

## **MILITARY LEAVE**

**PURPOSE:** To ensure all County Departments, managers and supervisors are knowledgeable of the Federal, State and County regulations guiding military leave of absence.

**SCOPE:** This policy applies to all County Departments and to all requests for military leave of absence.

### **POLICY STATEMENT:**

Employer obligations to provide military leave and reinstatement rights for employees are addressed in both Federal and State Statutes: the Uniformed Services Employment and Reemployment Rights Act (USERRA) effective December 12, 1994, as amended December 19, 2005, and ORS 408.240 to 408.290.

These laws provide civilian job protection and benefits for employees, veterans and members of the U.S. Armed Services, National Guard and Reserves, who voluntarily or involuntarily take a leave of absence for military service or training. Oregon law also provides an annual paid leave of absence to some public employees who have worked for the same employer for six (6) months or more and who are taking part in annual active duty for training.

### **CRITERIA FOR PROTECTED MILITARY LEAVE**

There are four criteria for an employee to have reinstatement rights following a military leave of absence, both short-term absences for training and longer absences for military service. The criteria are:

1. The employee must provide notice to the County that leave is needed for military training or service.
2. The leave must not exceed five-years of cumulative service (not including periodic absences for training).
3. The employee must be released from service under honorable conditions.
4. The employee must report back to work in a timely manner or make timely application for reemployment.

### **NOTICE REQUIREMENT**

An employee must give advance written or verbal notice to the County for any leave of absence for military service or training. Advance notice is referenced by USERRA as "as much advance notice as possible." The only circumstance in which advance notice is not required is "if the

giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable.” Examples include a classified recall of military personnel or when the employee cannot give notice due to failure of the phone system, mail system, or other means of delivering notice. Military leave must be granted by the County and the employee shall be considered to be on leave of absence for the period of military service.

### **DURATION OF SERVICE**

An employee may be absent for up to five (5) years (cumulative or consecutive) for military duty and retain reemployment rights. The following leaves do not count toward the cumulative five (5) year limit: 1) periodic and special Reserve training; 2) voluntary or involuntary service performed by Reserve and National Guard members in time of emergency, when Reserve Component members are being recalled; and 3) service that is performed if the person is unable to obtain orders releasing them prior to expiration of the five (5) year period and which was of no fault of their own.

An employee will be entitled to take leave beyond five (5) years if necessary to complete an initial period of obligated service (i.e., a six year tour in the Navy’s nuclear power program).

### **REPORTING BACK TO WORK**

Employees absent on leave for military training or service are eligible for reinstatement to their former or equivalent position. As a condition of reinstatement the employee must be discharged under honorable conditions and return to work or apply for reemployment under the following timelines:

- **Periods of training or service up to 30 consecutive days:** The employee must report back to work on the first full work shift following completion of military service and the expiration of eight hours following safe transportation to the employee’s residence.
- **Periods of training or service between 31-180 days:** The employee must “submit an application for reemployment” or register an intent to return, not later than 14 days after the completion of the service.
- **Periods of training or service of 181 days or more:** The employee must “submit an application for reemployment” or register an intent to return not later than 90 days after completion of the period of service, or from hospitalization continuing after discharge for a period of not more than a year.

When “submitting an application for reemployment” the employee is notifying the County that he/she is a former employee returning from military service and not a new applicant. The application need not be in writing, but the County may require documentation of service to establish if the application for reemployment is timely and to verify the service has not exceeded five (5) years (via a DD-214, an endorsed copy of military orders or a letter from the Commanding Officer).

The laws require the following in returning an employee from military leave:

- The employee must be “promptly reemployed” which is defined by law to be a matter of

days, not weeks or months.

- An employee returning from military leave is entitled to reinstatement to their former position or an equivalent position if the former position no longer exists. Reinstatement shall be made regardless of another individual filling the position on a temporary basis while the employee was on leave.
- Employees returning from military leave have special protection against discharge, except for cause, for a limited time. If the period of service was for 181 days or more, the period of special protection is one (1) year. If the period of service was 31-180 days, the period of special protection is 180 days.
- The County must make “reasonable efforts” to train or retrain an employee returning from leave.

### **LEAVE OF ABSENCE WITH PAY**

Any employee who has served in the County for six (6) months preceding notification of military leave is entitled to a leave of absence with pay and benefits not to exceed “fifteen (15) days in any one training year” (ORS 408.290). The State Attorney General wrote an opinion dated October 22, 1984 that stated the fifteen (15) calendar days is equivalent to eleven (11) paid work days for an employee on a five day work week or nine (9) days for an employee on a regularly scheduled four day work week. Leave paid by the County shall not exceed these amounts per training year. For employees serving more than two (2) calendar weeks in active duty or training, the first eleven (11) or nine (9) work days, as specified above, in a training year may be credited towards military leave with pay. The term “training year” refers to the federal fiscal year defined as October 1 through September 30.

