



2201 Post Road, Suite 104, Austin, Texas 78704
tel. 512/447-7707, ext. 370 • fax. 512/447-3940 •
www.texasbar.org • info@texasbar.org

by Anna Maria Mendez

A Nonprofit Employers' Legal Obligations to Veterans

Employees who are called to military service are entitled to basic rights regardless of the size or type of organization for which they work. Both federal and state laws offer certain protections to employees returning to employment after performing military service.

Are there any restrictions on a nonprofit employers' actions regarding veterans?

Yes. The primary federal law that governs the rights of employees who are called to or return from military duty is the Uniformed Services Employment and Reemployment Rights Act of 1994, "USERRA". USERRA prohibits discrimination by employers (including nonprofit employers) against employees who serve in the United States armed services. This means that an employer cannot deny employment, reemployment, promotions, or any benefits of employment based on a person's membership, performance, or application to serve in the armed forces.

Is a nonprofit required to rehire employees returning from military service?

Yes. USERRA also guarantees reemployment of those who left employment for up to five years to fulfill a military duty. For purposes of job status, position, and amount of pay, USERRA treats time spent on military leave as if the absence never occurred. Upon returning from military service the employee must be reemployed in a position in which he or she would have held had there been no military absence as long as certain conditions are satisfied:

- the employee must have given notice to the employer that he or she was leaving for military service (unless notice is impossible or unreasonable due to military necessity);
- the cumulative military service must not have exceeded 5 years (though there are exceptions to this limit including initial periods of service that exceed 5 years and employees called to active duty because of war or national emergency);
- the employee must have been released under honorable (i.e. not punitive or dishonorable) conditions; and
- upon completion of military service, the employee must have notified the employer of his or her intent to return to an employment position within designated time periods which are based on the length of military service (from an 8-hour rest period to 90 days). A person who is hospitalized or recovering from a military service-related illness or injury may have up to 2 years after recovery to report or submit an application for reemployment to the employer. Even if the employee fails to report or reapply for reemployment within the specified time, the employee's rights to reemployment are not automatically forfeited.

What happens if the same position is not open when the veteran returns?

A returning veteran is entitled to return to the position that he or she would have held had the military absence not occurred, including any promotions or changes in responsibility. Even if the nonprofit filled the position during the interim, the nonprofit must nevertheless reemploy the returning veteran.

If the veteran is not qualified to perform in the new position, the employer must make reasonable efforts to train the veteran so that he or she has the requisite skills to perform the job. If the veteran is still unqualified to perform the job, the employer may return the veteran to the same position he or she was in at the time the military service began. The employer may not, however, reemploy the veteran in a position of less pay or status.

What if the employee becomes disabled during military service?

Employees with disabilities incurred in or aggravated by military service are protected on two levels: as a veteran under USSERA and as a disabled employee under the Americans with Disabilities Act (ADA).

Under USSERA, a nonprofit employer is obligated to make reasonable efforts to accommodate any disability a veteran incurs during military service so that the veteran may be placed in the position he or she would have held but for the military absence. If after such accommodations the disabled employee is still unable to perform the job, the employer must place the employee in a position that is equivalent (or as equivalent as possible) in seniority, status, and pay, and which the employee could perform with reasonable training efforts by the employer.

Furthermore, employers with 15 or more employees must comply with the ADA. The ADA prohibits discrimination on the basis of disability and requires the employer to make reasonable accommodations in order to give disabled employees equal employment opportunities. This could include making changes to the way a job is performed, making changes to the work environment such as modifying doorways or other facilities, or changing other work policies and procedures.

What happens if a nonprofit merges with another organization?

Even if a nonprofit merges with another organization during an employee's military absence, the new combined organization will most likely assume the reemployment obligation to employees on military leave. The key issue is whether the employee would have still been employed but for the military service.

Are employers ever exempted from the rehire requirement?

Yes. An employer is exempt from these reemployment requirements under limited circumstances:

- if reemployment would be impossible or unreasonable;
- if it would cause undue hardship for the employer; or
- if the position the employee had before leaving for military duty was for a brief or temporary period, and there was no reasonable expectation the employment would continue as a permanent position.

