806 Accommodating Employee & Military Leaves of Absence

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Jeffrey Frost

Jeffrey Frost is risk services counsel for Sutter Health located in Sacramento, California. Sutter Health is one of the nation's leading not-for-profit networks of hospitals, doctors, nurses, and other health care services. Mr. Frost assists Sutter Health affiliate's human resource directors and managers with a variety of employment issues including, but not limited to, conducting workplace investigations, responding to administrative charges, management training on federal and state employment laws, and managing litigation matters.

Before joining Sutter Health, Mr. Frost served as vice president of legal affairs and chief compliance officer for U.S. Physical Therapy, Inc., a publicly traded company located in Houston, Texas, that operates over 200 outpatient physical and occupational therapy clinics in 35 states.

Mr. Frost is currently the program chair for ACC's Sacramento Chapter.

Mr. Frost received a B.A. from the University of Texas (Austin), and a J.D. from St. Mary's University (magna cum laude).

Robert Gans

Robert E. Gans is labor/employment counsel for Computer Sciences Corporation, located in Falls Church, Virginia, a Fortune 500 information technology company with approximately $14 billion revenue and 79,000 employees worldwide. Mr. Gans manages primarily U.S. employment litigation, as well as handles broader corporate policy issues related to human resources matters. He handles EEOC charges, Department of Labor complaints, OFCCP compliance reviews, Reduction in Force/WARN Act issues, severance and non-competition agreements, and FMLA/ADA administration and accommodation matters.

Prior to joining CSC, Mr. Gans was employment counsel for Nordstrom, managing east coast division employment and general liability matters, training and counseling senior management and human resources personnel, advising on matters of sexual harassment prevention, FMLA/ADA reasonable accommodations, benefits/severance, workplace violence prevention, and contractual issues. Prior to Nordstrom, Mr. Gans was a litigator for a Washington, DC employment law boutique firm of Shaw, Bransford, Veilleux and Roth. Mr. Gans started out his litigation career as a plaintiff's lawyer.

He has been the chair of the Employment & Labor Forum for the Washington Metro Area Corporate Counsel Association (WMACCA) and a previous speaker at the ACC Annual Meeting.

He received his B.A. from Duke University and is a graduate of Washington University Law School.

Rocco J. Maffei

Rocco J. Maffei is the general counsel for the Lockheed Martin Maritime Systems & Sensors -Akron, Ohio division of Lockheed Martin Corporation. His responsibilities include providing legal counsel for all division matters on government and commercial contracts, employment law, intellectual property, environmental, and general business matters.

Prior to joining Lockheed Martin, Mr. Maffei was the vice-president and general counse for General Dynamics Information Systems, a $600 million defense electronics company. Practice focused in the areas of commercial and government contract formation and litigation, export licensing compliance, intellectual property, and international technology licensing and agreements. Mr. Maffei was also a partner at Briggs and Morgan Law Firm and Hart and Bruner Law Firm. Mr. Maffei served as a captain in the United States Air Force (USAF) on active duty and recently retired as a colonel from the USAF Reserve.

Mr. Maffei is a member of the Ohio State Bar Association, Minnesota Bar Association, ABA public contract law section, Federal Bar Association, American Arbitration Association, and National Contract Management Association (Fellow, Board of Advisors). He has been an adjunct professor of law at William Mitchell College of Law and the Air Force Institute of Technology, Air University. He has been a lecturer for Federal Publications, Inc., the University of Minnesota, National Contract Management Association, ABA, and Minnesota CLE. He is also a certified mediator and arbitrator for the State of Minnesota, and the American Arbitration Association.

Mr. Maffei received a B.A. from Trinity College and his J.D. from the University of Maine School of Law.

The U.S. Equal Employment Opportunity Commission

[redacted]	NOTICE	Number 915.002
EEOC		
[redacted]		October 17, 2002

1. SUBJECT: EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
2. PURPOSE: This enforcement guidance supersedes the enforcement guidance issued by the Commission on 03/01/99. Most of the original guidance remains the same, but limited changes have been made as a result of: (1) the Supreme Court's decision in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), and (2) the Commission's issuance of new regulations under section 501 of the Rehabilitation Act. The major changes in response to the Barnett decision are found on pages 4-5, 44-45, and 61-62. In addition, minor changes were made to certain footnotes and the Instructions for Investigators as a result of the Barnett decision and the new section 501 regulations.
3. EFFECTIVE DATE: Upon receipt.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, . a(5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: ADA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

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Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

This Enforcement Guidance clarifies the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship. Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. This Guidance sets forth an employer's legal obligations regarding reasonable accommodation; however, employers may provide more than the law requires.

This Guidance examines what "reasonable accommodation" means and who is entitled to receive it. The Guidance addresses what constitutes a request for reasonable accommodation, the form and substance of the request, and an employer's ability to ask questions and seek documentation after a request has been made.

The Guidance discusses reasonable accommodations applicable to the hiring process and to the benefits and privileges of employment. The Guidance also covers different types of reasonable accommodations related to job performance, including job restructuring, leave, modified or part-time schedules, modified workplace policies, and reassignment. Questions concerning the relationship between the ADA and the Family and Medical Leave Act (FMLA) are examined as they affect leave and modified schedules. Reassignment issues addressed include who is entitled to reassignment and the extent to which an employer must search for a vacant position. The Guidance also examines issues concerning the interplay between reasonable accommodations and conduct rules.

The final section of this Guidance discusses undue hardship, including when requests for schedule modifications and leave may be denied.

GENERAL PRINCIPLES

Reasonable Accommodation

Title I of the Americans with Disabilities Act of 1990 (the "ADA")[1] requires an employer[2] to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[3]There are three categories of "reasonable accommodations":

> "(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[4]

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Reasonable accommodation is available to qualified applicants and employees with disabilities.[5] Reasonable accommodations must be provided to qualified employees regardless of whether they work part- time or full-time, or are considered "probationary."

Generally, the individual with a disability must inform the employer that an accommodation is needed.[6]

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.[7]

A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;"[8] this means it is "reasonable" if it appears to be "feasible" or "plausible."[9]An accommodation also must be effective in meeting the needs of the individual.[10] In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, a reasonable accommodation enables an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

Example A: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY[11] to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is "reasonable" because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.

Example B: A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This "reasonable" accommodation is effective because it addresses the employee's fatigue and enables her to perform her job.

Example C: A cleaning company rotates its staff to different floors on a monthly basis. One crew member has a psychiatric disability. While his mental illness does not affect his ability to perform the various cleaning functions, it does make it difficult to adjust to alterations in his daily routine. The employee has had significant difficulty adjusting to the monthly changes in floor assignments. He asks for a reasonable accommodation and proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments. These accommodations are reasonable because they appear to be feasible solutions to this employee's problems dealing with changes to his routine. They also appear to be effective because they would enable him to perform his cleaning duties.

There are several modifications or adjustments that are not considered forms of reasonable accommodation.[12] An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation,[13] is not a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards -- whether qualitative or quantitative[14] -- that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a production standard, it may do so if it wishes.

An employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job. Furthermore, an employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related rather than personal needs.[15]

Undue Hardship

The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer.[16] "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.[17] An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. The ADA's "undue hardship" standard is different from that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation.[18]

REQUESTING REASONABLE ACCOMMODATION

1. How must an individual request a reasonable accommodation?

   When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."[19]

   Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.

   Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem." This is a request for a reasonable accommodation.

   Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation.

   Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does not link his need for the new chair with a medical condition.

   While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of "disability,"[20] a prerequisite for the individual to be entitled to a reasonable accommodation.

2. May someone other than the individual with a disability request a reasonable accommodation on behalf of the individual?

   Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.[21] Of course, the individual with a disability may refuse to accept an accommodation that is not needed.

   Example A: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. This discussion constitutes a request for reasonable accommodation.

   Example B: An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation.

3. Do requests for reasonable accommodation need to be in writing?

   No. Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodations in conversation or may use any other mode of communication.[22]An employer may choose to write a memorandum or letter confirming the individual's request. Alternatively, an employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request. An employer also may request reasonable documentation that the individual has an ADA disability and needs a reasonable accommodation. (See Question 6).

4. When should an individual with a disability request a reasonable accommodation?

An individual with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. The ADA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer. Rather, an individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.[23] As a practical matter, it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.

5. What must an employer do after receiving a request for reasonable accommodation?

   The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.[24] The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.[25]

   The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.[26]

6. May an employer ask an individual for documentation when the individual requests reasonable accommodation?

   Yes. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. [27] The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

   Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation. If an individual has more than one disability, an employer can request information pertaining only to the disability that requires a reasonable accommodation.

An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.[28]

As an alternative to requesting documentation, an employer may simply discuss with the person the nature of his/her disability and functional limitations. It would be useful for the employer to make clear to the individual why it is requesting information, i.e., to verify the existence of an ADA disability and the need for a reasonable accommodation.

Example A: An employee says to an employer, "I'm having trouble reaching tools because of my shoulder injury." The employer may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities (i.e., the employer is seeking information as to whether the employee has an ADA disability).

Example B: A marketing employee has a severe learning disability. He attends numerous meetings to plan marketing strategies. In order to remember what is discussed at these meetings he must take detailed notes but, due to his disability, he has great difficulty writing. The employee tells his supervisor about his disability and requests a laptop computer to use in the meetings. Since neither the disability nor the need for accommodation are obvious, the supervisor may ask the employee for reasonable documentation about his impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities. The employer also may ask why the disability necessitates use of a laptop computer (or any other type of reasonable accommodation, such as a tape recorder) to help the employee retain the information from the meetings.[29]

Example C: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. The supervisor can ask the spouse to send in documentation from the employee's treating physician that confirms that the hospitalization was related to the multiple sclerosis and provides information on how long an absence may be required from work.[30]

If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation.[31] On the other

hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.[32]

7. May an employer require an individual to go to a health care professional of the employer's (rather than the employee's) choice for purposes of documenting need for accommodation and disability?

   The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.[33]

   Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.[34] If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

8. Are there situations in which an employer cannot ask for documentation in response to a request for reasonable accommodation?

   Yes. An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

   Example A: An employee brings a note from her treating physician explaining that she has diabetes and that, as a result, she must test her blood sugar several times a day to ensure that her insulin level is safe in order to avoid a hyperglycemic reaction. The note explains that a hyperglycemic reaction can include extreme thirst, heavy breathing, drowsiness, and flushed skin, and eventually would result in unconsciousness. Depending on the results of the blood test, the employee might have to take insulin. The note requests that the employee be allowed three or four 10-minute breaks each day to test her blood, and if necessary, to take insulin. The doctor's note constitutes sufficient documentation that the person has an ADA disability because it describes a substantially limiting impairment and the reasonable accommodation needed as a result. The employer cannot ask for additional documentation.

   Example B: One year ago, an employer learned that an employee had bipolar disorder after he requested a reasonable accommodation. The documentation provided at that time from the employee's psychiatrist indicated that this was a permanent condition which would always involve periods in which the disability would remit and then intensify. The psychiatrist's letter explained that during periods when the condition flared up, the person's manic moods or depressive episodes could be severe enough to create serious problems for the individual in caring for himself or working, and that medication controlled the frequency and severity of these episodes.

   Now, one year later, the employee again requests a reasonable accommodation related to his bipolar disorder. Under these facts, the employer may ask for reasonable documentation on the need for the accommodation (if the need is not obvious), but it cannot ask for documentation that the person has an ADA disability. The medical information provided one year ago established the existence of a long-term impairment that substantially limits a major life activity.

   Example C: An employee gives her employer a letter from her doctor, stating that the employee has asthma and needs the employer to provide her with an air filter. This letter contains insufficient information as to whether the asthma is an ADA disability because it does not provide any information as to its severity (i.e., whether it substantially limits a major life activity). Furthermore, the letter does not identify precisely what problem exists in the workplace that requires an air filter or any other reasonable accommodation. Therefore, the employer can request additional documentation.

9. Is an employer required to provide the reasonable accommodation that the individual wants?

   The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.[35] Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

   If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."[36]

   Example A: An employee with a severe learning disability has great difficulty reading. His supervisor sends him many detailed memoranda which he often has trouble understanding. However, he has no difficulty understanding oral communication. The employee requests that the employer install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. The supervisor asks whether a tape recorded message would accomplish the same objective and the employee agrees that it would. Since both accommodations are effective, the employer may choose to provide the supervisor and employee with a tape recorder so that the supervisor can record her memoranda and the employee can listen to them.

Example B: An attorney with a severe vision disability requests that her employer provide someone to read printed materials that she needs to review daily. The attorney explains that a reader enables her to review substantial amounts of written materials in an efficient manner. Believing that this reasonable accommodation would be too costly, the employer instead provides the attorney with a device that allows her to magnify print so that she can read it herself. The attorney can read print using this device, but with such great difficulty it significantly slows down her ability to review written materials. The magnifying device is ineffective as a reasonable accommodation because it does not provide the attorney with an equal opportunity to attain the same level of performance as her colleagues. Without an equal opportunity to attain the same level of performance, this attorney is denied an equal opportunity to compete for promotions. In this instance, failure to provide the reader, absent undue hardship, would violate the ADA.

10. How quickly must an employer respond to a request for reasonable accommodation?

    An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible.[37] Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.[38]

    Example A: An employer provides parking for all employees. An employee who uses a wheelchair requests from his supervisor an accessible parking space, explaining that the spaces are so narrow that there is insufficient room for his van to extend the ramp that allows him to get in and out. The supervisor does not act on the request and does not forward it to someone with authority to respond. The employee makes a second request to the supervisor. Yet, two months after the initial request, nothing has been done. Although the supervisor never definitively denies the request, the lack of action under these circumstances amounts to a denial, and thus violates the ADA.

    Example B: An employee who is blind requests adaptive equipment for her computer as a reasonable accommodation. The employer must order this equipment and is informed that it will take three months to receive delivery. No other company sells the adaptive equipment the employee needs. The employer notifies the employee of the results of its investigation and that it has ordered the equipment. Although it will take three months to receive the equipment, the employer has moved as quickly as it can to obtain it and thus there is no ADA violation resulting from the delay. The employer and employee should determine what can be done so that the employee can perform his/her job as effectively as possible while waiting for the equipment.

11. May an employer require an individual with a disability to accept a reasonable accommodation that s/he does not want?

    No. An employer may not require a qualified individual with a disability to accept an accommodation. If, however, an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, s/he may not be qualified to remain in the job.[39]

REASONABLE ACCOMMODATION AND JOB APPLICANTS

12. May an employer ask whether a reasonable accommodation is needed when an applicant has not asked for one?

    An employer may tell applicants what the hiring process involves (e.g., an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.

    During the hiring process and before a conditional offer is made, an employer generally may not ask an applicant whether s/he needs a reasonable accommodation for the job, except when the employer knows that an applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type. [40]

    After a conditional offer of employment is extended, an employer may inquire whether applicants will need reasonable accommodations related to anything connected with the job (i.e., job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question. Alternatively, an employer may ask a specific applicant if s/he needs a reasonable accommodation if the employer knows that this applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.[41]

13. Does an employer have to provide a reasonable accommodation to an applicant with a disability even if it believes that it will be unable to provide this individual with a reasonable accommodation on the job?

    Yes. An employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless it can show undue hardship). Thus, individuals with disabilities who meet initial requirements to be considered for a job should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation for the application process, that it will be unable to provide the individual with reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. Thus, an employer should assess the need for accommodations for the application process separately from those that may be needed to perform the job. [42]

    Example A: An employer is impressed with an applicant's resume and contacts the individual to come in for an interview. The applicant, who is deaf, requests a sign language interpreter for the interview. The employer cancels the interview

and refuses to consider further this applicant because it believes it would have to hire a full-time interpreter. The employer has violated the ADA. The employer should have proceeded with the interview, using a sign language interpreter (absent undue hardship), and at the interview inquired to what extent the individual would need a sign language interpreter to perform any essential functions requiring communication with other people.

Example B: An individual who has paraplegia applies for a secretarial position. Because the office has two steps at the entrance, the employer arranges for the applicant to take a typing test, a requirement of the application process, at a different location. The applicant fails the test. The employer does not have to provide any further reasonable accommodations for this individual because she is no longer qualified to continue with the application process.

REASONABLE ACCOMMODATION RELATED TO THE BENEFITS AND PRIVILEGES OF EMPLOYMENT [(43)]

The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs (EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings).[(44)] If an employee with a disability needs a reasonable accommodation in order to gain access to, and have an equal opportunity to participate in, these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

14. Does an employer have to provide reasonable accommodation to enable an employee with a disability to have equal access to information communicated in the workplace to non-disabled employees?

    Yes. Employers provide information to employees through different means, including computers, bulletin boards, mailboxes, posters, and public address systems. Employers must ensure that employees with disabilities have access to information that is provided to other similarly-situated employees without disabilities, regardless of whether they need it to perform their jobs.

    Example A: An employee who is blind has adaptive equipment for his computer that integrates him into the network with other employees, thus allowing communication via electronic mail and access to the computer bulletin board. When the employer installs upgraded computer equipment, it must provide new adaptive equipment in order for the employee to be integrated into the new networks, absent undue hardship. Alternative methods of communication (e.g., sending written or telephone messages to the employee instead of electronic mail) are likely to be ineffective substitutes since electronic mail is used by every employee and there is no effective way to ensure that each one will always use alternative measures to ensure that the blind employee receives the same information that is being transmitted via computer.

    Example B: An employer authorizes the Human Resources Director to use a public address system to remind employees about special meetings and to make certain announcements. In order to make this information accessible to a deaf employee, the Human Resources Director arranges to send in advance an electronic mail message to the deaf employee conveying the information that will be broadcast. The Human Resources Director is the only person who uses the public address system; therefore, the employer can ensure that all public address messages are sent, via electronic mail, to the deaf employee. Thus, the employer is providing this employee with equal access to office communications.

15. Must an employer provide reasonable accommodation so that an employee may attend training programs?

    Yes. Employers must provide reasonable accommodation (e.g., sign language interpreters; written materials produced in alternative formats, such as braille, large print, or on audio- cassette) that will provide employees with disabilities with an equal opportunity to participate in employer-sponsored training, absent undue hardship. This obligation extends to in-house training, as well as to training provided by an outside entity. Similarly, the employer has an obligation to provide reasonable accommodation whether the training occurs on the employer's premises or elsewhere.

    Example A: XYZ Corp. has signed a contract with Super Trainers, Inc., to provide mediation training at its facility to all of XYZ's Human Resources staff. One staff member is blind and requests that materials be provided in braille. Super Trainers refuses to provide the materials in braille. XYZ maintains that it is the responsibility of Super Trainers and sees no reason why it should have to arrange and pay for the braille copy.

    Both XYZ (as an employer covered under Title I of the ADA) and Super Trainers (as a public accommodation covered under Title III of the ADA)[(45)] have obligations to provide materials in alternative formats. This fact, however, does not excuse either one from their respective obligations. If Super Trainers refuses to provide the braille version, despite its Title III obligations, XYZ still retains its obligation to provide it as a reasonable accommodation, absent undue hardship.

    Employers arranging with an outside entity to provide training may wish to avoid such problems by specifying in the contract who has the responsibility to provide appropriate reasonable accommodations. Similarly, employers should ensure that any offsite training will be held in an accessible facility if they have an employee who, because of a disability, requires such an accommodation.

    Example B: XYZ Corp. arranges for one of its employees to provide CPR training. This three-hour program is optional. A deaf employee wishes to take the training and requests a sign language interpreter. XYZ must provide the interpreter because the CPR training is a benefit that XYZ offers all employees, even though it is optional.

TYPES OF REASONABLE ACCOMMODATIONS RELATED TO JOB PERFORMANCE[(46)]

Below are discussed certain types of reasonable accommodations related to job performance.

Job Restructuring

Job restructuring includes modifications such as:

- reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and
- altering when and/or how a function, essential or marginal, is performed.[47]

An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.

16. If, as a reasonable accommodation, an employer restructures an employee's job to eliminate some marginal functions, may the employer require the employee to take on other marginal functions that s/he can perform?

    Yes. An employer may switch the marginal functions of two (or more) employees in order to restructure a job as a reasonable accommodation.

    Example: A cleaning crew works in an office building. One member of the crew wears a prosthetic leg which enables him to walk very well, but climbing steps is painful and difficult. Although he can perform his essential functions without problems, he cannot perform the marginal function of sweeping the steps located throughout the building. The marginal functions of a second crew member include cleaning the small kitchen in the employee's lounge, which is something the first crew member can perform. The employer can switch the marginal functions performed by these two employees.

Leave

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability.[48] An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave.[49] For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:

- obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
- recuperating from an illness or an episodic manifestation of the disability;
- obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- training a service animal (e.g., a guide dog); or
- receiving training in the use of braille or to learn sign language.

17. May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

    No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.[50]

18. Does an employer have to hold open an employee's job as a reasonable accommodation?

    Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.[51]

    If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.[52]

    Example: An employee needs eight months of leave for treatment and recuperation related to a disability. The employer grants the request, but after four months the employer determines that it can no longer hold open the position for the remaining four months without incurring undue hardship. The employer must consider whether it has a vacant, equivalent position to which the employee can be reassigned for the remaining four months of leave, at the end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

19. Can an employer penalize an employee for work missed during leave taken as a reasonable accommodation?

    No. To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law.[53] Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.[54]

    Example A: A salesperson took five months of leave as a reasonable accommodation. The company compares the sales records of all salespeople over

a one-year period, and any employee whose sales fall more than 25% below the median sales performance of all employees is automatically terminated. The employer terminates the salesperson because she had fallen below the required performance standard. The company did not consider that the reason for her lower sales performance was her five-month leave of absence; nor did it assess her productivity during the period she did work (i.e., prorate her productivity).

Penalizing the salesperson in this manner constitutes retaliation and a denial of reasonable accommodation.

Example B: Company X is having a reduction-in-force. The company decides that any employee who has missed more than four weeks in the past year will be terminated. An employee took five weeks of leave for treatment of his disability. The company cannot count those five weeks in determining whether to terminate this employee.[55]

20. When an employee requests leave as a reasonable accommodation, may an employer provide an accommodation that requires him/her to remain on the job instead?

Yes, if the employer's reasonable accommodation would be effective and eliminate the need for leave.[56] An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation.[57] Accordingly, in lieu of providing leave, an employer may provide a reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. The employer is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he no longer needs the reasonable accommodation.

Example A: An employee with emphysema requests ten weeks of leave for surgery and recuperation related to his disability. In discussing this request with the employer, the employee states that he could return to work after seven weeks if, during his first three weeks back, he could work part-time and eliminate two marginal functions that require lots of walking. If the employer provides these accommodations, then it can require the employee to return to work after seven weeks.

Example B: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. After receiving the employee's request for leave for the surgery, the employer proposes that it provide certain equipment which it believes will mitigate the effects of the disability and delay the need for leave to get surgery. The employer's proposed accommodation is not effective because it interferes with the employee's ability to get medical treatment.

21. How should an employer handle leave for an employee covered by both the ADA and the Family and Medical Leave Act (FMLA)?[58]

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.[59]

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation).

If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Under the FMLA, an eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one.[60] An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. The FMLA requires an employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.

Example A: An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.[61]

Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

Example C: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment,[62] but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position

available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Modified or Part-Time Schedule

22. Must an employer allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship?

Yes.[63] A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.[64]

Example A: An employee with HIV infection must take medication on a strict schedule. The medication causes extreme nausea about one hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be allowed to take a daily 45-minute break when the nausea occurs. The employer must grant this request absent undue hardship.

For certain positions, the time during which an essential function is performed may be critical. This could affect whether an employer can grant a request to modify an employee's schedule.[65] Employers should carefully assess whether modifying the hours could significantly disrupt their operations -- that is, cause undue hardship -- or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs.

If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested. [66]

Example B: A day care worker requests that she be allowed to change her hours from 7:00 a.m. - 3:00 p.m. to 10:00 a.m. - 6:00 p.m. because of her disability. The day care center is open from 7:00 a.m. - 7:00 p.m. and it will still have sufficient coverage at the beginning of the morning if it grants the change in hours. In this situation, the employer must provide the reasonable accommodation.

Example C: An employee works for a morning newspaper, operating the printing presses which run between 10 p.m. and 3 a.m. Due to her disability, she needs to work in the daytime. The essential function of her position, operating the printing presses, requires that she work at night because the newspaper cannot be printed during the daytime hours. Since the employer cannot modify her hours, it must consider whether it can reassign her to a different position.

23. How should an employer handle requests for modified or part-time schedules for an employee covered by both the ADA and the Family and Medical Leave Act (FMLA)?[67]

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship. If there is undue hardship, the employer must reassign the employee if there is a vacant position for which s/he is qualified and which would allow the employer to grant the modified or part-time schedule (absent undue hardship).[68] An employee receiving a part-time schedule as a reasonable accommodation is entitled only to the benefits, including health insurance, that other part-time employees receive. Thus, if non- disabled part-time workers are not provided with health insurance, then the employer does not have to provide such coverage to an employee with a disability who is given a part-time schedule as a reasonable accommodation.

Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12- month period. When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position, with equivalent pay and benefits, for which the employee is qualified and which better suits his/her reduced hours.[69] An employer always must maintain the employee's existing level of coverage under a group health plan during the period of FMLA leave, provided the employee pays his/her share of the premium.[70]

Example: An employee with an ADA disability requests that she be excused from work one day a week for the next six months because of her disability. If this employee is eligible for a modified schedule under the FMLA, the employer must provide the requested leave under that statute if it is medically necessary, even if the leave would be an undue hardship under the ADA.

Modified Workplace Policies

24. Is it a reasonable accommodation to modify a workplace policy?

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations,[71] absent undue hardship. But, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees.

Example: An employer has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her employer that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The employer must modify its policy to grant this request, absent undue hardship. Similarly, an employer might have to modify a policy to allow an employee with a disability to bring in a small refrigerator, or to use the employer's refrigerator, to store medication that must be taken during working hours.

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. For example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability- related medical problems, barring undue hardship.[72] Furthermore, an employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.[73]

In some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability.[74]

Reassignment [75]

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation.[76] This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.[77]

An employee must be "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation.[78] The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job.[79] The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.

Example A: An employer is considering reassigning an employee with a disability to a position which requires the ability to speak Spanish in order to perform an essential function. The employee never learned Spanish and wants the employer to send him to a course to learn Spanish. The employer is not required to provide this training as part of the obligation to make a reassignment. Therefore, the employee is not qualified for this position.

Example B: An employer is considering reassigning an employee with a disability to a position in which she will contract for goods and services. The employee is qualified for the position. The employer has its own specialized rules regarding contracting that necessitate training all individuals hired for these positions. In this situation, the employer must provide the employee with this specialized training.

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.[80] However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.

"Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time.[81] A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position. The employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.[82]

Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

Example D: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent position plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of pay, status, etc.[83] If it is unclear which position comes closest, the employer should consult with the employee about his/her preference before determining the position to which the employee will be reassigned. Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion.

25. Is a probationary employee entitled to reassignment?

    Employers cannot deny a reassignment to an employee solely because s/he is designated as "probationary." An employee with a disability is eligible for reassignment to a new position, regardless of whether s/he is considered "probationary," as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.

    The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. If, however, the probationary employee has never adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

    Example A: An employer designates all new employees as "probationary" for one year. An employee has been working successfully for nine months when she becomes disabled in a car accident. The employee, due to her disability, is unable to continue performing the essential functions of her current position, with or without reasonable accommodation, and seeks a reassignment. She is entitled to a reassignment if there is a vacant position for which she is qualified and it would not pose an undue hardship.

    Example B: A probationary employee has been working two weeks, but has been unable to perform the essential functions of the job because of his disability. There are no reasonable accommodations that would permit the individual to perform the essential functions of the position, so the individual requests a reassignment. The employer does not have to provide a reassignment (even if there is a vacant position) because, as it turns out, the individual was never qualified -- i.e., the individual was never able to perform the essential functions of the position, with or without reasonable accommodation, for which he was hired.

26. Must an employer offer reassignment as a reasonable accommodation if it does not allow any of its employees to transfer from one position to another?

    Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.[84]

27. Is an employer's obligation to offer reassignment to a vacant position limited to those vacancies within an employee's office, branch, agency, department, facility, personnel system (if the employer has more than a single personnel system), or geographical area?

    No. This is true even if the employer has a policy prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. The ADA contains no language limiting the obligation to reassign only to positions within an office, branch, agency, etc.[85] Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship.[86]If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees.

28. Does an employer have to notify an employee with a disability about vacant positions, or is it the employee's responsibility to learn what jobs are vacant?

    The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time.[87] In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.[88]

    An employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly an employer can search for and identify whether an appropriate vacant position exists. For a very small employer, this process may take one day; for other employers this process may take several weeks.[89]When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

29. Does reassignment mean that the employee is permitted to compete for a vacant position?

    No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.[90]

30. If an employee is reassigned to a lower level position, must an employer maintain his/her salary from the higher level position?

    No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries.[91]

31. Must an employer provide a reassignment if it would violate a seniority system?

    Generally, it will be "unreasonable" to reassign an employee with a disability if doing so would violate the rules of a seniority system.[92] This is true both for collectively bargained seniority systems and those unilaterally imposed by management. Seniority systems governing job placement give employees expectations of consistent, uniform treatment expectations that would be

undermined if employers had to make the type of individualized, case-by-case assessment required by the reasonable accommodation process.[93]

However, if there are "special circumstances" that "undermine the employees' expectations of consistent, uniform treatment," it may be a "reasonable accommodation," absent undue hardship, to reassign an employee despite the existence of a seniority system. For example, "special circumstances" may exist where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system.[94] In this circumstance, one more exception (i.e., providing the reassignment to an employee with a disability) may not make a difference.[95] Alternatively, a seniority system may contain exceptions, such that one more exception is unlikely to matter.[96] Another possibility is that a seniority system might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.

OTHER REASONABLE ACCOMMODATION ISSUES [97]

32. If an employer has provided one reasonable accommodation, does it have to provide additional reasonable accommodations requested by an individual with a disability?

    The duty to provide reasonable accommodation is an ongoing one.[98] Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

    An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and (3) if effective, whether providing the reasonable accommodation would impose an undue hardship. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

33. Does an employer have to change a person's supervisor as a form of reasonable accommodation?

    No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so. Furthermore, although an employer is not required to change supervisors, the ADA may require that supervisory methods be altered as a form of reasonable accommodation.[99] Also, an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.

    Example: A supervisor frequently schedules team meetings on a day's notice often notifying staff in the afternoon that a meeting will be held on the following morning. An employee with a disability has missed several meetings because they have conflicted with previously-scheduled physical therapy sessions. The employee asks that the supervisor give her two to three days' notice of team meetings so that, if necessary, she can reschedule the physical therapy sessions. Assuming no undue hardship would result, the supervisor must make this reasonable accommodation.

34. Does an employer have to allow an employee with a disability to work at home as a reasonable accommodation?

    An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.[100] Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader).[101] For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.

35. Must an employer withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity?

    No. An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

36. Must an employer provide a reasonable accommodation for an employee with a disability who violated a conduct rule that is job- related for the position in question and consistent with business necessity?

    An employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination.[102] Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.[103] Possible reasonable accommodations could include adjustments to starting times, specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.[104]

Example: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 a.m. to 5:30 p.m., but he arrives at 9:00, 9:30, 10:00, or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 a.m. to 6:30 p.m., a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 a.m.

37. Is it a reasonable accommodation to make sure that an employee takes medication as prescribed?

    No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a workplace barrier. Similarly, an employer has no responsibility to monitor an employee's medical treatment or ensure that s/he is receiving appropriate treatment because such treatment does not involve modifying workplace barriers.[105]

    It may be a form of reasonable accommodation, however, to give an employee a break in order that s/he may take medication, or to grant leave so that an employee may obtain treatment.

38. Is an employer relieved of its obligation to provide reasonable accommodation for an employee with a disability who fails to take medication, to obtain medical treatment, or to use an assistive device (such as a hearing aid)?

    No. The ADA requires an employer to provide reasonable accommodation to remove workplace barriers, regardless of what effect medication, other medical treatment, or assistive devices may have on an employee's ability to perform the job.[106]

    However, if an employee with a disability, with or without reasonable accommodation, cannot perform the essential functions of the position or poses a direct threat in the absence of medication, treatment, or an assistive device, then s/he is unqualified.

39. Must an employer provide a reasonable accommodation that is needed because of the side effects of medication or treatment related to the disability, or because of symptoms or other medical conditions resulting from the underlying disability?

    Yes. The side effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability. Reasonable accommodation extends to all limitations resulting from a disability.

    Example A: An employee with cancer undergoes chemotherapy twice a week, which causes her to be quite ill afterwards. The employee requests a modified schedule -- leave for the two days a week of chemotherapy. The treatment will last six weeks. Unless it can show undue hardship, the employer must grant this request.

    Similarly, any symptoms or related medical conditions resulting from the disability that cause limitations may also require reasonable accommodation.[107]

    Example B: An employee, as a result of insulin-dependent diabetes, has developed background retinopathy (a vision impairment). The employee, who already has provided documentation showing his diabetes is a disability, requests a device to enlarge the text on his computer screen. The employer can request documentation that the retinopathy is related to the diabetes but the employee does not have to show that the retinopathy is an independent disability under the ADA. Since the retinopathy is a consequence of the diabetes (an ADA disability), the request must be granted unless undue hardship can be shown.

40. Must an employer ask whether a reasonable accommodation is needed when an employee has not asked for one?

    Generally, no. As a general rule, the individual with a disability -- who has the most knowledge about the need for reasonable accommodation -- must inform the employer that an accommodation is needed.[108]

    However, an employer should initiate the reasonable accommodation interactive process[109] without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.

    Example: An employee with mental retardation delivers messages at a law firm. He frequently mixes up messages for "R. Miller" and "T. Miller." The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that this employee is unable to ask for a reasonable accommodation because of his mental retardation. The employer asks the employee about mixing up the two names and asks if it would be helpful to spell the first name of each person. When the employee says that would be better, the employer, as a reasonable accommodation, instructs the receptionist to write the full first name when messages are left for one of the Messrs. Miller.

41. May an employer ask whether a reasonable accommodation is needed when an employee with a disability has not asked for one?

    An employer may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation. For example, an employer could ask a deaf employee who is being sent on a business trip if s/he needs reasonable accommodation. Or, if an employer is scheduling a luncheon at a restaurant and is uncertain about what questions it should ask to ensure that the restaurant is accessible for an employee who uses a wheelchair, the employer may first ask the employee. An

employer also may ask an employee with a disability who is having performance or conduct problems if s/he needs reasonable accommodation.[110]

42. May an employer tell other employees that an individual is receiving a reasonable accommodation when employees ask questions about a coworker with a disability?

No. An employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.[111]

An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

Since responding to specific coworker questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with information about various laws that require employers to meet certain employee needs (e.g., the ADA and the Family and Medical Leave Act), while also requiring them to protect the privacy of employees. In providing general ADA information to employees, an employer may wish to highlight the obligation to provide reasonable accommodation, including the interactive process and different types of reasonable accommodations, and the statute's confidentiality protections. Such information could be delivered in orientation materials, employee handbooks, notices accompanying paystubs, and posted flyers. Employers may wish to explore these and other alternatives with unions because they too are bound by the ADA's confidentiality provisions. Union meetings and bulletin boards may be further avenues for such educational efforts.

As long as there is no coercion by an employer, an employee with a disability may voluntarily choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation.

UNDUE HARDSHIP ISSUES [112]

An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.[113] A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- the impact of the accommodation on the operation of the facility.[114]

The ADA's legislative history indicates that Congress wanted employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly.[115] Undue hardship is determined based on the net cost to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation.[116] In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.

If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, then the employer must provide the second accommodation.

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability.[117] Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees's ability to work.

Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the employer cannot show significant disruption to its operation, there is no undue hardship.[118]

Example B: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part- time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk's hours are reduced, the second clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely

manner, keep the shelves stocked, and maintain store security. Thus, the employer can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee's hours. The employer, however, should explore whether any other reasonable accommodation will assist the store clerk without causing undue hardship.

43. Must an employer modify the work hours of an employee with a disability if doing so would prevent other employees from performing their jobs?

    No. If the result of modifying one employee's work hours (or granting leave) is to prevent other employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship.

    Example A: A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business. Thus, the employer can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.

    Example B: A computer programmer works with a group of people to develop new software. There are certain tasks that the entire group must perform together, but each person also has individual assignments. It is through habit, not necessity, that they have often worked together first thing in the morning.

    The programmer, due to her disability, requests an adjustment in her work schedule so that she works from 10:00 a.m. - 7:00 p.m. rather than 9:00 a.m. - 6:00 p.m. In this situation, the employer could grant the adjustment in hours because it would not significantly disrupt the operations of the business. The effect of the reasonable accommodation would be to alter when the group worked together and when they performed their individual assignments.

44. Can an employer deny a request for leave when an employee cannot provide a fixed date of return?

    Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave. In certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position. If an employee cannot provide a fixed date of return, and an employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship.

    In certain situations, an employee may be able to provide only an approximate date of return.[119] Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return. In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss, if necessary, the need for continued leave beyond what might have been granted originally.[120]

    Example A: An experienced chef at a top restaurant requests leave for treatment of her disability but cannot provide a fixed date of return. The restaurant can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the employer unable to determine how long it must hold open the position or to plan for the chef's absence. Therefore, the restaurant can deny the request for leave as a reasonable accommodation.

    Example B: An employee requests eight weeks of leave for surgery for his disability. The employer grants the request. During surgery, serious complications arise that require a lengthier period of recuperation than originally anticipated, as well as additional surgery. The employee contacts the employer after three weeks of leave to ask for an additional ten to fourteen weeks of leave (i.e., a total of 18 to 22 weeks of leave). The employer must assess whether granting additional leave causes an undue hardship.

45. Does a cost-benefit analysis determine whether a reasonable accommodation will cause undue hardship?

    No. A cost-benefit analysis assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee. Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship.[121] Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (e.g., full-time versus part-time, salary versus hourly wage, permanent versus temporary).

46. Can an employer claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else?

    No, an employer cannot claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else. In some situations, an employer will have the right under a lease or other contractual relationship with the property owner to make the type of changes that are needed. If this is the case, the employer should make the changes, assuming no other factors exist that would make the changes too difficult or costly. If the contractual relationship between the employer and property owner requires the owner's consent to the kinds of changes that are required, or prohibits them from being made, then the employer must make good faith efforts either to obtain the owner's permission or to negotiate an exception to the terms of the contract. If the owner refuses to allow the employer to make the modifications, the employer may claim undue hardship. Even in this situation, however, the employer must still provide another reasonable accommodation, if one exists, that would not cause undue hardship.

Example A: X Corp., a travel agency, leases space in a building owned by Z Co. One of X Corp.'s employees becomes disabled and needs to use a wheelchair. The employee requests as a reasonable accommodation that several room dividers be moved to make his work space easily accessible. X Corp.'s lease specifically allows it to make these kinds of physical changes, and they are otherwise easy and inexpensive to make. The fact that X Corp. does not own the property does not create an undue hardship and therefore it must make the requested accommodation.

Example B: Same as Example A, except that X Corp.'s lease requires it to seek Z Co.'s permission before making any physical changes that would involve reconfiguring office space. X Corp. requests that Z Co. allow it to make the changes, but Z Co. denies the request. X Corp. can claim that making the physical changes would constitute an undue hardship. However, it must provide any other type of reasonable accommodation that would not involve making physical changes to the facility, such as finding a different location within the office that would be accessible to the employee.

An employer should remember its obligation to make reasonable accommodation when it is negotiating contracts with property owners.[122] Similarly, a property owner should carefully assess a request from an employer to make physical changes that are needed as a reasonable accommodation because failure to permit the modification might constitute "interference" with the rights of an employee with a disability.[123] In addition, other ADA provisions may require the property owner to make the modifications.[124]

BURDENS OF PROOF

In US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), the Supreme Court laid out the burdens of proof for an individual with a disability (plaintiff) and an employer (defendant) in an ADA lawsuit alleging failure to provide reasonable accommodation. The "plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[125] Once the plaintiff has shown that the accommodation s/he needs is "reasonable," the burden shifts to the defendant/employer to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances.[126]

The Supreme Court's burden-shifting framework does not affect the interactive process triggered by an individual's request for accommodation.[127] An employer should still engage in this informal dialogue to obtain relevant information needed to make an informed decision.

INSTRUCTIONS FOR INVESTIGATORS

When assessing whether a Respondent has violated the ADA by denying a reasonable accommodation to a Charging Party, investigators should consider the following:

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- Is the Charging Party "otherwise qualified" (i.e., is the Charging Party qualified for the job except that, because of disability, s/he needs a reasonable accommodation to perform the position's essential functions)?
- Did the Charging Party, or a representative, request a reasonable accommodation (i.e., did the Charging Party let the employer know that s/he needed an adjustment or change at work for a reason related to a medical condition)? [see Questions 1-4]
    - Did the Respondent request documentation of the Charging Party's disability and/or functional limitations? If yes, was the documentation provided? Did the Respondent have a legitimate reason for requesting documentation? [see Questions 6-8]
    - What specific type of reasonable accommodation, if any, did the Charging Party request?
    - Was there a nexus between the reasonable accommodation requested and the functional limitations resulting from the Charging Party's disability? [see Question 6]
    - Was the need for reasonable accommodation related to the use of medication, side effects from treatment, or symptoms related to a disability? [see Questions 36-38]
- For what purpose did the Charging Party request a reasonable accommodation:
    - for the application process? [see Questions 12-13]
    - in connection with aspects of job performance? [see Questions 16-24, 32-33]
    - in order to enjoy the benefits and privileges of employment? [see Questions 14-15]
- Should the Respondent have initiated the interactive process, or provided a reasonable accommodation, even if the Charging Party did not ask for an accommodation? [see Questions 11, 39]
- What did the Respondent do in response to the Charging Party's request for reasonable accommodation (i.e., did the Respondent engage in an interactive process with the Charging Party and if so, describe both the Respondent's and the Charging Party's actions/statements during this process)? [see Questions 5-11]
- If the Charging Party asked the Respondent for a particular reasonable accommodation, and the Respondent provided a different accommodation, why did the Respondent provide a different reasonable accommodation than the one requested by the Charging Party? Why does the Respondent believe that the reasonable accommodation it provided was effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity? Why does the Charging Party believe that the reasonable accommodation provided by the Respondent was ineffective? [see Question 9]
- What type of accommodation could the Respondent have provided that would have been "reasonable" and effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity?
- Does the charge involve allegations concerning reasonable accommodation and violations of any conduct rules? [see Questions 34-35]

- If the Charging Party alleges that the Respondent failed to provide a reassignment as a reasonable accommodation [see generally Questions 25-30 and accompanying text]:
    - did the Respondent and the Charging Party first discuss other forms of reasonable accommodation that would enable the Charging Party to remain in his/her current position before discussing reassignment?
    - did the Respondent have any vacant positions? [see Question 27]
    - did the Respondent notify the Charging Party about possible vacant positions? [see Question 28]
    - was the Charging Party qualified for a vacant position?
    - if there was more than one vacant position, did the Respondent place the Charging Party in the one that was most closely equivalent to the Charging Party's original position?
    - if the reassignment would conflict with a seniority system, are there "special circumstances" that would make it "reasonable" to reassign the Charging Party? [see Question 31]
- If the Respondent is claiming undue hardship [see generally Questions 42-46 and accompanying text]:
    - what evidence has the Respondent produced showing that providing a specific reasonable accommodation would entail significant difficulty or expense?
    - if a modified schedule or leave is the reasonable accommodation, is undue hardship based on the impact on the ability of other employees to do their jobs? [see Question 42]
    - if leave is the reasonable accommodation, is undue hardship based on the amount of leave requested? [see Question 43]
    - if there are "special circumstances" that would make it "reasonable" to reassign the Charging Party, despite the apparent conflict with a seniority system, would it nonetheless be an undue hardship to make the reassignment? [see Question 31]
    - is undue hardship based on the fact that providing the reasonable accommodation requires changes to property owned by an entity other than the Respondent? [see Question 46]
    - if the Respondent claims that a particular reasonable accommodation would result in undue hardship, is there another reasonable accommodation that Respondent could have provided that would not have resulted in undue hardship?
- Based on the evidence obtained in answers to the questions above, is the Charging Party a qualified individual with a disability (i.e., can the Charging Party perform the essential functions of the position with or without reasonable accommodation)?

APPENDIX
RESOURCES FOR LOCATING REASONABLE ACCOMMODATIONS

U.S. Equal Employment Opportunity Commission
1-800-669-3362 (Voice)
1-800-800-3302 (TT)

The EEOC's Publication Center has many free documents on the Title I employment provisions of the ADA, including both the statute, 42 U.S.C. . 12101 et seq. (1994), and the regulations, 29 C.F.R. . 1630 (1997). In addition, the EEOC has published a great deal of basic information about reasonable accommodation and undue hardship. The two main sources of interpretive information are: (1) the Interpretive Guidance accompanying the Title I regulations (also known as the "Appendix" to the regulations), 29 C.F.R. pt. 1630 app. .. 1630.2(o), (p), 1630.9 (1997) , and (2) A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act III, 8 FEP Manual (BNA) 405:6981, 6998-7018 (1992). The Manual includes a 200-page Resource Directory, including federal and state agencies, and disability organizations that can provide assistance in identifying and locating reasonable accommodations.

The EEOC also has discussed issues involving reasonable accommodation in the following guidances and documents: (1) Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 5, 6-8, 20, 21-22, 8 FEP Manual (BNA) 405:7191, 7192-94, 7201 (1995); (2) Enforcement Guidance: Workers' Compensation and the ADA at 15-20, 8 FEP Manual (BNA) 405:7391, 7398-7401 (1996); (3) Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 19-28, 8 FEP Manual (BNA) 405:7461, 7470-76 (1997); and (4) Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 at 6-9, 8 FEP Manual (BNA) 405:7371, 7374-76 (1996).

Finally, the EEOC has a poster that employers and labor unions may use to fulfill the ADA's posting requirement.

All of the above-listed documents, with the exception of the ADA Technical Assistance Manual and Resource Directory and the poster, are also available through the Internet at http://www.eeoc.gov.

U.S. Department of Labor
(To obtain information on the Family and Medical Leave Act)
To request written materials:
1-800-959-3652 (Voice)
1-800-326-2577 (TT)
To ask questions: (202) 219-8412 (Voice)

Internal Revenue Service
(For information on tax credits and deductions for providing certain reasonable accommodations)

(202) 622-6060 (Voice)

Job Accommodation Network (JAN)
1-800-232-9675 (Voice/TT)
http://janweb.icdi.wvu.edu/.

A service of the President's Committee on Employment of People with Disabilities. JAN can provide information, free-of-charge, about many types of reasonable accommodations.

ADA Disability and Business Technical Assistance Centers (DBTACs) 1-800-949-4232 (Voice/TT)

The DBTACs consist of 10 federally funded regional centers that provide information, training, and technical assistance on the ADA. Each center works with local business, disability, governmental, rehabilitation, and other professional networks to provide current ADA information and assistance, and places special emphasis on meeting the needs of small businesses. The DBTACs can make referrals to local sources of expertise in reasonable accommodations.

Registry of Interpreters for the Deaf
(301) 608-0050 (Voice/TT)

The Registry offers information on locating and using interpreters and transliteration services.

RESNA Technical Assistance Project
(703) 524-6686 (Voice)
(703) 524-6639 (TT)
http://www.resna.org/hometa1.htm

RESNA, the Rehabilitation Engineering and Assistive Technology Society of North America, can refer individuals to projects in all 50 states and the six territories offering technical assistance on technology-related services for individuals with disabilities. Services may include:

- information and referral centers to help determine what devices may assist a person with a disability (including access to large data bases containing information on thousands of commercially available assistive technology products),
- centers where individuals can try out devices and equipment,
- assistance in obtaining funding for and repairing devices, and
- equipment exchange and recycling programs.

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Footnotes

1. 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).

The ADA's requirements regarding reasonable accommodation and undue hardship supercede any state or local disability antidiscrimination laws to the extent that they offer less protection than the ADA. See 29 C.F.R. § 1630.1(c)(2) (1997).

2. In addition to employers, the ADA requires employment agencies, labor organizations, and joint labor-management committees to provide reasonable accommodations. See 42 U.S.C. § 12112(a), (b)(5)(A) (1994).

3. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

4. 29 C.F.R. § 1630.2(o)(1)(i-iii) (1997) (emphasis added). The notices that employers and labor unions must post informing applicants, employees, and members of labor organizations of their ADA rights must include a description of the reasonable accommodation requirement. These notices, which must be in an accessible format, are available from the EEOC. See the Appendix.

5. All examples used in this document assume that the applicant or employee has an ADA "disability."

Individuals with a relationship or association with a person with a disability are not entitled to receive reasonable accommodations. See Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1084, 7 AD Cas. (BNA) 764, 772 (10th Cir. 1997).

6. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also H.R. Rep. No. 101-485, pt. 3, at 39 (1990) [hereinafter House Judiciary Report]; H.R. Rep. No. 101-485, pt. 2, at 65 (1990) [hereinafter House Education and Labor Report]; S. Rep. No. 101-116, at 34 (1989)[hereinafter Senate Report].

For more information concerning requests for a reasonable accommodation, see Questions 1-4, infra. For a discussion of the limited circumstance under which an employer would be required to ask an individual with a disability whether s/he needed a reasonable accommodation, see Question 40, infra.

7. 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2)(i-ii) (1997).

8. US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

9. Id.

Some courts have said that in determining whether an accommodation is "reasonable," one must look at the costs of the accommodation in relation to its benefits. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995). This "cost/benefit" analysis has no foundation in the statute, regulations, or legislative history of the ADA. See 42 U.S.C. § 12111(9), (10) (1994); 29 C.F.R. § 1630.2(o), (p) (1997); see also Senate Report, supra note 6, at 31-35; House Education and Labor Report, supra note 6, at 57-58.

10. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1522 (2002). The Court explained that "in ordinary English the word 'reasonable' does not mean 'effective.' It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness." Id.

11. A TTY is a device that permits individuals with hearing and speech impairments to communicate by telephone.

12. In US Airways, Inc. v. Barnett, the Supreme Court held that it was unreasonable, absent "special circumstances," for an employer to provide a reassignment that conflicts with the terms of a seniority system. 535 U.S., 122 S. Ct. 1516, 1524-25 (2002). For a further discussion of this issue, see Question 31, infra.

13. "[W]ith or without reasonable accommodation" includes, if necessary, reassignment to a vacant position. Thus, if an employee is no longer qualified because of a disability to continue in his/her present position, an employer must reassign him/her as a reasonable accommodation. See the section on "Reassignment," infra pp. 37-38 and n.77.

14. 29 C.F.R. pt. 1630 app. § 1630.2(n) (1997).

15. 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

16. See 42 U.S.C. § 12112 (b)(5)(A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ."); see also 42 U.S.C.

§ 12111(10) (1994) (defining "undue hardship" based on factors assessing cost and difficulty).

The legislative history discusses financial, administrative, and operational limitations on providing reasonable accommodations only in the context of defining "undue hardship." Compare Senate Report, supra note 6, at 31-34 with 35-36; House Education and Labor Report, supra note 6, at 57-58 with 67-70.

17. See 42 U.S.C. § 12111(10) (1994); 29 C.F.R. § 1630.2(p) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

18. See 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997). See also Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1048-49, 5 AD Cas. (BNA) 1367, 1372-73 (7th Cir. 1996); Bryant v. Better Business Bureau of Maryland, 923 F. Supp. 720, 740, 5 AD Cas. (BNA) 625, 638 (D. Md. 1996).

19. See, e.g., Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. . . The employee need not mention the ADA or even the term 'accommodation.'"). See also Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 694, 8 AD Cas. (BNA) 875, 882 (7th Cir. 1998) ("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation"); Bultemeyer v. Ft. Wayne Community Schs., 100 F.3d 1281, 1285, 6 AD Cas. (BNA) 67, 71 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist); McGinnis v. Wonder Chemical Co., 5 AD Cas. (BNA) 219 (E.D. Pa. 1995) (employer on notice that accommodation had been requested because: (1) employee told supervisor that his pain prevented him from working and (2) employee had requested leave under the Family and Medical Leave Act).

Nothing in the ADA requires an individual to use legal terms or to anticipate all of the possible information an employer may need in order to provide a reasonable accommodation. The ADA avoids a formulistic approach in favor of an interactive discussion between the employer and the individual with a disability, after the individual has requested a change due to a medical condition. Nevertheless, some courts have required that individuals initially provide detailed information in order to trigger the employer's duty to investigate whether reasonable accommodation is required. See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1660 (5th Cir. 1996); Miller v. Nat'l Cas. Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090-91 (8th Cir. 1995).

20. See Questions 5 - 7, infra, for a further discussion on when an employer may request reasonable documentation about a person's "disability" and the need for reasonable accommodation.

21. Cf. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996); Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146 (D. Or. 1994). But see Miller v. Nat'l Casualty Co., 61 F.3d 627, 630, 4 AD Cas. (BNA) 1089, 1091 (8th Cir. 1995) (employer had no duty to investigate reasonable accommodation despite the fact that the employee's sister notified the employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").

The employer should be receptive to any relevant information or requests it receives from a third party acting on the individual's behalf because the reasonable accommodation process presumes open communication in order to help the employer make an informed decision. See 29 C.F.R. §§ 1630.2(o), 1630.9 (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997).

22. Although individuals with disabilities are not required to keep records, they may find it useful to document requests for reasonable accommodation in the event there is a dispute about whether or when they requested accommodation. Employers, however, must keep all employment records, including records of requests for reasonable accommodation, for one year from the making of the record or the personnel action involved, whichever occurs later. If a charge is filed, records must be preserved until the charge is resolved. 29 C.F.R. § 1602.14 (1997).

23. Cf. Masterson v. Yellow Freight Sys., Inc., Nos. 98-6126, 98-6025, 1998 WL 856143 (10th Cir. Dec. 11, 1998) (fact that an employee with a disability does not need a reasonable accommodation all the time does not relieve employer from providing an accommodation for the period when he does need one).

24. See 29 C.F.R. § 1630.2(o)(3) (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997); see also Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601, 8 AD Cas. (BNA) 692, 700 (7th Cir. 1998); Dalton v. Subaru-Isuzu, 141 F.3d 667, 677, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998). The appendix to the regulations at § 1630.9 provides a detailed discussion of the reasonable accommodation process.

Engaging in an interactive process helps employers to discover and provide reasonable accommodation. Moreover, in situations where an employer fails to provide a reasonable accommodation (and undue hardship would not be a valid defense), evidence that the employer engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages. See 42 U.S.C. § 1981a(a)(3) (1994).

25. The burden-shifting framework outlined by the Supreme Court in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002), does not affect the interactive process between an employer and an individual seeking reasonable accommodation. See pages 61-62, infra, for a further discussion.

26. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997). The Appendix to this Guidance provides a list of resources to identify possible accommodations.

27. 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7191, 7193 (1995) [hereinafter Preemployment Questions and Medical Examinations]; EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 22-23, 8 FEP Manual (BNA) 405:7461, 7472-73 (1997) [hereinafter ADA and Psychiatric Disabilities]. Although the latter Enforcement Guidance

focuses on psychiatric disabilities, the legal standard under which an employer may request documentation applies to disabilities generally.

When an employee seeks leave as a reasonable accommodation, an employer's request for documentation about disability and the need for leave may overlap with the certification requirements of the Family and Medical Leave Act (FMLA), 29 C.F.R. §§ 825.305-.306, 825.310-.311 (1997).

28. Since a doctor cannot disclose information about a patient without his/her permission, an employer must obtain a release from the individual that will permit his/her doctor to answer questions. The release should be clear as to what information will be requested. Employers must maintain the confidentiality of all medical information collected during this process, regardless of where the information comes from. See Question 42 and note 111, infra.

29. See Question 9, infra, for information on choosing between two or more effective accommodations.

30. This employee also might be covered under the Family and Medical Leave Act, and if so, the employer would need to comply with the requirements of that statute.

31. See Templeton v. Neodata Servs., Inc., No. 98-1106, 1998 WL 852516 (10th Cir. Dec. 10, 1998); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1134, 5 AD Cas. (BNA) 304, 307 (7th Cir. 1996); McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518, 1525, 5 AD Cas. (BNA) 1047, 1052 (N.D. Tex. 1996).

32. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 887 (7th Cir. 1998).

33. If an individual provides sufficient documentation to show the existence of an ADA disability and the need for reasonable accommodation, continued efforts by the employer to require that the individual see the employer's health professional could be considered retaliation.

34. Employers also may consider alternatives like having their health professional consult with the individual's health professional, with the employee's consent.

35. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86, 6 AD Cas. (BNA) 1834, 1839 (11th Cir. 1997); Hankins v. The Gap, Inc., 84 F.3d 797, 800, 5 AD Cas. (BNA) 924, 926-27 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

36. 29 C.F.R. pt. 1630 app. §1630.9 (1997).

37. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998).

38. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.

39. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also Hankins v. The Gap, Inc., 84 F.3d 797, 801, 5 AD Cas. (BNA) 924, 927 (6th Cir. 1996).

40. 42 U.S.C. § 12112(d)(2)(A) (1994); 29 C.F.R. § 1630.13(a) (1997). For a thorough discussion of these requirements, see Preemployment Questions and Medical Examinations, supra note 27, at 6-8, 8 FEP Manual (BNA) 405:7193-94.

41. 42 U.S.C. § 12112(d)(3) (1994); 29 C.F.R. § 1630.14(b) (1997); see also Preemployment Questions and Medical Examinations, supra note 27, at 20, 8 FEP Manual (BNA) 405:7201.

42. See Question 12, supra, for the circumstances under which an employer may ask an applicant whether s/he will need reasonable accommodation to perform specific job functions.

43. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause undue hardship.

44. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

45. 42 U.S.C. §§ 12181(7), 12182(1)(A), (2)(A)(iii) (1994).

46. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause undue hardship.

The types of reasonable accommodations discussed in this section are not exhaustive. For example, employees with disabilities may request reasonable accommodations to modify the work environment, such as changes to the ventilation system or relocation of a work space.

See the Appendix for additional resources to identify other possible reasonable accommodations.

47. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997); see Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-13, 4 AD Cas. (BNA) 1234, 1236-37 (8th Cir. 1995).

48. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

An employee who needs leave, or a part-time or modified schedule, as a reasonable accommodation also may be entitled to leave under the Family and Medical Leave Act. See Questions 21 and 23, infra.

49. See A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at 3.10(4), 8 FEP Manual (BNA) 405:6981, 7011 (1992) [hereinafter TAM].

50. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002). See also Question 24, infra. While undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to the employer's operations if additional leave is granted beyond the period allowed by the policy. In determining whether undue hardship exists, the employer should consider how much additional leave is needed (e.g., two weeks, six months, one year?).

51. See Schmidt v. Safeway Inc., 864 F. Supp. 991, 996-97, 3 AD Cas. (BNA) 1141, 1145-46 (D. Or. 1994); Corbett v. National Products Co., 4 AD Cas. (BNA) 987, 990 (E.D. Pa. 1995).

52. See EEOC Enforcement Guidance: Workers' Compensation and the ADA at 16, 8 FEP Manual (BNA) 405:7391, 7399 (1996) [hereinafter Workers' Compensation and the ADA]. See also pp. 37-45, infra, for information on reassignment as a reasonable accommodation.

53. Cf. Kiel v. Select Artificials, 142 F.3d 1077, 1080, 8 AD Cas. (BNA) 43, 44 (8th Cir. 1998).

54. See Criado v. IBM, 145 F.3d 437, 444-45, 8 AD Cas. (BNA) 336, 341 (1st Cir. 1998).

55. But see Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1197-98, 7 AD Cas. (BNA) 1651, 1653-54 (7th Cir. 1997) (an employee who, because of a heart attack, missed several months of work and returned on a part-time basis until health permitted him to work full-time, could be terminated during a RIF based on his lower productivity). In reaching this decision, the Seventh Circuit failed to consider that the employee needed leave and a modified schedule as reasonable accommodations for his disability, and that the accommodations became meaningless when he was penalized for using them.

56. If an employee, however, qualifies for leave under the Family and Medical Leave Act, an employer may not require him/her to remain on the job with an adjustment in lieu of taking leave. See 29 C.F.R. § 825.702(d)(1) (1997).

57. See Question 9, supra.

58. For more detailed information on issues raised by the interplay between these statutes, refer to the FMLA/ADA Fact Sheet listed in the Appendix.

59. Employers should remember that many employees eligible for FMLA leave will not be entitled to leave as a reasonable accommodation under the ADA, either because they do not meet the ADA's definition of disability or, if they do have an ADA disability, the need for leave is unrelated to that disability.

60. 29 C.F.R. §§ 825.214(a), 825.215 (1997).

61. For further information on the undue hardship factors, see infra pp. 55-56.

62. 29 C.F.R. § 825.702(c)(4) (1997).

63. 42 U.S.C. §12111 (9) (B) (1994); see Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 172, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998) (a modified schedule is a form of reasonable accommodation).

64. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002).

65. Certain courts have characterized attendance as an "essential function." See, e.g., Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 438 (D.C. Cir. 1994); Jackson v. Department of Veterans Admin., 22 F.3d 277, 278-79, 3 AD Cas. (BNA) 483, 484 (11th Cir. 1994). Attendance, however, is not an essential function as defined by the ADA because it is not one of "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n)(1) (1997) (emphasis added). As the regulations make clear, essential functions are duties to be performed. 29 C.F.R. § 1630.2(n)(2) (1997). See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 602, 8 AD Cas. (BNA) 692, 701 (7th Cir. 1998); Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782-83, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

On the other hand, attendance is relevant to job performance and employers need not grant all requests for a modified schedule. To the contrary, if the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee's schedule as an undue hardship.

66. Employers covered under the Family and Medical Leave Act (FMLA) should determine whether any denial of leave or a modified schedule is also permissible under that law. See 29 C.F.R. § 825.203 (1997).

67. For more detailed information on issues raised by the interplay between these statutes, refer to the FMLA/ADA Fact Sheet listed in the Appendix.

68. See infra pp. 37-45 for more information on reassignment, including under what circumstances an employer and employee may voluntarily agree that a transfer is preferable to having the employee remain in his/her current position.

69. 29 C.F.R. § 825.204 (1997); see also special rules governing intermittent leave for instructional employees at §§ 825.601, 825.602.

70. 29 C.F.R. §§ 825.209, 825.210 (1997).

71. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002).

72. See Dutton v. Johnson County Bd. of Comm'rs, 868 F. Supp. 1260, 1264-65, 3 AD Cas. (BNA) 1614, 1618 (D. Kan. 1994).

73. See 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (1997). See also Question 17, supra.

74. But cf. Miller v. Nat'l Casualty Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090 (8th Cir. 1995) (court refuses to find that employee's sister had requested reasonable accommodation despite the fact that the sister informed the employer that the employee was having a medical crisis necessitating emergency hospitalization).

75. For information on how reassignment may apply to employers who provide light duty positions, see Workers' Compensation and the ADA, supra note 52, at 20-23, 8 FEP Manual (BNA) 405:7401-03.

76. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114, 4 AD Cas. (BNA) 1234, 1238 (8th Cir. 1995); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1187, 5 AD Cas. (BNA) 1326, 1338 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 498, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

Reassignment is available only to employees, not to applicants. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

77. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997); see Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1104, 4 AD Cas. (BNA) 1297, 1305 (S.D. Ga. 1995).

Some courts have found that an employee who is unable to perform the essential functions of his/her current position is unqualified to receive a reassignment. See, e.g., Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342, 345, 5 AD Cas. (BNA) 1340, 1342 (7th Cir. 1996); Pangalos v. Prudential Ins. Co. of Am., 5 AD Cas. (BNA) 1825, 1826 (E.D. Pa. 1996). These decisions, however, nullify Congress' inclusion of reassignment in the ADA. An employee requires a reassignment only if s/he is unable to continue performing the essential functions of his/her current position, with or without reasonable accommodation. Thus, an employer must provide reassignment either when reasonable accommodation in an employee's current job would cause undue hardship or when it would not be possible. See Aka v. Washington Hosp. Ctr.,156 F.3d 1284, 1300-01, 8 AD Cas. (BNA) 1093, 1107-08 (D.C. Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 27, at 28, 8 FEP Manual (BNA) 405:7476; Workers' Compensation and the ADA, supra note 52, at 17-18, 8 FEP Manual (BNA) 405:7399-7400.

78. 29 C.F.R. § 1630.2(m) (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(m), 1630.2(o)(1997). See Stone v. Mount Vernon, 118 F.3d 92, 100-01, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997).

79. See Quintana v. Sound Distribution Corp., 6 AD Cas. (BNA) 842, 846 (S.D.N.Y. 1997).

80. See 29 C.F.R. pt. 1630 app. §1630.2(o) (1997); Senate Report, supra note 6, at 31; House Education and Labor Report, supra note 6, at 63.

81. For suggestions on what the employee can do while waiting for a position to become vacant within a reasonable amount of time, see note 89, infra.

82. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997); see also White v. York Int'l Corp., 45 F.3d 357, 362, 3 AD Cas. (BNA) 1746, 1750 (10th Cir. 1995).

83. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

84. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521, 1524 (2002); see also Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998); United States v. Denver, 943 F. Supp. 1304, 1312, 6 AD Cas. (BNA) 245, 252 (D. Colo. 1996). See also Question 24, supra.

85. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997); see Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695, 8 AD Cas. (BNA) 875, 883 (7th Cir. 1998); see generally Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677-78, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998).

86. See Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1472 (7th Cir. 1996); see generally United States v. Denver, 943 F. Supp. 1304, 1311-13, 6 AD Cas. (BNA) 245, 251-52 (D. Colo. 1996).

Some courts have limited the obligation to provide a reassignment to positions within the same department or facility in which the employee currently works, except when the employer's standard practice is to provide inter-department or inter-facility transfers for all employees. See, e.g., Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 398, 4 AD Cas.(BNA) 1, 4-5 (E.D. Tex. 1995). However, the ADA requires modification of workplace policies, such as transfer policies, as a form of reasonable accommodation. See Question 24, supra. Therefore, policies limiting transfers cannot be a per se bar to reassigning someone outside his/her department or facility. \ Furthermore, the ADA requires employers to provide reasonable accommodations, including reassignment, regardless of whether such accommodations are routinely granted to non-disabled employees. See Question 26, supra.

87. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695-96, 697-98, 8 AD Cas. (BNA) 875, 883, 884 (7th Cir. 1998) (employer cannot mislead disabled employees who need reassignment about full range of vacant positions; nor can it post vacant positions for such a short period of time that disabled employees on medical leave have no realistic chance to learn about them); Mengine v. Runyon, 114 F.3d 415, 420, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (an employer has a duty to make reasonable efforts to assist an employee in identifying a vacancy because an employee will not have the ability or resources to identify a vacant position absent participation by the employer); Woodman v. Runyon, 132 F.3d 1330, 1344, 7 AD Cas. (BNA) 1189, 1199 (10th Cir. 1997) (federal employers are far better placed than employees to investigate in good faith the availability of vacant positions).

88. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA)1872, 1881 (7th Cir. 1998) (employer must first identify full range of alternative positions and then determine which ones employee qualified to perform, with or without reasonable accommodation); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 886-87 (7th Cir. 1998) (employer's methodology to determine if reassignment is appropriate does not constitute the "interactive process" contemplated by the ADA if it is directive rather than interactive); Mengine v. Runyon, 114 F.3d 415, 419-20, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (once an employer has identified possible vacancies, an employee has a duty to identify which one he is capable of performing).

89. If it will take several weeks to determine whether an appropriate vacant position exists, the employer and employee should discuss the employee's status during that period. There are different possibilities depending on the circumstances, but they may include: use of accumulated paid leave, use of unpaid leave, or a temporary assignment to a light duty position. Employers also may choose to take actions that go beyond the ADA's requirements, such as eliminating an essential function of the employee's current position, to enable an employee to continue working while a reassignment is sought.

90. 42 U.S.C. § 12111(9)(b) (1994); 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See Senate Report, supra note 6, at 31 ("If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker."). See Wood v. County of Alameda, 5 AD Cas. (BNA) 173, 184 (N.D. Cal. 1995) (when employee could no longer perform job because of disability, she was entitled to reassignment to a vacant position, not simply an opportunity to "compete"); cf. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998) (the court, in interpreting a collective bargaining agreement provision authorizing reassignment of disabled employees, states that "[a]n employee who is allowed to compete for jobs precisely like any other applicant has not been "reassigned"); United States v. Denver, 943 F. Supp. 1304, 1310-11, 6 AD Cas. (BNA) 245, 250 (D. Colo. 1996) (the ADA requires employers to move beyond traditional analysis and consider reassignment as a method of enabling a disabled worker to do a job).

Some courts have suggested that reassignment means simply an opportunity to compete for a vacant position. See, e.g., Daugherty v. City of El Paso, 56 F.3d 695, 700, 4 AD Cas. (BNA) 993, 997 (5th Cir. 1995). Such an interpretation nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation. Even without the ADA, an employee with a disability may have the right to compete for a vacant position.

91. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

92. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1524-25 (2002).

93. Id.

94. Id. at 1525. In a lawsuit, the plaintiff/employee bears the burden of proof to show the existence of "special circumstances" that warrant a jury's finding that a reassignment is "reasonable" despite the presence of a seniority system. If an employee can show "special circumstances," then the burden shifts to the employer to show why the reassignment would pose an undue hardship. See id.

95. Id.

96. Id. The Supreme Court made clear that these two were examples of "special circumstances" and that they did not constitute an exhaustive list of examples. Furthermore, Justice Stevens, in a concurring opinion, raised additional issues that could be relevant to show special circumstances that would make it reasonable for an employer to make an exception to its seniority system. See id. at 1526.

97. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause an undue hardship.

98. See Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 171, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998).

99. For a discussion on ways to modify supervisory methods, see ADA and Psychiatric Disabilities, supra note 27, at 26-27, 8 FEP Manual (BNA) 405:7475.

100. See 29 C.F.R. § 1630.2(o)(1)(ii), (2)(ii) (1997) (modifications or adjustments to the manner or circumstances under which the position held or desired is customarily performed that enable a qualified individual with a disability to perform the essential functions).

101. Courts have differed regarding whether "work-at-home" can be a reasonable accommodation. Compare Langon v. Department of Health and Human Servs., 959 F.2d 1053, 1060, 2 AD Cas. (BNA) 152, 159 (D.C. Cir. 1992); Anzalone v. Allstate Insurance Co., 5 AD Cas. (BNA) 455, 458 (E.D. La. 1995); Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 437-38 (D.D.C. 1994), with Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 545, 3 AD Cas. (BNA) 1636, 1640 (7th Cir. 1995). Courts that have rejected working at home as a reasonable accommodation focus on evidence that personal contact, interaction, and coordination are needed for a specific position. See, e.g., Whillock v. Delta Air Lines, 926 F. Supp. 1555, 1564, 5 AD Cas. (BNA) 1027 (N.D. Ga. 1995), aff'd, 86 F.3d 1171, 7 AD Cas. (BNA) 1267 (11th Cir. 1996); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227-28, 3 AD Cas. (BNA) 449, 457-58 (S.D.N.Y. 1994), aff'd, 60 F.3d 811, 6 AD Cas. (BNA) 576 (2d Cir. 1995).

102. See 29 C.F.R. § 1630.15(d) (1997).

103. See Siefken v. Arlington Heights, 65 F.3d 664, 666, 4 AD Cas. (BNA) 1441, 1442 (7th Cir. 1995). Therefore, it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur. For more information on conduct standards, including when they are job-related and consistent with business necessity, see ADA and Psychiatric Disabilities, supra note 27, at 29-32, 8 FEP Manual (BNA) 405:7476-78.

An employer does not have to offer a "firm choice" or a "last chance agreement" to an employee who performs poorly or who has engaged in misconduct because of alcoholism. "Firm choice" or "last chance agreements" involve excusing past performance or conduct problems resulting from alcoholism in exchange for an employee's receiving substance abuse treatment and refraining from further use of alcohol. Violation of such an agreement generally warrants termination. Since the ADA does not require employers to excuse poor performance or violation of conduct standards that are job-related and consistent with business necessity, an employer has no obligation to provide "firm choice" or a "last chance agreement" as a reasonable accommodation. See Johnson v. Babbitt, EEOC Docket No. 03940100 (March 28, 1996). However, an employer may choose to offer an employee a "firm choice" or a "last chance agreement."

104. See ADA and Psychiatric Disabilities, supra note 27, at 31-32, 8 FEP Manual (BNA) 405:7477-78.

105. See Robertson v. The Neuromedical Ctr., 161 F.3d 292, 296 (5th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 27, at 27-28, 8 FEP Manual (BNA) 405:7475.

106. While from an employer's perspective it may appear that an employee is "failing" to use medication or follow a certain treatment, such questions can be complex. There are many reasons why a person would choose to forgo treatment, including expense and serious side effects.

107. See Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 544, 3 AD Cas. (BNA) 1636, 1639 (7th Cir. 1995).

108. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also House Judiciary Report, supra note 6, at 39; House Education and Labor Report, supra note 6, at 65; Senate Report, supra note 6, at 34.

See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1659 (5th Cir. 1996); Tips v. Regents of Texas Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538, 5 AD Cas. (BNA) 141, 147 (N.D. Ala. 1995); Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075, 1080, 5 AD Cas. (BNA) 1295, 1300 (S.D. Ga. 1995), aff'd, 87 F.3d 1331, 6 AD Cas. (BNA) 1152 (11th Cir. 1996). But see Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) (employer had obligation to provide reasonable accommodation because it knew of the employee's alcohol problem and had reason to believe that an accommodation would permit the employee to perform the job).

An employer may not assert that it never received a request for reasonable accommodation, as a defense to a claim of failure to provide reasonable accommodation, if it actively discouraged an individual from making such a request.

For more information about an individual requesting reasonable accommodation, see Questions 1-4, supra.

109. See Question 5, supra, for information on the interactive process.

110. 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

111. 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C) (1994); 29 C.F.R. § 1630.14(b)(1) (1997). The limited exceptions to the ADA confidentiality requirements are:
(1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; (2) first aid and safety personnel may be told if the disability might require emergency treatment; and (3) government officials investigating compliance with the ADA must be given relevant information on request. In addition, the Commission has interpreted the ADA to allow employers to disclose medical information in the following circumstances: (1) in accordance with state workers' compensation laws, employers may disclose information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers; and (2) employers are permitted to use medical information for insurance purposes. See 29 C.F.R. pt. 1630 app. §1630.14(b) (1997); Preemployment Questions and Medical Examinations, supra note 27, at 23, 8 FEP Manual (BNA) 405:7201; Workers' Compensation and the ADA, supra note 52, at 7, 8 FEP Manual (BNA) 405:7394.

112. The discussions and examples in this section assume that there is only one effective accommodation.

113. See 29 C.F.R. pt. 1630 app. §1630.15(d) (1996); see also Stone v. Mount Vernon, 118 F.3d 92, 101, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997) (an employer who has not hired any persons with disabilities cannot claim undue hardship based on speculation that if it were to hire several people with disabilities it may not have sufficient staff to perform certain tasks); Bryant v. Better Business Bureau of Greater Maryland, 923 F. Supp. 720, 735, 5 AD Cas. (BNA) 625, 634 (D. Md. 1996).

114. See 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997); TAM, supra note 49, at 3.9, 8 FEP Manual (BNA) 405:7005-07.

115. See Senate Report, supra note 6, at 36; House Education and Labor Report, supra note 6, at 69. See also 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

116. See the Appendix on how to obtain information about the tax credit and deductions.

117. See 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997).

118. Failure to transfer marginal functions because of its negative impact on the morale of other employees also could constitute disparate treatment when similar morale problems do not stop an employer from reassigning tasks in other situations.

119. See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 600-02, 8 AD Cas. (BNA) 692, 699-701 (7th Cir. 1998).

120. See Criado v. IBM, 145 F.3d 437, 444-45, 8 AD Cas. (BNA) 336, 341 (1st Cir. 1998).

121. The ADA's definition of undue hardship does not include any consideration of a cost-benefit analysis. See 42 U.S.C. § 12111(10) (1994); see also House Education and Labor Report, supra note 6, at 69 ("[T]he committee wishes to make clear that the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of a finding of undue hardship.").

Furthermore, the House of Representatives rejected a cost-benefit approach by defeating an amendment which would have presumed undue hardship if a reasonable accommodation cost more than 10% of the employee's annual salary. See 136 Cong. Rec. H2475 (1990), see also House Judiciary Report, supra note 6, at 41; 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997).

Despite the statutory language and legislative history, some courts have applied a cost-benefit analysis. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995).

122. See 42 U.S.C. § 12112(b)(2) (1994); 29 C.F.R. § 1630.6 (1997) (prohibiting an employer from participating in a contractual relationship that has the effect of subjecting qualified applicants or employees with disabilities to discrimination).

123. See 42 U.S.C. § 12203(b) (1994); 29 C.F.R. § 1630.12(b) (1997).

124. For example, under Title III of the ADA a private entity that owns a building in which goods and services are offered to the public has an obligation, subject to certain limitations, to remove architectural barriers so that people with disabilities have equal access to these goods and services. 42 U.S.C.

§ 12182(b)(2)(A)(iv) (1994). Thus, the requested modification may be something that the property owner should have done to comply with Title III.

125. US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

126. Id.

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Jeffrey Frost is risk services counsel for Sutter Health located in Sacramento, California. Sutter Health is one of the nation's leading not-for-profit networks of hospitals, doctors, nurses, and other health care services. Mr. Frost assists Sutter Health affiliate's human resource directors and managers with a variety of employment issues including, but not limited to, conducting workplace investigations, responding to administrative charges, management training on federal and state employment laws, and managing litigation matters.

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Robert E. Gans is labor/employment counsel for Computer Sciences Corporation, located in Falls Church, Virginia, a Fortune 500 information technology company with approximately $14 billion revenue and 79,000 employees worldwide. Mr. Gans manages primarily U.S. employment litigation, as well as handles broader corporate policy issues related to human resources matters. He handles EEOC charges, Department of Labor complaints, OFCCP compliance reviews, Reduction in Force/WARN Act issues, severance and non-competition agreements, and FMLA/ADA administration and accommodation matters.

Prior to joining CSC, Mr. Gans was employment counsel for Nordstrom, managing east coast division employment and general liability matters, training and counseling senior management and human resources personnel, advising on matters of sexual harassment prevention, FMLA/ADA reasonable accommodations, benefits/severance, workplace violence prevention, and contractual issues. Prior to Nordstrom, Mr. Gans was a litigator for a Washington, DC employment law boutique firm of Shaw, Bransford, Veilleux and Roth. Mr. Gans started out his litigation career as a plaintiff's lawyer.

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Prior to joining Lockheed Martin, Mr. Maffei was the vice-president and general counse for General Dynamics Information Systems, a $600 million defense electronics company. Practice focused in the areas of commercial and government contract formation and litigation, export licensing compliance, intellectual property, and international technology licensing and agreements. Mr. Maffei was also a partner at Briggs and Morgan Law Firm and Hart and Bruner Law Firm. Mr. Maffei served as a captain in the United States Air Force (USAF) on active duty and recently retired as a colonel from the USAF Reserve.

Mr. Maffei is a member of the Ohio State Bar Association, Minnesota Bar Association, ABA public contract law section, Federal Bar Association, American Arbitration Association, and National Contract Management Association (Fellow, Board of Advisors). He has been an adjunct professor of law at William Mitchell College of Law and the Air Force Institute of Technology, Air University. He has been a lecturer for Federal Publications, Inc., the University of Minnesota, National Contract Management Association, ABA, and Minnesota CLE. He is also a certified mediator and arbitrator for the State of Minnesota, and the American Arbitration Association.

Mr. Maffei received a B.A. from Trinity College and his J.D. from the University of Maine School of Law.

ACC's 2005 ANNUAL MEETING USING COMPLIANCE FOR A COMPETITIVE ADVANTAGE

The U.S. Equal Employment Opportunity Commission

[redacted]	NOTICE	Number 915.002
EEOC		
[redacted]		October 17, 2002

1. SUBJECT: EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
2. PURPOSE: This enforcement guidance supersedes the enforcement guidance issued by the Commission on 03/01/99. Most of the original guidance remains the same, but limited changes have been made as a result of: (1) the Supreme Court's decision in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), and (2) the Commission's issuance of new regulations under section 501 of the Rehabilitation Act. The major changes in response to the Barnett decision are found on pages 4-5, 44-45, and 61-62. In addition, minor changes were made to certain footnotes and the Instructions for Investigators as a result of the Barnett decision and the new section 501 regulations.
3. EFFECTIVE DATE: Upon receipt.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, . a(5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: ADA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

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Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

This Enforcement Guidance clarifies the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship. Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. This Guidance sets forth an employer's legal obligations regarding reasonable accommodation; however, employers may provide more than the law requires.

This Guidance examines what "reasonable accommodation" means and who is entitled to receive it. The Guidance addresses what constitutes a request for reasonable accommodation, the form and substance of the request, and an employer's ability to ask questions and seek documentation after a request has been made.

ACC's 2005 ANNUAL MEETING USING COMPLIANCE FOR A COMPETITIVE ADVANTAGE

The Guidance discusses reasonable accommodations applicable to the hiring process and to the benefits and privileges of employment. The Guidance also covers different types of reasonable accommodations related to job performance, including job restructuring, leave, modified or part-time schedules, modified workplace policies, and reassignment. Questions concerning the relationship between the ADA and the Family and Medical Leave Act (FMLA) are examined as they affect leave and modified schedules. Reassignment issues addressed include who is entitled to reassignment and the extent to which an employer must search for a vacant position. The Guidance also examines issues concerning the interplay between reasonable accommodations and conduct rules.

The final section of this Guidance discusses undue hardship, including when requests for schedule modifications and leave may be denied.

GENERAL PRINCIPLES

Reasonable Accommodation

Title I of the Americans with Disabilities Act of 1990 (the "ADA")[1] requires an employer[2] to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[3] There are three categories of "reasonable accommodations":

> "(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[4]

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Reasonable accommodation is available to qualified applicants and employees with disabilities.[5] Reasonable accommodations must be provided to qualified employees regardless of whether they work part- time or full-time, or are considered "probationary."

Generally, the individual with a disability must inform the employer that an accommodation is needed.[6]

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.[7]

A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;"[8] this means it is "reasonable" if it appears to be "feasible" or "plausible."[9] An accommodation also must be effective in meeting the needs of the individual.[10] In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, a reasonable accommodation enables an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

Example A: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY[11] to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is "reasonable" because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.

Example B: A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This "reasonable" accommodation is effective because it addresses the employee's fatigue and enables her to perform her job.

Example C: A cleaning company rotates its staff to different floors on a monthly basis. One crew member has a psychiatric disability. While his mental illness does not affect his ability to perform the various cleaning functions, it does make it difficult to adjust to alterations in his daily routine. The employee has had significant difficulty adjusting to the monthly changes in floor assignments. He asks for a reasonable accommodation and proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments. These accommodations are reasonable because they appear to be feasible solutions to this employee's problems dealing with changes to his routine. They also appear to be effective because they would enable him to perform his cleaning duties.

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There are several modifications or adjustments that are not considered forms of reasonable accommodation.[12] An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation,[13] is not a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards -- whether qualitative or quantitative[14] -- that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a production standard, it may do so if it wishes.

An employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job. Furthermore, an employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related rather than personal needs.[15]

Undue Hardship

The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer.[16] "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.[17] An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. The ADA's "undue hardship" standard is different from that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation.[18]

REQUESTING REASONABLE ACCOMMODATION

1. How must an individual request a reasonable accommodation?

   When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."[19]

   Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.

   Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem." This is a request for a reasonable accommodation.

   Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation.

   Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does not link his need for the new chair with a medical condition.

   While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of "disability," [20] a prerequisite for the individual to be entitled to a reasonable accommodation.

2. May someone other than the individual with a disability request a reasonable accommodation on behalf of the individual?

   Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.[21] Of course, the individual with a disability may refuse to accept an accommodation that is not needed.

   Example A: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. This discussion constitutes a request for reasonable accommodation.

   Example B: An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation.

3. Do requests for reasonable accommodation need to be in writing?

   No. Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodations in conversation or may use any other mode of communication.[22] An employer may choose to write a memorandum or letter confirming the individual's request. Alternatively, an employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request. An employer also may request reasonable documentation that the individual has an ADA disability and needs a reasonable accommodation. (See Question 6).

4. When should an individual with a disability request a reasonable accommodation?

   An individual with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. The ADA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer. Rather, an individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.[23] As a practical matter, it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.

5. What must an employer do after receiving a request for reasonable accommodation?

   The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.[24] The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.[25]

   The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.[26]

6. May an employer ask an individual for documentation when the individual requests reasonable accommodation?

   Yes. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. [27] The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

   Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation. If an individual has more than one disability, an employer can request information pertaining only to the disability that requires a reasonable accommodation.

   An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

   In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.[28]

   As an alternative to requesting documentation, an employer may simply discuss with the person the nature of his/her disability and functional limitations. It would be useful for the employer to make clear to the individual why it is requesting information, i.e., to verify the existence of an ADA disability and the need for a reasonable accommodation.

   Example A: An employee says to an employer, "I'm having trouble reaching tools because of my shoulder injury." The employer may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities (i.e., the employer is seeking information as to whether the employee has an ADA disability).

   Example B: A marketing employee has a severe learning disability. He attends numerous meetings to plan marketing strategies. In order to remember what is discussed at these meetings he must take detailed notes but, due to his disability, he has great difficulty writing. The employee tells his supervisor about his disability and requests a laptop computer to use in the meetings. Since neither the disability nor the need for accommodation are obvious, the supervisor may ask the employee for reasonable documentation about his impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities. The employer also may ask why the disability necessitates use of a laptop computer (or any other type of reasonable accommodation, such as a tape recorder) to help the employee retain the information from the meetings.[29]

   Example C: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. The supervisor can ask the spouse to send in documentation from the employee's treating physician that confirms that the hospitalization was related to the multiple sclerosis and provides information on how long an absence may be required from work.[30]

   If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation.[31] On the other

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hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.[22]

7. May an employer require an individual to go to a health care professional of the employer's (rather than the employee's) choice for purposes of documenting need for accommodation and disability?

   The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.[23]

   Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.[24]If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

8. Are there situations in which an employer cannot ask for documentation in response to a request for reasonable accommodation?

   Yes. An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

   Example A: An employee brings a note from her treating physician explaining that she has diabetes and that, as a result, she must test her blood sugar several times a day to ensure that her insulin level is safe in order to avoid a hyperglycemic reaction. The note explains that a hyperglycemic reaction can include extreme thirst, heavy breathing, drowsiness, and flushed skin, and eventually would result in unconsciousness. Depending on the results of the blood test, the employee might have to take insulin. The note requests that the employee be allowed three or four 10-minute breaks each day to test her blood, and if necessary, to take insulin. The doctor's note constitutes sufficient documentation that the person has an ADA disability because it describes a substantially limiting impairment and the reasonable accommodation needed as a result. The employer cannot ask for additional documentation.

   Example B: One year ago, an employer learned that an employee had bipolar disorder after he requested a reasonable accommodation. The documentation provided at that time from the employee's psychiatrist indicated that this was a permanent condition which would always involve periods in which the disability would remit and then intensify. The psychiatrist's letter explained that during periods when the condition flared up, the person's manic moods or depressive episodes could be severe enough to create serious problems for the individual in caring for himself or working, and that medication controlled the frequency and severity of these episodes.

   Now, one year later, the employee again requests a reasonable accommodation related to his bipolar disorder. Under these facts, the employer may ask for reasonable documentation on the need for the accommodation (if the need is not obvious), but it cannot ask for documentation that the person has an ADA disability. The medical information provided one year ago established the existence of a long-term impairment that substantially limits a major life activity.

   Example C: An employee gives her employer a letter from her doctor, stating that the employee has asthma and needs the employer to provide her with an air filter. This letter contains insufficient information as to whether the asthma is an ADA disability because it does not provide any information as to its severity (i.e., whether it substantially limits a major life activity). Furthermore, the letter does not identify precisely what problem exists in the workplace that requires an air filter or any other reasonable accommodation. Therefore, the employer can request additional documentation.

9. Is an employer required to provide the reasonable accommodation that the individual wants?

   The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.[25] Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

   If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."[26]

   Example A: An employee with a severe learning disability has great difficulty reading. His supervisor sends him many detailed memoranda which he often has trouble understanding. However, he has no difficulty understanding oral communication. The employee requests that the employer install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. The supervisor asks whether a tape recorded message would accomplish the same objective and the employee agrees that it would. Since both accommodations are effective, the employer may choose to provide the supervisor and employee with a tape recorder so that the supervisor can record her memoranda and the employee can listen to them.

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   Example B: An attorney with a severe vision disability requests that her employer provide someone to read printed materials that she needs to review daily. The attorney explains that a reader enables her to review substantial amounts of written materials in an efficient manner. Believing that this reasonable accommodation would be too costly, the employer instead provides the attorney with a device that allows her to magnify print so that she can read it herself. The attorney can read print using this device, but with such great difficulty it significantly slows down her ability to review written materials. The magnifying device is ineffective as a reasonable accommodation because it does not provide the attorney with an equal opportunity to attain the same level of performance as her colleagues. Without an equal opportunity to attain the same level of performance, this attorney is denied an equal opportunity to compete for promotions. In this instance, failure to provide the reader, absent undue hardship, would violate the ADA.

10. How quickly must an employer respond to a request for reasonable accommodation?

    An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible.[27] Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.[28]

    Example A: An employer provides parking for all employees. An employee who uses a wheelchair requests from his supervisor an accessible parking space, explaining that the spaces are so narrow that there is insufficient room for his van to extend the ramp that allows him to get in and out. The supervisor does not act on the request and does not forward it to someone with authority to respond. The employee makes a second request to the supervisor. Yet, two months after the initial request, nothing has been done. Although the supervisor never definitively denies the request, the lack of action under these circumstances amounts to a denial, and thus violates the ADA.

    Example B: An employee who is blind requests adaptive equipment for her computer as a reasonable accommodation. The employer must order this equipment and is informed that it will take three months to receive delivery. No other company sells the adaptive equipment the employee needs. The employer notifies the employee of the results of its investigation and that it has ordered the equipment. Although it will take three months to receive the equipment, the employer has moved as quickly as it can to obtain it and thus there is no ADA violation resulting from the delay. The employer and employee should determine what can be done so that the employee can perform his/her job as effectively as possible while waiting for the equipment.

11. May an employer require an individual with a disability to accept a reasonable accommodation that s/he does not want?

    No. An employer may not require a qualified individual with a disability to accept an accommodation. If, however, an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, s/he may not be qualified to remain in the job.[29]

REASONABLE ACCOMMODATION AND JOB APPLICANTS

12. May an employer ask whether a reasonable accommodation is needed when an applicant has not asked for one?

    An employer may tell applicants what the hiring process involves (e.g., an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.

    During the hiring process and before a conditional offer is made, an employer generally may not ask an applicant whether s/he needs a reasonable accommodation for the job, except when the employer knows that an applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type. [30]

    After a conditional offer of employment is extended, an employer may inquire whether applicants will need reasonable accommodations related to anything connected with the job (i.e., job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question. Alternatively, an employer may ask a specific applicant if s/he needs a reasonable accommodation if the employer knows that this applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.[31]

13. Does an employer have to provide a reasonable accommodation to an applicant with a disability even if it believes that it will be unable to provide this individual with a reasonable accommodation on the job?

    Yes. An employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless it can show undue hardship). Thus, individuals with disabilities who meet initial requirements to be considered for a job should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation for the application process, that it will be unable to provide the individual with reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. Thus, an employer should assess the need for accommodations for the application process separately from those that may be needed to perform the job. [32]

    Example A: An employer is impressed with an applicant's resume and contacts the individual to come in for an interview. The applicant, who is deaf, requests a sign language interpreter for the interview. The employer cancels the interview

and refuses to consider further this applicant because it believes it would have to hire a full-time interpreter. The employer has violated the ADA. The employer should have proceeded with the interview, using a sign language interpreter (absent undue hardship), and at the interview inquired to what extent the individual would need a sign language interpreter to perform any essential functions requiring communication with other people.

Example B: An individual who has paraplegia applies for a secretarial position. Because the office has two steps at the entrance, the employer arranges for the applicant to take a typing test, a requirement of the application process, at a different location. The applicant fails the test. The employer does not have to provide any further reasonable accommodations for this individual because she is no longer qualified to continue with the application process.

REASONABLE ACCOMMODATION RELATED TO THE BENEFITS AND PRIVILEGES OF EMPLOYMENT [43]

The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs (EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings).[44] If an employee with a disability needs a reasonable accommodation in order to gain access to, and have an equal opportunity to participate in, these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

14. Does an employer have to provide reasonable accommodation to enable an employee with a disability to have equal access to information communicated in the workplace to non-disabled employees?

    Yes. Employers provide information to employees through different means, including computers, bulletin boards, mailboxes, posters, and public address systems. Employers must ensure that employees with disabilities have access to information that is provided to other similarly-situated employees without disabilities, regardless of whether they need it to perform their jobs.

    Example A: An employee who is blind has adaptive equipment for his computer that integrates him into the network with other employees, thus allowing communication via electronic mail and access to the computer bulletin board. When the employer installs upgraded computer equipment, it must provide new adaptive equipment in order for the employee to be integrated into the new networks, absent undue hardship. Alternative methods of communication (e.g., sending written or telephone messages to the employee instead of electronic mail) are likely to be ineffective substitutes since electronic mail is used by every employee and there is no effective way to ensure that each one will always use alternative measures to ensure that the blind employee receives the same information that is being transmitted via computer.

Example B: An employer authorizes the Human Resources Director to use a public address system to remind employees about special meetings and to make certain announcements. In order to make this information accessible to a deaf employee, the Human Resources Director arranges to send in advance an electronic mail message to the deaf employee conveying the information that will be broadcast. The Human Resources Director is the only person who uses the public address system; therefore, the employer can ensure that all public address messages are sent, via electronic mail, to the deaf employee. Thus, the employer is providing this employee with equal access to office communications.

15. Must an employer provide reasonable accommodation so that an employee may attend training programs?

    Yes. Employers must provide reasonable accommodation (e.g., sign language interpreters; written materials produced in alternative formats, such as braille, large print, or on audio- cassette) that will provide employees with disabilities with an equal opportunity to participate in employer-sponsored training, absent undue hardship. This obligation extends to in-house training, as well as to training provided by an outside entity. Similarly, the employer has an obligation to provide reasonable accommodation whether the training occurs on the employer's premises or elsewhere.

    Example A: XYZ Corp. has signed a contract with Super Trainers, Inc., to provide mediation training at its facility to all of XYZ's Human Resources staff. One staff member is blind and requests that materials be provided in braille. Super Trainers refuses to provide the materials in braille. XYZ maintains that it is the responsibility of Super Trainers and sees no reason why it should have to arrange and pay for the braille copy.

    Both XYZ (as an employer covered under Title I of the ADA) and Super Trainers (as a public accommodation covered under Title III of the ADA)[45] have obligations to provide materials in alternative formats. This fact, however, does not excuse either one from their respective obligations. If Super Trainers refuses to provide the braille version, despite its Title III obligations, XYZ still retains its obligation to provide it as a reasonable accommodation, absent undue hardship.

    Employers arranging with an outside entity to provide training may wish to avoid such problems by specifying in the contract who has the responsibility to provide appropriate reasonable accommodations. Similarly, employers should ensure that any offsite training will be held in an accessible facility if they have an employee who, because of a disability, requires such an accommodation.

    Example B: XYZ Corp. arranges for one of its employees to provide CPR training. This three-hour program is optional. A deaf employee wishes to take the training and requests a sign language interpreter. XYZ must provide the interpreter because the CPR training is a benefit that XYZ offers all employees, even though it is optional.

TYPES OF REASONABLE ACCOMMODATIONS RELATED TO JOB PERFORMANCE[46]

Below are discussed certain types of reasonable accommodations related to job performance.

Job Restructuring

Job restructuring includes modifications such as:

- reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and
- altering when and/or how a function, essential or marginal, is performed.[47]

An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.

16. If, as a reasonable accommodation, an employer restructures an employee's job to eliminate some marginal functions, may the employer require the employee to take on other marginal functions that s/he can perform?

    Yes. An employer may switch the marginal functions of two (or more) employees in order to restructure a job as a reasonable accommodation.

    Example: A cleaning crew works in an office building. One member of the crew wears a prosthetic leg which enables him to walk very well, but climbing steps is painful and difficult. Although he can perform his essential functions without problems, he cannot perform the marginal function of sweeping the steps located throughout the building. The marginal functions of a second crew member include cleaning the small kitchen in the employee's lounge, which is something the first crew member can perform. The employer can switch the marginal functions performed by these two employees.

Leave

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability.[48] An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave.[49] For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:

- obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
- recuperating from an illness or an episodic manifestation of the disability;
- obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- training a service animal (e.g., a guide dog); or
- receiving training in the use of braille or to learn sign language.

17. May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

    No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.[50]

18. Does an employer have to hold open an employee's job as a reasonable accommodation?

    Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.[51]

    If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.[52]

    Example: An employee needs eight months of leave for treatment and recuperation related to a disability. The employer grants the request, but after four months the employer determines that it can no longer hold open the position for the remaining four months without incurring undue hardship. The employer must consider whether it has a vacant, equivalent position to which the employee can be reassigned for the remaining four months of leave, at the end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

19. Can an employer penalize an employee for work missed during leave taken as a reasonable accommodation?

    No. To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law.[53] Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.[54]

    Example A: A salesperson took five months of leave as a reasonable accommodation. The company compares the sales records of all salespeople over

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a one-year period, and any employee whose sales fall more than 25% below the median sales performance of all employees is automatically terminated. The employer terminates the salesperson because she had fallen below the required performance standard. The company did not consider that the reason for her lower sales performance was her five-month leave of absence; nor did it assess her productivity during the period she did work (i.e., prorate her productivity).

Penalizing the salesperson in this manner constitutes retaliation and a denial of reasonable accommodation.

Example B: Company X is having a reduction-in-force. The company decides that any employee who has missed more than four weeks in the past year will be terminated. An employee took five weeks of leave for treatment of his disability. The company cannot count those five weeks in determining whether to terminate this employee.[59]

20. When an employee requests leave as a reasonable accommodation, may an employer provide an accommodation that requires him/her to remain on the job instead?

Yes, if the employer's reasonable accommodation would be effective and eliminate the need for leave.[60] An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation.[61] Accordingly, in lieu of providing leave, an employer may provide a reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. The employer is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he no longer needs the reasonable accommodation.

Example A: An employee with emphysema requests ten weeks of leave for surgery and recuperation related to his disability. In discussing this request with the employer, the employee states that he could return to work after seven weeks if, during his first three weeks back, he could work part-time and eliminate two marginal functions that require lots of walking. If the employer provides these accommodations, then it can require the employee to return to work after seven weeks.

Example B: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. After receiving the employee's request for leave for the surgery, the employer proposes that it provide certain equipment which it believes will mitigate the effects of the disability and delay the need for leave to get surgery. The employer's proposed accommodation is not effective because it interferes with the employee's ability to get medical treatment.

21. How should an employer handle leave for an employee covered by both the ADA and the Family and Medical Leave Act (FMLA)?[62]

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.[63]

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation).

If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Under the FMLA, an eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one.[64] An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. The FMLA requires an employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.

Example A: An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.[65]

Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

Example C: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment,[66] but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position

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available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Modified or Part-Time Schedule

22. Must an employer allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship?

Yes.[67] A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.[68]

Example A: An employee with HIV infection must take medication on a strict schedule. The medication causes extreme nausea about one hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be allowed to take a daily 45-minute break when the nausea occurs. The employer must grant this request absent undue hardship.

For certain positions, the time during which an essential function is performed may be critical. This could affect whether an employer can grant a request to modify an employee's schedule.[69] Employers should carefully assess whether modifying the hours could significantly disrupt their operations -- that is, cause undue hardship -- or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs.

If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested. [70]

Example B: A day care worker requests that she be allowed to change her hours from 7:00 a.m. - 3:00 p.m. to 10:00 a.m. - 6:00 p.m. because of her disability. The day care center is open from 7:00 a.m. - 7:00 p.m. and it will still have sufficient coverage at the beginning of the morning if it grants the change in hours. In this situation, the employer must provide the reasonable accommodation.

Example C: An employee works for a morning newspaper, operating the printing presses which run between 10 p.m. and 3 a.m. Due to her disability, she needs to work in the daytime. The essential function of her position, operating the printing presses, requires that she work at night because the newspaper cannot be printed during the daytime hours. Since the employer cannot modify her hours, it must consider whether it can reassign her to a different position.

23. How should an employer handle requests for modified or part-time schedules for an employee covered by both the ADA and the Family and Medical Leave Act (FMLA)?[71]

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship. If there is undue hardship, the employer must reassign the employee if there is a vacant position for which s/he is qualified and which would allow the employer to grant the modified or part-time schedule (absent undue hardship).[72]An employee receiving a part-time schedule as a reasonable accommodation is entitled only to the benefits, including health insurance, that other part-time employees receive. Thus, if non- disabled part-time workers are not provided with health insurance, then the employer does not have to provide such coverage to an employee with a disability who is given a part-time schedule as a reasonable accommodation.

Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12- month period. When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position, with equivalent pay and benefits, for which the employee is qualified and which better suits his/her reduced hours.[73] An employer always must maintain the employee's existing level of coverage under a group health plan during the period of FMLA leave, provided the employee pays his/her share of the premium.[74]

Example: An employee with an ADA disability requests that she be excused from work one day a week for the next six months because of her disability. If this employee is eligible for a modified schedule under the FMLA, the employer must provide the requested leave under that statute if it is medically necessary, even if the leave would be an undue hardship under the ADA.

Modified Workplace Policies

24. Is it a reasonable accommodation to modify a workplace policy?

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations,[75] absent undue hardship. But, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees.

Example: An employer has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her employer that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The employer must modify its policy to grant this request, absent undue hardship. Similarly, an employer might have to modify a policy to allow an employee with a disability to bring in a small refrigerator, or to use the employer's refrigerator, to store medication that must be taken during working hours.

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Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. For example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability- related medical problems, barring undue hardship.[219]Furthermore, an employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.[220]

In some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability.[221]

Reassignment [222]

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation.[223] This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.[224]

An employee must be "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation.[225] The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job.[226] The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.

Example A: An employer is considering reassigning an employee with a disability to a position which requires the ability to speak Spanish in order to perform an essential function. The employee never learned Spanish and wants the employer to send him to a course to learn Spanish. The employer is not required to provide this training as part of the obligation to make a reassignment. Therefore, the employee is not qualified for this position.

Example B: An employer is considering reassigning an employee with a disability to a position in which she will contract for goods and services. The employee is qualified for the position. The employer has its own specialized rules regarding contracting that necessitate training all individuals hired for these positions. In this situation, the employer must provide the employee with this specialized training.

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.[227] However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.

"Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time.[228] A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position. The employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.[229]

Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

Example D: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent position plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of pay, status, etc.[230]If it is unclear which position comes closest, the employer should consult with the employee about his/her preference before determining the position to which the employee will be reassigned. Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion.

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25. Is a probationary employee entitled to reassignment?

    Employers cannot deny a reassignment to an employee solely because s/he is designated as "probationary." An employee with a disability is eligible for reassignment to a new position, regardless of whether s/he is considered "probationary," as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.

    The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. If, however, the probationary employee has never adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

    Example A: An employer designates all new employees as "probationary" for one year. An employee has been working successfully for nine months when she becomes disabled in a car accident. The employee, due to her disability, is unable to continue performing the essential functions of her current position, with or without reasonable accommodation, and seeks a reassignment. She is entitled to a reassignment if there is a vacant position for which she is qualified and it would not pose an undue hardship.

    Example B: A probationary employee has been working two weeks, but has been unable to perform the essential functions of the job because of his disability. There are no reasonable accommodations that would permit the individual to perform the essential functions of the position, so the individual requests a reassignment. The employer does not have to provide a reassignment (even if there is a vacant position) because, as it turns out, the individual was never qualified -- i.e., the individual was never able to perform the essential functions of the position, with or without reasonable accommodation, for which he was hired.

26. Must an employer offer reassignment as a reasonable accommodation if it does not allow any of its employees to transfer from one position to another?

    Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.[231]

27. Is an employer's obligation to offer reassignment to a vacant position limited to those vacancies within an employee's office, branch, agency, department, facility, personnel system (if the employer has more than a single personnel system), or geographical area?

    No. This is true even if the employer has a policy prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. The ADA contains no language limiting the obligation to reassign only to positions within an office, branch, agency, etc.[232] Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship.[233]If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees.

28. Does an employer have to notify an employee with a disability about vacant positions, or is it the employee's responsibility to learn what jobs are vacant?

    The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time.[234] In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.[235]

    An employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly an employer can search for and identify whether an appropriate vacant position exists. For a very small employer, this process may take one day; for other employers this process may take several weeks.[236]When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

29. Does reassignment mean that the employee is permitted to compete for a vacant position?

    No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.[237]

30. If an employee is reassigned to a lower level position, must an employer maintain his/her salary from the higher level position?

    No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries.[238]

31. Must an employer provide a reassignment if it would violate a seniority system?

    Generally, it will be "unreasonable" to reassign an employee with a disability if doing so would violate the rules of a seniority system.[239] This is true both for collectively bargained seniority systems and those unilaterally imposed by management. Seniority systems governing job placement give employees expectations of consistent, uniform treatment expectations that would be

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undermined if employers had to make the type of individualized, case-by-case assessment required by the reasonable accommodation process.[95]

However, if there are "special circumstances" that "undermine the employees' expectations of consistent, uniform treatment," it may be a "reasonable accommodation," absent undue hardship, to reassign an employee despite the existence of a seniority system. For example, "special circumstances" may exist where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system.[96]In this circumstance, one more exception (i.e., providing the reassignment to an employee with a disability) may not make a difference.[97]Alternatively, a seniority system may contain exceptions, such that one more exception is unlikely to matter.[98] Another possibility is that a seniority system might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.

OTHER REASONABLE ACCOMMODATION ISSUES[97]

32. If an employer has provided one reasonable accommodation, does it have to provide additional reasonable accommodations requested by an individual with a disability?

    The duty to provide reasonable accommodation is an ongoing one.[99] Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

    An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and (3) if effective, whether providing the reasonable accommodation would impose an undue hardship. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

33. Does an employer have to change a person's supervisor as a form of reasonable accommodation?

    No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so. Furthermore, although an employer is not required to change supervisors, the ADA may require that supervisory methods be altered as a form of reasonable accommodation.[100]Also, an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.

Example: A supervisor frequently schedules team meetings on a day's notice often notifying staff in the afternoon that a meeting will be held on the following morning. An employee with a disability has missed several meetings because they have conflicted with previously-scheduled physical therapy sessions. The employee asks that the supervisor give her two to three days' notice of team meetings so that, if necessary, she can reschedule the physical therapy sessions. Assuming no undue hardship would result, the supervisor must make this reasonable accommodation.

34. Does an employer have to allow an employee with a disability to work at home as a reasonable accommodation?

    An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.[101]Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader).[102] For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.

35. Must an employer withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity?

    No. An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

36. Must an employer provide a reasonable accommodation for an employee with a disability who violated a conduct rule that is job- related for the position in question and consistent with business necessity?

    An employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination.[103]Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.[104] Possible reasonable accommodations could include adjustments to starting times, specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.[105]

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Example: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 a.m. to 5:30 p.m., but he arrives at 9:00, 9:30, 10:00, or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 a.m. to 6:30 p.m., a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 a.m.

37. Is it a reasonable accommodation to make sure that an employee takes medication as prescribed?

    No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a workplace barrier. Similarly, an employer has no responsibility to monitor an employee's medical treatment or ensure that s/he is receiving appropriate treatment because such treatment does not involve modifying workplace barriers.[106]

    It may be a form of reasonable accommodation, however, to give an employee a break in order that s/he may take medication, or to grant leave so that an employee may obtain treatment.

38. Is an employer relieved of its obligation to provide reasonable accommodation for an employee with a disability who fails to take medication, to obtain medical treatment, or to use an assistive device (such as a hearing aid)?

    No. The ADA requires an employer to provide reasonable accommodation to remove workplace barriers, regardless of what effect medication, other medical treatment, or assistive devices may have on an employee's ability to perform the job.[107]

    However, if an employee with a disability, with or without reasonable accommodation, cannot perform the essential functions of the position or poses a direct threat in the absence of medication, treatment, or an assistive device, then s/he is unqualified.

39. Must an employer provide a reasonable accommodation that is needed because of the side effects of medication or treatment related to the disability, or because of symptoms or other medical conditions resulting from the underlying disability?

    Yes. The side effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability. Reasonable accommodation extends to all limitations resulting from a disability.

Example A: An employee with cancer undergoes chemotherapy twice a week, which causes her to be quite ill afterwards. The employee requests a modified schedule -- leave for the two days a week of chemotherapy. The treatment will last six weeks. Unless it can show undue hardship, the employer must grant this request.

Similarly, any symptoms or related medical conditions resulting from the disability that cause limitations may also require reasonable accommodation.[108]

Example B: An employee, as a result of insulin-dependent diabetes, has developed background retinopathy (a vision impairment). The employee, who already has provided documentation showing his diabetes is a disability, requests a device to enlarge the text on his computer screen. The employer can request documentation that the retinopathy is related to the diabetes but the employee does not have to show that the retinopathy is an independent disability under the ADA. Since the retinopathy is a consequence of the diabetes (an ADA disability), the request must be granted unless undue hardship can be shown.

40. Must an employer ask whether a reasonable accommodation is needed when an employee has not asked for one?

    Generally, no. As a general rule, the individual with a disability -- who has the most knowledge about the need for reasonable accommodation -- must inform the employer that an accommodation is needed.[109]

    However, an employer should initiate the reasonable accommodation interactive process[110] without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.

    Example: An employee with mental retardation delivers messages at a law firm. He frequently mixes up messages for "R. Miller" and "T. Miller." The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that this employee is unable to ask for a reasonable accommodation because of his mental retardation. The employer asks the employee about mixing up the two names and asks if it would be helpful to spell the first name of each person. When the employee says that would be better, the employer, as a reasonable accommodation, instructs the receptionist to write the full first name when messages are left for one of the Messrs. Miller.

41. May an employer ask whether a reasonable accommodation is needed when an employee with a disability has not asked for one?

    An employer may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation. For example, an employer could ask a deaf employee who is being sent on a business trip if s/he needs reasonable accommodation. Or, if an employer is scheduling a luncheon at a restaurant and is uncertain about what questions it should ask to ensure that the restaurant is accessible for an employee who uses a wheelchair, the employer may first ask the employee. An

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employer also may ask an employee with a disability who is having performance or conduct problems if s/he needs reasonable accommodation.[110]

42. May an employer tell other employees that an individual is receiving a reasonable accommodation when employees ask questions about a coworker with a disability?

    No. An employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.[111]

    An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

    Since responding to specific coworker questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with information about various laws that require employers to meet certain employee needs (e.g., the ADA and the Family and Medical Leave Act), while also requiring them to protect the privacy of employees. In providing general ADA information to employees, an employer may wish to highlight the obligation to provide reasonable accommodation, including the interactive process and different types of reasonable accommodations, and the statute's confidentiality protections. Such information could be delivered in orientation materials, employee handbooks, notices accompanying paystubs, and posted flyers. Employers may wish to explore these and other alternatives with unions because they too are bound by the ADA's confidentiality provisions. Union meetings and bulletin boards may be further avenues for such educational efforts.

    As long as there is no coercion by an employer, an employee with a disability may voluntarily choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation.

UNDUE HARDSHIP ISSUES[112]

An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.[113] A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- the impact of the accommodation on the operation of the facility.[114]

The ADA's legislative history indicates that Congress wanted employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly.[115] Undue hardship is determined based on the net cost to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation.[116] In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.

If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, then the employer must provide the second accommodation.

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability.[117] Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees's ability to work.

Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the employer cannot show significant disruption to its operation, there is no undue hardship.[118]

Example B: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part- time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk's hours are reduced, the second clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Thus, the employer can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee's hours. The employer, however, should explore whether any other reasonable accommodation will assist the store clerk without causing undue hardship.

43. Must an employer modify the work hours of an employee with a disability if doing so would prevent other employees from performing their jobs?

    No. If the result of modifying one employee's work hours (or granting leave) is to prevent other employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship.

    Example A: A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business. Thus, the employer can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.

    Example B: A computer programmer works with a group of people to develop new software. There are certain tasks that the entire group must perform together, but each person also has individual assignments. It is through habit, not necessity, that they have often worked together first thing in the morning.

    The programmer, due to her disability, requests an adjustment in her work schedule so that she works from 10:00 a.m. - 7:00 p.m. rather than 9:00 a.m. - 6:00 p.m. In this situation, the employer could grant the adjustment in hours because it would not significantly disrupt the operations of the business. The effect of the reasonable accommodation would be to alter when the group worked together and when they performed their individual assignments.

44. Can an employer deny a request for leave when an employee cannot provide a fixed date of return?

    Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave. In certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position. If an employee cannot provide a fixed date of return, and an employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship.

    In certain situations, an employee may be able to provide only an approximate date of return.[119] Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return. In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss, if necessary, the need for continued leave beyond what might have been granted originally.[120]

    Example A: An experienced chef at a top restaurant requests leave for treatment of her disability but cannot provide a fixed date of return. The restaurant can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the employer unable to determine how long it must hold open the position or to plan for the chef's absence. Therefore, the restaurant can deny the request for leave as a reasonable accommodation.

    Example B: An employee requests eight weeks of leave for surgery for his disability. The employer grants the request. During surgery, serious complications arise that require a lengthier period of recuperation than originally anticipated, as well as additional surgery. The employee contacts the employer after three weeks of leave to ask for an additional ten to fourteen weeks of leave (i.e., a total of 18 to 22 weeks of leave). The employer must assess whether granting additional leave causes an undue hardship.

45. Does a cost-benefit analysis determine whether a reasonable accommodation will cause undue hardship?

    No. A cost-benefit analysis assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee. Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship.[121] Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (e.g., full-time versus part-time, salary versus hourly wage, permanent versus temporary).

46. Can an employer claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else?

    No, an employer cannot claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else. In some situations, an employer will have the right under a lease or other contractual relationship with the property owner to make the type of changes that are needed. If this is the case, the employer should make the changes, assuming no other factors exist that would make the changes too difficult or costly. If the contractual relationship between the employer and property owner requires the owner's consent to the kinds of changes that are required, or prohibits them from being made, then the employer must make good faith efforts either to obtain the owner's permission or to negotiate an exception to the terms of the contract. If the owner refuses to allow the employer to make the modifications, the employer may claim undue hardship. Even in this situation, however, the employer must still provide another reasonable accommodation, if one exists, that would not cause undue hardship.

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Example A: X Corp., a travel agency, leases space in a building owned by Z Co. One of X Corp.'s employees becomes disabled and needs to use a wheelchair. The employee requests as a reasonable accommodation that several room dividers be moved to make his work space easily accessible. X Corp.'s lease specifically allows it to make these kinds of physical changes, and they are otherwise easy and inexpensive to make. The fact that X Corp. does not own the property does not create an undue hardship and therefore it must make the requested accommodation.

Example B: Same as Example A, except that X Corp.'s lease requires it to seek Z Co.'s permission before making any physical changes that would involve reconfiguring office space. X Corp. requests that Z Co. allow it to make the changes, but Z Co. denies the request. X Corp. can claim that making the physical changes would constitute an undue hardship. However, it must provide any other type of reasonable accommodation that would not involve making physical changes to the facility, such as finding a different location within the office that would be accessible to the employee.

An employer should remember its obligation to make reasonable accommodation when it is negotiating contracts with property owners.[222] Similarly, a property owner should carefully assess a request from an employer to make physical changes that are needed as a reasonable accommodation because failure to permit the modification might constitute "interference" with the rights of an employee with a disability.[223] In addition, other ADA provisions may require the property owner to make the modifications.[224]

BURDENS OF PROOF

In US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), the Supreme Court laid out the burdens of proof for an individual with a disability (plaintiff) and an employer (defendant) in an ADA lawsuit alleging failure to provide reasonable accommodation. The "plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[225] Once the plaintiff has shown that the accommodation s/he needs is "reasonable," the burden shifts to the defendant/employer to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances.[226]

The Supreme Court's burden-shifting framework does not affect the interactive process triggered by an individual's request for accommodation.[227] An employer should still engage in this informal dialogue to obtain relevant information needed to make an informed decision.

