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MEMO PERD #58/07
November 26, 2007

TO: Department Directors
Division Administrators
Agency Personnel Liaisons
Agency Personnel Representatives

FROM: Todd Rich, Director
Department of Personnel

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**SUBJECT: OVERVIEW OF THE UNIFORMED SERVICES EMPLOYMENT &
REEMPLOYMENT RIGHTS ACT (USERRA)**

The Department of Personnel has developed a comprehensive overview regarding the benefits provided under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is attached for your review. The Department of Personnel consulted with the Department of Labor in compiling this document for your use.

This document is intended to provide an overview of the rights and benefits provided by the Federal law as well as State law for employees of the State of Nevada, in the uniformed services whom a leave of absence is needed to serve our country. We believe this guide will assist your agency in working with the affected employee(s) and help provide the employee the assistance they need when they go on a military leave of absence or upon their return to State employment following active military service.

This overview is available on the Department of Personnel Website at www.dop.nv.gov/publications. Please review and disseminate this plan within your respective agencies, as you deem appropriate.

Should you have any questions regarding this publication, please contact Renee Travis at (775)-674-0111.

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OVERVIEW OF THE
UNIFORMED SERVICES EMPLOYMENT &
REEMPLOYMENT RIGHTS ACT
(USERRA)

And
Related

NEVADA REVISED STATUTES &
ADMINISTRATIVE CODE

Prepared by:

The State of Nevada
Department of Personnel
Employee & Management Services Division
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INTRODUCTION

This overview of the Uniformed Services Employment and Reemployments Rights Act (USERRA) and relevant Nevada Revised Statute and Administrative Code is a resource guide for your department to refer to when addressing questions or concerns as you interact with employees who are called or volunteer to serve our Country; and when they return home to reclaim their jobs. It is not presented as legal counsel and individual circumstances may warrant the involvement of your department's legal counsel. If you have any questions regarding this document or any other questions related to your employees' military service call the Department of Personnel at 684-0111.

FEDERAL USERRA BENEFITS

Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), significantly strengthened and expanded the employment and reemployment rights of all uniformed service members. Further, the Nevada legislature passed State legislation that provides benefits beyond the requirements of Federal law to State employees who serve in our uniformed services.

Who's Eligible for Reemployment?

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty
- Absence from work for an examination to determine a person's fitness for any of the above types of duty
- Funeral honors duty performed by National Guard or reserve members
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Homeland Security – Emergency Preparedness and Response Directorate (FEMA), when activated for a public health emergency, and approved training to prepare for such service

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve
- Army National Guard or Air National Guard
- Commissioned Corps of the Public Health Service
- Any other category of persons designated by the President of the United States in time of war or emergency

"Brief Nonrecurring" Positions

The law provides an exemption from employer reemployment obligations if the employee's pre-service position of employment "is for a brief, non-recurrent period and there is no

reasonable expectation that such employment will continue indefinitely or for a significant period.” Examples would include persons hired into a temporary or limited service position to fulfill a specific project or to fill in for an absent employee whose return is expected. Contact your agency Personnel Office for assistance with any positions where the work is intermittent but tends to be or is continuous.

Advance Notice

The law requires all employees to provide their employer with advance notice of military service.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- Military necessity prevents the giving of notice; or
- The giving of notice is otherwise impossible or unreasonable.

Duration of Service

The cumulative length of service that causes a person’s absence from a position of employment with a given employer may not exceed five years.

Most types of service will be cumulatively counted in the computation of the five-year period.

Exceptions

Eight categories of service are exempt from the five-year limitation. These include:

- (1) **Service required beyond five years completing an initial period of obligated service.** Some military specialties, such as the Navy’s nuclear power program, require initial active service obligations beyond five years.
- (2) **Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit.** For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea.

Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm.

- (3) **Required training for reservists and National Guard members.** The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year

limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

- (4) **Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations.**
- (5) **Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress.** This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.
- (6) **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent.** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304. The U.S. military involvement in Haiti ("Uphold Democracy") and in Bosnia ("Joint Endeavor") are two examples of such an operational mission.

