

STAFFING

- 1. REASON FOR ISSUE:** To revise Department of Veterans Affairs (VA) procedures regarding staffing and recruitment.
- 2. SUMMARY OF CONTENTS/MAJOR CHANGES:** This handbook contains mandatory VA procedures on staffing. The pages in this issuance replace part III, chapter 6 in its entirety. This revision provides reemployment procedures for returning uniformed Servicemembers under the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994. These changes will be incorporated into the electronic version of VA Handbook 5005 that is maintained on the [Office of Human Resources Management \(OHRM\) Web site](#).
- 3. RESPONSIBLE OFFICE:** The Recruitment and Placement Policy Service (059), Office of the Deputy Assistant Secretary for Human Resources Management
- 4. RELATED DIRECTIVE:** VA Directive 5005, Staffing.
- 5. RESCISSIONS:** VA Handbook 5005, Part III, Chapter 6, dated April 15, 2002.

CERTIFIED BY:

**BY DIRECTION OF THE SECRETARY
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[CHAPTER 6. REEMPLOYMENT PROCEDURES UNDER
THE UNIFORMED SERVICES EMPLOYMENT AND
REEMPLOYMENT RIGHTS ACT (USERRA) OF 1994

- 1. PURPOSE.** USERRA is a Federal statute that protects Servicemembers' and Veterans' civilian employment rights. Under certain conditions, USERRA requires employers to put individuals back to work in their civilian jobs after military service. USERRA also protects Servicemembers from discrimination in the workplace based on their military service. This chapter explains reemployment procedures, rights and benefits of Service members, and identifies employee, manager/supervisor, and human resources responsibilities under USERRA law.
- 2. COVERAGE.** The provisions in this chapter cover VA employees who are former, current or future members of the uniformed services. Employees on time-limited appointments are covered and entitled to reemployment rights until their appointment expires. Facilities must reemploy employees for the period necessary to finish the unexpired portion of their appointment upon their return to duty.
- 3. DEFINITIONS**

 - a. Benefit, Benefit of Employment, or Rights and Benefits.** Any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice which is consistent with provisions in 38 U.S.C. 4303, that apply to Federal employees.
 - b. Escalator Principle.** The reemployment of returning Servicemembers in positions for which they qualify and would have otherwise attained had they remained continuously employed.
 - c. Injury.** A compensable injury sustained under the provisions of 5 U.S.C. chapter 81, subchapter 1, and includes, in addition to accidental injury, a disease most likely caused by the employment.
 - d. Military Leave.** Paid leave provided to reservists and members of the National Guard under 5 U.S.C. 6323.
 - e. Notice.** 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.
 - f. Physically Disqualified.** The employee is unable to perform the duties of the position formerly held or an equivalent position due to medical reasons; there is a medical reason to restrict the individual from some or all essential duties because of possible incapacitation (for example, a seizure) or because of risk of health impairment (such as further exposure to a toxic substance for an individual who has already shown the effects of such exposure); or the health condition is considered permanent with little likelihood for improvement or recovery.
 - g. Qualified.** Having the ability to perform the essential tasks of the position.

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h. **Reasonable Efforts.** Actions for a person returning from the uniformed service, including training required or provided by the Department, that does not place an undue hardship on the Department.

i. **Seniority.** Longevity in employment together with any benefits of employment that accrues with or is determined by longevity in employment.

j. **Service in the Uniformed Services.** 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, and a period for which a person is absent from employment for the purpose of examination to determine fitness for employment.

k. **Status.** The particular attributes of a specific position, which may include rank, responsibility, duties, working conditions, pay, tenure, and seniority.

l. **Undue Hardship.** Actions taken by an agency/department requiring significant difficulty or expense, when considered in light of the nature and cost of actions needed under 5 CFR, part 353, the overall financial resources of the facility involved in taking the action, the number of persons employed at the facility, the effect on expenses and resources, or the impact otherwise of the action on the operation of the facility, and the overall size of the department with respect to the number of employees, the number, type, and location of facilities and type of operations, including composition, structure, and functions of its workforce.

m. **Uniformed Services.** The Armed Forces, Army National Guard, and Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, approved training to prepare for such service, 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.

