

Employment and Reemployment Rights Questions and Answers for NDMS Members

NOTE: This material is for information only and should not be considered a legal authority. While this fact sheet is directed to members of NDMS, 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.

1. Is there a law governing reemployment rights after NDMS/military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights Act (VRRRA) law. On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act, a comprehensive revision of the VRRRA law. USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code at chapter 43. NDMS members received USERRA protections in 2002, by Act of Congress, codified at 42 U.S. Code § 300hh-11(e), Pub. L. 107-188, June 2002.

2. Am I eligible for reemployment rights under USERRA if I perform NDMS activated federal duty or NDMS training in support of my federal mission?

Yes, provided you meet five conditions, or "eligibility criteria":

- a. You must hold a civilian job. (Note: Jobs that are held for a brief, nonrecurrent period with no reasonable expectation that the employment will continue indefinitely or for a significant period do not qualify for protection.)
- b. You must give notice to your civilian employer that you will be leaving the job for NDMS training or service.
- c. You must not exceed the 5-year cumulative limit on periods of active federal service.
- d. You must be released from NDMS service under "honorable conditions" (which means you were not terminated for misconduct while on NDMS activation).
- e. You must report back to your civilian job in a timely manner or submit a timely application for reemployment.

3. Do I have USERRA reemployment rights following voluntary NDMS service? State or local government team call ups?

USERRA applies to voluntary as well as involuntary NDMS active federal service. However, USERRA does not apply to state or local government initiated call ups of NDMS organizations/personnel for disaster relief, riots, etc. The laws of the state involved must provide any protection for such state or local government duty.

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

It is necessary that the person who is performing the NDMS active federal service or federal mission training (or an official representative) give advance written or verbal notice to the employer. The notice requirement applies to all training or activated federal service. Notice is not required if precluded by emergency necessity or, if the giving of such notice is otherwise impossible or unreasonable. It is not reasonable to wait until the last possible moment to notify your employer of your pending activation or training, requiring your absence from work. In fact, if you have previous knowledge of your pending activation, but fail to notify your employer until the day of your activation, that can be valid grounds for the employer to refuse to rehire you.

A determination of “military necessity” from advance notice of your employer shall be made pursuant to regulations and/or policy prescribed the Department of Homeland Security/FEMA. 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 you should give your employer as much advance notice as possible.

5. How is the 5-year limit computed?

Service that you have performed while on NDMS federal activation or attending NDMS federal mission related training since NDMS came under USERRA in 2002, except the service described below, counts toward the cumulative 5-year limit of service you can perform while retaining rights under USERRA. When you start a new job with a new employer, you receive a fresh 5-year entitlement.

Since NDMS members have only been covered by USERRA since 2002, and most NDMS activations and training are generally less than 30 days a year, this ceiling for USERRA protection should not be a matter of concern for many years.

USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

- a. Unable (through no fault of yours) to obtain orders releasing you from service or service in excess of five years to fulfill an initial period of

obligated service, generally imposed on military Active component aviators or others who undergo extensive initial training in certain technical military specialties. [Generally not relevant to NDMS members.]

b. Required NDMS annual training and other training duty certified by NDMS officials to be necessary for professional development or skill training/retraining to serve on federal NDMS missions [even if you are not paid for the training].

c. Service performed during time of war or national emergency or for other critical missions, contingency operations, or NDMS requirements. [Probably such service should not count against the five year limit, but since NDMS is so new to USERRA coverage and this issue was not explicitly dealt with in the passage of the NDMS USERRA coverage legislative history, it is not clear how any courts or the MSPB will interpret this provision as to NDMS service limits.]

6. I understand that Federal employees receive 22 work days of paid military leave each year for emergency duty in support of civil authorities. Is that right? What about NDMS federal employees, do they get 22 work days paid leave for emergency duty, if they get USERRA rights?

This provision of federal law, Public Law 108-136, enacted November 24, 2003, codified at 5 U.S.C. section 6326(b), is not part of USERRA and it probably does not apply to federal employee NDMS members. It was passed by Congress to encourage federal employees to serve in the Reserve Components of the military and reduce hardship for that service for federal employee reservists.

As a Federal employee in the military reserves or National Guard, you have the right to 22 work days of paid military leave per calendar year, under Title 5 U.S. Code Section 6323(b), for emergency duty as ordered by the President, the Secretary of Defense, or a State Governor. This leave provision reduces your federal civilian pay by the amount of military pay the federal employee receives for the days of military service under this provision. This provision does not explicitly cover NDMS personnel. Since Congress passed this provision after the 2002 public law that extended USERRA coverage to NDMS employees, it is unlikely that OPM would concur that federal employee NDMS members are covered.

When you have exhausted your right to paid leave under Title 5, you still have the right to use your accrued civilian leave or unpaid leave under USERRA, because USERRA applies to the Federal Government as well as all other civilian employers.

If you wish to continue your federal civilian pay uninterrupted and you have annual leave on the books, you can use that annual leave for your NDMS training or service. USERRA gives you the explicit right to do this.

7. What about state or local governments or private businesses that provide some sort of military pay or differential pay for activated Reserve Component members. Are NDMS member entitled to these same benefits?