INSTRUCTIONS FOR INVESTIGATORS

When assessing whether a Respondent has violated the ADA by denying a reasonable accommodation to a Charging Party, investigators should consider the following:

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- Is the Charging Party "otherwise qualified" (i.e., is the Charging Party qualified for the job except that, because of disability, s/he needs a reasonable accommodation to perform the position's essential functions)?
- Did the Charging Party, or a representative, request a reasonable accommodation (i.e., did the Charging Party let the employer know that s/he needed an adjustment or change at work for a reason related to a medical condition)? [see Questions 1-4]
  - Did the Respondent request documentation of the Charging Party's disability and/or functional limitations? If yes, was the documentation provided? Did the Respondent have a legitimate reason for requesting documentation? [see Questions 6-8]
  - What specific type of reasonable accommodation, if any, did the Charging Party request?
  - Was there a nexus between the reasonable accommodation requested and the functional limitations resulting from the Charging Party's disability? [see Question 6]
  - Was the need for reasonable accommodation related to the use of medication, side effects from treatment, or symptoms related to a disability? [see Questions 36-38]
- For what purpose did the Charging Party request a reasonable accommodation:
  - for the application process? [see Questions 12-13]
  - in connection with aspects of job performance? [see Questions 16-24, 32-33]
  - in order to enjoy the benefits and privileges of employment? [see Questions 14-15]
- Should the Respondent have initiated the interactive process, or provided a reasonable accommodation, even if the Charging Party did not ask for an accommodation? [see Questions 11, 39]
- What did the Respondent do in response to the Charging Party's request for reasonable accommodation (i.e., did the Respondent engage in an interactive process with the Charging Party and if so, describe both the Respondent's and the Charging Party's actions/statements during this process)? [see Questions 5-11]
- If the Charging Party asked the Respondent for a particular reasonable accommodation, and the Respondent provided a different accommodation, why did the Respondent provide a different reasonable accommodation than the one requested by the Charging Party? Why does the Respondent believe that the reasonable accommodation it provided was effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity? Why does the Charging Party believe that the reasonable accommodation provided by the Respondent was ineffective? [see Question 9]
- What type of accommodation could the Respondent have provided that would have been "reasonable" and effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity?
- Does the charge involve allegations concerning reasonable accommodation and violations of any conduct rules? [see Questions 34-35]

- If the Charging Party alleges that the Respondent failed to provide a reassignment as a reasonable accommodation [see generally Questions 25-30 and accompanying text]:
  - did the Respondent and the Charging Party first discuss other forms of reasonable accommodation that would enable the Charging Party to remain in his/her current position before discussing reassignment?
  - did the Respondent have any vacant positions? [see Question 27]
  - did the Respondent notify the Charging Party about possible vacant positions? [see Question 28]
  - was the Charging Party qualified for a vacant position?
  - if there was more than one vacant position, did the Respondent place the Charging Party in the one that was most closely equivalent to the Charging Party's original position?
  - if the reassignment would conflict with a seniority system, are there "special circumstances" that would make it "reasonable" to reassign the Charging Party? [see Question 31]
- If the Respondent is claiming undue hardship [see generally Questions 42-46 and accompanying text]:
  - what evidence has the Respondent produced showing that providing a specific reasonable accommodation would entail significant difficulty or expense?
  - if a modified schedule or leave is the reasonable accommodation, is undue hardship based on the impact on the ability of other employees to do their jobs? [see Question 42]
  - if leave is the reasonable accommodation, is undue hardship based on the amount of leave requested? [see Question 43]
  - if there are "special circumstances" that would make it "reasonable" to reassign the Charging Party, despite the apparent conflict with a seniority system, would it nonetheless be an undue hardship to make the reassignment? [see Question 31]
  - is undue hardship based on the fact that providing the reasonable accommodation requires changes to property owned by an entity other than the Respondent? [see Question 46]
  - if the Respondent claims that a particular reasonable accommodation would result in undue hardship, is there another reasonable accommodation that Respondent could have provided that would not have resulted in undue hardship?
- Based on the evidence obtained in answers to the questions above, is the Charging Party a qualified individual with a disability (i.e., can the Charging Party perform the essential functions of the position with or without reasonable accommodation)?

APPENDIX
RESOURCES FOR LOCATING REASONABLE ACCOMMODATIONS

U.S. Equal Employment Opportunity Commission
1-800-669-3362 (Voice)
1-800-800-3302 (TT)

The EEOC's Publication Center has many free documents on the Title I employment provisions of the ADA, including both the statute, 42 U.S.C. . 12101 et seq. (1994), and the regulations, 29 C.F.R. . 1630 (1997). In addition, the EEOC has published a great deal of basic information about reasonable accommodation and undue hardship. The two main sources of interpretive information are: (1) the Interpretive Guidance accompanying the Title I regulations (also known as the "Appendix" to the regulations), 29 C.F.R. pt. 1630 app. .. 1630.2(o), (p), 1630.9 (1997) , and (2) A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act III, 8 FEP Manual (BNA) 405:6981, 6998-7018 (1992). The Manual includes a 200-page Resource Directory, including federal and state agencies, and disability organizations that can provide assistance in identifying and locating reasonable accommodations.

The EEOC also has discussed issues involving reasonable accommodation in the following guidances and documents: (1) Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 5, 6-8, 20, 21-22, 8 FEP Manual (BNA) 405:7191, 7192-94, 7201 (1995); (2) Enforcement Guidance: Workers' Compensation and the ADA at 15-20, 8 FEP Manual (BNA) 405:7391, 7398-7401 (1996); (3) Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 19-28, 8 FEP Manual (BNA) 405:7461, 7470-76 (1997); and (4) Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 at 6-9, 8 FEP Manual (BNA) 405:7371, 7374-76 (1996).

Finally, the EEOC has a poster that employers and labor unions may use to fulfill the ADA's posting requirement.

All of the above-listed documents, with the exception of the ADA Technical Assistance Manual and Resource Directory and the poster, are also available through the Internet at http://www.eeoc.gov.

U.S. Department of Labor
(To obtain information on the Family and Medical Leave Act)
To request written materials:
1-800-959-3652 (Voice)
1-800-326-2577 (TT)
To ask questions: (202) 219-8412 (Voice)

Internal Revenue Service
(For information on tax credits and deductions for providing certain reasonable accommodations)

(202) 622-6060 (Voice)

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Job Accommodation Network (JAN)
1-800-232-9675 (Voice/TT)
http://janweb.icdi.wvu.edu/.

A service of the President's Committee on Employment of People with Disabilities. JAN can provide information, free-of-charge, about many types of reasonable accommodations.

ADA Disability and Business Technical Assistance Centers (DBTACs) 1-800-949-4232 (Voice/TT)

The DBTACs consist of 10 federally funded regional centers that provide information, training, and technical assistance on the ADA. Each center works with local business, disability, governmental, rehabilitation, and other professional networks to provide current ADA information and assistance, and places special emphasis on meeting the needs of small businesses. The DBTACs can make referrals to local sources of expertise in reasonable accommodations.

Registry of Interpreters for the Deaf
(301) 608-0050 (Voice/TT)

The Registry offers information on locating and using interpreters and transliteration services.

RESNA Technical Assistance Project
(703) 524-6686 (Voice)
(703) 524-6639 (TT)
http://www.resna.org/hometa1.htm

RESNA, the Rehabilitation Engineering and Assistive Technology Society of North America, can refer individuals to projects in all 50 states and the six territories offering technical assistance on technology-related services for individuals with disabilities. Services may include:

- information and referral centers to help determine what devices may assist a person with a disability (including access to large data bases containing information on thousands of commercially available assistive technology products),
- centers where individuals can try out devices and equipment,
- assistance in obtaining funding for and repairing devices, and
- equipment exchange and recycling programs.

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Role of health care providers in reasonable accommodation process

Seniority systems and reassignment

State or local antidiscrimination laws; Relationship with the ADA

Supervisors and reasonable accommodation

Undue hardship

Cost

Cost-benefit analysis

Definition of

Disruption to operations

Factors to assess

Landlord/Tenant

Leave

Work environment and reasonable accommodation

Footnotes

1. 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).

The ADA's requirements regarding reasonable accommodation and undue hardship supercede any state or local disability antidiscrimination laws to the extent that they offer less protection than the ADA. See 29 C.F.R. § 1630.1(c)(2) (1997).

2. In addition to employers, the ADA requires employment agencies, labor organizations, and joint labor-management committees to provide reasonable accommodations. See 42 U.S.C. § 12112(a), (b)(5)(A) (1994).

3. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

4. 29 C.F.R. § 1630.2(o)(1)(i-iii) (1997) (emphasis added). The notices that employers and labor unions must post informing applicants, employees, and members of labor organizations of their ADA rights must include a description of the reasonable accommodation requirement. These notices, which must be in an accessible format, are available from the EEOC. See the Appendix.

5. All examples used in this document assume that the applicant or employee has an ADA "disability."

Individuals with a relationship or association with a person with a disability are not entitled to receive reasonable accommodations. See Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1084, 7 AD Cas. (BNA) 764, 772 (10th Cir. 1997).

6. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also H.R. Rep. No. 101-485, pt. 3, at 39 (1990) [hereinafter House Judiciary Report]; H.R. Rep. No. 101-485, pt. 2, at 65 (1990) [hereinafter House Education and Labor Report]; S. Rep. No. 101-116, at 34 (1989)[hereinafter Senate Report].

For more information concerning requests for a reasonable accommodation, see Questions 1-4, infra. For a discussion of the limited circumstance under which an employer would be required to ask an individual with a disability whether s/he needed a reasonable accommodation, see Question 40, infra.

7. 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2)(i-ii) (1997).

8. US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

9. Id.

Some courts have said that in determining whether an accommodation is "reasonable," one must look at the costs of the accommodation in relation to its benefits. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995). This "cost/benefit" analysis has no foundation in the statute, regulations, or legislative history of the ADA. See 42 U.S.C. § 12111(9), (10) (1994); 29 C.F.R. § 1630.2(o), (p) (1997); see also Senate Report, supra note 6, at 31-35; House Education and Labor Report, supra note 6, at 57-58.

10. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1522 (2002). The Court explained that "in ordinary English the word 'reasonable' does not mean 'effective.' It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness." Id.

11. A TTY is a device that permits individuals with hearing and speech impairments to communicate by telephone.

12. In US Airways, Inc. v. Barnett, the Supreme Court held that it was unreasonable, absent "special circumstances," for an employer to provide a reassignment that conflicts with the terms of a seniority system. 535 U.S., 122 S. Ct. 1516, 1524-25 (2002). For a further discussion of this issue, see Question 31, infra.

13. "[W]ith or without reasonable accommodation" includes, if necessary, reassignment to a vacant position. Thus, if an employee is no longer qualified because of a disability to continue in his/her present position, an employer must reassign him/her as a reasonable accommodation. See the section on "Reassignment," infra pp. 37-38 and n.77.

14. 29 C.F.R. pt. 1630 app. § 1630.2(n) (1997).

15. 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

16. See 42 U.S.C. § 12112 (b)(5)(A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ."); see also 42 U.S.C.

§ 12111(10) (1994) (defining "undue hardship" based on factors assessing cost and difficulty).

The legislative history discusses financial, administrative, and operational limitations on providing reasonable accommodations only in the context of defining "undue hardship." Compare Senate Report, supra note 6, at 31-34 with 35-36; House Education and Labor Report, supra note 6, at 57-58 with 67-70.

17. See 42 U.S.C. § 12111(10) (1994); 29 C.F.R. § 1630.2(p) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

18. See 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997). See also Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1048-49, 5 AD Cas. (BNA) 1367, 1372-73 (7th Cir. 1996); Bryant v. Better Business Bureau of Maryland, 923 F. Supp. 720, 740, 5 AD Cas. (BNA) 625, 638 (D. Md. 1996).

19. See, e.g., Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. . . The employee need not mention the ADA or even the term 'accommodation.'"). See also Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 694, 8 AD Cas. (BNA) 875, 882 (7th Cir. 1998) ("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation"); Bultemeyer v. Ft. Wayne Community Schs., 100 F.3d 1281, 1285, 6 AD Cas. (BNA) 67, 71 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist); McGinnis v. Wonder Chemical Co., 5 AD Cas. (BNA) 219 (E.D. Pa. 1995) (employer on notice that accommodation had been requested because: (1) employee told supervisor that his pain prevented him from working and (2) employee had requested leave under the Family and Medical Leave Act).

Nothing in the ADA requires an individual to use legal terms or to anticipate all of the possible information an employer may need in order to provide a reasonable accommodation. The ADA avoids a formulistic approach in favor of an interactive discussion between the employer and the individual with a disability, after the individual has requested a change due to a medical condition. Nevertheless, some courts have required that individuals initially provide detailed information in order to trigger the employer's duty to investigate whether reasonable accommodation is required. See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1660 (5th Cir. 1996); Miller v. Nat'l Cas. Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090-91 (8th Cir. 1995).

20. See Questions 5 - 7, infra, for a further discussion on when an employer may request reasonable documentation about a person's "disability" and the need for reasonable accommodation.

21. Cf. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996); Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146 (D. Or. 1994). But see Miller v. Nat'l Casualty Co., 61 F.3d 627, 630, 4 AD Cas. (BNA) 1089, 1091 (8th Cir. 1995) (employer had no duty to investigate reasonable accommodation despite the fact that the employee's sister notified the employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").

The employer should be receptive to any relevant information or requests it receives from a third party acting on the individual's behalf because the reasonable accommodation process presumes open communication in order to help the employer make an informed decision. See 29 C.F.R. §§ 1630.2(o), 1630.9 (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997).

22. Although individuals with disabilities are not required to keep records, they may find it useful to document requests for reasonable accommodation in the event there is a dispute about whether or when they requested accommodation. Employers, however, must keep all employment records, including records of requests for reasonable accommodation, for one year from the making of the record or the personnel action involved, whichever occurs later. If a charge is filed, records must be preserved until the charge is resolved. 29 C.F.R. § 1602.14 (1997).

23. Cf. Masterson v. Yellow Freight Sys., Inc., Nos. 98-6126, 98-6025, 1998 WL 856143 (10th Cir. Dec. 11, 1998) (fact that an employee with a disability does not need a reasonable accommodation all the time does not relieve employer from providing an accommodation for the period when he does need one).

24. See 29 C.F.R. § 1630.2(o)(3) (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997); see also Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601, 8 AD Cas. (BNA) 692, 700 (7th Cir. 1998); Dalton v. Subaru-Isuzu, 141 F.3d 667, 677, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998). The appendix to the regulations at § 1630.9 provides a detailed discussion of the reasonable accommodation process.

Engaging in an interactive process helps employers to discover and provide reasonable accommodation. Moreover, in situations where an employer fails to provide a reasonable accommodation (and undue hardship would not be a valid defense), evidence that the employer engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages. See 42 U.S.C. § 1981a(a)(3) (1994).

25. The burden-shifting framework outlined by the Supreme Court in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002), does not affect the interactive process between an employer and an individual seeking reasonable accommodation. See pages 61-62, infra, for a further discussion.

26. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997). The Appendix to this Guidance provides a list of resources to identify possible accommodations.

27. 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7191, 7193 (1995) [hereinafter Preemployment Questions and Medical Examinations]; EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 22-23, 8 FEP Manual (BNA) 405:7461, 7472-73 (1997) [hereinafter ADA and Psychiatric Disabilities]. Although the latter Enforcement Guidance

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focuses on psychiatric disabilities, the legal standard under which an employer may request documentation applies to disabilities generally.

When an employee seeks leave as a reasonable accommodation, an employer's request for documentation about disability and the need for leave may overlap with the certification requirements of the Family and Medical Leave Act (FMLA), 29 C.F.R. §§ 825.305-.306, 825.310-.311 (1997).

28. Since a doctor cannot disclose information about a patient without his/her permission, an employer must obtain a release from the individual that will permit his/her doctor to answer questions. The release should be clear as to what information will be requested. Employers must maintain the confidentiality of all medical information collected during this process, regardless of where the information comes from. See Question 42 and note 111, infra.

29. See Question 9, infra, for information on choosing between two or more effective accommodations.

30. This employee also might be covered under the Family and Medical Leave Act, and if so, the employer would need to comply with the requirements of that statute.

31. See Templeton v. Neodata Servs., Inc., No. 98-1106, 1998 WL 852516 (10th Cir. Dec. 10, 1998); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1134, 5 AD Cas. (BNA) 304, 307 (7th Cir. 1996); McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518, 1525, 5 AD Cas. (BNA) 1047, 1052 (N.D. Tex. 1996).

32. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 887 (7th Cir. 1998).

33. If an individual provides sufficient documentation to show the existence of an ADA disability and the need for reasonable accommodation, continued efforts by the employer to require that the individual see the employer's health professional could be considered retaliation.

34. Employers also may consider alternatives like having their health professional consult with the individual's health professional, with the employee's consent.

35. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86, 6 AD Cas. (BNA) 1834, 1839 (11th Cir. 1997); Hankins v. The Gap, Inc., 84 F.3d 797, 800, 5 AD Cas. (BNA) 924, 926-27 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

36. 29 C.F.R. pt. 1630 app. §1630.9 (1997).

37. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998).

38. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.

39. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also Hankins v. The Gap, Inc., 84 F.3d 797, 801, 5 AD Cas. (BNA) 924, 927 (6th Cir. 1996).

40. 42 U.S.C. § 12112(d)(2)(A) (1994); 29 C.F.R. § 1630.13(a) (1997). For a thorough discussion of these requirements, see Preemployment Questions and Medical Examinations, supra note 27, at 6-8, 8 FEP Manual (BNA) 405:7193-94.

41. 42 U.S.C. § 12112(d)(3) (1994); 29 C.F.R. § 1630.14(b) (1997); see also Preemployment Questions and Medical Examinations, supra note 27, at 20, 8 FEP Manual (BNA) 405:7201.

42. See Question 12, supra, for the circumstances under which an employer may ask an applicant whether s/he will need reasonable accommodation to perform specific job functions.

43. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause undue hardship.

44. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

45. 42 U.S.C. §§ 12181(7), 12182(1)(A), (2)(A)(iii) (1994).

46. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause undue hardship.

The types of reasonable accommodations discussed in this section are not exhaustive. For example, employees with disabilities may request reasonable accommodations to modify the work environment, such as changes to the ventilation system or relocation of a work space.

See the Appendix for additional resources to identify other possible reasonable accommodations.

47. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997); see Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-13, 4 AD Cas. (BNA) 1234, 1236-37 (8th Cir. 1995).

48. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

An employee who needs leave, or a part-time or modified schedule, as a reasonable accommodation also may be entitled to leave under the Family and Medical Leave Act. See Questions 21 and 23, infra.

49. See A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at 3.10(4), 8 FEP Manual (BNA) 405:6981, 7011 (1992) [hereinafter TAM].

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50. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002). See also Question 24, infra. While undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to the employer's operations if additional leave is granted beyond the period allowed by the policy. In determining whether undue hardship exists, the employer should consider how much additional leave is needed (e.g., two weeks, six months, one year?).

51. See Schmidt v. Safeway Inc., 864 F. Supp. 991, 996-97, 3 AD Cas. (BNA) 1141, 1145-46 (D. Or. 1994); Corbett v. National Products Co., 4 AD Cas. (BNA) 987, 990 (E.D. Pa. 1995).

52. See EEOC Enforcement Guidance: Workers' Compensation and the ADA at 16, 8 FEP Manual (BNA) 405:7391, 7399 (1996) [hereinafter Workers' Compensation and the ADA]. See also pp. 37-45, infra, for information on reassignment as a reasonable accommodation.

53. Cf. Kiel v. Select Artificials, 142 F.3d 1077, 1080, 8 AD Cas. (BNA) 43, 44 (8th Cir. 1998).

54. See Criado v. IBM, 145 F.3d 437, 444-45, 8 AD Cas. (BNA) 336, 341 (1st Cir. 1998).

55. But see Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1197-98, 7 AD Cas. (BNA) 1651, 1653-54 (7th Cir. 1997) (an employee who, because of a heart attack, missed several months of work and returned on a part-time basis until health permitted him to work full-time, could be terminated during a RIF based on his lower productivity). In reaching this decision, the Seventh Circuit failed to consider that the employee needed leave and a modified schedule as reasonable accommodations for his disability, and that the accommodations became meaningless when he was penalized for using them.

56. If an employee, however, qualifies for leave under the Family and Medical Leave Act, an employer may not require him/her to remain on the job with an adjustment in lieu of taking leave. See 29 C.F.R. § 825.702(d)(1) (1997).

57. See Question 9, supra.

58. For more detailed information on issues raised by the interplay between these statutes, refer to the FMLA/ADA Fact Sheet listed in the Appendix.

59. Employers should remember that many employees eligible for FMLA leave will not be entitled to leave as a reasonable accommodation under the ADA, either because they do not meet the ADA's definition of disability or, if they do have an ADA disability, the need for leave is unrelated to that disability.

60. 29 C.F.R. §§ 825.214(a), 825.215 (1997).

61. For further information on the undue hardship factors, see infra pp. 55-56.

62. 29 C.F.R. § 825.702(c)(4) (1997).

63. 42 U.S.C. §12111 (9) (B) (1994); see Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 172, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998) (a modified schedule is a form of reasonable accommodation).

64. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002).

65. Certain courts have characterized attendance as an "essential function." See, e.g., Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 438 (D.C. Cir. 1994); Jackson v. Department of Veterans Admin., 22 F.3d 277, 278-79, 3 AD Cas. (BNA) 483, 484 (11th Cir. 1994). Attendance, however, is not an essential function as defined by the ADA because it is not one of "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n)(1) (1997) (emphasis added). As the regulations make clear, essential functions are duties to be performed. 29 C.F.R. § 1630.2(n)(2) (1997). See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 602, 8 AD Cas. (BNA) 692, 701 (7th Cir. 1998); Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782-83, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

On the other hand, attendance is relevant to job performance and employers need not grant all requests for a modified schedule. To the contrary, if the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee's schedule as an undue hardship.

66. Employers covered under the Family and Medical Leave Act (FMLA) should determine whether any denial of leave or a modified schedule is also permissible under that law. See 29 C.F.R. § 825.203 (1997).

67. For more detailed information on issues raised by the interplay between these statutes, refer to the FMLA/ADA Fact Sheet listed in the Appendix.

68. See infra pp. 37-45 for more information on reassignment, including under what circumstances an employer and employee may voluntarily agree that a transfer is preferable to having the employee remain in his/her current position.

69. 29 C.F.R. § 825.204 (1997); see also special rules governing intermittent leave for instructional employees at §§ 825.601, 825.602.

70. 29 C.F.R. §§ 825.209, 825.210 (1997).

71. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002).

72. See Dutton v. Johnson County Bd. of Comm'rs, 868 F. Supp. 1260, 1264-65, 3 AD Cas. (BNA) 1614, 1618 (D. Kan. 1994).

73. See 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (1997). See also Question 17, supra.

74. But cf. Miller v. Nat'l Casualty Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090 (8th Cir. 1995) (court refuses to find that employee's sister had requested reasonable accommodation despite the fact that the sister informed the employer that the employee was having a medical crisis necessitating emergency hospitalization).

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75. For information on how reassignment may apply to employers who provide light duty positions, see Workers' Compensation and the ADA, supra note 52, at 20-23, 8 FEP Manual (BNA) 405:7401-03.

76. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114, 4 AD Cas. (BNA) 1234, 1238 (8th Cir. 1995); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1187, 5 AD Cas. (BNA) 1326, 1338 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 498, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

Reassignment is available only to employees, not to applicants. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

77. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997); see Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1104, 4 AD Cas. (BNA) 1297, 1305 (S.D. Ga. 1995).

Some courts have found that an employee who is unable to perform the essential functions of his/her current position is unqualified to receive a reassignment. See, e.g., Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342, 345, 5 AD Cas. (BNA) 1340, 1342 (7th Cir. 1996); Pangalos v. Prudential Ins. Co. of Am., 5 AD Cas. (BNA) 1825, 1826 (E.D. Pa. 1996). These decisions, however, nullify Congress' inclusion of reassignment in the ADA. An employee requires a reassignment only if s/he is unable to continue performing the essential functions of his/her current position, with or without reasonable accommodation. Thus, an employer must provide reassignment either when reasonable accommodation in an employee's current job would cause undue hardship or when it would not be possible. See Aka v. Washington Hosp. Ctr.,156 F.3d 1284, 1300-01, 8 AD Cas. (BNA) 1093, 1107-08 (D.C. Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 27, at 28, 8 FEP Manual (BNA) 405:7476; Workers' Compensation and the ADA, supra note 52, at 17-18, 8 FEP Manual (BNA) 405:7399-7400.

78. 29 C.F.R. § 1630.2(m) (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(m), 1630.2(o)(1997). See Stone v. Mount Vernon, 118 F.3d 92, 100-01, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997).

79. See Quintana v. Sound Distribution Corp., 6 AD Cas. (BNA) 842, 846 (S.D.N.Y. 1997).

80. See 29 C.F.R. pt. 1630 app. §1630.2(o) (1997); Senate Report, supra note 6, at 31; House Education and Labor Report, supra note 6, at 63.

81. For suggestions on what the employee can do while waiting for a position to become vacant within a reasonable amount of time, see note 89, infra.

82. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997); see also White v. York Int'l Corp., 45 F.3d 357, 362, 3 AD Cas. (BNA) 1746, 1750 (10th Cir. 1995).

83. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

84. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521, 1524 (2002); see also Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998); United States v. Denver, 943 F. Supp. 1304, 1312, 6 AD Cas. (BNA) 245, 252 (D. Colo. 1996). See also Question 24, supra.

85. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997); see Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695, 8 AD Cas. (BNA) 875, 883 (7th Cir. 1998); see generally Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677-78, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998).

86. See Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1472 (7th Cir. 1996); see generally United States v. Denver, 943 F. Supp. 1304, 1311-13, 6 AD Cas. (BNA) 245, 251-52 (D. Colo. 1996).

Some courts have limited the obligation to provide a reassignment to positions within the same department or facility in which the employee currently works, except when the employer's standard practice is to provide inter-department or inter-facility transfers for all employees. See, e.g., Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 398, 4 AD Cas.(BNA) 1, 4-5 (E.D. Tex. 1995). However, the ADA requires modification of workplace policies, such as transfer policies, as a form of reasonable accommodation. See Question 24, supra. Therefore, policies limiting transfers cannot be a per se bar to reassigning someone outside his/her department or facility. \ Furthermore, the ADA requires employers to provide reasonable accommodations, including reassignment, regardless of whether such accommodations are routinely granted to non-disabled employees. See Question 26, supra.

87. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695-96, 697-98, 8 AD Cas. (BNA) 875, 883, 884 (7th Cir. 1998) (employer cannot mislead disabled employees who need reassignment about full range of vacant positions; nor can it post vacant positions for such a short period of time that disabled employees on medical leave have no realistic chance to learn about them); Mengine v. Runyon, 114 F.3d 415, 420, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (an employer has a duty to make reasonable efforts to assist an employee in identifying a vacancy because an employee will not have the ability or resources to identify a vacant position absent participation by the employer); Woodman v. Runyon, 132 F.3d 1330, 1344, 7 AD Cas. (BNA) 1189, 1199 (10th Cir. 1997) (federal employers are far better placed than employees to investigate in good faith the availability of vacant positions).

88. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA)1872, 1881 (7th Cir. 1998) (employer must first identify full range of alternative positions and then determine which ones employee qualified to perform, with or without reasonable accommodation); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 886-87 (7th Cir. 1998) (employer's methodology to determine if reassignment is appropriate does not constitute the "interactive process" contemplated by the ADA if it is directive rather than interactive); Mengine v. Runyon, 114 F.3d 415, 419-20, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (once an employer has identified possible vacancies, an employee has a duty to identify which one he is capable of performing).

89. If it will take several weeks to determine whether an appropriate vacant position exists, the employer and employee should discuss the employee's status during that period. There are different possibilities depending on the circumstances, but they may include: use of accumulated paid leave, use of unpaid leave, or a temporary assignment to a light duty position. Employers also may choose to take actions that go beyond the ADA's requirements, such as eliminating an essential function of the employee's current position, to enable an employee to continue working while a reassignment is sought.

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90. 42 U.S.C. § 12111(9)(b) (1994); 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See Senate Report, supra note 6, at 31 ("If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker."). See Wood v. County of Alameda, 5 AD Cas. (BNA) 173, 184 (N.D. Cal. 1995) (when employee could no longer perform job because of disability, she was entitled to reassignment to a vacant position, not simply an opportunity to "compete"); cf. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998) (the court, in interpreting a collective bargaining agreement provision authorizing reassignment of disabled employees, states that "[a]n employee who is allowed to compete for jobs precisely like any other applicant has not been "reassigned"); United States v. Denver, 943 F. Supp. 1304, 1310-11, 6 AD Cas. (BNA) 245, 250 (D. Colo. 1996) (the ADA requires employers to move beyond traditional analysis and consider reassignment as a method of enabling a disabled worker to do a job).

Some courts have suggested that reassignment means simply an opportunity to compete for a vacant position. See, e.g., Daugherty v. City of El Paso, 56 F.3d 695, 700, 4 AD Cas. (BNA) 993, 997 (5th Cir. 1995). Such an interpretation nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation. Even without the ADA, an employee with a disability may have the right to compete for a vacant position.

91. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

92. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1524-25 (2002).

93. Id.

94. Id. at 1525. In a lawsuit, the plaintiff/employee bears the burden of proof to show the existence of "special circumstances" that warrant a jury's finding that a reassignment is "reasonable" despite the presence of a seniority system. If an employee can show "special circumstances," then the burden shifts to the employer to show why the reassignment would pose an undue hardship. See id.

95. Id.

96. Id. The Supreme Court made clear that these two were examples of "special circumstances" and that they did not constitute an exhaustive list of examples. Furthermore, Justice Stevens, in a concurring opinion, raised additional issues that could be relevant to show special circumstances that would make it reasonable for an employer to make an exception to its seniority system. See id. at 1526.

97. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause an undue hardship.

98. See Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 171, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998).

99. For a discussion on ways to modify supervisory methods, see ADA and Psychiatric Disabilities, supra note 27, at 26-27, 8 FEP Manual (BNA) 405:7475.

100. See 29 C.F.R. § 1630.2(o)(1)(ii), (2)(ii) (1997) (modifications or adjustments to the manner or circumstances under which the position held or desired is customarily performed that enable a qualified individual with a disability to perform the essential functions).

101. Courts have differed regarding whether "work-at-home" can be a reasonable accommodation. Compare Langon v. Department of Health and Human Servs., 959 F.2d 1053, 1060, 2 AD Cas. (BNA) 152, 159 (D.C. Cir. 1992); Anzalone v. Allstate Insurance Co., 5 AD Cas. (BNA) 455, 458 (E.D. La. 1995); Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 437-38 (D.D.C. 1994), with Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 545, 3 AD Cas. (BNA) 1636, 1640 (7th Cir. 1995). Courts that have rejected working at home as a reasonable accommodation focus on evidence that personal contact, interaction, and coordination are needed for a specific position. See, e.g., Whillock v. Delta Air Lines, 926 F. Supp. 1555, 1564, 5 AD Cas. (BNA) 1027 (N.D. Ga. 1995), aff'd, 86 F.3d 1171, 7 AD Cas. (BNA) 1267 (11th Cir. 1996); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227-28, 3 AD Cas. (BNA) 449, 457-58 (S.D.N.Y. 1994), aff'd, 60 F.3d 811, 6 AD Cas. (BNA) 576 (2d Cir. 1995).

102. See 29 C.F.R. § 1630.15(d) (1997).

103. See Siefken v. Arlington Heights, 65 F.3d 664, 666, 4 AD Cas. (BNA) 1441, 1442 (7th Cir. 1995). Therefore, it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur. For more information on conduct standards, including when they are job-related and consistent with business necessity, see ADA and Psychiatric Disabilities, supra note 27, at 29-32, 8 FEP Manual (BNA) 405:7476-78.

An employer does not have to offer a "firm choice" or a "last chance agreement" to an employee who performs poorly or who has engaged in misconduct because of alcoholism. "Firm choice" or "last chance agreements" involve excusing past performance or conduct problems resulting from alcoholism in exchange for an employee's receiving substance abuse treatment and refraining from further use of alcohol. Violation of such an agreement generally warrants termination. Since the ADA does not require employers to excuse poor performance or violation of conduct standards that are job-related and consistent with business necessity, an employer has no obligation to provide "firm choice" or a "last chance agreement" as a reasonable accommodation. See Johnson v. Babbitt, EEOC Docket No. 03940100 (March 28, 1996). However, an employer may choose to offer an employee a "firm choice" or a "last chance agreement."

104. See ADA and Psychiatric Disabilities, supra note 27, at 31-32, 8 FEP Manual (BNA) 405:7477-78.

105. See Robertson v. The Neuromedical Ctr., 161 F.3d 292, 296 (5th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 27, at 27-28, 8 FEP Manual (BNA) 405:7475.

106. While from an employer's perspective it may appear that an employee is "failing" to use medication or follow a certain treatment, such questions can be complex. There are many reasons why a person would choose to forgo treatment, including expense and serious side effects.

107. See Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 544, 3 AD Cas. (BNA) 1636, 1639 (7th Cir. 1995).

108. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also House Judiciary Report, supra note 6, at 39; House Education and Labor Report, supra note 6, at 65; Senate Report, supra note 6, at 34.

See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1659 (5th Cir. 1996); Tips v. Regents of Texas Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538, 5 AD Cas. (BNA) 141, 147 (N.D. Ala. 1995); Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075, 1080, 5 AD Cas. (BNA) 1295, 1300 (S.D. Ga. 1995), aff'd, 87 F.3d 1331, 6 AD Cas. (BNA) 1152 (11th Cir. 1996). But see Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) (employer had obligation to provide reasonable accommodation because it knew of the employee's alcohol problem and had reason to believe that an accommodation would permit the employee to perform the job).

An employer may not assert that it never received a request for reasonable accommodation, as a defense to a claim of failure to provide reasonable accommodation, if it actively discouraged an individual from making such a request.

For more information about an individual requesting reasonable accommodation, see Questions 1-4, supra.

109. See Question 5, supra, for information on the interactive process.

110. 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

111. 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C) (1994); 29 C.F.R. § 1630.14(b)(1) (1997). The limited exceptions to the ADA confidentiality requirements are: (1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; (2) first aid and safety personnel may be told if the disability might require emergency treatment; and (3) government officials investigating compliance with the ADA must be given relevant information on request. In addition, the Commission has interpreted the ADA to allow employers to disclose medical information in the following circumstances: (1) in accordance with state workers' compensation laws, employers may disclose information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers; and (2) employers are permitted to use medical information for insurance purposes. See 29 C.F.R. pt. 1630 app. §1630.14(b) (1997); Preemployment Questions and Medical Examinations, supra note 27, at 23, 8 FEP Manual (BNA) 405:7201; Workers' Compensation and the ADA, supra note 52, at 7, 8 FEP Manual (BNA) 405:7394.

112. The discussions and examples in this section assume that there is only one effective accommodation.

113. See 29 C.F.R. pt. 1630 app. §1630.15(d) (1996); see also Stone v. Mount Vernon, 118 F.3d 92, 101, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997) (an employer who has not hired any persons with disabilities cannot claim undue hardship based on speculation that if it were to hire several people with disabilities it may not have sufficient staff to perform certain tasks); Bryant v. Better Business Bureau of Greater Maryland, 923 F. Supp. 720, 735, 5 AD Cas. (BNA) 625, 634 (D. Md. 1996).

114. See 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997); TAM, supra note 49, at 3.9, 8 FEP Manual (BNA) 405:7005-07.

115. See Senate Report, supra note 6, at 36; House Education and Labor Report, supra note 6, at 69. See also 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

116. See the Appendix on how to obtain information about the tax credit and deductions.

117. See 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997).

118. Failure to transfer marginal functions because of its negative impact on the morale of other employees also could constitute disparate treatment when similar morale problems do not stop an employer from reassigning tasks in other situations.

119. See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 600-02, 8 AD Cas. (BNA) 692, 699-701 (7th Cir. 1998).

120. See Criado v. IBM, 145 F.3d 437, 444-45, 8 AD Cas. (BNA) 336, 341 (1st Cir. 1998).

121. The ADA's definition of undue hardship does not include any consideration of a cost-benefit analysis. See 42 U.S.C. § 12111(10) (1994); see also House Education and Labor Report, supra note 6, at 69 ("[T]he committee wishes to make clear that the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of a finding of undue hardship.").

Furthermore, the House of Representatives rejected a cost-benefit approach by defeating an amendment which would have presumed undue hardship if a reasonable accommodation cost more than 10% of the employee's annual salary. See 136 Cong. Rec. H2475 (1990), see also House Judiciary Report, supra note 6, at 41; 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997).

Despite the statutory language and legislative history, some courts have applied a cost-benefit analysis. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995).

122. See 42 U.S.C. § 12112(b)(2) (1994); 29 C.F.R. § 1630.6 (1997) (prohibiting an employer from participating in a contractual relationship that has the effect of subjecting qualified applicants or employees with disabilities to discrimination).

123. See 42 U.S.C. § 12203(b) (1994); 29 C.F.R. § 1630.12(b) (1997).

124. For example, under Title III of the ADA a private entity that owns a building in which goods and services are offered to the public has an obligation, subject to certain limitations, to remove architectural barriers so that people with disabilities have equal access to these goods and services. 42 U.S.C.

§ 12182(b)(2)(A)(iv) (1994). Thus, the requested modification may be something that the property owner should have done to comply with Title III.

125. US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

126. Id.

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806 - Accommodating Employee & Military Leaves of Absence

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Employee and Military Leave

- Overview of USERRA requirements (nuts and bolts)
- Recent developments (Notice requirements, COBRA extension), enforcement agencies, legal/non-legal resources
- Reinstatement rights –"Escalator" principle, RIF's/undue hardship, successors in interest, pre-employment call-ups, "discretionary" bonuses, cases
- Post-Reinstatement Job Protection rights – for "cause"
- Benefits/Accrual during USERRA leave
- Overview of FMLA/ADA, differences from USERRA issues/accommodations
- Establishing an effective compliance program - policies review

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USERRA

- **USERRA** – The Uniformed Services Employment and Reemployment Rights Act provides for up to 5 years (and perhaps longer) leave from employment with re-instatement rights for employees who are absent from employment because of "service in the uniformed services." Upon reemployment, an employee is entitled to all benefits they would have obtained if they had been continuously employed – such as leave under the FMLA.

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Purpose of USERRA (38 U.S.C. § 4301)

- Encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian employment which can result from such service
- Provide for the prompt reemployment of persons returning to civilian jobs from military service
- Minimize the disruption of their lives as well as to those of their employers, fellow employees and communities
- Prohibit discrimination against persons because of their service in the uniformed services

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USERRA

- Length = up to five years (maybe more)
- Disability = not defined
  - Reasonable accommodation
  - Reassignment
- Reinstatement - the job the person "would have held"
- FMLA eligibility

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USERRA – proposed regulations

- 20 CFR Part 1002, Proposed Rule, Federal Register, Vol. 69, No. 181 (September 20, 2004)
- -final rules release was expected in September 2005

USERRA Enforcement

- Department of Labor, Veterans Employment and Training Service (VETS) investigates and resolves complaints of USERRA violations, www.dol.gov/vets
- If VETS can't resolve it, can go to DOJ or OSC
- Or bypass VETS and go straight to civil action

Online Resources:

- USERRA advisor – www.dol.gov/elaws/userra.htm
- Other USERRA online resources: See www.esgr.org, www.roa.org, www.employersunited.org, www.military.com

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USERRA – Legislative History

- House Committee on Veterans' Affairs – "to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid." House Report No. 103-65, 1994 U.S. Code Congressional and Administrative News 2449, 2466-67.

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USERRA Reemployment Rights

To qualify for reemployment rights under USERRA, reserve soldiers must satisfy five basic conditions:

- Have a civilian job (including most "temporary" jobs);
- Give reasonable prior notice of military duty to the employer;
- Not exceed five years of cumulative active duty military service (with that particular employer);
- Be released from active military duty under honorable conditions; and
- Report back to the civilian job in a timely fashion after making a timely request to be reemployed.

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Reinstatement - Reasonable time period to apply

Period of Service	Time Allowed to Apply
1-30 days	Next full work day, allowing for 8 hours rest plus adequate travel time
31-180 days	Within 14 days
181 or more days	Within 90 days

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Reinstatement – into what position?

- <=90 days service – same position s/he would have been in "but for" the uniformed service
- > 90 days service – position of like seniority status and pay for which s/he is qualified
- If unable to qualify for escalator or comparable position, despite reasonable efforts, employee is still entitled to the next best thing (the nearest approximation to the escalator position)

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Reinstatement (continued)

- Seniority and other seniority-based rights and benefits
- Formal and informal seniority rights must both be recognized

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Reinstatement - "Escalator Principle"

- *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284-285 (1946)
- A returning service member "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]."
- The "but for" standard

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Reinstatement – "Escalator Principle" (continued…)

- The escalator principle applies to perquisites of seniority, not short-term compensation for services. Vacation days and sick days are considered short-term compensation, not a perquisite of seniority, and thus, are not accrued during military leave.
- However, the rate at which the individual earns vacation after returning to work can be affected by level of seniority.

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Reinstatement & RIF's

Three statutory justifications to denying reemployment:

- "Circumstances have so changed as to make such reemployment impossible or unreasonable."
- Assisting the returning individual to become qualified for the appropriate position would impose an "undue hardship" Position from which the individual left for military service was for a "brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."

  - But see [cite] 6th Cir. – "seasonal" position may have reemployment rights?)

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Reinstatement – other issues

- Commission-based employees – speculation is not necessary
- "merit-based" bonuses – are they really merit-based?
- Pro-rata bonuses (e.g., others on non-military leave get pro-rata bonuses if they are there for a significant part of the bonus period)
- Training to get caught up to speed
- Reasonable time to re-qualify (e.g., operator's license expired during uniformed service)
- Pre-employment issues

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Reinstatement – Successor in Interest

Coffman v. Chugach Support Services, Inc., 411 F.3d 1231 (11th Cir., June 8, 2005) – not a successor in interest

- no merger or transfer of assets

- analysis of *Lieb* factors – *Lieb v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991)

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Post-Reinstatement Job Protection

Duarte v. Agilent Technologies, Inc., 366 F.Supp.2d 1039 (U.S.D.C., D. Col., March 31, 3005) – two issues – proper reinstatement, as well as protection from termination for one year "except for cause" (if service exceeded 180 days)

- -backpay award ($114k), minus offset for military pay and severance pay (but not unemployment)
- -frontpay award ($324k), based on assumption he would reenter workforce at closer to 50% of his salary, and would take 6 years to "catch up"

USERRA – other cases of interest

- *Schmauch v. Honda of America Manufacturing, Inc.*, 2003 U.S. Dist. Lexis 24015 (S.D. Ohio 2003) – Six month "Attendance Improvement Period" (AIP) extended by the number of days of excused military leave (not extended for jury duty leave though).
- *Warren v. IBM*, 358 F.Supp.2d 201 (S.D.N.Y. Feb. 24, 2005) – the alleged "death threat" case
- *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F.Supp. 571 (E.D. Texas, May 22, 1997) – summary judgment denied – credibility battle
- *Gillie-Harp v. Cardinal Health, Inc.*, 249 F.Supp.2d 1113 (W.D. Wisconsin, January 9, 2003) - employer violates the act when the employee's military status is "a motivating factor in the employer's action" – does not have to be the *sole* reason (*citing Leisek v. Brightwood Corporation*, 278 F.3d 895, 898 (9th Cir. 2002)
- *Francis v. Booz Allen Hamilton, Inc.*, 2005 WL 991543 (E.D. Virginia, April 22, 2005) – return to work case (no "significant modification in work schedule")

USERRA – "Salary or wages" v. "taxable income"

IRS Revenue Ruling 69-136 at issue re: differential pay

- Do payments from the civilian employer constitute "salary" or "wages" as those terms are defined by the IRS?
- If so, there would be no requirement to withhold federal income tax, Social Security, and Medicare from those payments made to the individual while s/he is on active duty.
- These payments would not be considered income.
- But note: The individual would still be required to report them to the IRS and pay taxes on them.

Establishing an Effective Compliance Program

- Differential pay issues
- Sample Policies
- Friendly Suggestions

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Benefits during Military Leave

- *Rogers v. City of San Antonio* , 392 F.3d 758 (5th Cir. Dec. 2, 2004) – entitlement to non-seniority benefits commensurate with those due employees taking comparable non-military leaves of absence
- Accrual of overtime pay, sick/vacation time during military leave? (do others get it, e.g., FMLA-leave employees?)
- Paid Time off to be paid to the "non-employee" while on military leave?
- What about differential pay/paid military leave - "grossing up" the difference between military pay and employee's previous pay? Tax issues?
- Injury while on active duty
- TriCare

Health Benefits

- More than 30 days may elect to continue employer sponsored health care for up to 24 months (may be required to pay *up to* 102 percent of the full premium)
- Less than 31 days, health care coverage is provided as if the service member had remained employed.

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Pension Plans

- Under USERRA, the employer's pension plan must credit such employees with continuous service
- Military Service must be considered service with an employer for vesting and benefit accrual purposes

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401k

- Right to "make up" any elective and after-tax contributions to a 401(k) plan, that would have been made, but for the leave (can be made 3x period of military service capped at 5 years)
- Employer must make up any matching contributions relating to these contributions, and any profit-sharing contributions that were made during the military leave and that would have been allocated to the returning employee but for the leave.
- The employer must also make up benefit accruals under a defined benefit plan.

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Keys to Preventing Liability

- RECOGNIZE Protected Absences REQUIRED by law or regulation
- Know WHEN to contact HR to help you determine if EMPLOYEE is ELIGIBLE (case-specific analysis)
- Understand HOW to Implement EMPLOYERS' OBLIGATIONS for each Protected Absence, in partnership with HR.

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Employee Absences arise from Disability laws or regulations

- **Family Medical Leave(s)**
- **Disability Accommodation**
- **Workers' Compensation**
- **State Leave Laws**

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FAMILY AND MEDICAL LEAVE ACT

- **The Family and Medical Leave Act of 1993**, 29 U.S.C. 2612(a), requires employers of 50 or more workers within 75 miles of the employer's work site to provide eligible employees up to 12 weeks of unpaid job protected leave in a twelve month period for certain family and medical purposes. FMLA leave generally is permitted under the following circumstances: (1) the birth of the son or daughter of an employee and in order to care for the son or daughter; (2) the placement of a son or daughter with an employee for adoption or foster care; (3) to care for the spouse, son or daughter, or a parent of the employee if such spouse, son or daughter, or parent has a serious health condition; or (4) if the employee has a serious health condition which makes the employee unable to perform their job. FMLA also provides that where medically necessary, a person may take leave intermittently or be placed on a reduced leave schedule. In general, FMLA requires that an employee be restored to the same or an equivalent position upon return from leave. FMLA further prohibits discrimination against individuals who exercise their rights under FMLA. Employees must be employed for at least 12 months and performed 1250 hours of service for the employer during the preceding 12-month period to be a covered employee.

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WHAT does FMLA guarantee to Eligible Employees:

- Up to 12 weeks per year unpaid leave
- Continuation of benefits during leave
- Right to reinstatement to the same or equivalent position

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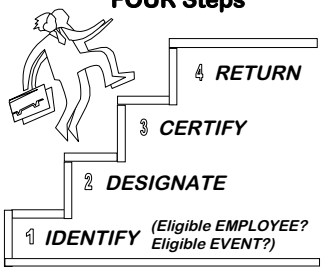
FOUR Steps



WHAT are QUALIFYING EVENTS?

1. The birth of a child or placement of a child for adoption or foster care
2. The employee's own serious health condition - work-related or non-work-related
3. Serious health condition of an employee's spouse, child or parent where the employee is "*needed to care for*" * the family member

*Includes physical or psychological care.

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WHO is an ELIGIBLE EMPLOYEE?

Eligibility determined by Disability

Law permits Eligibility threshold:

- ✓ 12 months service*
- ✓ 1,250 actual hours worked

*Caution if Joint Employment Relationship

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USERRA and FMLA Eligibility

- 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.

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FMLA – credit for "hours worked"

- 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 x 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.

RETURN to WORK

- **Restore the Employee to the Same Position or an Equivalent Position**
  - (Factors: pay, benefits, working conditions, geographic proximity, same work schedule)
- **Obtain a Return to Work Release**
  - **Simple statement** of employee's ability to return to work
  - Disability may contact the employee's health care provider with the **employee's permission** to clarify the employee's fitness
  - **Do not** return the employee to the schedule until clearance is provided.

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What are the employer's rights if we suspect FMLA abuse?

- Second Opinion
- Additional Certification and Clarification (DOL opinion letter)
  - Example: Friday / Monday patterns or exceeding certifications

Limitations on employer's right to knowledge of medical condition

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Accommodations under the ADA

- **Title I of the Americans with Disabilities Act of 1990 (ADA)**, 42 U.S.C. Section 12101, et seq. prohibits discrimination against qualified individuals with disabilities in all employment practices including job application procedures, hiring, firing, advancement, compensation, and training. The ADA also requires that the employer provide a "reasonable accommodation" of an employee's disability unless undue hardship (including direct threat to health and safety) can be shown. The ADA applies to all private employers with 15 or more employees.

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Broad "Reach" of Disability Law

Disabilities are legally recognized in 3 distinct ways:

❶ Physical or Mental Impairment that limits a major life function;

❷ A Record of Having an Impairment in the past;

❸ Persons Regarded as Physically or Mentally Impaired, although NOT actually Impaired

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation. This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship. – **EEOC Guidance 2002**

-**http://www.eeoc.gov/policy/docs/accommodation.html**

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An employee must be "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation. – **EEOC Guidance 2002**

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Reassignment involves more than a mere opportunity for disabled employees to compete.

It means that the employee gets the vacant position if s/he is qualified for it.

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ADA (v. USERRA) Preferential Reassignment rights

NO - ADA preferential reassignment rights (6th, 7th and 8th)

- **Hedrick v. Western Reserve Care System, 355 F.3d 444 (6th Cir. 2004)** - a disabled employee does not have preference in hiring over other more qualified candidates for an open position.
- **EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000)** – the ADA is not a mandatory preference act
- **Kellogg v. Union Pacific Railroad Company, 233 F.3d 1083 (8th Cir. 2000)** – employer is not required to make accommodations that would subvert other, more qualified applicants for the job

YES - ADA preferential reassignment rights (10th, plus EEOC)

- **Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999)(en banc)** – ADA does require an employer to prefer a disabled employee who needs a reassignment over other, better candidates for the vacant position
- Note: EEOC agrees - a disabled employee who can be accommodated by reassignment to a vacant position does not have to be the best qualified person for the job and should not have to compete against other applicants for the position.

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Do Not Forget?

STATE LEAVE LAWS

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YOUR RIGHTS UNDER USERRA
THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

REEMPLOYMENT RIGHTS

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- you ensure that your employer receives advance written or verbal notice of your service;
- you have five years or less of cumulative service in the uniformed services while with that particular employer;
- you return to work or apply for reemployment in a timely manner after conclusion of service; and
- you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION

If you:

- are a past or present member of the uniformed service;
- have applied for membership in the uniformed service; or
- are obligated to serve in the uniformed service;

then an employer may not deny you any of the following because of this status:

- initial employment;
- reemployment;
- retention in employment;
- promotion; or
- any benefit of employment.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

HEALTH INSURANCE PROTECTION

- If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

ENFORCEMENT

- The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.
- For assistance in filing a complaint, or for any other information on USERRA, contact VETS at **1-866-4-USA-DOL** or visit its **website at http://www.dol.gov/vets**. An interactive online USERRA Advisor can be viewed at **http://www.dol.gov/elaws/userra.htm**.
- If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice or the Office of Special Counsel, depending on the employer, for representation.
- You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. This notice was prepared by VETS, and may be viewed on the internet at this address: http://www.dol.gov/vets/programs/userra/poster.pdf. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying this notice where they customarily place notices for employees.

U.S. Department of Labor
1-866-487-2365

1-800-336-4590

Publication Date—February 2005

Title 38, United States Code
Chapter 43 – Employment and Reemployment Rights of Members of the Uniformed Services

Table of Contents

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SUBCHAPTER I – GENERAL

§ 4301. Purposes; sense of Congress

(a) The purposes of this chapter are—
(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
(3) to prohibit discrimination against persons because of their service in the uniformed services.
(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter

4302. Relation to other law and plans or agreements

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

§ 4303. Definitions

For the purposes of this chapter—
(1) The term "Attorney General" means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter.
(2) The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

§ 4303. Definitions (continued)

(3) The term "employee" means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319 (c) of this title.
(4)
(A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—
(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
(ii) the Federal Government;
(iii) a State;
(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and
(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.
(B) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.
(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002 (2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.
(5) The term "Federal executive agency" includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302 (a)(2)(C)(ii) of title 5, and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.
(6) The term "Federal Government" includes any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States.
(7) The term "health plan" means an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.
(8) The term "notice" means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.
(9) The term "qualified", with respect to an employment position, means having the ability to perform the essential tasks of the position.

§ 4303. Definitions (continued)

(10) The term "reasonable efforts", in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.
(11) Notwithstanding section 101, the term "Secretary" means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.
(12) The term "seniority" means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.
(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.
(14) The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).
(15) The term "undue hardship", in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of—
(A) the nature and cost of the action needed under this chapter;
(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and
(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.
(16) The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency

§ 4304. Character of service

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:
(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.
(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.
(3) A dismissal of such person permitted under section 1161 (a) of title 10.
(4) A dropping of such person from the rolls pursuant to section 1161 (b) of title 10.

SUBCHAPTER II – EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) 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 a uniformed service 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.
(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person
(1) has taken an action to enforce a protection afforded any person under this chapter,
(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,
(3) has assisted or otherwise participated in an investigation under this chapter, or
(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
(c) An employer shall be considered to have engaged in actions prohibited—
(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

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USING COMPLIANCE FOR A COMPETITIVE ADVANTAGE

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited (continued)

(2) under subsection (b), if the person's
(A) action to enforce a protection afforded any person under this chapter,
(B) testimony or making of a statement in or in connection with any proceeding under this chapter,
(C) assistance or other participation in an investigation under this chapter, or
(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312 (d)(1)(C) of this title.

§ 4312. Reemployment rights of persons who serve in the uniformed services

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—
(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;
(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and
(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).
(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

§ 4312. Reemployment rights of persons who serve in the uniformed services (continued)

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—
(1) that is required, beyond five years, to complete an initial period of obligated service;
(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
(3) performed as required pursuant to section 10147 of title 10, under section 502 (a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
(4) performed by a member of a uniformed service who is—
(A) ordered to or retained on active duty under section 688, 12301 (a), 12301 (g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;
(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or
(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10.
(d)
(1) An employer is not required to reemploy a person under this chapter if—
(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or
(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.
(2) In any proceeding involving an issue of whether—
(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,
(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

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(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,
the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.
(e)
(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:
(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—
(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or
(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.
(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).
(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.
(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.
(2)
(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

§ 4312. Reemployment rights of persons who serve in the uniformed services (continued)

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.
(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall 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.
(f)
(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that—
(A) the person's application is timely;
(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and
(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.
(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.
(3)
(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.
(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318 (a)(2)(A).
(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.
(h) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

§ 4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:
(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days—
(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or
(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—
(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or
(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—
(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or
(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.
(4) In the case of a person who
(A) is not qualified to be employed in
(i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or
(ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and
(B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.
(b)
(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.
(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:
(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.
(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

§ 4314. Reemployment by the Federal Government

(a) Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.
(b)
(1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall—
(A) identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and
(B) ensure that the person is offered such position.
(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that—
(A) the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or
(B) it is impossible or unreasonable for the agency to reemploy the person.
(c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).
(d) If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

§ 4315. Reemployment by certain Federal agencies

(a) The head of each agency referred to in section 2302 (a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.
(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

§ 4315. Reemployment by certain Federal agencies (continued)

(c)
(1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.
(2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.
(3) A determination pursuant to this subsection shall not be subject to judicial review.
(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.
(d)
(1) Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.
(2) This section may not be construed—
(A) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, alternative employment in the Federal Government under this chapter, or information relating to the rights and obligations of employee and Federal agencies under this chapter; or
(B) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.
(e) The Director of the Office of Personnel Management shall ensure the offer of employment to a person in a position in a Federal executive agency on the basis described in subsection (b) if—
(1) the person was an employee of an agency referred to in section 2302 (a)(2)(C)(ii) of title 5 at the time the person entered the service from which the person seeks reemployment under this section;
(2) the appropriate officer of the agency determines under subsection (c) that reemployment of the person by the agency is impossible or unreasonable; and
(3) the person submits an application to the Director for an offer of employment under this subsection.

§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.
(b)
(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
(A) deemed to be on furlough or leave of absence while performing such service; and
(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.
(2)
(A) Subject to subparagraph (B), a person who—
(i) is absent from a position of employment by reason of service in the uniformed services, and
(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,
is not entitled to rights and benefits under paragraph (1)(B).
(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).
(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.
(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.
(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.
(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.
(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—
(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service (continued)

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.
(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.
(e)
(1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.
(2) For purposes of section 4312 (e)(1) of this title, an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment.

§ 4317. Health plans

(a)
(1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, the plan shall provide that the person may elect to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of—
(A) the 24-month period beginning on the date on which the person's absence begins; or
(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312 (e).
(2) A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.

§ 4317. Health plans(continued)

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated—
(A) by the plan in such manner as the plan sponsor shall provide; or
(B) if the sponsor does not provide—
(i) to the last employer employing the person before the period served by the person in the uniformed services, or
(ii) if such last employer is no longer functional, to the plan.
(b)
(1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.
(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

§ 4318. Employee pension benefit plans

(a)
(1)
(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.
(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
(2)
(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

§ 4318. Employee pension benefit plans (continued)

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.
(b)
(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—
(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
(B) if the sponsor does not provide—
(i) to the last employer employing the person before the period served by the person in the uniformed services, or
(ii) if such last employer is no longer functional, to the plan.
(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

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(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—
(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).
(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.

§ 4319. Employment and reemployment rights in foreign countries

(a) Liability of Controlling United States Employer of Foreign Entity.— If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.
(b) Inapplicability to Foreign Employer.— This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by a United States employer.
(c) Determination of Controlling Employer.— For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.
(d) Exemption.— Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.

SUBCHAPTER III—PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND INVESTIGATION

§ 4321. Assistance in obtaining reemployment or other employment rights or benefits

The Secretary (through the Veterans' Employment and Training Service) shall provide assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under this chapter. In providing such assistance, the Secretary may request the assistance of existing Federal and State agencies engaged in similar or related activities and utilize the assistance of volunteers.

§ 4322. Enforcement of employment or reemployment rights

(a) A person who claims that—
(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by an employer; and
(2)
(A) such employer has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter; or
(B) in the case that the employer is a Federal executive agency, such employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter,
may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint.
(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.
(c) The Secretary shall, upon request, provide technical assistance to a potential claimant with respect to a complaint under this subsection, and when appropriate, to such claimant's employer.
(d) The Secretary shall investigate each complaint submitted pursuant to subsection (a). If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter.

