



# Overview of the UNIFORMED SERVICES EMPLOYMENT & REEMPLOYMENT RIGHTS ACT (USERRA)

And Related

NEVADA REVISED STATUTES &  
NEVADA ADMINISTRATIVE CODE

For State of Nevada Executive Branch  
Agencies

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The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a federal law that establishes rights and responsibilities for members of the Armed Forces including the National Guard and Reserve and their employers. It affects employment, reemployment and retention when individuals serve or have served in the Armed Forces. Rights provided by USERRA include prompt job reinstatement, accumulation of seniority, reinstatement of health insurance, training/retraining of job skills, accommodations for individuals with disabilities incurred and aggravated by military service and protection against discrimination.

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. The [USERRA final regulations](#) are issued by the Department of Labor.

Additionally, Nevada Revised Statutes (NRS) and Nevada Administrative Code (NAC) provide protections and benefits beyond USERRA's provisions to individuals who are members of the Armed Forces.

This overview is a resource guide and reference. This guide is not presented as legal counsel and individual circumstances may warrant involvement of your agency's legal counsel. If you have any questions regarding this guide or the impact of military service you may contact the Division of Human Resource Management at (775) 684-0111 or [cphughes@admin.nv.gov](mailto:cphughes@admin.nv.gov).

## **ELIGIBILITY**

### ***Under Nevada Revised Statute***

The State of Nevada's criteria for reemployment protection is outlined in [NRS 284.359](#).

***NRS 284.359 Military leave of absence; reinstatement.** A permanent or probationary employee who performs active military service under the provisions of any national military service or training act, or who voluntarily serves in the Armed Forces of the United States in time of war, or in such types of service as the Commission by regulation may prescribe ...*

### ***Under USERRA***

In general, reemployment rights are extended under USERRA to individuals who have been absent from their positions because of "service in the uniformed services".

All of the eligibility criteria outlined in the remainder of this chapter must be met for coverage under USERRA.

### **USERRA - Was the service in the "uniformed services"?**

"The uniformed services" include:

- 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; or
- Any other category of individuals designated by the President of the United States in time of war or emergency.

### **USERRA - Was it qualifying "service"?**

Qualifying "service" includes:

- 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 fitness for any of the above types of duty;

- Funeral honors duty performed by National Guard or reserve members; and
- 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.

Some state call-ups of National Guard members are protected under USERRA. “State Active Duty means National Guard training or other duty, other than inactive duty, performed under the authority of the Governor of a State. It does not include duty performed under federal authority (such as Title 10 or Title 32), nor duty for which the National Guard member is entitled to pay from the Federal Government... members of the National Guard serving on State Active Duty: a) for 14 days or more, b) in support of a national emergency declared by the President under the National Emergencies Act, or c) in support of a major disaster declared by the President under Section 401 of the Stafford Act, are now covered under USERRA.” ([New Coverage for Certain State Active Duty under the Uniformed Services Employment and Reemployment Rights Act](#), U.S. Department of Labor, Veterans Employment and Training Service)

## **USERRA - Was the service five years or less?**

One of the eligibility criteria for USERRA is that the cumulative length of actual service performed that causes an absence from State service may not exceed five years. However, USERRA allows for the following exceptions to the five-year limit on the military service eligibility factor:

- Service required beyond five years to complete an initial period of obligated service (Section 4312 (c)(1)). Some military specialties, such as the Navy’s nuclear power program, require initial active service obligations beyond five years.
- Service from which a person, through no fault of the person, is unable to obtain a release within the five year limit (Section 4312(c)(2)). 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.
- Required training for reservists and National Guard members (Section 4312(c)(3)). 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.
- Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).
- 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 (Section 4312(c)(4)(B)). This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.

- Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent (Section 4312(c)(4)(c)). 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. This 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.
- 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 (Section 4312 (c)(4)(D)). The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.
- 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 (Section 4312(c)(4)(E)).
- Service performed to mitigate economic harm where an individual's employer is in violation of its employment or reemployment obligations to him/her.

