

USERRA Facts for Employers of NDMS Members

Note: This material is for information only and should not be considered as legal authority. While this fact sheet is directed to civilian employers of members of the National Disaster Medical System, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

If you need more information concerning specific situations, call the ESGR at (800) 336-4590.

Note: Where applicable, a relevant section number of Title 38 or Title 42, United States Code, is provided in parentheses after the answer.

1. One of my employees has just notified me that she is a member of the National Disaster Medical System (NDMS), Department of Health and Human Services (HHS). She also just notified me that she has been asked by NDMS to deploy to Florida tomorrow for hurricane victim medical assistance duty. She told me that she has the option to turn down an NDMS deployment, and I am short employees and need her to be at work for our organization. Do I have the right to refuse her request for leave of absence to do NDMS duty?

No. The Uniformed Services Employment and Reemployment Rights Act (USERRA), as codified at Title 38, U.S. Code, as amended by Title 42, U.S. Code section 300hh-11(e), provides that NDMS members are intermittent federal employees considered members of the “uniformed services” for all purposes of USERRA. Under USERRA, if a member of the uniformed services, including an NDMS member, provides the employer with advance notice, when practical, of federal activation on behalf of NDMS, even if such activation is voluntary service, the employer must allow the employee leave of absence and reinstate them to their prior employment (or equivalent employment) upon the employee’s request. There is no small business or employer hardship exception to federal deployment/activation. (38 USC 4312)

2. Is there a law governing an NDMS member’s right to reemployment rights after his or her completion of NDMS training or federal active service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights Act (VRRRA). On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act – a comprehensive revision of the VRRRA, USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code, at chapter 43. (Sections 4301 through 4333). NDMS members received USERRA protections in 2002, by Act of Congress, codified at 42 U.S.

Code § 300hh-11(e), Pub. L. 107-188, Section 102(a), June 12, 2002. (42 USC 300hh-11(e))

3. Who is eligible for reemployment rights under USERRA following military/NDMS federal active service?

The individual must meet five conditions, or "eligibility criteria." The individual:

- a. must hold or have applied for a civilian job. (Note: Jobs employers can show to be held for a brief, nonrecurring period with no reasonable expectation of continuing for a significant period do not qualify for protection.)
- b. must have given written or verbal notice to the civilian employer prior to leaving the job for military/NDMS training or service except when precluded by military/NDMS necessity.
- c. must not have exceeded the 5-year cumulative limit on periods of active federal service.
- d. must have been released from service under conditions other than dishonorable for military reservists and Guard, and must not have been terminated for misconduct while serving on a federal status, if an NDMS member.
- e. must report back to the civilian job in a timely manner or submit a timely application for reemployment. (generally, 38 USC 4312)

3. Are there reemployment rights following voluntary NDMS service? State or local government call ups?

USERRA applies to voluntary as well as involuntary NDMS service, in peacetime as well as wartime. However, like the VRR law, USERRA does not apply to state or local government call ups of the NDMS teams/personnel for disaster relief, riots, etc. (38 USC 4303)

4. When is prior notice to the civilian employer required? How is such notice to be given?

The person who is performing the service (or an official representative of NDMS) must give advance written or verbal notice to the employer.

The notice requirement applies to all categories of training or service. Notice is not required if precluded by NDMS necessity or, if the giving of such notice is otherwise impossible or unreasonable under the circumstances.

A determination of NDMS necessity shall be made pursuant to regulations prescribed by the Department of Defense or HHS for NDMS personnel. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but the Department of Defense and Department of Health and Human Services advise NDMS members that they should provide their employers with as much advance notice as possible under the circumstances. (38 USC 4312)

5. Is an employer entitled to proof that NDMS duty for which an employee was granted a leave of absence was actually performed?

Yes. USERRA provides that following periods of federal NDMS service of 31 consecutive days or more, the returning employee must, upon the employer's request, provide documentation that establishes length and character of the service and the timeliness of the application for reemployment. Reemployment may not be delayed, however, if such documentation does not exist or is not readily available. In general, the following documents have been determined by the Secretary of Labor to satisfy proof of eligibility for reemployment: discharge papers, leave and earnings statements, school completion certificate, endorsed orders, or a letter from a proper NDMS authority.

