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USERRA: Understanding Your Compliance Responsibilities as an Employer

April 21, 2022



A spiral-bound notebook with a white page is mounted on a wooden stand. The page contains a disclaimer. Two small potted plants are placed on either side of the notebook. The plants have long, green, pointed leaves and are in white, ribbed pots. The background is a plain, light-colored wall.

Disclaimer:

The information in this presentation is intended for informational purposes only and should not be considered legal advice. You are strongly encouraged to consult your own legal counsel to ensure compliance with applicable law in your specific state, municipality or jurisdiction.



Today's Presenter:

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Today's Agenda:

- ✓ USERRA: Introduction and Overview of Key Provisions
- ✓ Anti-Discrimination Provisions of USERRA
- ✓ Benefit Rights Provided by USERRA
 - ✓ Health Insurance
 - ✓ Retirement
- ✓ Reemployment Rights Under USERRA
 - ✓ The "Escalator Principle"
- ✓ Enforcement of USERRA
- ✓ Additional Laws and Programs In Support of Service Members



USERRA: The Basics

- The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA):
 - ✓ protects the job rights of individuals who voluntarily or involuntarily leave employment positions to perform military service or certain types of service in the National Disaster Medical System.
 - ✓ USERRA prohibits discrimination against individuals based on membership in the uniformed services with regard to any aspect of employment.
- USERRA prohibits employers from discriminating against:
 - ✓ current members of the uniformed services,
 - ✓ those who served in the past, and
 - ✓ applicants to the uniformed services.

USERRA: Purpose of the Statute

- USERRA was designed and enacted:
 - ✓ To encourage service in the uniformed services by removing any negative impacts of military service on civilian careers
 - ✓ To minimize the disruption to service members and their workplaces
 - ✓ To prohibit discrimination against service members

38 U.S.C § 4301

Significance of USERRA

- USERRA protections are important to support significant participation of civilians in the uniformed services of the United States.
 - ✓ There are over 445,000 soldiers in the Army and Air National Guards (as of September 30, 2021)
 - ✓ Over 337,000 in the Army National Guard
 - ✓ Over 108,000 in the Air National Guard
 - ✓ Over 354,000 Service members in the Army, Air Force, Navy, Marine Corps, and Coast Guard Reserves nation-wide.
 - ✓ Members of the Guard and Reserves have been continuously deployed since September 11, 2001.
 - ✓ You may have employees who are members of the Guard or Reserves currently and/or in the future.

(Source: Congressional Research Service)



Significance of USERRA

- National Guard may be called on to respond and provide support during and after:
 - ✓ Severe weather events
 - ✓ Wildfires
 - ✓ Civil Disturbances
- In 2020 10.9 million days were served by National Guard members
 - ✓ This service included COVID-19 pandemic response efforts
 - ✓ More than 20,000 Army National Guard and Air Force National Guard are currently deployed

(Source: National Guard Bureau)



USERRA: An Overview

- USERRA protects service members' and veterans' civilian employment rights and is enforced by the United States Department of Labor (DOL).

USERRA's Military Leave Provisions Provide:

- ✓ **Protection from discrimination based on** an employee's **military status** and **service** requirements.
- ✓ The **right to re-employment** upon conclusion of military service.
- ✓ **Health insurance** and **benefits** protections.
- ✓ Protection from at-will termination for specified time periods after return from military service. (USERRA allows for-cause terminations)



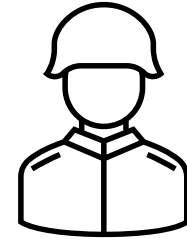
USERRA: An Overview

- Employers covered by USERRA:
 - ✓ Any entity that pays salary or wages for work performed or that has control over employment opportunities.
 - ✓ There is **no employer size requirement** for coverage under USERRA.
 - ✓ Private and public employers are covered by USERRA.
 - ✓ Successors in interest are covered by USERRA.



USERRA: The Basics

- Employees protected under USERRA:
 - ✓ Citizens, nationals or permanent residents
- USERRA applies to:
 - ✓ Employees even if they are working for a U.S. employer in another country.
 - ✓ Employees working in the U.S. for foreign companies.
 - ✓ Full-time employees, part-time employees, and to temporary and seasonal employees with a **reasonable expectation** of continued employment.



