

**Uniformed Services Employment and
Reemployment Rights Act of 1994 (38 U.S.C.A. §4301- 4330)**

SUNY System Administration
Office of Employee Relations
November, 2001

Basic Benefit: The USERRA attempts to mitigate financial losses that might arise as a consequence of employees' service in the uniformed services. To this end, the Act provides rights to reemployment in a position the employee would have held or position of like seniority, rights to continued health insurance and rights to continued pension coverage.

Eligibility

Covers all private and public employers including the States (§4303(4)(A)(iii)).

Covers voluntary and involuntary service (§4303(13)).

Covers employees who leave their jobs due to service in the "uniformed services" (§4303(16)).

Uniformed services include: Army, Navy, Air Force, Marines, Army and Air National Guard, Coast Guard, the reserves of these services and the Commissioned Corps of Public Service, along with any other category designated by the President in time of war or emergency (§4303(16)).

Does not cover employees in brief or non-recurrent positions. Determination is whether, regardless of the contract of employment, there is a reasonable expectation that employment would continue for an indefinite period of time and not that the position is permanent (§4312(d)(2)(C)).

Right to return provisions extend for a cumulative period of five years from beginning of leave. Benefits can extend beyond five years in declared war or natural emergency (§4312(a)(2)).

A State can provide additional benefits and most favorable State or Federal rules apply (§4302).

Note: §242 of N.Y. Military Law covers any ordered military duty performed in the service of the State or the United States including members of reserve forces or components of the armed forces; the collective bargaining agreements, the MOUs and side letters cover employees who are federally "activated" or activated by the Governor between September 11, 2001 and September 12, 2002.

Reemployment Rights

Eligible employee is entitled to reemployment upon request within specified time periods upon return. (§4312). N.Y. Military Law §242(4) entitles eligible employee to the right to leave which extends for unlimited period during ordered military duty.

The key reemployment feature of the USERR Act is the “escalator” protection which requires employers, as a first choice, to return an individual to any higher position they would have attained had they remained at their civilian employment. Only if the individual is not qualified do the job they would have attained, would they then be returned to the job they had at the time of departure.

Period of Service

Employment Rights under USERRA

Less than 91 days

In the position which the person would have had if employment had not been interrupted, the duties of which the person is qualified to perform

Or

Only if the employee is not qualified to perform the duties in the job above after reasonable efforts by the employer to qualify the person, then reemployment in the position they left
(38 §4313 (a)(1)A&B)

Or

If the employee is unable to perform either of above jobs, then a job that most closely matches the above jobs in pay, status and seniority.

More than 90 days

In the position which the person would have had if employment had not been interrupted Or a position of like seniority, status and pay, the duties of which the person is qualified to perform

Or

Only if the employee is not qualified to perform the duties of the jobs above after reasonable effort by the employer to qualify the person, their reemployment in the position they left or a position of like seniority, status and pay

A returning employee is entitled to bump an incumbent if necessary to accomplish the placement.

Limited exceptions to reemployment obligation include: change in circumstances that makes reemployment impossible or unreasonable or an undue hardship. In assessing whether an undue hardship exists, the overall financial resources of the employer and the facilities involved are considered (§4312(d)). Burden is on the employer to prove these reasons.

The employee retains full seniority, including the time spent in the uniformed service. As a general rule, non-seniority based benefits, other than those specifically covered in law, should be treated like other returns from a leave of absence (Similar to N.Y. Military Law §242(4)).

The USERRA provides no paid leave. For the first year, the 30 days/calendar year paid leave under New York State's Military Law (§242(5)), the supplemental leave with pay up to 30 days per September 11, 2001 through September 10, 2002 and the leave at reduced pay (AKA Military Stipend) under the Memorandums of Understanding and collective bargaining agreements provide greater economic benefits which, when added to military pay, is equivalent to State salary at the time of departure. The OSC October 23, 2001 Payroll Bulletin 276 provides guidance on the processing of these payments (Civil Service Advisory 10-06, p 5).

Rights are lost if military discharge is other than favorable (§4212(a)).

Employee cannot be required to use accruals during military leave, but may use them if they choose. (E.g. before being placed on Military Leave at reduced pay under the MOUs).

Accruals resume at rate as if employee had not left. MOUs with UUP and GSEU provide that employees on leave at reduced pay do not receive accruals (MOU ¶2(c); Civil Service Advisory Memorandum 01-06 provides a good summary of accrual provisions during leave with supplemental pay and leave at reduced pay).

Discharge Protection - Returning employee who serves for more than 30 up to 180 days may not be discharged except for cause for six months after his or her return; employee who serves for more than 180 days may not be discharged except for cause for up to one year from the date of return.

