

Job Rights and Military Leave for Reservists and Members of the National Guard

Following the tragic events of September 11, President Bush activated some military reservists; it is anticipated that additional reservists may be activated, as the United State's response to the acts of terrorism is further developed. During the upcoming weeks, issues involving military leave and the reemployment of returning reservists will undoubtedly arise. This paper, and its links to Web sites, attempts to answer some of those anticipated issues.

(Note: some of the answers to the questions set out below have application both to employees taking annual military leave and those who have been called into active service. Also, reference should be made to local policies and union contracts to see if a different answer is required.)

Which employers must comply with the state and federal regulations?

The state and federal regulations apply to all public and private employers, regardless of size. Thus, cities, towns, and counties must comply.

Which employees have rights under these laws?

The regulations apply to employees who perform duty, voluntarily or involuntarily, in the "uniformed services" (Army, Navy, Air Force, Marines, Coast Guard) and the Public Health Service, including the reserve forces of each of the services.

The covered employees include all whose employment is other than temporary. Employers should be aware that courts have construed the word "temporary" very narrowly. One commentator has indicated that "other than temporary" might be limited to seasonal employees and those employed by contract for a specified term.

Is an employee protected from unlawful discrimination by an employer based on military affiliation?

Yes; the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) provides protections for initial hiring and adverse employment actions by an employer if the action is motivated even in part by the employee's military service.

Military Leave

“Under Washington law, an employee is entitled to a military leave.”

Must an employer allow an employee time off so he or she can participate in military training or active duty?

Yes. Under Washington law, an employee is entitled to a military leave of absence for a period not to exceed 15 days each year beginning October 1 and ending the following September 30. During military leave or active duty, the employee continues to be paid his or her regular salary regardless whether the employee was ordered to take the training or whether he or she volunteered.

Does the 15 days of leave refer to work days or calendar days?

The 15 days of leave granted by the statute has been construed to refer to 15 *work* days. *State Employees v. Personnel Board*, 54 Wn. App. 305, 311 (1989).

If an employee works only four hours a day, does he or she qualify for a longer leave or active duty?

Under a 1999 attorney general opinion, a day is calculated according to the number of days the person would have worked, *but for* the military training or active duty. Thus, if the employee were scheduled to work four hours on a day, but for the military commitment, that one day would constitute a military leave day. Similarly, if the employee was scheduled to work 12 hours on a single day, that too would constitute one military leave day. See [AGO 1999 No. 2](#).

May an employer refuse to allow an employee to attend scheduled drills or annual training?

No. Employees must be excused from work to attend inactive duty training (drill) or annual training.

May an employer require an employee to reschedule drills, annual training, or any other military duty obligation?

No. According to fact sheet prepared by the National Committee for Employer Support of Guard and Reserve, when military duties require an employee to be absent from work for an extended period, during times of acute need, or when (in light of previous leaves) the requested military leave is cumulatively burdensome, the employer may contact the military commander of the employee’s military unit to determine if the duty could be rescheduled or performed by another member. If the military commander determines that the military duty cannot be rescheduled or canceled, the employer is required to permit the employee to perform his or her military duty.

“The employer may contact the military commander to determine if the duty could be rescheduled.”

May an employee be required to find someone to cover his or her work period when military duty interrupts the work schedule?

No, an employee is responsible for notification but not for altering the work schedule or finding a replacement.

Must the employee be paid by the employer during his or her leave of absence?

Neither state nor federal law requires payment for an employee's term of active duty *except* for the 15 days of military leave each year available to employees engaged in military training. However, the employee may use accrued vacation or other similar paid leave, if he or she chooses to do so.

Active Duty and Reemployment Rights

Must an employer grant leave to an employee who is called or volunteers for active duty?

Yes. An employer is required to grant a military leave of absence to a reservist who is called to or volunteers for active duty. The same rights apply whether the reservist is called or volunteers.

Is prior notice to the employer required for leave of absence for military duty?

Yes. Unless precluded by military necessity, advance notice must be provided either orally or in writing. While timeliness of notification is not spelled out in detail under USERRA, employees who participate in the National Guard or Reserve should provide their employers as much advance notice as possible. Failure to provide notice could result in a denial of the protection of USERRA.

When may an employer require an employee to provide documentation of military service?

