

USERRA

Uniformed Services Employment and Reemployment Rights Act (USERRA)

The lawyers at Tully Rinckey know what it means to serve. In fact, a number of our attorneys, including both the Founding and Managing Partners, are veterans of the United States Military. This gives our firm a unique perspective on the importance of military service to our country. Because of this outlook, we are continually striving to help those who are seeking to enforce the rights afforded to them by reason of their military service, whatever their civilian careers might be. Service members with civilian careers who are called to active duty serve and protect our country. They should not suffer employment discrimination because of military service. Likewise, they should not come home from military duty to find they have no job or that they have been denied the benefits of employment they would have earned had they not been called to service. The Uniformed Services Employment and Reemployment Rights Act prohibits employment discrimination because of military service. The statute also provides a wide range of protection regarding reemployment with a civilian employer upon the conclusion of military service. Lastly, USERRA also prohibits retaliation against those who seek to enforce their rights under the statute or who assist another in enforcing those rights. **Who**

USERRA Protects:

USERRA protects those who performed the following service:

Armed Forces

Army or Air National Guard (including full-time duty, active duty for training and inactive duty training)

Commissioned corps of the Public Health Services

Other categories of service designated by the President during time of war or national emergency

Who must comply with USERRA:

Private Employers

The Federal government

State and local governments

Unlike some other statutes, there is no minimum number of employees that and employer must have in order to be obligated under USERRA. **What USERRA protects:**

Reemployment Rights

If you leave your civilian job to perform qualified military service, USERRA generally requires your employer to rehire you upon return from military duty. There are, however, pre-conditions to this obligation. When you leave for military service, you must give advance notice of your service obligation, either written or verbal, to your employer unless you are unable to do so by reason of military necessity or it is otherwise impossible or unreasonable for you to do so. The cumulative period of your service, which includes all prior absences for uniformed service, must not exceed five years, although there are many types of service that are not counted toward this five year limit. Moreover, upon the conclusion of your military obligation, you must submit an application for reemployment. Depending on the circumstances, you may have to give notice immediately upon your return (if the period of service was less than 31 days) or you may have as long as 90 days to do so (if the period has exceeded 180 days.) In some cases of service-connected illness or injury, the required notice period could be extended to two years or longer. In general, if these procedural requirements are satisfied, the returning service member is entitled to the job that he or she would have held had his/her been continuous and not been interrupted due to military duty (for example, a promotion that would have been reasonably certain to occur if the employee had stayed at work instead of leaving for uniformed service), provided only that the service member is qualified to perform the duties of this new position. This is known as the escalator position. The service member gets off the escalator when he goes into service, but upon returning, he or she does not get back on the escalator where it was upon departure, but rather where that step on the escalator had advanced as of the time of return. In cases where the employee would not have advanced even if he had remained, the escalator position may be the position that the employee occupied at the time he/she departed for service. If the returning employee is not qualified to perform the duties of the escalator position, the employer must make efforts to qualify the employee for that position, unless such efforts would entail significant difficulty or expense for the employer. After making the necessary efforts to train the employee for the escalator program, if those efforts are not successful, the employer may reemploy the returning service member in the position he/she occupied at the time of departure for service. In cases where the period of service has exceeded 90 days, the employer may reemploy the returning service member in a position of similar seniority, status and pay to the escalator position or the position at the time of departure, whichever is otherwise appropriate. The employer does not have to reemploy the returning service member at all if the employer's circumstances have changed to the point where it would be impossible or unreasonable to do so or, in some cases, if it would impose an undue hardship on the employer. Seniority and Benefits

The escalator principle also applies to seniority and benefits. A returning veteran is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of commencement of military service plus the additional seniority and rights and benefits that the person would have attained if he or she had remained continuously employed. Benefits determined by seniority are those that would accrue to the employee by virtue of he or she remaining in the position of employment. An automatic pay raise after a specified period of service would be such a seniority-based benefit. Rights and benefits not determined by seniority are treated differently. For purposes of such benefits, the service member is deemed to be on furlough or leave of absence and entitled only to those non-seniority rights and benefits as the employer grants to employees in that status. Typically, the accrual of vacation time is considered a non-seniority based benefit and, therefore, the service member would not accrue vacation time in the military service. USERRA also contains provisions concerning the right to continue the employer's health care coverage while the employee is on military duty as well as the protection of employee pension benefits. Discharge from