Such leave may be taken consecutively or intermittently throughout the year. These leaves of absence with pay are generally used for annual duty and training associated with State National Guard or reserve units of the United States Military. An employee must show proof of military service to have time credited towards leave of absence with pay. If the employee does not show proof of military service either in advance or upon return to work, time away from work may be credited towards vacation or leave without pay, employee’s choice.

Employees should refer to the section of their union contract regarding military leaves, for specific language that may add to this policy.

### **VACATION DONATION PROGRAM**

The vacation donation program is intended to provide a means to assist employees on military leave whose rate of pay on active duty is less than what he/she earns in base wages as a County employee for a period of up to six months. Recipients of donated vacation may not receive more compensation under this program than they would have earned had they not been on military leave. This program does not apply to routine training or other similar activities of the National Guard or the military reserves.

The employee going on military leave must provide written documentation of the rate of pay the employee will receive for the anticipated duration of the military leave, including any differentials or special pay, and the date the employee is expected to be released from active duty. If the employee will receive more in military pay than his/her base pay, the employee is not eligible for

the vacation donation program.

Employees may donate vacation time in whole hours only. The dollar value of the donated vacation hours will be calculated by multiplying the donor's hourly rate times the number of hours donated. Donors must sign a declaration that the donation is voluntary, is intended as a gift, and has been made without coercion, compensation or other consideration. Donations are irrevocable, even if the employee returns from military leave sooner than expected.

During the six month eligibility period and so long as donated hours are available, recipients will receive a salary payment on their regularly scheduled pay day for an amount up to the difference between their military gross pay and their regular base pay, less any normal payroll deductions and withholdings. All payments made will be treated as wages and will be reported as such to all appropriate taxing authorities.

Employees are prohibited from threatening or coercing other employees concerning the vacation donation program, including but not limited to, pressuring another employee to donate vacation hours.

### **SERVICE ACCRUALS DURING MILITARY LEAVE**

All time spent on military leave counts towards continuous employment with the County. Military leave outside the annual entitlement for paid leave is considered unpaid leave (including any stipend provided through the donated vacation program) and therefore employees do not receive regular pay, or additional payments, such as longevity or incentive pay. However, upon their return to the County, the employee is entitled to begin at the seniority, salary step, level of leave accrual and additional payments as the employee would have achieved had they not left on military leave. If the employee had not completed probation prior to entering the military, the employee will be required to complete the remainder of the probation period upon return to County service.

All military leave must be reported on a Personnel Action form and identified as leave with pay or leave without pay. Leave with pay shall be the first eleven work days for an employee on a 5 day/week work schedule or the first nine work days for an employee on a 4 day/week schedule occurring between October 1 and September 30th. In addition the timesheets for the employee shall be designated for military leave with pay or military leave without pay. If an employee chooses to use vacation or compensatory time for additional days of training or weekend duty, this time is not required to be designated on a personnel action form.

### **BENEFITS DURING MILITARY LEAVE**

During military leave with pay, all employee benefits will continue, subject to Federal and state laws, rules and regulations and in accordance with provider contracts. During extended military leave without pay, County-paid health benefits for enrolled family members will be continued up to a maximum of twenty-four (24) months (or longer if required under the Affordable Care Act and related rules and regulations).

Under Federal law, active duty service members (including activated Guard/Reserve members) are required to enroll in a military health insurance plan and cannot be enrolled in other health insurance.

The subject of military leave is sufficiently complex to warrant careful consideration of any situation in which an employee provides notification of military training or service. If you have any questions, please contact the Department of Employee Services before taking action.

### **INTERNET LINKS**

US Department of Labor/Uniformed Services Employment and Reemployment Rights Act of 1994 as amended 12-19-05. (<http://www.dol.gov/vets>)

County Ordinance (<http://www.clackamas.us/code/documents/title2.pdf>)

## VETS USERRA Fact Sheet 3



### U.S. Department of Labor Program Highlights

Veterans' Employment and Training Service

#### **JOB RIGHTS FOR VETERANS AND RESERVE COMPONENT MEMBERS**

##### **The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA 38 U.S.C. 4301-4334)**

The Department of Labor, through the Veterans' Employment and Training Service (VETS), provides assistance to all persons having claims under USERRA.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) clarifies and strengthens the Veterans' Reemployment Rights (VRR) Statute.

USERRA protects civilian job rights and benefits for veterans and members of Reserve components. USERRA also makes major improvements in protecting service member rights and benefits by clarifying the law, improving enforcement mechanisms, and adding Federal Government employees to those employees already eligible to receive Department of Labor assistance in processing claims.

