

Important notice

Federal information on reemployment under Uniformed Services Employment and Reemployment Rights Act (USERRA) for reemployment on or after December 12, 1994

Disclaimer

This USERRA guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the federal and state statutes or the PERS and OPSRP administrative rules.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a reemployment law. Once a member qualifies for reemployment, the member is entitled to the applicable retirement benefits provided under Oregon Administrative Rules 459-011-0100 (PERS), 459-011-0110 (PERS), 459-075-0100 (OPSRP) and 459-080-0100 (OPSRP).

The first step an employer must take is to determine whether the returning employee is entitled to reemployment under USERRA. **Determining the right to reemployment is the employer's responsibility.**

Who is eligible for reemployment under USERRA?

USERRA provides reemployment rights to members who performed service in the uniformed services. "Uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- active duty,
- active duty for training,
- initial active duty for training,
- inactive duty training,
- full-time National Guard duty,
- absence from work for an examination to determine a person's fitness for any of the above types of duty, funeral honors duty performed by National Guard or reserve members, or
- duty performed by intermittent disaster response personnel for the Public Health Service and approved training to prepare for such service.

The "uniformed services" consist of:

- Army, Navy, Marine Corps, Air Force, or Coast Guard;
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve;
- Army National Guard or Air National Guard;
- Commissioned Corps of the Public Health Service; or
- any other category of persons designated by the president in time of war or emergency.

There are many federal requirements to becoming qualified for reemployment rights under USERRA. The general steps for eligibility are listed below.

Step 1: Notice

The first step to qualify for reemployment rights under USERRA is notice. The law requires all employees to provide their employers with advance notice of military service. Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if military necessity, as defined by federal statute, prevents the giving of notice or if the giving of notice is impossible or unreasonable.

Step 2: Length of Service

The total length of service that causes a person's absence from a position may not exceed five years. Most types of service will be cumulatively counted in the computation of the five-year period. There are, however, eight exceptions from the five-year limitation. If a member falls into one of the exemptions listed below, his/her total length of service may be for longer than five years and he/she may still qualify for reemployment under USERRA. Determining whether a member qualifies for an exception would be based on information provided by the employee to the employer.

Exceptions:

1. Service required beyond five years to complete an initial period of obligated service. Some military specialties require initial active service obligations beyond five years.
2. Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit. For example, the five-year limit will not be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date.
3. Required training for reservists and National Guard members. The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members, as well as additional training requirements certified in writing by the secretary of the member's branch of service are exempt from the five-year limitation.
4. Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security-related situations.
5. Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the president or Congress. This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.
6. Active duty (other than for training) by volunteers supporting "operational missions" in circumstances other than war or national emergency for which selected reservists have been ordered to active duty, under presidential authorization, without their consent.
7. Service by volunteers who are ordered to active duty in support of a "critical mission or requirement," as designated by the secretary of their branch, in times other than war or national emergency and when no involuntary call up is in effect.
8. Federal service by members of the National Guard called into action by the president to suppress an insurrection, repel an invasion, or to execute the laws of the United States.

Disqualifying service

The following circumstances would disqualify a member from reemployment, and accordingly, from the retirement benefits provided under the PERS and OPSRP administrative rules.

1. Separation from the service with a dishonorable or bad conduct discharge.
2. Separation from the service under other than honorable conditions. Each military branch has regulations for defining what is "other than honorable."

3. Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war.
4. Dropping an individual from the rolls when the individual has been absent without authority for more than three months or who is imprisoned by a civilian court.

Step 3: Reporting back to work

Time limits: Depends on the duration of a person's military service (taking exceptions into account). The time period in which a member must return to work, or apply for reemployment, differs depending on the length of service as described below:

1. **Fitness exam.** The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as for persons who are absent for 1 to 30 days (see below). This period will apply regardless of the length of the person's absence.
2. **Service of 1 to 30 days.** The member must report to his/her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an eight-hour rest period.
3. **Service of 31 to 180 days.** An application for reemployment must be submitted no later than 14 days after completion of a person's service. If the 14th day falls on a day when the offices are not open or there is otherwise no one available to accept the application, the time extends to the next business day.
4. **Service of 181 or more days.** An application for reemployment must be submitted no later than 90 days after completion of a person's military service. If the 90th day falls on a day when the offices are not open or there is otherwise no one available to accept the application, the time extends to the next business day.

Disability: The reporting or application deadlines are extended for up to two years for persons hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

Unexcused delay: A person's reemployment rights are **not** automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits. However, the person will be subject to the employer's rules governing unexcused absences.

Step 4: Documentation needed by employee

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- the person's application for reemployment is timely,
- the person has not exceeded the five-year service limitation, and
- the person's separation from service was other than disqualifying (see above).

If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

PERS and OPSRP contributions: If a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will have to be made for persons who are absent for 90 or fewer days even without the documentation.

Step 5: How to place returning eligible persons in a job

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1. **1 to 90 days.** A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:
 - A. In the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or,
 - B. In the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph A after reasonable efforts by the employer to qualify the person.

If the employee cannot become qualified for either position described in A or B above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. With respect to the positions in A and B, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

2. **91 or more days.** The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:
 - A. In the job the person would have held had the person remained continuously employed or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or,
 - B. In the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph A after reasonable efforts by the employer to qualify the person.

If the employee cannot become qualified for the position either in A or B above, then the employer may employ the person in any other position of lesser status and pay, but that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

The employee must be put into the position he/she most likely would have been in had they not left for military service. The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training and any training necessary to update a returning employee's skills

in situations where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation and pay that the person is qualified to perform (the third reemployment position in the above schemes).

The law specifies that returning service members be “promptly reemployed.” What is prompt will depend on the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member’s position and who might possibly have to vacate that position.

Disabilities incurred or aggravated while in military service

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in military service:

1. The employer must make reasonable efforts to accommodate a person’s disability so that the person can perform the position that person would have held if the person had remained continuously employed.
2. If, despite reasonable accommodation efforts, the person is not qualified for the position in (1) due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.
3. If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person’s case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

The law covers all employers, regardless of size.

Conflicting reemployment claims

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Exceptions to reemployment

Changed circumstances

Reemployment of a person is excused if an employer’s circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue hardship

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause “undue hardship.”

Forfeiture of rights

If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness or is otherwise coerced, the waiver will be ineffective.

Employees that file a notice of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Additional rights of reemployed persons

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of non-military leaves of absence, the service member is entitled to the most favorable treatment so long as the non-military leave is comparable. For example, a three-day bereavement leave is not comparable to a two-year period of active duty.

The returning employees shall be entitled not only to non-seniority rights and benefits available at the time they left for military service, but also those that became effective during their service.