

USERRA-FMLA QUESTIONS AND ANSWERS

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THE EFFECT OF THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT ON LEAVE ELIGIBILITY UNDER THE FAMILY AND MEDICAL LEAVE ACT

- 1. What is the Uniformed Services Employment and Reemployment Rights Act (USERRA)?**

USERRA is a Federal law that provides reemployment rights for veterans and members of the National Guard and Reserve following qualifying military service. It also prohibits employer discrimination against any person on the basis of that person's past military service, current military obligations or intent to join one of the uniformed services. Enacted in 1994, USERRA traces its roots to 1940. It is codified at 38 U.S.C. § 4301 to § 4333.

- 2. What is the Family and Medical Leave Act (FMLA)?**

FMLA is a Federal law that provides "eligible" employees of a covered employer the right to take up to 12 workweeks of unpaid, job-protected leave, during any 12 months, for the birth and care of a newborn, adoption or foster care, or a serious health condition of the employee or certain family members. An "eligible" employee is one who meets certain requirements specified in the statute. FMLA was enacted in 1993 and is codified at 29 U.S.C. § 2601 to § 2654 and at 5 U.S.C. § 6381 to § 6387, relating to Federal civil service employees.

- 3. What are the leave eligibility provisions of the FMLA?**

In order to be eligible for leave under the FMLA, employees must meet several eligibility criteria. Two of these criteria affected by USERRA are: (1) the person must have been employed by the employer for at least 12 months; and (2) the person must have worked at least 1250 hours for that employer during the 12 month period preceding the start of the leave. The requirement of 1250 hours worked applies to persons employed by private employers, state and local governments, and the Postal Service.

- 4. What effect does USERRA have on these requirements?**

USERRA requires that service members who conclude their tours of duty and who are reemployed by their civilian employers receive all benefits of employment that they would have obtained if they had been continuously employed, except those benefits that are considered a form of short-term compensation, such as accrued paid vacation. If a service member had been continuously employed, one such benefit to which he or she might have been entitled is leave under the FMLA. The service member's eligibility will depend

upon whether the service member would have met the eligibility requirements outlined above had he or she not performed military service.

5. How should the 12-month FMLA requirement be calculated for returning service members?

USERRA requires that a person reemployed under its provisions be given credit for any months he or she would have been employed *but for* the military service in determining eligibility for FMLA leave. A person reemployed following military service should be given credit for the period of military service towards the months-of-employment eligibility requirement. Each month served performing military service counts as a month actively employed by the employer. For example, someone who has been employed by an employer for 9 months is ordered to active military service for 9 months after which he or she is reemployed. Upon reemployment, the person must be considered to have been employed by the employer for more than the required 12 months (9 months actually employed plus 9 months while serving in the military service) for purposes of FMLA eligibility. It should be noted that the 12 months of employment do not have to be consecutive to meet this FMLA requirement.

6. How should the 1250 hours-of-service requirement be calculated for returning service members?

An employee returning after military service should be credited with the hours-of-service that would have been performed *but for* the period of military service in determining FMLA eligibility. Accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1250 hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations. For example, an employee who works 40 hours per week for the employer returns to employment following 20 weeks of military service and requests leave under the FMLA. To determine the person's eligibility, the hours he or she would have worked during the period of military service ($20 \times 40 = 800$ hours) must be added to the hours actually worked during the 12-month period prior to the start of the leave to determine if the 1250-hour requirement is met.

7. Where can I get more information about USERRA?

The Department of Labor's Veterans' Employment and Training Service (VETS) administers USERRA, provides technical assistance/educational outreach, and investigates complaints. Information about USERRA is available on the VETS Web site. The address is <http://www.dol.gov/vets/>. There you will find USERRA information as well as a directory of local VETS offices.

This is one of a series of fact sheets highlighting U.S. Department of Labor programs. It is intended as a general description only and does not carry the force of legal opinion.