This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

- (7) **Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect.** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.
- (8) **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.**

Note: You may require the employee, and/or the branch of service that the employee/serviceman is in to provide proof that the employee has not exceeded his five-year limitation.

Disqualifying Service

Employees lose their reemployment rights if their service is disqualifying. The statute lists

four circumstances:

- (1) Separation from the service with a dishonorable or bad conduct discharge.
- (2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."
- (3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war.
- (4) Dropping an individual from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court.

Reporting Back to Work

In accordance with NRS 284.359, an application for reemployment must be submitted no later than 90 days after completion of a person's military service. For the purposes of this overview, an application consists of oral or written notification to the pre-service employer that he or she seeks re-employment with the pre-service employer.

Fitness Exam. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above. This period will apply regardless of the length of the person's absence.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

Documentation Upon Return

An employer has the right to request that a person who is absent for a period of service of 31 days or more to provide documentation showing that:

- The person's application for reemployment is timely;
- The person has not exceeded the five-year service limitation; and

- The person's separation from service was other than disqualifying, i.e. less than honorable.

Unavailable documentation. If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

Pension contributions. If a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

How to Place Eligible Persons in a Job

Length of service. Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 days. A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

- (1) In the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person.
- (2) In the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (1) after reasonable efforts by the employer to qualify the person.
- (3) If the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority.

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

- (1) (A) In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
- (2) If the employee cannot become qualified for the position either in (A) or (B) above: in any other position that most nearly approximates the above positions (in that order) the duties of which the employee is qualified to perform, with full seniority.

"Escalator" position

The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority "escalator" at the point the person would have occupied if the person had remained continuously employed.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent; the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in a situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation of status and pay that the person is qualified to perform (the third reemployment position in the above schemes).

"Prompt" reemployment

The law specifies that returning service members be "promptly reemployed." What is prompt will depend to some degree on the circumstances of each individual case, but in most cases, means within two weeks of reporting in to the employer and requesting reemployment. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

Disabilities Incurred or Aggravated While in Military Service

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

- (1) The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.
- (2) If, despite reasonable accommodation efforts, the person is not qualified for the position in (1) due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.
- (3) If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

Conflicting Reemployment Claims

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Changed Circumstances

Reemployment of a person is excused if an employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue Hardship

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship." Undue hardship is decided on a case-by-case basis, considering the specifics of the situation and the employer's ability (resources) to make an accommodation.

Rights of Reemployed Persons

Seniority rights. Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of service. On the other hand, a right or benefit is not seniority-based if it is compensation or recognition for work performed or is subject to a significant contingency.

Rights not based on seniority. Returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.

Forfeiture of rights. If, prior to leaving for military service, an employee knowingly provides clear written notice of intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights. Do not attempt to get an employee to waive their rights under USERRA without first consulting with your legal counsel.

Funding of benefits. Service members will be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay. This will be the employees "normal" contribution to maintain benefits under the current program. For example health insurance, or the employee portion of retirement if he remains on the employee/employer paid plan.

Pension / Retirement Plans

Pension plans, which are tied to seniority, are given separate, detailed treatment under the

law. The law provides that:

- A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;
- Military service must be considered service with an employer for vesting and benefit accrual purposes;
- The employer is liable for funding any resulting obligation; and
- The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Employee contribution repayment period. Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

Calculation of contributions. For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service.

If the employee's compensation was not based on a fixed rate, or the determination of such rate is not reasonably certain, the employee's compensation during the period of service is computed on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation Pay

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, service members cannot be forced to use vacation time for military service.

Health Benefits

The law provides for health plan continuation for persons who are absent from work to serve in the military and their dependents, even when COBRA does not cover their employers.

If a person's health plan coverage (in connection with the person's position of employment) would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is

shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Upon reemployment of the service member, a waiting period or exclusion cannot be imposed upon reinstatement of health plan coverage of any person whose coverage was terminated by reason of the military service (unless an exclusion or waiting period would have been imposed absent the military service). However, an exception applies to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service-connected.

