



U.S. Department of Labor  
Veterans' Employment & Training Service



## **VETS USERRA FACT SHEET #4: Frequently Asked Questions – Notification of Absence due to Uniformed Service under USERRA**

The Department of Labor, through the Veterans' Employment and Training Service (VETS), provides assistance to all persons having questions or claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

USERRA's reemployment provisions generally provide that a service member who is absent from their position of employment due to service in the uniformed services is entitled to prompt and proper reemployment so long as they met the five eligibility criteria: 1) Left their civilian job to perform service in the uniformed service; 2) Provided the employer with advance notice of their service prior to leaving their civilian job, unless such notice was impossible, unreasonable or otherwise prevented by military necessity; 3) Performed five years or less of non-exempt service in the uniformed services while with the employer; 4) Timely returned to work or submitted an application for reemployment; and 5) Has not received a disqualifying separation from the uniformed service. 38 U.S.C. §§ 4304, 4312(a). There are, however, exceptions to the eligibility criteria.

USERRA sets forth the rights and status of a uniformed service member while absent as well as a uniformed service member's proper reemployment position(s). In addition, an employee is protected from adverse action that is partially motivated by their uniformed service. Please see 38 U.S.C. Chapter 43 and 20 C.F.R. Part 1002 for additional information.

The following frequently asked questions provide general information concerning a service member's responsibility to notify their employer of their absence due to their service in the uniformed services under USERRA.

**1. Can an employer require an employee to fill out a standardized leave request form for their uniformed service time and submit it to the human resources department a certain number of days in advance of their absence to perform uniformed service?**

No. The service member or an appropriate officer of the service in which the service is performed may give verbal notice of such service to the service member's employer to satisfy USERRA's advance notice requirement. 38 U.S.C. § 4312(a)(1); 20 C.F.R. § 1002.85(c). Additionally, USERRA does not require that a service member obtain permission from their employer to fulfill their uniformed service obligations; simple notification suffices. 20 C.F.R. § 1002.87. Although USERRA does not specify how far in advance the notice must be given, DOL encourages a service member to provide notice as far in advance as is reasonably possible. 20 C.F.R. § 1002.85(c). Also, an employee may be excused from giving advance notice of uniformed service if the employee cannot provide such notice due to "military necessity," as determined by the appropriate uniformed services official, or if it's impossible or unreasonable to give notice. 38 U.S.C. § 4312(b); 20 C.F.R. § 1002.86.

**2. An employer finds that the timing of their employee's uniformed service is inconvenient. Can the employer require the employee to adjust their uniformed service obligations? Or take action if the employee resists doing so?**

No, to both questions. However, the employer may bring their concerns about the timing, frequency, or duration of an employee's service to the attention of the appropriate military authority. The Department of Defense's regulations direct military authorities to consider requests from employers to adjust scheduled absences. 20 C.F.R. § 1002.104 and 32 C.F.R. § 104.6(b)(3); *see also* 38 U.S.C. § 4312(h). An employer may call the Department of Defense's Employer Support for the Guard and Reserve for contact information of the appropriate military authorities at 1-800-336-4590 or email [osd.USERRA@mail.mil](mailto:osd.USERRA@mail.mil).

**3. An employer suspects their employee volunteered for service knowing that the time away will be inconvenient for the workplace. Under these circumstances, can an employer require the employee to adjust their uniformed service, and take action if they don't change it?**

No. Voluntary uniformed service is treated the same as involuntary service under USERRA. 20 C.F.R. § 1002.6; 38 U.S.C. § 4312(h). *See also* 38 U.S.C. 4303(13); 20 C.F.R. § 1002.5(l). Therefore, any negative or adverse action against an employee based, in part or in whole, on the performance of service (be it voluntary or involuntary), membership in the services, application to perform service, or past service is prohibited. 38 U.S.C. § 4311(a); 20 C.F.R. § 1002.18. As to what service is covered by USERRA, *see* 38 U.S.C. § 4303(13) & (16); 20 C.F.R. § 1002.5(l) & (o).