USERRA: The Basics

- Uniformed Service Protected by USERRA includes:
 - ✓ Both **voluntary and involuntary** service
 - ✓ In both the active and reserve components of the military
 - ✓ The Public Health Service Commissioned Corps
 - ✓ Designated service in national emergencies (National Guard)

- Types of Service covered include:
 - ✓ Active duty and training
 - ✓ Annual training and weekday and weekend drill for reserve component
 - ✓ Fitness for duty examinations
 - ✓ Funeral honors

USERRA – The Basics

- USERRA has no minimum hour requirement for employee coverage purposes.
- Even employees who are in an employer's probationary or introductory period are covered by USERRA's protections.

Employers **not covered** under USERRA are very limited but include:

- ✓ Native American tribes
- ✓ Religious institutions
- ✓ Foreign embassies and consulates
- ✓ International organizations
- ✓ Judicial Branch of the Federal Government

USERRA – The Basics

- **Independent contractors** are **not** covered by USERRA but employers need to make sure an independent contractor is appropriately classified and meets the economic realities of an independent contractor before denying USERRA rights to the service member.

Factors to be considered are:

- ✓ The extent of the employer's right to control the way the individual's work is to be performed;
- ✓ The opportunity for profit or loss that depends upon the individual's managerial skill;
- ✓ Any investment in equipment or materials required for the individual's tasks, or his or her employment of additional workers;
- ✓ Whether the service the individual performs requires a specialized skill;
- ✓ The degree of permanence of the individual's working relationship; and
- ✓ Whether the service the individual performs is an integral part of the employer's business.



Non-Discrimination Provisions Under USERRA

- USERRA protects individuals against discrimination in employment based on military affiliation. *38 U.S.C. § 4311*
- USERRA's non-discrimination protections provide that if an individual is a past or present member of the uniformed services, or applied for membership in the uniformed services, or is otherwise obligated to serve in the uniformed services, an **employer may not deny** the individual:
 - ✓ Initial employment
 - ✓ Reemployment
 - ✓ Retention in employment
 - ✓ Promotion, or
 - ✓ Any benefit of employment

USERRA Non-Discrimination Protections for Applicants

- USERRA's anti-discrimination provisions protect against discrimination in initial hiring decisions.
- Job **applicants** cannot be denied employment due to their obligations as a member of the Uniformed Services, including the National Guard or Reserve.
- An employer that denies initial employment to an individual based on the individual's military affiliation, application for service, performance of service, or obligation for service in the Uniformed Services is in violation of USERRA.
- An employer need not actually employ an individual to be his/her "employer" for purposes of the individual being afforded protection under USERRA.

Non-Retaliation Provisions Under USERRA

- An employer may not retaliate against anyone assisting in the enforcement of USERRA rights.

Protected activity includes:

- ✓ Testifying; or
 - ✓ Making a statement in connection with a proceeding under USERRA.
- No military service connection is required to be eligible for these anti-retaliation protections provided by USERRA.



USERRA Rights – Benefit Protections

- Employee **seniority-based** rights are protected under USERRA
- An employment right or benefit is seniority-based if it is determined by or accrues with length of employment.
- Reemployed service members are entitled to:
 - ✓ Seniority and all rights and benefits based on seniority that they would have attained, with **reasonable certainty**, had they remained continuously employed.
 - ✓ The reasonable certainty standard does not require absolute certainty.
- Seniority-based benefits can include supervisory status, location, shift, and formal work assignments.