USERRA establishes the cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights to five years (the previous law provided four years of active duty, plus an additional year if it was for the convenience of the Government). There are important exceptions to the five-year limit, including initial enlistments lasting more than five years, periodic National Guard and Reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency. USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual's service as long as the basic eligibility criteria are met.

USERRA provides protection for disabled veterans, requiring employers to make reasonable efforts to accommodate the disability. Service members convalescing from injuries received during service or training may have up to two years from the date of completion of service to return to their jobs or apply for reemployment.

USERRA provides that returning service-members are reemployed in the job that they would have attained had they not been absent for military service (the long-standing "escalator" principle), with the same seniority, status and pay, as well as other rights and benefits determined by seniority. USERRA also requires that reasonable efforts (such as training or retraining) be made to enable returning service members to refresh or upgrade their skills to help them qualify for reemployment. The law clearly provides for alternative reemployment positions if the service member cannot qualify for the "escalator" position. USERRA also provides that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the non-seniority rights accorded other individuals on non-military leaves of absence.

Health and pension plan coverage for service members is provided for by USERRA. Individuals performing military duty of more than 30 days may elect to continue employer sponsored health care for up to 24 months; however, they may be required to pay *up to* 102 percent of the full premium. For military service of less than 31 days, health care coverage is provided as if the service member had remained employed. USERRA clarifies pension plan coverage by making explicit that all pension plans are protected.

The period an individual has to make application for reemployment or report back to work after military service is based on time spent on military duty. For service of less than 31 days, the service member must return at the beginning of the next regularly scheduled work period on the first full day after release from service, taking into account safe travel home plus an eight-hour rest period. For service of more than 30 days but less than 181 days, the service member must submit an application for reemployment within 14 days of release from service. For service of more than 180 days, an application for reemployment must be submitted within 90 days of release from service.

USERRA also requires that service members provide advance written or verbal notice to their employers for all military duty unless giving notice is impossible, unreasonable, or precluded by military necessity. An employee should provide notice as far in advance as is reasonable under the circumstances. Additionally, service members are able (but are not required) to use accrued vacation or annual leave while performing military duty.

The Department of Labor, through the Veterans' Employment and Training Service (VETS) provides assistance to all persons having claims under USERRA, including Federal and Postal Service employees.

If resolution is unsuccessful following an investigation, the service member may have his or her claim referred to the Department of Justice for consideration of representation in the appropriate District Court, at no cost to the claimant. Federal and Postal Service employees may have their claims referred to the Office of Special Counsel for consideration of representation before the Merit Systems Protection Board (MSPB). If violations under USERRA are shown to be willful, the court may award liquidated damages. Individuals who pursue their own claims in court or before the MSPB may be awarded reasonable attorney and expert witness fees if they prevail.

Service member employees of intelligence agencies are provided similar assistance through the agency's Inspector General.

For more information about U.S. Department of Labor employment and training programs for veterans, contact the Veterans' Employment and Training Service office nearest you, listed in the phone book in the United States Government under the Labor Department or visit our site:

<http://www.dol.gov/vets/aboutvets/contacts/main.htm>.





# YOUR RIGHTS UNDER USERRA THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

**USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.**

## REEMPLOYMENT RIGHTS

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- ★ you ensure that your employer receives advance written or verbal notice of your service;
- ★ you have five years or less of cumulative service in the uniformed services while with that particular employer;
- ★ you return to work or apply for reemployment in a timely manner after conclusion of service; and
- ★ you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

## RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION

If you:

- ★ are a past or present member of the uniformed service;
- ★ have applied for membership in the uniformed service; or
- ★ are obligated to serve in the uniformed service;

then an employer may not deny you:

- ★ initial employment;
- ★ reemployment;
- ★ retention in employment;
- ★ promotion; or
- ★ any benefit of employment

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

The rights listed here may vary depending on the circumstances. This notice was prepared by VETS, and may be viewed on the internet at this address: <http://www.dol.gov/vets/programs/userra/poster.htm>. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying this notice where they customarily place notices for employees.

## HEALTH INSURANCE PROTECTION

- ★ If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- ★ Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

## ENFORCEMENT

- ★ The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.
- ★ For assistance in filing a complaint, or for any other information on USERRA, contact VETS at **1-866-4-USA-DOL** or visit its **website at <http://www.dol.gov/vets>**. An interactive online USERRA Advisor can be viewed at <http://www.dol.gov/elaws/userra.htm>.
- ★ If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice for representation.
- ★ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.



U.S. Department of Justice



U.S. Department of Labor  
1-866-487-2365



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