Uniformed Services Employment and Reemployment Rights Act (USERRA)

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

Table of Contents

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Reference Number: MTAS-490

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 43, was signed into law by President William Clinton on October 13, 1994, and modified in 1996, 1998, 2000, 2004, 2005, 2009 and 2013. It is the latest in a series of laws designed to protect veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940 and the Veterans' Reemployment Rights Act (VRRA) to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (20 CFR Sec.1002.2). The purpose of the Act was to protect certain rights and benefits for employees and establish specific duties for employers affecting veteran employment, reemployment, and retention.

On Jan. 28, 2008, President George W. Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-181. Among other things, section 585 of the NDAA amended the Family and Medical Leave Act of 1993 (FMLA) to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 work weeks of leave (paid or unpaid) to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who undergoes medical treatment, recuperation or therapy, is in an outpatient status, or is on the temporary disability retired list, for a serious injury or illness." The NDAA also allows an employee to take FMLA leave for "any qualifying exigency arising out of the fact that the spouse, or a son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."

On Oct. 28, 2009, President Barack Obama signed a defense-spending bill into law that also contained amendments to the Family and Medical Leave Act (FMLA). The National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010) expanded FMLA provisions relating to "qualifying exigency leave" and military caregiver leave, both of which now include time off to care for veterans.

Basic Provisions

Reference Number: MTAS-1492

The general military leave law provides four basic entitlements to employees returning from active service:

- prompt reinstatement,
- accrued seniority,
- training or retraining to ensure that the employee can perform the functions of the job, and
- special protection against discrimination and retaliation in addition to special protection against discharge for 180 days following periods of service from 31 days to 180 days (except for cause). This protection is extended to one year for periods of service of 181 days or more.

Under USERRA, re-employment rights are required for any person who is absent from work because of service in the uniformed services. The "uniform services" consist of the following (20 CFR 1002.5(o)):

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

USERRA requires that returning service members be re-employed in the job they "would have attained" had they not been absent for military service, with the same seniority, status and pay, as well as other

rights and benefits determined by seniority. 38 U.S.C. § 4316(a). Additionally, returning employees are entitled to any other benefits not based on seniority. 38 U.S.C. § 4316(b).

All employers are required to notify employees of their rights under USERRA. The notice must explain what rights and protections employees have under the Act, including the right to re-employment after uniformed service, freedom from discrimination and retaliation for serving in uniform and certain health insurance protections (38 U.S.C § 4334).

The U.S. Department of Labor, Veterans Employment and Training Service (VET) has prepared a poster that may be used to fulfill the requirements. It can be downloaded from https://www.dol.gov/vets/programs/userra/USERRA_Private.pdf [1].

Service in the Uniformed Services Defined

Reference Number: MTAS-871

“Service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service, including [38 USC. § 4303(13) & (16)]:

- active duty and active duty for training,
- initial active duty for training,
- inactive duty training,
- full-time National Guard duty,
- absences from work for examinations to determine fitness for any of the above types of duty,
- funeral honors duty by National Guard or Reserve members, and
- certain duties performed by National Disaster Medical System, which is part of the Department of Health and Human Services, when activated for a public health emergency, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). See Title 42. U.S. Code, Section 300hh-11(d).

According to a Thompson Publishing Company’s Special Report, "Return from Duty, Return to Work: Understanding the Employer’s New USERRA Obligations" (2006), there is no exclusion for executive, managerial, or professional employees. The law even protects temporary, part-time, probationary, and seasonal employees, as well as employees on strike, layoff, or leave of absence. It does not, however, apply to individuals who act as independent contractors rather than as employees.

20 CFR, § Sec. 1002.18 provides that "an employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service,or obligation for service in the uniformed services". The Act also prohibits employers from taking actions against an individual for any of the activities protected by the Act, whether or not he or she has performed service in the uniformed services. The Thompson Publishing Company Report also provides that it is illegal for an employer to “retaliate against someone who exercises his or her rights under USERRA”.

The law requires all affected civilian employees to provide their employers with advance notice (written or oral) of their military service orders. 32 CFR Part 104 was revised to provide that "although oral notice is allowed pursuant to USERRA, written notice of pending uniformed service provides documentary evidence that this basic prerequisite to retaining reemployment rights was fulfilled by the service member and serves to avoid unnecessary disputes". [32 CFR § 104.6(a)(2)(iii)(A)(2)]. Section (3) recommends that the advance notice be provided at least 30 days prior to departure.