Multi-employer. Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from Discharge

Under USERRA, a reemployed employee may not be discharged without cause as follows:

- For one year after the date of reemployment if the person's period of military service was for more than 180 days.
- For six months after the date of reemployment if the person's period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation. Again, returning servicemen can be terminated for cause as outlined in NRS and NAC.

Protection from Discrimination and Retaliation

Discrimination. Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- hiring;
- promotion;
- reemployment;
- termination; and
- benefits

Persons protected. The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services or to perform service in the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination.

Under USERRA, persons with past, current, or future obligations in all branches of the military or as intermittent employees in the National Disaster Medical System are also protected.

Nevada Revised Statute (412.139) makes it a misdemeanor to terminate a Nevada National Guard member for reasons related to their service in the Guard.

Standard/burden of proof. If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service.

USERRA clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Retaliation prohibited. Employers are prohibited from retaliating against anyone:

- who files a complaint under the law;
- who testifies, assists or otherwise participates in an investigation or proceeding under the law; or
- who exercises any right provided under the law.

whether or not the person has performed military service (section 4311(b)).

How the Law is Enforced

Section 4331 of USERRA authorizes the Secretary of Labor (in consultation with the Secretary of Defense) to prescribe regulations implementing the law as it applies to States, local governments, and private employers. 38 U.S.C. 4331(a). The Department of Labor consulted with the Department of Defense, and issues regulations under that authority in order to provide guidance to employers and employees concerning the rights and obligations of both under USERRA.

For more information regarding the benefits provided under USERRA, the final regulations issued by the Federal Department of Labor can be viewed at the following website <http://www.dol.gov/vets/programs/userra/main.htm>

Veterans' Employment and Training Service. Reemployment assistance is provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. VETS investigates complaints and, if meritorious, attempts to resolve them. Filing of complaints with VETS is optional.

Access to documents. The law gives VETS a right of access to examine and duplicate

employer and employee documents that it considers relevant to an investigation. VETS also have the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

STATE OF NEVADA BENEFITS RELATED TO MILITARY SERVICE & EMPLOYMENT

Active Military Service and Public Employees Retirement System (PERS)

A veteran, who returns to employment with the State of Nevada from active military duty, must be credited with all benefit accruals under PERS as if the veteran had not left employment with the State of Nevada. Once a PERS member returns to public employment, the employer must report all wage and contribution information for the period of active military duty based on what the member would have earned had he remained in his civilian job. All contributions due for the period of active military duty must be paid at the time the wage and contribution information is submitted. If the returning veteran was making contributions under the joint employee/employer contribution plan at the time he was called to active duty, then the employer must report and pay all employee contributions to PERS. Under the provisions of USERRA, the employer has the right to recover all employee contributions paid on his behalf from the employee.

As provided for in subsection 3 of NRS 286.300, any PERS member who has five years of creditable service, served on active military duty during the period beginning on the date proclaimed by the President of the United States as the date on which Operation Desert Storm, Operation Enduring Freedom or Operation Iraqi Freedom began and was honorably discharged or released from active duty may purchase the number of months of service equal to the number of full months he served on active military duty, but in no case may the service purchased pursuant to this subsection exceed three years. The member must pay the full actuarial cost of the service as determined by an actuary of the System.

Differential Pay

An employee in the Uniformed Services of the United States or any other category of persons designated by the President of the United States or the Governor is entitled to civil leave with reduced pay for the period of such service. The pay that such an employee is entitled to receive pursuant to NAC 284.588 is the difference between the pay he would have otherwise received as a State employee and his pay for active military service. If his pay for active military service is greater than the pay he would have otherwise received as a State employee, the employee will not receive any additional pay pursuant to NAC 284.588 while he is in active military service.

In order for the State to provide differential pay in an accurate and timely manner, employees should contact their agency personnel office for guidance or see the procedures outlined on the Department of Personnel website at <http://dop.nv.gov/forms.html> (forms ML-1, ML-2, and ML-3) additionally, In order to generate differential pay for employees through NDOT or Central payroll, agencies should follow Department of Personnel IFS-HR procedure number 01.08.05 located on the following web site <http://ifs.state.nv.us/>

Agencies should work with the Budget Division in addressing any questions or concerns regarding what category to pay differential pay from or their approved work program or overlap requests.

