



# New Mexico State Personnel Board State Personnel Office

SUSANA MARTINEZ  
GOVERNOR

Eugene J. Moser  
Director

Nivia L. Thames  
Deputy Director

State Personnel Board  
Paul T. Yarbrough, Chairman  
Christine Romero, Vice Chairman

Devon Day Chris Sanchez  
Rebecca Long

## Interpretative Memorandum 2011 - 007

Date: August 23, 2011  
To: All Cabinet Secretaries, Agency Directors and Human Resources Managers  
From: Eugene J. Moser, Director, State Personnel  
Subject: Final USERRA Rules and Regulations

On December 16, 2005, the Labor Department's Veterans Employment and Training Service released final rules to implement the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). The regulations, effective January 18, 2006, pose no new legal requirements but interpret and clarify existing rights and responsibilities of returning military service members and employers. The final regulations may be viewed at <http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>.

All employers are required to notify employees of their rights under USERRA. The notice must explain what rights and protections employees have under the Act, including the right to re-employment after uniformed service, freedom from discrimination and retaliation for serving in uniform and certain health insurance protections. The United States Department of Labor has prepared a poster that an employer can use to fulfill the requirement. The poster is available at [http://www.dol.gov/vets/programs/userra/USERRA\\_Private.pdf](http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf).

The notice must be posted in a prominent place where employees customarily check for such information. **Please note that this poster replaces the version published in March 2005.**

Employees have the right to be reemployed in their job if:  
He/she leaves job to perform service in the uniformed service;  
Ensures that the employer receives advance written or verbal notice of service;  
Has five years or less of cumulative service in the uniformed services while with that particular employer;  
Returns to work or applies for reemployment in a timely manner after conclusion of service; and

has not been separated from service with a disqualifying discharge or under other than honorable conditions.

If eligible to be reemployed, the employee must be restored to the job and benefits he/she would have attained if he/she had not been absent due to military service or, in some cases, a comparable job.

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurring period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.

Clarifications set forth in the final regulations include but are not limited to:

- Employees serving in uniformed services may be laid off during military service (but not BECAUSE of military service). Any layoffs must be discussed with the State Personnel Office (SPO) and agency Human Resource Office prior to implementation.
- USERRA establishes the cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights to five years. There are important exceptions to the five-year limit, including initial enlistments lasting more than five years, periodic National Guard and Reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency. USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual's service as long as the basic eligibility criteria are met.
- The following service qualifies for USERRA protection:
  - Voluntary or involuntary duty in the uniformed services which include the Army, Navy, Marine Corps, Air Force, Coast Guard and Public Health Service commissioned corps, as well as the reserve components of each of these services;
    - Active duty for training
    - Inactive duty training (such as drills)
    - Initial active duty training
    - Funeral honors duty performed by National Guard and reserve members
  - Federal training or service in the Army National Guard or Air National Guard;
  - National Disaster Medical System activation by Federal Emergency Management Agency;
  - Exam to determine a service member's fitness to perform duty in the uniformed services; and
  - Attending a military service academy;
    - US Military Academy (West Point, NY)
    - US Naval Academy (Annapolis, MD)
    - US Air Force Academy (Colorado Springs, CO)
    - US Coast Guard Academy (New London, CT).
- Employers are required to grant time off from work to prepare for active duty if requested by the activated service member.
- All State of New Mexico employees who are members of the Army or Air National Guard or Army, Air Force, Navy or Marine or Coast Guard Reserves are entitled to 15 days of military leave with pay per federal fiscal year when ordered to duty for training, pursuant to §20-4-7 NMSA 1978.

- The rights, benefits and protections of USERRA shall apply to a member of the National Guard ordered to federal or state active duty for a period of thirty or more consecutive days, pursuant to §20-4-7.1 NMSA 1978.
- Upon reinstatement, employers must pay any progression increases that the employee would have received had employment not been interrupted by military service.
  - 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.