The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

### **USERRA - Was the separation from service an honorable discharge?**

Another eligibility factor for reemployment under USERRA is if the individual has not been separated from service with a disqualifying discharge or under other than honorable conditions. Reemployments rights, under USERRA, are terminated if the individual is:

- Separated with a dishonorable or bad conduct discharge;
- Separated under other than honorable conditions (Regulations for each military branch specify when separation from the service would be considered "other than honorable".);
- A commissioned officer is dismissed by sentence of a general court-martial, in commutation of a sentence of a general court-martial or, in time of war, by order of the President; or
- Dropped from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court.

### **USERRA - Was there a reasonable expectation of continued employment?**

USERRA provides an exemption for employers from reemployment obligations if the individual'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.” An example would be an individual hired into a temporary position for a one time only, three month long position.

### **USERRA - Was the agency provided with advance notice?**

An individual must inform his or her agency that the he or she intends to leave the employment position to perform military service; however, an employee is not required to ask for or get his or her agency’s permission. Additionally, an “appropriate officer” can give notice on the individual’s behalf. An “appropriate officer” would be a commissioned, warrant or non-commissioned officer authorized to give such notice. Notice may be either verbal or written and does not need to follow any particular format. However, no notice is required if military necessity prevents the giving of the notice or the giving of notice is otherwise impossible or unreasonable.

An individual does not have to tell the agency that he or she will seek reemployment upon completion of military service. Even if the individual states that he or she will not be seeking reemployment following military service, it does not forfeit the individual’s right to reinstatement under USERRA.

### **USERRA - Was the return within timeframes?**

The time limits for returning to work under USERRA are:

- 1-30 days of service: Next scheduled work day following travel time and 8 hours.
- 31-180 days of service: Applying within 14 days following completion of service. If timely application is impossible or unreasonable through no fault of the individual, the application must be submitted as soon as possible.
- 181 or more days of service: Applying within 90 days after completion of service.

Application for reemployment may be made either verbally or in writing and does not have to follow a particular format. Additionally, application may be made to an individual who has *apparent* responsibility for receiving employment applications.

See p. 11 of this overview for the time limit for return to work under [NRS 284.359](#) that is applicable if an employee qualifies for coverage under [NRS 284.359](#).

### ***Fitness Exam***

The time limit for reporting back to work for an individual who is absent from work in order to take a fitness for service examination is the same as the one for those absent 1-30 days. This period will apply regardless of the length of the individual’s absence.



### ***Disability Incurred or Aggravated***

The reporting or application deadlines are extended for up to two years for individuals 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***

An individual's reemployment rights are not automatically forfeited if the individual fails to report to work or apply for reemployment within the required time limits. However, the individual will then be governed by the rules for unexcused absences, see [NAC 284.594](#).

### **USERRA - Documentation upon Return**

If the individual's service exceeds 30 days, the agency may request documentation to establish that:

1. Application is timely;
2. The individual has not exceeded the five-year limit on the duration of service; and
3. The individual's separation or dismissal from service was qualifying.

Appropriate documentation can include:

- Department of Defense (DOD) 214 Certificate of Release or Discharge from Active Duty;
- Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
- Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
- Certificate of completion of military training school;
- Discharge certificate showing character of service; or
- Copy of extracts from payroll documents showing periods of service.

If an individual does not provide satisfactory documentation because it is not readily available or does not exist, the agency must still promptly reemploy the individual. However, if, after reemployment, documentation becomes available that shows one or more of the reemployment requirements were not met, the agency may terminate the employee. The termination would be effective as of the time the documentation becomes available, the termination would not be retroactive. If an individual has been absent for military service for 91 or more days, the agency

may delay making retroactive pension contributions until the individual submits satisfactory documentation.

## WHICH APPLIES, USERRA, NRS OR BOTH?

When an individual is covered under more than one provision (i.e., USERRA and NRS), an agency must provide the individual with the **greater** applicable benefit(s). However, keep in mind that this determination is not of coverage under USERRA or the NRS but instead between each benefit (e.g., leave time before returning to work, reemployment position) the individual is entitled to receive.

For example, a State employee who is also a National Guardsman is called up to active duty for a period of 90 days. How many days may the employee take to return to duty following the end of the active duty service? Under USERRA, if the employee meets all of the eligibility factors then the employee would need to return no later than 14 days after the end of the active military service. However, under [NRS 284.359](#) the employee would need to return to duty no later than 90 days following the end of the active military service. The greater benefit to be provided to the employee is allowing 90 days for the employee to return to work.

