



USERRA

GUIDE TO UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT



Published by the Air Line Pilots Association, International
for the Information and Guidance of Its Members

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FOREWORD


This Edition Version 1.0 of the Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the requirements and application of USERRA by focusing on common questions that arise under the Act in the context of airline pilots who also serve as members of the uniformed services of the United States. This Guide is presented in a question and answer format.

Throughout our history, the U.S. government has enacted legislation protecting the men and women who serve our nation in times of armed conflict. USERRA (codified as amended at 38 U.S.C. §§ 4301–4335) was passed by Congress and signed into law by President Clinton in 1994. USERRA applies to all U.S. uniformed services and their respective reserve components. USERRA clarified and strengthened the Vietnam Era Veterans' Readjustment Assistance Act by adding additional protections to civilian job rights and benefits for veterans, members of reserve components, and certain other individuals activated by the President to provide a federal response to national emergencies. Certain shortfalls in the 1994 Act that affected National Guard and Reserve members were addressed in 2008 by amendments to USERRA.

This Guide is based on the USERRA statute (as amended to date), the U.S. Department of Labor Regulations implementing USERRA, and Department of Labor comments stated in the Preamble to the Regulations, current as of the date of this Guide. In instances where USERRA does not mandate a particular result or industry practice related to airline pilots who also serve in the uniform services, answers included in this Guide may refer to a description of a common or best industry practice. Answers which include a description of a current or best industry practice are marked with an asterisk (*). These non-mandatory practices may vary from carrier to carrier.

The most recent version of this Guide is posted on the ALPA website on the Veterans Affairs Committee page. This Guide is intended to be a non-technical resource for the informational use of ALPA Members. Because the facts and circumstances of each particular situation may differ from those contained in this Guide, the Guide should not be considered legally binding and should not be considered a substitute for the language of the statute or regulations. The Department of Labor's Veterans' Employment and Training Service (VETS) administers USERRA. Should you have a particular question about the application of USERRA that is not addressed in this Guide, ALPA members may wish to contact VETS (1-866-487-2365 or visit their website at www.dol.gov/vets) or the ALPA Legal Department (703-689-4326 or by email at Legal@alpa.org) who may be able to further assist you in obtaining information or an answer to your specific question.

In Solidarity,



Captain William R. Couette
Vice President-Administration/Secretary
Air Line Pilots Association, Int'l

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ALPA Logo Reg. U.S. Pat. And T.M. Off.

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1. Introduction to Employer and Employee Responsibilities under USERRA

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (38 U.S.C. §§ 4301-4335, Public Law 103-353), as amended, provides for the employment and reemployment rights for all uniformed service members. Under USERRA, a pilot must meet five simple conditions to have the right to reemployment at his or her civilian airline job:

- (1) The pilot must have left the job for the purpose of performing voluntary or involuntary service in the uniformed services.
- (2) The pilot must have given the employer prior oral or written notice, unless prevented by military necessity, or otherwise impossible or unreasonable.
- (3) The pilot's period of service (the most recent period plus any prior periods while employed by that same employer) must not have exceeded five years. As is discussed in more detail below, certain military service is considered "exempt" under USERRA and does not count toward the five-year limit.
- (4) The pilot must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
- (5) The pilot must be timely in reporting back to work or applying for reemployment.

The Pilot must meet all five of these conditions to be entitled to reemployment—four out of five is not good enough.

Q1. Who is eligible for reemployment under USERRA?

A: Reemployment rights extend to persons who have been absent from a position of employment to

perform duty in the “Service in the Uniformed Services” of the United States on a voluntary or involuntary basis, including:

- (1) Active duty and active duty for training.
- (2) Initial active duty for training.
- (3) Inactive duty training.
- (4) Full-time National Guard duty.
- (5) Absence from work for an examination to determine a person’s fitness for any of the above types of duty.
- (6) Funeral honors duty performed by National Guard or Reserve members.
- (7) Duty performed by intermittent employees of the National Disaster Medical System when activated for a public health emergency, and approved training to prepare for such service.

Q2. How is “Service in the Uniformed Services” and “Uniformed Services” defined?