While USERRA does not address documentation of shorter periods of NDMS service, if doubt exists, an employer could contact the HHS/NDMS ombudsman about verification of a specific period of NDMS service. (38 USC 4312)

6. How is the 5-year limit computed?

Service in the uniformed services, except the types of service described below, counts toward the cumulative 5-year limit of active federal NDMS service a person can perform while retaining rights under USERRA. When a person starts a new job with a new employer, he or she receives a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8. USERRA's cumulative 5-year limit does not include certain kinds of NDMS training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

- a. Unable (through no fault of the individual) to obtain release from service or service in excess of five years to fulfill an initial period of obligated service (generally imposed on Active military component aviators or others who undergo extensive initial training in certain technical military specialties).
- b. Required NDMS training courses and other training duty certified by NDMS or NDMS's federal partner agencies (the U.S. Department of Veterans' Affairs, the U.S. Department of Homeland Security, and the U.S. Department of Defense) to be necessary for professional development or skill training/retraining. 42 U.S.C. Section 300hh-11(e).
- c. Service performed during time of national emergency or for other critical homeland security missions/contingencies (for NDMS members) requirements. Involuntary service of this type is exempt from the 5-year limit. NDMS voluntary service in support of a critical homeland security missions or contingencies is also exempt. (38 USC 4312)

7. Can an employee be required to use earned vacation while performing NDMS service?

No. As under the VRRRA law, a person may not be forced to use earned vacation. Employees are entitled to earned vacation or leave in addition to time off to perform NDMS service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and an employee's period of NDMS service happens to coincide with that period. (38 USC 4316)

8. Now that USERRA has been enacted, can a person serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military or NDMS service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits contained in the old law. (transition rules—not codified)

9. How much time off is an employee entitled to prior to reporting for military/NDMS service?

Although an exact amount of time is not specified in USERRA, an employee, at a minimum, needs to be given sufficient time to travel to the place where the NDMS duty is to be performed.

10. I provide a pay differential for my employees who are activated National Guard and Reserve members, if they make less on Reserve or Guard duty than they make working for our organization. Do I have to provide this pay differential for my NDMS employees under USERRA?

No. USERRA does not address the issue of pay differentials. This is an employer decision to provide a pay differential to support employees activated with the military Reserve and Guard forces or NDMS response disaster forces. If you provide such a pay differential for your military Reserve and Guard employees, you may want to consider providing a similar pay differential for your NDMS employees who provide valuable medical services to disaster victims.

11. After the completion of NDMS service, what is the time frame within which a person has to report back to work or apply for reemployment?

For periods of NDMS service of up to 30 consecutive days, the person must report back 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 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of the employee, he or she must report back as soon as possible after the expiration of the

8-hour period.

After a period of service of 31-180 days, the person 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. If submitting the application within 14 days is impossible or unreasonable through no fault of the employee, he or she must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, the person must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which a person was hospitalized for or convalescing from an injury or illness that occurred or was aggravated during a period of military/NDMS service. (38 USC 4312)

In either case, the person does not automatically forfeit the right to reemployment, but will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work." (38 USC 4312)

12. Does USERRA give a person the right to benefits from the civilian employer during a period of NDMS training or service?

Yes. USERRA gives an employee the right to elect continued employer health insurance coverage, for himself or herself and his or her dependents, during periods of NDMS service. For periods of up to 30 days of training or service, the employer can require the person to pay only the normal employee share, if any, of the cost of such coverage. For longer tours, the employer is permitted to charge the person up to 102 percent of the entire premium. If the employee elects coverage, the right to that coverage ends on the day after the deadline for him or her to apply for reemployment or 18 months after the absence from the civilian job began, whichever comes first.

USERRA gives an employee and previously covered dependents the right to immediate reinstatement of civilian health insurance coverage upon return to the civilian job. The health plan cannot impose a waiting period and cannot exclude the returning employee based on preexisting conditions (other than for those conditions determined by the Federal government to be service-connected). This right is not contingent on an election to continue coverage during the period of service. (38 USC 4317)

To the extent that an employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or a leave of absence, the employer is required to provide those same benefits to an employee during a period of service in the uniformed services. If the employer's

treatment of persons on leaves of absence varies according to the kind of leave (e.g., jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length. An employee may waive his or her rights to these other non-seniority benefits by knowingly stating, in writing, his or her intent not to return to work. However, such statement does not waive any other rights provided by USERRA. (38 USC 4316)

13. What is an employer required to provide to a returning NDMS member upon reemployment?

There are four basic entitlements (if the eligibility criteria in answer #2 are met):

- a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on the length of absence).
- b. Accrued seniority, as if continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
- c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
- d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year. (generally, Section 4313)

14. Is the returning employee always entitled to have the same job back?

No. USERRA provides that, if the period of service was less than 91 consecutive days, the person is entitled to the job he or she would have attained absent the NDMS service, provided the person is, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, the person is entitled to the job he or she left.

For periods of service of 91 days or more, the employer may reemploy the returning employee as above (i.e., position that would have been attained or position left), or in a position of "like seniority, status and pay" the duties which the person is qualified to perform. (38 USC 4313)

15. What if a person is not qualified for the reemployment position?

If a person has been gone from the civilian job for months or years, civilian job skills may have been dulled by a long period without use. A person must be (or become) qualified to do the job to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify that person. "Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If a person can't become qualified in the positions

described in #13 after reasonable efforts by the employer, and if not disabled, the person must be employed in any other position of lesser status and pay, which he or she is qualified to perform, with full seniority. (38 USC 4313)

16. What if a returning NDMS member is disabled?

USERRA also requires the employer to make "reasonable efforts" to accommodate persons with a disability incurred or aggravated during NDMS service. If a person returns from NDMS service and is suffering from a disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy the person in some other position he or she is qualified to perform and which is the "nearest approximation" of the position to which the person is otherwise entitled, in terms of status and pay, with full seniority.

A disability need not be permanent to confer rights under USERRA. For example, if a person breaks a leg during NDMS training or deployment, the employer may have an obligation to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg has healed. (Section 4313)

17. How does the new law address discrimination by an employer or prospective employer?

Section 4311(a) of USERRA provides as follows:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services [including NDMS] shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:

An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against employer discrimination, much broader than the VRRRA law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to

NDMS connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA. (38 USC 4311)

18. Who has the burden of proof in USERRA discrimination cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken by an employer will be unlawful if a service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership or obligation." (38 USC 4311)

19. Where do I go for information or assistance?

Employers should contact the Committee for Employer Support of the Guard and Reserve (ESGR). You can contact an ESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of NDMS, National Guard and Reserve members. As mediators, they act as neutrals, with a goal of helping bring about solutions to conflicts that are legal and equitable to each of the parties involved.

Sometimes, employers are particularly inconvenienced by the timing of proposed NDMS duty or training by an employee-NDMS member. For example, a scheduled NDMS training session by a "key" employee may disrupt a major project, special product promotion, annual inventory, etc.

In such cases, ESGR suggests employers contact the NDMS Team Leader involved to seek relief from the impending hardship. Experience has shown that NDMS team leaders are sensitive to employer concerns and can often assist, when homeland security requirements permit, by rescheduling the proposed NDMS duty or training or assigning someone else to perform it.

Ombudsman Services

NDMS members or their employers who experience problems resulting from employee participation in the NDMS, may request assistance from one of ESGR's ombudsmen.

Ombudsmen provide information about rights and responsibilities under the law and seek a solution through mediation that can provide quick problem resolution. This service (whether local or national) is informal; discussions are not entered into personnel records. The objective is to eliminate misunderstandings and resolve difficulties to the satisfaction of all.

The first attempt to resolve a problem should be made at the employer-employee level in an atmosphere of mutual cooperation. If that fails, NDMS team leaders should be consulted. Team leaders have a vested interest in the problem and may be able to explain the situation or suggest compromises that will satisfy everyone's needs. If those efforts fail, e-mail us at the address below and we'll put you in touch with an ombudsman who is qualified to help and is sympathetic to the needs of both employers and employees. As with all communications, you should provide full details of the problem, mailing and email addresses, and a telephone number where you can be reached.

For more information about ESGR Ombudsman Services, see ESGR's Website at :
www.esgr.org

Committee for Employer
Support of the Guard and Reserve
1555 Wilson Blvd, Suite 200
Arlington, VA 22209-2405
Toll-Free: 800-336-4590

Please note: ESGR's ombudsmen handle only employer-employee conflicts involving military/NDMS service. Recruiting and inspector general complaints should be forwarded to the appropriate agencies. None of the sources listed above have authority to enforce the law. Cases that require legal advice or assistance are referred to the United States Department of Labor Veterans Employment Training Service (DOL-VETS).

If you need more specific information on NDMS issues involving USERRA, contact:

National Disaster Medical System
USERRA Ombudsman
Department of Health and Human Services
ATTN: Gary Lindbergh
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