4. RESPONSIBILITIES**a. Employee/Servicemember Responsibilities**

(1) Give advanced oral or written notice of upcoming service unless doing so is impossible or precluded by circumstances beyond the employee's control;

(2) Provide the supervisor and HR office an updated resume and a list of title 5 positions of interest or request consideration for hybrid/title 38 promotion opportunities, whichever is applicable, to ensure employees receive proper consideration if/when such positions are announced during their uniformed service-related absences;

(3) Update official personnel folder;

(4) As a courtesy, provide supervisor and servicing HR office an advanced copy of orders (if available), the military unit address, phone number, a point of contact, and a current mailing address;

NOTE: *USERRA only requires that employees provide a copy of orders upon their return to duty to establish timeliness of reemployment, and length and character of service when absent more than 30 days, hospitalized, or convalescing from an injury aggravated or incurred during a uniformed service-related absence. USERRA does not prohibit an employer from requesting a courtesy copy of orders for record before the employee leaves. Employees may choose to provide a courtesy copy of orders at the facility's request. However, a facility may not require such documentation from employees prior to reemployment.*

- (5) Meet eligibility requirements identified in 38 U.S.C. 4312; and
- (6) Apply for reemployment and return to duty in accordance with time limits in 5 CFR 353.205.

b. Manager/Supervisor Responsibilities

- (1) Notify employees of their USERRA rights and responsibilities;
- (2) Request that employees provide an advanced schedule of military drills/assignments as early as possible or when notified of upcoming military service obligations.
- (3) Request a courtesy copy of orders (if available), the military unit address, phone number, a point of contact, and an alternate mailing address. If orders are not available, employees absent more than 30 days must provide orders when reemployed;
- (4) Determine if employees wish to receive consideration for positions or promotion opportunities during uniformed service-related absences. If so, request employees provide an updated resume and a list of such positions or written acknowledgement of interest in hybrid/title 38 promotion opportunities, whichever is applicable (see paragraphs 8b and c, this part);
- (5) Notify the servicing Human Resources (HR) office, provide a courtesy copy of the orders (if provided) along with the updated employee contact information, and submit request to place employee on LWOP or other authorized leave;
- (6) Complete required USERRA training in accordance with PL 110-389, and related Office of Personnel Management (OPM) requirements; and
- (7) If employee is absent 91 days or more, provide performance expectations within the first 30 days of the employees return to duty and provide training to reintegrate the employee if necessary after 90 days.

c. HR Office Responsibilities

- (1) Notify employees of their USERRA rights and responsibilities, reemployment procedures, time limits for reemployment;
- (2) Display the "[Your Rights Under USERRA](#)" poster in visible areas throughout the facility;
- (3) Inform employees that they may apply for jobs via USAJobs during their absence;

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(4) Request employees provide a courtesy copy of orders (if available), documentation of their requests for consideration, an updated resume and a list of positions for which they request consideration. Ensure that employees receive consideration if/when such positions are announced during a uniformed service-related absence;

(5) Determine employee's eligibility for reservist differential in accordance with 5 U.S.C. 5538, and take appropriate action.

(6) Advise employees regarding procedures for lump sum payment of annual leave in 5 CFR 550.1203(c) and VA Handbook 5007, part IV, chapter 3;

(7) Update employees' official personnel folders accordingly. Maintain active files for employees who are currently on leave in conjunction with military service, but will ~~to~~ return to duty. Transfer official personnel folders of separated employees to the National Personnel Records Center;

(8) Reemploy eligible employees with accrued seniority, status, and pay as soon as possible, but not later than 30 days after receiving their reemployment application;

(9) Provide Employee Assistance Program information in case the employee needs such services.

