

HR/LR General Memo #2014-5
Military Leave

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GENERAL GUIDANCE AND INFORMATION

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

This General Memo applies to employees of executive branch agencies and classified employees in the Office of Legislative Auditor, Minnesota State Retirement System, Public Employee Retirement Association, and Teachers' Retirement Association.

I. MINNESOTA STATUTES

State laws provide benefits and protections to state employees who are on leave for military duty. Under M.S. 43A.183, eligible state employees in the reserve forces who report for active service receive a military pay differential. M.S. 192.26 provides qualifying state employees with 15 days of paid military leave per calendar year. Finally, M.S. 192.261 provides employees with up to four years of job-protected, unpaid leaves of absence for qualifying active service. It is important to be aware of these employee rights and protections under state law. The following questions and answers will provide additional guidance on these topics.

Question: What is Military Pay Differential?

Answer: In accordance with M.S. 43A.183, subd. 1, each agency head shall pay to each eligible member an amount equal to the person's salary differential for each month or portion of month that the person is ordered to serve in active service. "Salary differential" means the difference between:

- (1) the person's monthly total gross earnings as an active state employee, excluding any overtime pay received but including all other earnings, averaged over the last three full months of the person's active state employment prior to reporting to active service, and including any additional salary or earnings adjustments that the person would have received at any time during the person's authorized leave from state employment had the person been serving as an active state employee during that time; and
- (2) the person's monthly base pay in active service.

Question: Who is eligible for military pay differential under M.S 43A.183?

Answer: State of Minnesota employees in the military service as defined in M.S. 43A.183, subd. 2(c), (d). "Eligible member" means:

- (1) any member of the National Guard or other reserve component of the United States armed forces who was an employee of the state of Minnesota at the time the member took military leave under section 192.261 to report for active military service; and

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- (2) any member of any other nonmilitary reserve component of the uniformed services of the United States who was an employee of the state of Minnesota at the time the member took properly authorized leave from state employment under substantially comparable federal or state authority ordering the person to report for federal or state active service.

"State employee" means an employee of the executive, judicial, or legislative branch of state government or an employee of the Minnesota State Retirement System, the Public Employee Retirement Association, or the Teachers Retirement Association.

Question: What service-related activities are eligible for military pay differential?

Answer: An individual is eligible for differential pay if the service order is for active duty or for active service as defined in M.S. 43A.183, subd. 2(e) and M.S. 190.05, subd. 5, as long as the service order is not for an exempt activity.

Exempt activities are services performed exclusively for purposes of:

- (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.

Question: Is Active Duty Training eligible for military pay differential?

Answer: No. Training activities are excluded from military pay differential under M.S. 43A.183, subd. 2(e).

Question: How long can an employee receive military pay differential?

Answer: Employees are eligible for military pay differential for up to four years from the date the employee reported for active service, plus any additional time the employee may be legally required to serve.

Question: How is military pay differential calculated?

Answer: The pay differential under M.S. 43A.183 is calculated based on the employee's monthly total gross salary earned, excluding any overtime pay, averaged over the last three full months of the employee's active state employment before being called to active service. This also includes any additional salary or earnings adjustments the person would have received at any time during the authorized military leave had the person been serving as an active state employee during that time.

Question: Does Minnesota Statute provide for paid leave for military duty?

Answer: Yes. Employees engaged in military duty as 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 the time when engaged in military training or active service for, up to 15 days in any calendar year. The employee can choose when during the calendar year to take the 15 days of paid military leave, can choose to use all of the 15 days of paid military leave at one time or, in the alternative, can choose to divide the 15 days of paid military leave and take it throughout the calendar year.

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

Answer: Minnesota Statutes 192.261 states that a military leave of absence that is longer than 15 calendar days is unpaid. However, eligible employees who are ordered to serve in active military service as defined in M.S. 43A.183, subd. 2(e) must be paid the difference between the employee's salary and his/her military pay,

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if the former exceeds the latter. (See military pay differential, above.)

Question: 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?

Answer: Yes. Minnesota Statutes section 192.26 states that state employees shall be entitled to a leave of absence without the loss of pay for up to 15 days per calendar year. Employees who are on extended and continuous military leave of absence shall be entitled to up to 15 days of paid leave for each calendar year during which they are on a military leave of absence.

For example:

Employee A leaves for an extended and continuous unpaid military leave of absence beginning on May 1, 2014. The leave is not exempt from military pay differential. Upon commencement of the leave, Employee A receives the first 15 days of the leave with pay, at his/her full state salary. For the balance of Employee A's military service in 2014, Employee A receives the difference between his/her state salary and his/her military pay. Employee A remains on an extended and continuous unpaid military leave of absence through 2015 and returns to his/her state position in February 2016. Because the military leave crosses over calendar years, Employee A is entitled to receive 15 days of his/her full state salary in 2014, 2015 and 2016. For the balance of 2015, and the remainder of the leave period in 2016, Employee A receives the difference between his/her state salary and his/her military pay.