USERRA Non-Seniority Benefit Rights

- Reemployed service members are entitled to:
 - ✓ All benefits and benefit related rights that are not based on seniority in the same manner as the employer would treat any employee on furlough or leave of absence under any policies, procedures or agreements that were in effect when the employee left to perform uniformed service.
- Employers that treat employees differently based on the type of leave they are on must treat returning services members with the most favorable treatment provided for other comparable leave types.
 - ✓ For determining comparable leaves, the type and duration of the leave are important factors to be considered.
- Non-seniority benefits can cover a range of benefits, but some common types include:
 - ✓ Vacation and PTO accrual
 - ✓ Life insurance
 - ✓ Bonuses



USERRA – Vacation Pay

- There is no requirement that an employee on military leave continue to accrue vacation or PTO. If an employer provides continued accrual for other similar types of leave, they would be required to do the same for military leave.
- Employers should review their leave policies comprehensively to ensure they are meeting the requirement of treating military leave as favorable as other similar types of leave.
- Where an employer provides separate sick time and vacation time allowances, an employee is generally not entitled to use the sick leave pay during military leave.
 - ✓ If, however, the employer allows the use of sick leave for any reason at all (not limited to employee sickness) or allows sick leave to be used in other similar leave situations, they would need to do the same for military leave.



Health Insurance Benefits Protection Under USERRA

- Under USERRA, an employee who leaves his or her job to perform military service has the right to elect the continuation of **group health plan coverage** for the employee and his or her dependents where:
 - ✓ The employee participated in the plan immediately prior to the leave; and
 - ✓ The employee's leave was for the purpose of uniformed service.
- An employee who did not elect health coverage is not entitled to do so because of his/her leave to fulfill their service obligation.
- Under USERRA, employers are required to provide coverage under all health plans, including where the employer has fewer than 20 employees and the health insurance is being provided through a non-ERISA benefit plan.
- USERRA does not require employers to establish a health plan if one isn't currently offered to employees in connection with their employment.

Health Insurance Benefits Protection Under USERRA

- The amount the employee must pay to maintain their health plan coverage while on USERRA leave is determined by the length of the employee's leave.
 - ✓ For **leaves of fewer than 31 days** (30 days or less), the employee must not be required to pay more than the **normal employee premium cost share**, if any, for his/her health coverage.
 - ✓ For **leaves of 31 days or more**, the employee may be required to pay no more than **102% of the full premium** under the health plan. This amount includes the regular employee portion of the premium, the employer's portion, and a 2% charge for administrative costs.
 - ✓ Health plan administrators may develop reasonable procedures for an employee's payment for health insurance while on USERRA leave. USERRA does not require a specific method for paying for continuing coverage.

Health Insurance Benefits Protection Under USERRA

Duration of Benefits Continuation Under USERRA

- USERRA requires that employers allow employees continued participation in the employer's health plan for:
 - ✓ **24 months** beginning on the day that the uniformed service leave begins; or
 - ✓ A period ending on the day after the employee fails to return to employment within the time allowed under USERRA.

Benefits - Retirement

USERRA provides rights to returning service members related to pension benefit plans.

- ✓ USERRA requires that the employee be treated as if he/she never left for military leave. The **employee is entitled to all accrued pension/retirement plan benefits** that would have been received with continuous employment.
- ✓ Defined benefit pensions, defined contribution plans, including **401(k)** and 403(b) plans, and profit-sharing plans are subject to this requirement under the act.

Employers are required to:

- ✓ Recognize and provide credit to an employee for years of service while on USERRA protected leave and to fund the plan for these years of service.
- ✓ Make contributions to the employee's defined contribution accounts for the period of an employee's USERRA leave of absence.

Benefits - Retirement

- USERRA requires that an employee's **period of military duty** be **counted as service** with the employer for purposes of;
 - ✓ Eligibility
 - ✓ Vesting
 - ✓ Allocation of employer contributions
- **Participation** in a plan upon return from covered service **must not require** any **requalification** period.
- Returning service members must be treated as if they had maintained continuous employment.

Benefits - Retirement

USERRA Requirements for Pension Plans - Continued

- ✓ There is no requirement for an employer to make contributions to a pension plan on behalf of a participant while the participant is on military leave. The employer can defer contributions until the employee returns to work.
- ✓ For plans that require employee contributions, employers must allow returning service members to **make up** any missed **contributions** over a time period equivalent to **three times the length of** their **leave** for uniformed service, **but not greater than five years**.
- ✓ A reemployed service member may choose to make up all or a part of their missed contributions or elective deferrals to the plan. The employee is **not required** to do so.