Even if an employee's job title is labeled "temporary," he or she may still have the right to reemployment upon returning from military service as long as the employee could have reasonably expected to have remained in that position but for the military call to duty. In these cases, the employer has the burden of proving the impossibility or unreasonableness, undue hardship, or lack of reasonable belief that the employment would have continued had the military absence not occurred.

Does USSERA affect returning employees' rights and benefits?

Yes. USSERA applies an "escalator" principle that entitles those returning to employment from military leave to the rights and benefits the person had and would have attained had he or she not left for military service.

Does an employee on military service accrue paid vacation or sick leave?

No. An employee on military leave will not accrue paid vacation or sick leave if employees on other types of leave do not accrue these benefits either.

How does USSERA affect pension and health benefits?

Time spent in military service is considered service with the employer for purposes of determining accrual of benefits under pension plans. If the employee has health coverage through his or her job, he or she may elect to continue coverage during the military leave for the lesser of two periods: either 18 months from the beginning of the military absence, or the day after the person fails to apply for or return to employment. If the employee does elect to continue health coverage, he or she may be required to pay up to 102 percent of the full premium under the health plan. Illnesses incurred in or aggravated during military service are not covered.

Must employers pay employees on military leave?

No. Employers are under no federal obligation to pay employees on military leave as long as employees on other leaves of absence are not paid either. The law does, however, specifically permit employees to apply any accrued paid vacation to the military absence. Although Texas law entitles government employees to up to 15 days a year of paid leave during military service, there is no parallel provision for employees of nonprofit organizations.

Does USSERA affect an Employment At Will policy?

Yes. Once a person returning from military service or training is reemployed, the employee may not be discharged without cause for 180 days to a year, depending on the length of the military absence. Although Texas's "at-will" employment doctrine generally allows an employer to terminate an employee for any reason or no reason at all, USSERA states that, for a specified amount of time, the employer must have a reason for terminating an employee who is reemployed after returning from military service.

Does military service count toward eligibility for FMLA leave?

Yes. The Department of Labor has issued a memorandum clarifying the applicability of the Family and Medical Leave Act (FMLA) to employees returning from military

service. Generally, employers who employ 50 or more employees are covered by the FMLA. These employers must give eligible employees up to 12 weeks of unpaid FMLA leave for the birth, adoption, or foster care of a child, to care for the serious health condition of a child, spouse, or parent, or because of the employee's own serious health condition.

In order to be considered eligible for FMLA leave, the employee must have worked for the employer for at least 12 months and 1250 hours, not including hours spent on paid or unpaid leave. Although for purposes of rights and benefits those on military leave are treated as if they were on a leave of absence (either paid or unpaid), the Department of Labor has stated that the time an employee in the armed forces would have worked but for the military duty counts toward the 12 month and 1250 hour requirement.

This means that, upon returning from military absence, an employee may immediately be eligible for FMLA leave even if he or she was deployed for the past year. For example, an employee returning after military service who requires physical therapy sessions or other treatments that, if left untreated would result in incapacity of more than 3 days (considered a "serious health condition"), could be entitled to FMLA leave immediately upon his or her return to employment.

Does Texas have regulations regarding employees called to state military leave?

Yes. A member of the state military forces who is ordered to active state military duty (including the Texas National Guard and the Texas State Guard) is entitled to most of the same benefits and protections afforded to those serving in a national military capacity. Texas law, by reference to specific provisions of USSERA, applies most of the USSERA rights and benefits to those called to state military duties. These include: the prohibition against veteran discrimination, the veteran rehire requirement, the option to continue coverage under a health plan, the "escalator" principle for rights and benefits, and the exception to at-will employment.

What are the penalties for noncompliance with state or federal laws?

Possible penalties for USSERA violations include compensating the employee for lost wages and benefits, paying attorney's fees and other costs related to litigation, and paying liquidated damages for willful violations.

Texas law provides penalties for failure to comply with state reemployment and continued rights and benefits obligations. These penalties include reasonable attorney's fees and no more than 6 months of compensation at the rate at which the employee was paid when called to state military duty.

For more information, visit www.dol.gov/vets or contact your nearest Veteran's Employment & Training Services (VETS) office. VETS is committed to educating employers in public and private sectors to avoid unintentional violations of statutes and has representatives in Austin, San Antonio, Houston, Fort Worth, and El Paso.