## REEMPLOYMENT

An employee is deemed to be on a leave of absence while performing military duty if the employee does not choose to terminate employment with the State of Nevada.

### *Under Nevada Revised Statute*

Under the provision of [NRS 284.359](#), an individual is entitled to be “reinstated to the employee’s former class of position, or to a class of position having like seniority, status and pay, or, if those positions have been abolished, to the nearest approximation thereof consistent with the circumstances” if the individual applies for reinstatement within 90 days following qualifying military service.

### *Under USERRA*

An individual must be provided “prompt reemployment” under USERRA, which means as soon as possible and practical under the circumstances. Absent unusual circumstances, reemployment must occur within two weeks of the individual’s application for reemployment. However, it will depend to some degree on the circumstances of each situation. For example, reinstatement after weekend National Guard duty will generally be the next regularly scheduled work day. On the other hand, reinstatement following four years active duty might require giving notice to an employee occupying the service member’s position.

Generally, an individual is entitled to reemployment in the position that he or she would have attained with reasonable certainty if not for the absence for military service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of military service, the individual could have been promoted, demoted, transferred or laid off due to intervening events. This principle requires that an individual be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority and other benefits that he or she would have attained if not for the period of military service. This can include opportunities for advancement, rank, responsibility and geographical location. It may cause an individual to be reemployed at a higher or lower position, laid off or terminated.

Except with respect to individuals who have a disability incurred in or aggravated by military service, the position into which an individual is reinstated is based on the length of an individual’s military service.

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

- (1) In the job the individual would have held had the individual remained continuously employed, so long as the individual is qualified for the job or can become qualified after reasonable efforts by the agency to qualify the individual.
- (2) In the position of employment in which the individual was employed on the date of the commencement of the service in the uniformed services, only if the individual is not qualified to perform the duties of the position referred to in subparagraph (1) after reasonable efforts by

the agency to qualify the individual.

- (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 agency efforts, the individual is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the individual is able to perform with full seniority.

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

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

- (1) (a) In the job the individual would have held had the individual remained continuously employed, or a position of like seniority status and pay, so long as the individual is qualified for the job or can become qualified after reasonable efforts by the agency to qualify the individual; or  
  
(b) in the position of employment in which the individual 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 individual is qualified to perform, only if the individual is not qualified to perform the duties of the position referred to in subparagraph (a) after reasonable efforts by the agency to qualify the individual.
- (2) If the employee cannot become qualified for the position either in (a) or (b) above, then the individual would be reemployed in any other position that most nearly approximates the above positions (in that order) the duties of which the individual is qualified to perform with full seniority.

## **USERRA - No Longer Qualified**

Agencies 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.

Agencies must provide refresher training and any training necessary to update a returning employee's skills in a situation where the individual 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 an individual for the first and second reemployment positions in the above schemes, the individual must be placed in a position of equivalent or nearest approximation of status and pay that the individual is qualified to perform (the third reemployment position in the above schemes).

## **USERRA - Disabilities Incurred or Aggravated**

USERRA does not define the term “disability”; however, the Department of Labor in the Section-by-Section Summary of the Final Rule and Discussion of Comments of the USERRA Final Rule indicates that if an employee’s disability limits his or her ability to perform the job, USERRA imposes a duty on the employer to make reasonable efforts to accommodate the disability.

The following three-part reemployment scheme is required for individuals with disabilities incurred or aggravated while in military service:

- (1) The agency must make reasonable efforts to accommodate an individual’s disability so that the individual can perform the position that individual would have held if the individual had remained continuously employed.
- (2) If, despite reasonable accommodation efforts, the individual is not qualified for the position in (1) due to his or her disability, the individual 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 individual does not become qualified for the position in either (1) or (2), the individual must be employed in a position that, consistent with the circumstances of that individual’s case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

## **USERRA - Conflicting Reemployment Claims**

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

- The individual who first left the position has the superior right to it.
- The individual 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 individual.

