



Employment Issues

Military Leave Special Report

CONTENTS

General Information	1
The Statutes that Grant the Rights...	2
USERRA	2
Basics.....	3
Eligibility	3
Length of Time an Employee Can be Gone from the Job	3
Reemployment to the Same or Similar Position	4
Workplace Changes.....	4
Health Insurance	5
Leave	5
Seniority	6
Pension	6
IPERS	6
Employment Rights after Reemployment.....	6
Other Benefits	7
Discrimination and Reprisal	7
Process for Enforcing the Act.....	7
Reemployment and Other Rights of Iowa Public Employees	8
Additional Useful References.....	9

General Information

This information was originally published as an IASB Special Report on March 19, 2003.

At that time, the Des Moines Register reported that Iowa had more members of the National Guard and Reserve serving on active duty than at any time since World

War II. That phenomenon was due not only to Operation Enduring Freedom, the war on terror declared by President Bush following the events of September 11, 2001, but also to the United States Armed Forces increased reliance on the National Guard and Reserve to fulfill vital national defense functions on a day-to-day basis.

For example, 70 percent of the Army's combat support units, the logistics support that enable an army to fight, are made up of National Guard and Reserve. Ninety-seven percent of the Army's civil affairs units, the nation-building component of the Army, are Guard members and Reserve. Eighty-one percent of the Army's psychological operations forces are Guard and Reserve. Eighty-five percent of the Army's medical brigades, and two-thirds of the Army's military police are Guard and Reserve.

The Air Force is similarly reliant on its Reserve Component. Sixty-four percent of the tactical airlift and 27 percent of the strategic airlift capability is made up of Guard and Reserve. Fifty-five percent of the air refueling capability is Guard and Reserve. Thirty-eight percent of tactical air support is Guard and Reserve. The day-to-day responsibility to provide pilots and aircraft for the air defense of the United States was performed entirely by the Air National Guard prior to September 11, 2001.

It is clear that this increased role for citizen soldiers in the national defense has placed an increased burden on public and private employers whose employees are members of

the Guard and Reserve. The purpose of this Special Report is to provide a quick reference for Iowa schools in dealing with that increased burden. Because, as with most areas of the law, the requirements of state and federal law are technical and the result can change by changing just one fact, you are encouraged to consult with your district's legal counsel to answer specific questions that arise in connection with the rights of Guards and Reservists that you employ.

The Statutes that Grant the Rights

The rights of returning service men and women and actively drilling members of the Reserve Component of the Uniformed Services have been conferred by both federal and state law. The most important legislation is 38 U.S.C. §§ 4301 through 4307, Uniformed Services Employment and Reemployment Rights Act, USERRA, and *IOWA CODE* §§ 29A.28 and 29A.43 (1989). Veterans also hold rights as provided by *IOWA CODE* chapter 35C (2001), the Veterans Preference statute.

USERRA

In the fall of 1994, Congress passed the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, 38 U.S.C. §§ 4301-4307, which clarifies the provisions of the Veteran's Readjustment Act. USERRA applies to all employers in the United States, regardless of size. USERRA does not diminish any policy, collective bargaining agreement, practice or contract that provides greater rights or benefits to service members. Conversely, no such law, policy or practice that would diminish such rights takes precedence over the provisions of USERRA. The USERRA was amended in 2001 to clarify its protections as applied to the National Guard and in 2002 to explicitly add funeral honors duty to service protected under USERRA. The purpose of USERRA is three-fold:

1. To encourage citizens to be involved in the military by minimizing the conflicts that can arise in employment because of military service;
2. To provide a mechanism for reemployment upon completion of military service; and
3. To provide protection to employees who may suffer discrimination because of their involvement in the armed services. See 38 U.S.C. § 4301.

Cases construing prior similar legislation have held the purpose of the legislation "is to insure that no veteran is penalized by reason of his absence from his [or her] civilian job." *Dyer v. Hinky Dinky, Inc.*, 710 F.2d 1348, 1350 (8th Cir. 1983). In litigation, that purpose is "that the veteran should be made whole." *Id.* at 1351. The Iowa Supreme court has found a similar purpose in applying the Iowa law. See *Painters and Allied Trades Local Union 246 v. City of Des Moines*, 451 N.W.2d 825 (Iowa 1990) and *Bewley v. Villisca Com. Sch. Dist.*, 299 N.W.2d 904 (Iowa 1980).