The notice can also be provided by an “appropriate officer” of the Department of Defense. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned. No notice, however, is required if military necessity prevents giving advance notice or if giving notice is impossible or unreasonable. [38 USC. § 4312(a)(1)].

Employees may also need additional time off before starting military service. 20 CFR § Sec. 1002.74 of the regulations recognize that absences for military service may include a period of time between the date the employee leaves the job and the date the employee actually begins service. In addition, the Thompson Publishing Company Report suggests that “employees may need intermittent time off from

work prior to military service for brief periods to put their affairs in order, for example, to interview child care providers, meet with bank officers regarding financial matters, or seek assistance for elderly parents".

20 CFR § Sec. 1002.74 also suggests that the amount of time an employee may need to prepare for military service will vary. "Relevant factors include:

- the duration of the military service,
- the amount of notice given an employee called to military service, and
- the location of the service."

Re-employment Schedule

Reference Number: MTAS-872

The Act established that the length of time an individual may be absent from work for military duty and retain re-employment rights is not to exceed five years. 38 U.S.C. § 4312(a)(2). Upon completing service in the uniformed services, the employee must notify the pre-service employer of his/her intent to return to the employment position by either reporting the work or submitting a timely application for re-employement. The time depends on the length of the employee's military service as outlined in 20 C.F.R. § 1002.115) below:

Service of fewer than 31 days (or any length of the absence that was for an examination to determine fitness to perform military service): The employee must report back to work not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the military service and the expiration of eight hours after a period allowing for safe transportation from the place of military service to the employee's residence. So, if an employee completes his or her period of service and arrives home at 10 p.m., an employer cannot require the employee to report to work until the beginning of the next full regularly scheduled work period that begins at least eight hours after arriving home (in this example, no earlier than 6 a.m. the next morning). If it is impossible or unreasonable for the employee to report in that time frame through no fault of his or her own, the employee must report to work as soon as possible after the expiration of the eight-hour period.

Service for more than 30 but fewer than 181 days: The employee must submit an application for re-employment (written or oral) no later than 14 days after completing service. If this is impossible or unreasonable through no fault of the employee, the employee must submit the application no later than the next full calendar day after it becomes possible to do so.

Service for more than 180 days: The employee must submit an application for re-employment (written or oral) no later than 90 days after completing service.

In 2011, 38 U.S.C. § 4312 was amended by Pub.L. 112-81, § 575(3), and states the following:

(f) A person who submits an application for reemployment shall provide to the person's employer (upon the request of such employer) documentation to establish that—

(A) the person's application is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304 [2].

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

However, under subsection (3),

(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1),

the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318 (a)(2)(A) [3].

Subsection (f)(4) provides that an employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available. 38 C.F.R. § 4312(f)(4). Documents that satisfy the requirements of USERRA (20 C.F.R, Sec. 1002.123) include the following:

1. DD 214 Certificate of Release or Discharge from Active Duty;
2. Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
3. Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
4. Certificate of completion from military training school'
5. Discharge certificate showing character of service; and
6. Copy of extracts from payroll documents showing periods of service;
7. Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and time of NDMS training or Federal activation.

Exceptions to the five-year service limitation include situations in which initial enlistments last longer than five years, periodic training is required, or there are involuntary active-duty extensions or recalls, especially during a time of national emergency. 38 U.S.C. § 4312(c). Additionally, employees recovering from injuries received during the service or training may have up to an additional two years to return to their jobs. 38 U.S.C. § 4313(e).

An employer is not required to re-employ a returning service member if the employer's circumstances have so changed as to make re-employment impossible or unreasonable 20 C.F.R. 1002.139(a). Thompson Publishing Company's Report provides a excellent example. The employer would not be required to create a useless job or reinstate an employee after a reduction in the workforce that reasonably would have included the service member. The employer cannot, however, refuse to re-employ the service member just because another employee was hired temporarily during the service member's absence.

20 C.F.R. § 1002.139 (c) and 38 U.S.C. § 4312(d) (1)(c) also provide that an employer is not required to re-employ a returning service member if the position vacated by the service member was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

Re-employment must occur as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position. 20 C.F.R. § 1002.181.