## **USERRA - Changed Circumstances**

Reemployment of an individual is excused if an employer’s circumstances have changed so much that reemployment of the individual would be impossible or unreasonable (e.g., a layoff that would have included the individual).

## **USERRA - 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 means an action requiring significant difficulty or expense, when considered in light of:

- (1) The nature and cost of the action;
- (2) The overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (3) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and
- (4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

## **OTHER BENEFITS**

### ***Seniority Rights***

Under USERRA, an individual is entitled to the seniority and seniority-based rights and benefits he or she had on the date military service began plus any seniority and seniority-based rights and benefits that he or she would have attained if he or she had remained continuously employed.

A seniority right is a right or benefit determined by or accrued based on length of service. A right or benefit is not seniority based if it is compensation or recognition for work performed or is subject to a significant contingency.

### ***Non-Seniority Rights***

A returning individual covered by USERRA would be entitled to those rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. That would include any rights and benefits available at the time the individual left for military service and also those that become effective during the individual's period of service. If there is a variation between different types of nonmilitary leave, the individual would be entitled to the most favorable treatment as long as the nonmilitary leave is comparable.

Agencies are not obligated to make payments for workers' compensation, unemployment or retired employees' group insurance while individuals are on military leave.

### ***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, under USERRA the employee waives entitlement to rights that would be available on paid or unpaid nonmilitary leave 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 rights that would be available on paid or unpaid nonmilitary leave and benefits not based on seniority. They cannot surrender other rights and benefits that an individual would be entitled to under the law, particularly reemployment rights. Consulting with legal counsel is strongly recommended prior to attempting to get an employee to waive their rights under USERRA or Nevada Revised Statute.

### ***Retirement Plan***

#### **General Principles**

Per [NAC 284.598](#), military leave for active service, if the individual returns from leave within 90 calendar days after an honorable discharge, is not a break in continuous service.



USERRA provides that:

- A reemployed individual must be treated as not having incurred a break in service with the employer maintaining a retirement plan; and
- Military service must be considered service with an employer for vesting and benefit accrual purposes.

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

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).

## **Public Employees' Retirement System**

Once a Public Employees' Retirement System of Nevada (PERS) member returns to State employment, the agency must report all wage and contribution information for the period of qualifying active military duty based on the rate of pay the individual would have received but for the absence during the period of service. If the returning veteran was making contributions under the joint employee/employer contribution plan at the time he or she 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 behalf of the employee. If the individual did not change his or her plan to the employer pay contribution plan prior to leaving for military service and indicates, in writing, that he or she does not want to receive a retirement adjustment upon his or her return from military service, the agency is not responsible for its contributions that are contingent on the employee's contribution.

NRS provides for additional benefits and exceptions due to qualifying military service in [NRS 286.300](#), [286.479](#), [286.510](#) and [286.667](#).

***NRS 286.300 Purchase of credit for service: Requirements; sources; refund of contributions; defaults. Except as otherwise required as a result of [NRS 286.537](#)...***

*3. In addition to the purchases authorized pursuant to the provisions of subsections 1 and 2 and in addition to any free credit received pursuant to [NRS 286.303](#) and [286.479](#), any member who has 5 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, except as otherwise provided in subsection 5, purchase a number of months of service equal to the number of full months the member served on*

*active military duty, but in no case may the service purchased pursuant to this subsection exceed 3 years. The member must pay the full actuarial cost of the service as determined by an actuary of the System.*

***NRS 286.479 Service credit for military service in Persian Gulf Crisis.***

*1. A member who has 5 years or more of service credit is entitled to receive free service credit for military service for the period beginning on the date proclaimed by the President of the United States as the date on which hostilities began in the Persian Gulf Crisis and ending on the date proclaimed by the President of the United States as the termination of hostilities in the Persian Gulf Crisis if the member:*

*(a) Began active military duty within 6 months after the last date of employment or leave of absence without pay with a participating public employer; and*

*(b) Returned to employment with a participating public employer within 1 year after being honorably discharged or released from active duty.*

*2. A member who meets all of the requirements of subsection 1 except that the member does not have 5 years of service credit is entitled to receive the free credit pursuant to subsection 1 as soon as the member attains 5 years of service credit.*