A: The “Uniformed Services” consist of the following:

- (1) Army, Navy, Marine Corps, Air Force and Coast Guard;
- (2) Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve and Coast Guard Reserve;
- (3) Army National Guard and Air National Guard;
- (4) Commissioned Corps of the Public Health Service; or
- (5) Any other category of persons designated by the President in time of war or emergency.

Q3. Which employers are subject to USERRA?

A: USERRA applies to virtually all employers, regardless of size, including airlines.

Q4. Is ALPA considered an employer of airline pilots under USERRA?

A: No. ALPA does not hire pilots or assign them to airline flying.

Q5. What is the Role of the U.S. Department of Labor under USERRA?

A: USERRA charges the Secretary of Labor (through the Veterans' Employment and Training Service (VETS)) with providing assistance to any person who seeks employment or reemployment rights or benefits under the Act.

2. Advance Notice of Military Service

Q6. How do I give advance notice of military service to my airline?

A: Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving.

Q7. Are there exceptions to the advance notice requirement?

A: Yes. No notice is required if military necessity prevents the giving of notice, or the giving of notice is otherwise impossible or unreasonable.

Q8. How is “military necessity” defined?

A: For purposes of the notice exception, “military necessity” is defined by regulation as “a mission, operation, exercise or requirement that is classified, or a pending or ongoing mission, operation, exercise or requirement that may be compromised or otherwise adversely affected by public knowledge.”

Q9. Can my airline require me to fill out a detailed log or form before taking long-term military leave of absence (MLOA), or leave around designated holidays?

A: No. The Department of Labor regulations provide:

“The employee’s notice to the employer may be either verbal or written. The notice may be informal and does not need to follow any particular format.” Because the veteran has the burden of establishing that advance notice was given to the employer under USERRA, DOD recommends that written notice be given, and a copy retained. In the event advance notice is verbal, a written confirmation may be provided as soon as practical.

Q10. Is the airline required to accept a verbal notification of military leave?

A: Yes, see the answer above.

Q11. How much time off is an employee entitled to prior to reporting for military service?

A: Although an exact amount of time is not specified in USERRA, an employee, at a minimum, needs to be given sufficient time to travel to the place where the military duty is to be performed and arrive fit and

prepared to perform the service. Depending on the specific circumstances including the duration of the service, the amount of notice received and the location of service additional time to rest, or to arrange affairs and report for duty, may be necessary. Members are not required to but may request airline leave to cover additional time necessary to report for uniformed service.

Q12. What is a pilot's status with the airline while on military leave?

A: Under USERRA, an airline pilot performing uniformed service is deemed to be on furlough or leave of absence and that pilot is entitled to the non-seniority rights and benefits generally provided by the airline to other pilots with similar status, pay and seniority on non-military furlough or leave of absence. These obligations cannot be avoided by employer characterizations of employment status (for example, characterizing a pilot on military leave as "terminated").

Q13. If an employer provides full or partial pay to a pilot on military leave, must it also provide other rights and benefits under USERRA?

A: The employer must also provide the uniformed service member any other non-seniority rights and benefits granted to other similarly situated employees on a non-military furlough or leave of absence

3. Removal of Notification of Military Leave Status

Q14. How do I withdraw notification of military leave?

***A:** Advise your airline that your MLOA notification is withdrawn in accordance with any specific procedures the airline may have to cancel military leave notification. If there are no airline specific procedures, cancellation of the MLOA should be handled similarly to cancellation of other types of unpaid leave. In that event, you may want to advise the crew desk of the cancellation and your availability.

4. Company Request to Defer or Reschedule Military Service

Q15. Can my company request that I defer or reschedule military service during periods of peak airline service?

A: Airlines are not prohibited by USERRA from requesting that pilots defer or reschedule military leave.

Q16. Can my company contact my military unit to request that my military service be deferred or rescheduled?

A: USERRA does not prohibit employers from contacting your military unit or the military authorities to discuss your military duty and scheduling conflicts. In the event a conflict cannot be resolved, the employer is obligated to respect the primacy of the military obligation.

5. Duration of Military Service and USERRA's Five-Year Limit

Q17. What is the USERRA five-year cumulative service rule?