Congress enacted the reemployment statutes pursuant to its power to make war. "The war power of the federal government is its supreme power. When it is in action, it is transcendent," *Peel v. Florida D.O.T.*, 600 F.2d 1070, 1081 (5th Cir. 1979). When reemployment rights are provided for those who have been called into service, it is "a legitimate exercise of Congress' power to raise armies." *Id.* at 1084. States are free to establish additional rights and protections supplemental to those the federal law provides but "they are not free to restrict the reemployment rights that the [federal] Act has created." *Id.* at 1074. See 38 U.S.C. § 2021(c).

The consideration of any issue involving reemployment rights must be done with the

understanding that the federal and state statutes are to be liberally construed for the benefit of the returning veteran. *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, (1980); *Bewley v. Villisca Com. Sch. Dist.*, 299 N.W.2d at 906.

Basics

If an employee presents the employer with evidence the employee will be absent because of service in the uniformed services, the employee must be allowed to go. The new law requires an employee to give written or verbal advance notice of upcoming duty, unless, in rare circumstances, it is impossible or unreasonable to give notice. USERRA protects both voluntary and involuntary performance of duty. See 38 U.S.C. § 4303 (13) which defines “service in the uniformed services” very broadly to include both voluntary and involuntary duty. It includes, among other things, inactive duty for training, active duty, absence for an examination to determine fitness for duty and absences for funeral honor guard duty.

An employee who returns to employment will have reemployment rights. Those rights ensure that he or she will not suffer detriment because of the time spent in military service.

Eligibility

USERRA applies to an employee who completes service in one of the uniformed services. Uniformed services refer to the U.S. Armed Services (including the Reserve Components and the Coast Guard), the Army National Guard, the Air National Guard (when engaged in active duty for training, inactivity duty training or full-time National Guard duty), and the Commissioned Corps of the Public Health Service. See 38 U.S.C. § 4303(16). The rights and protections of USERRA apply only to honorably discharged service persons (38 U.S.C. § 4304) but not to independent contractors.

The only exceptions to a service person's unqualified right to reemployment are if:

- The employer's circumstances have so changed as to make it impossible or unreasonable to reemploy;
- In the case of a person no longer qualified for the reemployment post despite reasonable efforts by the employer to re-qualify that person, if reemployment of the returning service person would impose an undue hardship; and
- The employment from which the employee left to perform uniformed service was for a brief, non-recurrent period for which there is no reasonable expectation that it would continue indefinitely. See 38 U.S.C. § 4312(d).

Length of Time an Employee Can be Gone from the Job

The length of time the employee is away from the job can make a difference in what kind of rights to afford that employee. Generally the length of service should not exceed five years. See 38 U.S.C. § 4312(c). Once the employee is ready to return, employers may request that an employee bring verification of the employee's orders so there is proof the employee made a timely request for reemployment. The employer cannot, however, penalize the employee if those orders are not available. Employers have, in some circumstances, been required to pay back pay for undue delays in reinstating employees after their return from service. Generally, a service member has the following amount of time to report to work after service.

- **Service for up to 30 days:**
Employees must be given a reasonable amount of time to arrive at home, rest and report to work. After returning home, the employee must report to work for the next regularly scheduled work shift. For example, an employee who returns from duty at 6 a.m. on Monday

- should be given the opportunity to rest and report to duty on Tuesday.
- **Service for 31 to 180 days:**
Employees must report no later than 14 days following completion of service.
 - **Service of more than 180 days:**
Employees must report no later than 90 days after completion of military service. See 38 U.S.C. § 4312 (e) (1).

Reemployment to the Same or Similar Position

Not only must service members be reemployed, they are also entitled to have the same or similar position they held at the time they left employment. The employer must consider, at the time of reemployment, how the employee would have fared without a break in service. For service of 90 days or less the employee is generally entitled to the same job he or she had when they left. For service of more than 90 days the employer may need to assess the work situation and compensate for any changes that have occurred in the employee's absence. See 38 U.S.C. § 4313(a).

Workplace Changes

Those changes can include technical or organizational changes in the work environment and can also include layoff. If a school is going through layoff, a service member may be laid off. The employer must consider whether the employee would have been laid off had the employee not been on military leave. See 38 U.S.C. § 4312(d)(1)(a). The employer must also consider whether the employee would be working in a higher position had the employee remained employed, applying what has become known as the "escalator principle." In those cases, "the veteran steps back on at the precise point he would have occupied had he kept his position continuously during the war. He acquires not only the same seniority he had; his service in the armed service is counted as

service in the plant so that he does not lose ground by reason of his absence." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-285, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946).