***NRS 286.510 Eligibility: Age and service of police officers, firefighters and other employees; reduction of benefit for retirement before required age...***

*2. A police officer or firefighter:*

*(a) Who has an effective date of membership before January 1, 2010, is eligible to retire at age 65 if the police officer or firefighter has at least 5 years of service, at age 55 if the police officer or firefighter has at least 10 years of service, at age 50 if the police officer or firefighter has at least 20 years of service and at any age if the police officer or firefighter has at least 25 years of service.*

*(b) Who has an effective date of membership on or after January 1, 2010, and before July 1, 2015, is eligible to retire at age 65 if the police officer or firefighter has at least 5 years of service, at age 60 if the police officer or firefighter has at least 10 years of service and at age 50 if the police officer or firefighter has at least 20 years of service.*

*(c) Who has an effective date of membership on or after July 1, 2015, is eligible to retire at age 65 if the police officer or firefighter has at least 5 years of service, at age 60 if the police officer or firefighter has at least 10 years of service and at age 50 if the police officer or firefighter has at least 20 years of service. For the purposes of this paragraph, any year or part of a year of service purchased by a police officer or firefighter pursuant to subsection 2 or 3 of NRS 286.300 or subsection 7 of NRS 286.367 or purchased on behalf of the police officer or firefighter as authorized by NRS 286.3005 and subsections 1 and 2 of NRS 286.3007 must not be considered in determining the number of years of service of a police officer or firefighter unless the police officer or firefighter has a family medical emergency. For the purposes of this paragraph, the Board shall define by regulation "family medical emergency" and set forth by regulation the circumstances in*

*which purchased service credit may be considered in determining the number of years of service of a police officer or firefighter who has a family medical emergency.*

↪ *Only service performed in a position as a police officer or firefighter, established as such by statute or regulation, service performed pursuant to subsection 3 and credit for military service, may be counted toward eligibility for retirement pursuant to this subsection...*

(emphasis added)

***NRS 286.667 Allowance for retired police officer or firefighter: Benefits for spouse upon death; credit for certain other service prohibited; costs of benefit paid by employee...***

*4. Service performed after July 1, 1981, in positions other than as a police officer or firefighter, except military service, may not be credited toward the benefit conferred by this section...*  
(emphasis added)

## ***Health Plan***

USERRA provides for the continuation of health benefit coverage for individuals who are absent from work to serve in the uniformed services.

Individuals who go into active military service for up to 31 days can continue their health care coverage during the military leave period if they continue to pay their contributions for coverage.

Employees who go into active military service for 31 days or more can purchase health care coverage through Public Employees' Benefits Program for up to 24 months. Under USERRA's provisions an individual cannot be required to pay more than 102 percent of the full premium for the coverage.

Upon return from service, an individual's health coverage will be reinstated immediately without a waiting period or exclusions for preexisting conditions (other than waiting periods or exclusions that would apply if there had been no absence for uniformed service). This rule does not apply to the coverage of any illness or injury determined by the Secretary of Veterans' Affairs to have been incurred in or aggravated during performance of service in the uniformed service.

## ***Accrued Paid Leave***

Service members must, at their request, be permitted to use any annual leave or compensatory (comp) time that had accrued before the beginning of their military service instead of unpaid leave. However, under USERRA service members cannot be forced to use accrued leave time for military service.

Accrual of annual and sick leave ceases when an employee goes on military leave that is unpaid; however, the period of time an employee is on unpaid military leave is considered as time worked for the purpose of qualifying for a higher leave accrual.

## ***Family and Medical Leave Act***

Time spent on an extended military leave of absence (i.e., military leave without pay) as defined by USERRA counts as time worked under the Family and Medical Leave Act if the hours that he or she would have worked for the State during the period of military service would have met the FMLA eligibility threshold.