A: USERRA reemployment rights apply if the cumulative length of service that causes a person's

absences from a position at the same employer does not exceed five years.

Q18. Does military service performed during employment with a prior employer count towards the five-year limit?

A: No. Military service that a pilot performed before starting with the current employer is irrelevant for reemployment rights purposes. When the pilot starts a new job with a new airline, or a new employer, he or she gets a fresh five-year limit with the new employer.

Q19. What happens when a pilot's cumulative military service reaches the five-year limit?

A: Pilots who accumulate five years of non-exempt military service are no longer entitled to the reemployment protections of USERRA.

Q20. Am I entitled to be reemployed in any circumstance after I have reached or exceeded five years of cumulative military service?

A: USERRA does not require but also does not prohibit reemployment after the cumulative five-year limit is reached. After the five-year limit is reached, an employer can offer reemployment in another or lesser position. It may be necessary to consult your collective bargaining agreement and the employer's work rules, as well as other laws, to determine your reemployment rights after the five-year limit is reached. It is also important to not overlook the possible effect of various state laws.

Q21. Is all military service included in USERRA's five-year limit calculation?

A: No. Numerous types of military service do not count towards the five-year limit. Particularly since the September 11, 2001 attacks a significant portion of military service has been deemed “exempt” from USERRA’s five-year cumulative service limit by the Department of Defense, or Presidential order, based on specific statutory exceptions within USERRA. Military service that is defined as “exempt” by a military or executive order, by law, does not count against a pilot’s five-year cumulative service limit.

Q22. What are the specific types of service that are not counted towards USERRA’s five-year service limit?

A: There are eight specific statutory exceptions to the five-year limit. The statutory exceptions are implemented by a Department of Labor regulation. The regulation also recognizes a ninth non-statutory exception based on equitable considerations. The nine exceptions are:

- (1) Initial military obligation in excess of five years;
- (2) Inability to obtain release orders;
- (3) Service to perform or fulfill periodic National Guard and Reserve training requirements prescribed by 10 U.S.C. § 10147 and 32 U.S.C. §§ 502(a) and 503, or to fulfill additional training requirements determined and certified by a proper military authority to be necessary for professional development or for completion of skill training or retraining;
- (4) Involuntary duty under specified sections of Titles 10 and 14 of the United States Code;
- (5) Involuntary duty due to war or national emergency declared by President or Congress;

(6) Active duty to support other personnel under 10 U.S.C. § 12304;

(7) Active duty to support a critical service mission as determined by the Secretary;

(8) National Guard duty in response to civil unrest or insurrection; and

(9) Continued service to mitigate economic harm where employer is in violation of USERRA's reemployment provisions.

Q23. What types of reserve and readiness training and professional development training included in category (3) above are exempt from USERRA's five-year limit?

A: Exempt training obligations include inactive duty training (like drill weekends) and annual training, plus any formal school or training determined and certified in writing by the Secretary concerned to be necessary to meet qualification and readiness requirements including additional flight training periods, participation in reinforcement training units, pilot instructor training, Air Command & Staff College assignments, and uniformed training assemblies.

Q24. Who is responsible for determining whether my specific service is exempt from the five-year limit?

A: It is the responsibility of the individual service member, in cooperation with the Department of Defense, to determine whether his or her service is exempt.

Analyzing the statutory scheme under which voluntary or involuntary service orders are authorized can be complex. A copy of the military

orders may be the best evidence of the authority under which the pilot was serving. Federal Executive or Agency Guidance may need to be consulted to identify qualified operations. Your military unit or service branch staff personnel are likely in the best position to clarify whether your specific service or orders are considered exempt from USERRA's five-year service limitation.

Q25. Are there other types of time related to my military obligations that do not count towards USERRA's five-year limit?

A: The five-year maximum period of absence includes only the time spent actually performing duty in the uniformed services. It does not include time spent, for example, getting ready to move. Also, USERRA permits a certain period of time after completing duty to submit a reemployment application; that period does not count against the five-year limit.

Q26. USERRA provides that an employer is under a legal obligation to provide reemployment if a pilot's service falls under the exemptions to the five-year limit. Must documentation demonstrating exempt service be provided by the service member prior to reemployment at the airline?