(10) Consider employees for any opportunity, incident or advantage of employment missed during periods of uniformed service in accordance with the provisions of 5 CFR 353.106. (See this part, paragraph 8, Promotion Consideration); and

(11) Complete required USERRA training in accordance with PL 110-389, and related OPM requirements.

5. FIVE-YEAR CUMULATIVE SERVICE LIMIT. Cumulative uniformed service-related absences must not exceed five years with each employer unless the excess service meets the criteria for exceptions in 5 CFR 353.203. Aside from these exceptions, individuals who exceed the five-year limit are not entitled to reemployment protection under USERRA. However, the five-year period starts over and USERRA protections resume each time an employee moves from one agency to another.

6. STAFF COVERAGE

a. **Scheduling Conflicts.** HR staff or supervisors may contact uniformed services authorities to request a scheduling adjustment if an employee's service obligations repeatedly impact the efficiency of service. Department of Defense regulation, 32 CFR 104.4(d) directs military authorities to consider such requests to minimize coverage issues. However, employees are not required to obtain the employer's permission to complete a uniformed service obligation if the unit official does not adjust the employee's schedule.

b. **Temporary Coverage.** When justified, facilities may temporarily fill positions encumbered by employees on extended military leave. In such cases, the provisions in 5 CFR, part 316, subpart D and, part III, chapter 2 of this handbook apply. Facilities may also maintain staff coverage with details. Details in VA must conform to both the requirements of 5 U.S.C. 3341, 5 CFR, part 300, and the restrictions on details to higher graded positions in 5 CFR, part 335, subpart C, and paragraph 15 of chapter 3 in this part.

7. REEMPLOYMENT

a. **Eligibility for Reemployment.** Employees must meet the following criteria to be eligible for reemployment:

- (1) Leave position of employment to perform in the uniformed services;
- (2) Give notice of uniformed service obligation unless prevented by justifiable circumstances;
- (3) Be released from the uniformed services under honorable conditions;
- (4) Not exceed the 5-year cumulative service limit, unless service is an exception to the limit; and
- (5) Apply for reemployment within appropriate time limits based on length of service.

b. **Application for Reemployment.** Employees absent more than 30 days must apply for reemployment by notifying the facility either verbally or in writing of their intent to return to work. Facilities must reemploy individuals who fail to apply for reemployment within the timeframes below, but absent appropriate justification, employees may be subject to disciplinary action for failure to report to work in a timely manner.

- (1) Employees absent 30 days or less or for a period necessary to complete a fitness for duty exam must report back to work on the first regularly scheduled work day after release from service, safe travel home, and 8 hours of rest;
- (2) Employees absent 31 to 180 days must submit reemployment application no later than 14 days after completion of service;
- (3) Employees absent more than 180 days must submit reemployment application no later than 90 days after completion of service;
- (4) Employees who are hospitalized or recovering from illness or injury aggravated or incurred during military service, must report for duty at the end of a recovery period based on their length of service as described above consistent with 5 CFR 353.205.

NOTE: *When warranted, facilities may extend an injured/ill employee's (described under b (4)) report date by the minimum time necessary for his/her full recovery, not to exceed a maximum of 2 years.*

c. **Reemployment Position.** Facilities must reemploy returning Servicemembers/employees under the following circumstances consistent with the provisions in 5 CFR 353.207:

- (1). If absent 90 days or less, reemploy employees in the position for which they qualify and would have attained if they remained continuously employed, (the position obtained as a result of applying the escalator principle), or in their former position, if employees are unqualified after putting forth reasonable efforts to help them become qualified.

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NOTE: *Applying the escalator principle could have a positive or an adverse impact on an employee's reemployment position. Facilities will determine an individual's reemployment position on a case-by-case basis subject to circumstances specific to the employee's position of record. Examples of events that could affect an employee's position are workforce restructuring, classification decisions or other actions that impacted the employee's position of record and occurred during his/her military service-related absence.*

(2) If absent more than 90 days, USERRA permits placing returning employees in positions of like seniority, status, and pay. However, in VA, facility HR offices must make every effort to reemploy all returning employees in their former position, and put forth reasonable efforts to qualify them prior to placing them in positions of like seniority, status, and pay.