Reemployment

- Employees in the uniformed services must meet 5 conditions to have the right to reemployment under USERRA.
 - ✓ The service member must have left a civilian job to perform voluntary or involuntary **service in the uniformed services**.
 - ✓ The service member must have given the employer **prior verbal or written notice**.
 - ✓ The service member must not have exceeded the **five-year limit** on the cumulative duration of his/her periods of uniformed service relating to the employer relationship for which he/she seeks reemployment.
 - ✓ The service member must have been released from the period of service having received an honorable or other non-disqualifying discharge from the military.
 - ✓ After release from the period of service the service member must have made a **timely application for reemployment** with the employer.



Reemployment

- Upon a request for reinstatement of employment by a returning service member meeting USERRA's requirements, the employer must reinstate the employee as follows;
 - ✓ For service of **30 days or less**, the reinstatement must be **immediate**.
 - ✓ For service of **31 days or more**, the employer must provide **prompt** reinstatement of the employee.
- USERRA requires that the returning service member be reemployed in the job that they **would have attained** had they not been absent for military service;
 - ✓ with the same **seniority**,
 - ✓ **status** and
 - ✓ **pay**

Reemployment – The “Escalator” Principle

- If the service member employee would have, with **reasonable certainty**, been promoted if he/she had remained continuously employed, he/she would be entitled to that promotion when reinstated.
- This right to reemployment in the position that the employee would have been promoted to with reasonable certainty, is referred to as **the “escalator” principle**.
- The “escalator” principle helps carry out USERRA’s intent to ensure military service does not hinder the progression of the employee’s civilian career.

Reemployment – The “Escalator” Principle

- The “escalator” can move in both directions. Under certain circumstances, the escalator may cause an employee to be reemployed in a lower position, or even be laid off or terminated.
- If a company restructuring or reduction-in-force takes place while an employee is away from work performing service on protected military leave, and their position was eliminated, the employee may not have a position to return to.
 - ✓ If the employment action would have been taken if the service member was not on military leave, it would not be a violation of the employee’s USERRA rights.
- An employee on military leave is not entitled to receive greater rights to their former position than other employees in the same or similar role and situation.
- If the company closed during the employee’s military leave due to business circumstances, or any other reason, the employee would not have reemployment rights.



Reemployment

- The impact of **service duration** on the position the employee/service member is eligible for:
 - ✓ For military service of **90 days or less** in duration, the employee is entitled to the position he/she would have attained with continuous employment (the “escalator position”). If the employee cannot be qualified for the position with reasonable employer effort, he/she should be employed in their **pre-service position**. If the employee cannot be qualified for either position, he/she must be employed in the nearest approximation to those positions in the same order of priority.
 - ✓ An employee on a military leave **longer than 90 days** is entitled to the **same** position or a **closely approximate position** to the job the employee would have attained with continuous employment. If he or she cannot be qualified for those positions with reasonable employer effort, he/she should be employed in their **pre-service position**, or the nearest approximation to the pre-service position.

Reemployment - Employer's Right to Documentation

- The employer has a right to require documentation in support of reemployment when an employee's military service **exceeds 30 days**. This documentation would need to be submitted with the service member's application for reemployment.
- The employer may choose not to require this supporting documentation.
- The **information** that can be **requested** of the service member/employee is documentation that **establishes** the criteria for **reemployment eligibility**:
 - ✓ The reemployment application is timely;
 - ✓ The employee has not exceeded the total 5-year cumulative service limit;
 - ✓ The employee's separation or dismissal from service was not a disqualifying.

Reemployment – Documentation Establishing Eligibility

- The documents that will satisfy the reemployment eligibility requirement vary depending on the specific circumstances of the employee's leave and military service.
- Documents that meet the requirements of USERRA for these purposes include:
 - ✓ Certificate of Release or Discharge from Active Duty;
 - ✓ Copy of military duty orders with an endorsement indicating completion of the service;
 - ✓ Letter of the commanding officer of a Personnel Support Activity or someone of comparable authority;
 - ✓ Certificate of completion from military training school;
 - ✓ Discharge certificate showing character of service.