USERRA does not address any such additional pay for activated NDMS members by their civilian employers. If your employer is a state or local government or private business that grants paid military leave for its Reserve Component employees, or differential pay (the employer pays the difference between activated military pay and their civilian job wages), you will need to check with your employer if you would qualify for such payments when on activated NDMS status. Such payments are specifically made pursuant to state laws, local ordinances, regulations, and employer policy. Most states and many local governments and private employers do grant Reserve Component employees paid military leave or differential pay. You will need to inquire with your human relations office if NDMS members on activated federal status would be covered under your specific employer policy.

When you have exhausted your paid leave, USERRA gives you the right to use of accrued vacation or unpaid leave of absence.

8. Can I be required to use my earned vacation while performing NDMS service?

No. As under the VRRRA law, you may not be forced to use earned vacation. You are entitled to earned vacation or leave in addition to time off to perform military 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 your period of NDMS service happens to coincide with that period.

9. After NDMS active federal service, how long do I have to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, you must report back to work for the first full regularly scheduled work period on the 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 your own, you must report back as soon as possible after the end of the 8-hour period.

After a period of service of 31-180 days, you must submit an application for reemployment, either written or verbal, 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 your own, you must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, you 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 you were hospitalized for or convalescing from a service-connected injury or illness.

10. What if I am late in reporting back to work or applying for reemployment without a valid excuse?

In either case, you do not automatically forfeit your right to reemployment, but you 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."

11. Does USERRA give me the right to benefits from my civilian employer during my NDMS training or active federal service?

Yes. USERRA gives you the right to elect continued health insurance coverage, for yourself and dependents, during periods of military/active federal NDMS service. For periods of up to 30 days of training or service, the employer can require you to pay only the employee share, if any, of the cost of such coverage.

For longer active federal service tours, the employer is permitted to charge you up to 102 percent of the entire premium. If you elect coverage, your right to that coverage ends on the day after the deadline for you to apply for reemployment or 18 months after your absence from your civilian job began, whichever comes first.

USERRA gives you and your previously covered dependents the right to immediate reinstatement of your civilian health insurance coverage upon return to your civilian job. There must be no waiting period and no exclusion of preexisting conditions (other than for those conditions determined to be service-connected). This right is not contingent on your having elected to continue that coverage during your period of service.

To the extent that your employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you, during your 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 (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.

12. To what am I entitled upon my application for reemployment?

You have four basic entitlements (if you meet the eligibility criteria in answer #2):

- a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on your length of absence).
- b. Accrued seniority, as if you had been 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. There is no special protection for periods of active federal service of 30 days or less. However, USERRA does protect someone activated for short periods of time from discrimination resulting from their NDMS service. See Question #15 below.

13. When I return from NDMS duty will I get my old job back?

USERRA provides that, if your period of service was less than 91 consecutive days, you are entitled to the job you would have attained if you hadn't left, provided that you are still, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, you are entitled to the job you left.

For periods of service of 91 days or more, the employer may reemploy you as above (i.e., position you would have attained or position you left), or in a position of "like seniority, status and pay" the duties of which you are qualified to perform.

14. What if I'm not qualified for my reemployment position? What if I'm injured or disabled?

If you have been gone from your civilian job for months or years, your civilian job skills may have been dulled by a long period without use. You must be qualified to do the job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify you.

"Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If you can't become qualified in the positions described in #13 after reasonable efforts by your employer and you are not disabled, you must be employed in any other position of lesser status and pay,

the duties of which you are qualified to perform, with full seniority.

USERRA also requires the employer to make "reasonable efforts" to accommodate a service-connected disability. If upon your return from NDMS service you are suffering from a service-connected disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy you in some other position that you are qualified to perform and which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status, and pay.

A disability need not be permanent in order to confer rights under USERRA. For example, if you break your leg during your annual NDMS training, your employer may have an obligation to make reasonable efforts to accommodate your broken leg, or to place you in another position, until your leg has healed.

15. Does the new law protect me from discrimination by my employer or a prospective employer?

Yes. Section 4311(a) of USERRA provides the following:

"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 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 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.

16. Who has the burden of proof in these cases?

The employer or prospective employer. USERRA provides that a denial of

employment or an adverse action taken against you by an employer will be unlawful if your 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."

17. Where do I go for information or assistance?

NDMS members with questions or concerns about their civilian job rights should first consult with their NDMS chain of command.

The Department of Defense Committee for Employer Support of the Guard and Reserve has an excellent USERRA website, at : www.esgr.org , with links to the Department of Labor, Veteran's Employment and Training Service, which enforces USERRA.

For further assistance and dispute mediation, contact the Committee for Employer Support of the Guard and Reserve (ESGR).

[The Department of Homeland Security/FEMA is working with ESGR to develop a Memorandum of Understanding for formal assistance from the Department of Defense's ESGR for NDMS USERRA information and enforcement.]

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 and National Guard and Reserve members. If you believe your employer has violated your rights under USERRA and you wish to file a formal complaint, you should contact the Veterans' Employment and Training Service of the United States Department of Labor, at (202) 693-4719/4701.