



Veterans Preference Act and USERRA Compliance in Employment: Navigating the Military Laws

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Members of the National Guard and federal branches of the military make many sacrifices in the performance of their military duties. In recognition of those sacrifices, service members and veterans (and in some limited circumstances their families) are afforded certain protections and rights under federal and state laws.

This Resource Briefing examines the applicability of the Minnesota Veterans Preference Act when hiring, promoting, terminating, demoting or suspending a veteran. It also provides a review of the veterans hearing and appeals processes that may be available. Finally, it examines an employer's legal obligation regarding some other employee military leave and reinstatement rights.

Veterans Preference Act

The Minnesota Veterans Preference Act (Minn. Stat. § 197.447, *et seq.*) was enacted to provide public employment benefits and protections to veterans of military service. The legislature established these statutes recognizing that the "training and experience in the military services ... and loyalty and sacrifice for the government are qualifications of merit which cannot be readily assessed by explanation." Minn. Stat. § 43A.11, subd. 1.

The Veterans Preference Act provides veterans with security in public employment and also protection from the "ravages and insecurity of a political spoils system."

Minn. Stat. §
197.447, *et seq.*;
Johnson v.
Village of
Cohasset, 116
N.W.2d 692
(Minn. 1962)

Who Is a Veteran?

The term “veteran” is defined as a citizen or resident alien of the United States who has separated under honorable conditions from any branch of the armed forces of the United States if he or she has:

- either served on active duty for 181 consecutive days;
- been disabled while serving on active duty;
- completed the minimum active duty requirements under federal law, as defined by 38 C.F.R. § 3.12a; or
- been in service certified by the United States Secretary of Defense as active military service under Public Law 95-202.

Minn. Stat. §
197.447

The U.S. Secretary of Defense must certify the active service and discharge under honorable conditions of the veteran.

Retired military veterans have the same preference rights as other veterans in state and local government hiring. Veterans should submit a DD 214 or DD 215 form that verifies their status as veterans from the military. From this form, it can be determined whether the individual meets the requirements of a “veteran” under Minn. Stat. § 197.447.

Applying the Veterans Preference Act

Under the Veterans Preference Act, a veteran applicant for hire or promotion may invoke special points for consideration during the hiring or promotion process. The Act also provides procedural safeguards for employee veterans from removal or wrongful termination by a public employer.

The Veterans Preference Act applies to all public employers, including counties, cities, towns, school districts or other municipalities, or political subdivisions of the State of Minnesota that recruit or employ veterans.¹ Local units of governments are governed by a separate statute from the state.

Minn. Stat. §
197.455, subd. 1

The Veterans Preference Act applies to all positions in government *except* the positions of private secretary, superintendent of schools, one chief deputy of any elected official or head of a department, head of a department², elected officials³ or any person holding a strictly confidential relationship to the appointing officer.⁴

Minn. Stat. §
197.46 (d)

Note: The term “head of a department” has been defined by the courts. To be a department head, all of the following questions must be affirmatively answered:

- Does the alleged department head have charge of the work of the department?
- Does his or her work require technical, professional training?

*Holmes v. Bd. of
Com’rs of
Wabasha
County*, 402
N.W.2d 642
(Minn. Ct. App.
1987)

¹ The University of Minnesota is not a political subdivision under the Act. *Windberg v. Univ. of Minnes.* (Minn. 1993)

² *Sprague v. Heise*, 67 N.W.2d 907, 910-911 (Minn. 1954)

³ Op. Atty. Gen., 85 F, March 7, 1958

⁴ Teachers are not covered by the removal provisions of Minn. Stat. § 197.46. Minn. Stat. § 197.455, subd. 5a of the Veterans’ Preference Act applies to teacher hiring.

- Is he or she the highest authority at that level of government as to his or her official duties?
- Does he or she supervise all of the work in the department?
- Does the success of the department depend on his or her technique?
- Are the employees in the department under his or her direction?
- Are his or her duties more than merely different from other employees?
- Does he or she have the power to hire and fire subordinates?

Caution should be exercised when deciding whether a position is a department head under the Veterans Preference Act. Public employers should consult with legal counsel when making this case-by-case determination.

The Veterans Preference Act also does not apply to “occasional or temporary” employment situations.⁵

Hiring or Promoting a Veteran Testing/Reviewing Applications

A public employer must apply the veterans preference laws during the hiring process for those open competitive positions covered by the Act.

When identifying applicants to interview, a public employer must set up its process on a 100-point basis to enable allocation of veterans preference points. The appointing authority has broad discretion to determine which criteria will be considered in awarding the 100 points. The evaluation process may be based on the job application, a written test, an oral examination, a skills test or any combination of factors. The public employer may administer any type of evaluation so long as it is based on criteria capable of being reduced to a 100-point rating scale.

Hall v. City of Champlin, 463 N.W.2d 502 (Minn. 1990)

The public employer should articulate the objective criteria establishing the 100 point rating scale prior to accepting or reviewing applications. The criteria must be based upon the actual job duties. Therefore an up-to-date job description is critical in determining the criteria that are utilized.

The maximum number of points for all categories must total 100; must be determined in advance of the testing and must be awarded in a uniform manner.

A veteran who achieves a passing score (i.e., meets the minimum qualifications of the job), is entitled to an additional 10 points. A disabled veteran is entitled to have 15 more points added to a passing score.

Minn. Stat. § 197.455, subd. 4 & subd. 5

A disabled veteran is defined as a person who has a compensable service-connected disability that exists at the time preference is sought as adjudicated by the United States Veterans Administration or by the retirement board of one of the several branches of the armed forces. A determination as to the veteran’s disability status should be made and verified before awarding additional disability points.

