

USERRA Questions & Answers

What is USERRA?

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and the Heroes Earnings Assistance and Relief Tax (HEART) Act are federal laws that provide benefit protection for employees who leave active employment for military service. The laws provide employees called to military duty in the uniformed services with a variety of rights including: the right to take employment leave, job restoration rights, and the continuation of certain benefits during military leave. These rights are collectively referred to as “USERRA rights.”

What employers are covered by USERRA?

USERRA applies to all employers, public and private alike, regardless of the number of employees. Church employers and church plans are not explicitly exempt from the obligations of USERRA.

Are churches exempt from USERRA because of the First Amendment?

The law has no exemption for churches or religious organizations. No challenge to the constitutionality of this law on the basis of the First Amendment has been made but there are questions regarding this issue. Any challenge to the constitutionality would require litigating the issue in court.

What is required of employers?

Employers must post a notice of the rights, benefits and obligations of both employer and employee under USERRA. The notice must be posted where employee notices are customarily placed. A copy of the notice in poster format is available at https://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf.

Additional employer obligations are discussed below.

What employees are covered by USERRA?

USERRA covers uniformed service and training, whether voluntary or involuntary, in all branches of the military including the reserves and the National Guard. A member who enlists or seeks a commission for service (as distinguished from being called to active duty as a member of the National Guard or as a reservist) is also afforded USERRA rights.

What rights are provided by USERRA?

Non-Discrimination - USERRA prohibits discrimination and retaliation on the basis of uniformed service or application for military service in hiring, reemployment, retention in employment, promotion or any other benefit of employment. If an organization has a leave of absence policy, an individual seeking leave for military service must be afforded the same rights and privileges as those on leave for other reasons.

Job Reinstatement - Under USERRA, a person who is absent from employment due to military service and who is honorably discharged from service within five (5) years is entitled to job restoration.

Resumption of Benefits upon Reinstatement - Upon return to employment, USERRA requires that the employee and his/her dependents be permitted to resume participation in those employment-related benefits in which they participated when the military service began.

Pension Coverage during Military Leave - Upon return to employment, USERRA requires that the employee receive pension credits or retirement savings contributions for the period of military leave.

Does the mobilization agreement that is part of an individual member's call package supersede these requirements?

No. Churches and other employers are required to provide these benefits even if these benefits are not mentioned in the member's mobilization agreement.

What obligations does an employer have when an employee leaves employment for military service?

Church employers should advise employees of their USERRA rights. Employees need to be informed that it is the employee's obligation to provide the employer with advance notice if his or her reason for leaving is to perform military service. A member cannot waive the right to reemployment under USERRA by notifying the employer prior to or during the period of military service that he or she does not intend to seek reemployment upon completion of his or her military service.

What is job reinstatement?

USERRA's right of reinstatement means that for leaves of absence of less than 91 days, the employee must be returned to the same position he/she would have attained by remaining continuously employed. Leaves of 91 or more days must result in reinstatement to the position that would have been attained by remaining continuously employed, or to a position of like seniority, pay and status. If the returning employee is unable to perform the essential duties of the job, the employer must make reasonable efforts to refresh the skills of the employee.

There is a general five-year limit on the right of reinstatement. This right is generally conditioned upon the individual providing advance notice of the need for a military leave of absence and upon a timely re-application for employment after discharge from uniformed service.

A reinstated employee under USERRA is job-protected and cannot be discharged except for cause during the first year of reemployment (or the first 180 days if the member's most recent period of military service was more than 30 but less than 181 days).

There are limited circumstances when an employer is not required to reemploy a person because circumstances have so changed as to make such reemployment impossible or unreasonable or create an undue hardship on the employer. Note that there has been no experience as to how a presbytery's discretion regarding the call of a Minister of the Word and Sacrament would interface with the law.

If a member returns to employment with a different church or employer, is he/she entitled to USERRA benefits?

Yes. Members are entitled to these benefits even if they return to a different church or employer within the Presbyterian Church (U.S.A.). Any member who returns to another Presbyterian Church (U.S.A.) after military leave should ask his or her employer to notify the Board of Pensions of his or her USERRA entitlement.

What benefits are protected by resumption of benefits?

These are benefits for which the employee was eligible prior to leave or would have become eligible during the leave of absence. The term “benefit” is broadly defined to include any advantage or interest that accrues by reason of an employment contract or employer policy. These include a pension plan, health plan, other insurance coverage and awards, vacations, and the opportunity to select work hours or location of employment.

For example, vacation time tied to length of service must be calculated as though the member had remained employed during the military leave of absence.

All benefits provided under the Benefits Plan of the Presbyterian Church (U.S.A.) meet this requirement.

What pension benefits does USERRA require?

Under USERRA, a member who serves five years or less of cumulative uniformed service and who is reinstated upon submitting a timely application for reemployment shall have his/her leave of absence counted for the accrual of pension credits and vesting under the Pension Plan. Thus, the employer must provide pension coverage to a returning member equivalent to that which he/she would have earned if continuously employed during the military leave period. Pension credits must be based on the greater of the last effective salary of the member or the applicable median salary. The Pension Plan must also adjust credits for any scheduled annual salary increase or increase in the applicable median salary that may have occurred during the period of military service. Military pay differential from an employer is included in Effective Salary for purposes of pension credit accrual.

The period of military service counts towards vesting and Years of Plan Participation (Rule of 70). The returning member is treated as if there was never a break in service.

