

LAWS PERTAINING TO NEW JERSEY'S MILITARY SERVICE MEMBER EMPLOYEES

I. DUTY STATUS

- A. Determining a service member's status is the single most important threshold question for ascertaining his or her rights and protections. You need to know (a) component (National Guard, Federal Reservist, Naval Militia or State Guard) and (b) authority under which he or she is "called up," or, type of duty performed (i.e., Title 10 & Title 14 = Federal Command, Control and Pay; Title 32 (National Guard only) = State Command and Control with Federal Pay; State Active Duty = State Command, Control and Pay; Inactive Duty = "Drills, IDTs or UTAs".

- B. When a service member is "called up" for duty he or she is considered mobilized or activated. Not all mobilized personnel are actually deployed, many remain local. Deployment refers to the movement of personnel to military operations sites, usually overseas. In most cases, written orders will state the call up authority and type of duty performed. Orders may or may not be produced for inactive duty.

II. LEAVES OF ABSENCES

- A. The Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. 4301, et seq., applies to all employers, regardless of size, including foreign employers doing business in the U.S. USERRA requires all employers to grant a leave of absence for up to 5 years to any person who is absent from a job because of uniformed service. USERRA applies to leaves of absence for all categories of military duty except "State Active Duty," or Governor "call ups," which are protected under N.J.S.A. 38:23C-20a. USERRA only requires the leave of absence; pay for military members is discretionary with each public and private entity.

- B. The Family Medical Leave Act ("FMLA"), 29 U.S.C. 2601, covers all public employees as well as private sector employees who have at least one year of service, have worked at least 1,250 hours in the past 12 months, and whose employer has at least 50 employees at worksites within a 75 mile radius. Employees who are not military, but are family of military, may be entitled to leave necessitated by their family member's service under new provisions of the FMLA, providing for 12 weeks of leave for a "qualifying exigency" (guidance forthcoming from US Dept. of Labor) arising out of a family member's service, or 26 weeks to care for an injured military family member. Employees who are military are also entitled under the FMLA to 12 work weeks unpaid leave, without offset or change in eligibility due to the period of military service.

III. REEMPLOYMENT PROCEDURES

A. Eligibility Criteria: The Service Member Employee:

1. Must have left the job for the purpose of performing military service;
2. Must have given prior oral or written notice to the employer. Prior notice, generally 30 days, is not required if precluded by military necessity or if otherwise impossible or unreasonable;
3. Served cumulative period or periods of service, that did not exceed 5 years – (5 year entitlement runs anew with each employer);
4. Was not discharged from military service dishonorably; and
5. Returned to work or submitted a timely application (oral or in writing) for reemployment. Time limits for application depend on the duration of the service and may be extended for up to 2 years for persons with a disability incurred or aggravated during service.

B. When Does Reemployment Occur and To What Position?

1. USERRA requires “prompt reemployment.” Generally, two weeks.
2. For service of 90 days or less, the employee is entitled to the job he or she would have held if he or she had remained employed, so long as he or she is qualified or can become qualified after reasonable efforts by the employer. If the employee cannot become qualified, the employee is placed in the pre-service position. For service over 90 days, the same rule applies, except employers may place employees in a position of comparable seniority, status or pay. If reasonable efforts fail to requalify an employee, and if the employee is not disabled, the reemployment position must reflect full seniority but may be of a lesser status or pay. Thus, employees may not always return to the same exact pre-service position.
3. Employees disabled during military service must be accommodated with reasonable efforts by employers. If accommodation is not possible, the employer must reemploy the person in another position for which he or she is qualified, which is the “nearest approximation” of the equivalent position to which he or she is otherwise entitled.
4. In all cases, seniority accrues (status, pay, pension). A returning employee must step onto the seniority “escalator” at the point which he or she would have occupied if he or she had not left.

5. USERRA provides special protection against discharge, except for cause. The period of protection is 180 days following service of 31-180 days, and for periods of 181 days or more, it is 1 year. Layoffs are considered “cause.” An employer must show that the employee would have been laid off or the job eliminated regardless of military duty.

IV. DISCRIMINATION

- A. Military service is a protected status.
- B. For public employees, *The New Jersey State Policy Prohibiting Discrimination in the Workplace* provides:

The State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated . . . liability for service in the Armed Forces of the United States.

- C. Although undefined in the actual State Policy, the *Department of Personnel Standard Operating Procedures* defines “liability for service” as being “subject” to service. Thus, just holding a military status is protected.
- D. The State Policy is “zero tolerance.” Disciplinary or other corrective action may be taken to address violation of the policy, regardless of whether the conduct satisfies the legal definition of discrimination. A violation can occur regardless of intent.
- E. The statutory protections of USERRA and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12, prohibit all employers, including private employers, regardless of size, from discriminating or retaliating against any employee or applicant because of a past, present or future application for military service or performance of such service. The Americans with Disabilities Act may also apply in the case of returning disabled employees (applicable to all public employers and private employers who had at least 15 employees working for at least 20 weeks in the current or preceding calendar year).
- F. These prohibitions against discrimination extend to decisions regarding hiring, reemployment, retention, promotion, or any benefit of employment. Derogatory or demeaning references regarding a person’s liability for service in the Armed Forces cannot be made in the workplace or at reasonable extensions of the workplace.

- G. USERRA further extends protection to anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in a proceeding, even if that person is not service connected.

V. REMEDIES

- A. The nature of the alleged violation determines the forum in which a complaint can be redressed and how the law is enforced.
- B. For investigation of complaints involving military service or status, forums service members should be directed to state EEO/AA departments, The New Jersey Division on Civil Rights, the US Equal Employment Opportunity Commission, and the Veterans' Employment and Training Service, ("VETS").
- C. The Secretary of the U.S. Department of Labor, through VETS, provides assistance to any person or entity with respect rights and benefits under USERRA. By statute, the VETS have broad powers to investigate USERRA complaints. If the VETS' efforts are unsuccessful, the service member may request that VETS refer the complaint to the Department of Justice, which has the discretion to file a court action on his or her behalf.
- D. Alternatively, the service member may file a private civil suit in New Jersey Superior Court or U.S. District Court.
- E. The New Jersey chapter of the *Committee for Employer Support of the Guard and Reserve* is also available to mediate military service related issues, as is consultation with the Staff Judge Advocate of the service member's reserve component.

**A non technical guide to USERRA can be accessed on the U.S. Department of Labor website:
<http://www.dol.gov/vets/programs/userra/>**