Retraining/Requalification of Returning Employee

- USERRA requires the employer to make “**reasonable efforts**” to qualify a returning service member/employee for the job that individual is entitled to.
- Reasonable efforts can include various actions, including providing **additional training**. Efforts and actions that would cause an **undue hardship** to the employer would not be required.
- If the returning service member cannot become qualified for the position that they are entitled to after reasonable efforts by the employer, he or she must be employed in another position that they can perform.
 - ✓ Under these circumstances, this alternative position can be one of lesser status and pay, which the service member is qualified for.

Reemployment – Multiple Applicants

- Multiple Applicants for Reemployment
 - ✓ If multiple returning service member employees are entitled to reemployment in the same position because two or more are returning from uniformed service, the person who left employment first will have the prior claim to the position.
 - ✓ Remaining applicants for reemployment will be entitled to reemployment in another position like that which they would have been reemployed in under the standard USERRA reemployment rules.
- USERRA leave beginning while on Layoff, Strike or Leave of Absence
 - ✓ If an employee is on a layoff with recall rights, is out on a strike, or on a leave of absence when his/her military service begins, he/she would still have reemployment rights provided he/she would have returned or been called back to work during the period of his/her military leave.

Reemployment - 5 Year Cumulative Service Limit

- Service in the uniformed services counts toward the **cumulative 5-year limit** that an employee has available while still retaining their USERRA rights with some limited exceptions. Leave that falls under the designated exceptions will **not** count towards the 5-year limit.

Exceptions to the 5-year limit include:

- ✓ **Required drills and annual training** and other training duty certified by the military as necessary for professional development or skill training or retraining.
- ✓ **Service performed during time of war or national emergency** or for other critical missions, contingencies, or military requirements.
- ✓ Where the service member/employee is unable to obtain release from service or for service in excess of five years to fulfill an initial period of obligated service. (this is generally imposed on service members who undergo extensive initial training in certain technical military specialties).
- ✓ **Involuntary** activations or service

Reemployment – Leave Notice Requirement

- Under USERRA the **employee must provide notice** to the employer that he or she intends to leave employment to perform military service.
 - ✓ Alternatively, an appropriate officer of the respective uniformed service could provide the leave notification on behalf of the employee.
 - ✓ An appropriate officer under USERRA regulations is one authorized by the military branch to provide notice.
- USERRA does not specify how far in advance notice must be provided to the employer or require any specific timeframe in which advanced notice needs to be given. Service members are encouraged to give notice as far in advance as is reasonable under the circumstances.
 - ✓ The Department of Defense “strongly recommends advance notice to civilian employers be provided at least 30 days prior to departure for Uniformed Service when it is feasible to do so.”

Reemployment – Leave Notice Requirement

- Although an employee must provide notice of his/her need for leave for the purpose of military service to qualify for re-employment rights under USERRA, the notice does not have to be provided in a formal communication:
 - ✓ A verbal notification from the employee would satisfy the notice requirement.
 - ✓ An employer is **not allowed to require** that the **notice** be **in writing** or submitted through a formal leave request process.



Reemployment – Timeframe for Return

- The **time period allowed** for a service member **to return to work upon conclusion of service** depends on the length of the employee's leave for uniformed service.

The service member's return is considered timely as follows;

- ✓ For service of **30 days or less** the service member is to report to work the next regularly scheduled work period the **first full day after service, safe transportation home, and at least 8 hours of rest.**
 - ✓ For service duration **between 31 and 180 days** the application for reinstatement must occur **within 14 days of completion of military duty.**
 - ✓ For periods of service of **181 days or more** the service member must apply for reinstatement **within 90 days of his/her return.**
- The deadline for reinstatement may be extended for up to 2 years for service members who are recovering from a disability incurred or aggravated during military service.



Reemployment – Exceptions to the Requirement

There are three exceptions to the re-employment requirement under USERRA.

- ✓ The employer's circumstances have changed and would make re-employment **impossible or unreasonable**.
- ✓ Re-employment would cause an **undue hardship** for the employer.
- ✓ The employment was for a brief, nonrecurring period with **no reasonable expectation that the employment would continue** indefinitely or for a significant duration.

