

**The Impact of USERRA**  
**ON ERISA And Cafeteria Plans**

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I. **Application of Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) on Employee Benefits.** Public Law 103-353 [H.R. 995], Title 38, USC, Chapter 43.

A. Introduction.

1. The material that follows summarizes the impact on employee benefits of USERRA, which was enacted October 13, 1994 and generally became effective for military leaves of absence occurring after that date (but see D. below).
  - a. The Small Business Job Protection Act of 1996 (“SBJPA”) enacted §414(u) of the Internal Revenue Code (“Code”) which addresses USERRA with respect to qualified retirement plans, discussed below.
2. USERRA provides that employees who perform military service generally first be in the same position with respect to employment and benefits that they would have been in if they had not left to perform military service. Earlier laws regarding veterans’ rights have not gone as far as USERRA in protecting veterans’ conditions of employment.
3. USERRA’s provisions apply *regardless* of the number of the employer’s employees. In that respect it is different from the Family and Medical Leave Act, as well as from COBRA.
4. An employee must meet the following requirements to be covered under USERRA.
  - a. The individual generally must be employed at the time of the leave.
  - b. The employee must be in the “uniformed services,” which means:
    - (1) the Armed Forces;
    - (2) the Army National Guard or the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty;
    - (3) the commissioned corps of the Public Health Service; and

- (4) any other category of persons designated by the President of the U.S. in time of war or emergency.

§4303(16). The leave may be voluntary or involuntary, in peacetime or war.

- c. Employees must give their employers advance notice of impending military leaves if they want to benefit from USERRA's provisions. This notification requirement is waived, however, if military necessity prevents the employee from being able to give advance notice. Notice to the employer may be either written or verbal.
- d. The employee's absence is limited to 5 years, with exceptions.
- e. Employees can lose their rights to USERRA's benefits if their service ends:
  - (1) with a dishonorable or bad conduct discharge;
  - (2) on other than honorable conditions;
  - (3) with dismissal as a commissioned officer under certain conditions; or
  - (4) as a commissioned officer dropped from the rolls under certain conditions.
- f. The employee must return to employment within a prescribed time frame after the employee's military service ends.

B. Interrelationship with Employer's Non-Military Leave Practices.

1. An employer must apply to military leaves its most favorable leave-of-absence policies applicable to nonmilitary leaves. For example, if employees on educational or training leaves are entitled to maintain benefits during the leave, but are not allowed to do so on an unpaid leave of absence for personal reasons, the employer must allow an employee on military leave to maintain benefits.
2. Employees on military leave are entitled to use accrued vacation, annual or other leave with pay to apply to the military leave. The employer is required to honor such a request. However, the employer may not force employees on military leave to use paid vacation leave.

C. USERRA's Effect on Health Plans. §4317.

1. Right to extended coverage.

- a. If an employee goes on military leave, he or she must have the right to continue health care benefits. This right to coverage during military leave is similar to COBRA but technically is not the same thing as COBRA. As an example of the differences between USERRA and COBRA, under USERRA there are no multiple “qualifying events” that could entitle an employee on military leave to coverage beyond the 18-month period.
- b. The employee (and his or her dependents) has the right to 18 months of coverage from the day he or she goes on military leave or, if lesser, for a period that ends the day after the date the person fails to apply or return to a position of employment as required under USERRA when the military service ends.
  - (1) If a military leave is under 31 days, the employee on leave must return to work at the beginning of the next pay period in order to be reinstated to employment. Under that circumstance, most employers may not be likely to regard the employee as having terminated employment. Under some health plans health plan coverage in such circumstance likely would not have terminated.
  - (2) The 18-month period may be cut short if the employee informs the employer that he or she does not intend to return to work after the leave.

2. Charge for continued health coverage.

- a. The method of charging the employee on military leave is similar to that under COBRA.
  - (1) If the military leave is under 31 days, the employee may be required to pay only the employee’s usual share for such coverage.
  - (2) For coverage that extends beyond 30 days, the employer may charge up to 102% of the full premium for the elected coverage.
  - (3) The applicable premium is calculated in the same manner as under COBRA.

3. Reinstatement in health plan upon return to employment.

- a. The employee must be entitled to recommence coverage upon return to work without regard to any waiting periods or exclusions.

- (1) This requirement applies even if the employee did not elect continuation coverage during the leave.
- (2) This rule also applies to any beneficiary who is covered as the employee's dependent.
- (3) However, this rule does not apply with respect to an illness or injury that the Secretary of Veterans Affairs determines to be service-related.

4. Employer notice requirements.

- a. USERRA does not require notifications of the sort required under COBRA. However, because the law gives an employee on military leave the right to elect continued coverage or else to terminate coverage until reemployment, it would appear that some written notice should be developed in order to apprise the employee of his or her election rights.
- b. ERISA's Title I disclosure requirements also likely would require written notice, likely in the form of a Summary Plan Description modification.

