

Military Breaks in Service Information

The Office of the State Auditor contacted Kevin D. Nagel, Veterans' Employment and Training Service Director with the U.S. Department of Labor, following the August 7, 2008 Defined Contribution Plan Sub-Group meeting. We asked Mr. Nagel several questions regarding relief association service credit for members absent due to a military break in service. The questions and Mr. Nagel's responses are provided below.

Q: Are there differences in how service is credited between defined contribution plans and defined benefit plans? If so, what are the differences?

A: See 1002.265 for differences. (Copy attached.)

Q: Must members return to service with their respective plan upon reemployment for at least a certain length of time?

A: No timeframe is specified.

Q: State law specifies that members "may obtain service credit." Is it mandatory that members meeting the minimum eligibility requirements be credited with service during their military break? Does language need to be included in a relief association's bylaws in order to provide the service credit?

A: If I understand this question, the military member's active duty time counts for seniority purposes. Therefore, this seniority is also applied to their pension. This includes the authorized time servicemembers have before they report back to work (example: A servicemember is deployed for 9 months on active duty. Upon return that servicemember has up to 90-days to return to work. That period of time counts towards pension).

Q: Can the five-year cap on service credit be increased under state law? For example, could state law be changed to allow members on a military break in service to be gone for a period of up to ten years and still receive relief association service credit for the entire period?

A: USERRA states a five-year limit with several caveats (see Section 1002.99). As one example, many active duty periods, such as Operation Iraqi Freedom and Operation Enduring Freedom (our two current wars) are not counted against the five-year limit. The State can go beyond this if they want however USERRA does not require it. And, under USERRA, it is feasible a servicemember could be deployed for more than five years but not reach that ceiling because of the type of orders they are on.

Q: Is the five-year cap per-deployment, or is it a total cap? For example, a member had a military break in service for three years, was reemployed, and then had a military break in service for another three years. Is service credit to the member capped at five years, or does the member receive service credit for all six years that he or she was gone, since each period was below the five-year cap?

A: The five-year limit is per employer, not per event. Your example would probably disqualify the individual if they enlisted for two separate three year terms.

Q: Because relief associations provide pension coverage for volunteer firefighters, the plan members usually have other, non-firefighting, full-time jobs. Occasionally, a volunteer firefighter is employed in a position with the military for his or her full-time career. Are members that are employed full-time by the military treated differently for relief association pension purposes if they are gone on a military break in service?

A: You would treat all members the same way.

Q: What steps must members take before leaving for military service and upon their return to be eligible for service credit with the relief association?

A: To be eligible there are five steps. First, the serviceperson must provide notice they are leaving for service. This can be written or orally (we recommend both). They must enter the service after leaving their employer. They must not exceed the five-year limit (again, many current active duty periods are not counted against that ceiling). They must make a timely application for reemployment (see Section 1002.115 for the timeframes) and they must have a qualifying discharge (see Section 1002.135).



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series of unlikely events could have prevented the employee from gaining the right or benefit.

Disabled Employees

§ 1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her to become qualified to perform the duties of one of these positions:

(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,

(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

§ 1002.226 If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?

(a) USERRA requires that the employee be qualified for the reemployment position regardless of any disability. The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

(b) "Qualified" has the same meaning here as in § 1002.198.

Rate of Pay

§ 1002.236 How is the employee's rate of pay determined when he or she returns from a period of service?

The employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:

(a) If the employee is reemployed in the escalator position, the employer must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the employee missed a merit pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the employee missed during service is based on a skills test or examination, then the employer should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the

employee's employment not been interrupted by uniformed service.

(b) If the employee is reemployed in the pre-service position or another position, the employer must compensate him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

Protection Against Discharge

§ 1002.247 Does USERRA provide the employee with protection against discharge?

Yes. If the employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause—

(a) For 180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,

(b) For one year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?

The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.

(a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.

(b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.

Pension Plan Benefits

§ 1002.259 How does USERRA protect an employee's pension benefits?

On reemployment, the employee is treated as not having a break in service with the employer or employers

maintaining a pension plan, for purposes of participation, vesting and accrual of benefits, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.

(a) Depending on the length of the employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See § 1002.115). This period of time must be treated as continuous service with the employer for purposes of determining participation, vesting and accrual of pension benefits under the plan.

(b) If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employer for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?

(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. Any such plan maintained by the employer or employers is covered under USERRA. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by a State, government entity, or church for its employees.

(b) USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. 8432b.

§ 1002.261 Who is responsible for funding any plan obligation to provide the employee with pension benefits?