Minn. Stat. § 197.455, subd. 6

⁵ *Crnkovich v. Ind. Sch. Dist. No. 701, Hibbing*, 142 N.W.2d 284 (Minn. 1966)

Veterans preference points may be used by the surviving spouse of a deceased veteran or by the spouse of a disabled veteran who, because of the disability, is unable to qualify.

Minn. Stat. §
197.455, subd. 7

Veterans preference points are added *only* if the applicant receives a passing score. Preference points cannot be used to increase a failing score to a passing score. If the test requires a score of 70 points to pass and the veteran scores a 68, no preference points may be added. If the veteran scores a 70, the score is increased to 80 (or 85 in the case of a disabled veteran).

The public employer must notify veterans of the availability of preference points. However, the applicant *must* request the preference. Therefore, the public employer should have a place on the employment application for the veteran to request veterans preference. The notice should also indicate that proof of veteran or disabled veteran status may be required before preference will be granted. An employer should request a copy of the applicants' DD 214 or DD215 form to determine eligibility before granting veterans preference rights to them.

Minn. Stat. §
197.455, subd. 9

Employers may not ask or require people seeking employment to make a written or oral statement whether they are members of the National Guard or a Reserve unit if the employers intend to use that information in a discriminatory manner. This provision does not apply to public subdivisions asking a question or requesting a statement for the purpose of determining whether veterans preference applies.

Minn. Stat. §
181.535

Ranking Applicants

The Veterans Preference Act does not provide absolute preference for veterans. Rather, the awarding of veterans preference credit increases the chance that a veteran will receive an interview.

A veteran applicant, even with preference points, may fall short of points determined necessary for an interview. When this occurs, the public employer is not obligated to interview the veteran.

If there are 40 applicants who achieve a score of 95, a veteran with a score of 75 will not likely receive an interview for the position. The additional points will move the veteran up on the eligibility list, but do not guarantee that the veteran will be at or near the top score.

However in the event of a tie, the law requires that a candidate who receives veterans preference points be entered on an eligibility list ahead of a nonveteran with the same rating.⁶

Minn. Stat. §
197.455, subd. 8

Notification

Whenever a public employer fails to hire a veteran who has received veterans preference, the employer is required to notify the veteran in writing of the reasons for

Minn. Stat. §
197.455, subd.
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⁶ Minn. Stat. § 43A.11 (the statute which governs the state) requires that the top five ranked recently separated veterans receive interviews.

rejection and file the notice with the appropriate local personnel officer. This applies to all veteran applicants regardless of whether they were interviewed.

Promotion

The Veterans Preference Act provides that five points are added to the competitive promotional examination rating of a disabled veteran. A disabled veteran can use the promotional preference only one time and only in securing the first promotional position. The veteran must have obtained a passing rating on the examination without the addition of the preference credit points.

Minn. Stat. §
197.455, subd. 5

The definition of “disabled veteran” differs for promotional opportunities. Under this provision, “disabled veteran” means a person who is entitled to disability compensation under laws administered by the Veterans Administration for a permanent service-connected disability rated at 50 percent or more at the time he or she requests a promotional preference.

Minn. Stat. §
197.455, subd. 6

Seniority

The Veterans Preference Act provides no guarantees as to seniority. The law addresses only the issue of veterans ranking on an eligibility list. That is, a veteran hired at the same time as a nonveteran will *not* be entitled to greater seniority by virtue of veterans preference. Additionally an employer that defines seniority by training date, rather than date of hire, is not in violation of the Act as long as the veteran received preference points and was correctly ranked on the list of eligible candidates.

Grehl v. Minneapolis Pub. Sch., 484 N.W.2d 815 (Minn. App. 1992)

Discipline and Discharge

Termination or Disciplinary Demotion

No veteran employed by a political subdivision “shall be removed from such position or employment except for incompetence or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.” Removal from a position or employment has been interpreted to mean discharge or demotion. It has also been interpreted to include “resign or be terminated” situations.

Minn. Stat. § 197.46; *Johnson v. County of Anoka*, 536 N.W.2d 336 (Minn. App. 1995), *rev. denied*

The Minnesota Supreme Court has held that there is no significant difference between the “incompetence or misconduct” standard required by the Veterans Preference Act and the “just cause” standard identified in other public employment statutes incorporated in most collective bargaining agreements.

The courts have held that the employer must establish that the veteran’s actions alleged to constitute incompetence or misconduct:

- relate to and affect the administration of the position;
- are of a substantial nature directly affecting the rights and interests of the public; and
- touch the qualifications of the position and the performance of the veteran’s duties, showing that he or she is not a fit or proper person to hold office.

Cass County v. Law Enforcement Labor Services, Inc., 353 N.W.2d 627 (Minn. App. 1984)

A government entity may require the veteran complete an initial probationary period that is required of non-veterans. The time period must be longer than 30 days, but less than two years as established by the collective bargaining agreements⁷.

Suspension

A disciplinary suspension without pay generally does not constitute a “removal” under the Act. As such, no Veterans Preference Act hearing rights exist.

However a veteran is deemed to have been removed from his or her position “when the effect of the employer’s action is to make it unlikely or improbable that the veteran will be able to return to the job.” If it is impossible for a veteran to comply with the conditions of his or her suspension, the suspension will be construed as a removal.

If a veteran is being considered for termination, that veteran cannot be suspended without pay pending a determination of those charges. The public employer may suspend a veteran with pay. Formal discharge occurs after the veteran receives notice and a hearing before the statutorily prescribed entity. (See Veterans Preference and Appeals Process *infra*.)

Nondisciplinary Layoff or Demotion

A public employer may layoff or demote a veteran without a showing of incompetence or misconduct where the veteran is the least senior employee and the veteran’s current position is abolished. The employer, however, cannot abolish the position and assign duties to other less senior employees as subterfuge to avoid a veteran’s right to a hearing.