## ***Leave of Absence for Military Duty (15 Days)***

In accordance with [NRS 281.145](#), State employees who are active members of the Army, Naval, Marine Corps, Coast Guard or Air Force Reserve or the Nevada National Guard must be relieved from their duties, upon their request, to serve under orders (e.g., training, deployment) without loss of their regular compensation for a period of not more than the number of hours equivalent to 15 working days in any 1 calendar year<sup>1</sup>. For example:

- An employee who works 8 hour days, 5 days a week would be eligible for:  
  
15 work days times 8 hours = 120 hours of paid military leave
- An employee who works 10 hour days, 4 days a week would be eligible for:  
  
15 work days times 10 hours = 150 hours of paid military leave
- An employee who works 6 hours days, 5 days a week would be eligible for:  
  
15 work days 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 leave), the employee is still allowed a total allotment that is equal to the number of hours of his or her regularly scheduled workday multiplied by 15 (i.e., if the employee works 8 hours per day he or she would still be entitled to not less than 120 hours of paid military leave in total).

## ***Military Pay Adjustment for Weekend Training***

Additionally, State employees who are active members of the Army, Naval, Marine Corps, Coast Guard or Air Force Reserve or the Nevada National Guard and whose regular work schedule includes Saturday or Sunday are provided up to 24 days in a 12-month period<sup>1</sup> to serve under orders for training scheduled on a Saturday or Sunday. An employee's State pay will be adjusted by either the full amount of his or her State pay when his or her State pay is less than his or her military pay for the day or by the full amount of his or her military pay when his or her military pay is less than his or her State pay for the day.

A State employee who receives the difference between the pay he or she would have otherwise received as a State employee and his or her pay to serve under orders for training that is scheduled

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<sup>1</sup> Per regulation, Office of the Military's employees' 15 days are calculated based on the federal fiscal year (beginning on October 1) instead of a calendar year.

on a Saturday or Sunday is not eligible to receive any other State compensation (e.g., differential pay pursuant to NRS 284.358, compensatory time, annual leave). No such absence may be a part of the employee's annual leave provided for by law.

### ***Differential Pay***

An employee in the uniformed services of the United States or any other category of individuals 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 [NRS 284.358](#) is the difference between the pay he or she would have otherwise received as a State employee and his or her pay for active military service. If his or her pay for active military service is greater than the pay he or she would have otherwise received as a State employee, the employee will not receive any additional pay pursuant to [NRS 284.358](#) while he or she is in active military service.

The criteria for differential pay in [NRS 284.358](#) are different than the reemployment criteria in [NRS 284.359](#).

In order for the State to provide differential pay in an accurate and timely manner, employees should contact their agency personnel/payroll staff for guidance or see the procedures outlined on the [Differential Pay for Active Military Duty Policy & Procedures \(ML-1, ML-2, and ML-3\)](#); additionally, in order to generate differential pay for employees through Central Payroll, agencies should follow the Division of Human Resource Management's [Agency HR Procedure 01.08.05](#).

Agencies should work with the Governor's Finance Office in addressing any questions or concerns regarding what category to pay differential pay from or their approved work program or overlap requests.

### ***Pay Progression Date***

An individual who is reemployed or returns from leave following military service under either USERRA's or [NRS 284.359](#)'s reemployment provisions retains the pay progression date held at the time he or she left on military leave. If the employee has not attained the top step in his or her grade and his or her last performance evaluation was standard or better, he or she must receive the appropriate number of step increases according to his or her pay progression date.

### ***Probationary Period***

When an individual returns to State service, he or she also returns to the status of appointment he or she held at the time he or she left on military leave. If he or she was serving a probationary period, he or she will be required to complete the remaining portion of his or her probation if there is a need for actual training and/or observation instead of merely time served in the position. However, under USERRA 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 or she would have attained permanent status had it not been for his or her active military service.

Under USERRA, if the employee's most recent period of service in the military was more than 30 days the employee cannot be terminated for six months to a year, except for "cause".

### ***Automatic Advancement/Progression***

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

### ***Protection against Termination***

Under USERRA, if the employee's most recent period of service in the military was more than 30 days, he or she must not be terminated except for cause for:

- 180 days after the employee's date of reemployment if his or her most recent period of service was more than 30 days but less than 181 days; or
- One year after the date of reemployment if the employee's most recent period of service was more than 180 days.

Termination is allowed for cause based on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons. USERRA does not provide a specific definition for "cause". According to the Department of Labor just cause may include unacceptable or unprofessional behavior, incompetent or inefficient performance of duties or criminal acts. However, the agency will bear the burden of establishing that it was reasonable to terminate the employee for the conduct in question and that he or she had notice that the conduct would constitute cause for termination. Additionally, eliminating the employee's position or laying off the employee would constitute cause under USERRA.