A: Yes. If the airline requests the information, it is the responsibility of the service member to provide the airline with the necessary documentation to properly identify and record his or her military service as "exempt" versus "non-exempt." USERRA states that an employee is obliged (upon request) to provide documentation to the employer establishing that his or her service has not exceeded the five-year limit. If the service member believes that the service

documentation improperly reflects non-exempt service, it is the responsibility of the service member to resolve the discrepancy with the Department of Defense and to provide updated documentation to the Company.

Q27. Who decides what type of documentation is sufficient to prove service is exempt?

A: Documents that satisfy eligibility requirements for reemployment are specified in regulations published under USERRA. The types of documents that are necessary to establish eligibility for reemployment will vary from case to case and not all documents specified in the regulations are available or necessary in every case. Service members may obtain the documents needed to reestablish reemployment eligibility by submitting a request to the military department concerned. Contact information which can assist you in obtaining the documentation is available in the back of this Guide. Ultimately, the service branch is obligated by law to provide the documentation that the employee requires to satisfy his or her obligation to the employer and the employer is under an obligation to provide prompt reemployment. An airline is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. If you have been denied a right or benefit under USERRA, such as prompt reemployment, you should complain. If documentation received after reemployment shows that the employee is not entitled to reemployment, an employer may terminate employment and any rights or benefits granted under USERRA.

6. Military Reserve Duty

Q28. Does military reserve duty count towards the USERRA five-year cumulative limit?

A: Yes, military reserve duty counts toward the USERRA cumulative five-year limit, unless it is exempt.

Q29. What is the status of National Guard civilian technicians and members of the Civil Air Patrol under USERRA?

A: National Guard civilian technicians are considered state employees under USERRA, although they are considered federal employees for most other purposes. National Guard service performed under state authority is not protected by USERRA although a number of states have enacted laws that provide job protection to National Guard members that serve under state rather than federal orders. USERRA also does not cover service performed in the Civil Air Patrol, the Coast Guard Auxiliary or in the Commissioned Corps of NOAA.

7. Military Duty During Reserve or Airline Time Off

Q30. Can an airline prohibit pilots from performing military service while on reserve or layovers?

A: USERRA grants reemployment rights and other benefits to employees who leave civilian jobs to perform military service and protects from discrimination persons who serve in the military, make complaints, participate in proceedings or exercise rights under the Act. USERRA further provides that an employer cannot deny any benefit of employment because of military service. USERRA

does not specifically address whether military duty may be performed during airline reserve or layover. The issue may be clarified in the future. Note that USERRA's reemployment protections may not apply in the event that a pilot is or becomes unavailable for airline work due to military service if the pilot has not provided the airline with advance notice of military service.

Q31. Can a pilot perform military duty on his or her own time without putting in for military leave from an airline's schedule?

A: The answer to this question appears to be yes, although there is apparently no definitive law on the subject. USERRA requires advance notice from the employee only if "absence from a position of employment is necessitated by reason of service in the uniformed services." In some cases, collective bargaining agreements or work rules may distinguish between hard-non-fly days off which present no conflict between the military service and airline employment, and soft days off which could be subject to a potential conflict between military service and airline employment. The answer to this question could be clarified in the future as a result of pending litigation.

8. Disqualifying Military Service

Q32. Under what circumstances may a pilot be disqualified from asserting USERRA rights?

A: USERRA lists four circumstances that disqualify a pilot from asserting USERRA rights:

(1) Separation from the service with a dishonorable or bad conduct discharge.

(2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation is considered “other than honorable.”

(3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war.

(4) Dropping an individual from the military rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court.

9. Extending Military Leave

Q33. How do I extend military leave?

***A:** When a pilot leaves an employer to begin a period of military service, there is no requirement under USERRA that the pilot tell the airline that he or she intends to seek reemployment after completing uniformed service. The employer may have an established process for notifying or advising the Company that military leave has been or will be extended. However, notifying an employer of an extension to military leave is not the same as notifying the employer of a return to work. Once you have confirmation of your new military service end date, you should notify the employer of the date you intend to return to work.