(3) In either case, if employees are not disabled, but are unqualified (for reasons other than service-connected disabilities) after exhaustive efforts to qualify them, reemploy them in any position for which they qualify that is of lesser status and pay, with full seniority.

(4) Exhaust efforts to provide reasonable accommodations for employees with service-connected disabilities. Otherwise, reemploy them in other positions for which they qualify that are of like seniority, status, and pay, or the nearest approximation thereof, unless reemployment would impose undue hardship.

d. Compensably Injured or Physically Disqualified. Employees who suffer compensable injuries and, become physically disqualified for their former position due to those injuries are subject to the reemployment provisions in CFR 353.301.

e. Documentation Upon Return. Employees who were absent more than 30 days must provide one of the following documents to validate length and character of service and timeliness of application for reemployment. Employees may be subject to termination if they are ineligible for reemployment.

- (1) Military orders, or a letter from unit official that provides the dates of service;
- (2) DD Form 214 displaying dates and character of service (honorable service required);
- (3) Certificate of completion from the military training school; or
- (4) Copy of payroll documents that display periods of service.

8. SENIORITY BENEFITS AND PROMOTION CONSIDERATION

a. Seniority Benefits. USERRA requires that agencies/departments reemploy returning employees in the job they would have attained had they remained continuously employed, with the same seniority, status and pay. These employees must automatically receive credit for seniority-based benefits such as within grade increases, career tenure, probation, leave accrual rate and severance pay.

b. Promotion Consideration. USERRA requires that agencies/departments consider returning employees for any incident or advantage of employment missed during a uniformed service-related absence. Facilities may consider and promote during a service-related absence, a title 5 employee who meets the qualifications for promotion. However, consistent with part III, chapter 4 of this handbook,

facilities must consider eligible hybrid/title 38 employees for promotion or advancements within grade and, take appropriate action upon their return to duty. When considering employees for missed promotion opportunities, the following provisions apply:

- (1) 5 CFR, 300, subpart F;
- (2) 5 CFR, 335;
- (3) VA Handbook 5005 – Part III, Chapters 2, 3, and 4; and
- (4) Applicable OPM or VA Occupational Qualification Standard.

c. **Promotion and Retroactive Pay.** A promotion effective during a uniformed service-related absence does not infer an entitlement to retroactive pay. If promoted during or after a uniform service-related absence, the employee's date of grade for time in grade purposes is the date the promotion would have occurred had he/she never left. Pay at the new grade is effective the date the employee returns to duty.

9. RESIGNATION IN LIEU OF SEPARATION-MILITARY

a. **Voluntary Resignation.** Facilities must advise employees of their reemployment rights immediately when notified of their intent to resign to serve in the uniformed services. Employees are entitled to reemployment upon completion of service and need not resign for this purpose. However, employees who wish to resign are entitled to do so. Facilities must take the following actions prior to separating employees that wish to serve in the uniformed services:

- (1) Request employees provide a resignation letter, a copy of orders (if available), the military unit address, phone number, a point of contact, and an alternate mailing address;

NOTE: *Employees who resign to serve in the uniformed services remain entitled to reemployment upon completion of service. However, separation affects seniority benefits. (5 CFR 353.106)*

- (2) Advise employees regarding procedures for lump sum payment of annual leave in 5 CFR 550.1203(c) and VA Handbook 5007, part IV, chapter 3; and
- (3) Advise employees of their responsibility to notify the servicing HR office of any change in circumstances as soon as possible.

b. **Unqualified for Military Service.** Employees who resign to serve in the uniformed services, but are deemed unqualified due to their failure to pass the fitness for duty entrance exam are entitled to reemployment in accordance with 5 CFR 353, parts 205 and 207.