Return to Work

Reference Number: MTAS-873

38 U.S.C. § 4313(a)(1) provides that after military service of less than 91 days, the military service person is entitled to reinstatement in the "escalator position," to the position in which he or she would have been employed if not for the interruption in employment. 20 C.F.R. § 1002.196(b) provides that the employer must make reasonable efforts to help the employee become qualified for that position. 20 C.F.R. § 1002.196(c) also provides that if the employee cannot become qualified for that position, the employee is entitled to the position in which he or she was employed when military service started. If

the employee is not able to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employer, the employee must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position.

After military service of more than 90 days, an employee is entitled to reinstatement in the escalator position, however, 20 C.F.R. § 1002.191 provide that upon the specific circumstances the employer may have the option, or may be required, to re-employ the employee in a position other than the escalator position. The employer must make reasonable efforts to help the employee qualify for one of those positions. 20 C.F.R. § 1002.197(a). If the employee cannot become qualified, the employee is entitled to be placed in any other position that is the closest approximation to the escalator position. 20 C.F.R. § 1002.197(b). If there is no such position for which the employee is qualified, the employer must place the employee in any other position that is the closest approximation to the pre-service position. 20 C.F.R. § 1002.197(c).Note: The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position. 20 C.F.R. § 1002.198.

The Thompson Publishing Company article states that “employers may treat missed opportunities for promotions differently, depending on whether the promotions are automatic or, as with many white collar jobs, based primarily on the employer’s discretion.” If an opportunity for promotion or eligibility for promotion that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. 20 C.F.R. § 1002.193(b).

The Department of Labor (DOL) acknowledges that if a promotion is not based simply on seniority or other forms of automatic progression, but depends on the employer’s discretion, a re-employed veteran would have to demonstrate that it was reasonably certain that he or she would have received the benefit if he or she had remained continuously employed. 20 C.F.R. § 1002.194.

Employers must make “reasonable efforts” to allow the returning service member to qualify for the position to which the employee is entitled. “Reasonable efforts” include training and retraining that does not place an undue hardship on the employer. 20 C.F.R. § 1002.5(i). "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make the employee unqualified. The employer, however, is not required to re-employ an individual into a position that he/she is not qualified to perform.

An employee leaving a job for military service is not required to decide at that time whether he or she intends to return to the employer upon completion of military service but can defer that decision until after completing service. 20 C.F.R. § 1002.88. The employer may, however, prohibit the individual from seeking employment with a competitor. The burden of proving that the employee does not intend to seek re-employment with that employer following military service still rest with the employer. The individual must provide “clear, written notice” of their intent not to return to the employment of the organization. Even with such notice, the employee does not losses rights and benefits to re-employment after completing service.

Under USERRA, employee can obtain employment with a different employer while waiting for reinstatement without giving up re-employment rights with the first employer. But if this alternative employment during the application period violates the pre-service employer’s employment policies (such as a city’s prohibition against second jobs) to such a degree that it would be just cause for discipline or termination, then there is no right to re-employment. 20 U.S.C. § 1002.120. Additionally, a returning employee loses his or her re-employment rights if he or she is discharged from military service for

- dishonorable or bad conduct,
- other than honorable conditions,
- dismissed by 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 roll due to an absence for at least three months; separated by reason of a sentence to confinement adjudged by a court-martial; or a sentence to confinement in a Federal or State penitentiary or correctional institution. 20 U.S.C. § 1002.135.

USERRA establishes re-employment rights to a job but does not require that employers pay employees their regular pay while absent for military service, although employers may choose to do so. 20 U.S.C. § 1002.7(c). Some employers provide “differential pay,” which is the difference between the employee’s military pay and civilian pay. Differential pay is not required but it is “a generous show of support by employers for their employees who are in service to the nation. 20 U.S.C. § 1002.7(d) also provides that if an employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the act.

Under Tennessee state law, however, eligible service members are entitled to 20 days of paid leave per year for active duty. T.C.A. § 8-33-109. If an employee has not used his military leave during the year, he is entitled to the first 20 days of his service at full pay. Whether the organization supplements the difference between an employee’s military pay and regular pay is a decision the employer can make. T.C.A. § 58-1-109 also provides that reservists called to duty by the governor “... in case of invasion, disaster, insurrection, riot, attack, or combinations ...” shall be paid from appropriated funds by the military. No member shall receive less than $50 per day. No member shall receive less than $55 per day when called to active duty in cases of grave emergencies.

20 U.S.C. § 1002.149 provides that an employer must treat an employee during his or her period of military service as being on furlough or leave of absence. The employee is entitled to the non-seniority rights and benefits that the employer generally provides to other employees who are on furlough or leave of absence with similar seniority, status, and pay. The non-seniority rights and benefits are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan.

