up to 24 months for employees who are reservists called to active duty in support of a contingency operation who are either separated or in leave without pay status to perform such active duty

For absences to perform uniformed service in support of a contingency operation, the employing agency may pay the employee and the employer cost of the employee's continuation of the FEHB enrollment

Protections

Individuals performing uniformed service are not subject to a reduction in force (RIF) while they are in the service. After restoration, they may not be discharged (except for cause) for 1 year if they served for more than 180 days, or for 6 months if they served for more than 30 days, but less than 181 days

USERRA prohibits an agency from discriminating against or taking any reprisal against an applicant or employee because of his or her application, membership, or service in the uniformed services

Excused Absence for Returning Reservists

A Federal employee (including a National Guard or Reserve member) returning from active military duty in the Global War on Terrorism is entitled to receive 5 days of excused absence upon return from each deployment, as long as the deployment was for at least 42 consecutive days

Employees are entitled to 5 days of excused absence only once in a 12-month period

The commencement of the 5 days of excused absence represents a return to Federal civilian employment, and the employee is obligated to report for work at the end of the 5-day period

Time Limits for Restoration

Employees who served

- Less than 31 days (or who leave to take a fitness exam for service) must report for civilian duty at the beginning of the next regularly scheduled work day following their release from service plus the expiration of 8 hours after a time for safe transportation back to the employee's residence

Time Limits for Restoration (cont.)

Employees who served

- More than 30 but less than 181 days must apply for reemployment within 14 days of release from uniformed service
- More than 180 days have 90 days after completion of uniformed service to apply for restoration

Time Limits for Restoration (cont.)

Employees who fail to return or apply within these time limits may be subject to disciplinary action

Employees must be reemployed as soon as practicable on a case by case basis, generally within 14 days, but no later than 30 days after the agency receives the application.

Agencies have the right to ask for documentation showing the length and character of the employee's uniformed service and the timeliness of the application

Position to Which Restored

Non-disabled employees with less than 91 days of uniformed service must be restored

- To the position they would have attained had the employment not been interrupted by uniformed service (Escalator Principle), or
- To the position in which they were employed on the date of the commencement of service but only if they are unable to perform the duties of the new 'escalator' position acceptably after reasonable efforts

Position to Which Restored (cont.)

Non-disabled employees with more than 90 days of uniformed service

Agencies must restore the employee

- To the position they would have attained had the employment not been interrupted by military service (Escalator Principle), or
- To the position in which they were employed on the date of the commencement of service but only if they are unable to perform the duties of the new 'escalator' position acceptably after reasonable efforts

Position to Which Restored (cont.)

Employees with service-connected disabilities

An employee with a service-connected disability must, after reasonable efforts to accommodate the disability by the agency, be placed in a position that will provide the employee with the same seniority, status, and pay as the position they would have attained – consistent with the circumstances in each employee's particular case

OPM Placement

If the agency is unable to reemploy an individual returning from duty in the uniformed services, OPM will order placement in another agency when:

OPM determines that it is impossible or unreasonable for an agency in the executive branch (other than an intelligence agency) to reemploy the person; or

An intelligence agency or an agency in the legislative or judicial branch notifies OPM that it is impossible or unreasonable to reemploy the person, and the person applies to OPM for placement assistance; or

A non-career National Guard technician who is not eligible for continued membership in the Guard for reasons beyond his or her control applies to OPM for placement assistance

Service Credit

Upon restoration, agencies must treat employees as though they had never left.

Time spent in the uniformed service counts for

- seniority
- promotions
- within-grade increases
- completion of probationary periods
- career tenure
- retirement
- leave accrual
- severance pay

Appeal Rights

Individuals who believe their agency has not complied with the law or with OPM's regulations (5 CFR part 353) may file a complaint with the U.S. Department of Labor Veterans Employment and Training Services online or appeal directly to the Merit Systems Protection Board

Case Examiners work with OPM on "meritorious" Federal cases in attempts to resolve issues before raising to the level of the Office of Special Counsel or the Merit Systems Protection Board

USERRA References

38 U.S.C. 4301 – 4335

5 CFR part 353

VetGuide, U.S. Office of Personnel Management,

<http://www.opm.gov/veterans/html/vetguide.asp>

Job Rights of Federal Employees Who Enter the Uniformed Services Fact Sheet, U.S. Office of Personnel Management,

<http://www.usajobs.gov/ei54.asp>

A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA), U.S. Department of Labor
Veterans Employment and Training Service

USERRA References (cont.)

For more information on USERRA and Federal employment, please refer generally to OPM's website at <http://www.opm.gov>. In addition, the following specific links may prove helpful:

Military Leave and Federal Employees Health Benefits (FEHB) Program Handbook <http://www.opm.gov/insure/health/reference/handbook/fehb27.asp>

Military Leave Fact Sheet

<http://www.opm.gov/oca/leave/html/military.asp>

Frequently Asked Questions on Military Leave Fact Sheet

<http://www.opm.gov/oca/leave/html/MILQA.asp>

USERRA References (cont.)

FEHB Coverage for Federal Civilian Employees Called to Military Duty <http://www.opm.gov/insure/health/eligibility/reservists.asp>

FEHB Frequently Asked Questions about Coverage for Federal Civilian Employees Called to Military Duty <http://www.opm.gov/insure/health/faq/reservists.asp>

Military Service and Federal Employee Group Life Insurance <http://www.opm.gov/insure/life/faq/faqs-16.asp>

Federal Long Term Care Insurance Program <http://www.ltcfeds.com/help/faq/activeduty.html>

FSAFEDS <http://www.opm.gov/insure/archive/quickguide.pdf>