A layoff notice should state that the employee has 30 days to petition the district court for a writ of mandamus compelling reinstatement and back pay if he or she believes that the layoff is being used to avoid rights under the Veterans Preference Act. The notice should also state that the veteran has the alternative right to petition the commissioner of Veterans Affairs for a hearing on the matter.

When a position is abolished in good faith, an employer’s failure to give notice of a veteran’s right to challenge the layoff tolls the 30-day period for the veteran to petition for a hearing. It does not entitle the veteran to back pay from the date of abolition to the date the veteran receives notice of the veterans preference rights.

A hearing on the issue of abolition of a position may lead to an order of reinstatement. Reinstatement is appropriate only when it is established that the abolition of the veteran’s position was not in good faith.

Harr v. City of Edina, 541 N.W.2d 603 (Minn. App. 1996)

Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987)

Mitlynd v. Wolff, 342 N.W.2d 120 (Minn. 1984);
Leininger v. City of Bloomington, 299 N.W. 2d 723 (Minn. 1980)

Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986)

Taylor v. City of New London, 536 N.W.2d 901 (Minn. App. 1995)

⁷ The 2016 legislature amended Minnesota Statutes, Section 197.455, Subdivision 1 to allow for probationary periods for veterans.

Veterans Preference Hearing and Appeals Process

Right to Hearing

The law provides that the veteran has the right to a hearing before a neutral body prior to discharge from employment. The veteran is entitled to compensation until the hearing panel makes its decision.

Minn. Stat. §
197.46

The hearing panel may consist of a civil service commission, the Merit System, an arbitrator selected via the process described in Minn. Stat. § 197.46(c) as discussed *infra*. If the veteran requests a hearing under this section, such written request must also contain the veteran's election to be heard by a civil service board or commission, a merit authority, or an arbitrator. If the veteran fails to identify the veteran's election, the governmental subdivision may select the hearing body.

In cases where the arbitration process is selected, Minn. Stat. § 197.46 (c) states the employer shall request a list of seven arbitrator names from the Bureau of Mediation Services (BMS). The parties, beginning with the employer, will strike alternatively an arbitrator's name from the list. The last remaining arbitrator will conduct the hearing. The employee has 48 hours to strike a name after receiving the list from the employer. After the arbitrator is selected, the employer will contact the selected arbitrator and request available dates.

The public employer has the burden of proof at the hearing to show that it acted reasonably in proposing to discharge or demote the veteran. Reasonableness is determined by considerations such as the veteran's conduct, its effect on the workplace and the veteran's fitness for the position.

*In re Matter of
Schrader, 394
N.W.2d 796
(Minn. 1986)
rhq. denied*

Notice

The Veterans Preference Act requires a public employer to notify the veteran of its intent to discharge him or her. Elements of the notice must:

- include the statutory grounds for the proposed termination or demotion.
- include a factual basis for the proposed termination or demotion.
- state that pursuant to the veterans preference laws, the employee has the right to request a hearing within 30 calendar days⁸ of the receipt of the notice.
- state that if the employee fails to request a hearing within the 30-day period, the employee's right to a hearing and other legal remedies for reinstatement will be waived.
- state that the hearing will be before a neutral panel.
- state that if employee choosing an arbitrator, employee must inform employer with 30 day period.

Minn. Stat. §
197.46

During this 30-day period, the public employer is obligated to compensate the veteran. If the veteran chooses to appeal, compensation continues until final disposition is made.

*Tombers v. City
of Brooklyn
Center, 611 NW
2d 24 (Minn.
App. 2000)*

⁸ The 2016 legislature amended Minnesota Statutes, Section 197.46 reducing the time to request a hearing to 30 days, eliminated the three person panel for the arbitrator option and now has the employer paying the cost regardless of the type of hearing.

If the veteran fails to request a hearing within 30 days of receiving the notice, the veteran's right to a hearing is waived, as are all other remedies for reinstatement under the Veterans Preference Act.

Consequences for Failing to Give Notice

Failure of the public employer to provide a discharged veteran of this notice extends the 30-day limitation period for requesting the hearing. A veteran successfully asserting a right to a hearing at a later date could be entitled to back pay from the date of discharge.

Pawelk v. Camden Township, 415 N.W.2d 47 (Minn. App. 1987)

In light of the risk associated with failing to provide notice to a veteran and recognizing that the veteran status of some employees is not known, it is most prudent to include a notice of the right to a veteran's hearing with every discharge. If the employee is not a veteran, he or she cannot invoke the statutory rights, but failure to provide the notice may expose the employer to liability if the employee is a veteran.

Duty of the Veterans Preference Hearing Body

- The decision of the hearing body must be made in writing.
- The decision must include findings of fact and conclusions of law.
- The hearing body may fashion a remedy other than the action proposed by the employer.

In re Matter of Schrader, 394 NW 2d 796 (Minn. 1986) *rhq. den.*

If the hearing body finds incompetence or misconduct and that the employer acted reasonably, it may only modify the proposed penalty upon substantial evidence of extenuating circumstances that justify a lesser penalty. Examples of extenuating circumstances include family problems, illness or disability.

Costs of Hearing

For disputes heard by a civil service board commission, merit system authority or arbitrator, the political subdivisions shall bear all costs associated with the hearing but not including attorney fees for attorneys representing the veteran. If the veteran prevails in a hearing and the level of the alleged incompetency or misconduct requiring discharge is reversed, the governmental subdivision shall pay the veteran's reasonable attorney fees.

Judicial Review of the Hearing Board Decision

District Court

Either party may appeal the findings of the hearing body to the district court. The appeal must be in writing and state the grounds for the appeal. The appealing party must serve a notice to appeal on the opposing party within 15 calendar days of the decision. The original notice and proof of service must be filed with the court administrator within 10 calendar days after service.

Minn. Stat. § 197.46

Penalties and Costs

The willful disregard of veterans preference laws may constitute a misdemeanor by the public employer.