Benefits During Leave

Reference Number: MTAS-874

During an employee’s leave of absence for military service, decisions about employee benefits must be made. USERRA provides for health insurance continuation coverage, but employees may elect to continue their health plan coverage while in the military. The plan must permit the employee (and dependents, if the plan offers dependent coverage) to elect to continue the coverage for a period that is the shorter of the following two periods: the 24-month period beginning on the date on which the employee’s absence begins, or the period beginning on the date on which the employee’s absence begins and ending on the date on which the employee fails to return to the job or apply for re-employment. 20 C.F.R. § 1002.164(a).

20 C.F.R. § 1002.166 provides that the amount the employee must pay for continuing health coverage varies according to how long the employee is absent. If the individual’s military service is fewer than 31 days, health coverage should be provided as if the employee had remained employed, and the employer cannot require the employee to pay more than the employee’s share (if any) for coverage. If the military duty exceeds 31 days, the employee must be offered continued health care and may be required to pay up to 102 percent of the full premium (the employee’s share plus the employer’s share) for coverage. In any case, the payment obligation begins on the 31st day of absence. On return from service, health insurance must be reinstated, and a waiting period or exclusions for preexisting conditions cannot be imposed. 38 C.F.R § 4317(b).

Pension plans that are tied to seniority are specifically covered by the law. The law provides that while away performing military service, the employee must be treated as not having incurred a break in employment. The military service also must be considered service for an employee for vesting and benefit-accrual purposes. C.F.R. § 1002.259. The employer is liable for continuing to fund the plan and any resulting obligations. C.F.R. § 1002.261.

If an employer offers a defined contribution plan, once the employee is re-employed, the employer must allocate its make-up contribution, the employee’s contribution, and the employee’s elective deferrals in the same manner that it would allocate these amounts for other employees. For defined benefit plans, the employee’s accrued benefits will be increased for the period of service once he or she is re-employed and, if applicable, has re-paid any amount previously paid to the employee and made any employee contributions that are required under the plan. 20 C.F.R. § 1002.265(b).

A re-employed service member has the right to make contributions or elective deferrals but is not required to do so. The employee's right to make up missed contributions is conditioned on continued employment with the post-service employer. 20 C.F.R. § 1002.265(c). Employee contributions to a pension plan that is not dependent on employee contributions must be made within 90 days following re-employment or when contributions are normally made for the year in which the military service was performed, whichever is later. 20 C.F.R. § 1002.262(a).

If employers match employee contributions, the re-employed service member may make his or her contributions or deferrals during the period starting with the date of re-employment and continuing for up to three times the length of the employee's immediate past period of military service, but the re-payment period may not exceed five years. Employer contributions that are contingent on employee contributions or elective deferrals must be made according to the plan's terms. 20 C.F.R. § 1002.262(b).

38 U.S.C. § 4318 provides that the re-employed person is entitled to any accrued benefits from the employee's banked benefits. Vacation and sick leave accrual generally are not tied to seniority: however, if an employer allows employees to accrue vacation while on leave without pay, the employee in military service is entitled to the same benefit. USERRA provides that service members must, at their request, be allowed to use any vacation leave that had accrued before beginning their military service instead of unpaid leave. The employer, however, cannot force the employee to use vacation leave for military service. 38 U.S.C. § 4316(d). The employee is not entitled to use accrued sick leave unless the employer allows employees to use sick leave for any reason or allows employees on comparable furlough or leave of absence to use accrued paid sick leave.

Qualified Exigency Leave

Reference Number: MTAS-875

The National Defense Authorization Act for FY 2010 established new benefits for service members and their families. FMLA now allows eligible employees to take time off for family emergencies resulting from a covered spouse, parent, or child being called to active military duty in the Armed Forces, including members of the National Guard or Reserve (called "qualifying exigency leave") and for emergencies resulting from the need to care for family members who become seriously ill or injured in the line of duty during active military service.

Qualifying exigency leave allows eligible employees of covered employers to take up to 12 weeks of FMLA leave arising from the fact that their spouse, child, or parent is on active duty or called to active duty in the armed forces in support of a "contingency operation." The qualifying exigency leave applies to families of members of any regular component of the armed services. An eligible employee whose spouse, parent or child is a member of the Armed Forces may take FMLA leave for a qualifying exigency related to the fact that they are deployed with the Armed Forces to a foreign county.