D. USERRA's Effect on Pension Plans - §4318.

1. Section 4318 of USERRA applies 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)."
  - a. Thus, it appears to apply to both qualified and nonqualified deferred compensation plans.
2. If a serviceman or woman *returns to his or her job* under USERRA:
  - a. The military leave of absence is not treated as a "break in service."
  - b. Vesting and eligibility service credit must be given for the period of absence.
  - c. The employee must be provided an allocation of the employer profit sharing, pension or other amounts (but not including earnings or allocations of forfeitures) that were contributed during the employee's absence.
    - (1) The amount that would have been allocated to the employee if he

or she had not been absent must be provided.

- (2) The compensation which is used (presuming compensation is used in the plan benefit or allocation formula) is the compensation that the employee would have earned if he or she were actively employed. If that cannot be determined, the plan must use the average rate of the employee's pay for the 12 months before the employee left for uniformed service.
  - d. The employee must be allowed to make pre-tax deferrals (Section 401(k)) or after-tax employee contributions, and also must be credited with the related employer match.
    - (1) The employee has up to 3 times the period of leave, to a maximum of 5 years after his or her return, to make the contribution.
  - e. For defined benefit plans, accruals must be provided as if there were no absence.
3. A plan may suspend repayment obligations for an outstanding loan during the absence. If the obligation to repay is not suspended and the loan is not repaid, the employee may have a taxable event.
  4. USERRA-required contributions are subject to the limitations applicable to the period *for which* the contributions are made (and not when made) for purposes of Code §§ 402(g), 402(h), 403(b), 404(a), 404(h), 408, 415 and 457. See §414(u).
  5. For purposes of Code §§ 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 401(m), 403(b)(12), 408(k)(3), 408(k)(6), 408(p), 410(b) and 416, a plan will not be treated as failing these requirements because of the USERRA-required contribution. See Code §414(u).
  6. There are uncertainties with the law.
    - a. What is the effective date for these changes? USERRA is not clear, and its legislative history implies an effective date back to 1940. USERRA was passed on October 13, 1994, but generally became effective for pension plans under §4318 for reemployments on or after December 12, 1994. But, retirement plans were given until October 13, 1996 to come into compliance.
      - (1) What does compliance mean?
      - (2) Are retroactive benefits before USERRA 's effective date required?
    - b. If an employee comes back for 1 day and quits, is he or she entitled to up

to 5 years worth of benefits?

- c. There are service-crediting issues.
  - d. There are possible differences from ERISA in the definition of the employer and employee. Related employer, controlled group issues should be studied if there is a controlled group.
  - e. There also appears to be a non-employer, fiduciary duty to comply with USERRA.
7. In Revenue Procedure 96-49 (I.R.B. 1996-43; October, 1996), the Service provided two model amendments for plans to comply with USERRA.
- a. The amendments are very brief and do not provide guidance to plan sponsors as to how to implement USERRA. The amendments are as follows:

*Amendment 1.* (Note to Sponsor: The following model amendment may be used to amend plans to provide for the requirements of USERRA and §414(u) of the Code.)

“Notwithstanding any provision of this plan to the contrary, contributions, benefits and service credit with respect to qualified military service will be provided in accordance with §414(u) of the Internal Revenue Code.”

*Amendment 2.* (Note to Sponsor: The following model amendment may be used to amend plans that provide for loans to participants, if the sponsor chooses to suspend loan repayments during participants’ periods of military service.)

“Loan repayments will be suspended under this plan as permitted under §414(u)(4) of the Internal Revenue Code.”

- b. Amendments to comply with USERRA are not required to be made before the date amendments are required under § 1465 of SBJPA.

8. In the author's view, employees should be notified immediately of their rights under USERRA, both as a practical matter and to comply with ERISA Title I. Plans should be amended in a manner more thorough than in the model amendments.

E. USERRA's Effect on Cafeteria Plans.

1. As one might expect, USERRA does not specifically address Code §125 plans.
2. Arguably, USERRA conflicts with the §125 proposed Treasury regulations which require an employee who revokes an election during the plan year to wait until the next plan year to recommence participation.
  - a. With respect to health plans, which should apply to Code §105(h) medical expense reimbursement plans (health FSA5), USERRA §4317 requires an employee to be immediately eligible to participate upon return to employment.
    - (1) Would this rationale apply to the dependent care portion of a cafeteria plan?
3. May an employee revoke his or her election(s) during the plan year on account of a leave? Is it a change in family status? What if the employee continues to receive pay, but perhaps lesser pay, on leave? If the employee ceases cafeteria plan payments, does his or her coverage cease?