Who pays the pension dues?

If a member returns to church employment, the last employer before the leave is responsible for paying 11 percent pension dues for the period of the leave. The Board of Pensions will offer installment payment arrangements for employers that cannot afford to pay dues for past service in a lump sum.

These dues cannot be waived, but a church that simply cannot meet these requirements may be able to establish a partnership with its presbytery regarding its obligations.

Can an employer provide special pension credit accrual for members who die or become disabled during USERRA leave?

Yes. If a member dies or becomes disabled during USERRA leave, the member's last employer may elect to remit dues to the Pension Plan for pension credit accrual during the military leave period up to the date of death or disability.

Doesn't the Chaplains Deposit Fund pay the dues for plan members serving in the military?

No. The fund is only responsible for certain individuals who serve in the military and do not return to work for a Presbyterian Church (U.S.A.) organization within five years. It is a pension insurance program administered by the Presbyterian Council for Chaplains and Military Personnel for career chaplains who fail for some reason to earn a military pension.

What are the healthcare, death and disability coverage options while an employee is on leave?

Under USERRA, when a member is on military leave, his or her employer must provide the member with the opportunity to elect health (medical, dental and vision) continuation coverage for the lesser of 24 months or the period beginning on the date that the member's military service begins and ending on the date the member fails to return to eligible service. During the first 30 days of military service, the member cannot be charged more than his or her regular share of healthcare premiums (i.e., the amount he or she paid while in eligible service). Thereafter, the member cannot be required to pay more than 102 percent of the full healthcare premium.

The member and/or the employer can choose healthcare and death and disability coverage for the member, spouse and dependent children under one of these options:

For Medical Plan members:

- Medical coverage only from TRICARE. (TRICARE is the benefit program offered by the Military; it does not provide death and disability coverage.)
- Medical coverage for TRICARE and the Benefits Plan death and disability coverage. The death and disability dues can be paid for a period of up to five years of continuous military service.
- Medical coverage only on a leave of absence basis with dues paid on the minimum medical participation basis for up to five years of continuous military service.
- Medical coverage only through the Medical Continuation Program with payment of the required dues for up to five years of continuous military service.
- Medical, death and disability coverage on a leave of absence basis with dues paid on the last effective salary for up to five years of continuous military service.

Please note: Members (or their survivors) only receive death or disability benefits if enrolled in these coverages on the date that either death or disability occurred.

Does the no-cost coverage period apply?

For Medical Plan members:

- Members in Pastor's Participation who leave employment for a period of uniformed service receive 30 days of no-cost medical coverage.
- Members in Pastor's Participation will also receive 90 days of free death coverage.
- There is no charge to the employer or the member for this no-cost coverage.

What about 403(b) plans?

Special rules apply to 403(b) plans and other defined contribution plans. A member may take a penalty-free distribution from his or her account in the 403(b)(9) Retirement Savings Plan of the Presbyterian Church (U.S.A.) (RSP) if his or her deployment is 180 days or longer. Any member who wishes to receive such a distribution must contact the Board of Pensions, rather than Fidelity Investments, with his or her request. Upon the member's return from active military service, he or she can make contributions to an IRA in an amount up to the amount of the penalty-free distribution (regardless of the otherwise applicable limits on IRA contributions) during the two-year period beginning the day after the end of the member's active military service.

If a member performs active duty services for a period of more than 30 days, he or she is treated as having terminated employment for RSP distribution purposes and may request a distribution from his or her plan account. If a member takes such a distribution, he or she cannot contribute to the plan for a period of six months.

Members receiving a military pay differential from an employer can include the amount in determining 403(b) contributions.

An employee returning from military leave must be given the opportunity to participate through "make-up" salary reduction contributions to the plan. Upon re-employment, an employer must make up any scheduled employer contributions which were not made during the uniformed service. Finally, USERRA also permits the suspension of a plan loan during military service.

What about Flexible Spending Accounts?

USERRA members who contributed to an employer flexible spending account (FSA) may take a refund of the contributions at the end of a calendar year due to the mobilization interfering with the ability to spend the FSA contributions as expected (assuming the terms of the FSA have been amended to permit such a refund).

Are optional coverages from the Board available during a military leave?

The member and/or the employer may elect to continue these coverages while in active military service but not beyond five years of military service. If the member desires to pay the dues directly, the member must notify the Board. The member will have the same enrollment options as any Benefits Plan member on transitional status.

What are the healthcare coverage options when an employee's leave is completed?

TRICARE coverage continues for 180 days at no cost to those returning from a call to active duty of more than 30 days in support of a contingency operation. Members returning to employment can either:

- immediately resume medical coverage through the Benefits Plan, or
- continue to use TRICARE coverage for 180 days.

If a member chooses to return to the Medical Plan provided through the Benefits Plan, the employer will resume paying dues. If the member prefers to remain on TRICARE coverage, the

employer will be relieved of medical dues for 180 days. The option that the member selects will apply to all family members.

The Board will require written documentation from the service branch the member served in stating eligibility, that the member accepted the extended TRICARE coverage, and the duration of that coverage.

Is that all?

No. Some state laws provide for additional or different rights for employees on military leave.

For example, the Pennsylvania Military Leave of Absence Act, 51 Pa. C.S.A. § 7301, *et seq.*, parallels USERRA rights in certain respects, reduces rights in others, and may add several new obligations.