With the exception of multiemployer plans, which have separate rules discussed below, the employer is liable to the pension benefit plan to fund any obligation of the plan to provide benefits that are attributable to the employee's period of service. In the case of a defined contribution plan, once the employee is reemployed, the employer must allocate the amount of its make-up contribution for the employee, if any; his or her make-up employee

contributions, if any; and his or her elective deferrals, if any; in the same manner and to the same extent that it allocates the amounts for other employees during the period of service. In the case of a defined benefit plan, the employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When is the employer required to make the plan contribution that is attributable to the employee's period of uniformed service?

(a) The employer is not required to make its contribution until the employee is reemployed. For employer contributions to a plan in which the employee is not required or permitted to contribute, the employer must make the contribution attributable to the employee's period of service no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable.

(b) If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer.

(c) If the employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution because the employer is required to make contributions that are contingent on or attributable to the employee's contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the employee's make-up contributions or elective deferrals must be made

according to the plan's requirements for employer matching contributions.

(d) The employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals the employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.

§ 1002.263 Does the employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

§ 1002.264 Is the employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?

Yes, provided the plan is a defined benefit plan. If the employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the employee must repay includes any interest that would have accrued had the monies not been withdrawn. The employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employer and the employee), provided the employee is employed with the post-service employer during this period.

§ 1002.265 If the employee is reemployed with his or her pre-service employer, is the employee's pension benefit the same as if he or she had remained continuously employed?

The amount of the employee's pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the employee's benefit will be the same as though he or she had remained continuously employed during the period of service.

(b) In a contributory defined benefit plan, the employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

(c) In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

§ 1002.266 What are the obligations of a multiemployer pension benefit plan under USERRA?

A multiemployer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multiemployer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multiemployer plans, as follows:

(a) The last employer that employed the employee before the period of service is responsible for making the employer contribution to the multiemployer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the employee.

(b) An employer that contributes to a multiemployer plan and that reemploys the employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within

which the reemploying employer must provide written notice to the multiemployer plan pursuant to this subsection does not begin until the employer has knowledge that the employee was reemployed pursuant to USERRA.

(c) The employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multiemployer plan, provided that the pre-service employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

§ 1002.267 How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

(b)(1) Where the rate of pay the employee would have received is not reasonably certain, such as where compensation is based on commissions earned, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.

(2) Where the rate of pay the employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

Subpart F—Compliance Assistance, Enforcement and Remedies

Compliance Assistance

§ 1002.277 What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Secretary, through the Veterans' Employment and Training Service (VETS), provides assistance to any person or entity with respect to employment and reemployment rights and benefits under USERRA. This assistance includes a wide range of compliance assistance outreach activities, such as responding to

inquiries; conducting USERRA briefings and Webcasts; issuing news releases; and, maintaining the elaws USERRA Advisor (located at <http://www.dol.gov/elaws/userra.htm>), the e-VETS Resource Advisor and other web-based materials (located at <http://www.dol.gov/vets>), which are designed to increase awareness of the Act among affected persons, the media, and the general public. In providing such assistance, VETS may request the assistance of other Federal and State agencies, and utilize the assistance of volunteers.

Investigation and Referral

§ 1002.288 How does an individual file a USERRA complaint?

If an individual is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employer has failed or refused, or is about to fail or refuse, to comply with the Act, the individual may file a complaint with VETS or initiate a private legal action in a court of law (see § 1002.303). A complaint may be filed with VETS either in writing, using VETS Form 1010, or electronically, using VETS Form e1010 (instructions and the forms can be accessed at <http://www.dol.gov/elaws/vets/userra/1010.asp>). A complaint must include the name and address of the employer, a summary of the basis for the complaint, and a request for relief.

§ 1002.289 How will VETS investigate a USERRA complaint?

(a) In carrying out any investigation, VETS has, at all reasonable times, reasonable access to and the right to interview persons with information relevant to the investigation. VETS also has reasonable access to, for purposes of examination, the right to copy and receive any documents of any person or employer that VETS considers relevant to the investigation.

(b) VETS may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience or resistance to the subpoena, the Attorney General may, at VETS' request, apply to any district court of the United States in whose jurisdiction such disobedience or resistance occurs for an order enforcing the subpoena. The district courts of the United States have jurisdiction to order compliance with the subpoena, and to punish failure to obey a subpoena as a contempt of court. This paragraph does not authorize VETS to seek issuance of a subpoena to the legislative or judicial branches of the United States.