



# County Technical Assistance Service

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## Federal Law-USERRA

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Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

Sincerely,

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## Federal Law-USERRA

**Reference Number:** CTAS-1014

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301 - 4333, protects the rights and benefits of employees who are absent from work because of service in the armed forces. This federal law prohibits employment discrimination because of past, current, or future military obligations, which includes hiring, promotion, reemployment, termination, and benefits.<sup>[1]</sup> USERRA does not apply to the state call-up of National Guardsmen.<sup>[2]</sup> State call-up of National Guardsmen is addressed by state law.<sup>[3]</sup>

Under USERRA, re-employment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." USERRA applies to persons who perform duty, voluntarily or involuntarily, in the "uniformed services."<sup>[4]</sup> The "uniformed services" include the Army National Guard and Air National Guard, in addition to the Army, Navy, Marine Corps, Air Force, Coast Guard, and the reserve components of each of these services.<sup>[5]</sup>

Any person whose absence from a position of employment is necessitated by service in the uniformed services is entitled to USERRA reemployment rights and benefits if:

- The person gave notice to the employer that he or she was leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable;<sup>[6]</sup>
- The period of service did not exceed five years;<sup>[7]</sup>
- The person reported back to the civilian job in a timely manner or submitted a timely application for re-employment; and<sup>[8]</sup>
- The person was not released from service under dishonorable or other punitive conditions.<sup>[9]</sup>

The employee returning from service must notify the employer of his or her intent to return to work within a specific time period that depends on the length of time the employee was in service. These time periods are:

*Less than 31 days of service:* The employee must report to the employer by not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or as soon as possible after the expiration of the eight-hour period referred to above, if reporting within the period referred to above is impossible or unreasonable through no fault of the person.<sup>[10]</sup>

*31 to 180 days of service:* The employee must submit an application for re-employment with the employer not later than 14 days after the completion of the period of service or if submitting the application within that time period is impossible or unreasonable through no fault of the employee, the next first full calendar day when submission of such application becomes possible.<sup>[11]</sup>

*181 days or more:* The employee must submit an application for re-employment with the employer not later than 90 days after the completion of the period of service.<sup>[12]</sup>

*With a service-connected injury or illness:* Reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing.<sup>[13]</sup>

Under USERRA, the position into which a returning employee is reinstated is also based on the length of military service. These rules are:

*Less than 91 days of service:* The employee must be re-employed and placed in the position in which the person would have been employed if continuous employment had not been interrupted by such service, and which the person is qualified to perform; or, if the person is not qualified to perform the duties of the position after reasonable efforts by the employer to qualify the person, the employee must be re-employed in the position in which the person was employed on the date of the commencement of the service in the uniformed services.<sup>[14]</sup>

*91 days of service or more:* The employee must be re-employed in the position in which the person would have been employed if continuous employment had not been interrupted by such ser-

vice, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or, if the person is not qualified to perform the duties of former position after reasonable efforts by the employer to qualify the person, the employee must be re-employed in the position which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.<sup>[15]</sup>

*Service-related disability:* If a person has a disability incurred in, or aggravated during, military service, and after reasonable efforts by the employer to accommodate the disability, is not qualified because of the disability for the position in which the person would have been employed if employment had not been interrupted by military service, the person must be placed in another position which is equivalent in seniority, status and pay, the duties for which the person is qualified or would become qualified with reasonable efforts by the employer, or the person must be placed in a position which is the nearest approximation to such a position in terms of seniority, status, and pay consistent with circumstances of the person's case.<sup>[16]</sup>

A re-employed employee is entitled to seniority and other rights and benefits that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits the person would have attained if the person had remained continuously employed.<sup>[17]</sup> A re-employed employee cannot be discharged, except for cause, within one year after the date of re-employment, if the person's period of service before the re-employment was more than 180 days; or within 180 days after re-employment if the person's period of service before the re-employment was more than 30 days but less than 181 days.<sup>[18]</sup>

Under USERRA, an employee who is absent from employment due to service in the uniformed services is deemed to be on furlough or leave of absence while performing such service and is entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.<sup>[19]</sup> However, an employee deemed to be on furlough or leave of absence under USERRA is not entitled to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed. And, the employee may be required to pay the employee cost, if any, of any continued funded benefit to the extent other employees on furlough or leave of absence are so required.<sup>[20]</sup>

An employee who is performing military service is permitted, upon request, to use any accrued vacation, annual, or similar leave with pay, but the employer cannot require an employee to use vacation, annual, or similar leave.<sup>[21]</sup> Like the state statute, USERRA does not provide for the accumulation of vacation or sick leave while a covered employee is on military leave. However, if the employer allows accrual of vacation or sick leave for employees who are on furlough or leave of absence, then an employee having similar seniority, status, and pay who is absent for military service is entitled to the same benefit.

USERRA also provides for the continuation of health insurance benefits. An employee who is performing military service may elect to continue such coverage. The maximum period of coverage of a person and the person's dependents under such an election is 18 months. An employee who elects to continue health-plan coverage may be required to pay not more than 102 percent of the full premium under the plan. However, if the employee's military service is less than 31 days, that person cannot be required to pay more than the employee share, if any, for such coverage.<sup>[22]</sup> USERRA also protects pension plan benefits that accrued during military service.<sup>[23]</sup>

A [non-technical resource guide to USERRA](#) may be downloaded from the Department of Labor. Additional assistance is available from ESGR (Employer Support of the Guard and Reserve). Part of ESGR's mission is to assist in preventing, resolving, or reducing employer and/or employee problems and misunderstandings that result from National Guard or Reserve membership, training, or duty requirements through information services and informal mediation. To contact an ESGR representative call (615) 313-0657 or access the [ESGR website](#).

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[1] 38 U.S.C. § 4311(a).

[2] Although USERRA applies to National Guard duty assignments under federal authority, it does not apply to National Guardsmen called to duty under state authority, such as disaster relief or riot control.

- [3] See T.C.A. §§ 8-33-101 *et seq.*, and 58-1-106.
  - [4] 38 U.S.C. § 4303 (13).
  - [5] 38 U.S.C. § 4303 (16).
  - [6] 38 U.S.C. § 4312 (a)(1) and (b).
  - [7] 38 U.S.C. § 4312 (a)(2) and (c).
  - [8] 38 U.S.C. § 4312 (a)(3) and (e).
  - [9] 38 U.S.C. § 4304.
  - [10] 38 U.S.C. § 4312 (e)(1)(A).
  - [11] 38 U.S.C. § 4312 (e)(1)(C).
  - [12] 38 U.S.C. § 4312 (e)(1)(D).
  - [13] 38 U.S.C. § 4312 (e)(2)(A).
  - [14] 38 U.S.C. § 4313 (a)(1)(A) and (B).
  - [15] 38 U.S.C. § 4313 (a)(2)(A) and (B).
  - [16] 38 U.S.C. § 4313 (a)(3)(A) and (B).
  - [17] 38 U.S.C. § 4316 (a).
  - [18] 38 U.S.C. § 4316 (c).
  - [19] 38 U.S.C. § 4316 (b)(1)(A) and (B).
  - [20] 38 U.S.C. § 4316 (b)(3) and (b)(4).
  - [21] 38 U.S.C. § 4316 (d).
  - [22] 38 U.S.C. § 4317 (a)(1) and (2).
  - [23] 38 U.S.C. § 4318.
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