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a. **Transfer of Function.** The HR office at the gaining facility or agency/department must place in a position of like seniority, status and pay, any returning employee who encumbers a position in which the function transferred during a uniformed service-related absence or a period of recovery from a compensable injury, unless that employee would not have otherwise transferred with the function.

b. **Position Abolished.** The HR office at the losing facility must place in a position of like seniority, status, and pay, any returning employee who encumbers a position that it abolished during a uniformed service-related absence or period of recovery from a compensable injury. If the employee is willing to relocate, the losing facility may place the individual at another VA facility. Consistent with provisions in 5 U.S.C. 5724, employees transferred in the interest of the Government from one official station to another station or agency, may receive paid travel expenses with discretionary approval.

c. **Option to Request Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payment (VSIP).** An employee, who met eligibility criteria for VERA, VSIP, or both, may request these incentives within 30 days of returning to duty if he/she was eligible, but unable to do so during a uniformed service-related absence. An employee may not otherwise request VERA or VSIP after expiration of the OPM-approved period for each authority.

d. **Reduction in Force.** An employee who encumbers a position abolished during a uniformed service-related absence (in excess of 30 days) is not subject to a reduction in force (RIF) while in service. However, if a RIF occurs after the employee returns to duty, he/she may be subject to RIF after the applicable period of protection from separation under 5 CFR 353.209 (6 months if period of service was 31 to 180 days or 1 year if period of service was 181 days or more). USERRA does not establish a period of protection from separation for uniformed service-related absences less than 30 days. In accordance with 5 CFR 353.302, an injured employee is not entitled to retention protection in a RIF and has no restoration rights if separated by RIF or for cause while on compensation.

e. **OPM Placement Assistance.** Upon request, OPM will assist with placement of VA employees under circumstances consistent with those described in 5 CFR 353.110. The servicing HR office must submit placement requests through appropriate channels to the Recruitment and Placement Policy Service (RPPS/059), Office of Human Resources Management. HR offices must exhaust placement options prior to submitting such requests to RPPS. RPPS will process formal requests for OPM approval, when warranted.

11. TRAINING. Public Law 110-389 requires that agencies and departments train their human resources personnel on the provisions of USERRA in consultation with OPM. Consistent with this requirement, OPM has developed USERRA training and requires HR personnel to complete it or other approved USERRA training on an annual basis. The term human resources personnel is defined as HR specialists, HR assistants, individuals with HR liaison responsibilities, and supervisory/management officials, as well as those delegated to act on their behalf. VA Talent Management System (TMS) currently documents this mandatory training in the learning plans of all designated VA staff.

12. EMPLOYER SUPPORT OF THE GUARD AND RESERVE (ESGR) ASSISTANCE. ESGR is a Department of Defense agency, which provides education, outreach, and mediation services to Servicemembers and their non-military employers. This agency acts as a neutral liaison between employees, their employers, and the Department of Labor (DOL). Employees may contact the [ESGR](#) for assistance with resolving USERRA issues as an alternative to filing a formal complaint with DOL, or seek direct DOL assistance.

13. USERRA ENFORCEMENT. Employees who feel that their USERRA rights have been violated may file a complaint with DOL's local Veterans Employment and Training Service (VETS) Office. Employees also have the option of appealing directly to the Merit Systems Protection Board (MSPB) should they choose not to file with DOL.

14. RELATED GUIDANCE. Facility HR Offices may contact Work Life and Benefits Service to obtain specific guidance on military leave, Compensation and Classification Service regarding reservist differential pay, and Employee Relations and Performance Management Service for information pertaining to the employment termination process.

15. REFERENCES

- a. 5 CFR, part 300, subparts C and F,
- b. 5 CFR, part 316, subpart D
- c. 5 CFR 335
- d. 5 CFR, part 351
- e. 5 CFR, part 353
- f. 5 CFR 550.1203(c)
- g. 5 CFR 831.114(j)
- h. 32 CFR 104.4(d)
- i. 5 U.S.C. 3341
- j. 38 U.S.C. 4301-4335
- k. VA Handbook 5005, Part III, Chapters 3, and 4
- l. VA Handbook 5007, Part IV, Chapter 3]