After periods of military leave of absence of more than 30 days, the employer has the right to request such documentation, which can be used to establish the employee's basic eligibility for protection under USERRA.

May an employer hire a replacement while the reservist is on active duty?

Yes, the employer may hire a replacement while the regular employee is on military leave.

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“On return from service, health insurance coverage must be reinstated without any waiting period.”

“Returning employees who meet the law’s eligibility criteria must be treated as if they had been continuously employed for pension purposes.”

May an employee be forced to use accrued vacation for a military leave of absence?

No, but the employee *may* use such leave, at his or her option.

Is the employee entitled to health benefits or other fringe benefits while on military leave?

If an employee was provided health benefits before being called into service, USERRA provides for COBRA-like benefit continuation while he or she is absent from work, even if the employer is not covered by COBRA. If a person’s health plan coverage would terminate because of an absence due to uniformed service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins, or the period of service, whichever is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the uniformed service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

On return from service, health insurance coverage must be reinstated without any waiting period or exclusions for preexisting conditions, other than waiting periods or exclusions that would have applied even if there had been no absence for uniformed service. This rule does not apply to the coverage of any illness or injury determined by the Secretary of Veterans’ Affairs to have been incurred in, or aggravated during, performance of service in the uniformed service.

Most government employers provide vacation leaves to their employees. And most—if not all—vacation policies tie accruals, that is, the actual accumulation of vacation hours, to their employees’ seniority. For example, a person returning from three years of service may have passed a time benchmark where that person is entitled to build vacation at an increased rate (e.g., from one week a year, to two weeks per year), but that person would not return to find three years back vacation waiting.

If an employer allows accrual of vacation for employees who are on furlough or leave of absence, then a person of similar seniority, status, and pay who is absent for uniformed service is entitled to the same benefit, because USERRA treats the individual as being on furlough or leave of absence while performing uniformed service.

As to pensions, USERRA requires that returning employees who meet the law’s eligibility criteria must be treated as if they had been continuously employed for pension purposes, regardless of the type of pension plan the employer has adopted. This applies to vesting (determining when the employee qualifies for a pension) and also benefit computation (determining the amount of the employee’s monthly pension check). Absence for service is not considered a break in employment for pension purposes. Also, an employee who would have become eligible to participate in a pension plan during that

individual's time in the service should be placed in the plan retroactive to the date of initial eligibility. If the employer contribution is contingent on the employee's contribution, then the employee must make his or her contribution before the employer is obligated to make its contribution.

Does the employee continue to accrue service credit under PERS or LEOFF for the time he or she is on active service?

Maybe. Depending upon the plan and the time of service, the employee may accrue service credit while on active military duty. Specific information should be sought from the state Department of Retirement Systems, <http://www.wa.gov/DRS/drs.html>.

Must the employer continue to pay contributions to the LEOFF and PERS retirement plans during the time the employee is on active duty?

A qualified "no." While the employee is actually on active duty, there is no requirement that contributions be made. However, upon the return of the employee, the employee may purchase service credit for the time he or she was on duty. If the employee pays for the credit (payment of interest is not required), the employer must pay its share, with interest. Different rules may apply depending upon the retirement plan involved and the dates of the employee's service. The state Department of Retirement Systems should be contacted for specific information. See <http://www.wa.gov/DRS/drs.html>.

What conditions must be met by a returning reservist in order to qualify for reinstatement?

A person who leaves a civilian job to enter active duty is entitled to return to his or her civilian job after discharge or release from active duty. However, there are five basic eligibility requirements under federal law:

- The person must have been released from service under honorable conditions and must furnish proof of that release;
- The person must have held a civilian job "other than temporary" at the time he or she entered active duty;
- The employee must have left the civilian job for the purpose of going into active duty, and must have given notice to his or her employer to that effect;
- The employee must apply in writing within 90 days of separation or release from training or service (lesser periods apply when the period of service is 180 days or less); and
- The period of service must not exceed five years.

Must the employer reinstate the returning reservist to his or her prior position?

The employer must offer the returning employee "an escalator position," which might be the job he or she would have had if employment had not been interrupted by military service, or a position of like status, seniority, and pay. If the employee is not qualified for

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“If the tour of duty was more than six months, the returning employee may not be discharged within one year of return.”

his or her previous position because of an injury sustained during military service, he or she is entitled to reemployment in any other position for which he or she is qualified, if that position provides similar seniority, status, and pay of his or her previous employment.