Minn. Stat. §§ 197.46, 197.481

A veteran who believes his or her rights under the Veterans Preference Act have been denied may also petition the commissioner of the Minnesota Department of Veterans Affairs for relief, as discussed below.

Under the Act, a wrongfully discharged veteran is entitled to compensation. If reinstated, the veteran is entitled to back pay and benefits. Even if the discharge is upheld, the veteran is entitled to compensation through the decision of the hearing panel.

Enforcement of Veterans Preference Laws

A veteran may petition the commissioner of Veterans Affairs if the veteran believes he or she has been denied veterans preference rights. The commissioner has broad subpoena power, as well as access to records, witnesses and documents. The commissioner may grant relief as justified.

Minn. Stat. §
197.481

The commissioner schedules a hearing on the petition of any party to be conducted within 120 calendar days of serving or being served with an authorized and complete petition. At the hearing, all parties have the right to be heard.

Minn. Stat. §
197.481, subd. 4

The political subdivision is responsible for all costs incurred by the commissioner.

Either party may appeal the commissioner's decision via writ of certiorari to the Court of Appeals. A petition for writ of certiorari by an aggrieved party for judicial review must be filed with the Court of Appeals and served on the agency not more than 30 calendar days after receipt of the agency's final decision and order. If a request for reconsideration is made within 10 calendar days after the Department of Veterans Affairs decision and order, the 30-day period will not begin to run until service of an order from the commissioner finally disposing of the application for reconsideration.

Minn. Stat. §
197.481, subd.
5-6; Minn. Stat.
Chpt. 14

On appeal, the court reviews the commissioner's decision and determines whether it is arbitrary and capricious and without substantial support in the record.

If a party refuses or fails to comply with a final decision of the commissioner, the commissioner may seek compliance in Ramsey County District Court. If warranted, the district court may award damages.

Minn. Stat. §
197.481, subd. 8

Uniformed Services Employment and Re-employment Rights Act (USERRA)

Federal and state laws guarantee certain benefits and securities to employees who are called to military service. Federal protections are addressed in the Uniformed Services Employment and Re-employment Rights Act.

Introduction to USERRA

The Uniformed Services Employment and Re-employment Rights Act was enacted in 1994 to protect veterans' employment and re-employment rights.

The guiding purposes of USERRA are:

- to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment.
- to minimize the disruption to the lives of persons performing service in the uniformed services, as well as to their employers, their fellow employees and their communities, by providing for the prompt re-employment of such persons upon their completion of such service.
- to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301

Uniformed services are defined as Army, Navy, Marine Corps, Air Force, Coast Guard, each reserve branch, Commissioned Corps of the Public Health Services, Army and Air National Guard when on active duty, inactive duty training or on full-time National Guard duty and any other group designated by the president during a war or national emergency.

38 U.S.C. § 4303 (16); 20 C.F.R. § 1002.6(o)

Employers are required to notify employees of their rights under USERRA. The notice must explain what rights, protections and obligations employees have under the act including:

- freedom from discrimination and retaliation.
- right to re-employment.
- health and pension benefit protections.
- enforcement.

38 U.S.C. § 4334(a); 20 C.F.R. § 1002 ; Appx.

The employer can provide this notice to individual employees who are covered by USERRA or it can post a notice. The U.S. Department of Labor has prepared a poster that employers can use to meet this notice requirement. It is available on the U.S. Department of Labor website (DOL.gov and search for "USERRA poster").

USERRA is a floor to military leave rights, meaning that employers and state regulations can afford more benefits but may not offer fewer benefits than those outlined in USERRA.

38 U.S.C. § 4302; 20 C.F.R. § 1002.7

Discrimination and Retaliation

USERRA prohibits discrimination and retaliation based on a person's military status. USERRA's discrimination and retaliation provisions apply to an individual who:

- is a past or present member of the uniformed service;
- has applied for membership in the uniformed service; or
- is obligated to serve in the uniformed service.

38 U.S.C. § 4311(a); 20 C.F.R. §§ 1002.6, 1002.18

The law prohibits an employer from denying any of the following based on military status:

- initial employment
- re-employment
- retention in employment
- promotion
- any benefit of employment

Additionally, USERRA prohibits an employer from taking any adverse employment action retaliating against an individual because he or she has:

- taken an action to enforce a protection afforded any person under USERRA.
- testified or otherwise made a statement in or in connection with a proceeding under USERRA.
- assisted or participated in a USERRA investigation.
- exercised a right provided under USERRA.

20 C.F.R. §
1002.19

Employers are prohibited from taking actions against an individual for any of the activities protected by USERRA, whether or not he or she has performed service in the uniformed services.

20 C.F.R. §
1002.19

The USERRA prohibitions against discrimination and retaliation apply to all covered employers and employment positions including those that are for a brief, nonrecurrent period, and those for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. (However, re-employment rights and benefits *supra* do not apply to such brief, nonrecurrent positions of employment.)

20 C.F.R. §
1002.20

General USERRA Leave and Re-employment Requirements

USERRA's re-employment requirements apply to all public and private employers in the United States, regardless of size.

20 C.F.R. §
1002.34

Employers are generally required to provide employees military leave for up to five cumulative years of active duty service with the right to re-employment. Military leave is available regardless if the military duty is voluntary or involuntary.

38 U.S.C. §§
4312, 4303(13)

Re-employment rights extend to employees who have been absent from their employment because of "service in the uniformed services." USERRA's definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war.⁹

As discussed below, the obligations of the employer and rights of the employee during leave and upon reinstatement may vary depending on the length of the leave.

In general, if the employee has been absent from a position of civilian employment for service in the uniformed services, he or she will be eligible for re-employment under USERRA if:

- the employer had advance notice of the employee's service;
- the employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;

⁹ As further discussed *infra*, Minnesota Statutes § 192.261 provides that any employee who engages in active service in time of war or other emergency for which leave is not otherwise permitted by law shall be entitled to a leave of absence.