§ 4322. Enforcement of employment or reemployment rights(continued)

(e) If the efforts of the Secretary with respect to any complaint filed under subsection (a) do not resolve the complaint, the Secretary shall notify the person who submitted the complaint of—
(1) the results of the Secretary's investigation; and
(2) the complainant's entitlement to proceed under the enforcement of rights provisions provided under section 4323 (in the case of a person submitting a complaint against a State or private employer) or section 4324 (in the case of a person submitting a complaint against a Federal executive agency or the Office of Personnel Management).
(f) This subchapter does not apply to any action relating to benefits to be provided under the Thrift Savings Plan under title 5.

§ 4323. Enforcement of rights with respect to a State or private employer

(a) Action for Relief.—
(1) A person who receives from the Secretary a notification pursuant to section 4322 (e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.
(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—
(A) has chosen not to apply to the Secretary for assistance under section 4322 (a) of this title;
(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or
(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.
(b) Jurisdiction.—
(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.
(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.
(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

§ 4323. Enforcement of rights with respect to a State or private employer (continued)

(c) Venue.—
(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.
(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.
(d) Remedies.—
(1) In any action under this section, the court may award relief as follows:
(A) The court may require the employer to comply with the provisions of this chapter.
(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.
(2)
(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.
(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.
(e) Equity Powers.— The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.
(f) Standing.— An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).
(g) Respondent.— In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.
(h) Fees, Court Costs.—
(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

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USING COMPLIANCE FOR A COMPETITIVE ADVANTAGE

§ 4323. Enforcement of rights with respect to a State or private employer (continued)

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.
(i) Inapplicability of State Statute of Limitations.— No State statute of limitations shall apply to any proceeding under this chapter.
(j) Definition.— In this section, the term "private employer" includes a political subdivision of a State.

§ 4324. Enforcement of rights with respect to Federal executive agencies

(a)
(1) A person who receives from the Secretary a notification pursuant to section 4322 (e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.
(2)
(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.
(B) If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.
(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—
(1) has chosen not to apply to the Secretary for assistance under section 4322 (a);
(2) has received a notification from the Secretary under section 4322 (e);
(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).

§ 4324. Enforcement of rights with respect to Federal executive agencies (continued)

(c)
(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.
(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.
(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.
(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.
(d)
(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.
(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

§ 4325. Enforcement of rights with respect to certain Federal agencies

(a) This section applies to any person who alleges that—
(1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or
(2) the failure of such agency to reemploy the person under such section was otherwise wrongful.

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§ 4325. Enforcement of rights with respect to certain Federal agencies (continued)

(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.
(c) In prescribing procedures for the investigation and resolution of allegations under subsection (b), the head of an agency shall ensure, to the maximum extent practicable, that the procedures are similar to the procedures for investigating and resolving complaints utilized by the Secretary under section 4322 (d).
(d) This section may not be construed—
(1) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter or information relating to the rights and obligations of employees and Federal agencies under this chapter; or
(2) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

§ 4326. Conduct of investigation; subpoenas

(a) In carrying out any investigation under this chapter, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to and the right to interview persons with information relevant to the investigation and shall have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or employer that the Secretary considers relevant to the investigation.
(b) In carrying out any investigation under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.
(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.
(d) Subsections (b) and (c) shall not apply to the legislative branch or the judicial branch of the United States.

SUBCHAPTER IV—MISCELLANEOUS PROVISIONS

§ 4331. Regulations

(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.
(b)
(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.
(2) The following entities may prescribe regulations to carry out the activities of such entities under this chapter:
(A) The Merit Systems Protection Board.
(B) The Office of Special Counsel.
(C) The agencies referred to in section 2303 (a)(2)(C)(ii) of title 5.

§ 4332. Reports

The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 4324 (a)(1) and no later than February 1, 2005, and annually thereafter, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:
(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.
(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.
(3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.
(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).
(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.
(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

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§ 4333. Outreach

The Secretary, the Secretary of Defense, and the Secretary of Veterans Affairs shall take such actions as such Secretaries determine are appropriate to inform persons entitled to rights and benefits under this chapter and employers of the rights, benefits, and obligations of such persons and such employers under this chapter.

§ 4334. Notice of rights and duties

(a) Requirement To Provide Notice- Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

(b) Content of Notice- The Secretary shall provide to employers the text of the notice to be provided under this section.'.

(c) Implementation- (1) Not later than the date that is 90 days after the date of the enactment of this Act, the Secretary of Labor shall make available to employers the notice required under section 4334 of title 38, United States Code, as added by subsection (a).

(2) The amendments made by this section shall apply to employers under chapter 43 of title 38, United States Code, on and after the first date referred to in paragraph (1).

Sample Company Policies on USERRA

Company 1 Example Policy

I. Military Leave under the National Guard and Military Reserve
A. Purpose

This Policy outlines the employment and reemployment rights of employees who enter either active or inactive training duty or service in the military while currently employed at XXXXXX, North America (the "Company").

B. Definitions

Differential Pay. The payment to the employee which is equal to the difference between military service pay received by the employee and the employee's regular pay for a similar period of time.
Regular Pay. *The salary, exclusive of overtime pay and other allowances, which an employee normally would have received during the pay periods he or she serves on military duty.*
Military Pay. *The military service payment received by an employee which includes base pay plus any other pay allowances, such as hazardous or special duty pay, but which excludes quarters, rations and subsistence allowance.*
Military Leave Under the National Guard & Military Reserve
An employee who is a member of the United States Army, Navy, Air Force, Marines, Coast Guard, National Guard, Reserves or Public Health Service (the "Uniformed Services") will be granted a partially paid leave for a maximum of six months of absence for military service, training or related obligations in accordance with applicable law. If the employee is on leave for greater than six months, the leave will be unpaid leave. At the conclusion of the leave, upon the satisfaction of certain conditions, an employee generally has a right to return to the same position he or she held prior to the leave or to a position with like seniority, status and pay that the employee is qualified to perform.

Requests for Military Leave

Leave for Active or Reserve Duty

Upon receipt of orders for active or reserve duty, an employee should notify his/her supervisor, as well as Human Resources, as soon as possible, and submit a copy of the military orders to his/her supervisor and the Human Resources Department (unless he/she is unable to do so because of military necessity or it is otherwise impossible or unreasonable).

Leave for Training and Other Related Obligations (e.g., fitness for service examinations)

Employees will also be granted time off for military training (normally 14 days plus travel time) and other related obligations, such as for an examination to determine fitness to perform service. Employees should advise their supervisor and/or department head of their training schedule and/or other related obligations as far in

advance as possible. Employees should retain their military pay vouchers. Upon return from training, the employee should submit his/her military pay voucher to the Human Resources Department; the Company will pay an employee's regular salary, less military pay, for the training period.

Return from Military Leave

Notice Required

Upon return from military service, an employee must provide notice of or submit an application for reemployment in accordance with the following schedule:

An employee who served for less than 31 days or who reported for a fitness to serve examination, must provide notice of reemployment at the beginning of the first full regular scheduled work period that starts at least eight hours after the employee has returned from the location of service.

An employee who served for more than 30 days, but less than 181 days, must submit an application for reemployment no later than 14 days after completing his/her period of service, or, if this deadline is impossible or unreasonable through no fault of the employee, then on the next calendar day when submission becomes possible.

An employee who served for more than 180 days must submit an application for reemployment no later than 90 days after the completion of the uniformed service.

An employee who has been hospitalized or is recovering from an injury or illness incurred or aggravated while serving must report to the Human Resources Department (if the service was less than 31 days), or submit an application for reemployment (if the service was greater than 30 days), at the end of the necessary recovery period (but which may not exceed two years).

DocumentationRequired

An employee whose military service was for more than 30 days must provide documentation within two weeks of his/her return (unless such documentation does not yet exist or is not readily available) showing the following:

- the application for reemployment is timely (i.e. submitted within the required time period);
- the period of service has not exceeded five years; and
- the employee received an honorable or general discharge.

Continuation of Health Benefits
During a military leave of less than six months, an employee is entitled to continued group health plan coverage under the same conditions as if the employee had continued to work. For military leaves of more than six months, an employee may elect to continue his/her health coverage for up to 18 months of uniformed service, but will be required to pay the entire premium for the continuation coverage. [NOTE: Employees and/or dependents who elect to continue their coverage may not be required to pay more than 102% of the full premium for the coverage elected. The premium is to be calculated in the same manner as that required by COBRA.]

Pay Differential
A salary differential (or Differential Pay), consisting of the difference between Company salary and military wages (before taxes) will be paid for up to six months while an employee is on active military duty. Where an Employee is entitled to Differential Pay under this policy and to payment under the union Military Leave of Absence policy Human Resources will review these situations and may reduce Differential Pay by the amount received through the union program. Any pay differential for a specific period of time will be determined upon presentation by the employee of military pay records for that period of time, excluding any food allowances. It is the employee's responsibility to provide documentation of his/her military compensation on which to base differential pay. Employees must provide a copy of their Leave Earnings Statement to _____in payroll. Employees may fax statement to _____.

Retirement Savings Plans
Membership in the Company's tax qualified Retirement and Savings Plans will be continued while an employee called to active duty is on paid leave of absence. Should the active duty extend beyond six months, membership will be suspended for the duration of the military leave of absence. Upon return to work, the period of leave will be credited to the employee's service under the Plan for vesting, as well as benefit and or contribution purposes. A more detailed explanation of an employee's rights in this regard will be provided upon the employee's return to work.

Life Insurance and Accidental Death & Dismemberment
Basic and optional employee and dependent life insurance coverage is extended for thirty days from the beginning of the leave of absence. Upon return to work, coverage will commence with no waiting period. Dependent coverage will also commence with no waiting period.

Disability
Disability coverage continues until the end of the month in which the employee enters active military status. This coverage does have an exclusion for disabilities caused by acts of war or terrorism.

Travel Accident
Benefits are payable due to war or act of war under our blanket accident insurance program. This benefit can be changed or revoked given a 31-day notice. All employees will be notified if any changes occur

Paid Time Off (PTO)
At the request of the employee, regular salary will be paid for any unused PTO entitlement. After returning to work, the employee will be eligible for full PTO entitlement as of the January 1st, with length of service to include the military leave. Once the six months of paid leave has expired, employees may begin to use any remaining PTO. An exception will be granted for those employees who are called to duty and cannot make use of their PTO entitlement. We will allow employees, in this situation, to rollover greater than the ten-day maximum carry-over.

II. UAW Labor Agreement language
(112) Employees who enter either active or inactive training duty or service in the armed forces of the United States will be given a leave of absence subject to the conditions herein. Upon submission of satisfactory proof of pending induction for active service, such employees may arrange for the leave up o thirty days prior to the induction date.

The leave shall not exceed the term of the initial enlistment and one (1) consecutive re-enlistment. In no event will the period of such leave exceed a total of eight (8) years, except when additional service in involuntary. Seniority will accumulate during the period of such leave. Upon termination of such leave, employees shall be offered re-employment in their previous position or a position of like seniority, status and pay, unless the circumstances have so changed as to make it impossible or unreasonable to do so, in which event they will be offered such employment in line with their seniority as may be available which they are capable of doing at the current rate of pay for such work, provided they meet the following requirements:
1. Have not been dishonorably discharged.
2. Are physically able to do the work.
3. Report for work within ninety days of the date of such discharge, or ninety days after hospitalization continuing after discharge.
(112a) The seniority of any employee who fails to report for work within the times specified in Paragraph (112) (3) shall be automatically broken, unless the employee gives a satisfactory reason for such failure to report.
(112b) As used in this paragraph, "Armed Forces of the United States" is defined as an limited to the United States Army, Air Force, Navy, Marine Corps, Coast Guard, National Guard, Air National Guard or any reserve component thereof.
(112c) Employees with seniority who are spouses of employees who enter active duty services in the Armed Forces of the United States and who obtain a leave of absence in accordance with Paragraph (112), may make written application to the Personnel Department for a leave of absence for the period of the spouse's initial enlistment but in no event to exceed four (4) years. Such leaves may be granted by management and will be subject to the conditions set forth in Paragraph (111). Seniority will accumulate during the period of such leaves.
(112d) Employees with seniority in any Allison Engine Company plant who are called to and perform short-term active duty of thirty (30) days or less, including annual active duty for training, as a member of the United States Armed Forces Reserve or National Guard, shall be paid as provided below for days spent performing such duty provided they would not otherwise be on layoff or leave of absence.

1. A payment will be made for each day, except for a day for which they receive holiday pay, which they would otherwise have worked equal to the amount by which their straight time rate of pay as of their last day worked plus applicable night shift premium (but not including overtime) for not more than eight (8) hours, exceeds their military earnings for that day including all allowances except for rations, subsistence and travel. Except for short term active duty of thirty (30) days or less performed by employees called to active service in the National Guard by state or federal authorities in case of public emergency, payment is limited to a maximum of fifteen (15) working days in a calendar year.
2. In order to receive payment under this Paragraph (112d), employees must give local Management prior notice of such military duty and, upon their return to work, furnish Management with a statement of the military pay received for performing such duty.

III. Service Representative Deployment Policy

Deployment Within Hostile Zones

Occasions may arise when the duties of a Service Representative entail a visit or assignment to areas which can be classified as hostile; e.g., deployment on an aircraft carrier within a zone of military activity, or being present within a territory involved in war, insurrection or terrorist activity, etc.
A current list of countries defined as "war zones" is maintained by the insurance companies.
When visiting or assigned to such hostile zones, notification of each such visit or assignment is necessary. Accordingly, the appropriate Manager must notify the Human Resources Department, in writing and in advance of any such visit or assignment providing the name(s) of the Service Representative(s) concerned, with as much detail as possible regarding anticipated duration of the visit or assignment and travel arrangements, with departure and return dates.
Any deployment of an employee on an aircraft carrier is to be notified in writing to the Human Resources Department. This will cover the possible situation of the carrier being diverted from a "non-hostile" to a "hostile" zone during the course of the assignment.

Shipboard Deployment
The following guidelines are provided to assist in making arrangements prior to an overseas carrier deployment.

1. Passport, Visas, Identification
   Please contact International Human Resources Department in Chantilly.

2. Medical
   a) A medical examination within the past year is required. Records of outstanding medical problems should be carried.

   b) An immunization record is required. A Naval medical department can determine what vaccinations are required for the countries to be visited.

   c) Dental care should be seen to prior to leaving.

3. NATEC – Naval Air Technical Engineering Command

   a) A Company letter to NATEC office, San Diego, CA is required.

   b) Endorsement is required upon arriving and upon departing the assigned task location. Orders will be issued by the on-site NATEC office directing the Representative to the relocation task assignment.

4. Letter of Instruction (LOI)
   Some deploying squadrons publish an LOI which contains helpful information such as:
   a) Mailing address while deployed, telegram to and from the ship.

   b) List of personnel deploying.

   c) Outlines the operation and commitments, administrative, logistics and maintenance responsibilities.

   d) Other aviation units aboard for the deployment.

   e) Do's and don'ts aboard a Navy ship.
5. Squadron Equipment Issued

   a) Flight deck helmet, goggles and life vests should be checked out prior to leaving for the ship.

   b) Cold weather clothing is available as required.

   c) A cruise box, which is 8 cubic feet and, can be locked is available for private use.
   d) Safety shoes are required as are long sleeved shirts.

6. Nice to Know
   a) There will be limited living and storage space.
   b) Laundry and cleaning facilities are available aboard. Laundry and dry cleaning bags should be obtained before embarkation from the local PX. Coveralls and wash and wear type clothing is highly recommended.
   c) Nice to have items: flashlight, extra batteries, night light with red bulb, radio/cassette player with headset, books, ear plugs.

   d) International driver's license is required and can be obtained through the local AAA office.

Shipboard Deployment Allowance

In recognition of the loss of liberty and inconvenience associated with living and working conditions aboard aircraft carriers, those assigned to a carrier for more than 14 days will receive a 25% premium. Such payment is effective upon start of the assignment and will be paid upon completion of assignment following receipt of written manager's authorization.
A daily allowance of $25 for meals and $8 for miscellaneous expenses may be claimed to help defray the costs of mess charges for any periods spent on shipboard deployment.

Land Deployment

In recognition of difficult living and working conditions while deployed on land, in the field and in certain geographic regions, employee will receive a 25% premium plus daily meal and miscellaneous allowances, as outlined above. Qualification for this allowance will be determined on an individual basis upon receipt of the specific conditions of the assignment.
An additional premium of 25% will be paid to those employees stationed temporarily in a crisis area, if and when the U.S. Department of Defense declares the specific geographic area of the assignment to be a hostile fire area. When this declaration becomes effective you will be notified in writing. The premium will be paid semi-monthly. Meal and miscellaneous allowances are reimbursable through GELCO.
The hardship deployment allowances and the hostile fire area premium are income to the employee and, therefore, subject to the usual Federal, State, and Local income tax. When deployed in an area where hotel accommodation is appropriate, the usual reasonable hotel, meal and miscellaneous allowance may be claimed in lieu of a hardship allowance.
The premiums and allowances are not included in base pay for purposes of any employee benefit plan.

IV. XXXXXX Benefits Coverage During War or Terrorism
U.S. Benefits At-A-Glance

	Regular Business Traveler Caught In Hostile Environment (War or Terrorism)	Active Employee Assigned to Work in Hostile Environment (War or Terrorism) (ex. Military Service Rep)		Military Reserves
Health Benefits	No exclusions in case of war or terrorism. Claims would be covered under XXXX health plans. Depending on injury, may coordinate with Workers Comp.	No exclusions in case of war or terrorism. Claims would be covered under XXXX health plans. Depending on injury, may coordinate with Workers Comp.		• RRNA Active covg. first 6 months & then 18 months Cobra Military coverage primary for employee and XXXX plan primary coverage for dependents
Life & AD&D Insurance	Basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.	Basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.		Coverage ends thirty days from beginning of leave. During the first thirty days, basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.
Disability	Not covered during acts of war or terrorism.	Not covered during acts of war or terrorism.		Not covered during acts of war or terrorism. Covg under U.S. government plan.
Travel Accident Insurance	Currently covered except for acts of war in Iran, Iraq, Pakistan, Afghanistan, Syria, and Israel *	Currently covered*		Not covered
Workers Compensation	Covered under XXXX program.	Covered under XXXX program.		Covered under U.S. government plan.

* This benefit can be changed or revoked given a 31-day notice. All employees will be notified if any changes occur.

Company 2 Example Policy

This memorandum establishes and authorizes the special pay and benefit arrangements to be extended to XXXXXXX employees called to active duty military service as a result of the terrorist attacks on September 11. These arrangements apply to all employees, salaried and hourly, in all operating units and are an expansion of our current policies.

1. Employees will be eligible to receive pay differentials to make up for any shortfall between their military rate and their XXXXXXX base pay **for a period of up to 6 months immediately following activation**. Any differential pay will be determined upon presentation by the employee of military pay records. The military rate is defined as military base pay, and any specialty pays such as flight pay, jump pay, etc.

   It is the employee's responsibility to provide documentation of the pertinent military compensation on which to base differential pay. This is independent of any differential paid during annual training periods.

2. During the period differential pay is being provided by the Company the called-up employees may choose to keep their Value 2001 Insurance elections as of the date of call-up in-force or they may within 31 days of call-up, elect to drop certain coverage for themselves or dependents. If after being called-up the individual receives new orders that extend the period of service beyond what was initially anticipated, employees will again have a 31 day period following receipt of those orders to change coverage elections for themselves and dependents. In order to keep employee and/or dependent benefits in effect during the interval between the employee's call-up and return to active XXXXXXX service, the employee must pay the employee contribution required by the Benefit Plan in effect just prior to call-up for the benefits he/she elects to keep.

   The above benefit arrangement applies to the first 6 months following call-up to active service and meets or exceeds the company's obligation for the period as specified in the Uniform Services Employment and Reemployment Rights Act of 1994, which was signed into effect October 13, 1994. The act requires that health care coverage must remain available to called-up employees and their dependents for a total of 18 months. XXXXXXX will comply with the basic requirements of the Act by making the health care (medical, dental and vision) COBRA options available to those employees and their families for the 7th through 18th month of call-up.

   During the period the employee is on Military Leave, the Government provided medical, dental and vision benefits will be primary for the employee and XXXXXXX sponsored benefit plans will be the secondary payer. All exclusions and limitations on claims resulting from an Act of War will apply.

3. Employees can elect to receive pay for all unused and accrued vacation at the time of call-up, or to leave that vacation on the books and available to be taken if the employee is released and returns to active employment.

4. Defined Contribution Plan accounts (i.e. 401(k) plans) will remain intact for employees called to active duty in this instance. Withdrawals may be made in accordance with provisions of the plan. **Returning employees will be permitted to make up contributions and also receive any associated Company match that would have been made if they had not been called-up.**

5. Upon release from active duty, reinstatement will be in accordance with current veteran's reemployment rights.

Company 3 Example Policy

Military Leave Policy

1.0 Policy

It is XXXXXXX policy to support its employees who serve in the uniformed military services by accommodating their temporary military duty-related absences from work and reducing the economic hardship resulting from such absences by providing differential pay in some situations.

2.0 Implementation

2.1 Military duty includes the performance of duty in the uniformed services of whatever nature, voluntary and involuntary, for up to five years, subject to the exceptions in the Uniformed Services Employment and Reemployment Rights Act (USERRA). If an employee's military duty exceeds a cumulative total of five years, then the element should obtain advice and direction regarding USERRA requirements from local Legal Counsel.

Notice of Military Duty

2.2 The employee will provide advance notice of military duty (at least one week's notice, when practical) to his or her immediate manager. The notice may be oral or in the form of written orders or other available documentation that indicates the anticipated length of the military duty. Notice is not required if military necessity prevents giving notice or if giving notice is otherwise impossible or unreasonable under the provisions of USERRA.

2.3 A copy of the written orders or other available documentation must be sent by mail or fax to the XXXXXXX Employee Service Center, who will process the leave and notify the employee's immediate manager.

Payment for Military Duty

2.4 XXXXXXX will pay employees for their annual military duty up to the lesser of 15 days, 120 hours, or three workweeks in a calendar year (the "Annual Military Allotment"). The days of Annual Military Allotment do not have to be taken consecutively. After the Annual Military Allotment has been exhausted, any additional military duty will be unpaid.

a) A "workweek" is a fixed and regularly recurring period of 168 hours (i.e., seven consecutive 24-hour periods), established for the employee by the element. See Corporate Policy on Hours of Work and Work Schedules.

b) The Annual Military Allotment for regular part time employees will be based on time scheduled to be worked.

c) The Annual Military Allotment for represented employees will be as defined in the applicable collective bargaining agreements.

d) The wage and hour legal restrictions that apply to certain partial day and partial week absences by exempt salaried employees may require an extension of the Annual Military Allotment for such employees.

e) In extenuating circumstances, the Senior Vice President Human Resources may authorize paid military duty beyond the Annual Military Allotment.

2.5 Employees on military leave will receive Full Pay or Differential Daily Pay during the Annual Military Allotment, as specified in Table A below. The difference between Full Pay and Differential Daily Pay is a wage advance that will be offset against future earnings via payroll deduction when the employee has completed military duty and returned to work.

a) "Full Pay" is XXXXXXX straight pay without diminution or offset.

b) "Differential Daily Pay" is the difference between lower military pay and higher Full Pay. Differential Daily Pay is computed on a daily basis and includes shift premium, where applicable. It does not include allowances (such as for subsistence, quarters, travel, or expenses) or military pay received on non-XXXXXXX workdays. "Non-XXXXXXX workdays" are days on which the employee is not regularly scheduled to work, such as Saturday or Sunday for an employee who is regularly scheduled to work Monday through Friday, or every other Friday for an employee on a 9/80 schedule.

Table A
Payment of Differential Daily Pay and Full Pay

IF the employee ...	THEN ...
Performs Military Duty for the entire workweek	the employee will receive Differential Daily Pay for the entire workweek.
Performs Military Duty for part of a day during the workweek, and works for XXXXXXX for part of that same day	an hourly or non-exempt salaried employee will receive Full Pay for the hours worked for XXXXXXX and Differential Daily Pay for hours reported as paid military. an exempt salaried employee will receive Full Pay for the entire day.
Performs Military Duty for part of the workweek, and works for XXXXXXX for the rest of that same workweek	the employee will receive Differential Daily Pay for the day(s) reported as paid military and Full Pay for the days worked for XXXXXXX.

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2.6 Before going on military leave, the employee will sign a payroll deduction agreement authorizing XXXXXXX to collect the amount of wages advanced during the period of military leave that exceeds the Differential Daily Pay due for the same period.

2.7 During the period of paid military duty the employee should account for his or her time in accordance with the applicable XXXXXXX time and attendance practices. The employee cannot charge time to military leave that is not covered by orders or other military documentation.

2.8 Within 15 business days after military duty is completed, the employee will submit to the XXXXX a Labor Earnings Statement (LES) from an appropriate agency of the government, showing the amount of pay received for the military duty. The employee's pay will be reduced or offset by the adjusted gross earnings received for military duty performed during the employee's regular workweek(s). If the employee's military pay exceeds his or her Full Pay, then the employee must repay all Full Pay to XXXXXXX.

Vacation

2.9 The employee may authorize full or partial payout of his or her unused vacation accrual. The vacation payout will be in the form of a lump sum, less all applicable legal withholdings. The employee never will be required to use vacation in connection with military leave.

Extensions

2.10 If while on military leave it is necessary to request an extension, the employee should make the request in a timely manner (preferably in writing) with any appropriate supporting documentation. Notice is not required if military necessity prevents giving notice or if giving notice is otherwise impossible or unreasonable under the provisions of USERRA.

Benefits

Employee who is on Paid Military Duty

2.11 All benefits will continue at the employee's normal contribution rate.

2.12 The employee will receive credited service and other seniority-based rights (and any other rights or benefits in accordance with USERRA) for the time spent on military leave, if he or she returns to work upon release from military duty within the time limitations and requirements of USERRA. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law.

2.13 Employee and employer savings plan contributions, benefits, and service credit will be provided in accordance with USERRA and the terms of the applicable plan documents.

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Employee who is on Unpaid Military Duty

2.14 Medical, dental, vision, and health care reimbursement benefits will continue for the first 31 calendar days of military leave at the employee's normal contribution rate. After 31 calendar days the employee will be entitled to continue coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and USERRA for a period of up to 18 months. The employee will not be required to pay more than 102% of the full premium for the benefit coverage. Under certain circumstances, involving "multiple qualifying events," COBRA may provide continuation beyond the 18 months required by USERRA.

2.15 The employee will receive credited service and other seniority-based rights (and any other rights or benefits in accordance with USERRA) for the time spent on military leave, if he or she returns to work upon release from military duty within the time limitations and requirements of USERRA. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law.

2.16 Employee and employer savings plan contributions, benefits, and service credit will be provided in accordance with USERRA and the terms of the applicable plan documents. Generally, contributions that would have been made during periods of qualified military service can be repaid by the returning employee over a period three times the period of military service, but no longer than five years. If the returning employee's repayment contributions relate back to years other than the current calendar year, these contributions will count toward the Internal Revenue Service (IRS) annual defined contribution plan limits on contributions for the years to which the repayments relate, rather than toward the current year's limits. Employer contributions will be based on amounts repaid by the employee. Loan repayments will be suspended during qualifying periods of military service.

Reinstatement/Termination

2.17 An employee who returns to work upon release from military duty within the time limitations and requirements of USERRA and any other applicable state law will be entitled to reinstatement rights consistent with USERRA and any other applicable federal or state law. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law, including USERRA provisions that may restrict layoffs for certain periods of time.

2.18 An employee who does not return to work within the time limitations and other requirements specified by USERRA and any applicable state law will be administratively terminated from employment without severance eligibility.

2.19 The effective date of termination for an employee who was on *paid* military duty will be the last regularly scheduled workday of the approved absence. The effective date of termination for an employee who was on *unpaid* military duty will be the last regularly scheduled workday prior to being placed on unpaid status.

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Expatriate Employees

2.20 Employees on international assignment will remain on the international payroll for the period of annual military duty. Employees who enlist or are called to active duty will be transferred to the domestic payroll, then placed on military leave.

3.0 General

3.1 This policy is intended to comply with USERRA and the Fair Labor Standards Act, among other federal and state laws.

3.2 Nothing in this policy will be construed to supersede any provision of any federal, state, or local law or collective bargaining agreement that provides greater rights than those outlined herein.

3.3 No provisions of this or any other XXXXXXX policy or procedure will be construed as an employment agreement. Employment with XXXXXXX can be terminated at any time with or without cause either by the employee concerned or by XXXXXXX.

3.4 Any deviation from this policy requires the prior approval of the Senior Vice President Human Resources or designee.

Company 4 Example Policy

Military Affairs Administration
Purpose/Summary

This procedure applies to **XXXXXX** employees who are members of, or apply to be members of, a uniformed service of the United States or who have performed, apply to perform, or have an obligation to perform service in such a uniformed service.

This procedure provides the standards governing payment of military differential pay for employees who are ordered to report for active duty or training duty.

Employees covered by collective bargaining agreements will be governed by the applicable agreement as well as this procedure with the agreement having precedence.

This procedure does not constitute a contract or contractual obligation, and the Company reserves the right, in its sole discretion] to amend, modify, or discontinue its use without prior notice, notwithstanding any person's acts, omissions or statements to the contrary.

This procedure applies to all segments of **The XXXXXX Company**, including subsidiaries (as implemented by resolution of the subsidiary Board of Directors).

Business segment sites may choose to not implement this procedure or choose only to implement specific provisions of this procedure. If applicable, the site will have a documented writing addressing this subject. Employees should contact their manager or People organization about the applicability of this procedure at their site.

Summary of Changes to the Title Page

The Issue Date, Purpose/Summary, Supersedes date, Applies to, Maintained by and Approved by information sections have changed. Otherwise, this is a major revision.

1. Definitions

The definitions of the following terms used in this procedure are for purposes of this procedure only and have no effect on the meaning of the same or similar terms used in other documents.

A. Military Differential Pay

The difference between an employee's gross military compensation and their regular XXXXXX pay (working rate of pay). Military compensation includes but is not limited to Base Pay, Foreign Duty Pay, Special and Incentive Pay and Housing (Basic Allowance for Housing (BAH)/Basic Allowance for Quarters (BAQ)), Subsistence (does not include Housing (BAH/BAQ)), uniform, and travel allowances will not be included in determining military compensation. For purposes of calculating military differential pay, a five-day workweek will be used.

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B. Original Work Location

Principal XXXXXX work location at time of military service (e.g.) Anaheim, Huntington Beach, Huntsville, Long Beach, Philadelphia, Portland, Puget Sound, Seal Beach. Spokane, St. Louis, Wichita.

C. Uniformed Service

Army, Navy, Marine Corps, Air Force, Coast Guard, and their reserves, Army National Guard or Air National Guard, and Commissioned Corps of the Public Health Service.

D. Working Rate of Pay

The employee's hourly base rate plus any additive rates.

2. Requirements

A. The Company will comply with all state and federal laws and regulations that apply to reemployment of employees returning from a leave of absence after active U.S. uniformed service.

B. The Company will make every reasonable effort to cooperate with the U.S. uniformed services. However, the Company reserves the right to contact military administrators in instances where an employee's time away from work exceeds normally expected amounts.

C. Military Leave of Absence

1. When an employee has orders to report for active duty, annual active duty or temporary special duty in the uniformed service of the United States, a leave will be granted for the period of service in accordance with procedure _____, 'Leave of Absence."

2. Employees on a leave of absence for active duty, annual active duty or temporary special duty may not may not return to work until the period of service is completed.

3,,. A leave of absence for military service shall not exceed five (5) years unless required by the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.

4. Company service will continue to accrue while on a military leave of absence for up to five years or longer if required by applicable laws.

5. Employees may use available vacation credits while on a military leave. Military pay differential is not applicable when using vacation credits. Vacation credits will continue to accrue during the first 90 calendar days of the leave of absence.

6. Employees may not use available sick leave credits while on military leave. Sick leave credits will continue to accrue during the first 90 calendar days of the leave of absence.

7. Employees are eligible for Company paid holidays occurring during the first 90 calendar days of military leave. Military differential pay is not applicable on a Company paid holiday.

D. Time Off and Military Differential Pay for Members of a Reserve Component Called to active duty.

Note: Provisions of this section do not apply to employees who volunteer for enlistment or re-enlistment into the Armed Forces during the initial period of active duty.

1. Members of a reserve component of a uniformed services who are ordered to annual active duty are eligible for military differential pay up to a maximum of 80 hours each military fiscal year (October 1 - September 30) or longer if required by applicable laws.

2. Members of a reserve component of the uniformed services who are ordered to temporary special duty in time of war, national or state emergency as outlined below in 2.a. through 2.e., herein referred to as call-up" are eligible for military differential pay for up to a maximum of 90 calendar days of active duty for each occurrence. Extension of military differential pay beyond 90 days may be approved on a case-by-case basis for each call-up. This approval will be based on the call-up and not on an individual employee basis. Military differential pay will end upon the employee's release from active duty.

a. Military U.S. Code Title 10; USC Chapter 1209; under the following sections:

Section 12301
Section 12302
Section 12304

b. Mobilized by the applicable state agency for a state emergency.
c. Mobilized for service as an intermittent disaster-response appointee when the Secretary of Health activates the National Disaster Medical System.

d. The military differential pay under this provision is in addition to the 80 hours of annual active duty described in 2.D.1.

e. Only copies of original orders with documentation of qualifying Title 10 sections as defined in 2.D.2.a. will be accepted. Letters from commanding officers will not be accepted.

3. Employees will retain all compensation received from the uniformed services. If the employee's military compensation is less than their regular

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XXXXXX pay (working rate of pay), the employee will receive pay for the difference upon receipt of the employee's leave and earnings statement. Employees on U.S. Code Title 10 call-ups should regularly submit leave and earnings statements to receive differential pay while serving. Subsistence (does not include Housing (BAH/BAQ)), uniform, and travel allowances will not be included in determining military pay.

4. Excluded from military differential pay is any active or inactive duty training whereby the employee does not receive military pay (no pay status). However, such training may qualify under the employee's organizational education and training guidelines if the training is relevant to the employee's job and is not offered through the Company's education and training program (i.e. seminars and conferences).

5. Employees may use available vacation credits while on a military leave. Military pay differential is not applicable when using vacation credits.

6, Employees may not use available sick leave credits while on military leave.

7. Employees are eligible for Company paid holidays occurring during the first 90 calendar days of military leave. Military differential pay is not applicable on a Company paid holiday. Employees eligible for extended military differential pay as defined in section 2.D.2. will continue to receive such pay for unpaid holidays after 90 calendar days,

E. Reemployment Rights

To qualify for reemployment rights following military service, employees must meet the following criteria as defined by the Uniformed Services Employment and Reemployment Rights Act of 1994 (U.S. Code Title 36, Chapter 43):

a. The employee gave notice prior to taking military leave.

b. The period of military leave has not exceeded five years unless otherwise exempt under the provisions of this act (Section 4312 (c)).

c. The employee's release from military service was under 'honorable conditions."

d. The employee reported back to work or applied for reemployment within 90 days of completion of service.

e. During an employment reduction, managers will review employees who are on military leaves of absence using the same layoff selection processes as if those employees had remained at work. If required, affected employees on an approved leave of absence will receive an advanced notification of layoff. Upon return from the eave of absence, employees will be subject to appropriate redeployment actions, which may include reassignment or layoff. If applicable, employees can remain on a military LOA up to 90 days following completion of duty. However, if an employee is subject to layoff upon return to work the termination date will be the day following completion of active duty.

2. Employees are eligible for reemployment at their original work location. Reference Exhibit A for specific provisions regarding reinstatement and job rights.

3, Employees may apply for reemployment at another work location. However, they are not entitled to reemployment rights at the new location.

3. Responsibilities

A. Employee

1. Provide management with advance notice of required uniformed service unless it is unreasonable or impossible to do so.

2. Request a leave of absence in accordance with procedure PRO-1874, 'Leave of Absence."

3. Provide the appropriate payroll center with a copy of military orders prior to annual active duty or special temporary duty. Changes to original military orders require a new set of orders. Changes to .original military orders on letterhead stationary or facsimile will not be accepted. Upon return or before, provide a copy of the appropriate military leave and earnings statement in order to ensure proper and timely payment. A substitute voucher or facsimile will not be accepted.

4. Employees on U.S. Code Title 10 call-ups should regularly submit leave and earnings statements to receive differential pay while serving.

5. After completion of military service, return to work through the resident return to work process and make application for reemployment within 90 days of completion of service.

B. Manager

1. Allow employees to meet their uniformed service obligations.

2. Ensure that the employee provides the payroll center with a copy of their military orders before departure to annual active duty or special temporary duty and, during or upon return, provides the payroll center with a copy of their military leave and earnings statement. No substitute payment voucher or facsimile will be accepted.

3, Ensure employee absence is properly recorded.

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4. Review with the appropriate People organization before any final action is taken to process a downgrade, suspension, or involuntary termination of a reinstated veteran during the first year of the veteran's return from military service. This action is required to ensure compliance with the Uniformed Services Employment and Reemployment Rights Act of 1994.
5. Review and determine if any military training not eligible for military differential pay may qualify under the organization's education and training guidelines.

C. People/Human Resources Organization

1. Counsel, coordinate, and assist employees and managers on all uniformed service duty and reemployment matters.

2. Counsel and assist employees and managers on matters relating to military regulations as they affect company employee relations.

D. Payroll

Analyze and interpret military orders and leave and earnings statements for qualifications and approval of military differential pay.

E. Employment

Counsel, coordinate, and assist employees and the People organization on reemployment matters.

F. World Headquarters Global Diversity and World Headquarters Compensation and Benefits

1. Interpret this procedure as required.

2. Initiate action necessary to keep this procedure up to date.

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT, I AM BEING MOBILIZED, WHAT ABOUT MY CIVILIAN JOB?

Rocco J. Maffei[1]

In March 2005, 6,500 former soldiers in the Individual Ready Reserve received notices ordering them to report to an Army installation as they were being recalled to active duty.[2] As the United States military commitments in Afghanistan and Iraq continue to be at high levels, employers are faced with difficult decisions concerning their employees with National Guard and reserve responsibilities. "An increasing number of U.S. soldiers deployed in Iraq have gray mustaches, bald heads, and noticeable paunches as more reservists and National Guard units are being sent to war."[3] The percentage of Reserves, National Guard and IRR in *Operation Iraqi Freedom* (OIF) is now about 40%.[4] Whether a police officer, trucker, nurse, or pharmaceutical distributor, these individuals leave their everyday jobs to serve the United States through military service. "Once a soldier, always a soldier," said Paul East, a long-haul trucker from Florida.[5]

Brief History of the Act

In October 13, 1994, President Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA).[6] USERRA is a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law. This law became fully effective on December 12, 1994. The Veterans' Benefits Improvement Act of 2004 (VBIA), signed by President Bush on December 10, 2004, modified employer obligations as well as complaint procedures under USERRA.[7]

The basic idea of USERRA, like the VRR law, is that if you leave your civilian job for service in the uniformed services, you are entitled to return to the job, with accrued seniority, provided that you meet the law's eligibility criteria. Like the VRR law, USERRA applies to voluntary as well as involuntary service[8] in peacetime as well as wartime, and the law applies to virtually all civilian employers, including the Federal Government, State and local governments, and private employers, regardless of size. [9] Unlike most Federal labor laws, the VRR law never had a threshold for applicability, based upon the size of an enterprise or the number of employees, and the Fifth Circuit declined to find an implied threshold. [10] If Congress had intended here to be an applicability threshold in

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[2] Vaughan, Chris, Fort Worth Star-Telegram, Mar. 18, 2005
[3] Mooney, Mark, New York Daily News, Feb.15, 2005
[4] Moskos, Charles, The Officer, June 2005
[5] Mooney , Mark, New York Daily News, Feb 15, 2005
[6] 38 U.S.C. 4301-4333, Public Law 103-353, 108 Stat. 3149
[7] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) pages 2-3-2-15, June 1998
[8] Section 4303(13)
[9] Section 4303(4)
[10] See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992)

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USERRA, it would have said so expressly, and the lack of an express threshold means that the law applies even to very small employers. [11]

Under USERRA, the District of Columbia government is treated as though D.C. were a state, and the same is true of Puerto Rico, Guam, the Virgin Islands, and the other territories and possessions of the United States.[12] Also, National Guard civilian technicians are treated as state employees, and the state adjutant general is considered to be their employer. [13]

USERRA represents a floor and not a ceiling on the rights of persons who serve or have served in the uniformed services. USERRA does not supersede, nullify, or diminish any federal or state law (including a local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to persons protected by USERRA or is in addition to rights and benefits accorded to those persons by USERRA..[14] USERRA does supersede any State law (including a local law or ordinance), contract, agreement, policy, practice, or other matter that reduces, limits, or eliminates USERRA rights and benefits or that imposes additional prerequisites upon the exercise of such rights or the receipt of such benefits. [15]

Under USERRA, service in the "uniformed services" gives rise to rights. These services include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services.[16] Federal training or service in the Army National Guard and Air National Guard gives rise to rights under USERRA, but state service, pursuant to a call from the governor of the state, is not protected by the federal law, although it may be protected by state law. [17]

Under the VRR law, different rules applied to different categories of military training or service. For example, one set of rules applied to active duty and another to active duty for training. Under USERRA, all categories are treated as "service in the uniformed services," and the rules depend upon the duration of service, not the category.
In order to have reemployment rights following a period of service in the uniformed services, five eligibility criteria must be met.

a. The employee must have held a civilian job. (Discrimination in hiring is prohibited)
b. The employee must have given notice to the employer that he is leaving the job for service in the uniformed services.
c. The period of service must not have exceeded five years.
d. The employee must have been released from service under "honorable conditions."

[11] Cf. King v. St. Vincent's Hospital, 112 S. Ct. 570 (l991) (rejecting any implied limitation on frequency or duration of military leaves of absence under the VRR law)
[12] Section 4303(14)
[13] Section 4303(4)(B)
[14] Section 4302(a)
[15] Section4302(b)
[16] Section 4303(16)
[17] Section 4303(13)

e. The employee must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.

Leaving a Civilian Job

Under USERRA, unlike the VRR law, a civilian job need not be "other than temporary." Even if the employer considered the pre-service job to have been "temporary," an individual reservist can have reemployment rights unless "the employment [was] for a brief, non-recurrent period and there [was] no reasonable expectation that such employment [would] last indefinitely or for a significant period."[18] This is an affirmative defense for which the employer bears the burden of proof. [19] Under USERRA, the reservist must give prior notice to the employer regardless of the category of the service to be performed.[20] Under the VRR law, prior notice was not required in the case of active duty or initial active duty training. [21] If the reservist entered active duty or initial active duty training prior to December 12, 1994, they will be excused from the notice requirement with respect to that one period of service, but not any subsequent periods.[22] The reservist is only required to notify the employer of the fact of leaving and impending service. He is not required to predict that he will return to the job to apply for reemployment. Like the VRR law, USERRA preserves the option to seek reemployment until a specified period after completion of the service.

Prior notice to the employer is not required if such notice is precluded by military necessity or if such notice is "impossible or unreasonable."[23] There should be rare exceptions to the notice requirement. A classified recall would be an example of a situation wherein notice would be precluded by military necessity. If a reservist is ordered to withhold notification of the fact of recall to active duty, he must obey such an order, and the decision by military authorities that military necessity precluded notice will not be subject to judicial review. [24]This will be a rare circumstance, but it is possible that military authorities could conclude that such secrecy would be required because the activation of a unit with a unique mission or capabilities could tip off a potential adversary to the plans of our military. If reservists are recalled to active duty in the middle of the night and it is impossible to give notice, they will be excused from the notice requirement. [25] Nevertheless, it is a good idea to notify the employer as soon as possible.

Under USERRA, the deploying service member can give the notice, or an appropriate officer of the service can give the notice for the service member. [26] The notice can be written or oral [27], but it is recommended that written notice be given and a copy retained. USERRA does not specify how much notice must be given, but as much advance notice as possible should be provided.

[18] Section 4312(d)(1)(C)
[19] Id.
[20] Section 4312(a)(1)
[21] See 38 U.S.C. 4301(a), 4304(a), 4304(b), 4304(c)(old law).
[22] Section 8(a)(4) of USERRA, not codified, "Transition Rules and Effective Dates"
[23] Section 4312(b)
[24] Section 4312(b)
[25] Section 4312(b)
[26] Section 4312(a)(1)
[27] Id.

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The legislative history of this section, indicating the intent of Congress, shows that the reservist will not be penalized if he had little notice from military authorities, but if he intentionally withholds notice to the employer, this will be viewed unfavorably, especially if the lateness of the notice causes serious problems for the employer. [28]

If the period of service is fewer than 31 days, such as a drill weekend or a 12-day annual tour, the documentation required under section 4312(f)(1) of USERRA does not apply. None the less, the service member must prove to their employer that they were performing military service and they should provide a letter from their commander showing their weekend drill periods and annual tour.[29]

Limit on Duration of Service

The period of service in the uniformed services can last up to five years.[30] This limit is cumulative, so long as the reservist is employed by or seeking reemployment with the same employer. When the reservist starts a new job with a new employer, they receive a fresh five-year entitlement.[31]

The passage of USERRA does not give currently employed persons fresh five-year entitlements. If one performed service under the VRR law and is still employed by the same civilian employer, that period of service counts toward USERRA's five-year limit unless it is exempted by one of the VRR law's exceptions to that law's four-year limit.[32]

It is important to note that some categories of military training or service do not count toward the five-year limit. Most periodic and special Reserve and National Guard training does not count [33] and most service in time of war or emergency does not count.[34] If one is retained on active duty past their expiration of active obligated service date, through no fault of their own, such an involuntary extension period does not count toward the five-year limit.[35] For example, if a service member is stationed on a vessel at sea on the service expiration date, he may be involuntarily extended until the ship returns to port.[36]

Under USERRA, the reservist can have reemployment rights if he leaves active duty at the end of the initial period of obligated service, even if that period exceeds five years.[37] For example, if one enlisted in the Navy's nuclear power program, they probably had to agree to serve on active duty for six years. If they seek reemployment following such a period of service and meet the other eligibility criteria, they will have reemployment

[28] H.R. Rep. 103-65, 103d Cong., 1st Sess., page 26 (April 28, 1993)
See also Burkart v. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988) (upholding firing of National Guard member who withheld notice until the last moment)
[29] Wright, Samuel, The Officer, September 2003
[30] Section 4312(a)(2)
[31] Section 4312(a)(2)
[32] Section 8(a)(3) of USERRA, not codified, "Transition Rules and Effective Dates"
[33] Section 4312(c)(3)
[34] Section 4312(c)(4)
[35] Section 4312(c)(2)
[36] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-6, June 1998
[37] Section 4312(c)(1)

rights. There are several exceptions to the five-year limit, and some are not as clear as they might be.[38]

If an individual is in any danger of exceeding the five-year limit with their current employer, they should seek advice as to how much of the limit they have already expended and whether a proposed tour of training or service will count toward the limit.

Character of Service

Under USERRA there are no reemployment rights if the reservist receives a punitive discharge or dismissal as a result of a court martial conviction, an "other than honorable" administrative discharge, or if they are "dropped from the rolls" of a uniformed service because of a long period of unauthorized absence or because of a civilian criminal conviction.[39] To receive the protection of USERRA the character of the service must be honorable.

Timely Return to Work

Under USERRA, the deadline to report back to work or to apply for reemployment depends upon the duration of service or training. Following a period of up to 30 consecutive days of training or service, the reservist must report back to work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation from the place of service [in the uniformed services] to the person's residence." [40] For example, if one completes their weekend drills at 4:00 Sunday afternoon, and if it takes five hours to drive home, they need not report to work for a shift that starts at 2:00 a.m. on Monday, because they have not had an opportunity for eight hours of rest.

This deadline is similar but not identical to the VRR law's deadline for returning to work following active duty for training or inactive duty training (drills). [41] The reference to "safe" transportation was added to ensure that reservists not be required to drive all night to be timely in reporting back to their civilian job, and the eight-hour period was added to ensure that they have the opportunity to have adequate rest before returning to work. If one finds it "impossible or unreasonable" through no fault of their own to report back to work the next day, as otherwise required, they must report back to work as soon as possible. [42] For example, an automobile accident on the way home from the drill weekend could extend the deadline by a day or two, even if the reservist is not injured.[43] In Gordon v. Wawa, Inc., however, the 3rd U.S. Circuit Court of Appeals refused to revive a suit brought by the estate of an Army reservist who was ordered to work the night shift immediately upon his return from a weekend of reserve duties and was allegedly

[38] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-6, June 1998
[39] Section 4304
[40] Section 4312(e)(1)(A)(i)
[41] See 38 U.S.C. 4304(4) (old)
[42] Section 4312(e)(1)(A)(ii)
[43] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-7, June 1998

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threatened to be fired if he refused. The court found the eight hour period to be the time within which the service member must return to work, not a guaranteed rest period.[44]

Following a period of 31-180 continuous days of service or training, the reservist must submit an application for reemployment within 14 days.[45] If they find it impossible or unreasonable to meet this deadline, through no fault of their own, they must submit the application as soon as possible thereafter.[46] Following a period of 181 or more days of continuous service or training, they must submit an application for reemployment within 90 days.[47] Any of these deadlines can be extended by up to two years if the reservist is hospitalized or convalescing from a service-connected injury or illness.[48]

If the reservist misses one of these deadlines, without adequate cause, they do not automatically lose reemployment rights, but they will be subject to the employer's normal policies concerning explanations and discipline for unexcused absences. [49]
The "application for reemployment" need not be in writing. The reservist is only required to inform the employer that they formerly worked there and are returning from service in the uniformed services.[50]

Following a period of training or service of 31 days or more, the employer has the right to request that the service member submit documentation establishing that their application for reemployment is timely, that they have not exceeded the five-year limit, and that they are not disqualified from reemployment by virtue of having received a punitive or "other than honorable" discharge. The service member must submit such documentation as is readily available. [51]

The Department of Labor will adopt regulations establishing the kinds of documentation that will be considered satisfactory. [52] Examples of such documentation could include a DD- 214, a letter from the service member's commanding officer, an endorsed copy of military orders, or a certificate of completion of a military training school. If the requested documentation does not yet exist or is not readily available, the employer is required to reemploy the service member while awaiting such documentation. If the documentation, when it becomes available, establishes that the service member is not entitled to reemployment, the employer is then free to discharge the service member and to terminate any benefits that the service member had been accorded.[53]The employer is permitted to delay reinstating the service member into the pension plan until the documentation has been provided. [54]

[44] Gordon v. Wawa, Inc. 388 F.3d 78 (3rd Cir, 2004)
[45] Section 4312(e)(1)(C)
[46] Section 4312(e)(1)(C)
[47] Section 4312(e)(1)(D)
[48] Section 4312(e)(2)(A)
[49] Section 4312(e)(3)
[50] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-7, June 1998
[51] Section 4312(f)(1)
[52] Section 4312(f)(2)
[53] Section 4312(f)(3)
[54] Section 4312(f)(3)(B)

Entitlements

If the service member meets the eligibility criteria discussed above, they have seven basic entitlements:
a. Prompt reinstatement.
b. Accrued seniority, as if they had been continuously employed.
c. Status.
d. Health insurance coverage.
e. Other non-seniority benefits, as if they had been on a furlough or leave of absence.
f. Training or retraining and other accommodations.
g. Special protection against discharge, except for cause.

Prompt Reinstatement

Following a period of up to 30 days of training or service, the service member must report back to work almost immediately, and should be put back on the payroll immediately upon reporting back to work. Following a longer tour, they must submit an application for reemployment, and the employer is required to act on the application promptly [55] even if there does not happen to be a vacancy at the time the application for reemployment is submitted. Sometimes, it is necessary for the employer to displace another employee in order to make room for the returning service member. [56] The law does not define "prompt," but generally this should be a matter of days, not weeks or months.

If the service member meets the USERRA eligibility criteria the employer is required to re-employ the service member even if doing so violates state law. A real estate agent, whose license has expired while deployed, if they are an employee, must be rehired and then given the opportunity to obtain their license.[57]

Accrued Seniority

In a 1946 case, the Supreme Court held: "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]." [58] USERRA codifies this "escalator principle." [59] If the service member meets these eligibility criteria, they are entitled to be treated as if they had been continuously employed for purposes of the employer's system of seniority, if any. Their uniformed service time must be treated as "service in the plant" for purposes of the employer's system of seniority, even an informal system based solely on practice.[60]

[55] Section 4313(a)
[56] See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992); Goggin v. Lincoln St. Louis, 702 F.2d 698, 703-04 (8th Cir. 1983); Fitz v. Board of Education of the Port Huron Area Schools, 662 F.Supp. 1011 (E.D. Mich. 1985); Anthony v. Basic American Foods, 600 F.Supp. 352, 357 (N.D. Cal. 1984); Green v. Oktibbeha County Hospital, 526 F. Supp. 49, 55 (N.D. Miss. 1981)
[57] Wright, Samuel The Officer May 2005
[58] Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946)
[59] Section 4316(a)
[60] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-8, June 1998

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If the employer does not have a system of seniority, then the service member is entitled to their pre-service job or another job of like status and rate of pay.[61] The employer's option of reemploying the service member in a "like" job only applies if the period of service was for 91 days or more. Following a shorter tour (up to 90 days), the service member is entitled to the precise job that he would have attained if continuously employed. [62]

USERRA expressly applies the same "escalator principle" to all kinds of pension plans, including defined contribution plans as well as defined benefit plans. Generally speaking, the service member must be treated as if they had been continuously employed in determining when they qualify for civilian pension (vesting) and also in determining the amount of the monthly pension check upon retirement (benefit computation).[63] If the service member and other employees contribute to the pension plan while working, they must make retroactive contributions to the plan upon returning from service in the uniformed services, if they wish to be treated as if they had been continuously employed for pension purposes. USERRA gives an extended period to make up back contributions, without interest. That period extends for three times the period of service in the uniformed services, but not to exceed five years. [64]

Employer and employee contributions to pension plans are often computed based upon a percentage of earnings. This computation will be based upon what would have been earned in the civilian job if the service member had remained continuously employed, not what was earned from the uniformed service. [65] In some cases, what the service member would have earned cannot readily be ascertained. If the service member worked on commission no one can determine precisely how many items would have sold and how many commissions you would have earned. In such a situation, the computation of employee and employer contributions to the pension plan will be based upon what was earned from the civilian employer during the 12 months immediately preceding entry into the uniformed services. If the service member was employed for less than 12 months, the computation will be based upon the entire time with that employer. [66] Longshoremen, construction workers, stagehands, and some other kinds of workers frequently work for a whole series of employers, as assigned by a "hiring hall" operated by the union or an employer association.[67] If the service member returns to a job situation of this kind, they are entitled to reemployment and to be treated as continuously employed for pension purposes, even if they return to a different "employer" (in the traditional sense) than their last employer prior to service in the uniformed services.[68] Case law to this effect under the VRR law was adopted by Congress when it enacted USERRA. [69]

[61] Section 4313(a)(2)(A)
[62] Section 4313(a)(1)(A)
[63] Section 4318
[64] Section 4318(b)(2)
[65] Section 4318(b)(3)(A)
[66] Section 4318(b)(3)(B)
[67] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-9, June 1998
[68] See Imel v. Laborers' Pension Trust Fund of Northern California, 904 F.2d 1327 (9th Cir.), cert. denied, 111 S. Ct. 343 (1990); Akers v. Ament, 597 F.Supp. 557 (S.D. Tex. 1983), aff'd, 748 F.2d 283 (5th Cir. 1984)
[69] Section 4303(4)(A)(i)(definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities")

Status

Whether or not the employer has a system of seniority, the service member is entitled to the status that he would have attained if continuously employed. [70] For example, if you were the Nurse Manager of a medical facility, reinstating you as "Assistant Nurse Manager" is not satisfactory, even if the pay is the same, because that is not equivalent status.[71]

If an opportunity for promotion or eligibility for promotion is based on a skills test or examination the employer should give the retiring service member a reasonable amount of time to adjust to their employment position and then give the skills test or examination. If based upon the results of the exam there is a reasonable certainty the service member would have been promoted then the promotion must be made effective the date it would have been but for the time in service.

Location is also an aspect of status. [72] For example, if the service member worked in his employer's store in Fairfax, Virginia, and if that position still exists (although it may have been filled), reinstating him in a vacant position in Fairbanks, Alaska is not satisfactory, if the service member objects, because the status of the Alaska job is not equivalent to the status of the Virginia job. Other aspects of status include the opportunity to work during the day, instead of at night, and the opportunity to work in a department or at such times when there are better opportunities to earn commissions or to be promoted.[73]

Health Insurance Coverage

Upon return to the civilian job, the service member is entitled to immediate reinstatement of civilian health insurance coverage, if the employer offers such insurance. There must be no waiting period and no exclusion of pre-existing conditions, other than those conditions which the Department of Veterans Affairs has determined to be service-connected. [74] If the civilian employer's health insurance plan covers each employee's family members, then the service member's entire family is entitled to reinstatement of this health insurance coverage.

Under USERRA, all employer-sponsored health care plans are required to provide COBRA-type coverage for up to 18 months after the employee's absence begins due to military service or for the period of uniformed service. If the service member serves for at least 31 days, his employer may require him to pay both his share and the employer's share of the health care premium. [75] However, the Veterans' Benefits Improvement Act of 2004 (VBIA) modifies elections made on or after December 10, 2004. The VBIA

[70] See Ryan v. Rush-Presbyterian-St. Luke's Medical Center, 15 F.3d 697, 699 (7th Cir. 1994)
[71] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-11, June 1998
[72] See Armstrong v. Cleaver Services, Inc., 79 L.R.R.M. 2921 (M.D. Tenn. 1972); Britton v. Department of Agriculture, 23 M.S.P.R. 170 (1984)
[73] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-11, June 1998
[74] Section 4317(b)
[75] Section 4317(a)

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extends the maximum period for which an employee may elect to continue employer-sponsored health insurance coverage to 24 months. The maximum period of coverage is the lesser of 24 months beginning on the date the employee's absence began or the day after the date on which the employee failed to apply for, or return to, a position of employment. [76] The service member may still be required to pay a premium similar to COBRA (no more than 102 percent of the full premium under the plan). However, a person who performs military service for less than 31 days may not be required to pay more than the employee share for such coverage. [77]

If the service member elects this coverage, it will continue until the period of service in the uniformed services has been completed and the deadline to apply for reemployment has passed, or until 18 months after absence from the civilian job began, whichever comes first. [78] The right to reinstatement of civilian health insurance coverage upon return to the civilian job is not dependent upon having exercised the right to continued coverage during the period of service.