Employment

Many workers in the private sector are employees at will, meaning that they can be fired at any time for any reason other than an unlawful one (for example race discrimination) or for no reason at all. However, USERRA provides some protection against at will terminations. If a service member is reemployed by his/her employer upon the conclusion of service, the employer is prohibited from terminating his/her employment for cause for a period of 180 days, if the period military service was from 31 to 180 days, or one year if the period of uniformed service exceeded 180 days. Federal employees also receive some protection from job loss due to reductions in force. How to Enforce Your Rights under USERRA

If a service member believes his or her USERRA rights have been violated, he or she may, but is not required to, file a complaint with the United States Department of Labor – Veterans Employment and Training Service (VETS). VETS will analyze the complaint, determine if a violation of USERRA has occurred and, if it has, try to negotiate a resolution of the situation with the employer. However, if it is unable to negotiate a resolution, VETS has no enforcement authority. The service member will then be informed that he or she may initiate a legal action against the employer, with or without an attorney. VETS typically will also ask the service member if he/she wants the matter forwarded either to the Office of Special Counsel, in the case of the Federal government, or to the United States Attorney General. However, these officials typically decline to pursue the matter. If a federal employee decides to pursue the matter further, this involves filing an appeal with the Merit Systems Protection Board

. For private employees, the remedy is a lawsuit in United States District Court. For employees of the state, the legal action must be brought in a court of that state. Certain National Guard are considered states employees for this purpose. All USERRA enforcement actions are technically complex and present numerous procedural hurdles. Skilled, experienced counsel can provide valuable assistance in such circumstances. Time deadlines for USERRA lawsuits

Currently, there is no statute of limitations for a USERRA claim, meaning that a case that arises today can be filed at any time. However, in some cases that arose prior to the Congressional enactment which made clear that no statute of limitations applied might still be considered barred by a four-year statute of limitations. In any event, it is important not to delay filing unduly. Such delay can significantly impact on the case. For example, in the case of a service member who has lost his or her job, a judge may not be willing to require a company to reinstate the service member if he or she has waited to file a complaint. If the employer can convince the judge that the delay has prejudiced it, for example due to the death or relocation of witnesses, he or she might dismiss the claim entirely. The typical USERRA case at the Merit Systems Protection Board

is completed within a period of about 120 to 150 days. Cases in Federal District Court typically last about 18 to 24 months from start to finish. Many state cases last longer than that. Of course, it is possible that the case will settle at any stage along the way and in most cases it is advisable to explore settlement options due to the time and expense required to take the case to a final decision. What remedies are available under USERRA

Once a Federal court complaint or MSPB appeal has been filed, the judge can impose a number of remedies, including: Require the employer to comply with USERRA, which may

include reinstatement to employment

Compensate the employee for lost wages or benefits suffered by reason of the employer's failure to comply with USERRA

In a case involving a private sector employer, require the company to pay double the amount of lost wages and benefits if the violation of USERRA is determined to have been willful

Award a successful employee attorney's fees and costs associated with the lawsuit. However, no fees or court costs can be awarded against the service member, meaning that even if he or she loses, the employer is not entitled to attorney's fees or costs.

The overwhelming percentage of USERRA cases are settled. In such cases, the employer typically agrees to pay some or all of the service member's attorney fees.

This material is not intended to be a complete explanation of USERRA, but only to provide an overview. USERRA provides many protections not completely discussed here. Each situation is unique and there are many rules and exceptions under USERRA. It is important for us to gain a full understanding of your personal circumstances in order to advise you on further steps and how the Act will protect you. [USERRA Intake Form](#)

[US Department of Labor Uniformed Services Re-Employment Rights](#)

[USERRA Veterans' Employment and Training Service](#)

[USERRA Teaching Guide](#)

[USERRA Legislative History](#)

[USERRA Law Review Basics: The most comprehensive law review on USERRA created by former Tully Rinckey Partner Sam Wright](#)

If you have questions about your USERRA rights, please call us at 518-218-7100 to schedule a consultation with one of our attorneys. Since its inception, Tully Rinckey PLLC has been one of the foremost practitioners of USERRA law in the country and has helped hundreds of returning service members obtain their statutory entitlements.

Contact us during normal business hours via [Skype](#)

. [Click on the image above to schedule a time to speak with an attorney.](#)