10. Reporting Back to Work at the Airline

Q34. How do I report back to work at the airline after military service?

A: To qualify for USERRA's protections, a service member must be available to return to work within certain time limits. These time limits for returning to work depend (except for fitness-for-service examinations) on the duration of a person's military service. The three periods of time of military service that control the return to work limits are: (a) less than 31 days; (b) more than 30 days but less than 181 days; and (c) more than 180 days.

Q35. What are the time limits applicable to returning to work after military service of less than 31 days?

A: The pilot must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the calendar day following completion of USERRA-protected service, safe travel home and an 8-hour rest period. If, due to no fault of the employee, it would be impossible or unreasonable for the employee to report within such time period, the employee must report back to work as soon as possible after the expiration of the 8-hour rest period.

Q36. What are the time limits applicable to returning to work after military service of more than 30 days but less than 181 days?

A: An application for reemployment must be submitted to the employer no later than 14 days after completion of a person's military service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible on the next day when submitting the application becomes possible.

Q37. What are the time limits applicable to returning to work after military service of more than 180 days?

A: An application for reemployment must be submitted to the employer no later than 90 days after completion of a person's military service.

Q38. What are the time limits applicable to returning to work after a military service fitness exam?

A: The time limit for reporting back to work for a person who is absent from work to take a fitness-for-service examination is the same as discussed above for persons who are absent for 1 to 30 days. That time limit will apply regardless of the length of the person's absence.

Q39. What documentation can the employer request upon return to work after military service?

A: An employer has the right to request that a person who is absent for a period of service of 31 days or more provides documentation showing that:

(1) the person's application for reemployment is timely;

(2) the person has not exceeded the five-year service limitation; and

(3) the person's separation from service was other than disqualifying under 38 U.S.C. § 4304.

Q40. Is a pilot required to submit documentation to the airline in connection with the application for reemployment?

A. Yes, if the period of service exceeded 30 days and if requested by the airline to do so.

Q41. What documents must the Company accept as proof of military service?

A: USERRA provides that the Department of Labor must specify acceptable documents by regulation. Those regulations, at 20 C.F.R. § 1002.123, identify the following documents to be used to establish eligibility for reemployment rights under USERRA:

- (1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;
- (2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
- (3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
- (4) Certificate of completion from military training school;
- (5) Discharge certificate showing character of service; and,
- (6) Copy of extracts from payroll documents showing periods of service;
- (7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

Q42. If my Company doesn't request documentation of military service, do I have to provide it?

A: No.

Q43. What can the airline do if it requests documentation of my military service and I don't have it, or it doesn't exist?

A: If a person does not provide satisfactory documentation because it is not readily available or does not exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person and any rights or benefits that may have been granted.

Q44. Are my reemployment rights forfeited if there is an unexcused delay in meeting the time limits for applying for reemployment following military service?

A: A person's reemployment rights are not automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits. In such cases, the person will be subject to the employer's established rules governing unexcused absences.

Q45. Can my airline require me to submit a letter 30 days prior to returning to work from a long-term MLOA?

A: No. USERRA only requires an application for reemployment no later than 14 days after completion of military service for service periods of 31-180 days, or no later than 90 days for service periods of more than 180 days. The employer cannot legally impose a greater restriction on this notice requirement. USERRA provides that the application for reemployment may be oral or in writing (although a written application with a copy retained would be prudent).

Q46. Can the USERRA time limits for applying for reemployment following military service be extended under any circumstances?

A: The deadlines can be extended up to two years, or more, if a person was hospitalized or convalescing because of an injury or illness resulting from the performance of military service.

11. Employee Rights and Benefits upon Return to Work from Military Service

Q47. What reemployment rights and benefits does a returning service member have under USERRA?

A: Reemployed service members are entitled to the seniority, and all rights and benefits based on seniority, that they would have attained with reasonable certainty had they remained continuously employed.

Q48. How is “reasonable certainty” defined under USERRA?

A: Reasonable certainty means that there is a high probability that a pilot would have received the seniority, or a seniority-based benefit, if that pilot had been continuously employed. Absolute certainty is not required. An employer may not withhold a right or benefit based upon an unlikely series of events.