The service member is well-advised to elect this coverage for short (up to 30 days) tours of service or training in the uniformed services, including typical annual training tours performed by Reservists and National Guard members. Electing such coverage can protect their family from any possible gap in health insurance coverage. CHAMPUS coverage only applies to reservists who are on active duty for duty for training for 31 days or more.[79] Electing continued coverage through the civilian job for longer tours (31 days or more) makes sense only if there is some reason why dependents cannot or don't want to use the CHAMPUS system.

Other Non-Seniority Benefits

If the service member's employer offers continued life insurance coverage, holiday pay, Christmas bonuses, and other non-seniority benefits to other employees on furlough or on non-military leaves of absence, the employer must offer similar benefits while the service member is absent from work for service in the uniformed services. [80] If the employer has more than one kind of non-military leave of absence, the comparison should be made with the employer's most generous form of leave. [81] The comparison must be for comparable periods of time. A four-day jury leave does not equate with a four-year military leave.

If the service member states in writing that he intends not to return to the civilian job, this will amount to a waiver of their right to these non-seniority benefits under this clause, but only if the waiver is made knowingly, voluntarily, and in writing. [82] Even if the waiver meets all of these tests, it only waives their right to these non-seniority benefits during service in the uniformed services. It does not waive their right to reemployment upon completion of service, nor the right to be treated as continuously employed for seniority

[76] Section 4317(a)(1)(B)
[77] Section 4317(a)(1)(B)
[78] Section 4317(a)(1)(A)
[79] See 10 U.S.C. 1076(a)(2)(A)
[80] Section 4316(b)(1)(A)
[81] See, Waltermyer v. Aluminum Company of America, 804 F.2d 821 (3d Cir. 1986)
[82] Section 4316(b)(2)(A)(ii)

purposes upon return to the civilian job.[83] Even if the service member intended not to apply for reemployment at the time he entered service in the uniformed services, the law gives him the right to change his mind.

Training or Retraining and Other Accommodations

If the service member has been gone from their civilian job for months or years, they may find many changes upon their return. The employer may be using new equipment and methods with which they are unfamiliar. Even if equipment and methods have not changed, their civilian job skills may have been dulled by a long period of absence. The service member must be qualified for the civilian job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify the returning reservist. [84] This may very well include training or retraining.

The September 2004 Department of Labor proposed USERRA regulations provide at section 1002.193, "If an opportunity for promotion, or eligibility for promotion, that you missed during service is based upon a skills test or examination, then your employer should give you a reasonable amount of time to adjust to your employment position and then give you the skills test or examination. If you are successful on the make up exam and, based upon the results of that exam there is a reasonable certainty that you would have been promoted or made eligible for promotion, during the time that you served in the military, then your promotion or eligibility for promotion must be made effective as of the date it would have occurred had your employment not been interrupted by military service."[85]

USERRA defines "reasonable efforts" as "actions, including training provided by an employer that does not place an undue hardship on the employer." [86] USERRA defines "undue hardship" as "actions requiring significant difficulty or expense, when considered in light of ... the overall financial resources of the employer [and several other factors]." [87]This is similar to the definitions of "reasonable accommodations" and "undue hardship" in the Americans with Disabilities Act (ADA). [88]Unlike the ADA, however, USERRA does not exempt very small employers.[89]

USERRA also requires an employer to make reasonable efforts to accommodate the disability of a returning disabled service member otherwise entitled to reemployment.[90] For example, an employer might be required to lower an assembly line by two feet to enable a returning veteran in a wheelchair to perform his or her job.[91]

[83] Section 8(g) of USERRA, not codified, "Transition Rules and Effective Dates"
[84] Section 4313(a)(1)(B)
[85] Federal Register, Vol 69 No 181, Monday, September 20, 2004 56296
[86] Section 4303(10)
[87] Section 4303(15)
[88] Sections 42 U.S.C. 12111(9) and 12111(10)
[89] Section 42 U.S.C. 12111(5)
[90] Section 4313(a)(3)
[91] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-13, June 1998

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If the disability cannot be reasonably accommodated in the position that the individual would have attained if continuously employed (usually the pre-service position), the pre-service employer must re-employ the returning disabled service member in another position that provides like seniority, status, and pay, or the closest approximation thereof consistent with the returning disabled veteran's circumstances.[92]

There is some overlap between USERRA and the ADA, which requires employers to make such accommodations for disabled persons generally, including but not limited to disabled veterans. USERRA applies to some small employers that are exempted from the ADA, but USERRA only applies to returning service members who are otherwise entitled to reemployment.[93]

There are some disabilities which cannot be accommodated by reasonable employer efforts. A blinded veteran cannot be a commercial airline pilot. If upon return from service in the uniformed services the service member is suffering from a disability that cannot be accommodated, thus disqualifying him from returning to his pre-service job, the employer is required to reemploy him in some other position which is the "nearest approximation" of the position to which he is otherwise entitled, in terms of seniority, status, and pay, consistent with the circumstances of the case. [94]

A disability need not be permanent in order to confer rights under this provision. If a service member breaks a leg during annual Reserve or National Guard training, their employer may have the obligation to make reasonable efforts to accommodate their broken leg, or to place them in an alternative position, until their leg has healed.[95]

Special Protection Against Discharge

If the period of continuous service in the uniformed services was 181 days or more, the period of special protection is one year. [96] If the period of continuous service was 31-180 days, the period of special protection is 180 days. [97] If a service member is fired during the period of special protection, the employer has a heavy burden of proof, to prove that he was discharged for cause.[98] This is intended to protect the service member from a bad faith or pro forma reinstatement.

There is no period of special protection after a period of up to 30 days of continuous service in the uniformed services, but the reservist will have rights under the anti-discrimination provision discussed below.

[92] Wright, Samuel The Officer, December 2004
[93] Ibid at 2-13
[94] Section 4313(a)(3)(B); See also Hembree v. Georgia Power Co., 637 F.2d 423 (5th Cir. 1981); Blake v. City of Columbus, 605 F. Supp. 567 (S.D. Ohio 1984); Ryan v. City of Philadelphia, 559 F.Supp. 783 (E.D. Pa. 1983), aff'd, 732 F.2d 147 (3d Cir. 1984); Armstrong v. Baker, 394 F.Supp. 1380 (N.D.W.V. 1975)
[95] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-13, June 1998
[96] Section 4316(c)(1)
[97] Section 4316(c)(2)
[98] See Carter v. United States, 407 F.2d 1238 (D.C. Cir. 1968)

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Prohibition of Discrimination and Reprisal

USERRA provides that an employer or a prospective employer cannot deny the service member initial employment, reemployment, retention in employment, promotion, or any benefit of employment because he is a member of, applied to be a member of, or has been a member of a uniformed service or because he performs, has performed, applied to perform, or has an obligation to perform service in the uniformed services. [99] USERRA also provides that it is unlawful for an employer to discriminate against the service member or to take any adverse employment action against him because he takes an action to enforce rights under USERRA, for himself or anyone else, because he has testified in or assisted a USERRA investigation, or because he has exercised any right under USERRA. [100] This provision was included because there have been cases wherein employers have fired witnesses who have provided information to the Department of Labor or who testified in VRR cases.[101]

If one of the above protected activities (service in the uniformed services, etc.) was a motivating factor (not necessarily the only factor) in an adverse action taken by an employer or a prospective employer, such action is unlawful unless the employer can prove (not just say) that the action would have been taken even in the absence of the protected activity. [102] This provision overrules Sawyer v. Swift & Co. [103] a VRR case which held that to prove a violation of Section 4301(b)(3) of the VRR law it was necessary to establish that an employee's firing was motivated solely by his or her military obligations.

It has been recognized in a number of cases that a service member's military position and related obligations were, or could be inferred to be, a motivating factor in an employer's decision to take adverse employment action against the employee for purposes of USERRA. The service member's military position and related obligations were a "motivating factor" in an employer's decision to take adverse employment action against an employee, decided the court in Robinson v. Morris Moore Chevrolet-Buick, Inc.[104] For purposes of a claim for retaliation under USERRA,[105] it is enough that the employer relied on, took into account, considered, or conditioned its decision on the employee's military-related absence.

In order to prevail on claim of discrimination under USERRA the service member need not show that their military obligations constituted the sole reason for the adverse employment action, only that the employer was motivated in part by an impermissible factor.[106]

[99] Section 4311(a)
[100] Section 4311(c)
[101] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-14, June 1998
[102] Section 4311(b)
[103] 836 F.2d 1257 (10th Cir. 1988)
[104] Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571 (E.D. Tex. 1997)
[105] Sections 4301-4333, 4311(b)
[106] Section 4311(a); See also, Gillie-Harp v. Cardinal Health, Inc., 249 F. Supp. 2d 1113 (W.D. Wis. 2003)

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In Duarte v. Agilent Technologies, Inc.[107] the U.S. District Court for the District of Colorado awarded a Marine Corps Reserve Officer nearly $500,000 after finding that he was wrongly terminated following his return from an overseas combat deployment. The company said the job was cut in a restructuring move and then advertised the same position a few months later. Since Duarte had been deployed more than 180 days upon his rehire he could not be terminated except for cause for one year after his reemployment.[108] The court in Leisek v. Brightwood Corporation,[109] determined, in an appeal from a grant of summary judgment in favor of the employer, that the evidence supported an inference that the service member's military status was a "motivating factor" in the defendant's decision to terminate his employment. After the service member had been promoted, the employer informed him that it would not honor any future guard orders. When the service member subsequently attended guard duties and related activities, his employment was terminated. Because the employer had not established as an "uncontroverted fact" that it would have fired the service member even without his guard activities, the court reversed and remanded. An aeronautical engineer, however, making a claim under USERRA,[110] failed to show by a preponderance of the evidence that his military service was a substantial or motivating factor in his employer's decisions to remove him from flight roster, or selection of others to fill two test pilot positions.[111] To support a claim of discrimination under USERRA, it must be shown that employee's military service was a substantial or motivating factor in employment action.[112] In Bedrossian v. Northwestern Memorial Hospital,[113] a medical school professor who was also a Colonel in the USAF reserve could not obtain an injunction to prevent his employer from firing him while his retaliatory firing law suit proceeded. The court found that Bedrossian could not show "irreparable harm", and that this was still a requirement for injunctive relief in a USERRA case. The court said, "Should he prevail on the merits of his suit, damages will make up what he has presumably lost during unemployment."[114]

Assistance and Enforcement

The Veterans' Employment and Training Service (VETS), United States Department of Labor, will assist persons claiming rights under USERRA, including persons claiming rights with respect to the federal government as a civilian employer. [115] USERRA has granted VETS subpoena authority so that it can obtain access to witnesses and documents to complete its investigations in a timely and comprehensive manner. [116]

[107] Duarte v. Agilent Technologies Inc., 366 F.Supp.2d 1039 (D.Co. 2005)
[108] Section 4316 (c)(1)
[109] Leisek v. Brightwood Corporation, 2002 WL 77034 (9th Cr. 2002)
[110] Section 4311(a)
[111] Geico v. Boeing Co., 347 F. Supp. 2d 955 (D. Kan. 2004)
[112] Section 4311(c). Crawford v. Department of Transp., 373 F.3d 1155 (Fed. Cir. 2004)
[113] Bedrossian v. Northwestern Memorial Hospital, 409 F. 3d 840 (7th Cr. 2005)
[114] Id. at 845; See also, Hetreed v. Allstate Ins. Co. 135 F.3d 1155, 1158 (7th Cir. 1998)
[115] Section 4321
[116] Section 4326

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If a service member requests assistance, VETS will contact their employer to explain the law and will conduct an investigation. [117] If the investigation establishes that a violation probably occurred, and if efforts to obtain voluntary compliance are not successful, VETS will refer the case to the Office of Special Counsel (OSC), if the employer is a federal executive agency, or the Attorney General (AG), if the employer is a state or local government or a private employer. [118] In Ohio the US Attorney for the Southern District of Ohio has taken a very proactive stance in enforcing USERRA violations. If the OSC or AG is reasonably satisfied that there is an entitled to the benefits, the OSC or AG may agree to provide free legal representation. [119]

If the OSC or AG declines a request for representation, or if their help is not requested, the service member can file suit directly, through private counsel. [20] If the service member prevails, the federal court can order the employer to pay attorney's fees and litigation expenses. [120] This new USERRA provision makes the option of proceeding through private counsel much more realistic.

The court can order the employer to comply with the law and to compensate you for lost pay, including interest. [121] USERRA expressly provides that states, as employers, are subject to the same remedies, including interest, as may be imposed upon private employers. [122] If the court finds that the employer's violation was willful, the court can double the back pay award.[123]

In Duarte,[124], the Federal District Court for the District of Colorado awarded $114,500 in back pay, plus $324,761 in front pay from November 2003 when Lt Col Joseph Duarte was terminated from his employment with Agilent Technologies, Inc. Duarte also received pre-judgment interest and attorney fees and expenses, in accordance with Section 4323(h) of USERRA. Duarte began work for Agilent in 1984. Duarte was mobilized on two occasions, from October 2001 to April 2002 and from November 2002 to July 2003. When Duarte returned from his second deployment he was not reinstated in the position he held previously, and which he would have held but for the mobilization. He was assigned to a Special Project which he completed four months later and then was terminated. The court held the "special project" position was not of like status to the position he would have attained if he had remained continuously employed. USERRA provides that after returning from a period of service of 180 days or more the service member can not be discharged from employment within one year after the date of reemployment. The court found Agilent violated this provision. While USERRA does not outlaw a bona fide layoff or reduction in force that would have happened anyway, even if the individuals employment had not been interrupted by military service, the reinstated in the special project position violated USERRA and if the company had properly rehired Duarte he would not have been in a surplus situation four months later. Even though Agilent was going through difficult financial times (it had reduced its work force from

[117] Section 4322(a)
[118] Section 4323(a)(1)
[119] Section 4323(a)(1)
[120] Section 4323(c)(2)(B)
[121] Section 4323(c)(1)(A)(ii)
[122] Section 4323(c)(7)
[123]Section 4323(c)(1)(A)(iii)(This provision for double damages does not apply to cases where the federal government is the employer)
[124] 366 F.Supp.2d 1039 (D.Co. 2005)

41,000 in '01 to 29,000 in '03) this did not excuse the company from its obligations under USERRA.[125]

Attorney General John Ashcroft and Labor Secretary Elaine Chao signed a memorandum of understanding to ensure employment rights of people returning from military service are vigorously protected. The memorandum streamlines and strengthens enforcement of the Uniformed Services Employment and Re-employment Rights Act of 1994. Congress passed the act to safeguard the employment rights and benefits of service members upon their return to civilian life. "The brave men and women protected by (the act) voluntarily set aside the comforts of civilian life and stepped in harm's way," Mr. Ashcroft said. "We owe it to them to make sure that their employment rights and protections are fully and vigorously protected upon their return from military service. Our (service members) have been there for us, so now it's our turn to step up our efforts for them," Ms. Chao said. "This agreement will strengthen enforcement of (the act) by ensuring faster resolution of (its) cases and quicker enforcement action by the government when it is necessary." [126]

Employer Notice Requirements

Effective March 10, 2005, all employers are required to post a new USERRA notice issued by the federal Department of Labor. The agency will give employers a 60-day grace period to have it posted where other notices for employees are customarily placed.

The informational USERRA poster required in every workplace is available at http://www.dol.gov/vets.

Employer or Employee Questions

If an employee of employer has questions, they can reach the National Committee for Employer Support of the Guard and Reserve (NCESGR) at 1-800-336-4590. NCESGR explains the law to reservists and their employers, but NCESGR is not an enforcement agency. Through an ombudsman program, public service announcements, and other means, NCESGR explains to employers the importance of the reserve components to our country, and the need for "employer support" of members of these components. NCESGR also operates an awards program for cooperative employers, especially those who go beyond what the law requires in accommodating their employees who serve in the National Guard or Reserve.

[125] Wright Samuel, The Officer, June 2005; Crawley, Vince, Air Force Times, April 25, 2005
[126] USAFPN

Assistance and enforcement. If you are a Reserve component member and experience employment problems because of your military obligations, you should first notify your command. Often a commander or legal officer can provide prompt and effective assistance in resolving disputes between you and your civilian employer. If local efforts fail, contact Ombudsmen Services at ESGR National Headquarters (telephone: 1-800-336-4590 or DSN 426-1390/91; Web site - www.esgr.org.) Ombudsmen are trained to provide information and informal mediation assistance. Of those situations that are brought to the Ombudsmen, they have been able to resolve greater than 95 percent. Situations that are complex or beyond the scope of informal resolution will be immediately referred to the U.S. Department of Labor Veterans' Employment and Training Service (VETS), or you can contact them at your local listing.

Offices of Directors, Veterans' Employment and Training Service (DVETs) U.S. DEPARTMENT OF LABOR

Alabama, Montgomery	334/223-7677
Alaska, Juneau	907/465-2723
Arizona, Phoenix	602/379-4961
Arkansas, Little Rock	501/682-3786
California, Sacramento	916/654-8178
Colorado, Denver	303/844-2151
Connecticut, Wethersfield	860/263-6490
Delaware, Newark	302/761-8138
Dist. of Col., Washington	202/698-6271
Florida, Tallahassee	850/877-4164
Georgia, Atlanta	404/656-3127
Hawaii, Honolulu	808-522-8216
Idaho, Boise	208/334-6163
Illinois, Chicago	312/793-3433
Indiana, Indianapolis	317/232-6804
Iowa, Des Moines	515/281-9061
Kansas, Topeka	785/296-5032
Kentucky, Frankfort	502/564-7062
Louisiana, Baton Rouge	225/389-0339
Maine, Lewiston	207/753-9090

Maryland, Baltimore	410/767-2110
Massachusetts, Boston	617/626-6699
Michigan, Detroit	313/876-5613
Minnesota, St. Paul	651/296-3665
Mississippi, Jackson	601/961-7588
Missouri, Jefferson City	573/751-3921
Montana, Helena	406/449-5431
Nebraska, Lincoln	402/437-5289
Nevada, Carson City	775/687-4632
New Hampshire, Concord	603/225-1424
New Jersey, Trenton	609/292-2930
New Mexico, Albuquerque	505/346-7502
New York, Albany	518/457-7465
North Carolina, Raleigh	919/733-7402
North Dakota, Bismarck	701/250-4337
Ohio, Columbus	614/466-2768
Oklahoma, Oklahoma City	405/231-5088
Oregon, Salem	503/947-1490
Pennsylvania, Harrisburg	717/787-5834
Puerto Rico/VI, Hato Rey	787/754-5391
Rhode Island, Providence	401/528-5134
South Carolina, Columbia	803/253-7649
South Dakota, Aberdeen	605/626-2325
Tennessee, Nashville	615/741-2135
Texas	512/463-2814
Utah, Salt Lake City	801/524-5703
Vermont, Montpelier	802/828-4441
Virginia, Richmond	804/786-7270
Washington, Olympia	360/438-4600
West Virginia, Charleston	304/558-4001
Wisconsin, Madison	608/266-3110
Wyoming, Casper	307/261-5454

For more information on the USERRA law* and the ESGR Ombudsmen Services program, visit these locations on this page:

Uniformed Services Employment and Reemployment Rights Act of 1994
Ombudsman Services Program

Department of Labor USERRA Advisor

Law Review Archive: Reserve Officers Association provides an archive of legal articles that cover specific situations. They can be found at http://www.roa.org/home/law_review_archive.asp.

*If you have a specific question about the USERRA law, you're likely to find the answer most quickly in the "Frequently Asked Questions" section of either the Employers or Nat'l Guard and Reserve Members pages of this Web site.

Sample Company Policies on USERRA

Company 1 Example Policy

I. Military Leave under the National Guard and Military Reserve
A. Purpose

This Policy outlines the employment and reemployment rights of employees who enter either active or inactive training duty or service in the military while currently employed at XXXXXX, North America (the "Company").
B. Definitions

Differential Pay. The payment to the employee which is equal to the difference between military service pay received by the employee and the employee's regular pay for a similar period of time.
Regular Pay. *The salary, exclusive of overtime pay and other allowances, which an employee normally would have received during the pay periods he or she serves on military duty.*
Military Pay. *The military service payment received by an employee which includes base pay plus any other pay allowances, such as hazardous or special duty pay, but which excludes quarters, rations and subsistence allowance.*
Military Leave Under the National Guard & Military Reserve
An employee who is a member of the United States Army, Navy, Air Force, Marines, Coast Guard, National Guard, Reserves or Public Health Service (the "Uniformed Services") will be granted a partially paid leave for a maximum of six months of absence for military service, training or related obligations in accordance with applicable law. If the employee is on leave for greater than six months, the leave will be unpaid leave. At the conclusion of the leave, upon the satisfaction of certain conditions, an employee generally has a right to return to the same position he or she held prior to the leave or to a position with like seniority, status and pay that the employee is qualified to perform.

Requests for Military Leave

Leave for Active or Reserve Duty

Upon receipt of orders for active or reserve duty, an employee should notify his/her supervisor, as well as Human Resources, as soon as possible, and submit a copy of the military orders to his/her supervisor and the Human Resources Department (unless he/she is unable to do so because of military necessity or it is otherwise impossible or unreasonable).

Leave for Training and Other Related Obligations (e.g., fitness for service examinations)

Employees will also be granted time off for military training (normally 14 days plus travel time) and other related obligations, such as for an examination to determine fitness to perform service. Employees should advise their supervisor and/or department head of their training schedule and/or other related obligations as far in advance as possible. Employees should retain their military pay vouchers. Upon return from training, the employee should submit his/her military pay voucher to the Human Resources Department; the Company will pay an employee's regular salary, less military pay, for the training period.

Return from Military Leave

Notice Required

Upon return from military service, an employee must provide notice of or submit an application for reemployment in accordance with the following schedule:

An employee who served for less than 31 days or who reported for a fitness to serve examination, must provide notice of reemployment at the beginning of the first full regular scheduled work period that starts at least eight hours after the employee has returned from the location of service.

An employee who served for more than 30 days, but less than 181 days, must submit an application for reemployment no later than 14 days after completing his/her period of service, or, if this deadline is impossible or unreasonable through no fault of the employee, then on the next calendar day when submission becomes possible.

An employee who served for more than 180 days must submit an application for reemployment no later than 90 days after the completion of the uniformed service.

An employee who has been hospitalized or is recovering from an injury or illness incurred or aggravated while serving must report to the Human Resources Department (if the service was less than 31 days), or submit an application for reemployment (if the service was greater than 30 days), at the end of the necessary recovery period (but which may not exceed two years).

DocumentationRequired

An employee whose military service was for more than 30 days must provide documentation within two weeks of his/her return (unless such documentation does not yet exist or is not readily available) showing the following:

- the application for reemployment is timely (i.e. submitted within the required time period);
- the period of service has not exceeded five years; and
- the employee received an honorable or general discharge.

Continuation of Health Benefits

During a military leave of less than six months, an employee is entitled to continued group health plan coverage under the same conditions as if the employee had continued to work. For military leaves of more than six months, an employee may elect to continue his/her health coverage for up to 18 months of uniformed service, but will be required to pay the entire premium for the continuation coverage. [NOTE: Employees and/or dependents who elect to continue their coverage may not be required to pay more than 102% of the full premium for the coverage elected. The premium is to be calculated in the same manner as that required by COBRA.]

Pay Differential

A salary differential (or Differential Pay), consisting of the difference between Company salary and military wages (before taxes) will be paid for up to six months while an employee is on active military duty. Where an Employee is entitled to Differential Pay under this policy and to payment under the union Military Leave of Absence policy Human Resources will review these situations and may reduce Differential Pay by the amount received through the union program. Any pay differential for a specific period of time will be determined upon presentation by the employee of military pay records for that period of time, excluding any food allowances. It is the employee's responsibility to provide documentation of his/her military compensation on which to base differential pay. Employees must provide a copy of their Leave Earnings Statement to _____in payroll. Employees may fax statement to _____.

Retirement Savings Plans

Membership in the Company's tax qualified Retirement and Savings Plans will be continued while an employee called to active duty is on paid leave of absence. Should the active duty extend beyond six months, membership will be suspended for the duration of the military leave of absence. Upon return to work, the period of leave will be credited to the employee's service under the Plan for vesting, as well as benefit and or contribution purposes. A more detailed explanation of an employee's rights in this regard will be provided upon the employee's return to work.

Life Insurance and Accidental Death & Dismemberment

Basic and optional employee and dependent life insurance coverage is extended for thirty days from the beginning of the leave of absence. Upon return to work, coverage will commence with no waiting period. Dependent coverage will also commence with no waiting period.

Disability

Disability coverage continues until the end of the month in which the employee enters active military status. This coverage does have an exclusion for disabilities caused by acts of war or terrorism.

Travel Accident

Benefits are payable due to war or act of war under our blanket accident insurance program. This benefit can be changed or revoked given a 31-day notice. All employees will be notified if any changes occur

Paid Time Off (PTO)

At the request of the employee, regular salary will be paid for any unused PTO entitlement. After returning to work, the employee will be eligible for full PTO entitlement as of the January 1st, with length of service to include the military leave. Once the six months of paid leave has expired, employees may begin to use any remaining PTO. An exception will be granted for those employees who are called to duty and cannot make use of their PTO entitlement. We will allow employees, in this situation, to rollover greater than the ten-day maximum carry-over.

II. UAW Labor Agreement language

(112) Employees who enter either active or inactive training duty or service in the armed forces of the United States will be given a leave of absence subject to the conditions herein. Upon submission of satisfactory proof of pending induction for active service, such employees may arrange for the leave up o thirty days prior to the induction date. The leave shall not exceed the term of the initial enlistment and one (1) consecutive re-enlistment. In no event will the period of such leave exceed a total of eight (8) years, except when additional service in involuntary. Seniority will accumulate during the period of such leave. Upon termination of such leave, employees shall be offered re-employment in their previous position or a position of like seniority, status and pay, unless the circumstances have so changed as to make it impossible or unreasonable to do so, in which event they will be offered such employment in line with their seniority as may be available which they are capable of doing at the current rate of pay for such work, provided they meet the following requirements:

1. Have not been dishonorably discharged.
2. Are physically able to do the work.
3. Report for work within ninety days of the date of such discharge, or ninety days after hospitalization continuing after discharge.

(112a) The seniority of any employee who fails to report for work within the times specified in Paragraph (112) (3) shall be automatically broken, unless the employee gives a satisfactory reason for such failure to report.

(112b) As used in this paragraph, "Armed Forces of the United States" is defined as an limited to the United States Army, Air Force, Navy, Marine Corps, Coast Guard, National Guard, Air National Guard or any reserve component thereof.

(112c) Employees with seniority who are spouses of employees who enter active duty services in the Armed Forces of the United States and who obtain a leave of absence in accordance with Paragraph (112), may make written application to the Personnel Department for a leave of absence for the period of the spouse's initial enlistment but in no event to exceed four (4) years. Such leaves may be granted by management and will be subject to the conditions set forth in Paragraph (111). Seniority will accumulate during the period of such leaves.

(112d) Employees with seniority in any Allison Engine Company plant who are called to and perform short-term active duty of thirty (30) days or less, including annual active duty for training, as a member of the United States Armed Forces Reserve or National Guard, shall be paid as provided below for days spent performing such duty provided they would not otherwise be on layoff or leave of absence.

1. A payment will be made for each day, except for a day for which they receive holiday pay, which they would otherwise have worked equal to the amount by which their straight time rate of pay as of their last day worked plus applicable night shift premium (but not including overtime) for not more than eight (8) hours, exceeds their military earnings for that day including all allowances except for rations, subsistence and travel. Except for short term active duty of thirty (30) days or less performed by employees called to active service in the National Guard by state or federal authorities in case of public emergency, payment is limited to a maximum of fifteen (15) working days in a calendar year.
2. In order to receive payment under this Paragraph (112d), employees must give local Management prior notice of such military duty and, upon their return to work, furnish Management with a statement of the military pay received for performing such duty.

III. Service Representative Deployment Policy

Deployment Within Hostile Zones

Occasions may arise when the duties of a Service Representative entail a visit or assignment to areas which can be classified as hostile; e.g., deployment on an aircraft carrier within a zone of military activity, or being present within a territory involved in war, insurrection or terrorist activity, etc.

A current list of countries defined as "war zones" is maintained by the insurance companies.

When visiting or assigned to such hostile zones, notification of each such visit or assignment is necessary. Accordingly, the appropriate Manager must notify the Human Resources Department, in writing and in advance of any such visit or assignment providing the name(s) of the Service Representative(s) concerned, with as much detail as possible regarding anticipated duration of the visit or assignment and travel arrangements, with departure and return dates.

Any deployment of an employee on an aircraft carrier is to be notified in writing to the Human Resources Department. This will cover the possible situation of the carrier being diverted from a "non-hostile" to a "hostile" zone during the course of the assignment.

Shipboard Deployment

The following guidelines are provided to assist in making arrangements prior to an overseas carrier deployment.

1. Passport, Visas, Identification
   Please contact International Human Resources Department in Chantilly.
2. Medical
   a) A medical examination within the past year is required. Records of outstanding medical problems should be carried.
   b) An immunization record is required. A Naval medical department can determine what vaccinations are required for the countries to be visited.
   c) Dental care should be seen to prior to leaving.
3. NATEC – Naval Air Technical Engineering Command
   a) A Company letter to NATEC office, San Diego, CA is required.
   b) Endorsement is required upon arriving and upon departing the assigned task location. Orders will be issued by the on-site NATEC office directing the Representative to the relocation task assignment.
4. Letter of Instruction (LOI)

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ACC's 2005 ANNUAL MEETING USING COMPLIANCE FOR A COMPETITIVE ADVANTAGE

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Some deploying squadrons publish an LOI which contains helpful information such as:

a) Mailing address while deployed, telegram to and from the ship.

b) List of personnel deploying.

c) Outlines the operation and commitments, administrative, logistics and maintenance responsibilities.

d) Other aviation units aboard for the deployment.

e) Do's and don'ts aboard a Navy ship.

5. Squadron Equipment Issued

a) Flight deck helmet, goggles and life vests should be checked out prior to leaving for the ship.

b) Cold weather clothing is available as required.

c) A cruise box, which is 8 cubic feet and, can be locked is available for private use.

d) Safety shoes are required as are long sleeved shirts.

6. Nice to Know

a) There will be limited living and storage space.

b) Laundry and cleaning facilities are available aboard. Laundry and dry cleaning bags should be obtained before embarkation from the local PX. Coveralls and wash and wear type clothing is highly recommended.

c) Nice to have items: flashlight, extra batteries, night light with red bulb, radio/cassette player with headset, books, ear plugs.

d) International driver's license is required and can be obtained through the local AAA office.

Shipboard Deployment Allowance

In recognition of the loss of liberty and inconvenience associated with living and working conditions aboard aircraft carriers, those assigned to a carrier for more than 14 days will receive a 25% premium. Such payment is effective upon start of the assignment and will be paid upon completion of assignment following receipt of written manager's authorization.

A daily allowance of $25 for meals and $8 for miscellaneous expenses may be claimed to help defray the costs of mess charges for any periods spent on shipboard deployment.

Land Deployment

In recognition of difficult living and working conditions while deployed on land, in the field and in certain geographic regions, employee will receive a 25% premium plus daily meal and miscellaneous allowances, as outlined above. Qualification for this allowance will be determined on an individual basis upon receipt of the specific conditions of the assignment.

An additional premium of 25% will be paid to those employees stationed temporarily in a crisis area, if and when the U.S. Department of Defense declares the specific geographic area of the assignment to be a hostile fire area. When this declaration becomes effective you will be notified in writing. The premium will be paid semi-monthly. Meal and miscellaneous allowances are reimbursable through GELCO.

The hardship deployment allowances and the hostile fire area premium are income to the employee and, therefore, subject to the usual Federal, State, and Local income tax. When deployed in an area where hotel accommodation is appropriate, the usual reasonable hotel, meal and miscellaneous allowance may be claimed in lieu of a hardship allowance.

The premiums and allowances are not included in base pay for purposes of any employee benefit plan.

IV. XXXXXX Benefits Coverage During War or Terrorism

U.S. Benefits At-A-Glance

	Regular Business Traveler Caught In Hostile Environment (War or Terrorism)	Active Employee Assigned to Work in Hostile Environment (War or Terrorism) (ex. Military Service Rep)		Military Reserves
Health Benefits	No exclusions in case of war or terrorism. Claims would be covered under XXXX health plans. Depending on injury, may coordinate with Workers Comp.	No exclusions in case of war or terrorism. Claims would be covered under XXXX health plans. Depending on injury, may coordinate with Workers Comp.		- RRNA Active covg. first 6 months & then 18 months Cobra Military coverage primary for employee and XXXX plan primary coverage for dependents
Life & AD&D Insurance	Basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.	Basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.		Coverage ends thirty days from beginning of leave. During the first thirty days, basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.
Disability	Not covered during acts of war or terrorism.	Not covered during acts of war or terrorism.		Not covered during acts of war or terrorism. Covg under U.S. government plan.
Travel Accident Insurance	Currently covered except for acts of war in Iran, Iraq, Pakistan, Afghanistan, Syria, and Israel *	Currently covered*		Not covered
Workers Compensation	Covered under XXXX program.	Covered under XXXX program.		Covered under U.S. government plan.

* This benefit can be changed or revoked given a 31-day notice. All employees will be notified if any changes occur.

Company 2 Example Policy

This memorandum establishes and authorizes the special pay and benefit arrangements to be extended to XXX employees called to active duty military service as a result of the terrorist attacks on September 11. These arrangements apply to all employees, salaried and houfly, in all operating units and are an expansion of our current policies.

1. Employees will be eligible to receive pay differentials to make up for any shortfall between their military rate and their XXX base pay **for a period of up to 6 months immediately following activation**. Any differential pay will be determined upon presentation by the employee of military pay records. The military rate is defined as military base pay, and any specialty pays such as flight pay, jump pay, etc.

   It is the employee's responsibility to provide documentation of the pertinent military compensation on which to base differential pay. This is independent of any differential paid during annual training periods.

2. During the period differential pay is being provided by the Company the called-up employees may choose to keep their Value 2001 Insurance elections as of the date of call-up in-force or they may within 31 days of call-up, elect to drop certain coverage for themselves or dependents. If after being called-up the individual receives new orders that extend the period of service beyond what was initially anticipated, employees will again have a 31 day period following receipt of those orders to change coverage elections for themselves and dependents. In order to keep employee and/or dependent benefits in effect during the interval between the employee's call-up and return to active XXX service, the employee must pay the employee contribution required by the Benefit Plan in effect just prior to call-up for the benefits he/she elects to keep.

   The above benefit arrangement applies to the first 6 months following call-up to active service and meets or exceeds the company's obligation for the period as specified in the Uniform Services Employment and Reemployment Rights Act of 1994, which was signed into effect October 13, 1994. The act requires that health care coverage must remain available to called-up employees and their dependents for a total of 18 months. XXX Controls will comply with the basic requirements of the Act by making the health care (medical, dental and vision) COBRA options available to those employees and their families for the 7th through 18th month of call-up.

   During the period the employee is on Military Leave, the Government provided medical, dental and vision benefits will be primary for the employee and XXX sponsored benefit plans will be the secondary payer. All exclusions and limitations on claims resulting from an Act of War will apply.

3. Employees can elect to receive pay for all unused and accrued vacation at the time of call-up, or to leave that vacation on the books and available to be taken if the employee is released and returns to active employment.

4. Defined Contribution Plan accounts (i.e. 401(k) plans) will remain intact for employees called to active duty in this instance. Withdrawals may be made in accordance with provisions of the plan. **Returning employees will be permitted to**

make up contributions and also receive any associated Company match that would have been made if they had not been called-up.

5. Upon release from active duty, reinstatement will be in accordance with current veteran's reemployment rights.

Company 3 Example Policy

Military Leave Policy

1.0 Policy

It is XXXXXXX policy to support its employees who serve in the uniformed military services by accommodating their temporary military duty-related absences from work and reducing the economic hardship resulting from such absences by providing differential pay in some situations.

2.0 Implementation

2.1 Military duty includes the performance of duty in the uniformed services of whatever nature, voluntary and involuntary, for up to five years, subject to the exceptions in the Uniformed Services Employment and Reemployment Rights Act (USERRA). If an employee's military duty exceeds a cumulative total of five years, then the element should obtain advice and direction regarding USERRA requirements from local Legal Counsel.

Notice of Military Duty

2.2 The employee will provide advance notice of military duty (at least one week's notice, when practical) to his or her immediate manager. The notice may be oral or in the form of written orders or other available documentation that indicates the anticipated length of the military duty. Notice is not required if military necessity prevents giving notice or if giving notice is otherwise impossible or unreasonable under the provisions of USERRA.

2.3 A copy of the written orders or other available documentation must be sent by mail or fax to the XXXXXXX Employee Service Center, who will process the leave and notify the employee's immediate manager.

Payment for Military Duty

2.4 XXXXXXX will pay employees for their annual military duty up to the lesser of 15 days, 120 hours, or three workweeks in a calendar year (the "Annual Military Allotment"). The days of Annual Military Allotment do not have to be taken consecutively. After the Annual Military Allotment has been exhausted, any additional military duty will be unpaid.

a) A "workweek" is a fixed and regularly recurring period of 168 hours (i.e., seven consecutive 24-hour periods), established for the employee by the element. See Corporate Policy on Hours of Work and Work Schedules.

b) The Annual Military Allotment for regular part time employees will be based on time scheduled to be worked.

c) The Annual Military Allotment for represented employees will be as defined in the applicable collective bargaining agreements.

d) The wage and hour legal restrictions that apply to certain partial day and partial week absences by exempt salaried employees may require an extension of the Annual Military Allotment for such employees.

e) In extenuating circumstances, the Senior Vice President Human Resources may authorize paid military duty beyond the Annual Military Allotment.

2.5 Employees on military leave will receive Full Pay or Differential Daily Pay during the Annual Military Allotment, as specified in Table A below. The difference between Full Pay and Differential Daily Pay is a wage advance that will be offset against future earnings via payroll deduction when the employee has completed military duty and returned to work.

a) "Full Pay" is XXXXXXX straight pay without diminution or offset.

b) "Differential Daily Pay" is the difference between lower military pay and higher Full Pay. Differential Daily Pay is computed on a daily basis and includes shift premium, where applicable. It does not include allowances (such as for subsistence, quarters, travel, or expenses) or military pay received on non-XXXXXXX workdays. "Non-XXXXXXX workdays" are days on which the employee is not regularly scheduled to work, such as Saturday or Sunday for an employee who is regularly scheduled to work Monday through Friday, or every other Friday for an employee on a 9/80 schedule.

Table A
Payment of Differential Daily Pay and Full Pay

IF the employee ...	**THEN ...**
Performs Military Duty for the entire workweek	the employee will receive Differential Daily Pay for the entire workweek.
Performs Military Duty for part of a day during the workweek, and works for XXXXXXX for part of that same day	an hourly or non-exempt salaried employee will receive Full Pay for the hours worked for XXXXXXX and Differential Daily Pay for hours reported as paid military. an exempt salaried employee will receive Full Pay for the entire day.
Performs Military Duty for part of the workweek, and works for XXXXXXX for the rest of that same workweek	the employee will receive Differential Daily Pay for the day(s) reported as paid military and Full Pay for the days worked for XXXXXXX.

2.6 Before going on military leave, the employee will sign a payroll deduction agreement authorizing XXXXXXX to collect the amount of wages advanced during the period of military leave that exceeds the Differential Daily Pay due for the same period.

2.7 During the period of paid military duty the employee should account for his or her time in accordance with the applicable XXXXXXX time and attendance practices. The employee cannot charge time to military leave that is not covered by orders or other military documentation.

2.8 Within 15 business days after military duty is completed, the employee will submit to the XXXXX a Labor Earnings Statement (LES) from an appropriate agency of the government, showing the amount of pay received for the military duty. The employee's pay will be reduced or offset by the adjusted gross earnings received for military duty performed during the employee's regular workweek(s). If the employee's military pay exceeds his or her Full Pay, then the employee must repay all Full Pay to XXXXXXX.

Vacation

2.9 The employee may authorize full or partial payout of his or her unused vacation accrual. The vacation payout will be in the form of a lump sum, less all applicable legal withholdings. The employee never will be required to use vacation in connection with military leave.

Extensions

2.10 If while on military leave it is necessary to request an extension, the employee should make the request in a timely manner (preferably in writing) with any appropriate supporting documentation. Notice is not required if military necessity prevents giving notice or if giving notice is otherwise impossible or unreasonable under the provisions of USERRA.

Benefits

Employee who is on Paid Military Duty

2.11 All benefits will continue at the employee's normal contribution rate.

2.12 The employee will receive credited service and other seniority-based rights (and any other rights or benefits in accordance with USERRA) for the time spent on military leave, if he or she returns to work upon release from military duty within the time limitations and requirements of USERRA. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law.

2.13 Employee and employer savings plan contributions, benefits, and service credit will be provided in accordance with USERRA and the terms of the applicable plan documents.

Employee who is on Unpaid Military Duty

2.14 Medical, dental, vision, and health care reimbursement benefits will continue for the first 31 calendar days of military leave at the employee's normal contribution rate. After 31 calendar days the employee will be entitled to continue coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and USERRA for a period of up to 18 months. The employee will not be required to pay more than 102% of the full premium for the benefit coverage. Under certain circumstances, involving "multiple qualifying events," COBRA may provide continuation beyond the 18 months required by USERRA.

2.15 The employee will receive credited service and other seniority-based rights (and any other rights or benefits in accordance with USERRA) for the time spent on military leave, if he or she returns to work upon release from military duty within the time limitations and requirements of USERRA. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law.

2.16 Employee and employer savings plan contributions, benefits, and service credit will be provided in accordance with USERRA and the terms of the applicable plan documents. Generally, contributions that would have been made during periods of qualified military service can be repaid by the returning employee over a period three times the period of military service, but no longer than five years. If the returning employee's repayment contributions relate back to years other than the current calendar year, these contributions will count toward the Internal Revenue Service (IRS) annual defined contribution plan limits on contributions for the years to which the repayments relate, rather than toward the current year's limits. Employer contributions will be based on amounts repaid by the employee. Loan repayments will be suspended during qualifying periods of military service.

Reinstatement/Termination

2.17 An employee who returns to work upon release from military duty within the time limitations and requirements of USERRA and any other applicable state law will be entitled to reinstatement rights consistent with USERRA and any other applicable federal or state law. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law, including USERRA provisions that may restrict layoffs for certain periods of time.

2.18 An employee who does not return to work within the time limitations and other requirements specified by USERRA and any applicable state law will be administratively terminated from employment without severance eligibility.

2.19 The effective date of termination for an employee who was on *paid* military duty will be the last regularly scheduled workday of the approved absence. The effective date of

termination for an employee who was on *unpaid* military duty will be the last regularly scheduled workday prior to being placed on unpaid status.

Expatriate Employees

2.20 Employees on international assignment will remain on the international payroll for the period of annual military duty. Employees who enlist or are called to active duty will be transferred to the domestic payroll, then placed on military leave.

3.0 General

3.1 This policy is intended to comply with USERRA and the Fair Labor Standards Act, among other federal and state laws.

3.2 Nothing in this policy will be construed to supersede any provision of any federal, state, or local law or collective bargaining agreement that provides greater rights than those outlined herein.

3.3 No provisions of this or any other XXXXXXX policy or procedure will be construed as an employment agreement. Employment with XXXXXXX can be terminated at any time with or without cause either by the employee concerned or by XXXXXXX.

3.4 Any deviation from this policy requires the prior approval of the Senior Vice President Human Resources or designee.

Company 4 Example Policy

Military Affairs Administration
Purpose/Summary

This procedure applies to **XXXXXX** employees who are members of, or apply to be members of, a uniformed service of the United States or who have performed, apply to perform, or have an obligation to perform service in such a uniformed service.

This procedure provides the standards governing payment of military differential pay for employees who are ordered to report for active duty or training duty.

Employees covered by collective bargaining agreements will be governed by the applicable agreement as well as this procedure with the agreement having precedence.

This procedure does not constitute a contract or contractual obligation, and the Company reserves the right, in its sole discretion] to amend, modify, or discontinue its use without prior notice, notwithstanding any person's acts, omissions or statements to the contrary.

This procedure applies to all segments of **The XXXXXX Company**, including subsidiaries (as implemented by resolution of the subsidiary Board of Directors).

Business segment sites may choose to not implement this procedure or choose only to implement specific provisions of this procedure. If applicable, the site will have a documented writing addressing this subject. Employees should contact their manager or People organization about the applicability of this procedure at their site.

Summary of Changes to the Title Page

The Issue Date, Purpose/Summary, Supersedes date, Applies to, Maintained by and Approved by information sections have changed. Otherwise, this is a major revision.

1. Definitions

The definitions of the following terms used in this procedure are for purposes of this procedure only and have no effect on the meaning of the same or similar terms used in other documents.

A. Military Differential Pay

The difference between an employee's gross military compensation and their regular XXXXXX pay (working rate of pay). Military compensation includes but is not limited to Base Pay, Foreign Duty Pay, Special and Incentive Pay and Housing (Basic Allowance for Housing (BAH)/Basic Allowance for Quarters (BAQ)). Subsistence (does not include Housing (BAH/BAQ)), uniform, and travel allowances will not be included in determining military compensation. For purposes of calculating military differential pay, a five-day workweek will be used.

B. Original Work Location

Principal XXXXXX work location at time of military service (e.g.) Anaheim, Huntington Beach, Huntsville, Long Beach, Philadelphia, Portland, Puget Sound, Seal Beach. Spokane, St. Louis, Wichita.

C. Uniformed Service

Army, Navy, Marine Corps, Air Force, Coast Guard, and their reserves, Army National Guard or Air National Guard, and Commissioned Corps of the Public Health Service.

D. Working Rate of Pay

The employee's hourly base rate plus any additive rates.

2. Requirements

A. The Company will comply with all state and federal laws and regulations that apply to reemployment of employees returning from a leave of absence after active U.S. uniformed service.

B. The Company will make every reasonable effort to cooperate with the U.S. uniformed services. However, the Company reserves the right to contact military administrators in instances where an employee's time away from work exceeds normally expected amounts.

C. Military Leave of Absence

1. When an employee has orders to report for active duty, annual active duty or temporary special duty in the uniformed service of the United States, a leave will be granted for the period of service in accordance with procedure _____, 'Leave of Absence."

2. Employees on a leave of absence for active duty, annual active duty or temporary special duty may not may not return to work until the period of service is completed.

3... A leave of absence for military service shall not exceed five (5) years unless required by the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.

4. Company service will continue to accrue while on a military leave of absence for up to five years or longer if required by applicable laws.

5. Employees may use available vacation credits while on a military leave. Military pay differential is not applicable when using vacation credits. Vacation credits will continue to accrue during the first 90 calendar days of the leave of absence.

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6. Employees may not use available sick leave credits while on military leave. Sick leave credits will continue to accrue during the first 90 calendar days of the leave of absence.

7. Employees are eligible for Company paid holidays occurring during the first 90 calendar days of military leave. Military differential pay is not applicable on a Company paid holiday.

D. Time Off and Military Differential Pay for Members of a Reserve Component Called to active duty.

Note: Provisions of this section do not apply to employees who volunteer for enlistment or re-enlistment into the Armed Forces during the initial period of active duty.

1. Members of a reserve component of a uniformed services who are ordered to annual active duty are eligible for military differential pay up to a maximum of 80 hours each military fiscal year (October 1 - September 30) or longer if required by applicable laws.

2. Members of a reserve component of the uniformed services who are ordered to temporary special duty in time of war, national or state emergency as outlined below in 2.a. through 2.e., herein referred to as call-up" are eligible for military differential pay for up to a maximum of 90 calendar days of active duty for each occurrence. Extension of military differential pay beyond 90 days may be approved on a case-by-case basis for each call-up. This approval will be based on the call-up and not on an individual employee basis. Military differential pay will end upon the employee's release from active duty.

a. Military U.S. Code Title 10; USC Chapter 1209; under the following sections:

Section 12301
Section 12302
Section 12304

b. Mobilized by the applicable state agency for a state emergency.
c. Mobilized for service as an intermittent disaster-response appointee when the Secretary of Health activates the National Disaster Medical System.

d. The military differential pay under this provision is in addition to the 80 hours of annual active duty described in 2.D.1.

e. Only copies of original orders with documentation of qualifying Title 10 sections as defined in 2.D.2.a. will be accepted. Letters from commanding officers will not be accepted.

3. Employees will retain all compensation received from the uniformed services. If the employee's military compensation is less than their regular XXXXXX pay (working rate of pay), the employee will receive pay for the difference upon receipt of the employee's leave and earnings statement. Employees on U.S. Code Title 10 call-ups should regularly submit leave and earnings statements to receive differential pay while serving. Subsistence (does not include Housing (BAH/BAQ)), uniform, and travel allowances will not be included in determining military pay.

4. Excluded from military differential pay is any active or inactive duty training whereby the employee does not receive military pay (no pay status). However, such training may qualify under the employee's organizational education and training guidelines if the training is relevant to the employee's job and is not offered through the Company's education and training program (i.e. seminars and conferences).

5. Employees may use available vacation credits while on a military leave. Military pay differential is not applicable when using vacation credits.

6, Employees may not use available sick leave credits while on military leave.

7. Employees are eligible for Company paid holidays occurring during the first 90 calendar days of military leave. Military differential pay is not applicable on a Company paid holiday. Employees eligible for extended military differential pay as defined in section 2.D.2. will continue to receive such pay for unpaid holidays after 90 calendar days,

E. Reemployment Rights

To qualify for reemployment rights following military service, employees must meet the following criteria as defined by the Uniformed Services Employment and Reemployment Rights Act of 1994 (U.S. Code Title 36, Chapter 43):

a. The employee gave notice prior to taking military leave.

b. The period of military leave has not exceeded five years unless otherwise exempt under the provisions of this act (Section 4312 (c)).

c. The employee's release from military service was under "honorable conditions."

d. The employee reported back to work or applied for reemployment within 90 days of completion of service.

e. During an employment reduction, managers will review employees who are on military leaves of absence using the same layoff selection processes as if those employees had remained at work. If required, affected employees on an approved leave of absence will receive an advanced notification of layoff. Upon return from the eave of absence, employees will be subject to appropriate redeployment actions, which may include reassignment or layoff. If applicable, employees can remain on a military LOA up to 90 days following completion of duty. However, if an employee is subject to layoff upon return to work the termination date will be the day following completion of active duty.

2. Employees are eligible for reemployment at their original work location. Reference Exhibit A for specific provisions regarding reinstatement and job rights.

3, Employees may apply for reemployment at another work location. However, they are not entitled to reemployment rights at the new location.

3. Responsibilities

A. Employee

1. Provide management with advance notice of required uniformed service unless it is unreasonable or impossible to do so.

2. Request a leave of absence in accordance with procedure PRO-1874, "Leave of Absence."

3. Provide the appropriate payroll center with a copy of military orders prior to annual active duty or special temporary duty. Changes to original military orders require a new set of orders. Changes to original military orders on letterhead stationary or facsimile will not be accepted. Upon return or before, provide a copy of the appropriate military leave and earnings statement in order to ensure proper and timely payment. A substitute voucher or facsimile will not be accepted.

4. Employees on U.S. Code Title 10 call-ups should regularly submit leave and earnings statements to receive differential pay while serving.

5. After completion of military service, return to work through the resident return to work process and make application for reemployment within 90 days of completion of service.

B. Manager

1. Allow employees to meet their uniformed service obligations.

2. Ensure that the employee provides the payroll center with a copy of their military orders before departure to annual active duty or special temporary duty and, during or upon return, provides the payroll center with a copy of their military leave and earnings statement. No substitute payment voucher or facsimile will be accepted.

3, Ensure employee absence is properly recorded.

4. Review with the appropriate People organization before any final action is taken to process a downgrade, suspension, or involuntary termination of a reinstated veteran during the first year of the veteran's return from military service. This action is required to ensure compliance with the Uniformed Services Employment and Reemployment Rights Act of 1994.
5. Review and determine if any military training not eligible for military differential pay may qualify under the organization's education and training guidelines.

C. People/Human Resources Organization

1. Counsel, coordinate, and assist employees and managers on all uniformed service duty and reemployment matters.

2. Counsel and assist employees and managers on matters relating to military regulations as they affect company employee relations.

D. Payroll

Analyze and interpret military orders and leave and earnings statements for qualifications and approval of military differential pay.

E. Employment

Counsel, coordinate, and assist employees and the People organization on reemployment matters.

F. World Headquarters Global Diversity and World Headquarters Compensation and Benefits

1. Interpret this procedure as required.

2. Initiate action necessary to keep this procedure up to date.

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Sample

Employee's Active Duty Absence Notification Letter to Employer

[Employee's Home Address]

[Date]

[Employer's Business Address]

Send by Certified Mail, Return receipt requested

Dear Sir/Madam:

I will perform service with the [**service**] beginning on [**date**] and ending on [**date**]. My absence from work for this period of military service is protected by the Uniformed Services Employment and Reemployment Rights Act, Title 38, United States Code Sections 4301-33.

My last day at work with you before I begin my military service will be [**date**]. I expect to return to work with you on or about [**date**]. ****Note: Make sure your return date complies with Title 38, United States Code Section 4312.*** [During my absence, I can be reached at {give mailing address and telephone number, if known}] [During my absence, ____, telephone number (____) ___-____, will know how to reach me] {I (do) (do not) desire to take ___ days of paid [vacation, annual leave, etc.) as the first ___ days of my absence.} Please be advised that I may not be required to use vacation pay or time for military absence from my workplace, per Title 38, United States Code Section 4316(d).

If you have any questions about the provisions of the Uniformed Services Employment and Reemployment Rights Act, the National Committee for Employer Support of the Guard and Reserve, toll-free telephone number 1-800-336-4590, will be happy to answer them.

Sincerely,

[Signature]

Original Received for Employer by:

_____
[Printed Name and Signature]

**National Committee for
Employer Support of the Guard and Reserve**

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Sample

Employee's Active Duty Return Notification Letter to Employer

[Employee's Home Address]

[Date]

[Employer's Business Address]

Send by Certified Mail, Return receipt requested

RE: Application for Reinstatement – Uniformed Services Employment and Reemployment Act, Title 38, U.S. Code Section 4312

Dear Sir/Madam:

On [**date**], I entered active duty with the [**service**]. On [**date**], I was honorably released from active duty with the service.

Please accept this letter as a formal request to be reinstated in my former job. With your permission, I plan to report to work on [**date**]. Please call me at the number listed below if this date is not convenient. Pursuant to the Uniformed Services Employment and Reemployment Rights Act, Title 38, United States Code Sections 4301-33, I am entitled to be reinstated as soon as possible in my former position.

If you have any questions about the provisions of the Uniformed Services Employment and Reemployment Rights Act, the National Committee for Employer Support of the Guard and Reserve, toll-free telephone number 1-800-336-4590, will be happy to answer them.

Sincerely,

[Signature]

Original Received for Employer by:

_____
[Printed Name and Signature]

**National Committee for
Employer Support of the Guard and Reserve**

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**A Non-Technical Resource Guide
to the
Uniformed Services Employment and
Reemployment Rights Act
(USERRA)**

**The U.S. Department of Labor
Veterans' Employment and Training Service**

July 2004

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Introduction

The Department of Labor's Veterans' Employment and Training Service provides this guide to enhance the public's access to information about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in various circumstances. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

USERRA applies to virtually all employers, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal employers. Specific questions should be addressed to the State director of the Veterans' Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive system, "The USERRA Advisor," answers many of the most-often asked questions about the law. It can be found in the "E-Laws" section of the Department of Labor's home page. The Internet address is *http://www.dol.gov.*

Disclaimer

This user's guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the actual statute.

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Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353), significantly strengthens and expands the employment and reemployment rights of all uniformed service members.

Who's eligible for reemployment?

"Service in the uniformed services" and "uniformed services" defined -- (38 U.S.C. Section 4303 (13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.
- Funeral honors duty performed by National Guard or reserve members.
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Homeland Security – Emergency Preparedness and Response Directorate (FEMA), when activated for a public health emergency, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). See Title 42, U.S. Code, section 300hh-11(e).

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve.
- Army National Guard or Air National Guard.
- Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

"Brief Nonrecurrent" positions (Section 4312(d)(1)(C))

The law provides an exemption from employer reemployment obligations if the employee's pre-service position of employment "is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."

Advance Notice (Section 4312(a)(1))

The law requires all employees to provide their employers with advance notice of military service.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- military necessity prevents the giving of notice; or
- the giving of notice is otherwise impossible or unreasonable.

Duration of Service (Section 4312(c))

The cumulative length of service that causes a person's absence from a position of employment with a given employer may not exceed five years.

Most types of service will be cumulatively counted in the

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computation of the five-year period.

Exceptions . Eight categories of service are exempt from the five-year limitation. These include:

(1) **Service required beyond five years to complete an initial period of obligated service (Section 4312 (c)(1)).** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

(2) **Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit (Section 4312(c)(2)).** For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea.

Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm.

(3) **Required training for reservists and National Guard members (Section 4312(c)(3)).** The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

(4) **Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).**

(5) **Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress (Section 4312(c)(4)(B)).** This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.

(6) **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent (Section 4312(c)(4)(c)).** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304. The U.S. military involvement in Haiti ("Uphold Democracy") and in Bosnia ("Joint Endeavor") is two examples of such an operational mission.

This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

(7) **Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect (Section 4312 (c)(4)(D)).** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

(8) **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States (Section 4312(c)(4)(E)).**

Disqualifying service (Section 4304)

When would service be disqualifying? The statute lists four circumstances:

(1) Separation from the service with a dishonorable or bad conduct discharge.

(2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

(3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war **(Section 1161(a) of Title 10).**

(4) Dropping an individual from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court. **(Section 1161(b) of Title 10)**

Reporting back to work (Section 4312(e))

Time limits for returning to work depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.

If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.

Fitness Exam. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible.

Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

Documentation upon return (Section 4312(f))

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under **Section 4304.**

Unavailable documentation . **Section: 4312(f)(3)(A)**. If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively. **Pension contributions. Section 4312(f)(3)(B).** Pursuant to **Section 4318**, if a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

How to place eligible persons in a job

Length of service -- Section 4313(a)

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 days. Section 4313(a)(1)(A) & (B). A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

(1) **(Section 4313(a)(1)(A))** in the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the

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service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) if the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. **(Section 4313(a)(4))**

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. Section 4313(a)(2). The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

(1) **Section 4313(a)(2)(A)**. In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) **Section 4313(a)(4)**. If the employee cannot become qualified for the position either in (A) or (B) above: in any other position that most nearly approximates the above positions (in that order) the duties of which the employee is qualified to perform, with full seniority.

