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HRDG 4630 - Absence and Leave - Section H - Subsection a

Last Modified:

Subchapter 4630 - Absence and Leave

Section H - Absences to Perform Duty with the Uniformed Services

**Subsection a - Uniformed Services Employment and Reemployment Rights
Act of 1994 (USERRA)**

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Purpose

The purpose of this Subsection is to provide guidance on the rights and entitlements of employees under the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, only as it relates to absence s to perform duty in the uniformed services. Questions regarding employment, reemployment, restoration rights, and benefits coverage during and after such military duty, should be referred to your servicing personnel office.

Public Law 103-353 revised and restructured the Veteran's Reemployment Rights Law (Chapter 43 of Title 38, U.S. Code), governing the restoration rights of employees who perform military duty. In general, with regard to the impact of this law on absence and leave entitlements, USERRA:

Overview of USERRA

- Establishes a 5-year cumulative total on uniformed service,
- Allows service members convalescing from service-related injuries up to 2 years to return to their jobs,
- Bases the return to duty date on how long the employee has been gone,
- Requires that employees provide advance written or verbal notice to their agencies for all military service,
- Provides assistance from the Department of Labor's Veterans' Employment and Training Service to employees with complaints,
- Considers the employee's status while on duty with the uniformed services to be on LWOP or furlough unless the employee elects to use other leave, and
- Forbids any discrimination because of uniformed service.

All employees who enter the uniformed services are covered by the provisions of USERRA. This coverage is in addition to the military leave entitlements of 5 U.S.C. 6323.

Note: Any employee under a time-limited appointment who enters the uniformed service is entitled to complete any unexpired portion of the appointment upon his/her return.

Coverage

Example: An employee is hired on a temporary appointment effective October 1, 1996, with a not-to-exceed date of September 30, 1997. On February 10, 1997, his/her reserve unit is mobilized for active duty by the Secretary of Defense to assist in an international crisis. The employee returns to work on July 1, 1997, and will work through September 30, 1997, the remaining unexpired period of the temporary appointment.

Military duty in the uniformed services includes:

- All service, voluntary or involuntary, with the Armed Forces (including active duty, active duty for training, initial active duty for training, inactive duty training, and absence for service fitness examination);
- National Guard service when engaged in active duty for training, initial active duty for training, or full-time Guard duty;
- Commissioned Corps of the Public Health Service; and
- Other groups designated by the President in time of war or emergency.

What is Military Duty in the Uniformed Services?

The cumulative time an employee may be absent from work for military duty and retain reemployment rights is 5 years. For additional information, see 5 CFR 353.203. Exceptions to the 5-year limit are:

**Cumulative
Time for
Military Duty**

- Initial enlistments lasting more than 5 years,
- Periodic training duty, and
- Involuntary active duty extensions and recalls.

Restoration rights are based on the duration of the military service rather than the type of military duty performed.

**Advance Notice
of Service
Required**

When applying for absence to perform duty with the uniformed service, the employee (or an appropriate officer of the applicable service) must give the supervisor advance written or verbal notice. This notice and a copy of the military order should be provided as early as possible.

Exception: No notice is required if it is precluded by military necessity or, under all relevant circumstances, giving notice is impossible or unreasonable.

Because the employee has an obligation to both the military and to his/her employer, conflict with job demands is sometimes unavoidable. A good-faith effort on the part of both the employee and the agency is needed to minimize conflict and resolve differences, and may require some accommodation by both parties.

**Reserve
Service--
Resolving
Conflicts**

Most reserve members are required, as a minimum, to participate in drills 2 days each month and in active duty training 2 weeks per year. Some members are required to participate in longer or more frequent training tours. By law, members of the Selected Reserve (a component of the Ready Reserve), can be called up under a Presidential Order for purposes other than training for as long as 270 days. If the President declares a national emergency, the remainder of the Ready Reserve - the Individual Ready Reserve and the Inactive National Guard - may be called up. The Ready Reserve as a whole is subject to as much as 24 consecutive months of active duty in a national emergency declared by the President.

There is no limit to the frequency, duration, timing, and nature of the duty as long as the employee has provided proper notice and does not exceed the time limits for returning to duty as provided under USERRA.

**Contacting the
Military to
Resolve
Conflicts**

When a conflict arises between the military duty and the legitimate needs of the program, the supervisor may contact the commander of the employee's military unit to determine if the military duty can be rescheduled or performed by another member. Such contact is proper when:

- The military duty would require the employee to be absent from work for an extended period;
- The military duty occurs during times of acute need; or,
- In light of previous leaves, the requested leave is cumulatively burdensome.