The employee is entitled to all the privileges all other employees received while he or she was away. The employee must be placed in the position he or she would have attained had they remained continuously employed. The employee must benefit from any promotion or pay increase, and retain his or her seniority in the position. The statement is simple in the abstract. As a practical matter the issues are more complex. In organizations where people are granted annual service increases, those increases are treated as "perquisites of seniority." *Great Falls Sch. Dist.*, 842 F.2d 1046, 1049 (9th Cir. 1988). It is clear the courts will look to what the employer did and not what it said. For example, if each employee, or each employee in a relevant group, received the same raise in dollars or percentage, even if it is asserted that raises are based on merit, the returning employees will be entitled to the pay they would have received if they had been there. "If it is reasonably certain" that a person would have been promoted if he had not been in service, the court will find there is a right to the job based on the veteran's reemployment statute. *Brandt v. Minneapolis, Northfield & Southern R. Co.*, 714 F.2d 793, 798 (8th Cir. 1983).

In the school context, experience as a teacher isn't the criterion for pay increases if the salary schedule has a firm annual increase. Most school district salary schedules are based on time in service. Employees who return from duty are entitled to the same salary level they would have had if they had not been gone. The employee, however, cannot "demand that he or she be assigned a position higher than he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer." *McKinney v. Mo.-Kan.-Texas*

RR. Co., 357 U.S. 265, 78 S.Ct. 1222, 1227 (1958).

Another exception to this rule requiring reinstatement is if the employee, after a reasonable effort, can no longer qualify for the position or if the employee cannot perform the work because of a service-related disability. In those cases, the employee retains full company seniority but should be given a different position for which the employee is qualified and which most closely approximates the employee's former position in terms of seniority, status and pay consistent with the employee's circumstances. See 38 U.S.C. § 4313 (a) (3).

Health Insurance

While on military leave, most service members will be entitled to the military health insurance plan, but may want to continue the employer-sponsored health insurance coverage. USERRA requires employers to offer employees and their dependents continuing health insurance coverage for up to 18 months. Employees who choose this coverage must pay not more than 102 percent of the premium for absences of 31 days or more. Employees who serve less than 31 days cannot be charged more than the active employee share of the premium, if any. See 38 U.S.C. § 4317.

Employees returning from military leave are entitled to be reinstated in the health insurance program offered by the employer without any limitations or restrictions. Specifically, there should be no lapse in coverage, no waiting period and no exclusion for pre-existing conditions for either employees or their dependents.

Leave

While on military leave, it is unlawful to require a reservist to use earned vacation time for military service. An employee can, however, request that annual leave or vacation be used to continue civilian pay. Additionally, in most instances, an

employee does not accrue vacation during a period of military service unless the employer allows for such accrual for employees on a non-military leave of absence.

The Iowa office of the Department of Labor, Veterans Employment and Training Service takes the position, in light of the legislative history of USERRA, that an employer cannot readjust an employee's schedule in light of protected duty:

“[R]earranging an employee's work schedule around his or her expected absences for Reserve Component training amounts to requiring the employee to use his or her days off for such training. Accordingly, such a schedule arrangement is unlawful if the employee objects.” Dennis A. Larson, Assistant Director, Veterans' Employment and Training Service, U.S. Department of Labor, Des Moines Letter dated August 29, 2001.

This position is contrary to an Iowa Attorney General's opinion that pre-dated USERRA. See 1989 Iowa Op. Atty. Gen. 10, 1989 WL 264887, Op. No. 89-2-5(L) (*Galenbeck to Mann and Strobel*).

In the context of teachers, it seems clear that the Department of Labor would view requiring a teacher to utilize summer break for guard or reserve duty as similarly unlawful. In addition, the Iowa Supreme Court held that to require a custodian to use vacation time for his national guard annual training violated *IOWA CODE* § 29A.43. See *Bewley v. Villisca Community School District*, 299 N.W.2d 904 (Iowa 1980).

At the time of reemployment, vacation and leave banks that accrue based on the amount of time an employee had been employed, should continue to accrue as if the employee had never left employment. For example, if an employee earns an extra day of sick leave

for every year of service, that employee, even if gone on military leave for the year, is entitled to count that year as a year of service and should earn an extra day of sick leave. See 38 U.S.C. § 4316.

Seniority

At the time of reemployment, a person is entitled to seniority and all benefits determined by seniority as if the person had remained continuously employed. See 38 U.S.C. § 4316 (a).