### ***Protection against Discrimination and Retaliation***

#### **Discrimination**

[NRS 412.139](#) makes it a misdemeanor to terminate a National Guard member for reasons related to their service in the Guard.

Under USERRA, 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.

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

### **Hostile work environment**

The VOW to Hire Heroes Act of 2011 clarified that USERRA provides coverage for claims of harassment and hostile work environment based on military and veteran status.

### **Retaliation**

Under USERRA, employers are prohibited from retaliating against anyone (whether or not the individual has performed military service):

- 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.

## **ENFORCEMENT**

Under USERRA, reemployment assistance is provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. VETS investigates complaints and, if a claim has merit, attempts to resolve them. VETS has a right of access to examine and duplicate documents that it considers relevant to an investigation, reasonable access to interview individuals with information relevant to an investigation and subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Filing of complaints with VETS is optional.

Individuals whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the federal Attorney General for possible court action.

An individual may also privately file a court action. This may be done if they have not chosen to file a complaint with VETS, not requested VETS to refer their complaint to the federal Attorney General or have been refused representation by the federal Attorney General.



## CHECKLISTS

### ***USERRA Coverage - Service Member Checklist***

- ☐ Was my service in the “uniformed services”? pg. 5
- ☐ Was my service qualifying “service”? pgs. 5-6
- ☐ Was my service five years or less cumulative (excluding exceptions)? pgs. 6-7
- ☐ Was my separation from service an honorable discharge? pg. 7
- ☐ Was there a reasonable expectation of continued employment with my State position (and not brief and nonrecurring)? pg. 7-8
- ☐ Did I provide my agency with advance notice of my military training or service? pgs. 8
- ☐ Was my application/return from leave within timeframes? pg. 8-9
- ☐ When requested by my agency, did I provide readily available documentation showing eligibility for reemployment? pg. 9-10
- ☐ Did I, if my military leave exceeded 30 days, elect to continue health insurance coverage? pg. 19
- ☐ Did I sign a notice of intent not to return to work after military service? pg. 16

### ***NRS Coverage – Service Member Checklist***

- ☐ Am I a permanent or probationary employee who performs/performed active military service under the provisions of any national military service or training act, or who voluntarily serves/served in the Armed Forces of the United States in time of war? pgs. 5-6
- ☐ If going out on extended military leave, have I decided whether to switch to employer paid retirement to avoid any costs upon return for service credit? Have I contacted PERS to determine what my financial obligations upon return will be if I remain on employee/employer paid? pg. 17
- ☐ Will my pay as a service member be lower than my State pay? If yes, have I set up for differential pay? pg. 20-21

## ***State of Nevada Coverage – Agency Checklist***

- ☐ Was the leave covered by USERRA, NRS or both? pgs. 5-11
- ☐ Was a leave of absence allowed, without requiring use of annual or other accrued leave? pg. 18
- ☐ Upon timely application for reinstatement, was timely reinstatement made to his or her escalator position? pgs. 12-15
- ☐ Was accrued seniority granted as if he or she had been continuously employed? pg. 16
- ☐ Were reemployment rights delayed (or an attempt made to defeat) by a demand for documentation that did not then exist or was not then readily available? pg. 9-10
- ☐ Was the timing, frequency or duration of training or service or the nature of such training or service considered before granting rights? pgs. 6-9
- ☐ Was training or retraining and other accommodations provided to an individual with service-connected disabilities? If a disability could not be accommodated after reasonable efforts, was reemployment made in some other position he or she was qualified to perform which is the "nearest approximation" of the position to which the individual was otherwise entitled, in terms of status and pay, and with full seniority? pgs. 13-15
- ☐ Were reasonable efforts made to train or otherwise qualify for a position? If the individual could not be qualified in a similar position, was placement made in any other position of lesser status and pay which he or she was qualified to perform with full seniority? pg. 12-13
- ☐ Was the reemployed individual granted retirement benefits that accrued during military service? pgs. 16-19
- ☐ Was health coverage provided upon request? Upon election, was continued coverage provided at the regular employee cost for the service member, if his or her leave was for less than 31 days? pg. 19
- ☐ Was a hostile work environment or discrimination in employment, reemployment, or any benefit of employment allowed on the basis of past or present military service or application for or obligation for service? Was there discrimination in employment or adverse employment action taken against any individual who assisted in the enforcement of a protection? pgs. —22-23