Reemployment - Protection Against Discharge

- ✓ USERRA requires that employees who have returned from military leave shall not be discharged, **except for cause**, for designated periods based on their military leave duration. 38 U.S.C. 4316(c)
 - ✓ Where the length of service was **31 to 180** days the employee must not be discharged except for cause for a **6-month period**.
 - ✓ Where the service member's length of service was **181 days or more** the service member would have **1 year** of protection from discharge, except for cause.
- ✓ These provisions alter any employee's at-will nature of employment for the designated period, based on the employee's military leave, for employees otherwise working under the at-will standard.

USERRA - Disability Accommodation Requirements

- When an employee returns from military service with a disability incurred or aggravated during his/her service USERRA requires that employers make “**reasonable efforts**” to accommodate the employee.
- If the employee returns from military service with a disability that **cannot** be accommodated through reasonable employer efforts, the employer must reemploy the employee in another position they are qualified to perform.
 - ✓ In this case the alternate position should be the “nearest approximation” of the position to which the employee is otherwise entitled, in terms of **status** and **pay**.
- The disability does not have to be a permanent disability to qualify for accommodation rights under USERRA. Employers may have an obligation to provide a workplace accommodation for temporary disabilities incurred in service.

Military Service Leave – Partial Week Absences

- Partial week absences for employees serving in the uniformed services occur for leave periods to complete weekend drills and for mobilizations to active duty. Employers must treat these partial week absences appropriately under Fair Labor Standards Act (FLSA) requirements.

FLSA compliance considerations for partial week absences:

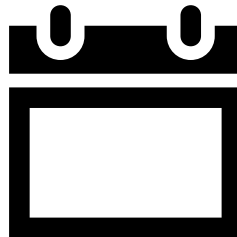
- ✓ Non-exempt employees are not entitled to be paid for work time missed during a workweek related to USERRA leave.
- ✓ Employers are prohibited from docking an exempt employee's pay for military leave in a workweek in which an employee performs work. Under the FLSA, **exempt employees must be paid their full salary** for any workweek in which they perform work and take military leave.

USERRA – Vacation Pay & Employee Work Schedules

- Employers cannot **require** an employee to use vacation or paid time off (PTO) during his/her military leave.
 - ✓ When an employee who is a member of the National Guard or Reserves is required to attend training for an extended weekend each month, causing them to miss days of work on an ongoing basis, the employer must accommodate this recurring leave. The employer cannot require the employee to use his/her vacation or PTO for this recurring missed time.
 - ✓ The employee could **elect** to use available vacation time or PTO for these purposes, but this would need to be the employee's decision.
- **Employee work schedule:**
 - ✓ employer cannot adjust the employee's schedule so that their military leave falls on a scheduled day off.
 - ✓ The employer cannot require the employee to make up time missed due to military service during the week.

Reasonable Time Allowed Before Reporting for Duty

- Employers must provide an employee who is reporting for military service sufficient time to travel to the location where the military service is to be performed.
- No exact amount of time is specified by USERRA



Employer Support for the Guard and Reserves (ESGR)

- The Department of Defense established the **Employer Support for the Guard and Reserves (ESGR)**.
- **The ESGR** promotes cooperation and understanding between the Military's reserve service members and their civilian employers.
- The ESGR **provides** free **technical assistance** for employers. This service can benefit employers facing complex military leave related matters.

The ESGR can:

- ✓ Confirm whether an employee's military service is qualifying or disqualifying. (related to the service member's discharge status)
- ✓ Help determine whether specific service counts toward the five-year cumulative service limit for reemployment eligibility.