Pension

A person reemployed under USERRA shall be treated as not having a break in service when determining the accrual of pension benefits. The employer has the obligation to credit an employee with years of service while on uniformed service leave and to fund the plan for these years of service. USERRA also calls for employers to make employer contributions to defined contribution accounts while the employee is on uniformed service leave of absence. As for any required employee contributions or elective deferrals, an employer's obligations for matching or making accrual calculations depend on whether the employee makes up the permitted contributions within the period allowed.

Upon reemployment, the employee may elect to contribute to the employee pension plan for a period of service where the plan requires employee contributions. Any such payment must be made during a period that begins upon reemployment and lasts three times the period of service, not to exceed five years. If the employee elects to make contributions for the period of service, the employer is liable for allocation of its contribution just as for other employees.

After the employee is reemployed, employers must make up contributions for plan service periods during which the employee was away on uniformed service. The contribution is to be made in the same manner and to the same extent that the

allocation would occur for other employees during the period of uniformed service. See 38 U.S.C. § 4318.

IPERS

The Iowa Public Employees Retirement System (IPERS) currently allows full credit for absences due to military service without requiring either the employee or the employer to contribute for the period provided that the employee returns to IPERS covered service within a year of separating from uniformed service. IPERS will allow the employee to contribute the employee's share of covered wages during the employee's absence at his or her election. If the employee elects to contribute, the employer is required to match the contribution.

Employment Rights after Reemployment

USERRA has an explicit provision that a reemployed person cannot be terminated, except for cause within one year after the date of reemployment if the person's service period was over 180 days. If the service period was 31-180 days, the employee cannot be terminated without cause for the first 180 days. See 38 U.S.C. § 4316 (c) (1) and (c) (2). This means that during this period of time the employee has a property interest in continued employment which can only be taken by affording due process of law. You should consult with your district legal counsel in light of this requirement prior to terminating a covered employee within the protected period.

In addition, Iowa's Veterans Preference Act also confers an expectation of continued employment by providing that a veteran cannot be terminated from public employment except for incompetence or misconduct. See *IOWA CODE* § 35C.6. That property interest can only be lawfully terminated by providing due process of law.

Other Benefits

A returning veteran or other recognized uniform service person is entitled to all benefits that are not based on seniority that any employee on furlough or leave of absence would be able to accrue under policies or practices in the place when the leave began or implemented while the employee was away. The obligation for coverage applies to benefit arrangements under collective bargaining contracts or agreements, voluntarily offered plans or practices by the employer. If an employer's policies or practices vary among types of non-military leaves of absence, Congress intends the most favorable treatment accorded any type of leave must also be accorded to uniformed service leave, regardless of whether the non-military leave is paid or unpaid.

Discrimination and Reprisal

Both federal law and Iowa law ban discrimination in employment against a member of the uniformed services and federal law bans reprisal against an employee for asserting their rights protected under the statute. See 38 U.S.C. § 4311, and *IOWA CODE* § 29A.43. If past, present, or future connection with uniformed service is a motivating factor in the employer's decision, the employer has acted unlawfully unless the employer can prove that it would have made the decision regardless of the employee's connection with uniformed service. The burden shifts to the employer once the employee establishes that uniformed service was a motivating factor in the employer's decision. See 38 U.S.C. § 4311 (c).

Process for Enforcing the Act

If an employee determines that a public employer has not complied with the act, the employee may bring an action directly in federal court. See 38 U.S.C. § 4323 (a). The court in *McKinney, supra*, 357 U.S. at 268, said that the employee need not pursue procedures before the National Railroad Adjustment Board. Similarly, public

employees would not need to exhaust the procedures provided by a collective bargaining agreement before bringing suit.

A complaint can be filed with the Veterans' Employment and Training Service of the U.S. Department of Labor. An investigation will be conducted, and if the case has merit and the employer refuses to comply, the U.S. Attorney General may act as attorney on the complainant's behalf in an action in federal court. See 38 U.S.C. § 4322. If the Attorney General declines to represent the person, that person may file a private cause of action in federal court. If the person prevails, the court can order the employer to pay reasonable attorney fees and litigation expenses. See 38 U.S.C. § 4323.

Remedies for a violation of USERRA include an order that the employer comply with the Act and pay the employee lost wages and benefits. A willful violation may result in double damages. USERRA gives the courts equity powers, such as injunctive relief and temporary restraining orders. See 38 U.S.C. § 4323. If the veteran prevails and is entitled to relief under the law, "the veteran is entitled to recover the full amount of wages and benefits lost because of the unlawful refusal to reinstate him with proper seniority." *Teamsters Local v. Helton*, 413 F.2d 1380, 1385 (5th Cir. 1969). As in other employment cases, a veteran has a duty to mitigate damages. However, the "veteran who has been denied reemployment in violation [of the law] has no duty, under the principles of mitigation, to continue at a job which is not comparable to his previous position." *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1309 (7th Cir. 1984). cert. denied. In an early case, the court ruled that it is presumed the veteran was qualified for the position held before entering service and it is also presumed, absent a service-connected disability, that the veteran is qualified to resume the position upon discharge. *Greathouse v. Babcock & Wilcox Co.*, 381 F. Supp. 156, 163 (N.D. Ohio 1974).

Reemployment and Other Rights of Iowa Public Employees

Iowa public employees who enter active military duty have been granted rights in addition to those provided by federal law. The major additional right Iowa has granted is when public employees are ordered into active service they are entitled to a leave of absence “without loss of pay during the first thirty days of such leave of absence.” *IOWA CODE* § 29A.28. The thirty days has been construed to mean calendar days. *City of Des Moines*, 451 N.W.2d at 827. Opinions of the Iowa Attorney General have made clear that the entitlement to paid leave is not affected by whether the employee is in active duty status or on inactive duty for training. See e.g. 1978 Iowa Op. Atty. Gen. 608, 1978 WL 17449, Op. No. 78-8-9 (*Blumberg to Hansen*). Additionally, the Attorney General has repeatedly opined that “without loss of pay” means full paid leave, not just the difference between military pay and civilian pay. See, e.g., 1995 Iowa Op. Atty. Gen. 34, 1995 WL 1778794, Op. No. 95-8-4(L), (*Kempkes to Tinsman*). A recent amendment to *IOWA CODE* § 29A.1 makes clear that a member of the Iowa National Guard is considered to be on protected duty when called to testify about an incident that the member observed or which occurred while the member was on duty.

The language granting paid leave rights to Iowa public employees exempts “employees employed temporarily for six months or less . . .”. *IOWA CODE* § 29A.28. The language of *IOWA CODE* § 29A.43, which prohibits discrimination against military personnel, applies to all employees “other than employment of a temporary nature, . . .”.

The final sentence of *IOWA CODE* § 29A.28 is of great importance to Iowa public employers with employees who were inducted into the military service or called to active duty from the National Guard or Reserves. The sentence provides:

The proper appointing authority may make a temporary appointment to fill any vacancy created by such [military] leave of absence.

It is crucial that schools make certain that contracts and letters of assignment are clear that the temporary status of employees who replaced persons in military service will continue even if the temporary status extends beyond the year they were appointed. There is no reported decision construing the continuing contract requirements for certified employees in Chapter 279 in light of *IOWA CODE* § 29A.28. You should carefully discuss temporary replacement of certified employees with your district counsel.

Temporary employees who are employed more than 180 days are entitled to paid military leave. See 1977 Iowa Op. Atty. Gen. 68, 1977 WL 18880, Op. No. 77-2-17 (*Foudree to Burns*).

Many of these issues relate to reemployment rights as a result of active duty. Other rights apply to “training” absences. Iowa public employees cannot be required to use their vacation time for attending, e.g., National Guard training. *Bewley v. Villisca Com. Sch. Dist.*, *supra*. Both *IOWA CODE* § 29A.43, and 38 U.S.C. § 4311 prohibit denial of any employment rights or benefits because of any obligation as a member of the National Guard or a reserve unit.

In summary, employers should be careful to plan for the return of personnel who have entered military service for training or active duty. Those individuals possess important reemployment rights. Their replacements, if any, must be temporary. If there is conflict between an employer and a returning veteran, the law is construed to favor the veteran.

Finally, if it is shown in litigation that the veteran was unlawfully deprived of rights, the court will act to make the veteran “whole.”

Additional Useful References

The United States Department of Labor has published a useful reference, A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA), U.S. Department of Labor, Veterans Employment and Training Service, October 2001. The Resource Guide is available on the DOL Web site in Adobe® format. In addition, the US DOL, VETS Web site contains valuable information to assist in answering questions including a section with interactive guidance for employers. The DOL site may be found at

www.dol.gov/vets.

The National Committee for Employer Support of the Guard and Reserve has a useful Web site for employer questions located at

www.esgr.org.

Finally, the Reserve Officers Association Web site, in addition to other valuable information, has short “law reviews” that cover a variety of questions regarding USERRA and other federal rights of Guardsmen and Reservists. The ROA Web site is located at

www.roa.org.