This “escalator” position refers to the concept that the returning employee does not step back on the “seniority escalator” at the point he or she stepped off to enter into military service. Instead, the employee steps back on the escalator at the spot he or she *would have been* had he or she been continuously employed during military service. The employee thus benefits from any cost of living and/or step increases granted to similarly situated employees during the time he or she was gone.

On the other hand, an employee who would have been laid off or discharged but for the fact that he or she was on a military leave of absence may not be entitled to reinstatement upon return. The employer has the burden in such instances to prove that circumstances have so changed as to make it impossible or unreasonable to reemploy the person; the employee is no longer qualified for the position and reemployment would impose an undue hardship; or the employment the employee left was “temporary,” with no reasonable expectation that it would continue indefinitely.

USERRA specifies that returning employees must be “promptly reemployed.” What is prompt will depend on individual circumstances. Reinstatement after three years on active duty might require several weeks to allow giving notice to a replacement employee who might have to vacate the position.

What if the returning employee is disabled and would not be able to perform his or her prior job?

If the returning employee is unable to perform the duties of his or her prior job because of a military-connected disability, the employer must make reasonable efforts to accommodate the disability so that the person can perform in the position. If, despite reasonable accommodation efforts, the person is still not qualified for the position, he or she must be reemployed in a position of equivalent seniority, status, and pay (the “alternate position”), so long as the employee is qualified to perform the duties of that position or could become qualified with reasonable efforts by the employer. If, however, the returning employee is unable to become qualified for the original or alternate position, the person must be employed in a position that, consistent with the circumstances of the person’s case, most nearly approximates the alternate or original position in terms of seniority, status, and pay.

Is a returning veteran granted any additional rights of employment upon his or her return?

Yes. If the tour of duty was for more than six months, the returning employee may not be discharged within one year of his or her return, unless the discharge is for cause; if the period of duty was for less than six months, the employee cannot be discharged within six months of return, except for cause.

What are the penalties for noncompliance?

A veteran or reservist who is wrongfully denied his or her job may be granted reinstatement with back pay and benefits plus attorney's fees and costs. Damages of back pay and benefits can be doubled, if the violation was willful.

What happens if an elected mayor or councilmember is called to active duty?

Obviously, if an elected official is a member of a legislative body, he or she will be required to miss a number of meetings while on active duty. The legislative body has authority to grant excused absences for such individuals. Accordingly, it is not automatically required that such individuals forfeit their offices as might otherwise occur if there are unexcused absences.

If the person called to active duty is a mayor, the council has statutory authority to appoint a mayor pro tem during the period of the mayor's absence. In noncharter code cities, there is authority to appoint a councilmember pro tem to serve during the absence of a councilmember.

Links

The following links, from which much of the information set out above is taken, provide additional information on military leave and military reemployment rights.

- State law providing for military leave, [RCW 38.40.060](#).
- Federal law governing military leave and reemployment rights, [Uniformed Services Employment and Reemployment Rights Act](#) (USERRA), 38 U.S.C. 4301 et seq.
- A comprehensive article available from the National Public Employer Labor Relations Association regarding USERRA, set out in question and answer format, <http://www.npelra.org/militaryleave.pdf>
- Information regarding retirement system benefits available to members engaged in active duty, <http://www.wa.gov/DRS/drs.htm#military>.
- Fact sheet on USERRA prepared by the Veterans' Employment and Training Service (VETS), <http://www.dol.gov/dol/vets/public/programs/fact/vet97-3.htm>.
- Interactive program answering questions regarding the USERRA, <http://www.dol.gov/elaws/userra0.htm>.
- Information and fact sheets regarding USERRA from the National Committee for Employer Support of the Guard and Reserve, <http://www.esgr.org/factsheets.html>.

Interested persons are encouraged to discuss their questions regarding military leave with their city or town attorneys or with their county prosecuting attorney. Questions may also be posed to the Municipal Research and Services Center of Washington.

“A veteran or reservist who is wrongfully denied his or her job may be granted reinstatement with back pay and benefits.”

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