

THE INSIDE PERSPECTIVE

LABOR AND EMPLOYMENT LAW SOLUTIONS FOR EXECUTIVES AND HR PROFESSIONALS



SMITH MOORE LLP
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Considerations For Employers When Military Leaves Run Long

The U.S. military's ongoing role in global engagements has meant longer stays on active duty for civilian soldiers in the National Guard and Reserves. Longer absences impact not only families but also employers, who may find that an employee has been gone for so long that the workplace looks much different when the employee **returns** than it did when the leave began.

The Uniformed Services Employment & Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, provides broad protection against discrimination and retaliation and gives returning service members rights to reemployment and reinstatement of health benefits. Given the difficulties that can arise when someone returns after a lengthy leave, however, it is important to understand not only what is required but also what is not.

- Reemployment is not required if it would be impossible or unreasonable due to changed circumstances. The law does not draw precise lines to define what is impossible or unreasonable or what is an excusable changed circumstance. Generally, such changes must be fundamental to the business and the employer must be prepared to show that the business has changed so much that the employee would not have the job today even if he or she had not taken leave.
- Reemployment is also not required if the employee is no longer qualified due to a disability and cannot, with reasonable accommodation, become qualified. As with the Americans with Disabilities Act, proving that someone is not qualified or is disabled can be tricky, but USERRA at least recognizes the idea that not everyone remains qualified for a particular job.
- Employers are not required to maintain positions that were intended to be temporary and, consequently, are not available when the employee's leave ends. Relying on this narrow exception, however, is difficult without evidence that the employee understood before taking leave that the job was temporary.

TIP

Re-employment of military personnel is not always legally mandated by USERRA. The law recognizes that business realities may intervene. Each situation requires a careful look.



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The firm restricts its practice in the labor and employment area to the representation of management.

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