



Apr 02, 2020

**Categories:**

[Coronavirus Response Team](#)

**Authors:**

[Catherine F. Burgett](#)

[Tessa L. Castner](#)

[Elizabeth J. Reburn](#)

# Employers' Obligations to Provide Military Leave During The COVID-19 Pandemic

---

In response to the COVID-19 pandemic, National Guardsmen are and will be called to service to support relief efforts. Under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), employers are obligated not to discriminate against employees based on their service, to provide military leave to employees called to service, and to reinstate employees returning from service in their former jobs. The following is a refresher on employers' obligations under USERRA. It is important to remember, however, that many states also have their own military leave laws that may differ in the type or amount of protection offered.

## Who must comply with USERRA?

USERRA applies to both public and private employers of all sizes.

## What protections does USERRA provide?

Under USERRA, employers must not discriminate against employees because of their service in the uniformed services. Employers must also permit employees called to service to take the necessary leave and then promptly reinstate those employees when the service ends, without any loss of status, pay, or benefits. Employers are cautioned to evaluate benefits provided to employees on other similar leaves to ensure that employees on military leave are receiving the same or comparable benefits.

## What service does USERRA protect?

USERRA protects uniformed service, which includes any employee in the Armed Forces, the Army National Guard, and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty. Note, National Guard service under authority of State law is not protected by USERRA.

That said, many, if not most, states have laws protecting the civilian job rights of National Guard members who serve under state orders. USERRA also applies to an employee's service in the commissioned corps of the Public Health Service, members of the National Urban Search and Rescue Response System, and any other category of persons designated by the President in time of war or national emergency.

## Does USERRA apply to an employee who assists with FEMA efforts?

USERRA applies if an employee is called to assist with FEMA's disaster-response efforts as a member of the National Guard or pursuant to the National Disaster Medical System ("NDMS"). NDMS is coordinated by FEMA and provides health services, health-related social services, other appropriate human services, and appropriate auxiliary services to respond to the needs of victims of a public health emergency.

## What kind of notice must the employee provide?

An employee must provide advance notice of the need to take leave under USERRA unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under the circumstances. In these uncertain times, notice periods may be short or nonexistent. Employers should keep in mind that this does not obviate their obligations to follow USERRA. The law requires only that the employee provide notice as far in advance as reasonable under the circumstances. Regarding the format of the notice, such may be informal and may be either written or verbal.

## Do employees have to be paid during leave for uniformed service?

USERRA does not have a requirement that employers pay employees while on military leave. However, paid military leave does exist under certain state laws.

## What if a significant number of a public employer's workforce is called up as part of the National Guard?

An employer does not have the ability to prohibit an employee from taking leave for participation in the armed services, and there is no exception based on the leave's impact on an employer's workforce. While an employee's commanding officer can be contacted to resolve conflicts, employees are only required to provide an employer with notice of service in the uniformed services – not to obtain the employer's permission.

## What reinstatement rights does an employee have under USERRA?

In general, under USERRA, employees who are absent from a position of employment due to service in the uniformed services are entitled to reemployment rights and benefits if the employee gave advance written or oral notice to his employer, the cumulative length of service does not exceed 5 years, and the employee complies with the reporting / application procedures described in USERRA.

Employees must be reinstated in the position they would have had if they had not taken uniformed services leave. This may be the same position the person left. It could also mean, for example, that if the service member would have been promoted within reasonable certainty had that person not been absent, the service member would be entitled to that promotion upon reinstatement.

## When must an employee report for reemployment?

If the employee's absence is for 30 days or less, the employee must report no later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service. It also allows for an additional 8 hours for safe travel, or as soon as possible after the additional 8

hours, if reporting within the given period is impossible or unreasonable through no fault of the employee. If the employee's absence is for between 31 and 180 days, the employee must submit an application for reemployment no later than 14 days after the service is completed, or if submitting such application within such a period is impossible or unreasonable through no fault of the employee, the next first full calendar day when submission of such application becomes possible. If the employee's absence exceeds 180 days, the employee must submit an application for reemployment no later than 90 days after the service is completed in order to be reinstated.

## Must an employee provide documentation to return to work?

If an employee is absent for 30 days or less, the employer cannot require documentation.

If an employee is absent for 31 days or more, the employer can request documentation showing that: the employee's application for reemployment was timely; the employee has not exceeded the 5-year service limitation; and the employee's separation from service was not for a disqualifying reason. If the employee does not have satisfactory documentation, the employer must still reemploy the person, but if the employer later learns that one or more of the reemployment requirements was not met, the employer can discharge the employee.

## How quickly must an employee be reinstated upon their return?

Under USERRA, an employee entitled to reemployment upon completing his or her service must be "promptly" reemployed. "Prompt reemployment" means as soon as practicable, and absent unusual circumstances, reemployment must occur within two weeks of the employee's application.

## What if the employee is a member of a bargaining unit?

If the employee is a member of a bargaining unit, the employer must review the applicable collective bargaining agreement to determine what, if any, additional rights have been agreed to with respect to military leave. The employer must also ensure that the employee receives all rights under the collective bargaining agreement that he or she would have received if he or she had been continuously employed during the leave (e.g., seniority, pay raises, etc.).

For more information please contact [Catherine Burgett](#), [Tessa Castner](#), or [Elizabeth Reburn](#) or any attorney in Frost Brown Todd's [Labor and Employment](#) or [Government Services](#) practice group.

---

*To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.*

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.