



Rights and Responsibilities Under USERRA

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Seven years after the invasion of Iraq, the U.S. military continues to be stretched thin; 98,000 U.S. troops remain in Iraq as of February 28, 2010, and 30,000 more U.S. troops will be deployed to Afghanistan by the summer of 2010. A large portion of these service members are drawn from the ranks of reservists and National Guard members. You may be one of them. Some of them may be your professional colleagues, partners or employees. Some may be your family members.

Members of the uniformed services and certain others are protected by the federal law known as the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet eligibility criteria. Enacted in 1994, USERRA revised and updated the 1940 Veterans' Reemployment Rights Act (VRRRA). USERRA's stated goals include "encourag(ing) non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service," and "minimiz(ing) the disruption to the lives of persons perform-

ing service in the uniformed services as well as to their employers." Department of Labor regulations under the law are available at www.dol.gov/vets/regs/fedreg/final/2005023961.pdf.

The courts are beginning to examine and rule on USERRA claims. In the recent case, *Dees v. Hyundai Motor Manufacturing Alabama, LLC*, the Federal Court of Appeals for the 11th Circuit concluded that the employee claimant, a member of the National Guard, had failed to prove that he was discriminated against and ultimately fired because of his membership and service. The court agreed with Hyundai that the claimant was fired for reasons unrelated to his National Guard membership.



Who is eligible?

USERRA protects members of the uniformed services (Army, Navy, Air Force, Marines and Coast Guard, including the Reserve components of any of those branches, and National Guard members on federally-funded state active duty), the commissioned corps of the Public Health Service and those intermittent disaster

response appointees who serve on Disaster Medical Assistance Teams. National Guard members on purely state-funded duty are not eligible. Note that members of National Disaster Medical System (NDMS), including Federal Emergency Management Agency (FEMA), are intermittent federal employees, considered members of the "uniformed services" for all purposes of USERRA. There is no small business or employer hardship exception.

In order to qualify for protection, the service member must meet the following criteria:

- The service member must hold or have applied for a civilian job and have left his or her job for the purpose of performing uniformed service.
- The service member must have given prior written or verbal notice to the civilian employer prior to leaving the job for training or service, except when precluded by military/NDMS necessity.
- The service member's cumulative periods of service for that particular employer must generally not exceed the five-year limit.
- The service member must have been released from the period of service without receiving a disqualifying discharge and must not have been terminated for misconduct while serving on a federal status, if an NDMS member.
- The service member must report back to the civilian job in a timely manner or submit a timely application for reemployment.

The five-year limit starts over when a service member starts employment with a new employer. Also, certain service does not count toward the five-year limit (service required to fulfill an initial period of obligated service; required drills and annual training and other training duty certified by the military and/or NDMS to be necessary for professional development or skill training/retraining; service performed during time of war or national emergency or for other critical homeland security missions/contingencies).

An employee may not be required to use vacation while performing military service.

A service member's duty to reapply or report for work after the end of a period of active service varies with the length of the active duty:

- If the service was up to 30 consecutive days, the service member must generally report to work for the first full regularly scheduled work period on the first full calendar day following the completion of the

period of service and safe transportation home, plus an eight-hour period for rest.

- For service lasting between 31-180 days, the service member must submit a written or verbal application for reemployment with the employer not later than 14 days after the completion of the period of service.
- For service lasting 181 days or more, the service member must submit an application for reemployment not later than 90 days after completion of the period of service.

Each of these deadlines may be extended if the service member is unable to meet them for reasons beyond his or her control, so long as the service member complies as soon as possible. Also, the deadlines may be extended for up to two years if the service member is hospitalized for or convalescing from an injury or illness that occurred or was aggravated during a period of service.

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Service members' rights under USERRA

An eligible returning service member is entitled to prompt reinstatement, seniority credit, pension credit, status protection from arbitrary dismissal and training or retraining. Special rules apply to extension of health coverage under COBRA during deployment and prompt reinstatement of employer-based health coverage upon return. Additional rules apply to qualified retirement plans; the service member is generally given credit toward vesting for the time spent in active duty.



the physician may request a pro rata refund of any premium that has been pre-paid by the physician or his or her employer. A tail policy may be necessary to maintain coverage during deployment if the physician has claims-made coverage. Upon the physician's return, the insurance carrier is required to reinstate the coverage at the same premium. Insurers are required to continue to defend pending cases. Any cases pending during deployment may be suspended until the service member returns.

Only "employment" protected

USERRA was intended to protect employment relationships only. Accordingly, partners in partnerships, shareholders in professional corporations and members of limited liability companies are not protected. Students, volunteers and independent contractors are also not protected under the law. However, an employment position need not be permanent, and the law may protect individuals who have temporary, part-time, seasonal, probationary or "at will" jobs. An individual who has been laid off or furloughed is still considered to hold a position of employment with the employer, so long as there is a possibility that the person will be called back to work when business conditions improve.

Hospital staff membership and clinical privileges are not employment, therefore USERRA does not guarantee reinstatement upon return from military service. Physicians should consult their hospitals' medical staff bylaws and review military leave policies.

Licensure issues

Most states, including Pennsylvania, have not addressed whether a physician on active duty must maintain his or her medical license. The physician should contact the State Board of Medicine to determine what steps should be taken regarding licensure, renewal and CME requirements during deployment. The board may grant extensions based on the facts and circumstances of the physician's situation. As always, make sure all communication with the board is fully documented.

Malpractice insurance and pending claims

A separate federal law, the Servicemembers Civil Relief Act (SCRA), provides that medical malpractice insurance may be suspended during a deployment, and

For more information on this topic, see a previous *Bulletin* article by Kathryn Zeltwanger, Esq., "Need to Know: Reservists and National Guard" (January 2007, page 24, available online at www.acms.org).

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