

Service in the Uniformed Services Defined

Dear Reader:

The following document was created from the MTAS website ([mtas.tennessee.edu](https://www.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,

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Table of Contents

Service in the Uniformed Services Defined	4
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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.”

DISCLAIMER: The letters and publications written by the MTAS consultants were written based upon the law at the time and/or a specific sets of facts. The laws referenced in the letters and publications may have changed and/or the technical advice provided may not be applicable to your city or circumstances. Always consult with your city attorney or an MTAS consultant before taking any action based on information contained in this website.

Source URL (retrieved on 09/18/2019 - 1:55pm): <https://www.mtas.tennessee.edu/reference/service-uniformed-services-defined>