## ***HR/Payroll Checklist for Leaving Service Members***

- ☐ Discuss PERS options with employee – it is recommended that they switch to employer pay contribution plan to avoid any costs for service credit upon return. If the employee wishes to remain on employee/employer pay contribution plan, refer the employee to PERS prior to his or her leave regarding what his or her financial obligations may be upon his or her return.
- ☐ If the employee wishes to waive health insurance coverage, fill out applicable PEBP forms and change his or her benefit deduction code on an ESMT, see [Agency HR Procedures](#). If employee will maintain coverage ensure that employee is aware of the cost that will be his or her responsibility. For more information, have employee contact PEBP.
- ☐ In accordance with [NRS 284.145](#), employees who are active members of the Army, Naval, Marine Corps, Coast Guard or Air Force Reserve or the Nevada National Guard are entitled to 15 days of military leave with pay annually. If an employee is eligible and has not already exhausted the days, plan with the employee when these 15 days will be used. The 15 days provided for in [NRS 284.145](#) should be coded on timesheets only using the code UMIL.
- ☐ Once you are ready to place an employee on military leave without pay:
  - Prepare an ESMT placing the employee on AMIL, indicate effective date;
  - Leave employee status alone;
  - Change pay class to P80H (positive reporter);
  - Leave the pay progression date alone; and
  - Report UMLWP on the employee's timesheets.
- ☐ If applicable, process military differential pay pursuant to NRS 284.358 in accordance with [Agency HR Procedure # 01.08.05](#) using [Differential Pay for Active Military Duty Policy & Procedures \(M-1, M-2 and M-3\)](#).
- ☐ If the employee will be gone for an extended period of time, opted for the health insurance coverage from the uniformed services and elects to waive the State health plan during that time period, you will need to use the appropriate benefit deduction policy code as outlined in the Agency HR Procedures Appendix G. Contact PEBP to ensure completion of any necessary paperwork.

## ***HR/Payroll Checklist for Returning Service Members***

- ☐ Once ready to return an employee from military leave without pay, complete the following steps:
  - Prepare an ESMT removing the employee from leave RMIL, indicate effective date (must complete this step even if you are going to process the employee out as a termination);
  - Change pay class back to E80H; and
  - Process any necessary personnel actions that should have occurred during absence.
- ☐ Contact Central Payroll (or pay center representative) to confirm PERS contributions.
- ☐ Report wage and contribution information to PERS for the period of qualifying active military duty based on the rate of pay the individual would have received but for the absence during the period of service.
- ☐ Complete necessary paperwork to reinstate benefits with PEBP, if applicable.

## REFERENCES

- United States of America, *Uniformed Services Employment and Reemployment Rights Act (USERRA)*, Pub. Law No. 103-353, October 13, 1994
- United States of America, *Veterans Benefits Improvement Act of 2004 (VBIA)*, Pub. Law No. 108-454, Dec. 10, 2004
- United States of America, *VOW to Hire Heroes Act*, Pub. Law No. 112–56, Nov. 21, 2011
- U.S. Department of Labor, *Uniformed Services Employment and Reemployment Rights Act of 1994 Final Rules*, Federal Register, Vol.70, No. 242, December 19, 2005
- U.S. Department of Labor, Veterans’ Employment and Training Service, *A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)*, April 2005
- U.S. Department of Defense, Employer Support of the Guard and Reserve (ESGR), [\*Employer Resource Guide\*](#), 2011
- U.S. Department of Labor, Veterans’ Employment and Training Service (VETS), [\*USERRA A Guide to the Uniformed Services Employment and Reemployment Rights Act\*](#), June 15, 2012
- U.S. Department of Labor, Veterans Employment and Training Service, [\*New Coverage for Certain State Active Duty under the Uniformed Services Employment and Reemployment Rights\*](#)