

## Reservists' Leave Rights

Employers should be aware of their rights and responsibilities regarding employees in the military reserves. The Uniformed Services Employment and Reemployment Rights Act (USERRA) governs the employment and reemployment rights of all federal uniformed service members and requires both private and public employers to provide employees with leave to serve in the military. USERRA also requires employers to reinstate employees returning from military leave.

### General Guidelines and Requirements:

1. All public and private employers, and their successors, must provide military leaves of absence to employees who must fulfill their military obligations.
2. Under USERRA, reemployment rights and benefits extend to all employees who must miss work to fulfill their commitment in the uniformed services. These services include the Army, Navy, Air Force, Marines (and the reserve units of the foregoing), the Army National Guard, the Air National Guard, full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of individuals the President may designate in a time of war or national emergency.
3. "Service in the uniformed services" under USERRA includes active duty, active duty for training, initial active duty for training, full-time National Guard duty, and absence from work for an examination to determine an individual's fitness for any of the above types of duties.
4. The employee or an appropriate military officer must give the employer advance notice (either written or oral) of the leave. No notice is required, however, if military necessity prevents the giving of notice or such notice is otherwise impossible or unreasonable.
5. The cumulative length of service that causes a person's absence cannot exceed five years, with certain exceptions, including service under an order to remain on active duty because of a war or national emergency declared by the President or Congress.
6. An employer cannot dictate either the frequency or length of military leave taken by its workers. Additionally, an employer cannot require employees to use earned vacation while performing military duty.
7. USERRA does not require employers to pay employees while they are absent on military duty. However, under the Fair Labor Standards Act, if employees are salaried and exempt, and are absent for less than a full week, they must still be paid their full salaries.
8. Depending on the length of leave, returning veterans must be reinstated either to the position they would have attained, their former position, or one with similar seniority, status, and pay.
9. Veterans must reapply or report back to work within certain time limits, anywhere from eight hours to 90 days after completion of service, depending on length of service. Reemployment rights are not automatically forfeited if the person fails to report to work or reapply within the required time limits, but the person will be subject to the employer's rules governing unexcused absences.
10. Veterans returning from active duty, once reinstated, cannot be fired except for cause for a period of one year if the service period was more than 180 days or for six months if the service period was more than 30 days. This includes employees who are employed at-will.
11. Benefits that normally accumulate during other types of leaves must also accumulate during military absences, in keeping with company policy.
12. Under USERRA, all employer health care plans must make immediate provision for continuing health care coverage to any employee (and his or her dependents) where (1) they were participants in the plan immediately before the uniformed leave of absence, and (2) the employee's absence was due to a uniformed service leave.

This applies even to employers who are not covered by COBRA. (COBRA is a federal law that helps workers and their families keep their group health coverage during times of voluntary and involuntary job loss, and transition between jobs; employers with fewer than 20 employees are exempt from COBRA.) Unlike COBRA, the right to continuation of coverage applies to all health plans not just to group health plans. Specific states may have statutes that provide greater or different protection for members of the uniformed services.

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# Retaliation Can Be A Costly Mistake

An increasingly popular claim by disgruntled employees is that of retaliation. An allegation of retaliation is now commonly included in an employment discrimination suit. According to the Equal Employment Opportunity Commission (EEOC), the number of retaliation charges has more than doubled in the last decade. Retaliation, once proven, violates both federal law – Title VII of the 1964 Civil Rights Act - and most state and local laws as well.

What is prohibited retaliation? Retaliation occurs when an employer impermissibly takes an adverse job action against an employee for exercising rights protected by law. Examples of an adverse job action include termination or demotion. Complaining within the company or to the EEOC about sexual advances by a supervisor or other discriminatory practices of an employer, or threatening to file a formal complaint concerning illegal corporate practices are examples of legally protected activities.

Importantly, even if an employer can successfully defend against a discrimination claim, for example, one based upon race or sex, the employee still might have a meritorious retaliation claim against the employer.

The law prohibits retaliation even if the complaint is not valid, as long as the employee had a reasonable, good faith belief that discrimination or harassment occurred. This means that even if the employee's claim of discrimination is rejected in court, the employee still might have a viable retaliation claim. When retaliation claims are found valid, large awards are often the result. In short, taking action against an employee for participating in legally protected activity is discriminatory, and entitles the employee to sue for compensatory damages, back pay, counsel fees and where the adverse action was willful, for punitive damages, too.