- the employee returns to work or applies for re-employment in a timely manner; and
- the employee has not been separated from service with a disqualifying discharge or under other-than-honorable conditions.

These general leave and re-employment requirements have several qualifications and exceptions, and are subject to court interpretation. Not all qualifications and exceptions are discussed in detail here. Members should work with their human resources professional or legal counsel to determine whether any of these qualifications or exceptions may apply.

Employee to Provide Notification

The employee must provide the employer with notice (either written or verbal) unless giving notice is impossible, unreasonable or precluded by military necessity. Notice should be “as far in advance as is reasonable under the circumstances.” An authorized officer may provide notice on the employee’s behalf.

38 U.S.C. § 4312

The employee is not required to ask for or get his or her employer's permission for leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.

20 C.F.R. § 1002.87

The employee also is not required to tell the employer that he or she intends to seek re-employment after completing uniformed service. Even if the employee tells the employer that he or she does not intend to seek re-employment after completing the uniformed service, the employee does not forfeit the right to re-employment after completing service. In short, the employee is not required to decide in advance of leaving civilian employment whether he or she will seek re-employment after completing uniformed service.

20 C.F.R. § 1002.88

Employee Has Five Years or Less of Cumulative Service

USERRA re-employment rights apply if the cumulative length of the employee’s absences for service in the uniformed services does not exceed five years.

38 U.S.C. § 4312;
20 C.F.R. § 1002.99-103

Calculating this five-year limitation can be complicated. There are several categories of service that are exempt from the five-year cap. For example, required training, such as drill weekends and annual trainings, for reservists and National Guard members in inactive duty status are not counted as part of the five-year cap. There are several other exceptions that extend the five-year cap. These can be found in 38 U.S.C § 4312(c) and 20 C.F.R. § 1002.99-1002.103.

Application for Re-employment

Employees seeking re-employment are required to report to work or to submit an application for re-employment in a timely manner.

Leaves up to 30 days or for fitness-for-service examinations regardless of length:

To claim re-employment rights, the employee must report back for his or her first regularly scheduled work period on the day after completion of service. The time must

38 U.S.C. § 4312 (e)(1); 20 C.F.R. § 1002.115

allow for safe transportation from the place of service to the employee’s residence and an eight-hour rest period.

Leave more than 30 days, but less than 181 days: An application for re-employment (written or verbal) must be made to the employer no later than 14 days after completing service. If submission of a timely application is impossible or unreasonable within 14 days through no fault of the employee, he or she must submit the application no later than the next full calendar day after it becomes possible to do so.

Leave of more than 181 days: An application for re-employment (written or verbal) must be submitted no later than 90 days after completing service.

Deadlines for Re-employment Applications Extended Due to Military Injury: If the employee is hospitalized for or convalescing from an illness or injury incurred in or aggravated during service, the employee does not have to report to or submit an application for re-employment to the employer at the end of the period necessary for recovering from the illness or injury. The deadline may be extended for up to two years under this provision unless additional time is necessary to accommodate circumstances beyond the employee's control that make reporting within the two-year period impossible or unreasonable.

38 U.S.C. § 4312 (e)(2); 20 C.F.R. § 1002.116

Note: Applications for re-employment need not follow any particular format and can be written or verbal. An application can be given to anyone with apparent authority to accept employment applications, such as a manager or a line supervisor. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks re-employment with the preservice employer.

20 C.F.R. § 1002.118

Failure to Report Back to Work: When the employee fails to report back to work within these timeframes, he or she does not necessarily forfeit his or her employment rights. It does make the employee subject to the employer’s policies on unauthorized absence from work.

38 U.S.C. § 4312 (e)(3); 20 C.F.R. § 1002.117

Disqualifying Service

An employee does not have the right to re-employment if he or she has been:

- separated from uniformed service with a dishonorable or bad conduct discharge;
- separated from uniformed service under other-than-honorable conditions, as characterized by regulations of the uniformed service;
- a commissioned officer dismissed as permitted under federal law (10 U.S.C. 1161(a)) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the president; or
- a commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or a sentence to confinement in a federal or state penitentiary or correctional institution.

20 C.F.R. §§ 1002.1345 – .135

The branch of service in which the employee performs the tour of duty determines the characterization of service. If the employee’s characterization of service is upgraded to a qualifying status, the employee’s re-employment rights are restored, providing the

20 C.F.R. § 1002.136 – .138

employee otherwise meets the USERRA criteria. However, the employee cannot claim back pay or other benefits.

Re-employment and Right of Reinstatement

If an employee meets the reinstatement requirements, the employer must promptly re-employ the individual. "Prompt re-employment" means as soon as practicable given the circumstances of the situation.

20 C.F.R.
§1002.181

Generally, absent unusual circumstances, the employer must re-employ the employee within two weeks of the employee's application for re-employment. However, USERRA envisions that prompt reinstatement after a longer deployment may require more time because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

With the exception of employees who have a disability incurred in or aggravated by military service, the employee's reinstatement position is based upon the length of the leave taken.

Leave up to 90 days: The employee is entitled to reinstatement to the job position that he or she would have attained with reasonable certainty if not for the military leave. This position is known as the escalator position.

38 U.S.C. §
4313(a)(1); 20
C.F.R. §
1002.196

The escalator position must reflect the pay, benefits, seniority and other job privileges that the employee would have attained if not for the period of service. The escalator position is based upon the principle that but for the uniformed service leave, the employee could have been promoted, demoted, transferred or laid off due to intervening events.

The employer must make reasonable efforts to help the employee become qualified to perform the duties of the escalator position if needed.

If after reasonable efforts (including additional training), the employee does not qualify for the appropriate escalator position(s), the employee must then be employed in the position that the employee held on the date of entering military service. If needed, the employer must make reasonable efforts to help the employee become qualified to perform the duties of the previously held position.

