

## USERRA Questions for Speakers

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Thanks!

- Has there been any guidance on extending the 24 month health or life insurance coverage for employees on Military-LWOP? **We are not aware of any initiative extending beyond the 24-month coverage.**
- If someone is on military orders, and it indicates they're on MPA (Military Personnel Authorization) orders, it's not training, but they are on active duty. Is MPA orders excluded from the 5 year rule (which doesn't exist)? **I am unfamiliar with "Military Personnel Authorization" orders, but if an individual is absent from civilian employment for purposes of serving on active duty, s/he would have reemployment rights provided the following 5 criteria are met. They are:**
  - 1) Must be absent for a period of covered military service
  - 2) Must provide advance notice to the employer (oral or written)
  - 3) Cumulative period of active service not to exceed 5 years subject to a number of exceptions;
  - 4) Application for reemployment must be timely; and
  - 5) Cannot have a disqualifying discharge.

I suggest that you review the exceptions to the 5-year cumulative service limit set forth at: 38 U.S.C. § 4312(c), and see if the employee was ordered to active duty under any of those provisions. It is ultimately up to the service branch to determine what periods of active service fall within and without exceptions to the 5-year cumulative limit. Further, the employee's discharge certificate, not initial orders to active duty would be dispositive as to whether any or all of his/her military duty is exempt from the 5-year limit. An employee is not required to provide orders to active duty to an employer prior to leaving for active duty. All that is required is that the employee advise the employer orally or in writing that s/he will be on active duty. As discussed during the training session, if you require verification of your employee's current military status, you should either contact his/her military command authority or contact ESGR at: [www.esgr.com](http://www.esgr.com), or at: 703.696.1386.

- How is it fair or reasonable to management and the organization if a military member is considered for a position, and they are selected, but they won't be returning to civilian service any time soon? The work and mission will not be fulfilled, and management will have to hire someone temporarily until the military member returns to the civilian job. This is fiscally irresponsible. Isn't it?

USERRA is a Federal statute imposing certain requirements on all employers in order to ensure that Service Members' employment and reemployment rights are preserved. The Veterans' Employment and Training Service (VETS), the U.S. Department of Justice, and the Office of Special Counsel do not have discretion as to which provisions of that law they will administer or enforce. You may, however, wish to direct your comments to the Senate and House Veterans' Affairs Committees, and it is reasonably certain that the Chairs of both committees will be highly interested in hearing your views.

- If a civilian employee is coming off of military service, do they ALL automatically get the 5 days of uncharged leave or does it depend on how they were called up (i.e. the authority they were called up under). We have lots of employees who are called up "IN SUPPORT OF OIF or

OEF" under Title 10, but they are not deploying to the theater, they are performing their military service in CONUS. Does the 5 days apply to them?

Not necessarily – it depends on the orders and how he or she was called to serve. A civilian employee is entitled to 5 days of excused absence after he or she returns from active military service in connection with the continuing Global War on Terrorism (GWOT) -- such as those called to active duty as part of Operation Noble Eagle, Operation Enduring Freedom, and Operation Iraqi Freedom, as well as any other current or future military operations deemed to be part of the GWOT. The intent of the President's memorandum is to grant 5 days of paid time off (excused absence) to employees returning to Federal civilian service from active duty to aid in their readjustment to civilian life. The President's memorandum anticipates Federal employees will serve a significant period of time on active duty in support of the GWOT. An employee must be on active duty in support of the GWOT for at least 42 consecutive days to qualify for 5 days of excused absence. An employee does not qualify for excused absence for active duty of less than 42 days or for an accumulation of 42 or more days of active duty if at least one of the activations does not meet the 42 consecutive days standard. However, agencies may exercise their normal policies to grant excused absence in circumstances not covered by this policy.

- Under merit based actions, are the accommodations and flexibilities limited to the "home" location or does any location need to provide accommodations for a "deployed" applicant? For example: If the employee is currently employed by Army in DC and applies for an Air Force position in DC, is the employee entitled to the same accommodations and flexibilities when applying to the AF position? (Application, interviews, etc)

• Title 5 Code of Federal Regulations part 353 provides the rights, benefits and obligations of employees and agencies in connection with leaves of absence or restoration to duty following uniformed service. When applying for a new civil service position, and you are absent from the area and wondering what accommodations are provided by the agency, we recommend you speak with a representative of such agency and let them know you plan on applying for employment and what they offer for accommodations.

- Can a disabled veteran who is being terminated from a career conditional appointment during a probationary period use USERRA to appeal the termination if he/she believes that the termination is related to his/her military service? This is a newly hired employee, not someone who has returned from military service.

An employee may always allege and file a complaint to the effect that s/he believes that an employer has taken an adverse action due to his/her status as a veteran. But the simple fact that the employee is a disabled veteran does not offer protection against discharge during a probationary period or for cause. Rather, the law provides that the employer may not take any adverse action against the employee due in any part to his/her status as a veteran. As long as his/her military status is not a factor in the decision to terminate, then USERRA would not be violated.

Similarly, the employee could allege that his/her disability played a role in the decision in violation of the Americans with Disabilities Act of 1990 (ADA). Office of Special Counsel and Equal Employment Opportunities Commission (EEOC) investigate those complaints as PPPs, and the processes and standards for both ADA and USERRA complaints in that context would be similar.

- I was told by one of our employees that documentation is not required for less than 30 days. Is that true, even if they are requesting paid military leave differential? What about if the employee leaves for 22 days and claims that the service is for a contingency operation? Don't we need documentation to verify that it was contingency service?

The employer may ask for, but may not **require** documentation for USERRA reinstatement/reemployment purposes for periods of service less than 30 days.

The employer may, however, require such documentation if the employee wishes to claim military leave or differential pay. OPM can best address issues involving military leave and differential pay.

- We had an employee who turned in an unsigned letter on blank bond paper to request military leave. When the supervisors requested a signed letter or a document that was on the military letterhead, the employee was indignant. The employee then stated when she went back to her Army superiors they told her they were going to report the Agency to his/her congressman. Have you encountered employees, and even the branch of service, who do not seem cooperative when requesting documentation and how do you suggest to handle.

An employer may ask for, but **may not require** employees to submit copies of orders or other documentation prior to leaving for active duty. Moreover, the employee is not required to seek permission of his/her employer to leave civilian employment to go on active duty. We (VETS) and DOD strongly encourage employees to submit copies of orders in order to avoid any ambiguity, but employees cannot be required to do so. This is because orders may not be available at that time.

USERRA only requires that an employee provide advance notice orally or in writing to the employer prior to leaving for a period of covered military service. If the employer questions whether or not the duty is actually performed, s/he may contact the employee's unit of assignment to verify the employee's current military status. Or the employer may contact ESGR, 703.696.1386, and request verification.

- In respect to career promotions, are employees entitled to all successive promotions that would have occurred had it not been for active duty. Example, employee hired as GS-05 target GS-12....six months into GS-05 assignment, employee is put on orders for 3 years...when he or she returns is the employee entitled to be promoted to the GS-07 level, GS-09 level to the GS-11, that would have occurred in 3 years except for the call to active duty.

Short answer, yes. If the GS-05 to GS 12 is part of a normal ladder promotion, only contingent upon successful completion, then the employee should be brought back at the GS level s/he otherwise would have attained. OPM regulations at Title 5 CFR also provide that probationary periods continue to run while Federal employees are on active duty.

- Is there a link to USERRA poster?
  - [http://www.dol.gov/vets/programs/userra/USERRA\\_Federal.pdf](http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf)