

HR/LR Memo # 2014-5

Military Leave

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Authority: Enterprise Employee Resources

GENERAL GUIDANCE AND INFORMATION

Objective

State and federal law provides protections to employees on leave for military duty. As employees are called for and return from military service, employers must ensure compliance with these laws. This General Memo addresses frequently asked questions regarding the rights and protections provided under state and federal law.

Definitions and Key Terms

Key Term	Definition
<i>Active Service</i>	<p>Federal active service, federally funded state active service, or state active service.</p> <p>Active service excludes service performed exclusively for purposes of:</p> <ul style="list-style-type: none"> (1) basic training, advanced individual training, annual training, and periodic inactive duty training; (2) special training periodically made available to reserve members; (3) service performed in accordance with M.S. 190.08, Subd. 3; and (4) service performed as part of the active guard/reserve program pursuant to United States Code, title 32, section 502(f), or other applicable authority, as well as substantially comparable service by members of other nonmilitary components of the uniformed services of the United States.
<i>Active State Employment</i>	Any time when a state employee is still listed as an active employee (including months that include periods of unpaid time off).
<i>Federal Active Service</i>	Federal-level active service or duty for federal-level missions (e.g., deployment abroad) and travel to or from that duty, as described in United States Code, title 10 , Armed Forces, and other service or duty as may be required by the law, regulation, or order of the United States government.

Key Term	Definition
<i>Federally Funded State Active Service</i>	Federal active service or duty for specific state missions (e.g., a major natural disaster) and travel to or from that service or duty, as described in United States Code, title 32 , National Guard.
<i>State Active Service</i>	As defined in M.S. 190.05, Subd. 5a , includes service or duty and travel to or from that service or duty on behalf of the state when called upon by state civil authority (e.g., called by the governor for a natural disaster).

Statutory References

- Minn. Stat. § 43A.183 Payment of salary differential to reserve forces who report for active service
- Minn. Stat. § 181.947 Leave for immediate family members of military personnel injured or killed in active service
- Minn. Stat. § 181.948 Leave to attend military ceremonies
- Minn. Stat. § 190.05 Definitions
- Minn. Stat. § 190.08 Military staff; active duty orders; pay and allowances
- Minn. Stat. § 192.26 State and municipal officers and employees not to lose pay while on authorized leave for military duty
- Minn. Stat. § 192.261 Leave of absence
- 32 U.S.C. § 502(f) Required drills and field exercises
- 38 U.S.C. §§ 4301-4335 Employment and reemployment rights of members of the uniformed services (USERRA)

GENERAL STANDARDS AND EXPECTATIONS

State laws provide benefits and protections to state employees who are on leave for military duty. Eligible employees may be entitled to the following in accordance with statute:

- [M.S. 43A.183](#) Military pay differential for employees in the reserve forces who report for active service.
- [M.S. 192.26](#) Paid military leave of 15 days per calendar year.
- [M.S. 192.261](#) Up to four (4) years of job-protected unpaid leave for qualifying active service.

The federal Uniformed Services Employment and Reemployment Act (USERRA) protects the employment and reemployment rights of individuals serving in the military. This includes those called from the reserves or the National Guard. USERRA also prohibits discrimination based on military service or obligation.

Military Leave of Absence

1. Does Minnesota Statute provide for paid leave for military duty?

Yes. Employees engaged in military duty described in [M.S. 192.26](#) are eligible for military leave without loss of pay, seniority status, efficiency rating, vacation, sick leave, or other benefits for up to 15 days in any calendar year.

2. Is an employee who is on a military leave of absence that crosses over calendar years entitled to 15 days of paid military leave every calendar year the employee remains in a continuous military leave status?

Yes. State employees are entitled to a leave of absence without the loss of pay for military leave for up to 15 days per calendar year. Employees who are on an extended and continuous military leave of absence are entitled to up to 15 days of paid leave for each calendar year they are on a military leave of absence. Prior to receiving payment for military leave, employees must provide documentation of their military orders.

Employees that have provided a copy of their military orders for military leaves that are not exempt from military salary differential receive that differential for the balance of the employee's military service.

If, after returning from military leave in a calendar year which the employee has already used their 15 days of paid military leave, an employee is later activated for a second military service in the same calendar year, they are not entitled to any additional paid military leave.

3. Must employees provide their agency documentation of their military orders prior to their use of 15 days of paid military leave?

Yes. Generally, employees on an unpaid military leave are not required to provide documentation of their military orders prior to the start of leave. However, employees **must** provide documentation of their military orders prior to receiving paid military leave.

4. Are employees permitted to choose when to use their 15 days paid military leave?

Yes. Pursuant to [M.S. 192.26](#), the employee can choose when during the calendar year to take the 15 days of paid military leave. They can choose to use all of the 15 days of paid military leave at one time or choose to divide the 15 days of paid military leave and take it throughout the calendar year.

For calendar years in which the employee is on a continuous military leave and the military orders continue beyond December 31, and the employee or the employee's designated attorney in fact under a power of attorney has not provided in writing the employee's request for the use of paid military leave, agencies shall pay military leave before the end of the calendar year.

5. Is the State of Minnesota required to pay employees who are on an "unpaid" military leave of absence?

In accordance with statute, a military leave of absence longer than 15 calendar days is unpaid. However, eligible employees ordered to serve in active military service must be paid the difference between their state salary and their military pay when the state salary is greater than their military pay. Refer to [HR/LR Policy # 1448 Military Salary Differential](#).

6. Must employees who are eligible for military salary differential notify their agency of their military orders and provide the name and contact information for their designated attorney-in-fact under a power of attorney?

Yes, a copy of military orders showing active service must be provided prior to payment of military salary differential. Additionally, the agency must notify agency personnel that are members of a reserve unit of the statutory benefits to which they are entitled. The agency notification requirement can be met by posting the information on the agency's website in a highly recognizable manner that can be easily found and understood by the employees to whom it might apply. During the time the employee is on active duty, the agency must provide a copy of any relevant communications directed to that employee to the employee's designated attorney-in-fact. Agencies must honor requests for information or other appropriate directives from the designated attorney-in-fact on behalf of an employee while on military leave.

Federal Uniformed Services Employment and Reemployment Act (USERRA)

7. Must employees provide their agency documentation of their military orders to retain reemployment rights with the employer?

An employee must provide advance written or oral notice of their need for leave, unless military necessity prevents the giving of notice, or the giving of notice is otherwise impossible or unreasonable.

Upon return from leave, an employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- The application for reemployment is timely;
- The individual has not exceeded the five-year service limitation; and
- The employee's separation or dismissal from service was not disqualifying.

If the employee is unable to provide the requested documentation because it is not readily available or does not exist, the employer must still promptly reemploy the individual. If, after reemploying the individual, documentation becomes available that shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.

8. Is there a limit on the total amount of service in the uniformed services that an employee may perform and still retain reemployment rights with the employer?

In general, the employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employer. However, certain types of service may be exempt from the five-year service limit. Exemptions include:

- (1) Service that is required beyond five years to complete an initial period of obligated service. For example, some military specialties require more than five years of initial service. If the employee works in one of these specialties, the employee has reemployment rights when the initial period of obligated service is complete.
- (2) If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault.
- (3) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by [10 U.S.C. 10147](#) and [32 U.S.C. 502\(a\)](#) and [503](#).
- (4) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining.
- (5) Certain other types of service performed in a uniformed service if the employee was ordered to or retained on active duty. [20 C.F.R. 1002.103](#).

9. Does the period between completing uniformed service and reporting back to work or seeking reemployment count against the five-year maximum for reemployment rights?

No. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. The five-year period includes only the time that the employee spends performing service in the uniformed services.

10. Upon return from military leave, is an employee entitled to return to their former position?

The position into which a person is reinstated is based on the length of the leave and whether the employee continues to be qualified for that position. Under USERRA, a person whose military service lasts 1 to 90 days must be “promptly reemployed” in the following order:

- (1) In the job the person would have held had the person remained continuously employed (escalator position). The person must be qualified for the job, or able to become qualified after reasonable efforts by the employer to qualify the person.
- (2) If the employee cannot become qualified for the position described in (1), they must be reemployed in the position held on the date military service began. This is only if the person is qualified for the job or could become qualified after reasonable efforts by the employer.

- (3) If the employee cannot become qualified for either of the above positions, they must be reemployed in a position that is closest first to the escalator position and then to the pre-service position. The employee must be qualified for the duties of the position, or the employer must make reasonable efforts to help the employee become qualified. The employee will receive full seniority.

If the military service lasts more than 90 days, the employee must be promptly reemployed in the following order:

- (1) In the escalator position or a position of equivalent seniority, status, and pay, if the person is qualified for the job, or can become qualified after reasonable efforts by the employer to qualify the person.
- (2) If the employee cannot become qualified for the as described in (1) then they should be placed in the employee's pre-service position or in a position of similar seniority, status, and pay. This is only if the person is qualified for the job or could become qualified after reasonable efforts by the employer.
- (3) If the employee cannot become qualified for either of the above positions, they must be reemployed in a position that is the closest first to the escalator position and then to the pre-service position, with full seniority. The employee must be qualified to perform the duties of the position, or the employer must make reasonable efforts to help the employee become qualified.

In many cases, options (1) and (2) in both scenarios are likely to be the same (i.e., the position that the employee held at the time the employee commenced military service). However, the principle behind the escalator position under option (1) is that, if not for the period of uniformed service, the employee could have been promoted, 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 uniformed service.

State law provides that a state employee who takes unpaid military leave is entitled to reinstatement. The law generally provides that state employees returning from military leave are entitled to be returned to their former or a comparable position of "like seniority, status and pay" upon these conditions:

- (1) That the position has not been abolished or the term expired.
- (2) That the employee is not physically or mentally disabled from the service.
- (3) That the employee makes a timely written application for reinstatement.
- (4) That the employee submits an honorable discharge or other form of release.

Following reinstatement under state law, the employee has the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if the employee had been employed during the time of such leave. Therefore, state employees continue to accrue vacation and sick leave hours during military leave (earnings code MLU - Military Leave Unpaid-Accruals).

If an employee incurs or aggravates a disability during the military service that affects the employee's ability to return to employment, agencies should consult with their labor relations representative to determine the employee's rights to reinstatement.

11. What service qualifies for USERRA protection?

USERRA defines the term "uniformed services" to include the Armed Forces including reserves; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other

category of persons designated by the president in time of war or national emergency. USERRA protection also extends to National Disaster Medical System activation by FEMA; exams to determine a service member's fitness to perform duty in the uniformed services; performing authorized funeral honors (veterans' service organizations are excluded); and attending a military service academy.

12. Do employers have to grant time off from work to allow an employee to prepare for active duty?

Yes. Employers are required to grant time off from work to prepare for active duty if requested by the activated service member

13. Should employees on extended military leave be allowed to use vacation and their floating holidays while they are on military leave?

Yes. Employees on unpaid extended military leave must be permitted upon the employee's request to use their accrued vacation and the current fiscal year's floating holiday while they are on an unpaid military leave (Action PLA, Reason Code MLV). The employee cannot be required to use vacation time for military service. Any vacation leave used must have been accrued prior to the start of the military leave.

Use of vacation accrued prior to the start of the military leave and the current fiscal year's floating holiday must be for the fiscal year of the date the agency received the request from the employee and is not retroactive to prior fiscal years.

14. Are employees on military leave allowed to earn holiday pay during their leave?

Employees on military leave may earn holiday pay only if they are in paid status on the day before and the day after the holiday.

15. Can employees continue the employer contribution for insurance benefits if they use one day of vacation per payroll period while on extended military leave?

No. Although employees on extended military leave can use their accrued vacation, use of vacation while on military leave does not extend the employer contribution for insurance benefits.

This is consistent with language in the insurance article of the state's collective bargaining agreements and compensations plans. An employee on an unpaid leave of absence may not use vacation for the purpose of maintaining eligibility for an employer contribution by keeping the employee on a state payroll for one (1) working day per pay period.

Service members on active duty for more than 30 days, and their dependents, are generally covered by military health care. They have the right to choose to continue employer coverage through COBRA, at their own expense, for the duration of the leave. When the service member returns to employment following the military leave, coverage is reinstated on the day the employee returns to work.

Under USERRA, if a service member is performing military duty for less than 31 days, the employee maintains the employer contribution for that period.

16.Are employers required to notify employees of their USERRA rights?

Yes. 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 notice must be posted in a prominent place where employees customarily check for such information.

17.May agencies treat the employee differently depending on whether the military leave is for voluntary service or for involuntary (mandated) service?

No. Neither state nor federal law allows the employer to distinguish between voluntary and involuntary service. It is prohibited for an employer to even make such distinction. Additionally, Minnesota courts have held that the protection of the state military leave law is available to all persons who perform military service, whether that service is voluntary or involuntary.

REFERENCES

Department of Labor's USERRA website: <https://www.dol.gov/agencies/vets/programs/userra>

USERRA poster: https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf

CONTACTS

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