



**Employment Systems, Inc: Military Leave and Reemployment Rights
in California
(2001)**

The call-up of military reservists and members of the National Guard since September 11th has an impact on employers throughout the country. *The Uniformed Services Employment and Reemployment Rights Act of 1994* (USERRA) provides the national framework for the rights and protections for “service in the uniformed services”. Therefore, it places restrictions on what employers can do when employees are called to active duty, decide to join the military, or are activated into the National Guard or military reserves.

In addition to the application of USERRA guidelines, in California there is a Military and Veterans Code that also provides rights and protections to employees engaged in military-related activities. Clients of Employment Systems, Inc. should contact ESI if they have ESI employees who are called to active military duty or to National Guard service, or who have questions about military service issues.

The following is a summary of some of the obligations and responsibilities of employers and employees with regards to military duty leave and reinstatement rights at the conclusion of those leaves:

- The State’s Military and Veterans Code (see Section 394) forbids employment discrimination based on service in the military. This includes employment actions such as discharge and refusal to hire. Also, under the Military and Veterans Code, private sector employers must allow an employee to take up to 17 days of unpaid leave of absence each year in order to meet their military obligations. (There are even broader leave requirements in the Code for public sector employers.) The Military and Veterans Code also covers situations where the National Guard is called up for emergency service by order of the Governor. (USERRA does not apply in that situation.) Generally, the Military and Veterans Code provides reemployment rights to employees of private sector companies who are called to temporary emergency military duty as members of the National Guard. There are additional regulations in the Code, as well as restrictions, that apply in the situation of part-time employees.
- However, it is the federal law, USERRA, that is more generally applicable and broader in scope than the State Code. All employers are covered by USERRA. It applies to duty in the usual military services, plus the Coast Guard, Military Reserves, National Guard, and certain other services like Public Health or other categories of persons designated by the President during wartime or national

emergency.

- The basic concept in USERRA is that an employer may not discriminate against a person who serves in the armed services. The law provides for unpaid leaves of absence of up to 5 years of cumulative military service. However, there are significant exceptions to what is counted towards the 5 years that can expand that length of time. **For example**, a recall to active duty, such as happened after September 11th, would not be counted towards the 5 years limit.
- If an employee is going on leave that is protected by the USERRA, the employee should give advance notice verbally or in writing unless circumstances prohibit it. However, the law does not define what constitutes advance notice, and there are circumstances when the employee may be activated and the information considered a military secret. An employer cannot actually request a copy of the employee's military orders until after the employee is off for 30 days (but the employee can provide it earlier if possible). National Guard and Reservists are encouraged in the law to provide their orders before taking the military leave.
- As noted, USERRA prohibits discrimination based on military service. This means that an individual cannot be denied employment, reemployment, retention, promotion or other benefits of employment based on their military status.
- After the period of military leave is over, the employee has reemployment rights under USERRA. The employee has the right to reinstatement if they gave notice that they were taking time off for the service (with the exception noted above), if they have not exhausted the 5 years, if they were discharged under honorable conditions, and if they submitted a request for reinstatement in a timely manner as required by the law.
- The requirements for submitting the reinstatement request are based on the following formula: If they are off less than 31 days, they must submit notice of request for reinstatement no later than the beginning of the first full regularly scheduled work period on the first day following the leave, (after 8 hours of rest and reasonable commute time). If the employee is off between 31 and 180 days, the employee's application for reinstatement has to be within 14 days of the end of the leave. If the employee's leave was for more than 180 days, they have 90 days to request reinstatement. If they fail to meet these deadlines, the employer must treat the individual as they would anyone else returning from a leave of absence.



- However, if the employee is injured while in military duty they can have up to 2 extra years to request reinstatement.
- When the employee is reinstated, the particular job that they have a right to return to is determined in part by the length of time that they were off. If they are on a leave for less than 91 days, they must be reinstated into the job they had or would have had if they had not gone on leave (with some consideration for qualifications and training). If they are on leave for more than 90 days, they should be reinstated to the same job they had before the leave, or they can be reinstated to a position of like seniority, status, and pay (assuming the employee is qualified or can easily be qualified). Whatever the job, the employee must be “promptly” reinstated. That can mean right away, or if the employee has been off for several years, it can mean a week or so.
- The general guideline used in USERRA reinstatement is known as the “escalator” principle, which means that if the employee had remained at work they would have been on some type of seniority “escalator”. When they are reinstated, they should be reinstated to the same point on the “escalator” they would have been on if they had remained on the job.
- While there is room for a “changed circumstances” exception to reinstatement, it is very narrowly interpreted and difficult to justify. Also, reinstatement does not have to apply when the job that the employee left when they went on the USERRA leave was a brief, non-recurrent job of a temporary nature. This too has been very narrowly interpreted when challenged.
- There is a benefits-continuation right for employees who go on a leave that is covered by USERRA. If the employee is off for less than 31 days, their insurance should be continued as if they were not off on the leave. However, if the leave is for a longer period of time, the employee has what amounts to an 18 month, COBRA-type benefit extension. Upon returning from leave, the employee should be immediately reinstated to their insurance without a waiting period.
- The employee who goes on a leave that is covered by USERRA is considered to have not had a break in service with regards to calculating pension rights. If the employer would have made contributions to the pension plan during the time that the employee is absent on the USERRA leave, the employer has to make those contributions when the employee is reinstated. If the pension plan has employee-only contributions, the employee has to be allowed to make up the contributions that they missed. Because this can be a complicated situation, it should be addressed on a case-by-case basis when the employee returns.



- Once an employee is reinstated under USERRA, the employee cannot be terminated without cause for a period of 180 days, if their leave was 180 days or less. However, if their leave was for more than 180 days, they are protected from discharge, other than for cause, for one year.

This summary is not exhaustive. But these guidelines give you some idea of the nature of the rights for employees that are provided by USERRA (and the California Military and Veterans Code). Because Employment Systems, Inc. has a variety of business arrangements with its clients, it will be important for ESI to address each employee-client situation on an individual basis if a military leave issue arises. Again, please call ESI at 858-451-0040 if you have questions or if you have a specific situation involving military or USERRA leave that requires action.