If after reasonable efforts, the employee does not qualify for either of the above, the employee must be employed in any other position that is the nearest approximation to either the escalator position or the preservice position with full seniority. Again the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

Leave more than 90 days: The employee must be re-employed in the escalator position or a position of like seniority, status and pay. The employer must make reasonable efforts to help the employee become qualified to perform the duties of the escalator position or a position of like seniority, status and pay.

38 U.S.C. §
4313(a)(2); 20
C.F.R. §
1002.197

If after reasonable efforts (including additional training) by the employer, the employee does not qualify for the duties of the escalator position or a like position, the employee must then be employed in the position held on the date he or she entered military service or in a position of like seniority, status and pay to that previously held position. If needed, the employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

If the employee is not qualified to perform the duties of the escalator position, the pre-service position or a like position (after reasonable efforts by the employer), he or she must be re-employed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The employee must be qualified to perform the duties of this position, and the employer must again make reasonable efforts to help the employee become qualified.

Disability Incurred or Aggravated During Military Service: If the employee has been disabled, the employer must make reasonable efforts to accommodate the employee's disability so that he or she may perform the duties of one of these positions (in order of priority):

- the escalator position
- if the person is not qualified for the escalator position by reason of the disability, a position that is the equivalent in seniority, status, and pay to the escalator position, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by employer
- if the person is not qualified for the equivalent position by reason of the disability, a position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case in terms of seniority, status and pay

38 U.S.C. §
4313(a)(3); 20
C.F.R. §
1002.225

When Re-employment May Not Be Required

There are some circumstances when an employer may be excused from its obligation to re-employ the employee. In all of these cases, the burden of proof is on the employer. Prior to refusing to re-employ an eligible employee, members are strongly encouraged to discuss the specific facts of the situation with their legal counsel.

38 U.S.C.
4312(d)(1); 20
C.F.R. §
1002.139

The employer is not required to re-employ an employee where the employer's circumstances have so changed as to make re-employment impossible or unreasonable. For example, there has been an intervening reduction in force and the employee would be on lay-off status if not for military leave.

USERRA does not permit the employer to refuse to re-employ the employee on the basis that another employee was hired to fill the re-employment position during the employee's absence, even if re-employment might require the termination of that replacement employee.

The employer is not required to re-employ an eligible employee if it establishes that the accommodation, training or effort needed to assist the employee in becoming qualified for re-employment would impose an undue hardship, as defined by USERRA.

Finally, the employer is not required to re-employ an eligible employee if the pre-service employment was for a brief, nonrecurrent period and there was no reasonable expectation that employment would continue indefinitely or for a significant period. For example, a temporary, summer employee may not be eligible for re-employment.

Note that although re-employment may or may not be required, the employer may have to pay any severance the employee would have otherwise received.

Additional Employee Rights and Benefits

Nonseniority Rights and Benefits

During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer, regardless of how the employer may characterize the absence.

38 U.S.C.
4316(b); 20
C.F.R. §
1002.149 – .151

In this status, the employee is entitled to the nonseniority rights and benefits generally provided by the employer to other employees with similar seniority, status and pay that are available for a comparable nonmilitary leave of absence. A right or benefit is nonseniority-based if it is compensation for work performed or available regardless of length of employment.

If the employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those nonseniority rights and benefits. However, this written notice does not waive entitlement to any other rights to which he or she is entitled under USERRA including the right to re-employment.

Use of Accrued Vacation, Annual or Similar Leave

An employer must allow the employee to use any accrued vacation, annual or similar leave with pay during the period of service to continue his or her civilian pay. However, the employee is not entitled under USERRA to use accrued sick leave unless the employer allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable nonmilitary leave to use accrued paid sick leave.

38 U.S.C.
4316(d); 20
C.F.R. §
1002.153

Accrual of vacation leave is considered to be a nonseniority benefit. USERRA requires an employer to permit the employee on a military leave of absence to accrue vacation leave only if the employer provides that benefit to similarly situated employees on comparable nonmilitary leaves of absence.

An employer may not require the employee to use accrued vacation, annual or similar leave during a period of service in the uniformed services.

Health Benefits

USERRA permits an employee who has health plan coverage through the employer for him- or herself and dependants to elect to continue that coverage for up to 24 months after the absence begins or for the period of service plus the time permitted to apply for re-employment, whichever is shorter.

38 U.S.C. 4317;
20 C.F.R. §
1002.164 – .171

USERRA does not specify requirements for electing to continue coverage. Health plan administrators may develop reasonable requirements for how an employee may elect continuing coverage. It may be reasonable for a health plan administrator to adopt COBRA compliant rules (even if the entity is otherwise not subject to COBRA requirements) regarding election of coverage, as long as those rules do not conflict with USERRA or state regulations. An employee cannot be precluded from electing to continue health plan coverage because it is impossible or unreasonable for him or her to elect coverage.

The amount an employer can require the employee to pay to continue health plan coverage depends on the length of the leave.

Leaves up to 30 days: The employee cannot be required to pay more than the regular employee share of premiums if any.

Leaves of more than 30 days: Employee may not be required to pay more than 102 percent of full premium under the plan (employer's share plus 2 percent for the administrative costs).

Coverage may be canceled in accordance with reasonable employer rules if the employee fails to make timely payments. If health insurance is terminated during the employee's service period, that coverage must be reinstated upon re-employment.

The employer generally cannot impose an exclusion or waiting period on the reinstatement of coverage unless an exclusion or waiting period would also be imposed if the coverage were terminated for a reason other than the leave for service or for an illness or injury incurred or aggravated during service.

USERRA does not require the employer to establish a health plan if there was none in place prior to the employee's leave for service or where there is a plan to provide any particular type of coverage. Additionally USERRA does not require the employer to permit the employee to start coverage under the health plan at the beginning of a period of service if he or she did not previously have such coverage.