The regulation 29 C.F.R. § 825.126(b) contains a specific list of reasons for qualifying exigency leave. They include:

- Short-notice deployment, meaning a call or order that is given seven or fewer calendar days before deployment. The employee can take up to seven days beginning on the date of notification.
- Military events and related activities, such as official military-sponsored ceremonies and family support and assistance programs sponsored by the military and related to the family member's call to duty.
- Urgent (as opposed to recurring and routine) child-care and school activities such as arranging for child care.
- Financial and legal tasks, such as making or updating legal arrangements to deal with a family member's active duty.
- Counseling for the employee or his or her minor child that is not already covered by the FMLA.
- Spending time with the covered service member on rest and recuperation breaks during deployment for up to five days per break.
- Post-deployment activities such as arrival ceremonies and reintegration briefings, or to address issues from the service member's death while on active duty.

- Other purposes arising out of the call to duty, as agreed upon by the employee and employer.

Employees seeking qualifying exigency leave must give reasonable and practical notice if the exigency is foreseeable. The notice must (1) inform the employer that a covered family member is on active duty or call-to-active duty status, (2) give a listed reason for leave, and (3) give the anticipated length of absence. 29 C.F.R. § 825.302(c).

Regulation 29 C.F.R. § 825.309(d) provides that the employer may require certification for qualifying exigency leave by requiring the employee to provide a copy of the service member's active duty orders; for example a DOL form WH-384 may be used for qualifying exigency certification. The regulations also allow employers to verify with a third party that an employee met with the third party (e.g., a teacher) during qualifying exigency leave.

Military Caregiver Leave

Reference Number: MTAS-876

The National Defense Authorization Act (NDAA) for FY 2010 also established a new "military caregiver" leave category. This type of leave allows an eligible employee to take up to 26 work weeks of leave during a 12-month period to care for a covered service member. 29 C.F.R. § 825.127 redefines a covered service member as the employee's spouse, son, daughter, or parent on active duty or call to active duty status. The employee may be a spouse, parent, child, or next of kin of the service member.

A veteran is considered a covered service member if he or she meets both of the following:

- He or she is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred or aggravated while on active duty in the Armed Forces, whether or not the illness or injury manifested itself before or after the member became a veteran.
- He or she was a member of the Armed Forces, National Guard or Reserves at any time during the five-year period before he or she began treatment, recuperation or therapy. In other words, the FMLA now allows the caregiver to take up to 26 weeks of leave to care for a veteran for up to five years after the service member leaves military service.

The military caregiver regulations also establish a new category of eligible employees called "next of kin." Next of kin excludes a service member's spouse, parents or children, and is defined in 29 C.F.R. § 825.122(e) as the following blood relatives, in order of priority:

- Blood relatives with legal custody of the service member by court order or statute
- Siblings
- Grandparents
- Aunts and uncles
- First cousins

If no designation of a next of kin is made, and there are multiple family members with the same level of relationship to the service member, all such family members shall be considered the covered service members next of kin and may take FMLA leave to provide care, either consecutively or simultaneously. The service member, however, may designate any specific blood relative as "next of kin" in writing. Employers can ask employees for reasonable documentation of family relationships; however, a single statement will suffice.

The NDAA establishes a different calendar for military caregiver leave. Military caregiver leave begins with the first date of caregiver leave and ends 12 months later This differs from the regular FMLA year and if an employee takes military caregiver FMLA leave, the employer will have to track FMLA use under the two calendars. The DOL's regulations state that "once an employee takes military caregiver leave and has begun to use that type of FMLA during the military FMLA year, he/she can take a maximum of 26 weeks of FMLA leave for any purpose during that 12 month period. If he/she takes non-military FMLA leave during the military FMLA year to take care of his/her own serious health condition that counts against the maximum 26 weeks of FMLA leave the service member is entitled to during that 12 month period." The employer continues to count the service member's FMLA leave against his or her entitlement as measured during the regular FMLA year as well. 29 C.F.R. § 825.127(c)(1).

The maximum of 26 weeks of caregiver leave may be taken in a single block, reduced leave schedule or intermittently during the employee's military FMLA year. Military caregiver leave cannot be carried over from year to year; it runs during a single 12-month period. It is possible, however, for an eligible employee to take more than one military caregiver entitlement because this type of leave, according to the regulations, applies on a per-service-member, per-injury basis in a single 12-month period.