Employer Support for the Guard and Reserves (ESGR)

- The ESGR has offices in every state and U.S. territory.
- ESGR local offices may be able to provide technical assistance on any applicable **state requirements and protections** related to military leave.
- The website for the ESGR - www.esgr.mil

The ESGR's Fiscal Year 2021 Annual Review reports that there were:

- ✓ 43,800 Employers engaged by ESGR
- ✓ 1,171 USERRA Cases were assigned

USERRA: Enforcement

- USERRA is enforced by the **U.S. Department of Labor** (DOL).
- The **Veterans Employment and Training Service** (VETS) is an agency within the DOL **authorized to investigate and resolve** complaints of USERRA **violations**.
- If an employee files a complaint with VETS and VETS is unable to resolve it, they may request that the case be referred to the **Department of Justice** (DOJ) for representation. If the employer is the federal government, the referral would be to the Office of Special Counsel.
- Employees may choose to bypass the VETS process and file a private lawsuit against an employer for violations of USERRA.



USERRA: Enforcement

- USERRA lawsuits filed in federal court may seek the following:
 - ✓ Require the employer to comply with the provisions of the law
 - ✓ Compensate the employee for any loss of wages or benefits resulting from the employer's noncompliance with the law; and
 - ✓ Additional liquidated damages in an amount that doesn't exceed the actual lost wages and benefits.
- Courts may award service members reasonable attorney' fees and other litigation expenses.
- Employers may not seek attorneys' fees or court costs from returning service members who do not prevail in their USERRA cases.



USERRA Posting Requirement

- All employers must notify employees of their rights, benefits and obligations under USERRA.
- The United States Department of Labor provides a USERRA notice for download by employers.
- Employers can meet USERRA's notice requirement by posting the sample USERRA notice where the employer generally posts other required labor law postings.

https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf



USERRA Records Retention

- USERRA does not establish any specific requirements or designate any records that must be retained related to the Act.
- Records related to an employee's military leave should, however, be retained because there is **no statute of limitations** for claims made or enforcement of rights under the USERRA statute.

Records related to:

- ✓ An employee's request for absence due to military service and return from service records should be retained.
- ✓ The handling of benefits during and after the employee's service should be retained to demonstrate compliance with USERRA requirements.

New Coverage for Certain State Active Duty under USERRA

- Members of the National Guard serving on **State Active Duty** are now **covered under USERRA when the following conditions are met**

The service is:

- a) For **14 days or more**,
 - b) In support of a national emergency declared by the President under the National Emergencies Act, **or**
 - c) In support of a major disaster declared by the President
- The coverage of certain state active duty is a recent amendment to Section 4303 of USERRA. This amendment went into effect on January 5, 2021.
 - Members of the National Guard serving on **State Active Duty** may have similar additional employment protections under **state** law. ESGR state offices may be able to provide USERRA assistance in these instances.

Providing Additional Employee Support

Additional (not required) ways employers can support the military service of their employees include:

- ✓ Providing supplemental pay in the form of a pay differential for a designated time period to employees on military leave. Some employers provide additional pay when an employee's pay for his/her military service is less than the pay he/she would have received from the employer if they had remained at work.
- ✓ Employers may want to consider setting limits to the duration that an employee would be eligible to receive supplemental or differential pay since employees can have extended military obligations and be on leave for lengthy periods.

Additional Employer Support

Additional ways employers can support their employees in the uniformed services.

- Employers and coworkers can stay in touch with their colleagues who are away from work on military leave.
- Maintaining contact with an employee deployed in the uniformed services can serve to:
 - ✓ Keep the employee connected to workplace developments
 - ✓ Provide an opportunity for two-way communication that may help the employer stay up to date and aid in planning for the employee's return

Additional Employer Support

- Employers can establish a military support group. These employee resource groups can be sponsored/supported by a designated company executive. These groups can serve to provide consistent support to employees in the uniformed services before, during and after periods of active military service.
- Employers can recognize military service at company events around significant military holidays.
 - ✓ Veterans Day
 - ✓ Memorial Day
 - ✓ Independence Day
- Employers can hold farewell and welcome home ceremonies for service member employees.

Service Member Support Programs (Non-Employer)

Yellow Ribbon Reintegration Program

- The Yellow Ribbon Reintegration Program is a Department of Defense effort to promote the well-being of National Guard and Reserve members, their families, and their communities.
- The program fulfills its purpose by connecting the service members, families and communities to resources throughout the military deployment cycle.
- National Guard and Reserve service members and their families can attend Yellow Ribbon Events where they can access information on healthcare, education, employment, and financial and legal benefits.

