

**SUBJECT:** Employer Support of the Guard and Reserve (ESGR) - Response to Service Members COVID-19 Quarantine Inquiries as of March 23, 2020

The ESGR customer service center remains open and committed to assisting Service members and employers during the COVID-19 outbreak. For assistance with USERRA and employment-related inquiries, contact 1-800-336-4590, option 1. Additionally, Service members may contact DOL-VETS for concerns about possible USERRA violations, at 1-866-487-2365.

Service members activated under **State Active Duty** authority in response to COVID-19 should contact the appropriate state office regarding their specific employment protections and concerns. USERRA is a federal statute and applies to uniformed service under Title 32, Title 10, and Title 14 of the U.S. Code.

**USERRA protections for Service members released from active duty following service in a COVID-19 area:**

*Can Service members released from active duty following service in a COVID-19 affected area be delayed prompt reinstatement for quarantine purposes?*

The short answer is no. In accordance with USERRA, an employer must reemploy Service members returning from service in the Uniformed Service "promptly." Title 20, Code of Federal Regulations (C.F.R.) 1002.181 states that "prompt" typically means within two weeks of the employee's application to return to work, unless unusual circumstances exist. In some cases, a reinstatement beyond the typical two-week period may be warranted due to the company's policy regarding the COVID-19 health emergency **as applicable to all employees**. As noted below in 20 C.F.R. 1002.181, "promptly" means as soon as practicable under the circumstance for each case. In these situations, it may be advisable for employers to encourage the employee to work remotely and/or in a telework or similar status prior to returning to the workplace. And in some circumstances the employer could be responsible for paying the employee's full salary while the employee awaits reinstatement beyond the normal two-week period.

Please also note that the company policy should be broad in scope and intended for all employees traveling to areas with a high risk for exposure to the Coronavirus. If an employer's policy limiting return to work is focused only on Service members, it could be viewed as discriminatory under USERRA. Please see 20 C.F.R. 1002.18 below regarding discrimination.

**USERRA protections related to reemployment position and possible lay-offs:**

*Can Service members be laid off from their civilian employment during or after the COVID-19 outbreak?*

Possibly. As a general rule, Service members are entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to

uniformed service. This is referred to as the escalator position. Due to a potential economic downturn, our Service members may return to their employer to find they have been laid off. This would not necessarily be a violation of USERRA. If the Service member is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee would not be entitled to reemployment following the period of service simply because he or she is a covered employee. It is, however, incumbent upon the employer to be able to affirmatively show that the adverse employment action would have occurred regardless of the employee's military service.

It may be appropriate for the employer to reinstate the employee back to the escalator position during any company-imposed quarantine following return from service in the Uniformed Services. As discussed, employers are encouraged to use options such as remote work locations, telework when possible.

It may also be appropriate for the military Services to keep Service members on orders during the quarantine period. If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, 20 C.F.R. 1002.116 provides that he or she must report to or submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury, which period may not exceed two years except when necessary to accommodate circumstances beyond the employee's control.

## Relevant References

### **Discrimination**

#### **20 C.F.R. §1002.18 What status or activity is protected from employer discrimination by USERRA?**

An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Please also see 20 C.F.R. 1002.191 below regarding the Escalator Position.

### **Prompt Reemployment**

#### **20 C.F.R. §1002.180 When is an employee entitled to be reemployed by his or her civilian employer?**

The employer must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.

### **20 C.F.R. §1002.181 How is “prompt reemployment” defined?**

“Prompt reemployment” means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the return

### **Escalator Position**

#### **20 C.F.R. §1002.191 What position is the employee entitled to upon reemployment?**

As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employer may have the option, or be required, to reemploy the employee in a position other than the escalator position.

### **Possible Adverse Job Consequences**

#### **20 CFR §1002.194 Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

### **USERRA Protections Relevant to Layoffs**

#### **20 CFR §1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?**

(a) If an employee is laid off with recall rights, on strike, or on a leave of absence, he or she is an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service. Similar principles apply if the employee is on strike or on a leave of absence from work when he or she begins a period of service in the uniformed services.

(b) If the employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service even if he or she did not respond to the recall notice.

(c) If the employee is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee. Reemployment rights under USERRA cannot put the employee in a better position than if he or she had remained in the civilian employment position.

This interim guidance is based on current ESGR inquiries and the application of the USERRA. We will continue to share additional information as it becomes available.