Dual employment in the case of spouses working for the same employer can result in further complications if they wish to take military caregiver FMLA leave. The employees may be limited to a combined total of 26 work weeks of leave during the single 12-month period if the leave is taken for the birth of a child or to care for a child after birth, for placement of a child for adoption or foster care or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered service member with a serious illness or injury. 29 C.F.R. § 825.127(d).

NDAA 2010 also expanded the definition of a "serious injury or illness" to include care for covered service members whose pre-existing injury or illness was aggravated in the line of duty (29 C.F.R. § 825.127(a)(1)) on active duty in the Armed Forces and manifested itself before or after the member became a veteran, and is:

- A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the service member unable to perform the duties of the service member's office, grade, rank, or rating; or
- A physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; or
- A physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or
- An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Previously, the law allowed military caregiver leave only for serious injury or illness incurred while on active duty that rendered the service member medically unfit to perform the duties of his office, grade, rank, or rating and for which he was undergoing medical treatment, recuperation, therapy, or outpatient treatment.

To account for the covered veterans, the new 2013 changes also expand the list of health care providers who are authorized to complete a certification for military caregiver leave, the information required on the certification forms, and the acceptable documentation employees may provide to substantiate the leave.

USERRA Resources

Reference Number: MTAS-877

Employers may require certification of the need for caregiver and qualifying exigency leave using the DOL forms. The qualifying exigency form can be found at http://www.dol.gov/whd/forms/WH-384.pdf [4]. The certification for serious injury or illness of a covered service member form can be found at http://www.dol.gov/whd/forms/WH-385.pdf [5].

Employees seeking to use military caregiver leave must follow existing FMLA notice rules, including the requirement to work with employers to schedule leave without unduly disrupting operations.

Contact the MTAS human resource consultants,John Grubbs, SPHR, IPMA-SCP, SHRM-SPHR or Richard Stokes, PHR, IPMA-SCP, SHRM-CP, at (615) 532-4956, for copies of the Uniformed Services Employment and Reemployment Rights Act. A summary of the revised bill may be found at https://www.govtrack.us/congress/bills/111/hr2647/summary [6] or you can find the actual legislation at: http://www.justice.gov/crt/military/statute.htm [7] . Copies of the required USERRA posters can also be obtained from the U.S. Department of Labor at www.dol.gov/vets/programs/userra/poster.htm [8].

Additional information about the act may be obtained from the U.S. Department of Labor's Veterans' Employment and Training Service at 800-336-4590 or on the Internet at http://www.dol.gov/vets/

index.htm [9] . The Employer Support of the Guard and Reserve (ESGR), Veterans' Employment and Trainings Service (VETS) and the National Veterans Training Institute (VTI) have developed an on-line introduction to the rules utilizing an e-Learning course entitled USERRA 101. The course is free but individuals must register at: http://www.nvti.ucdenver.edu/U101/ [10] .

In Tennessee, you can contact the Region IV representatives of the Veterans' Employment and Training Service for more information at the following locations:

Veterans' Employment and Training Service
U.S. Department of Labor
P.O. Box 280656
Nashville, Tennessee 37228-0656
(615) 736-7680
(615) 741-1962
(615) 736-5037
Fax: (615) 741-4241

Veterans' Employment and Training Service
U.S. Department of Labor
1309 Poplar Ave.
Memphis, Tennessee 38104-2006
(901) 543-7853
Fax: (901) 543-7882

Veterans' Employment and Training Service
U.S. Department of Labor
350 Pageant Lane, Suite 406
Clarksville, Tennessee 37040
(931) 572-1688
Fax: (931) 648-5564

Links:
[1] https://www.dol.gov/vets/programs/userra/USERRA_Private.pdf
[2] http://www.law.cornell.edu/uscode/text/38/4304
[3] http://www.law.cornell.edu/uscode/text/38/4318
[4] http://www.dol.gov/whd/forms/WH-384.pdf
[5] http://www.dol.gov/whd/forms/WH-385.pdf
[6] http://www.govtrack.us/congress/bill.xpd?bill=h111-2647&tab=summary
[7] https://www.justice.gov/servicemembers/uniformed-services-employment-and-reemployment-rights-act-1994-userra
[8] http://www.dol.gov/vets/programs/userra/poster.htm
[9] http://www.dol.gov/vets/index.htm
[10] http://www.nvti.ucdenver.edu/U101/

MTAS