If Employee A were to be activated for a second military service in 2016, regardless of the length of the leave period, Employee A would not be entitled to any additional paid military leave in 2016 as s/he has already used his/her 15 days of paid leave, however the employee would remain eligible for the military pay differential. If the second activation were to be continuous and extend into 2017, Employee A would again be entitled to 15 days of paid leave for 2017 and the employee would remain eligible for the military pay differential.

Question: Must employees ordered to active service notify the agency of their military orders and provide the name and contact information for their designated attorney-in-fact under a power of attorney?

Answer: Yes. In addition, the employing agency must notify agency personnel who may be members of a reserve component of the benefits provided by this statute. The agency notification requirement can be met by posting the information on the agency's web site 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.

II. FEDERAL UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT ACT

The Uniformed Services Employment and Reemployment Act (USERRA) protects the employment and reemployment rights of individuals serving in the military, including those called from the reserves or the National Guard. USERRA also prohibits discrimination based on military service or obligation. The following questions and answers provide guidance on common issues related to USERRA.

Question: Upon return from military leave, is an employee entitled to return to his/her former position?

Answer: 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:

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- (1) In the escalator position, which is the job the person would have held had the person remained continuously employed. 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 above in (1) after reasonable efforts by the employer, he or she must be reemployed in the position held on the date military service began, as long as 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, he or she must be reemployed in any other position that is the nearest approximation 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, which is the job the person would have held had the person remained continuously employed, *or* a position of equivalent seniority, status and pay, so long as 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 position in (1) after reasonable efforts by the employer, in the employee's pre-service position *or* in a position of similar seniority, status, and pay, as long as 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, he or she must be reemployed in any other position that is the nearest approximation 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.

Please note that 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 prerequisites, that he or she would have attained if not for the period of uniformed service.

State law also 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 position 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; and,
- (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 actually been employed during the time of such leave. Therefore, state employees continue to accrue vacation and sick leave hours during military leave.

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

Question: What service qualifies for USERRA protection?

Answer: The 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.

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

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

Question: Should employees on extended military leave be allowed to take one day of vacation per payroll period to extend the employer contribution for insurance benefits?

Answer: No. Employees on extended military leave cannot use one day of vacation per payroll period to extend the employer contribution for insurance benefits.

The service member and dependents generally have military-provided health and dental insurance coverage available after reporting for duty. Additionally, under USERRA, an individual performing military duty of less than 31 days must continue receiving coverage as if the individual remained employed during the military service. An individual performing military duty of more than 30 days is entitled to elect to continue coverage for up to 24 months at the individual's expense, for himself or herself, and for any dependents if the plan offers dependent coverage. Upon the individual's return to employment following the military service, the state must provide health insurance coverage immediately with no waiting period.

This is also consistent with the language in the insurance article of the contracts and plans which provide that an employee on an unpaid leave of absence may not use vacation leave for the purposes of maintaining eligibility for an employer contribution by keeping the employee on a state payroll for one (1) working day per pay period (e.g., AFSCME contract, Article 19, Section 3.E.2).

Question: Should employees on extended military leave be allowed to use vacation while they are on military leave?

Answer: Yes. Under USERRA, employees may use their vacation accruals prior to the designation of their unpaid leave of absence. There may be no break between active work status and the use of such vacation. As stated above, the employees are not permitted to use the vacation "for the purpose of" maintaining the employer contribution for health insurance. Employees on military leave do not have the right to use vacation sporadically (e.g., a day or week at a time during the unpaid leave). While employees on military leave are allowed to use vacation, they cannot be required to use vacation time for military service.

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

Answer: No. Under federal regulations, 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 actually performing service in the uniformed services.

Question: Are employers required to notify employees of their USERRA rights?

Answer: Yes. All employers are required to notify employees of their rights under USERRA. The notice must

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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.

Question: May you treat the employee differently depending on whether the military leave is for voluntary service or for involuntary (mandated) service?

Answer: No. Neither state nor federal law allows the employer to distinguish between voluntary and involuntary service. In fact, USERRA specifically prohibits the employer from making any such distinction. 38 U.S.C. Sec. 4312(h). Further, 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.

FORMS AND SUPPLEMENTS

Contacts	Please contact your agency's Labor Relations Representative for further questions.
References	M.S. 43A.183, M.S. 181.947, M.S. 181.948, M.S. 192.261, M.S. 192.26, M.S. 190.05, M.S. 190.08, 32 USC Sect 502(f), 38 U.S.C. §§ 4301-4333 (1994), Department of Labor's USERRA Advisor website: http://www.dol.gov/elaws/userra.htm USERRA poster: http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf