

## Benefits During Leave

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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,

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](http://www.mtas.tennessee.edu)

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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.

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