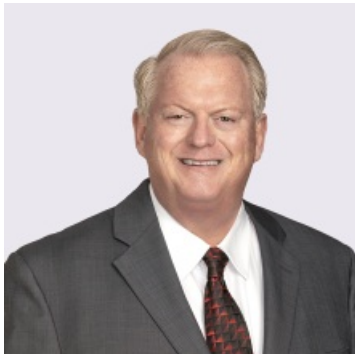


A USERRA Leave Primer for Manufacturing Employers

By Michael W. Padgett &

December 22, 2023

Meet the Authors



Michael W. Padgett

(He/Him • Mike)

Principal

317-489-6936

Michael.Padgett@jacksonlewis.com

Related Services

Disability, Leave and Health
Management
Manufacturing

Manufacturers rely on consistent employee attendance to operate production lines and meet critical delivery deadlines to customers. The best-laid production plans can be disrupted by employee absences leaving a gap in the production line. As a result, manufacturers rely on reasonable and enforceable attendance policies to support their operations. Those attendance policies must make room for appropriate employee time off under the Family and Medical Leave Act, state workers' compensation laws, other state and local leave laws, and perhaps the Americans With Disabilities Act (ADA). Employee leave requests for military duty are likewise protected by law.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) and similar state laws protect the employment rights of servicemembers. Under USERRA, servicemembers who leave their civilian jobs for military duty have the right to return to their former (or similar) jobs with the same benefits if they meet certain conditions.

USERRA prohibits employers from discriminating against employees or applicants based on their past, present, or future military service or obligations. It also prohibits employers from retaliating against employees for exercising their rights under the statute.

Coverage

USERRA covers almost all employees, whether they work full-time, part-time, or on a probationary basis.

In contrast to statutes like the ADA or Title VII of the Civil Rights Act, USERRA covers employers no matter how many workers they have.

Notice

Employers must inform their employees about their rights, benefits, and obligations under USERRA. Employers can do this by posting the [Your Rights Under USERRA](#) notice in a visible location where employee notices are usually placed.

An employee must give the employer notice of military leave, unless it is impossible, unreasonable, or prevented by military necessity. The regulations strongly recommend, but do not require, that employees give at least 30 days of notice. The employer's USERRA leave policy should prominently feature this notice requirement to avoid unexpected absences among managers, supervisors, and front-line employees that lead to production delays. Such notice does not have to be in writing.

Further, employers generally cannot require employees to provide their military orders or other documents before they approve a military leave. However, employers can require documentation if the employee returns to work after a military leave that lasts more than 30 days.

Reemployment Eligibility

To qualify for reemployment, employees must meet five conditions. They must have:

1. Left their position for military service;
2. Provided the required notice;
3. Taken no more than five total years of military absences with the same employer;
4. Received an honorable or non-punitive discharge from service; and
5. Sought to return to their civilian job within a certain time frame (unless it was impossible or reasonable to do so).

The five-year limit on the total amount of protected military service that an employee can serve with the same employer excludes many circumstances, including emergencies, reserve drills, or annual active duty for training.

The time in which an employee must apply for reemployment is as follows:

- Leave of less than 31 days – No later than the beginning of the first regularly scheduled shift on the first full calendar day following military service, plus eight hours for the employee’s return trip home;
- Leave of more than 30 days but less than 181 days – 14 days after completion of military service; and
- Leave of more than 180 days – 90 days after completion of military service.

Return to Work and Reasonable Accommodations

Under USERRA’s “escalator” principle, employers must place returning employees in the position they would have attained if they had never left for military service, including with respect to career advancement.

To assist in determining the appropriate position, factors employers should look at include the employee’s performance level before military leave and the career progression of similar performers during the employee’s absence. For production employees, this will often include review of relevant provisions of the collective bargaining agreement to determine wages and benefits currently applicable to the employee.

To help returning servicemembers who have disabilities due to their service, USERRA includes a reasonable accommodation provision like that in the ADA. Employers operating in a fast-paced manufacturing environment are accustomed to dealing with employee work restrictions and other accommodation issues, but USERRA offers broader protections. This includes that, if a returning servicemember is unable to perform their escalator position due to a service-related or -aggravated disability, the employer must train the veteran to qualify for a job that has the same status, pay, seniority, and responsibility as the employee’s previously held position.

Health Insurance Protection

In a COBRA-like manner, USERRA allows servicemembers to elect whether to continue

with their existing employer-based health insurance plan for up to 24 months while in the military.

USERRA also allows servicemembers to rejoin their employer's health plan upon their return to work, without any waiting periods or exclusions, except for illnesses or injuries related to the military service.

Additional Key Points

Employers may consider adopting a written military leave policy that covers eligibility, benefits, and procedures for employees in the uniformed services that aligns with USERRA and applicable state and local laws and communicate the policy to employees.

Finally, employers should document all military leave requests, including the dates, duration, and reason for the leave, and maintain records of any notices, communications, or documents related to the leave.

Please contact a Jackson Lewis attorney with any questions.

©2023 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.