**4. Can an employer require their employee to submit written proof of service upon return from uniformed service, before reemploying them?**

No. A service member may satisfy USERRA's timely application for reemployment requirement by providing verbal notification to the employer of their intent to be reemployed, or by reporting back to work, within the applicable timeframes. 38 U.S.C. § 4312(e); 20 C.F.R. §§ 1002.115, 1002.118. *See also* § 38 U.S.C. 4303(8). Furthermore, the notice may be directed to anyone at the company who may receive employment applications (for example, potentially an HR officer or first-line supervisor). 20 C.F.R. § 1002.119. An employer may request documentation if the period of service exceeded 30 days; an employee may satisfy such a request by providing any of the types of documentation outlined in the regulations that show that the reemployment eligibility criteria are met. 38 U.S.C. § 4312(f)(1) and (2); 20 C.F.R. §§ 1002.121, 1002.123. However, the employer may not delay or deny reemployment if the documentation is not readily available. 38 U.S.C. § 4312(f)(3); 20 C.F.R. § 1002.122.

**5. Must an employee provide their employer notice of their service that is scheduled to take place during a time period during which the employee is not scheduled to be working?**

No. An employee whose absence from a position of employment by reason of service in the uniformed services is entitled to reemployment if they comply with the eligibility criteria for reemployment, one of which is providing advance notice of service, as discussed in Question 1 above. An employee whose leave for uniformed service takes place wholly during a time period in which they are not working, or subject to be working, is not required to give notice of their service because the employee will not be absent from employment due to service. However, if the uniformed service spans a time frame that

overlaps with scheduled work, then the employee must provide notice of the uniformed service that will require them to be absent from work.

For example, an airline pilot who is off-duty, under a policy that does not provide for recall to work during this period of time, need not provide advance notice of service for orders that will be completed well in advance of their scheduled return to work. However, a pilot who is “on-call” to fly would be required to give advance notice for orders conflicting with their on-call duties.

Additionally, service performed while employees are not absent from work does not count for purposes of the five-year service limitation on non-exempt service. 38 U.S.C. § 4312(a); 20 C.F.R. § 1002.32(a). The Department of Labor encourages employees who suspect they may end up absent from their work due to performance of uniformed service to provide notice in order to preserve their reemployment rights. Additionally, the Department of Labor encourages a service member to communicate clearly and consistently regarding uniformed service commitments.

#### **6. Can an employer require their employee to provide notice of uniformed service when the employee is on-call for work but may not end up working?**

Yes. If the employee receives orders during a time period in which the employee has work commitments (such as being “on-call” to perform work if needed), the service would cause the employee to be absent from a position of employment. Therefore, the employee should give advance notice in order to be eligible for reemployment. However, there are certain circumstances in which an employee is excused from giving advanced notice. 38 U.S.C. § 4312(b); 20 C.F.R. § 1002.86. In addition, note that a failure to provide notice does not automatically mean that the employee has lost all rights under USERRA. 38 U.S.C. § 4312(b) 20 C.F.R. § 1002.117.

#### **7. If an employee tells their employer that they aren’t planning on coming back to work while the employee is gone on uniformed service, can the employer place the employee into termination status?**

No. An employee does not waive the right to reemployment by informing the employer that they do not intend to seek reemployment following the service. A service member is entitled to exercise their reemployment rights throughout the period in which they may report to work or apply for reemployment has passed. 38 U.S.C. § 4312(e); 20 C.F.R. § 1002.88. *See also* 20 C.F.R. § 1002.152. For a service member that is convalescing or hospitalized, the time period in which to request reemployment is extended. 38 U.S.C. § 4312(e)(2)(A); 20 C.F.R. § 1002.116.

#### **Where to Obtain Additional Information:**

For additional information, visit our Veterans’ Employment & Training Service USERRA Website: <http://www.dol.gov/vets/programs/userra> and/or call our toll-free information and helpline, available 8:00am to 8:00pm (Eastern Time), at 1-866-4-USA-DOL (1-866-487-2365). The website includes links to the statute, regulations, and DOL’s [USERRA guide](#), which provide more details on these issues.

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