**Approval of
Absence is
Mandatory**

If the military authorities determine that the duty is necessary and cannot be rescheduled or canceled, the supervisor must approve the employee's request.

In addition to providing proper notice and not exceeding the specified time limits allowed by law and regulation, the employee is also expected to:

**Employee
Responsibilities**

- Minimize the burden to the agency caused by his/her absence to the extent that he/she has influence upon the timing, frequency, or duration of the training; and
- Provide as much advance notice as possible whenever military duty or training will interfere with civilian work.

The length of time an employee has to report back for duty following uniformed service is determined by how long he/she has been gone.

Return to Duty from Uniformed Service	If the absence was:	Then:
	1 - 30 days (including an exam to determine fitness for military duty)	The employee is expected to report for duty at the beginning of the first regularly scheduled workday on the first full calendar day following completion of service and the expiration of 8 hours after time for safe travel to his/her residence. If reporting within this period is impossible or unreasonable through no fault of the employee, he/she will report as soon as possible after the expiration of the 8-hour period.
	31 - 180 days	The employee must submit an application for reemployment within 14 calendar days of release from service. If submitting the application is impossible or unreasonable through no fault of the employee, it must be submitted the next full calendar day when it becomes possible to do so.
	More than 180 days	The employee must submit an application for reemployment within 90 calendar days of release from service.

Note: If the employee is hospitalized or convalescing from a service-related injury or illness, he/she is required to report for duty at the end of the period that is necessary for recovery, based on the length of service described above. However, the period of recovery may not exceed 2 years (extended by the minimum time required to accommodate circumstances beyond the employee's control which make reporting within the period specified impossible or unreasonable).

The agency may not deny reemployment rights to an employee who does not return to duty when required, but may treat the failure to report as it would any other unexcused absence.

**Timing of
Restoration by
Agency**

An employee returning from the uniformed services following an absence of more than 30 days is entitled to be restored as soon as possible after making application. In no event will such restoration be later than 30 days after the agency receives his/her application. For information on the position to which an employee has restoration rights refer to 5 CFR 353.207.

**Documentation
Upon Return**

Upon request, a returning employee who was absent for more than 30 days must provide the agency with documentation that establishes the timeliness of the application for reemployment, and length and character of service. If documentation is unavailable, the agency must restore the employee until documentation becomes available. If the employee fails to provide the requested documentation, contact your servicing ERS.

**Notification of
Rights and
Obligations**

Agency - When an agency grants a leave of absence, separates, restores, or fails to restore an employee because of uniformed service, it will notify the employee of his/her rights, obligations, and benefits relating to Government employment, including any appeal and grievance rights.

Employee - Regardless of notification, an employee is still required to exercise due diligence in ascertaining his/her rights, and to seek reemployment within the time limits provided by Chapter 43 of Title 38, U.S. Code, for restoration after uniformed service.

**Personnel
Actions During
Employee
Absence**

An employee is to be carried on LWOP unless he/she elects to use other leave. If the employee willingly elects to resign, he/she will be separated from the agency.

**Service Credit
for Leave Rate
Accrual**

Upon reemployment, employees receive credit for the entire period of absence for purposes of leave rate accrual. However, employees will not earn annual or sick leave for each increment of 80 hours in a nonpay status or while off the rolls.

**Use of Paid
Leave During
Uniformed
Service**

Employees performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave, earned compensatory time off for travel (CTOT), or sick leave, if appropriate, or military leave during such service, Under 5 U.S.C. 6323(a), military leave may be used for inactive duty (e.g., drills). (See Federal Register Volume 72, Number 50, dated March 15, 2007.)

Employees who enter into active military duty may choose:

- To have their annual leave remain to their credit until they return to their civilian position, or
- To receive a lump sum payment.

There is no requirement that employees entering active military duty be separated from civilian positions before receiving lump sum payments for annual leave (5 U.S.C. 5552).

**Lump Sum
Payments**

If an employee	and:	then . . .
Is separated or placed in a leave without pay (LWOP) status to perform service in the uniformed services	Has unused compensatory time	He or she must be paid for it at the overtime rate that was in effect when it was earned.
Is separated or placed in a LWOP status due to an on-the-job injury with injury compensation entitlements		

(See Federal Register Volume 72, Number 50, dated March 15, 2007.)

**Discrimination
and Acts of
Reprisal
Prohibited**

A person may not be denied hiring, retention in employment, or any other incident or advantage of employment because of any application, membership, or service in the uniformed services. An agency may not take any reprisal against employees for taking any action to enforce a protection, assist or participate in an investigation, or exercise any right provided for under Chapter 43 of Title 38, U.S. Code.

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