Discrimination Prohibited

Person who applies for, performs or has performed uniformed services shall not be denied:

- initial employment
- reemployment
- retention in employment
- promotion, or
- any benefit of employment.

An employer may not discriminate against anyone who:

- seeks protection of the USERRA

- testifies or makes a statement in connection with a proceeding under the USERRA
- has assisted or participated in an investigation under the USERRA (§4311; Similar to but more explicit than N.Y. Military Law §242(4)).

“But for” test applies. Prima facie case is made if person’s protected activities are a motivating factor in denial of benefit; unless employer can prove that the negative action would have taken place in the absence of the person’s engaging in protected activity (§4311).

A Word about Health Insurance

Based on the Memorandums of Understanding and collective bargaining agreements with the unions, many of the State health insurance benefits will be significantly better than the federally required minima. The USERRA requires health benefits be extended for 31 days at the same cost that employees paid while employed, then requires COBRA-like benefits for 18 months from the date of departure. Under the MOUs and the collective bargaining agreements, the State will extend health benefits at the regular cost for up to a year (September 10, 2002) for those who qualify. The Federal law covers employees who enlist, while the MOU and collective agreements may not cover employees who voluntarily serve. Should this discrepancy affect any of your employees, please contact SUNY Office of Employee Relations. The minima required by the USERRA are set forth here for informational purposes, and the State intends to be at least as generous in all respects.

Benefits:

<u>Period of Service</u>	<u>Coverage</u>	<u>Cost</u>
Less than 31 days	Coverage of employee and eligible dependents	Employee contribution capped at amount they usually pay
More than 31 days	Continued coverage of employee and eligible dependents	Employee may be required to pay up to 102% of premium (calculated pursuant to COBRA)

The maximum period of coverage is the lesser of 18 months from the date the employee’s absence begins Or the day after the person fails to apply for return to a position of employment within the time limits of the law.

On return from military service, the employee is entitled to reinstatement in the health plan with no waiting period.

The waiting period may be applied to illnesses or injuries incurred in or aggravated during uniformed service.

The employee is eligible for continued State coverage even though also covered by the health care plan for the military called CHAMPUS. For example, dependent coverage would normally be better under the State plan.

A Word about Retirement Benefits

Applies to employee pension benefit plans provided under any State law governing pension benefit for governmental employees (§4318).

The specific application of this component of the law to New York State retirement plans will be interpreted by OSC, ERS, TRS and TIAA-CREF, so this summary should be considered a general advisory only.

Military service is counted as time in civilian service for purposes of vesting and entitlement to retirement benefits. Military service is not considered an interruption of service for any purpose. The USERRA and Military Law both establish rules for retirement plans (§4312; §242(b)(c)).

An employee is not required to begin a new waiting period upon return to service.

The Federal Act entitles a returning employee to make up the contributions that were missed during the time of uniformed service. Given that the return in the equity and other markets will inevitably be different at the “make up” point, as well as some loss of value of the duration of the investment, there likely would be an impact on the value of the retirement benefit.

An employer is required to “make up” any contributions to a pension plan that were missed during an employee’s absence. The employer is not required to make up lost investment earnings on these made up contributions.

Generally, a reemployed individual is entitled to benefits that are contingent on or derived from any employee contributions only to the extent that the person makes payment to the plan of such contributions. These contributions can be made after the employee returns to service over a several year period depending on length of service (4318(b)(2)).

An employer is liable to the employee pension benefits plan for the period during the employee’s absence for funding any employee obligation and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service.

For purposes of computing the employer contribution liability, the employee’s compensation shall be computed at the rate the employee would have received or, if that cannot be ascertained, the employee’s average rate of compensation during the previous 12-month period.

TIAA-CREF intends to voluntarily suspend loan repayments at the request of the employee.

Enforcement

Enforcement is through the U.S. Department of Labor, Veterans Employment and Training Service (VETS), and the Justice Department. Awards in the courts can include injunctive relief, such as directing the employer to comply with the terms of the statute, as well as monetary relief for damages and attorneys fees.

References

U.S. Department of Labor Veterans Employment and Training Service
www.dol.gov/dolvets

Department of Defense, National Committee of Employer Support for the Guard and Reserve
www.esgr.org/faqemployers.html

Uniformed Services Employment and Reemployment Act, 38 U.S.C.A. 4301 et seq.

New York Military Law, §242 (McKinney 2001)

New York State Department of Civil Service Attendance & Leave Manual,
Advisory Memorandum 01-06

Payroll Bulletin #276, Office of State Comptroller, October 23, 2001