Additional Laws Supporting Service Members

The Heroes Earnings Assistance and Relief Tax (HEART) Act

- The HEART Act was enacted in 2008 and provides tax and pension benefits to service members who are disabled while on active duty for more than 30 days, and to their survivors if they die on active duty.
- The Heart Act requires employers and sponsors of qualified defined benefit and defined contribution plans to treat service members as being reemployed by the company for purposes of entitlement.
- If a participant in a 401(k), 403(b) or 457(b) defined contribution benefit plan dies while performing qualified military service, the HEART Act requires that:
 - ✓ The plan provide the participant's survivor with any additional benefits (other than benefit accruals) to which the participant would have been entitled to had he or she resumed active employment and then terminated employment on account of death.

Additional Laws Supporting Service Members

The Heroes Earnings Assistance and Relief Tax (HEART) Act (Continued)

These additional benefits may include:

- ✓ Accelerated vesting
- ✓ Ancillary life insurance benefits
- ✓ Other survivor benefits provided under the plan that are contingent on the participant's termination of employment due to death

Additional Laws Protecting Service Members

The **Servicemembers Civil Relief Act (SCRA)**

- ✓ Designed to lessen financial burdens on service members during periods of military service.
- ✓ Covers a wide range of financial and other matters including rental agreements, security deposits, evictions, credit card interest rates, mortgage interest rates, mortgage foreclosures, civil judicial proceedings, automobile leases, life insurance, health insurance, and income tax payments.
- ✓ SCRA protections can extend to dependents of service members.
- ✓ SCRA can provide for early lease termination and eviction protections where the service member's ability to meet their obligation is **materially affected because of his/her military service.**



Additional Laws Protecting Service Members

Important examples of **SCRA** protections include:

- ✓ A 6% cap on interest rates for financial obligations incurred **prior** to entering military service;
- ✓ Protections against default judgements in civil court proceedings where the defendant servicemember does not make an appearance;
- ✓ A requirement for a creditor to receive a court order before foreclosing on a mortgage taken out by a service member before beginning military service;
- ✓ Protection from repossession of the service members vehicle without a court order;
- ✓ The ability to terminate a residential lease, without penalty, if a service member receives orders to transfer or PCS orders; and
- ✓ A prohibition on the enforcement of storage liens on a service member's property without a court order.



Military Family Leave Provisions of the FMLA

- Eligible employees are entitled to two types of FMLA leave related to a qualifying family member's military service. This type of FMLA leave is referred to as **military family leave** and they are:
 - ✓ Qualifying Exigency Leave.
 - ✓ Military Caregiver Leave
- Under **qualifying exigency leave** an eligible employee may take leave when the employee's spouse, son, daughter, or parent who is a member of the Armed Forces (including the National Guard and Reserves) is on covered active duty or has been notified of an impending call or order to covered active duty.
- **Military caregiver leave** allows an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member with a serious injury or illness to take up to a total of 26 workweeks of unpaid leave during a "single 12-month period" to provide care for the servicemember.

USERRA: FMLA

- Impact of employee's military service leave on FMLA eligibility.

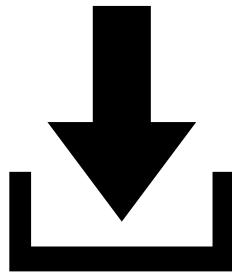
For purposes of determining FMLA eligibility requirements:

- ✓ The months employed and the hours **worked** for the employer must be **combined with**
- ✓ The months and hours **that would have been worked** if the employee had remained continuously employed.



USERRA: Final Thoughts and a Handout

- ✓ Attached along with the slides is a compliance overview, Uniformed Services Employment & Reemployment Rights Act (USERRA).
- ✓ This resource offers a review of the key provisions of USERRA.
- ✓ The document references and has links to important USERRA resources from the U.S. Department of Labor



Download our handout

Thank You for Attending

Join Us Next Month
May 19, 2022 @ 2 pm ET

[Register Here](#)