

PERSONNEL NOTEBOOK

For Your Most Important Resource

WHEN JOHNNY COMES MARCHING HOME He'll Be Wanting His Old Job Back

With the high numbers of men and women in today's U.S. military, it's important to remember that they're all volunteers and they're all defending us.

So holding their job for them while they're doing it is not only what we want to do, but also what the law requires us to do. We find it in the Uniformed Services Employment and Reemployment Act of 1994 (USERRA).

In general, USERRA requires you to rehire, or otherwise hold the jobs, of former employees who have entered the military service, even if that return is several years later.

What Do I Need To Know About Rehiring Military Veterans?

Here are 12 things you should know:

1. The law applies to you

Unlike many other employment laws, USERRA applies to all employers, regardless of size. All includes private, federal, state, and municipal employees as well as Indian tribes. And it covers all employees including part-time and probationary employees.

2. Almost every type of military service is covered

These rights to reemployment are extended to employees who have been absent from their jobs because of their duties in the uniformed services. "Uniformed services" include the Army, Navy, Marine Corps, Air Force, Coast Guard, and each of their reserves, any state or National Guard units, Commissioned Corps of the Public Health Service, and any other category designated by the President. Covered duties include active-duty training, inactive duty-training, full time state or National Guard duty, fitness examinations for duty, funeral honors obligations and service in the National Disaster Medical System.

3. The employee must give you notice of his impending military service

The employee must tell you that he/she is leaving your employment for military service. That notification can be oral or written and can come from either the employee or a representative of the military branch he is entering. Notice is not required if military necessity prevents giving it or it is otherwise unreasonable or impossible to do so.

4. The employee may be gone for up to five years

Most service time will be counted toward a cumulative five-year period. However, mandatory weekend and annual training for reservists and state or National Guard may not be included in that five-year tally.

The five-year maximum may be extended for specific service such as enlistment in the Navy's nuclear power program which requires a six-year term.

5. The employee must reclaim her job within specific time limits

When the employee's military service ends, she must report back to work within a specific time. If her leave was for 30 days or less, she must report back to work on the first regularly scheduled workday following the day her service obligation ends. If her obligation lasted between 31 and 180 days, she must report back to work within 14 days of her release. If her service was for 181 or more days, she must report to work within 90 days of her release. However, if she is hospitalized as a result of her service, that time can be extended up to two years.

Keep in mind that a returnee who misses her deadline must be treated as all other employees who miss leave deadlines.

6. Not everyone is entitled to be reinstated

A returnee with a dishonorable or a bad conduct discharge is not entitled to these protections and you are not required to reinstate him. This also includes those with less than honorable discharges or who have been dismissed by a military court martial or were released to serve a civil imprisonment. If the employee was working in a temporary job you are not required to reinstate. And if your business circumstances are so depressed as to make reemployment impossible or unreasonable, you are not required to reinstate. In addition, if he declares to you upon leaving that he does not intend to return after his military service, you are not required to hold his job or to reinstate him upon

his return. However it must be made clear to him the rights he is surrendering. (A signed release might be wise)

7. You may require documentation to determine the employee's right to reinstatement

If he has been gone for 31 or more days, you have the right to request documentation of his service time and discharge papers to establish all compliance. However, you must reemploy him while verifying that information. If the information is not forthcoming, you may discharge him.

8. An employee is entitled to the job she would have had if she had never left for military service

This is known as the "escalator position". This may be a higher level or a lower level job or even a job that is currently laid off. But she must be restored to the position as it now exists and as if she had remained continuously employed.

More specifically, if she was gone for less than 90 days, you must place her in the position she would have held if she had remained continuously employed (even if that position is now more advanced or at a higher level), as long as she is qualified or can become qualified. If she cannot do so, you must reinstate her to her former position.

If she was gone for more than 90 days, you must also place her in the position she would have held if she had remained continuously employed, or a position of similar seniority, status and pay, as long as she is, or can become, qualified for it. If she cannot become qualified, you must place her in her former position or one of similar seniority, status and pay for which she is qualified.

If there is no longer such a position in existence, you must place her in an equivalent position for which she is qualified.

9. Employees who now hold those jobs must surrender them but are also entitled to reinstatement

When the veteran returns, there will likely be someone holding his former job. The person who left the job first has the rightful claim to it. The other employee must be reinstated in another position with similar status and pay. In the event that a union bargaining agreement is in conflict with this action, USERRA will supersede the collective bargaining agreement.

10 Returning veterans are entitled to retroactive employee benefits

This does not mean that you owe her for all the missed vacation, but it does mean that her seniority must be considered continuous during her service time. Therefore she may be entitled to a higher level of vacation accrual. She is also entitled to retroactive pension contributions. If she was gone for less than 90 days, you must make the pension contribution immediately. If she was gone for more than 90 days, you do not have to make the contribution until after all verification of military documents and eligibility are verified. Contributions must be based on the wages she would have earned if she had been working the entire time. Military service must be considered continuous service with the company for vesting and benefit accrual purposes. However, the employee must repay his previously required contributions to any accrued benefits. He must also be given an extended period of time to repay those contributions. The time you must allow for his repayment is three times the length of his military service not to exceed five years. He is entitled to any right or benefit that is associated with seniority that he would have attained had he remained continuously employed. A right or benefit is considered seniority based if it is determined (or accrued) through length of service, such as vacation time. He must also be allowed to use any accrued vacation time he chooses (instead of unpaid leave) before beginning his military service. If

he chooses not to use vacation, it must be reinstated when he returns. You may not force him to use his vacation time during his military service, this includes annual reservist training.

11. You must offer continuation of health insurance for departing employees

Even if you are not required to comply with COBRA (Which is required if you have 20 or more employees), you must still offer employees departing for military service, the opportunity to continue their and their dependents health coverage for up to 24 months at their own cost. And when they return from military service, you may not require a new waiting period for eligibility.

12. Military service changes the Employment At Will (EAW) relationship

Most of us are aware of the Employment At Will (EAW) doctrine. (See HR University on PLANET'S web site for the Personnel Notebook entitled "Employment At Will, Does It still Work?") An EAW employer declares the company's position that an employee may terminate his/her employment with the company at any time and for any reason, and that the company may also terminate the employee's employment at any time and for any reason. However, the EAW may not be applied to any employee who has been on military leave for more than 30 days. Such an employee may not be fired without due cause. More specifically, if she was on military leave for between 30 and 180 days, you may not fire her without due cause for a period of six months. If she served for more than 180 days, you may not fire her without due cause for a period of one year.

It's clear that both the military employee and the company have great burdens to bear in the defense of our national security. As employers, we should also be ready, willing and able to do our part. Our responsibility is to know our

obligations and to provide these protections for those who serve.

This article was partly based on information from M. Lee Smith Publishers (for subscription information (800) 274-6774) and the Department of Labor's USERRA Advisor which is available at www.dol.gov/elaws/vets/userra

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