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## **Employer Responsibilities to Employees Undertaking Military Service**

John L. Valentino (February 2003)

President Bush declared major combat to be over in Iraq on May 3, 2003. As a result, thousands of reservists will be returning to their homes and jobs in the not too distant future. Moreover, the War on Terrorism will undoubtedly last for many years and create continuing issues for employers as their employees face military service and the hope of returning to their jobs one day.

The Uniformed Services Employment and Re-Employment Rights Act of 1994 (“USERRA”) outlines several employer obligations with regard to employees undertaking military service. The following is a highlight of some of USERRA’s basic provisions.

Under USERRA, employers are required to provide re-employment rights to their employees who, with notice to their employers, undertake military service on either a voluntary or involuntary basis. USERRA extends the re-employment rights for up to five years to individuals who have been absent from a position of employment on account of military duty in the “Uniformed Services”.

### I. What employers are bound by USERRA?

USERRA applies to all employers, regardless of size.

### II. What is an employee’s obligation under USERRA?

A. Notice. An employee must provide, in advance, written or verbal notice of all military duty, unless giving notice is impossible, unreasonable, or precluded by military necessity. Notice may be provided by the employee or by an appropriate officer of the branch of the military service in which the employee will be serving. The law only requires “advance” notice and does not specify when the notice must be given.

B. Return to Work. When an employee has complete his military duty, he is obligated to provide notice of his intention to return to work promptly upon completion of the military service. Time limits for returning to work depend on the length of the person’s military service.

- Military Service of 1-30 Days. In the case of an employee whose military service is 30 days or less, the returning employee must report to the employer either on the first day of regularly scheduled work following completion of service, or “as soon as



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possible” if reporting on the first regularly scheduled work day is “impossible or unreasonable through no fault of the employee”.

- **Military Service of 31-180 Days.** For returning employees whose military service was more than 30 days but 180 days or less, an application for re-employment must be submitted no later than 14 days following completion of military service, or “as soon as possible” if the failure to make timely application is through no fault of the returning employee.

- **Military Service More Than 180 Days.** For the returning employee whose service is more than 180 days, applications for re-employment must be submitted not later than 90 days after completion of military service. A special exemption is provided for returning employees who have been hospitalized or who are recuperating from injuries incurred in or aggravated by military service. These employees may apply for re-employment within two years following recovery from their injuries.

**Failure to give timely notice.** If a returning employee fails to apply for re-employment or report to work within the specified time limits, the returning employee will be subject, without discrimination, to the employer’s rules governing unexcused absences.

**III. Returning Employees Rights to Re-employment and Benefits.** The position to which a returning employee is entitled also depends on the length of his or her military service. Generally, USERRA mandates that returning employees be re-employed in the same or equivalent position they would have attained but for their military service, with the same seniority, status, and pay, as well as other rights and benefits that would have accrued based on the employee’s seniority.

- **Military Service up to 90 Days.** Under USERRA, returning employees whose military service was 90 days or less are entitled to be placed in the same positions in which they were employed or would have been employed if their employment had not been interrupted.

- **Military Service of 91 Days or More.** Returning employees whose military service was for more than 90 days are entitled to return to the positions in which they were employed, would have been employed, or a position of “like seniority, status and pay, the duties of which the person is qualified to perform” after reasonable efforts by the employer to qualify the person. Exceptions: re-employment is excused if an employer’s circumstances have changed to such an extent that re-employment is impossible or unreasonable, such as where the service member would have lost his or her position due to a lay-off, even if he or she had never entered military service.



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- A. Disabled Veterans. For returning employees who are disabled during military service, an employer is obligated to reasonably accommodate the returning employee's disability. If an employer's reasonable efforts fail to accommodate the returning employee's disability, the employee is entitled to another position for which he or she is qualified.
- B. Escalator Provision. As discussed above, the returning employee is entitled to the same position and pay grade, or the position and pay grade which the employee would have held if his employment had not been interrupted. This is commonly referred to as the Escalator Provision. Under the provision, an employee continues to accrue seniority for the time spent in military service. If the person is not or cannot become qualified for his "escalator position", he should be placed in his pre-service position. If the pre-service position is no longer available, he may be placed in a position with less status and pay, but with full seniority.
- C. USERRA does not require employers to compensate employees for performing military service. Employers may, however, elect to voluntarily compensate employees in military service for the difference between their military pay and what the employees would have received had their employment not been interrupted by the military service. Some employers offer employees "military leave pay" for a specified period, such as two or four weeks per calendar year.

IV. Protection from Termination. Of course, USERRA prohibits discrimination against individuals because of their past, current, or future military obligations. This prohibition extends to discrimination, hiring, promotion, re-employment, termination, and benefits.

USERRA, however, provides a special protection to employees that return from military service. Employers may not, for a specified period of time, terminate the re-employed individual without cause. Specifically, an individual whose military service was more than six months may not be terminated without cause for one year after his date of employment. For those whose service was between 31 and 180 days, there is a six month period of protection.

V. Enforcement. USERRA permits individuals who believe their rights have been violated to file a complaint with the United States Department of Labor. The Department of Labor will investigate the complaint and a court action may be commenced by the Attorney General. Alternatively, the returning employee may by-pass the administrative process and file an action directly in court.

VI. New York Law. New York has provisions governing the rights of public employees, but those provisions do not apply to private employers. New York does have an anti-



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discrimination provision applicable to all employers and USERRA is not preempted by any state law.