Termination Protections After Re-employment

USERRA provides returning employees a period when they are protected from being terminated from their jobs. When an employer terminates an employee during that period, the employer has the burden to show that the employee was discharged for cause. The period of protection depends on the employee's length of military service.

- Up to 30 days: no protection period
- Between 31 and 180 days: 180 days
- More than 180 days: one year

Note: It is important to remember that USERRA prohibits discrimination and retaliation based on an employee's military service status. Under the Minnesota Veterans Preference Act and Minnesota case law, a qualified veteran can only be terminated for misconduct or incompetence, or if the job is eliminated in good faith regardless of length of service.

38 U.S.C. § 4316;
20 C.F.R. §
1002.247

Retirement Benefits

Upon re-employment, the employee must be treated as having been in continuous service to the employer for purposes of participation, vesting and accrual of benefits.

20 C.F.R.
§1002.262

For retirement plans to which employer contributions are not dependant on employee contributions, the employer is not required to make its contribution until the employee is re-employed. Such contributions must be made no later than 90 days after the date of re-employment. Extra time may be afforded if such payment is impossible or unreasonable.

If the employee is enrolled in a contributory plan, the employee can choose to make up any contributions or elective deferrals missed due to the service leave. If the employee chooses not to contribute, the employer is not required to provide matching funds. The employee may choose partially to fund his or her past retirement obligations. The employee does not have to pay interest on any missed payments while on leave.

Starting with the date of re-employment, the employee has up to three times the length of the employee's immediate past period of uniformed service, not to exceed five years, to make up any missed contributions or elective deferrals. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer.

The employee's right to pension benefits will be determined by the type of pension plan. In a noncontributory defined benefit plan, the employee's benefit will be the same as if he or she had been continuously employed. In a contributory defined benefit plan, the employee will need to make his or her contributions to receive full benefits.

20 C.F.R.
§1002.265

In a defined contribution plan, the employee's benefit may not be the same as if he or she had been continuously employed, even though the employee makes up the contributions because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period(s) of service.

Enforcement of USERRA

An individual has the right to file a complaint with the Veterans Employment and Training Service (VETS) of the U.S. Department of Labor to enforce USERRA. VETS investigates and attempts to resolve complaints against employers. If VETS cannot resolve a complaint, the case could be referred to the U.S. Department of Justice for representation by the attorney general. Alternatively, the individual may file a civil action in federal district court.

20 C.F.R.
§1002.303 - .314

Possible remedies for USERRA violations are an award of lost wages and benefits. If the failure to comply was willful, a similar amount as liquidated damages may be awarded. The federal court can also issue injunctions and restraining orders.

Additional State Military Leave Laws

As noted previously, USERRA is a floor to military leave rights. Below are a few state laws that may provide greater benefits than those articulated in USERRA.

Authorized Paid Leave

Employees who are members of the U.S. Reserves or National Guard have the right to a leave of absence *without loss of pay*, seniority status, efficiency rating, vacation, sick leave or other benefits for all the time when engaged with such organization or component in training or active service ordered up to 15 days a year.

Minn. Stat. §
192.26

To be eligible for the paid leave, the employee must return to the public position immediately after being relieved, unless:

- the employee is prevented from returning due to a physical or mental disability or other cause not due to the officer's or employee's fault; or
- the employee is required by proper authority to continue in such military or naval service beyond the 15 days.

Leave of Absence Benefit Rights

Employees who engage in active service in a time of war or other emergency declared by the proper authority and for which leave is not otherwise allowed by law, or during convalescence for a documented injury or disease incurred during active service are entitled to an unpaid leave of absence with a right to reinstatement.

Minn. Stat. §
192.261

The leave of absence may not extend beyond four years (plus any additional time as such individual may be legally required to serve).

Like the veterans rights under USERRA, upon re-employment, the employee is entitled to the equivalent escalator position. The employee also has a right to accrued sick leave, accrued vacation time and other benefits, such as seniority, that the officer or employee would have had had the employee actually been employed during the leave. The accrual of leave time must be without regard to regulations limiting the number of days that may be accumulated.

Reinstatement under this statute is not required if:

- the position has been abolished;
- the employee is not physically or mentally able to perform the duties of the position;
- the employee was dishonorably discharged; or
- the employee fails to make a timely application for re-employment, as defined by Minn. Stat. § 192.261.

Any person who is reinstated under this provision cannot be discharged from the position unless for cause, after notice and hearing, within one year after reinstatement.¹⁰

¹⁰ Public-sector employers may only discharge veterans for cause pursuant to the Minnesota Veterans Preference Act.

If the benefits under this state statute are less than those granted by USERRA, the USERRA benefits control.

Authorized Leave for Training

Initial period of active duty for training of not less than three consecutive

months: The employee is entitled to reinstatement upon re-employment within 31 days after he or she is:

- released from active duty for training after satisfactory service; or
- discharged from hospitalization incident to that active duty for training, or one year after a scheduled release from that training, whichever is earlier.

Any person who is reinstated under this provision cannot be discharged from the position unless for cause within six months after reinstatement.

The employee is entitled to all re-employment rights and benefits provided by statute.

Any other training for active duty or inactive duty: An employee who takes leave for this purpose (unless the employee is covered by Minn. Stat. § 192.26) is entitled to reinstatement with all re-employment rights and benefits. He or she must report for work on the next regularly scheduled working period after release from training (including any necessary travel time), or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control.

If that employee is hospitalized incident to active duty for training or inactive duty training, that employee shall be required to report for work:

- at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment;
- within a reasonable time thereafter if delayed return is due to factors beyond the employee's control; or
- within one year after the release from active duty for training or inactive duty training, whichever is earlier.

Minnesota Statute § 192.261, subd. 5(c) also contains protections for employees for the period required to report for the purpose of being inducted into, entering or determining by a pre-induction or other examination the employee's physical fitness to enter the military forces.