"Escalator" position . The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority "escalator" at the point the person would have occupied if the person had remained continuously employed.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation of status and pay that the person is qualified to perform (the third reemployment position in the above schemes).

"Prompt" reemployment. Section 4313(a). The law specifies that returning service members be "promptly reemployed." What is prompt will depend on the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

Disabilities incurred or aggravated while in Military Service Section 4313(a)(3).

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

(1) The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.

(2) If, despite reasonable accommodation efforts, the person is not qualified for the position in **(1)** due to

his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.

(3) If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

The law covers all employers, regardless of size.

Conflicting reemployment claims Section 4313(b)(1) & (2)(A).

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Changed circumstances Section 4312(d)(1)(A)).

Reemployment of a person is excused if an employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue hardship Section 4312(d)(1)(B).

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Rights of reemployed persons

Seniority rights Section 4316(a)

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of service. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency.

Rights not based on seniority Section 4316(b).

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the service member is entitled to the most favorable treatment so long as the nonmilitary leave is comparable. For example, a three-day bereavement leave is not comparable to a two-year period of active duty.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.

Forfeiture of rights. Section 4316(b)(2)(A)(ii). If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Funding of benefits. Section 4316(b)(4). Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay.

Pension/retirement plans

Pension plans, Section 4318, which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- **Section 4318(a)(2)(A)**. A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;

- **Section 4318(a)(2)(B)**. Military service must be considered service with an employer for vesting and benefit accrual purposes;

- **Section 4318(b)(1)**. The employer is liable for funding any resulting obligation; and

- **Section 4318(b)(2)**. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. Section 4318. A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Multi-employer plans. Section 4318(b)(1). In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate the liability of the plan for pension benefits accrued by persons who are absent for military service. If no allocation or cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment. **(4318(c))**

Employee contribution repayment period. Section 4318(b)(2). Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

Calculation of contributions. Section 4318(b)(3)(A). For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service.

Section 4318(b)(3)(B). If the employee's compensation was not based on a fixed rate, or the determination of such rate is not reasonably certain, the employee's compensation during the period of service is computed on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation pay. Section 4316(d).

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, service members cannot be forced to use vacation time for military service.

Health benefits. Section 4317

The law provides for health plan continuation for persons who are absent from work to serve in the military and their dependents, even when their employers are not covered by COBRA. (Employers with fewer than 20 employees are exempt for COBRA.) **Section 4317(a)(1).**

If a person's health plan coverage (in connection with the person's position of employment) would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Section 4317(b). Upon reemployment of the service member, a waiting period or exclusion cannot be imposed upon reinstatement of health plan coverage of any person whose coverage was terminated by reason of the military service (unless an exclusion or waiting period would have been imposed absent the military service). However, an exception applies to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service-connected.

Multi-employer. Section 4317(a)(3). Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from discharge

Under USERRA, a reemployed employee may not be discharged without cause as follows:

- **Section 4316(c)(1)**. For one year after the date of reemployment if the person's period of military service was for more than 180 days.

- **Section 4316(c)(2).** For six months after the date of reemployment if the person's period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from discrimination and retaliation

Discrimination -- Section 4311.

Section 4311(a). Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- hiring;

- promotion;

- reemployment;

- termination; and

- benefits

Persons protected. Section 4311(a). The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services or to perform service in the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations in all branches of the military or as intermittent employees in the National Disaster Medical System are also protected.

Standard/burden of proof. Section 4311(c). If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service.

USERRA clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Reprisals

Employers are prohibited from retaliating against anyone:

- who files a complaint under the law;

- who testifies, assists or otherwise participates in an investigation or proceeding under the law; or

- who exercises any right provided under the law.

- whether or not the person has performed military service **(section 4311(b))**.

How the law is enforced (Non-Federal employers)

Department of Labor

Regulations. Section 4331(a). The Secretary of Labor is empowered to issue regulations implementing the statute for States, local governments, and private employers. Previously, the Secretary lacked such authority.

Veterans' Employment and Training Service. Reemployment assistance is provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. **Section 4321.** VETS investigates complaints and, if meritorious, attempts to resolve them. Filing of complaints with VETS is optional. **Section 4322.**

Access to documents. Section 4326(a). The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. Section 4326(b). The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Government-assisted court actions

Section 4323(a)(1). Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

Private court actions Section 4323(a).

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double damages. Section 4323(d)(1)(C). Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees. Section 4323(h)(2). The law, at the court's discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also, the law bans charging of court fees or costs against anyone who brings suit (4323(c)(2)(A)).

Declaratory judgments. Section 4323(f). Only persons claiming rights under the law may bring lawsuits. According to the law's legislative history, its purpose is to prevent employers, pension plans, or unions from filing actions for declaratory judgments to determine potential claims of employees.

Service Member Checklist

Service Member Obligations

Yes

No

Comments

Reference1. Did the service member hold a job other than one that was brief, nonrecurring? (exception would be discrimination cases.)Page 22. Did the service member notify the employer that he/she would be leaving the job for military training or service?Page 23. Did the service member exceed the 5-year limitation limit on periods of service? (exclude exception identified in the law)Page 24. Was the service member discharged under conditions other than disqualifying under section 4304?Page 45. Did the service member make application or report back to the pre-service employer in a timely manner?Page 46. When requested by the employer, did the service member provide readily available documentation showing eligibility for reemployment?Page 57. Did the service member whose military leave exceeded 30 days elect to continue health insurance coverage? The employer is permitted to charge up to 102% of the entire premium in these cases.Page 10

Employer Obligations

Employer Obligations:YesNoCommentsReference1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal)Page 2
2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used.Page 103. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?Page 5

4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations. Page 85. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?Page 56. Did the employer consider the timing, frequency, or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?Page 2
7. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities. If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?Page 78. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority?Page 79. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?Page 9
10. Did the employer providehealth coverage upon request of a service member? Upon the service member's election, did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days?Page 1011. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute?Page 11
12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for service?Page 11

May 25,
2004
FMLA2004-2-A

Dear ***Name****,

Thank you for your letters dated July 7, 1998, addressed to Ms. Michelle Bechtoldt, formerly of the Office of Enforcement Policy, Family and Medical Leave Act Team, in regard to medical recertification issues under the Family and Medical Leave Act of 1993 (FMLA). You have requested clarification of Regulations 29 Part 825 in regard to recertification issues.

You agreed in a telephone conversation on February 27, 2004, that it would be appropriate to combine our response to your inquiries in one letter. We apologize for the long delay in providing this response.

The Wage and Hour Division of the U.S. Department of Labor administers the FMLA for all private, state and local government employees, and some federal employees. Although determinations of coverage, eligibility and other issues of compliance under the FMLA are fact intensive, we trust that the following information will provide the clarification you requested.

1. **Minimum recertification period when no minimum duration of capacity is specified in the medical certification.**

You understand that the FMLA allows an employer to request recertification every 30 days for pregnancy, chronic or permanent/long term conditions, citing four scenarios involving such conditions, none of which have a minimum duration of incapacity specified in the medical certification.[1] You request that we confirm this understanding or explain our basis for disagreement.

We agree with your understanding, provided the recertification is requested in connection with an absence. Section 103(e) of the FMLA states the employer may require subsequent recertifications "on a reasonable basis." The FMLA regulations at §825.308(a) limit recertification for pregnancy, chronic, or permanent/long-term serious health conditions, when no minimum duration of incapacity is specified on the medical certification (as discussed in §825.308(b)), to no more often than every 30 days, provided the recertification is done only in connection with an absence. If circumstances have changed significantly, or the employer receives information which casts doubt upon the continuing validity of the certification, recertification may be requested more frequently than every 30 days.

2. **Minimum recertification period with Friday/Monday absence pattern.**

You understand that a pattern of Friday/Monday absences can constitute "information that casts doubt upon the employee's stated reason for the absence" (§825.308(a)(2)), thus allowing an employer to request recertification more frequently than every 30 days.

We agree with your understanding, provided there is no evidence that provides a medical reason for the timing of such absences and the request for recertification is made in conjunction with an absence. A recertification under these circumstances could thus be justified, for example, if a medical certification indicated the need for intermittent leave for two or three days a month due to migraine headaches, and the employee took such leave every Monday or Friday (the first and last days of the employee's work week).

3. **Informing medical provider of pattern of Monday/Friday or apparent excessive absences, and asking for clarification.**

You understand that an employer, when requesting medical certification or recertification, may inform the health care provider that the employee has a pattern of Friday/Monday or apparent excessive absences. You add that you understand that an employer who has observed such a pattern of potential abuse may ask the health care provider, as part of the certification (and subsequent recertification) process, if this pattern of absence is consistent with the employee's serious health condition. You recognize that an employer's direct contact with the employee's health care provider is prohibited, but you understand that this question could be added to the medical certification form given to the employee for completion by the health care provider.[1]

The FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences. Nor does the FMLA prohibit an employer from asking, as part of the recertification process, whether the likely duration and frequency of the employee's incapacity due to the chronic condition is limited to Mondays and Fridays.

Further, please be aware that Regulation §825.307(a) permits a health care provider representing the employer to contact the employee's health care provider for purposes of clarifying the information in the medical certification. Such contact may only be made with the employee's permission.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We hope that this has been responsive to the questions you have raised. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,
Tammy D. McCutchen, Administrator

Note: * The actual name(s) was removed to preserve privacy.

[1] Scenario One: An employee's Health Care Provider (HCP) certifies her migraine headaches will last indefinitely. Scenario Two: An employee's HCP certifies a chronic serious health condition (diabetes) and provides no time frame for the duration of the condition. Scenario Three: The employee's chronic serious health condition (asthma) is certified to last for an indefinite period, with possible episodes of incapacity (coinciding with pollen season) over a three month period. Scenario Four: The certification again specifies an indefinite period, but indicates a need for breathing tests and treatments to be conducted over the next three months.

[2] Under the Health Insurance Portability and Accountability Act (HIPAA), 104 P.L. 191, 42 USC §1320d, covered entities (such as HCPs) are subject to certain standards regarding the use and disclosure of an individual's protected health information. (See 45 CFR Parts 160 and 164, administered by the U.S. Department of Health and Human Services, Office for Civil Rights.) In general, the HIPAA does not prohibit covered entities from releasing an individual's protected health information to that individual.

CALIFORNIA EMPLOYERS -- PROTECTED LEAVES OF ABSENCE
REVISED 8/31/04

	FEDERAL FMLA (Family and Medical Leave Act)	CALIFORNIA CFRA (California Family Rights Act)	CALIFORNIA PDL (Fair Employment and Housing Act)	SB 1661 (Paid Family Leave Effective 7/1/04)
Number of Employees Necessary to be Obligated to Provide Leave or Benefit	50 (within 75 miles).	Same as FMLA.	5 within California.	One or more. (PFL does not create a right to leave.)
Length of Service Requirement for Eligibility	At least 12 months (not necessarily consecutive).	More than 12 months (not necessarily consecutive).	None -- immediately eligible.	None--immediately eligible.
Hours of Service Requirement for Eligibility	1,250 hours within 12-months prior to leave.	Same as FMLA (except for birth bonding leave for a woman following delivery where the 1,250 hour requirement is measured at commencement of pregnancy disability leave).	None -- immediately eligible.	None--immediately eligible.
What if Employee Works Away from Work Site with 50 Employees?	Employee is eligible for leave if his/her work is directed from a work site with 50 employees within 75 miles.	Same as FMLA.	Eligible if employee works in California.	Eligible if employee works in California.
Reason for Leave	Employee's serious health condition; care of a parent, spouse or child with a serious health condition; birth or placement for adoption or foster care of a child.	Same as FMLA, except definition of an employee's serious health condition excludes pregnancy-related disabilities and related medical conditions.	Employee's disability on account of pregnancy, childbirth, or related medical conditions.	Care of a parent, spouse, child, or domestic partner with a serious health condition; birth or placement for adoption or foster care of a child, including the child of a domestic partner.
Duration of Leave	12 weeks in a 12-month period.	12 weeks in a 12-month period.	4 months or 88 work days for a full-time employee (per pregnancy).	Does not require provision of leave.

	FEDERAL FMLA (Family and Medical Leave Act)	CALIFORNIA CFRA (California Family Rights Act)	CALIFORNIA PDL (Fair Employment and Housing Act)	SB 1661 (Paid Family Leave Effective 7/1/04)
Payment During Leave	No obligation to pay employee unless employee's own leave of absence policy provides otherwise. Employee may apply for state disability insurance benefits if employee qualifies.	Same as FMLA.	Same as FMLA.	Provides for partial wage replacement for 6 weeks in a 12-month period. There is a 7-day waiting period during which no benefits are payable at the outset of each family temporary disability insurance leave.
Employee Request for Leave/Employer Response	Employee may request leave without using the term "FMLA." Employer may require 30 days written notice before requested leave is to begin — if: (1) need for leave is foreseeable; and (2) employee had notice of this requirement. Employer must respond to request for leave within 2 business days. Employer may respond orally but must subsequently notify employee in writing that the leave is designated as FMLA leave. (JL has an employer response form for this purpose.)	Employee may request leave without using the term "CFRA" and request may be oral. Employer may require 30 days notice before requested leave is to begin — if: (1) need for leave is foreseeable; and (2) employee had notice of this requirement. Employer must respond to request no later than 10 calendar days after leave requested. Approval is deemed retroactive to first day of the leave. (JL has an employer response form for this purpose.)	Same as CFRA for request. Employee is not obligated to notify employee in writing the leave will be counted as PDL leave; however, JL suggests giving such notice to ensure the employee properly accounts for the leave time.	Employee must file a claim supported by either a certification form for an employee taking leave due to the birth of a child or the placement of a child who is unable to care for himself or herself in connection with adoption or foster care, or a certificate of the treating physician or practitioner that establishes the condition of the family member that warrants the care of the employee. The certification forms will be developed by the Employment Development Department.

	FEDERAL FMLA (Family and Medical Leave Act)	CALIFORNIA CFRA (California Family Rights Act)	CALIFORNIA PDL (Fair Employment and Housing Act)	SB 1661 (Paid Family Leave Effective 7/1/04)
Birth Bonding/Child Care Incremental Leave or Reduced Schedule	Leave taken after birth, adoption, foster placement to "bond" with child must be taken continuously within one year of birth, adoption or placement; reduced schedules and intermittent leave are not required by the statute, but may be mutually agreed to.	Birth bonding leave must be taken within 1 year after the child's birth and in at least 2-week increments, except on 2 occasions when leave can be for shortest period of time payroll system accounts for absences. Reduced schedule leave is not required by the statute, but may be mutually agreed to.	Not applicable. (After disability ends, employee may take a CFRA leave to bond with the newborn child for a maximum of 12 weeks.)	Any family temporary disability insurance leave taken due to the birth of a child or the placement of a child who is unable to care for himself or herself in connection with adoption or foster care must be taken during the first year after the birth or placement of the child.
Incremental Leave or Reduced Schedule Leave Taken For Serious Health Condition of Employee or Employee's Spouse, Child, or Parent	Serious health condition leave may be taken in increments of the shortest period the payroll system accounts for if medically necessary (employees entitled to increments adding up to 12 weeks). Employer may deduct salary for hours taken by exempt employees as intermittent or reduced schedule leave without employees losing exempt status.	Same as FMLA.	Same as FMLA, except that full-time employee is entitled to increments adding up to 4 months or 88 work days for each pregnancy.	No provision for intermittent or reduced schedule leave.

ACC's 2005 ANNUAL MEETING USING COMPLIANCE FOR A COMPETITIVE ADVANTAGE

	FEDERAL FMLA (Family and Medical Leave Act)	CALIFORNIA CFRA (California Family Rights Act)	CALIFORNIA PDL (Fair Employment and Housing Act)	SB 1661 (Paid Family Leave Effective 7/1/04)
If Husband and Wife Both Work for Employer	The employer may limit the leave taken for birth, adoption, or foster placement and leave to care for an employee's parent with a serious health condition to a combined 12-week period shared between the husband and wife (i.e., if the wife takes 3 weeks to bond with a newborn child, the husband can only take 9 weeks to care for his mother with a serious health condition. However, the wife and husband would still have 9 and 3 weeks, respectively, remaining to use for their own serious health condition or that of their child).	The employer only may limit the leave taken for birth, adoption, or foster placement to a combined 12-week period shared between the husband and wife, not leave for a serious health condition.	Not applicable.	Because an individual is not eligible for family temporary disability insurance benefits for any day that another family member is able and available to provide the required care, it is unlikely 2 employees could draw benefits at the same time.
What if Employee Requests Transfer to Another Position?	No provision for transfer; however, if the employee's own serious health condition would qualify as a disability under the Americans with Disabilities Act, the employer may be required to accommodate the employee's request for transfer.	No provision. (See FMLA, FEHA disability discrimination provisions.)	Employees are eligible to transfer to less strenuous or hazardous duties if the employee provides certification from her health care provider that this transfer is medically advisable. The employer need not create a new position, discharge or transfer other employees to accommodate this request.	Not applicable to law providing only wage replacement benefits when employees take covered leave.

	FEDERAL FMLA (Family and Medical Leave Act)	CALIFORNIA CFRA (California Family Rights Act)	CALIFORNIA PDL (Fair Employment and Housing Act)	SB 1661 (Paid Family Leave Effective 7/1/04)
Employer May Transfer Employee to Another Position to Accommodate Reduced Schedule and/or Intermittent Leave	To accommodate intermittent leave or a reduced schedule, the employer may require the employee to transfer to an alternative position for which the employee is qualified, that provides equivalent pay and benefits, and better accommodates recurring periods of leave. The alternative job need not have equivalent duties.	Same as FMLA.	Same as FMLA.	No provision for intermittent or reduced schedule leave.
Medical Certification of Employee's Serious Health Condition or Employee's Spouse, Child, or Parent's Medical Condition	May be required if the employee has notice of the requirements; must give employee 15 days to obtain medical certificate. (JL has certification form.) Note: the employer cannot require a medical certification for bonding leave.	Same as FMLA, except cannot ask for nature of health condition (JL has a certification form.) Note: the employer cannot require a medical certification for bonding leave.	May be required if a certificate is also required for other medical leaves of absence.	Employee's claim must include either a certification for an employee taking leave due to the birth of a child or the placement of a child who is unable to care for himself or herself in connection with adoption or foster care, or a certificate of the treating physician or practitioner that establishes the condition of the family member that warrants the care of the employee. The certification forms have been developed by the Employment Development Department.

ACC's 2005 ANNUAL MEETING USING COMPLIANCE FOR A COMPETITIVE ADVANTAGE

	FEDERAL FMLA (Family and Medical Leave Act)	CALIFORNIA CFRA (California Family Rights Act)	CALIFORNIA PDL (Fair Employment and Housing Act)	SB 1661 (Paid Family Leave Effective 7/1/04)
Can Employer Require Second Medical Opinion?	Yes (at the employer's cost) for both employee's own serious health condition and employee's parent/child/spouse's condition (not bonding leave).	Yes (at the employer's cost) for the employee's own serious health condition if there is reason to disbelieve the employee's doctor report. California employers may not require a second opinion for the employee's parent's, child's or spouse's medical condition.	No provision.	No provision.
Fitness for Duty Medical Release	Employer may require certification from the employee's medical provider that the employee is able to resume work as long as the employer requires fitness for duty certification from all employees returning from a medical leave.	Same as FMLA.	Same as FMLA.	No provision.
Requiring Use of Vacation Time for Leave	Employer may designate vacation to run concurrently with FMLA leave only during the unpaid portion of the leave (e.g., the employee does not receive wage replacement benefits). (Must notify employee of this within 2 business days after request for leave.)	Employer may designate vacation to run concurrently with CFRA leave only during the unpaid portion of the leave (e.g., the employee does not receive wage replacement benefits).	At employee's option, she can use accrued vacation (it cannot be required).	Employer may require an employee to take up to 2 weeks of earned but unused vacation leave or paid time off prior to the employee's initial receipt of family temporary disability insurance benefits during any 12-month period. If the employee chooses to require the use of vacation leave, the first week of vacation must be applied to the 7-day waiting period.

	FEDERAL FMLA (Family and Medical Leave Act)	CALIFORNIA CFRA (California Family Rights Act)	CALIFORNIA PDL (Fair Employment and Housing Act)	SB 1661 (Paid Family Leave Effective 7/1/04)
Requiring Use of Sick Leave	Employer may designate sick leave to run concurrently with FMLA absence if leave is taken for employee's own or a family member's serious health condition.	Employer may designate sick leave to run concurrently with CFRA absence if leave is taken for employee's own serious health condition. Employer and employee may agree to apply sick leave to other types of CFRA leaves of absence.	Employer may require sick leave to run concurrently with PDL.	No provision.
Designation of Pregnancy Disability	Employer should designate the leave as FMLA during PDL if the employee qualifies for FMLA leave. (FMLA and PDL run concurrently.)	Employer may not designate CFRA to run concurrently with PDL unless employee exhausts PDL (up to 4 months for full-time employee).	Pregnancy leave should be designated PDL and FMLA if the employee also qualifies under the FMLA.	Statute does not apply to pregnancy. Regular state disability insurance may cover pregnancy and related conditions.
Designation of Leave - Notice to Employee	Employer must notify employee within 2 business days of FMLA designation after employee requests FMLA leave.	Employer must notify employee within 10 business days of CFRA designation after employee requests CFRA leave.	Same as CFRA.	Not applicable to law providing only wage replacement benefits when employees take covered leave. Family temporary disability insurance leave runs concurrently with FMLA/CFRA leave.
Retroactive Designation	Employer may not retroactively designate FMLA leave except when employer does not know of FMLA qualifying condition (e.g., employee injured during vacation).	If timely approval of leave is given, (i.e., within 10 days after request), approval is deemed retroactive to first day of leave.	Same as CFRA.	Not applicable to law providing only wage replacement benefits when employees take covered leave.

	FEDERAL FMLA (Family and Medical Leave Act)	**CALIFORNIA CFRA** (California Family Rights Act)	**CALIFORNIA PDL** (Fair Employment and Housing Act)	**SB 1661** (Paid Family Leave Effective 7/1/04)
Notice to Intent to Return to Work	Employer may require employees to give 2 business days' notice prior to returning from leave.	No notice required if employee returns to work at end of agreed upon leave. If length of leave changes, employer may require employees to give 2 business days' notice.	Same as CFRA.	No provision.
Reinstatement Rights of Employee	Employee must be reinstated to same or equivalent position at end of leave. Equivalent position must have same pay, benefits, schedule, shift and job duties and a geographically proximate location.	Employee must be reinstated to same or comparable position at end of leave. "Comparable" position has similar definition as FMLA "equivalent" position.	Employee must be reinstated to same position (very narrow exceptions exist).	No provision.
Denial of Reinstatement to Highly Paid Employees	Employer can deny reinstatement to a salaried employee who is among top 10% of the highest paid employees within 75 miles if: (1) denial is necessary to prevent "substantial and grievous economic injury"; (2) the employer notified the employee before or during leave; and (3) employee had the option to return from or not take leave. (The employer must still give benefits during leave if the employee's reinstatement is not guaranteed.)	Same as FMLA.	Employer cannot deny reinstatement on this basis.	No provision for reinstatement of any employee.

	FEDERAL FMLA (Family and Medical Leave Act)	**CALIFORNIA CFRA** (California Family Rights Act)	**CALIFORNIA PDL** (Fair Employment and Housing Act)	**SB 1661** (Paid Family Leave Effective 7/1/04)
Health Benefits	Employer must continue benefits under the same conditions as if the employee was working for the period of leave, up to 12 weeks (even if reinstatement is not guaranteed because highly-paid employee.)	Same as FMLA. [Note: an employee disabled by pregnancy who takes a leave to later bond with a newborn is entitled to a maximum of 12 weeks of benefits for both FMLA and CFRA combined, although the leave period can exceed 12 weeks.]	No requirement under PDL. However, continued benefits are required if employee qualifies under the FMLA or if employee would qualify under employer's policy of giving continued health benefits for employees on other unpaid leaves of absence.	No requirement under this law. However, continued benefits are required if employee qualifies under the FMLA.
Recovery of Health Premiums	Employer can recover premiums paid an employee if either employee does not return from leave, or does not work for at least 30 days after the leave, unless the failure to return is beyond the control of employee.	Same as FMLA.	No provision under PDL; see FMLA, if employee qualifies.	No provision.
Employer's Notice Obligations	Employer must post required poster and provide notices to persons requesting leave at time they request leave. If employer gives any description of other benefits in a handbook, the employer must include an FMLA policy in the handbook. (See JL Model Policy.)	Employer must post the DFEH poster, describe policy, and give copy of leave policy to those requesting leave. If employer publishes a handbook that describes other available personal or disability leaves, the employer must include a description of CFRA leave in its handbook. The policy can combine the requirements of CFRA and FMLA. (See JL Model Policy.)	Employer must post PDL leave description and give copy of leave description to employees requesting leave. If employer publishes a handbook that describes other available temporary disability leaves or transfers, the employer must include a description of pregnancy disability leave or transfer in its handbook. The policy can combine the requirements of PDL and CFRA. Also, employer must provide pregnant employees with notice of their rights under PDL as soon as the employer learns of an employee's pregnancy. (See JL Model Policy.)	The notification to employees as to their rights and benefits under the disability insurance law was changed to include family temporary disability insurance benefits. This notice must be distributed to all new hires beginning January 1, 2004, and to employees taking leave for a reason covered by the law beginning July 1, 2004.

	FEDERAL FMLA (Family and Medical Leave Act)	**CALIFORNIA CFRA** (California Family Rights Act)	**CALIFORNIA PDL** (Fair Employment and Housing Act)	**SB 1661** (Paid Family Leave Effective 7/1/04)
Recordkeeping Requirements [Records to be kept a minimum of 3 years.]	Records of: 1. Payroll information. 2. Dates FMLA leave is taken (must be designated FMLA leave in records.) 3. Hours of leave taken, if less than a full day. 4. Copies of notices of leave given to employer and employee. 5. Employer's other benefits and leave policies. 6. Premium payments of employee benefits. 7. Any disputes regarding designation of leave. 8. Medical records must be kept separate and confidential.	No recordkeeping requirements.	Same as CFRA.	No recordkeeping requirements specific to this law.

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YOUR RIGHTS UNDER USERRA

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

REEMPLOYMENT RIGHTS

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- ☆ you ensure that your employer receives advance written or verbal notice of your service;
- ☆ you have five years or less of cumulative service in the uniformed services while with that particular employer;
- ☆ you return to work or apply for reemployment in a timely manner after conclusion of service; and
- ☆ you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION

If you:

- ☆ are a past or present member of the uniformed service;
- ☆ have applied for membership in the uniformed service; or
- ☆ are obligated to serve in the uniformed service;

then an employer may not deny you any of the following because of this status:

- ☆ initial employment;
- ☆ reemployment;
- ☆ retention in employment;
- ☆ promotion; or
- ☆ any benefit of employment.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

HEALTH INSURANCE PROTECTION

- ☆ If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- ☆ Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

ENFORCEMENT

- ☆ The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.
- ☆ For assistance in filing a complaint, or for any other information on USERRA, contact VETS at **1-866-4-USA-DOL** or visit its **website at http://www.dol.gov/vets**. An interactive online USERRA Advisor can be viewed at **http://www.dol.gov/elaws/userra.htm**.
- ☆ If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice or the Office of Special Counsel, depending on the employer, for representation.
- ☆ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. This notice was prepared by VETS, and may be viewed on the internet at this address: http://www.dol.gov/vets/programs/userra/poster.pdf. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying this notice where they customarily place notices for employees.

VETS

U.S. Department of Labor
1-866-487-2365

ESGR
EMPLOYER SUPPORT OF THE GUARD AND RESERVE

1-800-336-4590

Publication Date—February 2005

Title 38, United States Code
Chapter 43 – Employment and Reemployment Rights of Members of the Uniformed Services

Table of Contents

SUBCHAPTER I – GENERAL

§ 4301. Purposes; sense of Congress

(a) The purposes of this chapter are—
(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
(3) to prohibit discrimination against persons because of their service in the uniformed services.
(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter

4302. Relation to other law and plans or agreements

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

§ 4303. Definitions

For the purposes of this chapter—
(1) The term “Attorney General” means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter.
(2) The term “benefit”, “benefit of employment”, or “rights and benefits” means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

§ 4303. Definitions (continued)

(3) The term “employee” means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319 (c) of this title.
(4)
(A) Except as provided in subparagraphs (B) and (C), the term “employer” means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—
(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
(ii) the Federal Government;
(iii) a State;
(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and
(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.
(B) In the case of a National Guard technician employed under section 709 of title 32, the term “employer” means the adjutant general of the State in which the technician is employed.
(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002 (2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.
(5) The term “Federal executive agency” includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302 (a)(2)(C)(ii) of title 5, and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.
(6) The term “Federal Government” includes any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States.
(7) The term “health plan” means an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.
(8) The term “notice” means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.
(9) The term “qualified”, with respect to an employment position, means having the ability to perform the essential tasks of the position.

§ 4303. Definitions (continued)

(10) The term "reasonable efforts", in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.
(11) Notwithstanding section 101, the term "Secretary" means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.
(12) The term "seniority" means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.
(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.
(14) The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).
(15) The term "undue hardship", in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of—
(A) the nature and cost of the action needed under this chapter;
(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and
(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.
(16) The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency

§ 4304. Character of service

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:
(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.
(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.
(3) A dismissal of such person permitted under section 1161 (a) of title 10.
(4) A dropping of such person from the rolls pursuant to section 1161 (b) of title 10.

SUBCHAPTER II – EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) 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 a uniformed service 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.
(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person
(1) has taken an action to enforce a protection afforded any person under this chapter,
(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,
(3) has assisted or otherwise participated in an investigation under this chapter, or
(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
(c) An employer shall be considered to have engaged in actions prohibited—
(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited (continued)

(2) under subsection (b), if the person's
(A) action to enforce a protection afforded any person under this chapter,
(B) testimony or making of a statement in or in connection with any proceeding under this chapter,
(C) assistance or other participation in an investigation under this chapter, or
(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312 (d)(1)(C) of this title.

§ 4312. Reemployment rights of persons who serve in the uniformed services

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—
(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;
(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and
(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).
(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

§ 4312. Reemployment rights of persons who serve in the uniformed services (continued)

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—
(1) that is required, beyond five years, to complete an initial period of obligated service;
(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
(3) performed as required pursuant to section 10147 of title 10, under section 502 (a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
(4) performed by a member of a uniformed service who is—
(A) ordered to or retained on active duty under section 688, 12301 (a), 12301 (g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;
(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or
(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10.
(d)
(1) An employer is not required to reemploy a person under this chapter if—
(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or
(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.
(2) In any proceeding involving an issue of whether—
(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,
(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,
the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.
(e)
(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:
(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—
(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or
(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.
(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).
(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.
(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.
(2)
(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

§ 4312. Reemployment rights of persons who serve in the uniformed services (continued)

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.
(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall 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.
(f)
(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that—
(A) the person's application is timely;
(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and
(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.
(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.
(3)
(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.
(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318 (a)(2)(A).
(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.
(h) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

§ 4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:
(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days—
(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or
(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—
(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or
(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—
(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or
(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.
(4) In the case of a person who
(A) is not qualified to be employed in
(i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or
(ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and
(B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.
(b)
(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.
(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:
(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.
(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

§ 4314. Reemployment by the Federal Government

(a) Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.
(b)
(1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall—
(A) identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and
(B) ensure that the person is offered such position.
(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that—
(A) the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or
(B) it is impossible or unreasonable for the agency to reemploy the person.
(c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).
(d) If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

§ 4315. Reemployment by certain Federal agencies

(a) The head of each agency referred to in section 2302 (a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.
(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

§ 4315. Reemployment by certain Federal agencies (continued)

(c)
(1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.
(2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.
(3) A determination pursuant to this subsection shall not be subject to judicial review.
(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.
(d)
(1) Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.
(2) This section may not be construed—
(A) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, alternative employment in the Federal Government under this chapter, or information relating to the rights and obligations of employee and Federal agencies under this chapter; or
(B) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.
(e) The Director of the Office of Personnel Management shall ensure the offer of employment to a person in a position in a Federal executive agency on the basis described in subsection (b) if—
(1) the person was an employee of an agency referred to in section 2302 (a)(2)(C)(ii) of title 5 at the time the person entered the service from which the person seeks reemployment under this section;
(2) the appropriate officer of the agency determines under subsection (c) that reemployment of the person by the agency is impossible or unreasonable; and
(3) the person submits an application to the Director for an offer of employment under this subsection.

§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.
(b)
(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
(A) deemed to be on furlough or leave of absence while performing such service; and
(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.
(2)
(A) Subject to subparagraph (B), a person who—
(i) is absent from a position of employment by reason of service in the uniformed services, and
(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,
is not entitled to rights and benefits under paragraph (1)(B).
(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).
(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.
(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.
(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.
(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.
(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—
(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service (continued)

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.
(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.
(e)
(1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.
(2) For purposes of section 4312 (e)(1) of this title, an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment.

§ 4317. Health plans

(a)
(1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, the plan shall provide that the person may elect to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of—
(A) the 24-month period beginning on the date on which the person's absence begins; or
(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312 (e).
(2) A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.

§ 4317. Health plans(continued)

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated—
(A) by the plan in such manner as the plan sponsor shall provide; or
(B) if the sponsor does not provide—
(i) to the last employer employing the person before the period served by the person in the uniformed services, or
(ii) if such last employer is no longer functional, to the plan.
(b)
(1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.
(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

§ 4318. Employee pension benefit plans

(a)
(1)
(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.
(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
(2)
(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

§ 4318. Employee pension benefit plans (continued)

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.
(b)
(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—
(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
(B) if the sponsor does not provide—
(i) to the last employer employing the person before the period served by the person in the uniformed services, or
(ii) if such last employer is no longer functional, to the plan.
(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—
(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).
(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.

§ 4319. Employment and reemployment rights in foreign countries

(a) Liability of Controlling United States Employer of Foreign Entity.— If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.
(b) Inapplicability to Foreign Employer.— This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by a United States employer.
(c) Determination of Controlling Employer.— For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.
(d) Exemption.— Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.

SUBCHAPTER III—PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND INVESTIGATION

§ 4321. Assistance in obtaining reemployment or other employment rights or benefits

The Secretary (through the Veterans' Employment and Training Service) shall provide assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under this chapter. In providing such assistance, the Secretary may request the assistance of existing Federal and State agencies engaged in similar or related activities and utilize the assistance of volunteers.

§ 4322. Enforcement of employment or reemployment rights

(a) A person who claims that—
(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by an employer; and
(2)
(A) such employer has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter; or
(B) in the case that the employer is a Federal executive agency, such employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter,
may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint.
(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.
(c) The Secretary shall, upon request, provide technical assistance to a potential claimant with respect to a complaint under this subsection, and when appropriate, to such claimant's employer.
(d) The Secretary shall investigate each complaint submitted pursuant to subsection (a). If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter.

§ 4322. Enforcement of employment or reemployment rights(continued)

(e) If the efforts of the Secretary with respect to any complaint filed under subsection (a) do not resolve the complaint, the Secretary shall notify the person who submitted the complaint of—
(1) the results of the Secretary's investigation; and
(2) the complainant's entitlement to proceed under the enforcement of rights provisions provided under section 4323 (in the case of a person submitting a complaint against a State or private employer) or section 4324 (in the case of a person submitting a complaint against a Federal executive agency or the Office of Personnel Management).
(f) This subchapter does not apply to any action relating to benefits to be provided under the Thrift Savings Plan under title 5.

§ 4323. Enforcement of rights with respect to a State or private employer

(a) Action for Relief.—
(1) A person who receives from the Secretary a notification pursuant to section 4322 (e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.
(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—
(A) has chosen not to apply to the Secretary for assistance under section 4322 (a) of this title;
(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or
(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.
(b) Jurisdiction.—
(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.
(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.
(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

§ 4323. Enforcement of rights with respect to a State or private employer (continued)

(c) Venue.—
(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.
(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.
(d) Remedies.—
(1) In any action under this section, the court may award relief as follows:
(A) The court may require the employer to comply with the provisions of this chapter.
(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.
(2)
(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.
(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.
(e) Equity Powers.— The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.
(f) Standing.— An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).
(g) Respondent.— In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.
(h) Fees, Court Costs.—
(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

§ 4323. Enforcement of rights with respect to a State or private employer (continued)

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.
(i) Inapplicability of State Statute of Limitations.— No State statute of limitations shall apply to any proceeding under this chapter.
(j) Definition.— In this section, the term "private employer" includes a political subdivision of a State.

§ 4324. Enforcement of rights with respect to Federal executive agencies

(a)
(1) A person who receives from the Secretary a notification pursuant to section 4322 (e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.
(2)
(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.
(B) If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.
(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—
(1) has chosen not to apply to the Secretary for assistance under section 4322 (a);
(2) has received a notification from the Secretary under section 4322 (e);
(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).

§ 4324. Enforcement of rights with respect to Federal executive agencies (continued)

(c)
(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.
(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.
(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.
(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.
(d)
(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.
(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

§ 4325. Enforcement of rights with respect to certain Federal agencies

(a) This section applies to any person who alleges that—
(1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or
(2) the failure of such agency to reemploy the person under such section was otherwise wrongful.

§ 4325. Enforcement of rights with respect to certain Federal agencies (continued)

(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.
(c) In prescribing procedures for the investigation and resolution of allegations under subsection (b), the head of an agency shall ensure, to the maximum extent practicable, that the procedures are similar to the procedures for investigating and resolving complaints utilized by the Secretary under section 4322 (d).
(d) This section may not be construed—
(1) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter or information relating to the rights and obligations of employees and Federal agencies under this chapter; or
(2) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

§ 4326. Conduct of investigation; subpoenas

(a) In carrying out any investigation under this chapter, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to and the right to interview persons with information relevant to the investigation and shall have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or employer that the Secretary considers relevant to the investigation.
(b) In carrying out any investigation under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.
(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.
(d) Subsections (b) and (c) shall not apply to the legislative branch or the judicial branch of the United States.

SUBCHAPTER IV—MISCELLANEOUS PROVISIONS

§ 4331. Regulations

(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.
(b)
(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.
(2) The following entities may prescribe regulations to carry out the activities of such entities under this chapter:
(A) The Merit Systems Protection Board.
(B) The Office of Special Counsel.
(C) The agencies referred to in section 2303 (a)(2)(C)(ii) of title 5.

§ 4332. Reports

The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 4324 (a)(1) and no later than February 1, 2005, and annually thereafter, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:
(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.
(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.
(3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.
(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).
(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.
(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

§ 4333. Outreach

The Secretary, the Secretary of Defense, and the Secretary of Veterans Affairs shall take such actions as such Secretaries determine are appropriate to inform persons entitled to rights and benefits under this chapter and employers of the rights, benefits, and obligations of such persons and such employers under this chapter.

§ 4334. Notice of rights and duties

(a) Requirement To Provide Notice- Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

(b) Content of Notice- The Secretary shall provide to employers the text of the notice to be provided under this section.'.

(c) Implementation- (1) Not later than the date that is 90 days after the date of the enactment of this Act, the Secretary of Labor shall make available to employers the notice required under section 4334 of title 38, United States Code, as added by subsection (a).

(2) The amendments made by this section shall apply to employers under chapter 43 of title 38, United States Code, on and after the first date referred to in paragraph (1).

Sample Company Policies on USERRA

Company 1 Example Policy

I. Military Leave under the National Guard and Military Reserve
A. Purpose

This Policy outlines the employment and reemployment rights of employees who enter either active or inactive training duty or service in the military while currently employed at XXXXXX, North America (the "Company").
B. Definitions

Differential Pay. The payment to the employee which is equal to the difference between military service pay received by the employee and the employee's regular pay for a similar period of time.
Regular Pay. *The salary, exclusive of overtime pay and other allowances, which an employee normally would have received during the pay periods he or she serves on military duty.*
Military Pay. *The military service payment received by an employee which includes base pay plus any other pay allowances, such as hazardous or special duty pay, but which excludes quarters, rations and subsistence allowance.*
Military Leave Under the National Guard & Military Reserve
An employee who is a member of the United States Army, Navy, Air Force, Marines, Coast Guard, National Guard, Reserves or Public Health Service (the "Uniformed Services") will be granted a partially paid leave for a maximum of six months of absence for military service, training or related obligations in accordance with applicable law. If the employee is on leave for greater than six months, the leave will be unpaid leave. At the conclusion of the leave, upon the satisfaction of certain conditions, an employee generally has a right to return to the same position he or she held prior to the leave or to a position with like seniority, status and pay that the employee is qualified to perform.

Requests for Military Leave

Leave for Active or Reserve Duty

Upon receipt of orders for active or reserve duty, an employee should notify his/her supervisor, as well as Human Resources, as soon as possible, and submit a copy of the military orders to his/her supervisor and the Human

Resources Department (unless he/she is unable to do so because of military necessity or it is otherwise impossible or unreasonable).

Leave for Training and Other Related Obligations (e.g., fitness for service examinations)

Employees will also be granted time off for military training (normally 14 days plus travel time) and other related obligations, such as for an examination to determine fitness to perform service. Employees should advise their supervisor and/or department head of their training schedule and/or other related obligations as far in

advance as possible. Employees should retain their military pay vouchers. Upon return from training, the employee should submit his/her military pay voucher to the Human Resources Department; the Company will pay an employee's regular salary, less military pay, for the training period.

Return from Military Leave

Notice Required

Upon return from military service, an employee must provide notice of or submit an application for reemployment in accordance with the following schedule:

An employee who served for less than 31 days or who reported for a fitness to serve examination, must provide notice of reemployment at the beginning of the first full regular scheduled work period that starts at least eight hours after the employee has returned from the location of service.

An employee who served for more than 30 days, but less than 181 days, must submit an application for reemployment no later than 14 days after completing his/her period of service, or, if this deadline is impossible or unreasonable through no fault of the employee, then on the next calendar day when submission becomes possible.

An employee who served for more than 180 days must submit an application for reemployment no later than 90 days after the completion of the uniformed service.

An employee who has been hospitalized or is recovering from an injury or illness incurred or aggravated while serving must report to the Human Resources Department (if the service was less than 31 days), or submit an application for reemployment (if the service was greater than 30 days), at the end of the necessary recovery period (but which may not exceed two years).

DocumentationRequired

An employee whose military service was for more than 30 days must provide documentation within two weeks of his/her return (unless such documentation does not yet exist or is not readily available) showing the following:

- the application for reemployment is timely (i.e. submitted within the required time period);
- the period of service has not exceeded five years; and
- the employee received an honorable or general discharge.

Continuation of Health Benefits

During a military leave of less than six months, an employee is entitled to continued group health plan coverage under the same conditions as if the employee had continued to work. For military leaves of more than six months, an employee may elect to continue his/her health coverage for up to 18 months of uniformed service, but will be required to pay the entire premium for the continuation coverage. [NOTE: Employees and/or dependents who elect to continue their coverage may not be required to pay more than 102% of the full premium for the coverage elected. The premium is to be calculated in the same manner as that required by COBRA.]

Pay Differential

A salary differential (or Differential Pay), consisting of the difference between Company salary and military wages (before taxes) will be paid for up to six months while an employee is on active military duty. Where an Employee is entitled to Differential Pay under this policy and to payment under the union Military Leave of Absence policy Human Resources will review these situations and may reduce Differential Pay by the amount received through the union program. Any pay differential for a specific period of time will be determined upon presentation by the employee of military pay records for that period of time, excluding any food allowances. It is the employee's responsibility to provide documentation of his/her military compensation on which to base differential pay. Employees must provide a copy of their Leave Earnings Statement to _____in payroll. Employees may fax statement to _____.

Retirement Savings Plans

Membership in the Company's tax qualified Retirement and Savings Plans will be continued while an employee called to active duty is on paid leave of absence. Should the active duty extend beyond six months, membership will be suspended for the duration of the military leave of absence. Upon return to work, the period of leave will be credited to the employee's service under the Plan for vesting, as well as benefit and or contribution purposes. A more detailed explanation of an employee's rights in this regard will be provided upon the employee's return to work.

Life Insurance and Accidental Death & Dismemberment

Basic and optional employee and dependent life insurance coverage is extended for thirty days from the beginning of the leave of absence. Upon return to work, coverage will commence with no waiting period. Dependent coverage will also commence with no waiting period.

Disability

Disability coverage continues until the end of the month in which the employee enters active military status. This coverage does have an exclusion for disabilities caused by acts of war or terrorism.

Travel Accident

Benefits are payable due to war or act of war under our blanket accident insurance program. This benefit can be changed or revoked given a 31-day notice. All employees will be notified if any changes occur

Paid Time Off (PTO)

At the request of the employee, regular salary will be paid for any unused PTO entitlement. After returning to work, the employee will be eligible for full PTO entitlement as of the January 1st, with length of service to include the military leave. Once the six months of paid leave has expired, employees may begin to use any remaining PTO. An exception will be granted for those employees who are called to duty and cannot make use of their PTO entitlement. We will allow employees, in this situation, to rollover greater than the ten-day maximum carry-over.

II. UAW Labor Agreement language

(112) Employees who enter either active or inactive training duty or service in the armed forces of the United States will be given a leave of absence subject to the conditions herein. Upon submission of satisfactory proof of pending induction for active service, such employees may arrange for the leave up o thirty days prior to the induction date.

The leave shall not exceed the term of the initial enlistment and one (1) consecutive re-enlistment. In no event will the period of such leave exceed a total of eight (8) years, except when additional service in involuntary. Seniority will accumulate during the period of such leave. Upon termination of such leave, employees shall be offered re-employment in their previous position or a position of like seniority, status and pay, unless the circumstances have so changed as to make it impossible or unreasonable to do so, in which event they will be offered such employment in line with their seniority as may be available which they are capable of doing at the current rate of pay for such work, provided they meet the following requirements:
1. Have not been dishonorably discharged.
2. Are physically able to do the work.
3. Report for work within ninety days of the date of such discharge, or ninety days after hospitalization continuing after discharge.
(112a) The seniority of any employee who fails to report for work within the times specified in Paragraph (112) (3) shall be automatically broken, unless the employee gives a satisfactory reason for such failure to report.
(112b) As used in this paragraph, "Armed Forces of the United States" is defined as an limited to the United States Army, Air Force, Navy, Marine Corps, Coast Guard, National Guard, Air National Guard or any reserve component thereof.
(112c) Employees with seniority who are spouses of employees who enter active duty services in the Armed Forces of the United States and who obtain a leave of absence in accordance with Paragraph (112), may make written application to the Personnel Department for a leave of absence for the period of the spouse's initial enlistment but in no event to exceed four (4) years. Such leaves may be granted by management and will be subject to the conditions set forth in Paragraph (111). Seniority will accumulate during the period of such leaves.
(112d) Employees with seniority in any Allison Engine Company plant who are called to and perform short-term active duty of thirty (30) days or less, including annual active duty for training, as a member of the United States Armed Forces Reserve or National Guard, shall be paid as provided below for days spent performing such duty provided they would not otherwise be on layoff or leave of absence.

1. A payment will be made for each day, except for a day for which they receive holiday pay, which they would otherwise have worked equal to the amount by which their straight time rate of pay as of their last day worked plus applicable night shift premium (but not including overtime) for not more than eight (8) hours, exceeds their military earnings for that day including all allowances except for rations, subsistence and travel. Except for short term active duty of thirty (30) days or less performed by employees called to active service in the National Guard by state or federal authorities in case of public emergency, payment is limited to a maximum of fifteen (15) working days in a calendar year.
2. In order to receive payment under this Paragraph (112d), employees must give local Management prior notice of such military duty and, upon their return to work, furnish Management with a statement of the military pay received for performing such duty.

III. Service Representative Deployment Policy

Deployment Within Hostile Zones

Occasions may arise when the duties of a Service Representative entail a visit or assignment to areas which can be classified as hostile; e.g., deployment on an aircraft carrier within a zone of military activity, or being present within a territory involved in war, insurrection or terrorist activity, etc.
A current list of countries defined as "war zones" is maintained by the insurance companies.
When visiting or assigned to such hostile zones, notification of each such visit or assignment is necessary. Accordingly, the appropriate Manager must notify the Human Resources Department, in writing and in advance of any such visit or assignment providing the name(s) of the Service Representative(s) concerned, with as much detail as possible regarding anticipated duration of the visit or assignment and travel arrangements, with departure and return dates.
Any deployment of an employee on an aircraft carrier is to be notified in writing to the Human Resources Department. This will cover the possible situation of the carrier being diverted from a "non-hostile" to a "hostile" zone during the course of the assignment.

Shipboard Deployment
The following guidelines are provided to assist in making arrangements prior to an overseas carrier deployment.

1. Passport, Visas, Identification
   Please contact International Human Resources Department in Chantilly.

2. Medical
   a) A medical examination within the past year is required. Records of outstanding medical problems should be carried.

   b) An immunization record is required. A Naval medical department can determine what vaccinations are required for the countries to be visited.

   c) Dental care should be seen to prior to leaving.

3. NATEC – Naval Air Technical Engineering Command

   a) A Company letter to NATEC office, San Diego, CA is required.

   b) Endorsement is required upon arriving and upon departing the assigned task location. Orders will be issued by the on-site NATEC office directing the Representative to the relocation task assignment.

4. Letter of Instruction (LOI)
   Some deploying squadrons publish an LOI which contains helpful information such as:
   a) Mailing address while deployed, telegram to and from the ship.

   b) List of personnel deploying.

   c) Outlines the operation and commitments, administrative, logistics and maintenance responsibilities.

   d) Other aviation units aboard for the deployment.

   e) Do's and don'ts aboard a Navy ship.
5. Squadron Equipment Issued

a) Flight deck helmet, goggles and life vests should be checked out prior to leaving for the ship.

b) Cold weather clothing is available as required.

c) A cruise box, which is 8 cubic feet and, can be locked is available for private use.

d) Safety shoes are required as are long sleeved shirts.

6. Nice to Know
   a) There will be limited living and storage space.
   b) Laundry and cleaning facilities are available aboard. Laundry and dry cleaning bags should be obtained before embarkation from the local PX. Coveralls and wash and wear type clothing is highly recommended.
   c) Nice to have items: flashlight, extra batteries, night light with red bulb, radio/cassette player with headset, books, ear plugs.

   d) International driver's license is required and can be obtained through the local AAA office.

Shipboard Deployment Allowance

In recognition of the loss of liberty and inconvenience associated with living and working conditions aboard aircraft carriers, those assigned to a carrier for more than 14 days will receive a 25% premium. Such payment is effective upon start of the assignment and will be paid upon completion of assignment following receipt of written manager's authorization.
A daily allowance of $25 for meals and $8 for miscellaneous expenses may be claimed to help defray the costs of mess charges for any periods spent on shipboard deployment.

Land Deployment

In recognition of difficult living and working conditions while deployed on land, in the field and in certain geographic regions, employee will receive a 25% premium plus daily meal and miscellaneous allowances, as outlined above. Qualification for this allowance will be determined on an individual basis upon receipt of the specific conditions of the assignment.
An additional premium of 25% will be paid to those employees stationed temporarily in a crisis area, if and when the U.S. Department of Defense declares the specific geographic area of the assignment to be a hostile fire area. When this declaration becomes effective you will be notified in writing. The premium will be paid semi-monthly. Meal and miscellaneous allowances are reimbursable through GELCO.
The hardship deployment allowances and the hostile fire area premium are income to the employee and, therefore, subject to the usual Federal, State, and Local income tax. When deployed in an area where hotel accommodation is appropriate, the usual reasonable hotel, meal and miscellaneous allowance may be claimed in lieu of a hardship allowance.
The premiums and allowances are not included in base pay for purposes of any employee benefit plan.

IV. XXXXXX Benefits Coverage During War or Terrorism
U.S. Benefits At-A-Glance

	Regular Business Traveler Caught In Hostile Environment (War or Terrorism)	Active Employee Assigned to Work in Hostile Environment (War or Terrorism) (ex. Military Service Rep)		Military Reserves
Health Benefits	No exclusions in case of war or terrorism. Claims would be covered under XXXX health plans. Depending on injury, may coordinate with Workers Comp.	No exclusions in case of war or terrorism. Claims would be covered under XXXX health plans. Depending on injury, may coordinate with Workers Comp.		• RRNA Active covg. first 6 months & then 18 months Cobra Military coverage primary for employee and XXXX plan primary coverage for dependents
Life & AD&D Insurance	Basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.	Basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.		Coverage ends thirty days from beginning of leave. During the first thirty days, basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.
Disability	Not covered during acts of war or terrorism.	Not covered during acts of war or terrorism.		Not covered during acts of war or terrorism. Covg under U.S. government plan.
Travel Accident Insurance	Currently covered except for acts of war in Iran, Iraq, Pakistan, Afghanistan, Syria, and Israel *	Currently covered*		Not covered
Workers Compensation	Covered under XXXX program.	Covered under XXXX program.		Covered under U.S. government plan.

* This benefit can be changed or revoked given a 31-day notice. All employees will be notified if any changes occur.

Company 2 Example Policy

This memorandum establishes and authorizes the special pay and benefit arrangements to be extended to XXXXXXX employees called to active duty military service as a result of the terrorist attacks on September 11. These arrangements apply to all employees, salaried and hourly, in all operating units and are an expansion of our current policies.

1. Employees will be eligible to receive pay differentials to make up for any shortfall between their military rate and their XXXXXXXX base pay **for a period of up to 6 months immediately following activation**. Any differential pay will be determined upon presentation by the employee of military pay records. The military rate is defined as military base pay, and any specialty pays such as flight pay, jump pay, etc.

   It is the employee's responsibility to provide documentation of the pertinent military compensation on which to base differential pay. This is independent of any differential paid during annual training periods.

2. During the period differential pay is being provided by the Company the called-up employees may choose to keep their Value 2001 Insurance elections as of the date of call-up in-force or they may within 31 days of call-up, elect to drop certain coverage for themselves or dependents. If after being called-up the individual receives new orders that extend the period of service beyond what was initially anticipated, employees will again have a 31 day period following receipt of those orders to change coverage elections for themselves and dependents. In order to keep employee and/or dependent benefits in effect during the interval between the employee's call-up and return to active XXXXXXX service, the employee must pay the employee contribution required by the Benefit Plan in effect just prior to call-up for the benefits he/she elects to keep.

   The above benefit arrangement applies to the first 6 months following call-up to active service and meets or exceeds the company's obligation for the period as specified in the Uniform Services Employment and Reemployment Rights Act of 1994, which was signed into effect October 13, 1994. The act requires that health care coverage must remain available to called-up employees and their dependents for a total of 18 months. XXXXXXX will comply with the basic requirements of the Act by making the health care (medical, dental and vision) COBRA options available to those employees and their families for the 7th through 18th month of call-up.

   During the period the employee is on Military Leave, the Government provided medical, dental and vision benefits will be primary for the employee and XXXXXXX sponsored benefit plans will be the secondary payer. All exclusions and limitations on claims resulting from an Act of War will apply.

3. Employees can elect to receive pay for all unused and accrued vacation at the time of call-up, or to leave that vacation on the books and available to be taken if the employee is released and returns to active employment.

4. Defined Contribution Plan accounts (i.e. 401(k) plans) will remain intact for employees called to active duty in this instance. Withdrawals may be made in accordance with provisions of the plan**. Returning employees will be permitted to make up contributions and also receive any associated Company match that would have been made if they had not been called-up.**

5. Upon release from active duty, reinstatement will be in accordance with current veteran's reemployment rights.

Company 3 Example Policy

Military Leave Policy

1.0 Policy

It is XXXXXXX policy to support its employees who serve in the uniformed military services by accommodating their temporary military duty-related absences from work and reducing the economic hardship resulting from such absences by providing differential pay in some situations.

2.0 Implementation

2.1 Military duty includes the performance of duty in the uniformed services of whatever nature, voluntary and involuntary, for up to five years, subject to the exceptions in the Uniformed Services Employment and Reemployment Rights Act (USERRA). If an employee's military duty exceeds a cumulative total of five years, then the element should obtain advice and direction regarding USERRA requirements from local Legal Counsel.

Notice of Military Duty

2.2 The employee will provide advance notice of military duty (at least one week's notice, when practical) to his or her immediate manager. The notice may be oral or in the form of written orders or other available documentation that indicates the anticipated length of the military duty. Notice is not required if military necessity prevents giving notice or if giving notice is otherwise impossible or unreasonable under the provisions of USERRA.

2.3 A copy of the written orders or other available documentation must be sent by mail or fax to the XXXXXXX Employee Service Center, who will process the leave and notify the employee's immediate manager.

Payment for Military Duty

2.4 XXXXXXX will pay employees for their annual military duty up to the lesser of 15 days, 120 hours, or three workweeks in a calendar year (the "Annual Military Allotment"). The days of Annual Military Allotment do not have to be taken consecutively. After the Annual Military Allotment has been exhausted, any additional military duty will be unpaid.

a) A "workweek" is a fixed and regularly recurring period of 168 hours (i.e., seven consecutive 24-hour periods), established for the employee by the element. See Corporate Policy on Hours of Work and Work Schedules.

b) The Annual Military Allotment for regular part time employees will be based on time scheduled to be worked.

c) The Annual Military Allotment for represented employees will be as defined in the applicable collective bargaining agreements.

d) The wage and hour legal restrictions that apply to certain partial day and partial week absences by exempt salaried employees may require an extension of the Annual Military Allotment for such employees.

e) In extenuating circumstances, the Senior Vice President Human Resources may authorize paid military duty beyond the Annual Military Allotment.

2.5 Employees on military leave will receive Full Pay or Differential Daily Pay during the Annual Military Allotment, as specified in Table A below. The difference between Full Pay and Differential Daily Pay is a wage advance that will be offset against future earnings via payroll deduction when the employee has completed military duty and returned to work.

a) "Full Pay" is XXXXXXX straight pay without diminution or offset.

b) "Differential Daily Pay" is the difference between lower military pay and higher Full Pay. Differential Daily Pay is computed on a daily basis and includes shift premium, where applicable. It does not include allowances (such as for subsistence, quarters, travel, or expenses) or military pay received on non-XXXXXXX workdays. "Non-XXXXXXX workdays" are days on which the employee is not regularly scheduled to work, such as Saturday or Sunday for an employee who is regularly scheduled to work Monday through Friday, or every other Friday for an employee on a 9/80 schedule.