In order to meet his or her initial burden of proof, an employee suing for retaliation generally must show the following: (1) that he was engaged in legally protected activity; (2) that his employer took an adverse employment action against him; (3) that there is a causal link between the adverse employment action and the legally protected activity. Once these elements are shown to exist, to avoid liability, the employer must come forward and articulate a non-retaliatory reason for its action. Thereafter, the alleged victim must show that the employer's offered reason for taking the adverse employment action was a pretext or not worthy of belief and that discrimination is the real reason for the alleged wrongful conduct.

A successful retaliation claim can be very expensive to the employer. Consequently, it is imperative that employers take steps to avoid even the appearance of retaliation. This can be achieved by having the human resource or personnel department document consistently and accurately exactly why an adverse job action is being undertaken. Performance counseling, demotions and non-promotions need to be carefully documented and implemented consistent with an employer's prior practices

and existing policies. In addition, all managers and supervisors should receive training on the scope and illegality of employer retaliation. Finally, an employer should consult with an experienced employment attorney before taking any adverse job action against a worker whom has arguably engaged in legally protected activity.

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## Can I refuse to hire someone who has a criminal arrest or conviction record?

Increasingly, employers are facing the dilemma of how extensively they should pre-screen an applicant's criminal background. On the one hand, they wish to avoid negligent hiring suits for an employee's violent or harassing behavior. On the other hand, they fear accusations of discrimination. Although there is no federal statute that prohibits inquiries into arrest records, many states have enacted statutes that restrict or prohibit employers from inquiring about arrests.

The EEOC and many courts have taken the position that policies precluding the hiring of applicants with arrest records result in discrimination because members of some minority groups are arrested more often than non-minorities in proportion to their numbers in the population. Consequently, questions about arrest records can be viewed as a way to screen out applicants based on race. Even if employers do not use arrest record information in the hiring decision, the EEOC believes merely requesting such information tends to discourage minority applicants.

EEOC policy provides that arrest records alone cannot be used as an absolute bar to employment, but conduct that indicates unsuitability for a particular position is a basis for exclusion. If it appears that the applicant or employee engaged in the conduct for which s/he was arrested, the conduct is job-related, and the conduct occurred relatively recently, the employer may be justified in excluding the applicant/employee. Employers that fail to hire an applicant due to an arrest or conviction may be required in a subsequent discrimination suit to show that the criminal conduct directly diminished the applicant's suitability to perform the job. A refusal to hire must be job-related and consistent with business necessity.

If you do decide to inquire about an applicant's criminal record, the EEOC suggests that the following language appear near the inquiry:

*Conviction of a crime will not necessarily be a bar to employment. Factors such as age at the time of the offense, type of offense, remoteness of the offense in time and rehabilitation will be taken into account in determining the effect on suitability for employment.*

Since an applicant might not truthfully reveal his or her arrest or conviction record, and depending on the position and employer's needs, it may be prudent to check outside sources. Because some investigative methods may be unlawful or require certain disclosures to the applicant under federal or state law, you should consult counsel before adopting any investigative method other than job reference checks.

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# Employment Interview Basics

- ❑ Carefully review the employment application form before interviewing.
- ❑ Look for unexplained lapses of employment but avoid inquires into periods of disability revealed by the applicant.
- ❑ Make sure all questions on the employment application have been answered and that the application has been signed and dated.
- ❑ Interview questions are subject to the same cautions that accompany application questions. If it is not permissible to ask a question on an application, it is not permissible to ask it in an interview.
- ❑ It is important for employers to inform interviewers about the requirements of Title VII, the ADEA, and any applicable state law requirements and specifically detail what questions an interviewer may and may not ask. See, e.g., EEOC Enforcement Guidance on Pre-employment Disability-Related Questions and Medical Examinations, <http://www.eeoc.gov/docs/guidance-inquiries.html> and EEOC Enforcement Guidance: Workers' Compensation and The Americans with Disabilities Act, <http://www.eeoc.gov/docs/workcomp.html>.
- ❑ Employers are required to provide reasonable accommodations to applicants with disabilities. An employer should not engage in recruitment activities that exclude candidates with disabilities, such as participating in a job fair at a location that is not wheelchair accessible.
- ❑ Interviewers should not make statements about job security or continued employment, because it may be construed by applicants as "promises" that are enforceable contracts of employment. Interviewers should avoid predicting, promising, or guaranteeing about the position or the employer, and should use words such as "possible," "potential," and "maybe" when describing career opportunities.

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