



Re-employment Schedule

Dear Reader:

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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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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-employment. 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 [1].

(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) [2].

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 an 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.

Links:

- [1] <http://www.law.cornell.edu/uscode/text/38/4304>
- [2] <http://www.law.cornell.edu/uscode/text/38/4318>

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