Table A
Payment of Differential Daily Pay and Full Pay

IF the employee ...	**THEN ...**
Performs Military Duty for the entire workweek	the employee will receive Differential Daily Pay for the entire workweek.
Performs Military Duty for part of a day during the workweek, and works for XXXXXXX for part of that same day	an hourly or non-exempt salaried employee will receive Full Pay for the hours worked for XXXXXXX and Differential Daily Pay for hours reported as paid military. an exempt salaried employee will receive Full Pay for the entire day.
Performs Military Duty for part of the workweek, and works for XXXXXXX for the rest of that same workweek	the employee will receive Differential Daily Pay for the day(s) reported as paid military and Full Pay for the days worked for XXXXXXX.

2.6 Before going on military leave, the employee will sign a payroll deduction agreement authorizing XXXXXXX to collect the amount of wages advanced during the period of military leave that exceeds the Differential Daily Pay due for the same period.

2.7 During the period of paid military duty the employee should account for his or her time in accordance with the applicable XXXXXXX time and attendance practices. The employee cannot charge time to military leave that is not covered by orders or other military documentation.

2.8 Within 15 business days after military duty is completed, the employee will submit to the XXXXX a Labor Earnings Statement (LES) from an appropriate agency of the government, showing the amount of pay received for the military duty. The employee's pay will be reduced or offset by the adjusted gross earnings received for military duty performed during the employee's regular workweek(s). If the employee's military pay exceeds his or her Full Pay, then the employee must repay all Full Pay to XXXXXXX.

Vacation

2.9 The employee may authorize full or partial payout of his or her unused vacation accrual. The vacation payout will be in the form of a lump sum, less all applicable legal withholdings. The employee never will be required to use vacation in connection with military leave.

Extensions

2.10 If while on military leave it is necessary to request an extension, the employee should make the request in a timely manner (preferably in writing) with any appropriate supporting documentation. Notice is not required if military necessity prevents giving notice or if giving notice is otherwise impossible or unreasonable under the provisions of USERRA.

Benefits

Employee who is on Paid Military Duty

2.11 All benefits will continue at the employee's normal contribution rate.

2.12 The employee will receive credited service and other seniority-based rights (and any other rights or benefits in accordance with USERRA) for the time spent on military leave, if he or she returns to work upon release from military duty within the time limitations and requirements of USERRA. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law.

2.13 Employee and employer savings plan contributions, benefits, and service credit will be provided in accordance with USERRA and the terms of the applicable plan documents.

Employee who is on Unpaid Military Duty

2.14 Medical, dental, vision, and health care reimbursement benefits will continue for the first 31 calendar days of military leave at the employee's normal contribution rate. After 31 calendar days the employee will be entitled to continue coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and USERRA for a period of up to 18 months. The employee will not be required to pay more than 102% of the full premium for the benefit coverage. Under certain circumstances, involving "multiple qualifying events," COBRA may provide continuation beyond the 18 months required by USERRA.

2.15 The employee will receive credited service and other seniority-based rights (and any other rights or benefits in accordance with USERRA) for the time spent on military leave, if he or she returns to work upon release from military duty within the time limitations and requirements of USERRA. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law.

2.16 Employee and employer savings plan contributions, benefits, and service credit will be provided in accordance with USERRA and the terms of the applicable plan documents. Generally, contributions that would have been made during periods of qualified military service can be repaid by the returning employee over a period three times the period of military service, but no longer than five years. If the returning employee's repayment contributions relate back to years other than the current calendar year, these contributions will count toward the Internal Revenue Service (IRS) annual defined contribution plan limits on contributions for the years to which the repayments relate, rather than toward the current year's limits. Employer contributions will be based on amounts repaid by the employee. Loan repayments will be suspended during qualifying periods of military service.

Reinstatement/Termination

2.17 An employee who returns to work upon release from military duty within the time limitations and requirements of USERRA and any other applicable state law will be entitled to reinstatement rights consistent with USERRA and any other applicable federal or state law. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law, including USERRA provisions that may restrict layoffs for certain periods of time.

2.18 An employee who does not return to work within the time limitations and other requirements specified by USERRA and any applicable state law will be administratively terminated from employment without severance eligibility.

2.19 The effective date of termination for an employee who was on *paid* military duty will be the last regularly scheduled workday of the approved absence. The effective date of termination for an employee who was on *unpaid* military duty will be the last regularly scheduled workday prior to being placed on unpaid status.

Expatriate Employees

2.20 Employees on international assignment will remain on the international payroll for the period of annual military duty. Employees who enlist or are called to active duty will be transferred to the domestic payroll, then placed on military leave.

3.0 General

3.1 This policy is intended to comply with USERRA and the Fair Labor Standards Act, among other federal and state laws.

3.2 Nothing in this policy will be construed to supersede any provision of any federal, state, or local law or collective bargaining agreement that provides greater rights than those outlined herein.

3.3 No provisions of this or any other XXXXXXX policy or procedure will be construed as an employment agreement. Employment with XXXXXXX can be terminated at any time with or without cause either by the employee concerned or by XXXXXXX.

3.4 Any deviation from this policy requires the prior approval of the Senior Vice President Human Resources or designee.

Company 4 Example Policy

Military Affairs Administration
Purpose/Summary

This procedure applies to **XXXXXX** employees who are members of, or apply to be members of, a uniformed service of the United States or who have performed, apply to perform, or have an obligation to perform service in such a uniformed service.

This procedure provides the standards governing payment of military differential pay for employees who are ordered to report for active duty or training duty.

Employees covered by collective bargaining agreements will be governed by the applicable agreement as well as this procedure with the agreement having precedence.

This procedure does not constitute a contract or contractual obligation, and the Company reserves the right, in its sole discretion] to amend, modify, or discontinue its use without prior notice, notwithstanding any person's acts, omissions or statements to the contrary.

This procedure applies to all segments of **The XXXXXX Company**, including subsidiaries (as implemented by resolution of the subsidiary Board of Directors).

Business segment sites may choose to not implement this procedure or choose only to implement specific provisions of this procedure. If applicable, the site will have a documented writing addressing this subject. Employees should contact their manager or People organization about the applicability of this procedure at their site.

Summary of Changes to the Title Page

The Issue Date, Purpose/Summary, Supersedes date, Applies to, Maintained by and Approved by information sections have changed. Otherwise, this is a major revision.

1. Definitions

The definitions of the following terms used in this procedure are for purposes of this procedure only and have no effect on the meaning of the same or similar terms used in other documents.

A. Military Differential Pay

The difference between an employee's gross military compensation and their regular XXXXXX pay (working rate of pay). Military compensation includes but is not limited to Base Pay, Foreign Duty Pay, Special and Incentive Pay and Housing (Basic Allowance for Housing (BAH)/Basic Allowance for Quarters (BAQ)). Subsistence (does not include Housing (BAH/BAQ)), uniform, and travel allowances will not be included in determining military compensation. For purposes of calculating military differential pay, a five-day workweek will be used.

B. Original Work Location

Principal XXXXXX work location at time of military service (e.g.) Anaheim, Huntington Beach, Huntsville, Long Beach, Philadelphia, Portland, Puget Sound, Seal Beach. Spokane, St. Louis, Wichita.

C. Uniformed Service

Army, Navy, Marine Corps, Air Force, Coast Guard, and their reserves, Army National Guard or Air National Guard, and Commissioned Corps of the Public Health Service.

D. Working Rate of Pay

The employee's hourly base rate plus any additive rates.

2. Requirements

A. The Company will comply with all state and federal laws and regulations that apply to reemployment of employees returning from a leave of absence after active U.S. uniformed service.

B. The Company will make every reasonable effort to cooperate with the U.S. uniformed services. However, the Company reserves the right to contact military administrators in instances where an employee's time away from work exceeds normally expected amounts.

C. Military Leave of Absence

1. When an employee has orders to report for active duty, annual active duty or temporary special duty in the uniformed service of the United States, a leave will be granted for the period of service in accordance with procedure _____, 'Leave of Absence."

2. Employees on a leave of absence for active duty, annual active duty or temporary special duty may not may not return to work until the period of service is completed.

3.,. A leave of absence for military service shall not exceed five (5) years unless required by the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.

4. Company service will continue to accrue while on a military leave of absence for up to five years or longer if required by applicable laws.

5. Employees may use available vacation credits while on a military leave. Military pay differential is not applicable when using vacation credits. Vacation credits will continue to accrue during the first 90 calendar days of the leave of absence.

6. Employees may not use available sick leave credits while on military leave. Sick leave credits will continue to accrue during the first 90 calendar days of the leave of absence.

7. Employees are eligible for Company paid holidays occurring during the first 90 calendar days of military leave. Military differential pay is not applicable on a Company paid holiday.

D. Time Off and Military Differential Pay for Members of a Reserve Component Called to active duty.

Note: Provisions of this section do not apply to employees who volunteer for enlistment or re-enlistment into the Armed Forces during the initial period of active duty.

1. Members of a reserve component of a uniformed services who are ordered to annual active duty are eligible for military differential pay up to a maximum of 80 hours each military fiscal year (October 1 - September 30) or longer if required by applicable laws.

2. Members of a reserve component of the uniformed services who are ordered to temporary special duty in time of war, national or state emergency as outlined below in 2.a. through 2.e., herein referred to as call-up" are eligible for military differential pay for up to a maximum of 90 calendar days of active duty for each occurrence. Extension of military differential pay beyond 90 days may be approved on a case-by-case basis for each call-up. This approval will be based on the call-up and not on an individual employee basis. Military differential pay will end upon the employee's release from active duty.

a. Military U.S. Code Title 10; USC Chapter 1209; under the following sections:

Section 12301
Section 12302
Section 12304

b. Mobilized by the applicable state agency for a state emergency.
c. Mobilized for service as an intermittent disaster-response appointee when the Secretary of Health activates the National Disaster Medical System.

d. The military differential pay under this provision is in addition to the 80 hours of annual active duty described in 2.D.1.

e. Only copies of original orders with documentation of qualifying Title 10 sections as defined in 2.D.2.a. will be accepted. Letters from commanding officers will not be accepted.

3. Employees will retain all compensation received from the uniformed services. If the employee's military compensation is less than their regular

XXXXXX pay (working rate of pay), the employee will receive pay for the difference upon receipt of the employee's leave and earnings statement. Employees on U.S. Code Title 10 call-ups should regularly submit leave and earnings statements to receive differential pay while serving. Subsistence (does not include Housing (BAH/BAQ)), uniform, and travel allowances will not be included in determining military pay.

4. Excluded from military differential pay is any active or inactive duty training whereby the employee does not receive military pay (no pay status). However, such training may qualify under the employee's organizational education and training guidelines if the training is relevant to the employee's job and is not offered through the Company's education and training program (i.e. seminars and conferences).

5. Employees may use available vacation credits while on a military leave. Military pay differential is not applicable when using vacation credits.

6, Employees may not use available sick leave credits while on military leave.

7. Employees are eligible for Company paid holidays occurring during the first 90 calendar days of military leave. Military differential pay is not applicable on a Company paid holiday. Employees eligible for extended military differential pay as defined in section 2.D.2. will continue to receive such pay for unpaid holidays after 90 calendar days,

E. Reemployment Rights

To qualify for reemployment rights following military service, employees must meet the following criteria as defined by the Uniformed Services Employment and Reemployment Rights Act of 1994 (U.S. Code Title 36, Chapter 43):

a. The employee gave notice prior to taking military leave.

b. The period of military leave has not exceeded five years unless otherwise exempt under the provisions of this act (Section 4312 (c)).

c. The employee's release from military service was under 'honorable conditions."

d. The employee reported back to work or applied for reemployment within 90 days of completion of service.

e. During an employment reduction, managers will review employees who are on military leaves of absence using the same layoff selection processes as if those employees had remained at work. If required, affected employees on an approved leave of absence will receive an advanced notification of layoff. Upon return from the eave of absence, employees will be subject to appropriate redeployment actions, which may include reassignment or layoff. If applicable, employees can remain on a military LOA up to 90 days following completion of duty. However, if an employee is subject to layoff upon return to work the termination date will be the day following completion of active duty.

2. Employees are eligible for reemployment at their original work location. Reference Exhibit A for specific provisions regarding reinstatement and job rights.

3, Employees may apply for reemployment at another work location. However, they are not entitled to reemployment rights at the new location.

3. Responsibilities

A. Employee

1. Provide management with advance notice of required uniformed service unless it is unreasonable or impossible to do so.

2. Request a leave of absence in accordance with procedure PRO-1874, 'Leave of Absence."

3. Provide the appropriate payroll center with a copy of military orders prior to annual active duty or special temporary duty. Changes to original military orders require a new set of orders. Changes to .original military orders on letterhead stationary or facsimile will not be accepted. Upon return or before, provide a copy of the appropriate military leave and earnings statement in order to ensure proper and timely payment. A substitute voucher or facsimile will not be accepted.

4. Employees on U.S. Code Title 10 call-ups should regularly submit leave and earnings statements to receive differential pay while serving.

5. After completion of military service, return to work through the resident return to work process and make application for reemployment within 90 days of completion of service.

B. Manager

1. Allow employees to meet their uniformed service obligations.

2. Ensure that the employee provides the payroll center with a copy of their military orders before departure to annual active duty or special temporary duty and, during or upon return, provides the payroll center with a copy of their military leave and earnings statement. No substitute payment voucher or facsimile will be accepted.

3, Ensure employee absence is properly recorded.

4. Review with the appropriate People organization before any final action is taken to process a downgrade, suspension, or involuntary termination of a reinstated veteran during the first year of the veteran's return from military service. This action is required to ensure compliance with the Uniformed Services Employment and Reemployment Rights Act of 1994.
5. Review and determine if any military training not eligible for military differential pay may qualify under the organization's education and training guidelines.

C. People/Human Resources Organization

1. Counsel, coordinate, and assist employees and managers on all uniformed service duty and reemployment matters.

2. Counsel and assist employees and managers on matters relating to military regulations as they affect company employee relations.

D. Payroll

Analyze and interpret military orders and leave and earnings statements for qualifications and approval of military differential pay.

E. Employment

Counsel, coordinate, and assist employees and the People organization on reemployment matters.

F. World Headquarters Global Diversity and World Headquarters Compensation and Benefits

1. Interpret this procedure as required.

2. Initiate action necessary to keep this procedure up to date.

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT, I AM BEING MOBILIZED, WHAT ABOUT MY CIVILIAN JOB?

Rocco J. Maffei[1]

In March 2005, 6,500 former soldiers in the Individual Ready Reserve received notices ordering them to report to an Army installation as they were being recalled to active duty.[2] As the United States military commitments in Afghanistan and Iraq continue to be at high levels, employers are faced with difficult decisions concerning their employees with National Guard and reserve responsibilities. "An increasing number of U.S. soldiers deployed in Iraq have gray mustaches, bald heads, and noticeable paunches as more reservists and National Guard units are being sent to war."[3] The percentage of Reserves, National Guard and IRR in *Operation Iraqi Freedom* (OIF) is now about 40%.[4] Whether a police officer, trucker, nurse, or pharmaceutical distributor, these individuals leave their everyday jobs to serve the United States through military service. "Once a soldier, always a soldier," said Paul East, a long-haul trucker from Florida.[5]

Brief History of the Act

In October 13, 1994, President Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA). [6] USERRA is a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law. This law became fully effective on December 12, 1994. The Veterans' Benefits Improvement Act of 2004 (VBIA), signed by President Bush on December 10, 2004, modified employer obligations as well as complaint procedures under USERRA.[7]

The basic idea of USERRA, like the VRR law, is that if you leave your civilian job for service in the uniformed services, you are entitled to return to the job, with accrued seniority, provided that you meet the law's eligibility criteria. Like the VRR law, USERRA applies to voluntary as well as involuntary service[8] in peacetime as well as wartime, and the law applies to virtually all civilian employers, including the Federal Government, State and local governments, and private employers, regardless of size. [9] Unlike most Federal labor laws, the VRR law never had a threshold for applicability, based upon the size of an enterprise or the number of employees, and the Fifth Circuit declined to find an implied threshold. [10] If Congress had intended here to be an applicability threshold in

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[2] Vaughan, Chris, Fort Worth Star-Telegram, Mar. 18, 2005
[3] Mooney, Mark, New York Daily News, Feb.15, 2005
[4] Moskos, Charles, The Officer, June 2005
[5] Mooney , Mark, New York Daily News, Feb 15, 2005
[6] 38 U.S.C. 4301-4333, Public Law 103-353, 108 Stat. 3149
[7] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) pages 2-3-2-15, June 1998
[8] Section 4303(13)
[9] Section 4303(4)
[10] See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992)

USERRA, it would have said so expressly, and the lack of an express threshold means that the law applies even to very small employers. [11]

Under USERRA, the District of Columbia government is treated as though D.C. were a state, and the same is true of Puerto Rico, Guam, the Virgin Islands, and the other territories and possessions of the United States.[12] Also, National Guard civilian technicians are treated as state employees, and the state adjutant general is considered to be their employer. [13]

USERRA represents a floor and not a ceiling on the rights of persons who serve or have served in the uniformed services. USERRA does not supersede, nullify, or diminish any federal or state law (including a local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to persons protected by USERRA or is in addition to rights and benefits accorded to those persons by USERRA..[14] USERRA does supersede any State law (including a local law or ordinance), contract, agreement, policy, practice, or other matter that reduces, limits, or eliminates USERRA rights and benefits or that imposes additional prerequisites upon the exercise of such rights or the receipt of such benefits. [15]

Under USERRA, service in the "uniformed services" gives rise to rights. These services include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services.[16] Federal training or service in the Army National Guard and Air National Guard gives rise to rights under USERRA, but state service, pursuant to a call from the governor of the state, is not protected by the federal law, although it may be protected by state law. [17]

Under the VRR law, different rules applied to different categories of military training or service. For example, one set of rules applied to active duty and another to active duty for training. Under USERRA, all categories are treated as "service in the uniformed services," and the rules depend upon the duration of service, not the category.
In order to have reemployment rights following a period of service in the uniformed services, five eligibility criteria must be met.

a. The employee must have held a civilian job. (Discrimination in hiring is prohibited)
b. The employee must have given notice to the employer that he is leaving the job for service in the uniformed services.
c. The period of service must not have exceeded five years.
d. The employee must have been released from service under "honorable conditions."
e. The employee must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.

Leaving a Civilian Job

Under USERRA, unlike the VRR law, a civilian job need not be "other than temporary." Even if the employer considered the pre-service job to have been "temporary," an individual reservist can have reemployment rights unless "the employment [was] for a brief, non-recurrent period and there [was] no reasonable expectation that such employment [would] last indefinitely or for a significant period."[18] This is an affirmative defense for which the employer bears the burden of proof. [19] Under USERRA, the reservist must give prior notice to the employer regardless of the category of the service to be performed.[20] Under the VRR law, prior notice was not required in the case of active duty or initial active duty training. [21] If the reservist entered active duty or initial active duty training prior to December 12, 1994, they will be excused from the notice requirement with respect to that one period of service, but not any subsequent periods.[22] The reservist is only required to notify the employer of the fact of leaving and impending service. He is not required to predict that he will return to the job to apply for reemployment. Like the VRR law, USERRA preserves the option to seek reemployment until a specified period after completion of the service.

Prior notice to the employer is not required if such notice is precluded by military necessity or if such notice is "impossible or unreasonable."[23] There should be rare exceptions to the notice requirement. A classified recall would be an example of a situation wherein notice would be precluded by military necessity. If a reservist is ordered to withhold notification of the fact of recall to active duty, he must obey such an order, and the decision by military authorities that military necessity precluded notice will not be subject to judicial review. [24]This will be a rare circumstance, but it is possible that military authorities could conclude that such secrecy would be required because the activation of a unit with a unique mission or capabilities could tip off a potential adversary to the plans of our military. If reservists are recalled to active duty in the middle of the night and it is impossible to give notice, they will be excused from the notice requirement. [25] Nevertheless, it is a good idea to notify the employer as soon as possible.

Under USERRA, the deploying service member can give the notice, or an appropriate officer of the service can give the notice for the service member. [26] The notice can be written or oral [27], but it is recommended that written notice be given and a copy retained. USERRA does not specify how much notice must be given, but as much advance notice as possible should be provided.

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[11] Cf. King v. St. Vincent's Hospital, 112 S. Ct. 570 (l991) (rejecting any implied limitation on frequency or duration of military leaves of absence under the VRR law)
[12] Section 4303(14)
[13] Section 4303(4)(B)
[14] Section 4302(a)
[15] Section4302(b)
[16] Section 4303(16)
[17] Section 4303(13)
[18] Section 4312(d)(1)(C)
[19] Id.
[20] Section 4312(a)(1)
[21] See 38 U.S.C. 4301(a), 4304(a), 4304(b), 4304(c)(old law).
[22] Section 8(a)(4) of USERRA, not codified, "Transition Rules and Effective Dates"
[23] Section 4312(b)
[24] Section 4312(b)
[25] Section 4312(b)
[26] Section 4312(a)(1)
[27] Id.

The legislative history of this section, indicating the intent of Congress, shows that the reservist will not be penalized if he had little notice from military authorities, but if he intentionally withholds notice to the employer, this will be viewed unfavorably, especially if the lateness of the notice causes serious problems for the employer. [28]

If the period of service is fewer than 31 days, such as a drill weekend or a 12-day annual tour, the documentation required under section 4312(f)(1) of USERRA does not apply. None the less, the service member must prove to their employer that they were performing military service and they should provide a letter from their commander showing their weekend drill periods and annual tour.[29]

Limit on Duration of Service

The period of service in the uniformed services can last up to five years.[30] This limit is cumulative, so long as the reservist is employed by or seeking reemployment with the same employer. When the reservist starts a new job with a new employer, they receive a fresh five-year entitlement.[31]

The passage of USERRA does not give currently employed persons fresh five-year entitlements. If one performed service under the VRR law and is still employed by the same civilian employer, that period of service counts toward USERRA's five-year limit unless it is exempted by one of the VRR law's exceptions to that law's four-year limit.[32]

It is important to note that some categories of military training or service do not count toward the five-year limit. Most periodic and special Reserve and National Guard training does not count [33] and most service in time of war or emergency does not count.[34] If one is retained on active duty past their expiration of active obligated service date, through no fault of their own, such an involuntary extension period does not count toward the five-year limit.[35] For example, if a service member is stationed on a vessel at sea on the service expiration date, he may be involuntarily extended until the ship returns to port.[36]

Under USERRA, the reservist can have reemployment rights if he leaves active duty at the end of the initial period of obligated service, even if that period exceeds five years.[37] For example, if one enlisted in the Navy's nuclear power program, they probably had to agree to serve on active duty for six years. If they seek reemployment following such a period of service and meet the other eligibility criteria, they will have reemployment rights. There are several exceptions to the five-year limit, and some are not as clear as they might be.[38]

If an individual is in any danger of exceeding the five-year limit with their current employer, they should seek advice as to how much of the limit they have already expended and whether a proposed tour of training or service will count toward the limit.

Character of Service

Under USERRA there are no reemployment rights if the reservist receives a punitive discharge or dismissal as a result of a court martial conviction, an "other than honorable" administrative discharge, or if they are "dropped from the rolls" of a uniformed service because of a long period of unauthorized absence or because of a civilian criminal conviction.[39] To receive the protection of USERRA the character of the service must be honorable.

Timely Return to Work

Under USERRA, the deadline to report back to work or to apply for reemployment depends upon the duration of service or training. Following a period of up to 30 consecutive days of training or service, the reservist must report back to work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation from the place of service [in the uniformed services] to the person's residence." [40] For example, if one completes their weekend drills at 4:00 Sunday afternoon, and if it takes five hours to drive home, they need not report to work for a shift that starts at 2:00 a.m. on Monday, because they have not had an opportunity for eight hours of rest.

This deadline is similar but not identical to the VRR law's deadline for returning to work following active duty for training or inactive duty training (drills). [41] The reference to "safe" transportation was added to ensure that reservists not be required to drive all night to be timely in reporting back to their civilian job, and the eight-hour period was added to ensure that they have the opportunity to have adequate rest before returning to work. If one finds it "impossible or unreasonable" through no fault of their own to report back to work the next day, as otherwise required, they must report back to work as soon as possible. [42] For example, an automobile accident on the way home from the drill weekend could extend the deadline by a day or two, even if the reservist is not injured.[43] In Gordon v. Wawa, Inc., however, the 3rd U.S. Circuit Court of Appeals refused to revive a suit brought by the estate of an Army reservist who was ordered to work the night shift immediately upon his return from a weekend of reserve duties and was allegedly

[28] H.R. Rep. 103-65, 103d Cong., 1st Sess., page 26 (April 28, 1993)
See also Burkart v. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988) (upholding firing of National Guard member who withheld notice until the last moment)
[29] Wright, Samuel, The Officer, September 2003
[30] Section 4312(a)(2)
[31] Section 4312(a)(2)
[32] Section 8(a)(3) of USERRA, not codified, "Transition Rules and Effective Dates"
[33] Section 4312(c)(3)
[34] Section 4312(c)(4)
[35] Section 4312(c)(2)
[36] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-6, June 1998
[37] Section 4312(c)(1)
[38] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-6, June 1998
[39] Section 4304
[40] Section 4312(e)(1)(A)(i)
[41] See 38 U.S.C. 4304(d) (old)
[42] Section 4312(e)(1)(A)(ii)
[43] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-7, June 1998

threatened to be fired if he refused. The court found the eight hour period to be the time within which the service member must return to work, not a guaranteed rest period.[44]

Following a period of 31-180 continuous days of service or training, the reservist must submit an application for reemployment within 14 days.[45] If they find it impossible or unreasonable to meet this deadline, through no fault of their own, they must submit the application as soon as possible thereafter.[46] Following a period of 181 or more days of continuous service or training, they must submit an application for reemployment within 90 days.[47] Any of these deadlines can be extended by up to two years if the reservist is hospitalized or convalescing from a service-connected injury or illness.[48]

If the reservist misses one of these deadlines, without adequate cause, they do not automatically lose reemployment rights, but they will be subject to the employer's normal policies concerning explanations and discipline for unexcused absences. [49]
The "application for reemployment" need not be in writing. The reservist is only required to inform the employer that they formerly worked there and are returning from service in the uniformed services.[50]

Following a period of training or service of 31 days or more, the employer has the right to request that the service member submit documentation establishing that their application for reemployment is timely, that they have not exceeded the five-year limit, and that they are not disqualified from reemployment by virtue of having received a punitive or "other than honorable" discharge. The service member must submit such documentation as is readily available. [51]

The Department of Labor will adopt regulations establishing the kinds of documentation that will be considered satisfactory. [52] Examples of such documentation could include a DD- 214, a letter from the service member's commanding officer, an endorsed copy of military orders, or a certificate of completion of a military training school. If the requested documentation does not yet exist or is not readily available, the employer is required to reemploy the service member while awaiting such documentation. If the documentation, when it becomes available, establishes that the service member is not entitled to reemployment, the employer is then free to discharge the service member and to terminate any benefits that the service member had been accorded..[53]The employer is permitted to delay reinstating the service member into the pension plan until the documentation has been provided. [54]

[44] Gordon v. Wawa, Inc, 388 F.3d 78 (3rd Cir, 2004)
[45] Section 4312(e)(1)(C)
[46] Section 4312(e)(1)(C)
[47] Section 4312(e)(1)(D)
[48] Section 4312(e)(2)(A)
[49] Section 4312(e)(3)
[50] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-7, June 1998
[51] Section 4312(f)(1)
[52] Section 4312(f)(2)
[53] Section 4312(f)(3)
[54] Section 4312(f)(3)(B)

Entitlements

If the service member meets the eligibility criteria discussed above, they have seven basic entitlements:
a. Prompt reinstatement.
b. Accrued seniority, as if they had been continuously employed.
c. Status.
d. Health insurance coverage.
e. Other non-seniority benefits, as if they had been on a furlough or leave of absence.
f. Training or retraining and other accommodations.
g. Special protection against discharge, except for cause.

Prompt Reinstatement

Following a period of up to 30 days of training or service, the service member must report back to work almost immediately, and should be put back on the payroll immediately upon reporting back to work. Following a longer tour, they must submit an application for reemployment, and the employer is required to act on the application promptly [55] even if there does not happen to be a vacancy at the time the application for reemployment is submitted. Sometimes, it is necessary for the employer to displace another employee in order to make room for the returning service member. [56] The law does not define "prompt," but generally this should be a matter of days, not weeks or months.

If the service member meets the USERRA eligibility criteria the employer is required to re-employ the service member even if doing so violates state law. A real estate agent, whose license has expired while deployed, if they are an employee, must be rehired and then given the opportunity to obtain their license.[57]

Accrued Seniority

In a 1946 case, the Supreme Court held: "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]." [58] USERRA codifies this "escalator principle." [59] If the service member meets these eligibility criteria, they are entitled to be treated as if they had been continuously employed for purposes of the employer's system of seniority, if any. Their uniformed service time must be treated as "service in the plant" for purposes of the employer's system of seniority, even an informal system based solely on practice.[60]

[55] Section 4313(a)
[56] See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992); Goggin v. Lincoln St. Louis, 702 F.2d 698, 703-04 (8th Cir. 1983); Fitz v. Board of Education of the Port Huron Area Schools, 662 F.Supp. 1011 (E.D. Mich. 1985); Anthony v. Basic American Foods, 600 F.Supp. 352, 357 (N.D. Cal. 1984); Green v. Oktibbeha County Hospital, 526 F. Supp. 49, 55 (N.D. Miss. 1981)
[57] Wright, Samuel The Officer May 2005
[58] Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946)
[59] Section 4316(a)
[60] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-8, June 1998

If the employer does not have a system of seniority, then the service member is entitled to their pre-service job or another job of like status and rate of pay.[61] The employer's option of reemploying the service member in a "like" job only applies if the period of service was for 91 days or more. Following a shorter tour (up to 90 days), the service member is entitled to the precise job that he would have attained if continuously employed. [62]

USERRA expressly applies the same "escalator principle" to all kinds of pension plans, including defined contribution plans as well as defined benefit plans. Generally speaking, the service member must be treated as if they had been continuously employed in determining when they qualify for civilian pension (vesting) and also in determining the amount of the monthly pension check upon retirement (benefit computation).[63]
If the service member and other employees contribute to the pension plan while working, they must make retroactive contributions to the plan upon returning from service in the uniformed services, if they wish to be treated as if they had been continuously employed for pension purposes. USERRA gives an extended period to make up back contributions, without interest. That period extends for three times the period of service in the uniformed services, but not to exceed five years. [64]

Employer and employee contributions to pension plans are often computed based upon a percentage of earnings. This computation will be based upon what would have been earned in the civilian job if the service member had remained continuously employed, not what was earned from the uniformed service. [65] In some cases, what the service member would have earned cannot readily be ascertained. If the service member worked on commission no one can determine precisely how many items would have sold and how many commissions you would have earned. In such a situation, the computation of employee and employer contributions to the pension plan will be based upon what was earned from the civilian employer during the 12 months immediately preceding entry into the uniformed services. If the service member was employed for less than 12 months, the computation will be based upon the entire time with that employer. [66] Longshoremen, construction workers, stagehands, and some other kinds of workers frequently work for a whole series of employers, as assigned by a "hiring hall" operated by the union or an employer association.[67] If the service member returns to a job situation of this kind, they are entitled to reemployment and to be treated as continuously employed for pension purposes, even if they return to a different "employer" (in the traditional sense) than their last employer prior to service in the uniformed services.[68] Case law to this effect under the VRR law was adopted by Congress when it enacted USERRA. [69]

[61] Section 4313(a)(2)(A)
[62] Section 4313(a)(1)(A)
[63] Section 4318
[64] Section 4318(b)(2)
[65] Section 4318(b)(3)(A)
[66] Section 4318(b)(3)(B)
[67] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-9, June 1998
[68] See Imel v. Laborers' Pension Trust Fund of Northern California, 904 F.2d 1327 (9th Cir.), cert. denied, 111 S. Ct. 343 (1990); Akers v. Arnett, 597 F.Supp. 557 (S.D. Tex. 1983), aff'd, 748 F.2d 283 (5th Cir. 1984)
[69] Section 4303(4)(A)(i)(definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities")

Status

Whether or not the employer has a system of seniority, the service member is entitled to the status that he would have attained if continuously employed. [70] For example, if you were the Nurse Manager of a medical facility, reinstating you as "Assistant Nurse Manager" is not satisfactory, even if the pay is the same, because that is not equivalent status.[71]

If an opportunity for promotion or eligibility for promotion is based on a skills test or examination the employer should give the retiring service member a reasonable amount of time to adjust to their employment position and then give the skills test or examination. If based upon the results of the exam there is a reasonable certainty the service member would have been promoted then the promotion must be made effective the date it would have been but for the time in service.

Location is also an aspect of status. [72] For example, if the service member worked in his employer's store in Fairfax, Virginia, and if that position still exists (although it may have been filled), reinstating him in a vacant position in Fairbanks, Alaska is not satisfactory, if the service member objects, because the status of the Alaska job is not equivalent to the status of the Virginia job. Other aspects of status include the opportunity to work during the day, instead of at night, and the opportunity to work in a department or at such times when there are better opportunities to earn commissions or to be promoted.[73]

Health Insurance Coverage

Upon return to the civilian job, the service member is entitled to immediate reinstatement of civilian health insurance coverage, if the employer offers such insurance. There must be no waiting period and no exclusion of pre-existing conditions, other than those conditions which the Department of Veterans Affairs has determined to be service-connected. [74] If the civilian employer's health insurance plan covers each employee's family members, then the service member's entire family is entitled to reinstatement of this health insurance coverage.

Under USERRA, all employer-sponsored health care plans are required to provide COBRA-type coverage for up to 18 months after the employee's absence begins due to military service or for the period of uniformed service. If the service member serves for at least 31 days, his employer may require him to pay both his share and the employer's share of the health care premium. [75] However, the Veterans' Benefits Improvement Act of 2004 (VBIA) modifies elections made on or after December 10, 2004. The VBIA

[70] See Ryan v. Rush-Presbyterian-St. Luke's Medical Center, 15 F.3d 697, 699 (7th Cir. 1994)
[71] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-11, June 1998
[72] See Armstrong v. Cleaner Services, Inc., 79 L.R.R.M. 2921 (M.D. Tenn. 1972); Britton v. Department of Agriculture, 23 M.S.P.R. 170 (1984)
[73] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-11, June 1998
[74] Section 4317(b)
[75] Section 4317(a)

extends the maximum period for which an employee may elect to continue employer-sponsored health insurance coverage to 24 months. The maximum period of coverage is the lesser of 24 months beginning on the date the employee's absence began or the day after the date on which the employee failed to apply for, or return to, a position of employment. [76] The service member may still be required to pay a premium similar to COBRA (no more than 102 percent of the full premium under the plan). However, a person who performs military service for less than 31 days may not be required to pay more than the employee share for such coverage. [77]

If the service member elects this coverage, it will continue until the period of service in the uniformed services has been completed and the deadline to apply for reemployment has passed, or until 18 months after absence from the civilian job began, whichever comes first. [78] The right to reinstatement of civilian health insurance coverage upon return to the civilian job is not dependent upon having exercised the right to continued coverage during the period of service.

The service member is well-advised to elect this coverage for short (up to 30 days) tours of service or training in the uniformed services, including typical annual training tours performed by Reservists and National Guard members. Electing such coverage can protect their family from any possible gap in health insurance coverage. CHAMPUS coverage only applies to reservists who are on active duty for duty for training for 31 days or more.[79] Electing continued coverage through the civilian job for longer tours (31 days or more) makes sense only if there is some reason why dependents cannot or don't want to use the CHAMPUS system.

Other Non-Seniority Benefits

If the service member's employer offers continued life insurance coverage, holiday pay, Christmas bonuses, and other non-seniority benefits to other employees on furlough or on non-military leaves of absence, the employer must offer similar benefits while the service member is absent from work for service in the uniformed services. [80] If the employer has more than one kind of non-military leave of absence, the comparison should be made with the employer's most generous form of leave. [81] The comparison must be for comparable periods of time. A four-day jury leave does not equate with a four-year military leave.

If the service member states in writing that he intends not to return to the civilian job, this will amount to a waiver of their right to these non-seniority benefits under this clause, but only if the waiver is made knowingly, voluntarily, and in writing. [82] Even if the waiver meets all of these tests, it only waives their right to these non-seniority benefits during service in the uniformed services. It does not waive their right to reemployment upon completion of service, nor the right to be treated as continuously employed for seniority purposes upon return to the civilian job.[83] Even if the service member intended not to apply for reemployment at the time he entered service in the uniformed services, the law gives him the right to change his mind.

Training or Retraining and Other Accommodations

If the service member has been gone from their civilian job for months or years, they may find many changes upon their return. The employer may be using new equipment and methods with which they are unfamiliar. Even if equipment and methods have not changed, their civilian job skills may have been dulled by a long period of absence. The service member must be qualified for the civilian job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify the returning reservist. [84] This may very well include training or retraining.

The September 2004 Department of Labor proposed USERRA regulations provide at section 1002.193, "If an opportunity for promotion, or eligibility for promotion, that you missed during service is based upon a skills test or examination, then your employer should give you a reasonable amount of time to adjust to your employment position and then give you the skills test or examination. If you are successful on the make up exam and, based upon the results of that exam there is a reasonable certainty that you would have been promoted or made eligible for promotion, during the time that you served in the military, then your promotion or eligibility for promotion must be made effective as of the date it would have occurred had your employment not been interrupted by military service."[85]

USERRA defines "reasonable efforts" as "actions, including training provided by an employer that does not place an undue hardship on the employer." [86] USERRA defines "undue hardship" as "actions requiring significant difficulty or expense, when considered in light of ... the overall financial resources of the employer [and several other factors]." [87]This is similar to the definitions of "reasonable accommodations" and "undue hardship" in the Americans with Disabilities Act (ADA). [88]Unlike the ADA, however, USERRA does not exempt very small employers.[89]

USERRA also requires an employer to make reasonable efforts to accommodate the disability of a returning disabled service member otherwise entitled to reemployment.[90] For example, an employer might be required to lower an assembly line by two feet to enable a returning veteran in a wheelchair to perform his or her job.[91]

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[76] Section 4317(a)(1)(B)
[77] Section 4317(a)(1)(B)
[78] Section 4317(a)(1)(A)
[79] See 10 U.S.C. 1076(a)(2)(A)
[80] Section 4316(b)(1)(A)
[81] See, Waltermyer v. Aluminum Company of America, 804 F.2d 821 (3d Cir. 1986)
[82] Section 4316(b)(2)(A)(ii)
[83] Section 8(g) of USERRA, not codified, "Transition Rules and Effective Dates"
[84] Section 4313(a)(1)(B)
[85] Federal Register, Vol 69 No 181, Monday, September 20, 2004 56296
[86] Section 4303(10)
[87] Section 4303(15)
[88] Sections 42 U.S.C. 12111(9) and 12111(10)
[89] Section 42 U.S.C. 12111(5)
[90] Section 4313(a)(3)
[91] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-13, June 1998

If the disability cannot be reasonably accommodated in the position that the individual would have attained if continuously employed (usually the pre-service position), the pre-service employer must re-employ the returning disabled service member in another position that provides like seniority, status, and pay, or the closest approximation thereof consistent with the returning disabled veteran's circumstances.[92]

There is some overlap between USERRA and the ADA, which requires employers to make such accommodations for disabled persons generally, including but not limited to disabled veterans. USERRA applies to some small employers that are exempted from the ADA, but USERRA only applies to returning service members who are otherwise entitled to reemployment.[93]

There are some disabilities which cannot be accommodated by reasonable employer efforts. A blinded veteran cannot be a commercial airline pilot. If upon return from service in the uniformed services the service member is suffering from a disability that cannot be accommodated, thus disqualifying him from returning to his pre-service job, the employer is required to reemploy him in some other position which is the "nearest approximation" of the position to which he is otherwise entitled, in terms of seniority, status, and pay, consistent with the circumstances of the case. [94]

A disability need not be permanent in order to confer rights under this provision. If a service member breaks a leg during annual Reserve or National Guard training, their employer may have the obligation to make reasonable efforts to accommodate their broken leg, or to place them in an alternative position, until their leg has healed.[95]

Special Protection Against Discharge

If the period of continuous service in the uniformed services was 181 days or more, the period of special protection is one year. [96] If the period of continuous service was 31-180 days, the period of special protection is 180 days. [97] If a service member is fired during the period of special protection, the employer has a heavy burden of proof, to prove that he was discharged for cause.[98] This is intended to protect the service member from a bad faith or pro forma reinstatement.

There is no period of special protection after a period of up to 30 days of continuous service in the uniformed services, but the reservist will have rights under the anti-discrimination provision discussed below.

[92] Wright, Samuel The Officer, December 2004
[93] Ibid at 2-13
[94] Section 4313(a)(3)(B); See also Hembree v. Georgia Power Co., 637 F.2d 423 (5th Cir. 1981); Blake v. City of Columbus, 605 F.Supp. 567 (S.D. Ohio 1984); Ryan v. City of Philadelphia, 559 F.Supp. 783 (E.D. Pa. 1983), aff'd, 732 F.2d 147 (3d Cir. 1984); Armstrong v. Baker, 394 F.Supp. 1380 (N.D.W.V. 1975)
[95] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-13, June 1998
[96] Section 4316(c)(1)
[97] Section 4316(c)(2)
[98] See Carter v. United States, 407 F.2d 1238 (D.C. Cir. 1968)

Prohibition of Discrimination and Reprisal

USERRA provides that an employer or a prospective employer cannot deny the service member initial employment, reemployment, retention in employment, promotion, or any benefit of employment because he is a member of, applied to be a member of, or has been a member of a uniformed service or because he performs, has performed, applied to perform, or has an obligation to perform service in the uniformed services. [99] USERRA also provides that it is unlawful for an employer to discriminate against the service member or to take any adverse employment action against him because he takes an action to enforce rights under USERRA, for himself or anyone else, because he has testified in or assisted a USERRA investigation, or because he has exercised any right under USERRA. [100] This provision was included because there have been cases wherein employers have fired witnesses who have provided information to the Department of Labor or who testified in VRR cases.[101]

If one of the above protected activities (service in the uniformed services, etc.) was a motivating factor (not necessarily the only factor) in an adverse action taken by an employer or a prospective employer, such action is unlawful unless the employer can prove (not just say) that the action would have been taken even in the absence of the protected activity. [102] This provision overrules Sawyer v. Swift & Co. [103] a VRR case which held that to prove a violation of Section 4301(b)(3) of the VRR law it was necessary to establish that an employee's firing was motivated solely by his or her military obligations.

It has been recognized in a number of cases that a service member's military position and related obligations were, or could be inferred to be, a motivating factor in an employer's decision to take adverse employment action against the employee for purposes of USERRA. The service member's military position and related obligations were a "motivating factor" in an employer's decision to take adverse employment action against an employee, decided the court in Robinson v. Morris Moore Chevrolet-Buick, Inc.[104] For purposes of a claim for retaliation under USERRA,[105] it is enough that the employer relied on, took into account, considered, or conditioned its decision on the employee's military-related absence.

In order to prevail on claim of discrimination under USERRA the service member need not show that their military obligations constituted the sole reason for the adverse employment action, only that the employer was motivated in part by an impermissible factor.[106]

[99] Section 4311(a)
[100] Section 4311(c)
[101] The Judges Advocate General's School, U.S. Army, JA 270, Uniformed Services Employment and Reemployment Rights Act (USERRA) page 2-14, June 1998
[102] Section 4311(b)
[103] 836 F.2d 1257 (10th Cir. 1988)
[104] Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571 (E.D. Tex. 1997)
[105] Sections 4301-4333, 4311(b)
[106] Section 4311(a); See also, Gillie-Harp v. Cardinal Health, Inc., 249 F. Supp. 2d 1113 (W.D. Wis. 2003)

In Duarte v. Agilent Technologies, Inc.[107] the U.S. District Court for the District of Colorado awarded a Marine Corps Reserve Officer nearly $500,000 after finding that he was wrongly terminated following his return from an overseas combat deployment. The company said the job was cut in a restructuring move and then advertised the same position a few months later. Since Duarte had been deployed more than 180 days upon his rehire he could not be terminated except for cause for one year after his reemployment.[108] The court in Leisek v. Brightwood Corporation,[109] determined, in an appeal from a grant of summary judgment in favor of the employer, that the evidence supported an inference that the service member's military status was a "motivating factor" in the defendant's decision to terminate his employment. After the service member had been promoted, the employer informed him that it would not honor any future guard orders. When the service member subsequently attended guard duties and related activities, his employment was terminated. Because the employer had not established as an "uncontroverted fact" that it would have fired the service member even without his guard activities, the court reversed and remanded. An aeronautical engineer, however, making a claim under USERRA,[110] failed to show by a preponderance of the evidence that his military service was a substantial or motivating factor in his employer's decisions to remove him from flight roster, or selection of others to fill two test pilot positions.[111] To support a claim of discrimination under USERRA, it must be shown that employee's military service was a substantial or motivating factor in employment action.[112] In Bedrossian v. Northwestern Memorial Hospital,[113] a medical school professor who was also a Colonel in the USAF reserve could not obtain an injunction to prevent his employer from firing him while his retaliatory firing law suit proceeded. The court found that Bedrossian could not show "irreparable harm", and that this was still a requirement for injunctive relief in a USERRA case. The court said, "Should he prevail on the merits of his suit, damages will make up what he has presumably lost during unemployment."[114]

Assistance and Enforcement

The Veterans' Employment and Training Service (VETS), United States Department of Labor, will assist persons claiming rights under USERRA, including persons claiming rights with respect to the federal government as a civilian employer. [115] USERRA has granted VETS subpoena authority so that it can obtain access to witnesses and documents to complete its investigations in a timely and comprehensive manner. [116]

[107] Duarte v. Agilent Technologies Inc., 366 F.Supp.2d 1039 (D.Co. 2005)
[108] Section 4316 (c)(1)
[109] Leisek v. Brightwood Corporation, 2002 WL 77034 (9th Cr. 2002)
[110] Section 4311(a)
[111] Goico v. Boeing Co., 347 F. Supp. 2d 955 (D. Kan. 2004)
[112] Section 4311(c). Crawford v. Department of Transp., 373 F.3d 1155 (Fed. Cir. 2004)
[113] Bedrossian v. Northwestern Memorial Hospital, 409 F. 3d 840 (7th Cr. 2005)
[114] Id. at 845; See also, Hetreed v. Allstate Ins. Co. 135 F.3d 1155, 1158 (7th Cir. 1998)
[115] Section 4321
[116] Section 4326

If a service member requests assistance, VETS will contact their employer to explain the law and will conduct an investigation. [117] If the investigation establishes that a violation probably occurred, and if efforts to obtain voluntary compliance are not successful, VETS will refer the case to the Office of Special Counsel (OSC), if the employer is a federal executive agency, or the Attorney General (AG), if the employer is a state or local government or a private employer. [118] In Ohio the US Attorney for the Southern District of Ohio has taken a very proactive stance in enforcing USERRA violations. If the OSC or AG is reasonably satisfied that there is an entitled to the benefits, the OSC or AG may agree to provide free legal representation. [119]

If the OSC or AG declines a request for representation, or if their help is not requested, the service member can file suit directly, through private counsel. [86] If the service member prevails, the federal court can order the employer to pay attorney's fees and litigation expenses. [120] This new USERRA provision makes the option of proceeding through private counsel much more realistic.

The court can order the employer to comply with the law and to compensate you for lost pay, including interest. [121] USERRA expressly provides that states, as employers, are subject to the same remedies, including interest, as may be imposed upon private employers. [122] If the court finds that the employer's violation was willful, the court can double the back pay award.[123]

In Duarte,[124], the Federal District Court for the District of Colorado awarded $114,500 in back pay, plus $324,761 in front pay from November 2003 when Lt Col Joseph Duarte was terminated from his employment with Agilent Technologies, Inc. Duarte also received pre-judgment interest and attorney fees and expenses, in accordance with Section 4323(h) of USERRA. Duarte began work for Agilent in 1984. Duarte was mobilized on two occasions, from October 2001 to April 2002 and from November 2002 to July 2003. When Duarte returned from his second deployment he was not reinstated in the position he held previously, and which he would have held but for the mobilization. He was assigned to a Special Project which he completed four months later and then was terminated. The court held the "special project" position was not of like status to the position he would have attained if he had remained continuously employed. USERRA provides that after returning from a period of service of 180 days or more the service member can not be discharged from employment within one year after the date of reemployment. The court found Agilent violated this provision. While USERRA does not outlaw a bona fide layoff or reduction in force that would have happened anyway, even if the individuals employment had not been interrupted by military service, the reinstated in the special project position violated USERRA and if the company had properly rehired Duarte he would not have been in a surplus situation four months later. Even though Agilent was going through difficult financial times (it had reduced its work force from

[117] Section 4322(a)
[118] Section 4323(a)(1)
[119] Section 4323(a)(1)
[120] Section 4323(c)(2)(B)
[121] Section 4323(c)(1)(A)(ii)
[122] Section 4323(c)(7)
[123] Section 4323(c)(1)(A)(iii)(This provision for double damages does not apply to cases where the federal government is the employer)
[124] 366 F.Supp.2d 1039 (D.Co. 2005)

41,000 in '01 to 29,000 in '03) this did not excuse the company from its obligations under USERRA.[125]

Attorney General John Ashcroft and Labor Secretary Elaine Chao signed a memorandum of understanding to ensure employment rights of people returning from military service are vigorously protected. The memorandum streamlines and strengthens enforcement of the Uniformed Services Employment and Re-employment Rights Act of 1994. Congress passed the act to safeguard the employment rights and benefits of service members upon their return to civilian life. "The brave men and women protected by (the act) voluntarily set aside the comforts of civilian life and stepped in harm's way," Mr. Ashcroft said. "We owe it to them to make sure that their employment rights and protections are fully and vigorously protected upon their return from military service. Our (service members) have been there for us, so now it's our turn to step up our efforts for them," Ms. Chao said. "This agreement will strengthen enforcement of (the act) by ensuring faster resolution of (its) cases and quicker enforcement action by the government when it is necessary." [126]

Employer Notice Requirements

Effective March 10, 2005, all employers are required to post a new USERRA notice issued by the federal Department of Labor. The agency will give employers a 60-day grace period to have it posted where other notices for employees are customarily placed.

The informational USERRA poster required in every workplace is available at http://www.dol.gov/vets.

Employer or Employee Questions

If an employee of employer has questions, they can reach the National Committee for Employer Support of the Guard and Reserve (NCESGR) at 1-800-336-4590. NCESGR explains the law to reservists and their employers, but NCESGR is not an enforcement agency. Through an ombudsman program, public service announcements, and other means, NCESGR explains to employers the importance of the reserve components to our country, and the need for "employer support" of members of these components. NCESGR also operates an awards program for cooperative employers, especially those who go beyond what the law requires in accommodating their employees who serve in the National Guard or Reserve.

[125] Wright Samuel, The Officer, June 2005; Crawley, Vince, Air Force Times, April 25, 2005
[126] USAFPN

Assistance and enforcement. If you are a Reserve component member and experience employment problems because of your military obligations, you should first notify your command. Often a commander or legal officer can provide prompt and effective assistance in resolving disputes between you and your civilian employer. If local efforts fail, contact Ombudsmen Services at ESGR National Headquarters (telephone: 1-800-336-4590 or DSN 426-1390/91; Web site - www.esgr.org.) Ombudsmen are trained to provide information and informal mediation assistance. Of those situations that are brought to the Ombudsmen, they have been able to resolve greater than 95 percent. Situations that are complex or beyond the scope of informal resolution will be immediately referred to the U.S. Department of Labor Veterans' Employment and Training Service (VETS), or you can contact them at your local listing.

Offices of Directors, Veterans' Employment and Training Service (DVETs) U.S. DEPARTMENT OF LABOR

Alabama, Montgomery	334/223-7677
Alaska, Juneau	907/465-2723
Arizona, Phoenix	602/379-4961
Arkansas, Little Rock	501/682-3786
California, Sacramento	916/654-8178
Colorado, Denver	303/844-2151
Connecticut, Wethersfield	860/263-6490
Delaware, Newark	302/761-8138
Dist. of Col., Washington	202/698-6271
Florida, Tallahassee	850/877-4164
Georgia, Atlanta	404/656-3127
Hawaii, Honolulu	808-522-8216
Idaho, Boise	208/334-6163
Illinois, Chicago	312/793-3433
Indiana, Indianapolis	317/232-6804
Iowa, Des Moines	515/281-9061
Kansas, Topeka	785/296-5032
Kentucky, Frankfort	502/564-7062
Louisiana, Baton Rouge	225/389-0339
Maine, Lewiston	207/753-9090

Maryland, Baltimore	410/767-2110
Massachusetts, Boston	617/626-6699
Michigan, Detroit	313/876-5613
Minnesota, St. Paul	651/296-3665
Mississippi, Jackson	601/961-7588
Missouri, Jefferson City	573/751-3921
Montana, Helena	406/449-5431
Nebraska, Lincoln	402/437-5289
Nevada, Carson City	775/687-4632
New Hampshire, Concord	603/225-1424
New Jersey, Trenton	609/292-2930
New Mexico, Albuquerque	505/346-7502
New York, Albany	518/457-7465
North Carolina, Raleigh	919/733-7402
North Dakota, Bismarck	701/250-4337
Ohio, Columbus	614/466-2768
Oklahoma, Oklahoma City	405/231-5088
Oregon, Salem	503/947-1490
Pennsylvania, Harrisburg	717/787-5834
Puerto Rico/VI, Hato Rey	787/754-5391
Rhode Island, Providence	401/528-5134
South Carolina, Columbia	803/253-7649
South Dakota, Aberdeen	605/626-2325
Tennessee, Nashville	615/741-2135
Texas	512/463-2814
Utah, Salt Lake City	801/524-5703
Vermont, Montpelier	802/828-4441
Virginia, Richmond	804/786-7270
Washington, Olympia	360/438-4600
West Virginia, Charleston	304/558-4001
Wisconsin, Madison	608/266-3110
Wyoming, Casper	307/261-5454

For more information on the USERRA law* and the ESGR Ombudsmen Services program, visit these locations on this page:

Uniformed Services Employment and Reemployment Rights Act of 1994
Ombudsman Services Program

Department of Labor USERRA Advisor

Law Review Archive: Reserve Officers Association provides an archive of legal articles that cover specific situations. They can be found at http://www.roa.org/home/law_review_archive.asp.

*If you have a specific question about the USERRA law, you're likely to find the answer most quickly in the "Frequently Asked Questions" section of either the Employers or Nat'l Guard and Reserve Members pages of this Web site.

Sample Company Policies on USERRA

Company 1 Example Policy

I. Military Leave under the National Guard and Military Reserve
A. Purpose

This Policy outlines the employment and reemployment rights of employees who enter either active or inactive training duty or service in the military while currently employed at XXXXXX, North America (the "Company").
B. Definitions

Differential Pay. The payment to the employee which is equal to the difference between military service pay received by the employee and the employee's regular pay for a similar period of time.
Regular Pay. *The salary, exclusive of overtime pay and other allowances, which an employee normally would have received during the pay periods he or she serves on military duty.*
Military Pay. *The military service payment received by an employee which includes base pay plus any other pay allowances, such as hazardous or special duty pay, but which excludes quarters, rations and subsistence allowance.*
Military Leave Under the National Guard & Military Reserve
An employee who is a member of the United States Army, Navy, Air Force, Marines, Coast Guard, National Guard, Reserves or Public Health Service (the "Uniformed Services") will be granted a partially paid leave for a maximum of six months of absence for military service, training or related obligations in accordance with applicable law. If the employee is on leave for greater than six months, the leave will be unpaid leave. At the conclusion of the leave, upon the satisfaction of certain conditions, an employee generally has a right to return to the same position he or she held prior to the leave or to a position with like seniority, status and pay that the employee is qualified to perform.

Requests for Military Leave

Leave for Active or Reserve Duty

Upon receipt of orders for active or reserve duty, an employee should notify his/her supervisor, as well as Human Resources, as soon as possible, and submit a copy of the military orders to his/her supervisor and the Human Resources Department (unless he/she is unable to do so because of military necessity or it is otherwise impossible or unreasonable).

Leave for Training and Other Related Obligations (e.g., fitness for service examinations)

Employees will also be granted time off for military training (normally 14 days plus travel time) and other related obligations, such as for an examination to determine fitness to perform service. Employees should advise their supervisor and/or department head of their training schedule and/or other related obligations as far in advance as possible. Employees should retain their military pay vouchers. Upon return from training, the employee should submit his/her military pay voucher to the Human Resources Department; the Company will pay an employee's regular salary, less military pay, for the training period.

Return from Military Leave

Notice Required

Upon return from military service, an employee must provide notice of or submit an application for reemployment in accordance with the following schedule:

An employee who served for less than 31 days or who reported for a fitness to serve examination, must provide notice of reemployment at the beginning of the first full regular scheduled work period that starts at least eight hours after the employee has returned from the location of service.

An employee who served for more than 30 days, but less than 181 days, must submit an application for reemployment no later than 14 days after completing his/her period of service, or, if this deadline is impossible or unreasonable through no fault of the employee, then on the next calendar day when submission becomes possible.

An employee who served for more than 180 days must submit an application for reemployment no later than 90 days after the completion of the uniformed service.

An employee who has been hospitalized or is recovering from an injury or illness incurred or aggravated while serving must report to the Human Resources Department (if the service was less than 31 days), or submit an application for reemployment (if the service was greater than 30 days), at the end of the necessary recovery period (but which may not exceed two years).

DocumentationRequired

An employee whose military service was for more than 30 days must provide documentation within two weeks of his/her return (unless such documentation does not yet exist or is not readily available) showing the following:

- the application for reemployment is timely (i.e. submitted within the required time period);
- the period of service has not exceeded five years; and
- the employee received an honorable or general discharge.

Continuation of Health Benefits

During a military leave of less than six months, an employee is entitled to continued group health plan coverage under the same conditions as if the employee had continued to work. For military leaves of more than six months, an employee may elect to continue his/her health coverage for up to 18 months of uniformed service, but will be required to pay the entire premium for the continuation coverage. [NOTE: Employees and/or dependents who elect to continue their coverage may not be required to pay more than 102% of the full premium for the coverage elected. The premium is to be calculated in the same manner as that required by COBRA.]

Pay Differential

A salary differential (or Differential Pay), consisting of the difference between Company salary and military wages (before taxes) will be paid for up to six months while an employee is on active military duty. Where an Employee is entitled to Differential Pay under this policy and to payment under the union Military Leave of Absence policy Human Resources will review these situations and may reduce Differential Pay by the amount received through the union program. Any pay differential for a specific period of time will be determined upon presentation by the employee of military pay records for that period of time, excluding any food allowances. It is the employee's responsibility to provide documentation of his/her military compensation on which to base differential pay. Employees must provide a copy of their Leave Earnings Statement to _____in payroll. Employees may fax statement to _____.

Retirement Savings Plans

Membership in the Company's tax qualified Retirement and Savings Plans will be continued while an employee called to active duty is on paid leave of absence. Should the active duty extend beyond six months, membership will be suspended for the duration of the military leave of absence. Upon return to work, the period of leave will be credited to the employee's service under the Plan for vesting, as well as benefit and or contribution purposes. A more detailed explanation of an employee's rights in this regard will be provided upon the employee's return to work.

Life Insurance and Accidental Death & Dismemberment

Basic and optional employee and dependent life insurance coverage is extended for thirty days from the beginning of the leave of absence. Upon return to work, coverage will commence with no waiting period. Dependent coverage will also commence with no waiting period.

Disability

Disability coverage continues until the end of the month in which the employee enters active military status. This coverage does have an exclusion for disabilities caused by acts of war or terrorism.

Travel Accident

Benefits are payable due to war or act of war under our blanket accident insurance program. This benefit can be changed or revoked given a 31-day notice. All employees will be notified if any changes occur

Paid Time Off (PTO)

At the request of the employee, regular salary will be paid for any unused PTO entitlement. After returning to work, the employee will be eligible for full PTO entitlement

as of the January 1st, with length of service to include the military leave. Once the six months of paid leave has expired, employees may begin to use any remaining PTO. An exception will be granted for those employees who are called to duty and cannot make use of their PTO entitlement. We will allow employees, in this situation, to rollover greater than the ten-day maximum carry-over.

II. UAW Labor Agreement language

(112) Employees who enter either active or inactive training duty or service in the armed forces of the United States will be given a leave of absence subject to the conditions herein. Upon submission of satisfactory proof of pending induction for active service, such employees may arrange for the leave up o thirty days prior to the induction date. The leave shall not exceed the term of the initial enlistment and one (1) consecutive re-enlistment. In no event will the period of such leave exceed a total of eight (8) years, except when additional service in involuntary. Seniority will accumulate during the period of such leave. Upon termination of such leave, employees shall be offered re-employment in their previous position or a position of like seniority, status and pay, unless the circumstances have so changed as to make it impossible or unreasonable to do so, in which event they will be offered such employment in line with their seniority as may be available which they are capable of doing at the current rate of pay for such work, provided they meet the following requirements:

1. Have not been dishonorably discharged.
2. Are physically able to do the work.
3. Report for work within ninety days of the date of such discharge, or ninety days after hospitalization continuing after discharge.

(112a) The seniority of any employee who fails to report for work within the times specified in Paragraph (112) (3) shall be automatically broken, unless the employee gives a satisfactory reason for such failure to report.

(112b) As used in this paragraph, "Armed Forces of the United States" is defined as an limited to the United States Army, Air Force, Navy, Marine Corps, Coast Guard, National Guard, Air National Guard or any reserve component thereof.

(112c) Employees with seniority who are spouses of employees who enter active duty services in the Armed Forces of the United States and who obtain a leave of absence in accordance with Paragraph (112), may make written application to the Personnel Department for a leave of absence for the period of the spouse's initial enlistment but in no event to exceed four (4) years. Such leaves may be granted by management and will be subject to the conditions set forth in Paragraph (111). Seniority will accumulate during the period of such leaves.

(112d) Employees with seniority in any Allison Engine Company plant who are called to and perform short-term active duty of thirty (30) days or less, including annual active duty for training, as a member of the United States Armed Forces Reserve or National Guard, shall be paid as provided below for days spent performing such duty provided they would not otherwise be on layoff or leave of absence.

1. A payment will be made for each day, except for a day for which they receive holiday pay, which they would otherwise have worked equal to the amount by which their straight time rate of pay as of their last day worked plus applicable night shift premium (but not including overtime) for not more than eight (8) hours, exceeds their military earnings for that day including all allowances except for rations, subsistence and travel. Except for short term active duty of thirty (30) days or less performed by employees called to active service in the National Guard by state or federal authorities in case of public emergency, payment is limited to a maximum of fifteen (15) working days in a calendar year.
2. In order to receive payment under this Paragraph (112d), employees must give local Management prior notice of such military duty and, upon their return to work, furnish Management with a statement of the military pay received for performing such duty.

III. Service Representative Deployment Policy

Deployment Within Hostile Zones

Occasions may arise when the duties of a Service Representative entail a visit or assignment to areas which can be classified as hostile; e.g., deployment on an aircraft carrier within a zone of military activity, or being present within a territory involved in war, insurrection or terrorist activity, etc.

A current list of countries defined as "war zones" is maintained by the insurance companies.

When visiting or assigned to such hostile zones, notification of each such visit or assignment is necessary. Accordingly, the appropriate Manager must notify the Human Resources Department, in writing and in advance of any such visit or assignment providing the name(s) of the Service Representative(s) concerned, with as much detail as possible regarding anticipated duration of the visit or assignment and travel arrangements, with departure and return dates.

Any deployment of an employee on an aircraft carrier is to be notified in writing to the Human Resources Department. This will cover the possible situation of the carrier being diverted from a "non-hostile" to a "hostile" zone during the course of the assignment.

Shipboard Deployment

The following guidelines are provided to assist in making arrangements prior to an overseas carrier deployment.

1. Passport, Visas, Identification
   Please contact International Human Resources Department in Chantilly.

2. Medical
   a) A medical examination within the past year is required. Records of outstanding medical problems should be carried.

   b) An immunization record is required. A Naval medical department can determine what vaccinations are required for the countries to be visited.

   c) Dental care should be seen to prior to leaving.

3. NATEC – Naval Air Technical Engineering Command

   a) A Company letter to NATEC office, San Diego, CA is required.

   b) Endorsement is required upon arriving and upon departing the assigned task location. Orders will be issued by the on-site NATEC office directing the Representative to the relocation task assignment.

4. Letter of Instruction (LOI)

Some deploying squadrons publish an LOI which contains helpful information such as:

a) Mailing address while deployed, telegram to and from the ship.

b) List of personnel deploying.

c) Outlines the operation and commitments, administrative, logistics and maintenance responsibilities.

d) Other aviation units aboard for the deployment.

e) Do's and don'ts aboard a Navy ship.

5. Squadron Equipment Issued

a) Flight deck helmet, goggles and life vests should be checked out prior to leaving for the ship.

b) Cold weather clothing is available as required.

c) A cruise box, which is 8 cubic feet and, can be locked is available for private use.

d) Safety shoes are required as are long sleeved shirts.

6. Nice to Know

a) There will be limited living and storage space.

b) Laundry and cleaning facilities are available aboard. Laundry and dry cleaning bags should be obtained before embarkation from the local PX. Coveralls and wash and wear type clothing is highly recommended.

c) Nice to have items: flashlight, extra batteries, night light with red bulb, radio/cassette player with headset, books, ear plugs.

d) International driver's license is required and can be obtained through the local AAA office.

Shipboard Deployment Allowance

In recognition of the loss of liberty and inconvenience associated with living and working conditions aboard aircraft carriers, those assigned to a carrier for more than 14 days will receive a 25% premium. Such payment is effective upon start of the assignment and will be paid upon completion of assignment following receipt of written manager's authorization.

A daily allowance of $25 for meals and $8 for miscellaneous expenses may be claimed to help defray the costs of mess charges for any periods spent on shipboard deployment.

Land Deployment

In recognition of difficult living and working conditions while deployed on land, in the field and in certain geographic regions, employee will receive a 25% premium plus daily meal and miscellaneous allowances, as outlined above. Qualification for this allowance will be determined on an individual basis upon receipt of the specific conditions of the assignment.

An additional premium of 25% will be paid to those employees stationed temporarily in a crisis area, if and when the U.S. Department of Defense declares the specific geographic area of the assignment to be a hostile fire area. When this declaration becomes effective you will be notified in writing. The premium will be paid semi-monthly. Meal and miscellaneous allowances are reimbursable through GELCO.

The hardship deployment allowances and the hostile fire area premium are income to the employee and, therefore, subject to the usual Federal, State, and Local income tax. When deployed in an area where hotel accommodation is appropriate, the usual reasonable hotel, meal and miscellaneous allowance may be claimed in lieu of a hardship allowance.

The premiums and allowances are not included in base pay for purposes of any employee benefit plan.

IV. XXXXXX Benefits Coverage During War or Terrorism

U.S. Benefits At-A-Glance

	Regular Business Traveler Caught In Hostile Environment (War or Terrorism)	Active Employee Assigned to Work in Hostile Environment (War or Terrorism) (ex. Military Service Rep)		Military Reserves
Health Benefits	No exclusions in case of war or terrorism. Claims would be covered under XXXX health plans. Depending on injury, may coordinate with Workers Comp.	No exclusions in case of war or terrorism. Claims would be covered under XXXX health plans. Depending on injury, may coordinate with Workers Comp.	•	RRNA Active covg. first 6 months & then 18 months Cobra Military coverage primary for employee and XXXX plan primary coverage for dependents
Life & AD&D Insurance	Basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.	Basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.		Coverage ends thirty days from beginning of leave. During the first thirty days, basic and optional life insurance coverage is payable in acts of war or terrorism. Basic and optional AD&D is not.
Disability	Not covered during acts of war or terrorism.	Not covered during acts of war or terrorism.		Not covered during acts of war or terrorism. Covg under U.S. government plan.
Travel Accident Insurance	Currently covered except for acts of war in Iran, Iraq, Pakistan,	Currently covered*		Not covered

	Afghanistan, Syria, and Israel *		
Workers Compensation	Covered under XXXX program.	Covered under XXXX program.	Covered under U.S. government plan.

* This benefit can be changed or revoked given a 31-day notice. All employees will be notified if any changes occur.

Company 2 Example Policy

This memorandum establishes and authorizes the special pay and benefit arrangements to be extended to XXX employees called to active duty military service as a result of the terrorist attacks on September 11. These arrangements apply to all employees, salaried and hourly, in all operating units and are an expansion of our current policies.

1. Employees will be eligible to receive pay differentials to make up for any shortfall between their military rate and their XXX base pay **for a period of up to 6 months immediately following activation**. Any differential pay will be determined upon presentation by the employee of military pay records. The military rate is defined as military base pay, and any specialty pays such as flight pay, jump pay, etc.

   It is the employee's responsibility to provide documentation of the pertinent military compensation on which to base differential pay. This is independent of any differential paid during annual training periods.

2. During the period differential pay is being provided by the Company the called-up employees may choose to keep their Value 2001 Insurance elections as of the date of call-up in-force or they may within 31 days of call-up, elect to drop certain coverage for themselves or dependents. If after being called-up the individual receives new orders that extend the period of service beyond what was initially anticipated, employees will again have a 31 day period following receipt of those orders to change coverage elections for themselves and dependents. In order to keep employee and/or dependent benefits in effect during the interval between the employee's call-up and return to active XXX service, the employee must pay the employee contribution required by the Benefit Plan in effect just prior to call-up for the benefits he/she elects to keep.

   The above benefit arrangement applies to the first 6 months following call-up to active service and meets or exceeds the company's obligation for the period as specified in the Uniform Services Employment and Reemployment Rights Act of 1994, which was signed into effect October 13, 1994. The act requires that health care coverage must remain available to called-up employees and their dependents for a total of 18 months. XXX Controls will comply with the basic requirements of the Act by making the health care (medical, dental and vision) COBRA options available to those employees and their families for the 7th through 18th month of call-up.

   During the period the employee is on Military Leave, the Government provided medical, dental and vision benefits will be primary for the employee and XXX sponsored benefit plans will be the secondary payer. All exclusions and limitations on claims resulting from an Act of War will apply.

3. Employees can elect to receive pay for all unused and accrued vacation at the time of call-up, or to leave that vacation on the books and available to be taken if the employee is released and returns to active employment.

4. Defined Contribution Plan accounts (i.e. 401(k) plans) will remain intact for employees called to active duty in this instance. Withdrawals may be made in accordance with provisions of the plan**. Returning employees will be permitted to**

make up contributions and also receive any associated Company match that would have been made if they had not been called-up.

5. Upon release from active duty, reinstatement will be in accordance with current veteran's reemployment rights.

Company 3 Example Policy

Military Leave Policy

1.0 Policy

It is XXXXXXX policy to support its employees who serve in the uniformed military services by accommodating their temporary military duty-related absences from work and reducing the economic hardship resulting from such absences by providing differential pay in some situations.

2.0 Implementation

2.1 Military duty includes the performance of duty in the uniformed services of whatever nature, voluntary and involuntary, for up to five years, subject to the exceptions in the Uniformed Services Employment and Reemployment Rights Act (USERRA). If an employee's military duty exceeds a cumulative total of five years, then the element should obtain advice and direction regarding USERRA requirements from local Legal Counsel.

Notice of Military Duty

2.2 The employee will provide advance notice of military duty (at least one week's notice, when practical) to his or her immediate manager. The notice may be oral or in the form of written orders or other available documentation that indicates the anticipated length of the military duty. Notice is not required if military necessity prevents giving notice or if giving notice is otherwise impossible or unreasonable under the provisions of USERRA.

2.3 A copy of the written orders or other available documentation must be sent by mail or fax to the XXXXXXX Employee Service Center, who will process the leave and notify the employee's immediate manager.

Payment for Military Duty

2.4 XXXXXXX will pay employees for their annual military duty up to the lesser of 15 days, 120 hours, or three workweeks in a calendar year (the "Annual Military Allotment"). The days of Annual Military Allotment do not have to be taken consecutively. After the Annual Military Allotment has been exhausted, any additional military duty will be unpaid.

a) A "workweek" is a fixed and regularly recurring period of 168 hours (i.e., seven consecutive 24-hour periods), established for the employee by the element. See Corporate Policy on Hours of Work and Work Schedules.

b) The Annual Military Allotment for regular part time employees will be based on time scheduled to be worked.

c) The Annual Military Allotment for represented employees will be as defined in the applicable collective bargaining agreements.

d) The wage and hour legal restrictions that apply to certain partial day and partial week absences by exempt salaried employees may require an extension of the Annual Military Allotment for such employees.

e) In extenuating circumstances, the Senior Vice President Human Resources may authorize paid military duty beyond the Annual Military Allotment.

2.5 Employees on military leave will receive Full Pay or Differential Daily Pay during the Annual Military Allotment, as specified in Table A below. The difference between Full Pay and Differential Daily Pay is a wage advance that will be offset against future earnings via payroll deduction when the employee has completed military duty and returned to work.

a) "Full Pay" is XXXXXXX straight pay without diminution or offset.

b) "Differential Daily Pay" is the difference between lower military pay and higher Full Pay. Differential Daily Pay is computed on a daily basis and includes shift premium, where applicable. It does not include allowances (such as for subsistence, quarters, travel, or expenses) or military pay received on non-XXXXXXX workdays. "Non-XXXXXXX workdays" are days on which the employee is not regularly scheduled to work, such as Saturday or Sunday for an employee who is regularly scheduled to work Monday through Friday, or every other Friday for an employee on a 9/80 schedule.

Table A
Payment of Differential Daily Pay and Full Pay

IF the employee ...	**THEN ...**
Performs Military Duty for the entire workweek	the employee will receive Differential Daily Pay for the entire workweek.
Performs Military Duty for part of a day during the workweek, and works for XXXXXXX for part of that same day	an hourly or non-exempt salaried employee will receive Full Pay for the hours worked for XXXXXXX and Differential Daily Pay for hours reported as paid military. an exempt salaried employee will receive Full Pay for the entire day.
Performs Military Duty for part of the workweek, and works for XXXXXXX for the rest of that same workweek	the employee will receive Differential Daily Pay for the day(s) reported as paid military and Full Pay for the days worked for XXXXXXX.

2.6 Before going on military leave, the employee will sign a payroll deduction agreement authorizing XXXXXXX to collect the amount of wages advanced during the period of military leave that exceeds the Differential Daily Pay due for the same period.

2.7 During the period of paid military duty the employee should account for his or her time in accordance with the applicable XXXXXXX time and attendance practices. The employee cannot charge time to military leave that is not covered by orders or other military documentation.

2.8 Within 15 business days after military duty is completed, the employee will submit to the XXXXX a Labor Earnings Statement (LES) from an appropriate agency of the government, showing the amount of pay received for the military duty. The employee's pay will be reduced or offset by the adjusted gross earnings received for military duty performed during the employee's regular workweek(s). If the employee's military pay exceeds his or her Full Pay, then the employee must repay all Full Pay to XXXXXXX.

Vacation

2.9 The employee may authorize full or partial payout of his or her unused vacation accrual. The vacation payout will be in the form of a lump sum, less all applicable legal withholdings. The employee never will be required to use vacation in connection with military leave.

Extensions

2.10 If while on military leave it is necessary to request an extension, the employee should make the request in a timely manner (preferably in writing) with any appropriate supporting documentation. Notice is not required if military necessity prevents giving notice or if giving notice is otherwise impossible or unreasonable under the provisions of USERRA.

Benefits

Employee who is on Paid Military Duty

2.11 All benefits will continue at the employee's normal contribution rate.

2.12 The employee will receive credited service and other seniority-based rights (and any other rights or benefits in accordance with USERRA) for the time spent on military leave, if he or she returns to work upon release from military duty within the time limitations and requirements of USERRA. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law.

2.13 Employee and employer savings plan contributions, benefits, and service credit will be provided in accordance with USERRA and the terms of the applicable plan documents.

Employee who is on Unpaid Military Duty

2.14 Medical, dental, vision, and health care reimbursement benefits will continue for the first 31 calendar days of military leave at the employee's normal contribution rate. After 31 calendar days the employee will be entitled to continue coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and USERRA for a period of up to 18 months. The employee will not be required to pay more than 102% of the full premium for the benefit coverage. Under certain circumstances, involving "multiple qualifying events," COBRA may provide continuation beyond the 18 months required by USERRA.

2.15 The employee will receive credited service and other seniority-based rights (and any other rights or benefits in accordance with USERRA) for the time spent on military leave, if he or she returns to work upon release from military duty within the time limitations and requirements of USERRA. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law.

2.16 Employee and employer savings plan contributions, benefits, and service credit will be provided in accordance with USERRA and the terms of the applicable plan documents. Generally, contributions that would have been made during periods of qualified military service can be repaid by the returning employee over a period three times the period of military service, but no longer than five years. If the returning employee's repayment contributions relate back to years other than the current calendar year, these contributions will count toward the Internal Revenue Service (IRS) annual defined contribution plan limits on contributions for the years to which the repayments relate, rather than toward the current year's limits. Employer contributions will be based on amounts repaid by the employee. Loan repayments will be suspended during qualifying periods of military service.

Reinstatement/Termination

2.17 An employee who returns to work upon release from military duty within the time limitations and requirements of USERRA and any other applicable state law will be entitled to reinstatement rights consistent with USERRA and any other applicable federal or state law. The element should consult with local Legal Counsel for advice and directions regarding full compliance with USERRA and any applicable state law, including USERRA provisions that may restrict layoffs for certain periods of time.

2.18 An employee who does not return to work within the time limitations and other requirements specified by USERRA and any applicable state law will be administratively terminated from employment without severance eligibility.

2.19 The effective date of termination for an employee who was on *paid* military duty will be the last regularly scheduled workday of the approved absence. The effective date of termination for an employee who was on *unpaid* military duty will be the last regularly scheduled workday prior to being placed on unpaid status.

Expatriate Employees

2.20 Employees on international assignment will remain on the international payroll for the period of annual military duty. Employees who enlist or are called to active duty will be transferred to the domestic payroll, then placed on military leave.

3.0 General

3.1 This policy is intended to comply with USERRA and the Fair Labor Standards Act, among other federal and state laws.

3.2 Nothing in this policy will be construed to supersede any provision of any federal, state, or local law or collective bargaining agreement that provides greater rights than those outlined herein.

3.3 No provisions of this or any other XXXXXXX policy or procedure will be construed as an employment agreement. Employment with XXXXXXX can be terminated at any time with or without cause either by the employee concerned or by XXXXXXX.

3.4 Any deviation from this policy requires the prior approval of the Senior Vice President Human Resources or designee.

Company 4 Example Policy

Military Affairs Administration
Purpose/Summary

This procedure applies to **XXXXXX** employees who are members of, or apply to be members of, a uniformed service of the United States or who have performed, apply to perform, or have an obligation to perform service in such a uniformed service.

This procedure provides the standards governing payment of military differential pay for employees who are ordered to report for active duty or training duty.

Employees covered by collective bargaining agreements will be governed by the applicable agreement as well as this procedure with the agreement having precedence.

This procedure does not constitute a contract or contractual obligation, and the Company reserves the right, in its sole discretion] to amend, modify, or discontinue its use without prior notice, notwithstanding any person's acts, omissions or statements to the contrary.

This procedure applies to all segments of **The XXXXXX Company**, including subsidiaries (as implemented by resolution of the subsidiary Board of Directors).

Business segment sites may choose to not implement this procedure or choose only to implement specific provisions of this procedure. If applicable, the site will have a documented writing addressing this subject. Employees should contact their manager or People organization about the applicability of this procedure at their site.

Summary of Changes to the Title Page

The Issue Date, Purpose/Summary, Supersedes date, Applies to, Maintained by and Approved by information sections have changed. Otherwise, this is a major revision.

1. Definitions

The definitions of the following terms used in this procedure are for purposes of this procedure only and have no effect on the meaning of the same or similar terms used in other documents.

A. Military Differential Pay

The difference between an employee's gross military compensation and their regular XXXXXX pay (working rate of pay). Military compensation includes but is not limited to Base Pay, Foreign Duty Pay, Special and Incentive Pay and Housing (Basic Allowance for Housing (BAH)/Basic Allowance for Quarters (BAQ)). Subsistence (does not include Housing (BAH/BAQ)), uniform, and travel allowances will not be included in determining military compensation. For purposes of calculating military differential pay, a five-day workweek will be used.

B. Original Work Location

Principal XXXXXX work location at time of military service (e.g.) Anaheim, Huntington Beach, Huntsville, Long Beach, Philadelphia, Portland, Puget Sound, Seal Beach. Spokane, St. Louis, Wichita.

C. Uniformed Service

Army, Navy, Marine Corps, Air Force, Coast Guard, and their reserves, Army National Guard or Air National Guard, and Commissioned Corps of the Public Health Service.

D. Working Rate of Pay

The employee's hourly base rate plus any additive rates.

2. Requirements

A. The Company will comply with all state and federal laws and regulations that apply to reemployment of employees returning from a leave of absence after active U.S. uniformed service.

B. The Company will make every reasonable effort to cooperate with the U.S. uniformed services. However, the Company reserves the right to contact military administrators in instances where an employee's time away from work exceeds normally expected amounts.

C. Military Leave of Absence

1. When an employee has orders to report for active duty, annual active duty or temporary special duty in the uniformed service of the United States, a leave will be granted for the period of service in accordance with procedure _____, 'Leave of Absence."

2. Employees on a leave of absence for active duty, annual active duty or temporary special duty may not may not return to work until the period of service is completed.

3.,. A leave of absence for military service shall not exceed five (5) years unless required by the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.

4. Company service will continue to accrue while on a military leave of absence for up to five years or longer if required by applicable laws.

5. Employees may use available vacation credits while on a military leave. Military pay differential is not applicable when using vacation credits. Vacation credits will continue to accrue during the first 90 calendar days of the leave of absence.

6. Employees may not use available sick leave credits while on military leave. Sick leave credits will continue to accrue during the first 90 calendar days of the leave of absence.

7. Employees are eligible for Company paid holidays occurring during the first 90 calendar days of military leave. Military differential pay is not applicable on a Company paid holiday.

D. Time Off and Military Differential Pay for Members of a Reserve Component Called to active duty.

Note: Provisions of this section do not apply to employees who volunteer for enlistment or re-enlistment into the Armed Forces during the initial period of active duty.

1. Members of a reserve component of a uniformed services who are ordered to annual active duty are eligible for military differential pay up to a maximum of 80 hours each military fiscal year (October 1 - September 30) or longer if required by applicable laws.

2. Members of a reserve component of the uniformed services who are ordered to temporary special duty in time of war, national or state emergency as outlined below in 2.a. through 2.e., herein referred to as call-up" are eligible for military differential pay for up to a maximum of 90 calendar days of active duty for each occurrence. Extension of military differential pay beyond 90 days may be approved on a case-by-case basis for each call-up. This approval will be based on the call-up and not on an individual employee basis. Military differential pay will end upon the employee's release from active duty.

a. Military U.S. Code Title 10; USC Chapter 1209; under the following sections:

Section 12301
Section 12302
Section 12304

b. Mobilized by the applicable state agency for a state emergency.
c. Mobilized for service as an intermittent disaster-response appointee when the Secretary of Health activates the National Disaster Medical System.

d. The military differential pay under this provision is in addition to the 80 hours of annual active duty described in 2.D.1.

e. Only copies of original orders with documentation of qualifying Title 10 sections as defined in 2.D.2.a. will be accepted. Letters from commanding officers will not be accepted.

3. Employees will retain all compensation received from the uniformed services. If the employee's military compensation is less than their regular XXXXXX pay (working rate of pay), the employee will receive pay for the difference upon receipt of the employee's leave and earnings statement. Employees on U.S. Code Title 10 call-ups should regularly submit leave and earnings statements to receive differential pay while serving. Subsistence (does not include Housing (BAH/BAQ)), uniform, and travel allowances will not be included in determining military pay.

4. Excluded from military differential pay is any active or inactive duty training whereby the employee does not receive military pay (no pay status). However, such training may qualify under the employee's organizational education and training guidelines if the training is relevant to the employee's job and is not offered through the Company's education and training program (i.e. seminars and conferences).

5. Employees may use available vacation credits while on a military leave. Military pay differential is not applicable when using vacation credits.

6, Employees may not use available sick leave credits while on military leave.

7. Employees are eligible for Company paid holidays occurring during the first 90 calendar days of military leave. Military differential pay is not applicable on a Company paid holiday. Employees eligible for extended military differential pay as defined in section 2.D.2. will continue to receive such pay for unpaid holidays after 90 calendar days,

E. Reemployment Rights

To qualify for reemployment rights following military service, employees must meet the following criteria as defined by the Uniformed Services Employment and Reemployment Rights Act of 1994 (U.S. Code Title 36, Chapter 43):

a. The employee gave notice prior to taking military leave.

b. The period of military leave has not exceeded five years unless otherwise exempt under the provisions of this act (Section 4312 (c)).

c. The employee's release from military service was under 'honorable conditions."

d. The employee reported back to work or applied for reemployment within 90 days of completion of service.

e. During an employment reduction, managers will review employees who are on military leaves of absence using the same layoff selection processes as if those employees had remained at work. If required, affected employees on an approved leave of absence will receive an advanced notification of layoff. Upon

return from the eave of absence, employees will be subject to appropriate redeployment actions, which may include reassignment or layoff. If applicable, employees can remain on a military LOA up to 90 days following completion of duty. However, if an employee is subject to layoff upon return to work the termination date will be the day following completion of active duty.

2. Employees are eligible for reemployment at their original work location. Reference Exhibit A for specific provisions regarding reinstatement and job rights.

3, Employees may apply for reemployment at another work location. However, they are not entitled to reemployment rights at the new location.

3. Responsibilities

A. Employee

1. Provide management with advance notice of required uniformed service unless it is unreasonable or impossible to do so.

2. Request a leave of absence in accordance with procedure PRO-1874, 'Leave of Absence."

3. Provide the appropriate payroll center with a copy of military orders prior to annual active duty or special temporary duty. Changes to original military orders require a new set of orders. Changes to .original military orders on letterhead stationary or facsimile will not be accepted. Upon return or before, provide a copy of the appropriate military leave and earnings statement in order to ensure proper and timely payment. A substitute voucher or facsimile will not be accepted.

4. Employees on U.S. Code Title 10 call-ups should regularly submit leave and earnings statements to receive differential pay while serving.

5. After completion of military service, return to work through the resident return to work process and make application for reemployment within 90 days of completion of service.

B. Manager

1. Allow employees to meet their uniformed service obligations.

2. Ensure that the employee provides the payroll center with a copy of their military orders before departure to annual active duty or special temporary duty and, during or upon return, provides the payroll center with a copy of their military leave and earnings statement. No substitute payment voucher or facsimile will be accepted.

3, Ensure employee absence is properly recorded.

4. Review with the appropriate People organization before any final action is taken to process a downgrade, suspension, or involuntary termination of a reinstated veteran during the first year of the veteran's return from military service. This action is required to ensure compliance with the Uniformed Services Employment and Reemployment Rights Act of 1994.
5. Review and determine if any military training not eligible for military differential pay may qualify under the organization's education and training guidelines.

C. People/Human Resources Organization

1. Counsel, coordinate, and assist employees and managers on all uniformed service duty and reemployment matters.

2. Counsel and assist employees and managers on matters relating to military regulations as they affect company employee relations.

D. Payroll

Analyze and interpret military orders and leave and earnings statements for qualifications and approval of military differential pay.

E. Employment

Counsel, coordinate, and assist employees and the People organization on reemployment matters.

F. World Headquarters Global Diversity and World Headquarters Compensation and Benefits

1. Interpret this procedure as required.

2. Initiate action necessary to keep this procedure up to date.

Employee's Active Duty Absence Notification Letter to Employer

[Employee's Home Address]

[Date]

[Employer's Business Address]

Send by Certified Mail, Return receipt requested

Dear Sir/Madam:

I will perform service with the [**service**] beginning on [**date**] and ending on [**date**]. My absence from work for this period of military service is protected by the Uniformed Services Employment and Reemployment Rights Act, Title 38, United States Code Sections 4301-33.

My last day at work with you before I begin my military service will be [**date**]. I expect to return to work with you on or about [**date**]. ***Note: Make sure your return date complies with Title 38, United States Code Section 4312.*** [During my absence, I can be reached at {give mailing address and telephone number, if known}] [During my absence, _____, telephone number (___) ___-____, will know how to reach me] [I {do} {do not} desire to take ___ days of paid {vacation, annual leave, etc.} as the first ___ days of my absence.] Please be advised that I may not be required to use vacation pay or time for military absence from my workplace, per Title 38, United States Code Section 4316(d).

If you have any questions about the provisions of the Uniformed Services Employment and Reemployment Rights Act, the National Committee for Employer Support of the Guard and Reserve, toll-free telephone number 1-800-336-4590, will be happy to answer them.

Sincerely,

[Signature]

Original Received for Employer by:

_____
[Printed Name and Signature]

National Committee for
Employer Support of the Guard and Reserve

Employee's Active Duty Return Notification Letter to Employer

[Employee's Home Address]

[Date]

[Employer's Business Address]

Send by Certified Mail, Return receipt requested

RE: Application for Reinstatement – Uniformed Services Employment and Reemployment Act, Title 38, U.S. Code Section 4312

Dear Sir/Madam:

On [**date**], I entered active duty with the [**service**]. On [**date**], I was honorably released from active duty with the service.

Please accept this letter as a formal request to be reinstated in my former job. With your permission, I plan to report to work on [**date**]. Please call me at the number listed below if this date is not convenient. Pursuant to the Uniformed Services Employment and Reemployment Rights Act, Title 38, United States Code Sections 4301-33, I am entitled to be reinstated as soon as possible in my former position.

If you have any questions about the provisions of the Uniformed Services Employment and Reemployment Rights Act, the National Committee for Employer Support of the Guard and Reserve, toll-free telephone number 1-800-336-4590, will be happy to answer them.

Sincerely,

[Signature]

Original Received for Employer by:

_____
[Printed Name and Signature]

National Committee for
Employer Support of the Guard and Reserve

A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)

The U.S. Department of Labor
Veterans' Employment and Training Service

July 2004

Introduction

The Department of Labor's Veterans' Employment and Training Service provides this guide to enhance the public's access to information about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in various circumstances. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

USERRA applies to virtually all employers, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal employers. Specific questions should be addressed to the State director of the Veterans' Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive system, "The USERRA Advisor," answers many of the most-often asked questions about the law. It can be found in the "E-Laws" section of the Department of Labor's home page. The Internet address is *http://www.dol.gov.*

Disclaimer

This user's guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the actual statute.

Table of Contents

Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353), significantly strengthens and expands the employment and reemployment rights of all uniformed service members.

Who's eligible for reemployment?

"Service in the uniformed services" and "uniformed services" defined -- (38 U.S.C. Section 4303 (13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.
- Funeral honors duty performed by National Guard or reserve members.
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Homeland Security – Emergency Preparedness and Response Directorate (FEMA), when activated for a public health emergency, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). See Title 42, U.S. Code, section 300hh-11(e).

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve.
- Army National Guard or Air National Guard.
- Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

"Brief Nonrecurrent" positions (Section 4312(d)(1)(C))

The law provides an exemption from employer reemployment obligations if the employee's pre-service position of employment "is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."

Advance Notice (Section 4312(a)(1))

The law requires all employees to provide their employers with advance notice of military service.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- military necessity prevents the giving of notice; or
- the giving of notice is otherwise impossible or unreasonable.

Duration of Service (Section 4312(c))

The cumulative length of service that causes a person's absence from a position of employment with a given employer may not exceed five years.

Most types of service will be cumulatively counted in the

computation of the five-year period.

Exceptions . Eight categories of service are exempt from the five-year limitation. These include:

(1) **Service required beyond five years to complete an initial period of obligated service (Section 4312 (c)(1)).** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

(2) **Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit (Section 4312(c)(2)).** For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea.

Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm.

(3) **Required training for reservists and National Guard members (Section 4312(c)(3)).** The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

(4) **Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).**

(5) **Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress (Section 4312(c)(4)(B)).** This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.

(6) **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent (Section 4312(c)(4)(c)).** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304. The U.S. military involvement in Haiti ("Uphold Democracy") and in Bosnia ("Joint Endeavor") is two examples of such an operational mission.

This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

(7) **Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect (Section 4312 (c)(4)(D)).** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

(8) **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States (Section 4312(c)(4)(E)).**

Disqualifying service (Section 4304)

When would service be disqualifying? The statute lists four circumstances:

(1) Separation from the service with a dishonorable or bad conduct discharge.

(2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

(3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war **(Section 1161(a) of Title 10).**

(4) Dropping an individual from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court. **(Section 1161(b) of Title 10)**

Reporting back to work (Section 4312(e))

Time limits for returning to work depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.

If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.

Fitness Exam. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible.

Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

Documentation upon return (Section 4312(f))

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under **Section 4304.**

Unavailable documentation . **Section: 4312(f)(3)(A)**. If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.
Pension contributions. Section 4312(f)(3)(B). Pursuant to **Section 4318**, if a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

How to place eligible persons in a job

Length of service -- Section 4313(a)

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 days. Section 4313(a)(1)(A) & (B). A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

(1) **(Section 4313(a)(1)(A))** in the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the

service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) if the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. **(Section 4313(a)(4))**

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. **Section 4313(a)(2)**. The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

(1) **Section 4313(a)(2)(A)**. In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) **Section 4313(a)(4)**. If the employee cannot become qualified for the position either in (A) or (B) above: in any other position that most nearly approximates the above positions (in that order) the duties of which the employee is qualified to perform, with full seniority.

"Escalator" position . The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority "escalator" at the point the person would have occupied if the person had remained continuously employed. The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation of status and pay that the person is qualified to perform (the third reemployment position in the above schemes).

"Prompt" reemployment. Section 4313(a). The law specifies that returning service members be "promptly reemployed." What is prompt will depend on the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

Disabilities incurred or aggravated while in Military Service Section 4313(a)(3).

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

(1) The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.

(2) If, despite reasonable accommodation efforts, the person is not qualified for the position in **(1)** due to

his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.

(3) If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

The law covers all employers, regardless of size.

Conflicting reemployment claims Section 4313(b)(1) & (2)(A).

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.

- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Changed circumstances Section 4312(d)(1)(A)).

Reemployment of a person is excused if an employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue hardship Section 4312(d)(1)(B).

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Rights of reemployed persons

Seniority rights Section 4316(a)

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of service. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency.

Rights not based on seniority Section 4316(b).

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the service member is entitled to the most favorable treatment so long as the nonmilitary leave is comparable. For example, a three-day bereavement leave is not comparable to a two-year period of active duty.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.

Forfeiture of rights. Section 4316(b)(2)(A)(ii). If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Funding of benefits. **Section 4316(b)(4)**. Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay.

Pension/retirement plans

Pension plans, **Section 4318,** which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

• **Section 4318(a)(2)(A)**. A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;

• **Section 4318(a)(2)(B)**. Military service must be considered service with an employer for vesting and benefit accrual purposes;

• **Section 4318(b)(1)**. The employer is liable for funding any resulting obligation; and

• **Section 4318(b)(2)**. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. Section 4318. A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Multi-employer plans. Section 4318(b)(1). In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate the liability of the plan for pension benefits accrued by persons who are absent for military service. If no allocation or cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment. **(4318(c))**

Employee contribution repayment period. Section 4318(b)(2). Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

Calculation of contributions. Section 4318(b)(3)(A). For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service.

Section 4318(b)(3)(B). If the employee's compensation was not based on a fixed rate, or the determination of such rate is not reasonably certain, the employee's compensation during the period of service is computed on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation pay Section 4316(d).

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, service members cannot be forced to use vacation time for military service.

Health benefits Section 4317

The law provides for health plan continuation for persons who are absent from work to serve in the military and their dependents, even when their employers are not covered by COBRA. (Employers with fewer than 20 employees are exempt for COBRA.) **Section 4317(a)(1).**

If a person's health plan coverage (in connection with the person's position of employment) would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Section 4317(b). Upon reemployment of the service member, a waiting period or exclusion cannot be imposed upon reinstatement of health plan coverage of any person whose coverage was terminated by reason of the military service (unless an exclusion or waiting period would have been imposed absent the military service). However, an exception applies to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service-connected.

Multi-employer. Section 4317(a)(3). Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from discharge

Under USERRA, a reemployed employee may not be discharged without cause as follows:

• **Section 4316(c)(1)**. For one year after the date of reemployment if the person's period of military service was for more than 180 days.

• **Section 4316(c)(2).** For six months after the date of reemployment if the person's period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from discrimination and retaliation

Discrimination -- **Section 4311.**

Section 4311(a). Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

• hiring;

• promotion;

• reemployment;

• termination; and

• benefits

Persons protected. Section 4311(a). The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services or to perform service in the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations in all branches of the military or as intermittent employees in the National Disaster Medical System are also protected.

Standard/burden of proof. Section 4311(c). If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service.

USERRA clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Reprisals

Employers are prohibited from retaliating against anyone:

• who files a complaint under the law;

• who testifies, assists or otherwise participates in an investigation or proceeding under the law; or

• who exercises any right provided under the law.

• whether or not the person has performed military service **(section 4311(b))**.

How the law is enforced (Non-Federal employers)

Department of Labor

Regulations. Section 4331(a). The Secretary of Labor is empowered to issue regulations implementing the statute for States, local governments, and private employers. Previously, the Secretary lacked such authority.

Veterans' Employment and Training Service. Reemployment assistance is provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. **Section 4321.** VETS investigates complaints and, if meritorious, attempts to resolve them. Filing of complaints with VETS is optional. **Section 4322.**

Access to documents. Section 4326(a). The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. Section 4326(b). The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Government-assisted court actions

Section 4323(a)(1). Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

Private court actions Section 4323(a).

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double damages. Section 4323(d)(1)(C). Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees. Section 4323(h)(2). The law, at the court's discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also, the law bans charging of court fees or costs against anyone who brings suit (4323(c)(2)(A)).

Declaratory judgments. Section 4323(f). Only persons claiming rights under the law may bring lawsuits. According to the law's legislative history, its purpose is to prevent employers, pension plans, or unions from filing actions for declaratory judgments to determine potential claims of employees.

Service Member Checklist

Service Member Obligations

Yes

No

Comments

Reference1. Did the service member hold a job other than one that was brief, nonrecurring? (exception would be discrimination cases.)Page 22. Did the service member notify the employer that he/she would be leaving the job for military training or service?Page 23. Did the service member exceed the 5-year limitation limit on periods of service? (exclude exception identified in the law)Page 24. Was the service member discharged under conditions other than disqualifying under section 4304?Page 45. Did the service member make application or report back to the pre-service employer in a timely manner?Page 46. When requested by the employer, did the service member provide readily available documentation showing eligibility for reemployment?Page 57. Did the service member whose military leave exceeded 30 days elect to continue health insurance coverage? The employer is permitted to charge up to 102% of the entire premium in these cases.Page 10

Employer Obligations

Employer Obligations:YesNoCommentsReference1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal)Page 2
2. Did the employer allow the service member a leave of absence? The employer cannot require that

vacation or other personal leave be used.Page 103. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?Page 5

4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations. Page 85. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?Page 56. Did the employer consider the timing, frequency, or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?Page 2

7. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities. If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?Page 78. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority?Page 79. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?Page 9

10. Did the employer providehealth coverage upon request of a service member? Upon the service member's election, did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days?Page 1011. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute?Page 11

12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for service?Page 11

May 25,
2004
FMLA2004-2-A

Dear ***Name****,

Thank you for your letters dated July 7, 1998, addressed to Ms. Michelle Bechtoldt, formerly of the Office of Enforcement Policy, Family and Medical Leave Act Team, in regard to medical recertification issues under the Family and Medical Leave Act of 1993 (FMLA). You have requested clarification of Regulations 29 Part 825 in regard to recertification issues.

You agreed in a telephone conversation on February 27, 2004, that it would be appropriate to combine our response to your inquiries in one letter. We apologize for the long delay in providing this response.

The Wage and Hour Division of the U.S. Department of Labor administers the FMLA for all private, state and local government employees, and some federal employees. Although determinations of coverage, eligibility and other issues of compliance under the FMLA are fact intensive, we trust that the following information will provide the clarification you requested.

1. **Minimum recertification period when no minimum duration of capacity is specified in the medical certification.**

You understand that the FMLA allows an employer to request recertification every 30 days for pregnancy, chronic or permanent/long term conditions, citing four scenarios involving such conditions, none of which have a minimum duration of incapacity specified in the medical certification.[1] You request that we confirm this understanding or explain our basis for disagreement.

We agree with your understanding, provided the recertification is requested in connection with an absence. Section 103(e) of the FMLA states the employer may require subsequent recertifications "on a reasonable basis." The FMLA regulations at §825.308(a) limit recertification for pregnancy, chronic, or permanent/long-term serious health conditions, when no minimum duration of incapacity is specified on the medical certification (as discussed in §825.308(b)), to no more often than every 30 days, provided the recertification is done only in connection with an absence. If circumstances have changed significantly, or the employer receives information which casts doubt upon the continuing validity of the certification, recertification may be requested more frequently than every 30 days.

2. **Minimum recertification period with Friday/Monday absence pattern.**

You understand that a pattern of Friday/Monday absences can constitute "information that casts doubt upon the employee's stated reason for the absence" (§825.308(a)(2)), thus allowing an employer to request recertification more frequently than every 30 days.

We agree with your understanding, provided there is no evidence that provides a medical reason for the timing of such absences and the request for recertification is made in conjunction with an absence. A recertification under these circumstances could thus be justified, for example, if a medical certification indicated the need for intermittent leave for two or three days a month due to migraine headaches, and the employee took such leave every Monday or Friday (the first and last days of the employee's work week).

3. **Informing medical provider of pattern of Monday/Friday or apparent excessive absences, and asking for clarification.**

You understand that an employer, when requesting medical certification or recertification, may inform the health care provider that the employee has a pattern of Friday/Monday or apparent excessive absences. You add that you understand that an employer who has observed such a pattern of potential abuse may ask the health care provider, as part of the certification (and subsequent recertification) process, if this pattern of absence is consistent with the employee's serious health condition. You recognize that an employer's direct contact with the employee's health care provider is prohibited, but you understand that this question could be added to the medical certification form given to the employee for completion by the health care provider.[2]

The FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences. Nor does the FMLA prohibit an employer from asking, as part of the recertification process, whether the likely duration and frequency of the employee's incapacity due to the chronic condition is limited to Mondays and Fridays.

Further, please be aware that Regulation §825.307(a) permits a health care provider representing the employer to contact the employee's health care provider for purposes of clarifying the information in the medical certification. Such contact may only be made with the employee's permission.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We hope that this has been responsive to the questions you have raised. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,
Tammy D. McCutchen, Administrator

Note: * The actual name(s) was removed to preserve privacy.

[1] Scenario One: An employee's Health Care Provider (HCP) certifies her migraine headaches will last indefinitely. Scenario Two: An employee's HCP certifies a chronic serious health condition (diabetes) and provides no time frame for the duration of the condition. Scenario Three: The employee's chronic serious health condition (asthma) is certified to last for an indefinite period, with possible episodes of incapacity (coinciding with pollen season) over a three month period. Scenario Four: The certification again specifies an indefinite period, but indicates a need for breathing tests and treatments to be conducted over the next three months.

[2] Under the Health Insurance Portability and Accountability Act (HIPAA), 104 P.L. 191, 42 USC §1320d, covered entities (such as HCPs) are subject to certain standards regarding the use and disclosure of an individual's protected health information. (See 45 CFR Parts 160 and 164, administered by the U.S. Department of Health and Human Services, Office for Civil Rights.) In general, the HIPAA does not prohibit covered entities from releasing an individual's protected health information to that individual.

CALIFORNIA EMPLOYERS -- PROTECTED LEAVES OF ABSENCE
REVISED 8/31/04

	FEDERAL FMLA (Family and Medical Leave Act)	**CALIFORNIA CFRA** (California Family Rights Act)	**CALIFORNIA PDL** (Fair Employment and Housing Act)	**SB 1661** (Paid Family Leave Effective 7/1/04)
Number of Employees Necessary to be Obligated to Provide Leave or Benefit	50 (within 75 miles).	Same as FMLA.	5 within California.	One or more. (PFL does not create a right to leave.)
Length of Service Requirement for Eligibility	At least 12 months (not necessarily consecutive).	More than 12 months (not necessarily consecutive).	None -- immediately eligible.	None--immediately eligible.
Hours of Service Requirement for Eligibility	1,250 hours within 12-months prior to leave.	Same as FMLA (except for birth bonding leave for a woman following delivery where the 1,250 hour requirement is measured at commencement of pregnancy disability leave).	None -- immediately eligible.	None--immediately eligible.
What if Employee Works Away from Work Site with 50 Employees?	Employee is eligible for leave if his/her work is directed from a work site with 50 employees within 75 miles.	Same as FMLA.	Eligible if employee works in California.	Eligible if employee works in California.
Reason for Leave	Employee's serious health condition; care of a parent, spouse or child with a serious health condition; birth or placement for adoption or foster care of a child.	Same as FMLA, except definition of an employee's serious health condition excludes pregnancy-related disabilities and related medical conditions.	Employee's disability on account of pregnancy, childbirth, or related medical conditions.	Care of a parent, spouse, child, or domestic partner with a serious health condition; birth or placement for adoption or foster care of a child, including the child of a domestic partner.
Duration of Leave	12 weeks in a 12-month period.	12 weeks in a 12-month period.	4 months or 88 work days for a full-time employee (per pregnancy).	Does not require provision of leave.

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Payment During Leave	No obligation to pay employee unless employer's own leave of absence policy provides otherwise. Employee may apply for state disability insurance benefits if employee qualifies.	Same as FMLA.	Same as FMLA.	Provides for partial wage replacement for 6 weeks in a 12-month period. There is a 7-day waiting period during which no benefits are payable at the outset of each family temporary disability insurance leave.
Employee Request for Leave/Employer Response	Employee may request leave without using the term "FMLA." Employer may require 30 days written notice before requested leave is to begin — if: (1) need for leave is foreseeable; and (2) employee had notice of this requirement. Employer must respond to request for leave within 2 business days. Employer may respond orally but must subsequently notify employee in writing that the leave is designated as FMLA leave. (JL has an employer response form for this purpose.)	Employee may request leave without using the term "CFRA" and request may be oral. Employer may require 30 days notice before requested leave is to begin — if: (1) need for leave is foreseeable; and (2) employee had notice of this requirement. Employer must respond to request no later than 10 calendar days after leave requested. Approval is deemed retroactive to first day of the leave. (JL has an employer response form for this purpose.)	Same as CFRA for request. Employer is not obligated to notify employee in writing the leave will be counted as PDL leave; however, JL suggests giving such notice to ensure the employer properly accounts for the leave time.	Employee must file a claim supported by either a certification form for an employee taking leave due to the birth of a child or the placement of a child who is unable to care for himself or herself in connection with adoption or foster care, or a certificate of the treating physician or practitioner that establishes the condition of the family member that warrants the care of the employee. The certification forms will be developed by the Employment Development Department.

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Birth Bonding/Child Care Incremental Leave or Reduced Schedule	Leave taken after birth, adoption, foster placement to "bond" with child must be taken continuously within one year of birth, adoption or placement; reduced schedules and intermittent leave are not required by the statute, but may be mutually agreed to.	Birth bonding leave must be taken within 1 year after the child's birth and in at least 2-week increments, except on 2 occasions when leave can be for shortest period of time payroll system accounts for absences. Reduced schedule leave is not required by the statute, but may be mutually agreed to.	Not applicable. (After disability ends, employee may take a CFRA leave to bond with the newborn child for a maximum of 12 weeks.)	Any family temporary disability insurance leave taken due to the birth of a child or the placement of a child who is unable to care for himself or herself in connection with adoption or foster care must be taken during the first year after the birth or placement of the child.
Incremental Leave or Reduced Schedule Leave Taken For Serious Health Condition of Employee or Employee's Spouse, Child, or Parent	Serious health condition leave may be taken in increments of the shortest period the payroll system accounts for if medically necessary (employees entitled to increments adding up to 12 weeks). Employer may deduct salary for hours taken by exempt employees as intermittent or reduced schedule leave without employees losing exempt status.	Same as FMLA.	Same as FMLA, except that full-time employee is entitled to increments adding up to 4 months or 88 work days for each pregnancy.	No provision for intermittent or reduced schedule leave.

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If Husband and Wife Both Work for Employer	The employer may limit the leave taken for birth, adoption, or foster placement and leave to care for an employee's parent with a serious health condition to a combined 12-week period shared between the husband and wife (i.e., if the wife takes 3 weeks to bond with a newborn child, the husband can only take 9 weeks to care for his mother with a serious health condition. However, the wife and husband would still have 9 and 3 weeks, respectively, remaining to use for their own serious health condition or that of their child).	The employer only may limit the leave taken for birth, adoption, or foster placement to a combined 12-week period shared between the husband and wife, not leave for a serious health condition.	Not applicable.	Because an individual is not eligible for family temporary disability insurance benefits for any day that another family member is able and available to provide the required care, it is unlikely 2 employees could draw benefits at the same time.
What if Employee Requests Transfer to Another Position?	No provision for transfer; however, if the employee's own serious health condition would qualify as a disability under the Americans with Disabilities Act, the employer may be required to accommodate the employee's request for transfer.	No provision. (See FMLA, FEHA disability discrimination provisions.)	Employees are eligible to transfer to less strenuous or hazardous duties if the employee provides certification from her health care provider that this transfer is medically advisable. The employer need not create a new position, discharge or transfer other employees to accommodate this request.	Not applicable to law providing only wage replacement benefits when employees take covered leave.

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Employer May Transfer Employee to Another Position to Accommodate Reduced Schedule and/or Intermittent Leave	To accommodate intermittent leave or a reduced schedule, the employer may require the employee to transfer to an alternative position for which the employee is qualified, that provides equivalent pay and benefits, and better accommodates recurring periods of leave. The alternative job need not have equivalent duties.	Same as FMLA.	Same as FMLA.	No provision for intermittent or reduced schedule leave.
Medical Certification of Employee's Serious Health Condition or Employee's Spouse, Child, or Parent's Medical Condition	May be required if the employee has notice of the requirements; must give employee 15 days to obtain medical certificate. (JL has certification form.) Note: the employer cannot require a medical certification for bonding leave.	Same as FMLA, except cannot ask for nature of health condition (JL has a certification form.) Note: the employer cannot require a medical certification for bonding leave.	May be required if a certificate is also required for other medical leaves of absence.	Employee's claim must include either a certification for an employee taking leave due to the birth of a child or the placement of a child who is unable to care for himself or herself in connection with adoption or foster care, or a certificate of the treating physician or practitioner that establishes the condition of the family member that warrants the care of the employee. The certification forms have been developed by the Employment Development Department.

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Can Employer Require Second Medical Opinion?	Yes (at the employer's cost) for both employee's own serious health condition and employee's parent/child/spouse's condition (not bonding leave).	Yes (at the employer's cost) for the employee's own serious health condition if there is reason to disbelieve the employee's doctor report. California employers may not require a second opinion for the employee's parent's, child's or spouse's medical condition.	No provision.	No provision.
Fitness for Duty Medical Release	Employer may require certification from the employee's medical provider that the employee is able to resume work so long as the employer requires fitness for duty certification from all employees returning from a medical leave.	Same as FMLA.	Same as FMLA.	No provision.
Requiring Use of Vacation Time for Leave	Employer may designate vacation to run concurrently with FMLA leave only during the unpaid portion of the leave (e.g., the employee does not receive wage replacement benefits). (Must notify employee of this within 2 business days after request for leave.)	Employer may designate vacation to run concurrently with CFRA leave only during the unpaid portion of the leave (e.g., the employee does not receive wage replacement benefits).	At employee's option, she can use accrued vacation (it cannot be required).	Employer may require an employee to take up to 2 weeks of earned but unused vacation leave or paid time off prior to the employee's initial receipt of family temporary disability insurance benefits during any 12-month period. If the employer chooses to require the use of vacation leave, the first week of vacation must be applied to the 7-day waiting period.

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Requiring Use of Sick Leave	Employer may designate sick leave to run concurrently with FMLA absence if leave is taken for employee's own or a family member's serious health condition.	Employer may designate sick leave to run concurrently with CFRA absence if leave is taken for employee's own serious health condition. Employer and employee may agree to apply sick leave to other types of CFRA leaves of absence.	Employer may require sick leave to run concurrently with PDL.	No provision.
Designation of Pregnancy Disability	Employer should designate the leave as FMLA during PDL if the employee qualifies for FMLA leave. (FMLA and PDL run concurrently.)	Employer may not designate CFRA to run concurrently with PDL unless employee exhausts PDL (up to 4 months for full-time employee).	Pregnancy leave should be designated PDL and FMLA if the employee also qualifies under the FMLA.	Statute does not apply to pregnancy. Regular state disability insurance may cover pregnancy and related conditions.
Designation of Leave - Notice to Employee	Employer must notify employee within 2 business days of FMLA designation after employee requests FMLA leave.	Employer must notify employee within 10 business days of CFRA designation after employee requests CFRA leave.	Same as CFRA.	Not applicable to law providing only wage replacement benefits when employees take covered leave. Family temporary disability insurance leave runs concurrently with FMLA/CFRA leave.
Retroactive Designation	Employer may not retroactively designate FMLA leave except when employer does not know of FMLA qualifying condition (i.e., employee injured during vacation).	If timely approval of leave is given, (i.e., within 10 days after request), approval is deemed retroactive to first day of leave.	Same as CFRA.	Not applicable to law providing only wage replacement benefits when employees take covered leave.

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Notice to Intent to Return to Work	Employer may require employees to give 2 business days' notice prior to returning from leave.	No notice required if employee returns to work at end of agreed upon leave. If length of leave changes, employer may require employees to give 2 business days' notice.	Same as CFRA.	No provision.
Reinstatement Rights of Employee	Employee must be reinstated to same or equivalent position at end of leave. Equivalent position must have same pay, benefits, schedule, shift and job duties and a geographically proximate location.	Employee must be reinstated to same or comparable position at end of leave. "Comparable" position has similar definition as FMLA "equivalent" position.	Employee must be reinstated to same position (very narrow exceptions exist).	No provision.
Denial of Reinstatement to Highly Paid Employees	Employer can deny reinstatement to a salaried employee who is among top 10% of the highest paid employees within 75 miles if: (1) denial is necessary to prevent "substantial and grievous economic injury"; (2) the employer notified the employee before or during leave; and (3) employee had the option to return from or not take leave. (The employer must still give benefits during leave if the employee's reinstatement is not guaranteed.)	Same as FMLA.	Employer cannot deny reinstatement on this basis.	No provision for reinstatement of any employee.
Health Benefits	Employer must continue benefits under the same conditions as if the employee was working for the period of leave, up to 12 weeks (even if reinstatement is not guaranteed because highly-paid employee.)	Same as FMLA. [Note: an employee disabled by pregnancy who takes a leave to later bond with a newborn is entitled to a maximum of 12 weeks of benefits for both FMLA and CFRA combined, although the leave period can exceed 12 weeks.]	No requirement under PDL. However, continued benefits are required if employee qualifies under the FMLA or if employee would qualify under employer's policy of giving continued health benefits for employees on other unpaid leaves of absence.	No requirement under this law. However, continued benefits are required if employee qualifies under the FMLA.
Recovery of Health Premiums	Employer can recover premiums paid an employee if either employee does not return from leave, or does not work for at least 30 days after the leave, unless the failure to return is beyond the control of employee.	Same as FMLA.	No provision under PDL; see FMLA, if employee qualifies.	No provision.
Employer's Notice Obligations	Employer must post required poster and provide notices to persons requesting leave at time they request leave. If employer gives any description of other benefits in a handbook, the employer must include an FMLA policy in the handbook. (See JL Model Policy.)	Employer must post the DFEH poster, describe policy, and give copy of leave policy to those requesting leave. If employer publishes a handbook that describes other available personal or disability leaves, the employer must include a description of CFRA leave in its handbook. The policy can combine the requirements of CFRA and FMLA. (See JL Model Policy.)	Employer must post PDL leave description and give copy of leave description to employees requesting leave. If employer publishes a handbook that describes other available temporary disability leaves or transfers, the employer must include a description of pregnancy disability leave or transfer in its handbook. The policy can combine the requirements of PDL and CFRA. Also, employer must provide pregnant employees with notice of their rights under PDL as soon as the employer learns of an employee's pregnancy. (See JL Model Policy.)	The notification to employees as to their rights and benefits under the disability insurance law was changed to include family temporary disability insurance benefits. This notice must be distributed to all new hires beginning January 1, 2004, and to employees taking leave for a reason covered by the law beginning July 1, 2004.

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Recordkeeping Requirements [Records to be kept a minimum of 3 years.]	Records of: 1. Payroll information. 2. Dates FMLA leave is taken (must be designated FMLA leave in records.) 3. Hours of leave taken, if less than a full day. 4. Copies of notices of leave given to employer and employee. 5. Employer's other benefits and leave policies. 6. Premium payments of employee benefits. 7. Any disputes regarding designation of leave. 8. Medical records must be kept separate and confidential.	No recordkeeping requirements.	Same as CFRA.	No recordkeeping requirements specific to this law.

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