Retirement and Pension Rights

Employees on leaves under Minn. Stat. §§ 192.26-192.264 have a right to continued employment and retirement benefits including increases as if they were not on leave if payment of contributions or assessments continues to occur. If an employee elects to purchase PERA service credit, the employer is obligated to provide the employer contribution.

Minn. Stat. §
192.261, subd. 5

Minn. Stat. §
192.262

Filling Vacancies

If it is determined that the work performed by an employee on leave under Minn. Stat. §§ 192.26-192.264 is necessary and in the public's interest, a government entity has the authority to fill a vacancy until the employee returns or the term of the position expires.

Minn. Stat. §
192.263

Authorized Pay Differential

A public entity may pay a salary differential to an employee who is a member of the National Guard or U.S. Reserve who are ordered to active military service. The term "active service" is defined in Minn. Stat. § 471.975, and contains several exclusions.

Minn. Stat. §
471.975

The salary differential is an amount equal to the difference between the employee's base active duty military salary and the salary the employee would be paid as an active political subdivision employee, including any adjustments the employee would have received if not on leave of absence.

Payment may be made only to a person whose base active military pay is less than the salary the employee would have received as an employee of the political subdivision.

Payment must not extend four years from the date that the employee reported for active service, plus any additional time the employee may be legally required to serve.

An employee has the option to use accrued vacation during the leave, but may not be required to use it.

Employment Leave for Family Members of an Injured or Killed Soldier¹¹

Public employers must grant an unpaid leave of absence of up to 10 days to an employee whose immediate family member is injured or killed while serving anywhere in active military service.

Minn. Stat. §
181.947

- "Immediate family" is defined as an injured or deceased service member's parent, child, grandparent, sibling or spouse.
- "Active service" is defined broadly to include both federal and state active military for any purpose including training.
- Independent contractors are included in the definition of employee.
- The employee must give the employer as much notice as is practicable before taking leave.
- The employer may reduce the unpaid leave by any period of paid leave provided for the employee.
- The employer may provide leave benefits in addition to those provided in this section.

¹¹ An employer may also have an obligation to grant leave under the provisions of the Family and Medical Leave Act (FMLA) to injured service member employees or employees who are family members of injured service members. For more information, see the MCIT Resource Briefing "Employee Leaves."

Employment Leave for Family Members to Attend Military Ceremonies

Employers must grant an unpaid leave of absence to an employee whose immediate family member has been ordered into active service in support of a war or other national emergency. Independent contractor is *not* included in the definition of employee.

Minn. Stat. §
181.948

Leave does not have to be granted if it unduly disrupts the operations of the employer. The employer may limit the amount of leave to the actual time necessary to attend a send-off or homecoming ceremony not to exceed one day's duration in any calendar year.

Employer must not discharge from employment, take adverse employment action against or otherwise prevent an employee from attending the following kinds of events relating to the military service of the employee's spouse, parent, or child and to which the employee is invited or otherwise called upon to attend by proper military authorities including:

Minn. Stat. §
192.325

- departure and return ceremonies for deploying or returning military personnel or units
- family training or readiness events sponsored or conducted by the military
- events held as part of official military reintegration programs

The employee must provide reasonable notice. The employee's right to leave may not exceed two consecutive days or six days in a calendar year. The employee is allowed but may not be compelled to use accumulated but unused vacation.

Professional Licenses or Registration

Any person who is required by Minnesota law to be licensed or registered with the state to perform a practice or trade and who enters into active military service (or other employment outside the U.S. essential to a war effort or national defense) does not have to file or pay filing fees for the renewal of the license or certificate. His or her present license or certificate remains in effect until six months after active military service has ended.

Minn. Stat. §
326.56

Additional Nondiscrimination Laws

It is unlawful for any employer:

- to discharge any person from employment because he or she is a member of the military or naval forces.
- to hinder or prevent any person from performing any military service that he or she may be called upon to perform by proper authority.
- to dissuade any person from enlistment in the military service by threat or injury with respect to that person's employment, trade or business.

Minn. Stat. §
192.34

Any person violating any of the provisions of this section would be deemed guilty of a gross misdemeanor.

Additionally, an employer may not discharge from employment or take adverse employment action against any employee because of that employee's spouse's, parent's or child's membership in the military forces.

Minn. Stat. §
192.325

Enforcement of Minnesota State Laws

To enforce state military leave and rights laws, an employee can contact the Minnesota Department of Labor and Industry or bring a state court action. The employee can also contact the commissioner of Veterans Affairs. Possible remedies could include lost wages, benefits, costs and injunctions or restraining orders.

Civil Relief Laws

The Federal Servicemembers Civil Relief Act provides protections relating to civil law actions of military members. This law applies to soldiers in active service. The law temporarily suspends civil legal proceedings "which may prejudice the civil rights of persons" actively participating in the military. This law could apply to any employment-related action involving these employees.

50 USC App. §
501 et seq.
Minn. Stat.
§190.055

The Minnesota legislature extended the federal protections to Minnesota soldiers in 2002 with Minn. Stat. §190.055. The state law applies to service members in state active service or federally funded state active service.

Seek Legal Advice

Whether MCIT coverage will apply to a lawsuit arising out of the failure to comply with the Veterans Preference Act, USERRA or other similar state or federal laws depends upon the nature of any claims brought. Generally, MCIT coverage excludes claims involving nonjudicial administrative proceedings; seeking back salary; or seeking lost, past or future wages.

MCIT recognizes that risks exist for members when complying with these laws and regulations. This publication provides general risk management advice on adhering to the various state and federal laws and regulations. There may be additional regulations, case law or administrative decisions not discussed herein that may affect a particular situation. Members are strongly encouraged to discuss any specific questions related to this topic with their county attorney, labor attorney or employment attorney.

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