Leave of Absence for Military Duty (15 Days)

In accordance with NRS 281.145, State employees must be relieved from their duties, upon their request, to serve under orders without loss of their regular compensation for a period of not more than 15 working days in any 1 calendar year. No such absence may be a part of the employee's annual vacation provided for by law. The provision for 15 working days has been defined to include workdays that differ from the standard eight-hour day and forty hour week. For example:

The employee who works 5 eight-hour days would be eligible for:
15 workdays times 8 hours = 120 hours of paid military leave

The employee's normal work shift requires 10-hour days, 4 days a week:
15 workdays times 10 hours = 150 hours of paid military leave

The employee who is part time and normally works 6 hours a day five days a week:
15 workdays times 6 hours = 90 hours of paid military leave

In addition, it is important to note that if an employee takes less than full workday absences (e.g., their normal workday is 8 hours but they take 3 hours), they are still allowed a total allotment that is equal to their regularly scheduled workday multiplied by 15 (i.e. if they work 8 hours per day they would still be entitled to not less than 120 hours of paid military leave). Be advised that NDOT and Central Payroll agencies will need to process events beyond 15 through a special pay document. The system will only accept 15 entries through NEATS, so additional entries will need to be processed via a special pay document.

Health Insurance

If the employee's service-related absence is for 31 days or more, he is eligible to enroll himself and his family in health care coverage provided by the military effective the day he is activated for military duty. The employee is also eligible to purchase continued health care coverage for themselves and their families for up to 18 months in a manner similar to the provisions of COBRA.

When the employee returns from military service within the required reemployment period, he must be provided immediate reinstatement to the State's health insurance coverage with no waiting period or pre-existing condition limitations. (Specific questions regarding the State's health insurance coverage should be directed to the Public Employees Benefits' Program.)

Annual Leave/Sick Leave

Accrual of annual leave and sick leave ceases when the employee goes on extended military leave; however, the period of time an employee is on extended military leave is considered as time worked for the purpose of qualifying for a higher leave accrual rate. An employee may elect to use their accumulated annual leave and/or comp time while on active duty, but this will

require removing them from extended military leave for the duration of the annual leave and/or comp time.

Longevity Pay

An employee who works a portion of the six-month qualifying period would be entitled to a prorated benefit. The time the person spends on extended military leave is counted as time worked when determining the rate of pay for longevity.

Pay Progression Date

An employee who is re-employed within 90 days following his release from military service retains the pay progression date held at the time he left on military leave. If the employee has not attained the top step in his grade and his last performance evaluation was standard or better, he must receive the appropriate number of step increases *according* to his pay progression date.

Probationary Period

When the employee returns to State service, he also returns to the status of appointment he held at the time he left on military leave. If he was serving a probationary period, he will be required to complete the remaining portion of his probation. However, once the employee completes the remaining portion of the probationary period, the employee's status should reflect both the pre and post-service time in the probationary period. Further, under the escalator principle, the subject employee's permanent status should be awarded retroactively to the date he would have attained permanent status had it not been for his active military service.

Automatic Advancement

In accordance with the escalator principal and federal guidelines for USERRA, an employee returning from a military leave of absence to a position that provides for automatic advancement must successfully complete the remaining period of probation for the position and then receive automatic advancement. Upon the successful completion of the remaining portion of the employee's probationary period, automatic advancement must be granted as of the date it would have been granted had it not been for the military leave of absence.

Miscellaneous Benefits

The employer is not obligated to make payment for industrial insurance, unemployment insurance, or retired employees' group insurance while the employee is on military leave.

FMLA and Military Leave

Time spent on an extended military leave of absence (i.e., military leave without pay) counts as time worked under the Family and Medical Leave Act if the hours that he would have

worked for the civilian employer during the period of military service would have met the FMLA eligibility threshold.

APPENDIX I

Service Member Checklist

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