Q49. How does USERRA define a seniority-based benefit?

A: A right or benefit is seniority based if it is determined by or accrues with length of employment. On the other hand, a right or benefit is not seniority based if it is compensation for work

performed or is made available without regard to length of employment.

Q50. To what non-seniority-based benefits is an absent or returning service member entitled under USERRA?

A: During periods of military service, employees must be treated as if they are on a furlough or leave of absence. Consequently, during their period of service they are entitled to participate in any rights and benefits not based on seniority that are available to employees on comparable non-military leaves of absence, whether paid or unpaid. For example, if an employer provides employees on other types of unpaid leave with continued health insurance, life insurance, disability insurance, or other benefits, these same benefits must be provided to the employee on military leave. If there is a variation in benefits among different types of non-military leaves of absence, the service member is entitled to the most favorable treatment so long as the non-military leave is comparable.

Q51. Is a returning service member entitled to rights and benefits that first became effective while he or she was on a leave of military absence?

A: Yes. Under USERRA returning military service members are entitled to rights and benefits that become effective during their absence for military service and that are provided to similarly situated employees on furlough or leave of absence.

12. The Requirement for Prompt Reemployment

Q52. How soon must the airline put a pilot back to work after the pilot applies for reemployment following military service?

A: Returning service members must be “promptly reemployed.” “Prompt reemployment” means as soon as is practicable under the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require reassigning or giving notice to an incumbent employee who has occupied the service member’s position.

Q53. Can the position in which I am reemployed be determined by the length of military service?

A: Yes, the employer’s obligations under USERRA vary depending on whether the length of military service was 90 days or less, or longer.

Q54. What are the employer’s reemployment obligations to an employee who was absent for military service which lasted 1 to 90 days?

A: A person whose military service lasted 1 to 90 days must be “promptly reemployed” in the following order of priority:

(1) In the job the person would have held had the person remained continuously employed, so long as the person is qualified or can become qualified after reasonable efforts by the employer.

(2) In the job in which the person was employed on the date of the commencement of the service in the uniformed services, so long as the person is qualified or can become qualified after reasonable efforts by the employer.

(3) If the veteran cannot become qualified for either of those positions, then in a position that is the nearest approximation to the positions described above, in that order, with full seniority.

Q55. What are the employer's reemployment obligations to an employee who was absent for military service which lasted 91 or more days?

A: A person whose military service lasted 91 or more days must be "promptly reemployed" in the following order of priority:

(1) In the job the person would have held had the person remained continuously employed, or a position of like seniority, status and pay, so long as the person is qualified or can become qualified after reasonable efforts by the employer.

(2) In the job in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay, so long as the person is qualified or can become qualified after reasonable efforts by the employer.

(3) If the veteran cannot become qualified for either of those positions, then in a position that is the nearest approximation to the positions described above, in that order, with full seniority.

Q56. What are the employer's requalification obligations under USERRA?

A: Employers must make reasonable efforts to qualify a returning service member for the reemployment position. Employers must provide refresher training, and any other training necessary to update a returning employee's skills so that he or she can perform the essential tasks of the position.

Q57. What is the "Escalator" Principle under USERRA?

A: The reemployment position with the highest priority in the reemployment schemes discussed above reflects the "escalator" principle—a key concept under USERRA. The escalator principle requires that each returning service member be reemployed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority.

The position may not necessarily be the same job the person previously held. For instance, if a pilot would have been promoted with reasonable certainty had he or she not been absent for reasons of military service (for example, from narrow body First Officer to narrow body Captain), the pilot would be entitled to that promotion upon reinstatement. On the other hand, depending on economic circumstances, reorganizations, layoffs, etc., the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in furlough status. In other words, the escalator can move up or down.

Q58. What procedure applies if two or more persons are entitled to reemployment in the same position?

A: The person who first left has the superior right to a position that provides similar seniority, status, and pay.

Q59. What are the employer's reemployment obligations towards injured and disabled service members?

A: As mentioned above, the deadlines for applying for reemployment can be extended up to two years, or more, if a person was hospitalized or convalescing because of an injury or illness resulting from the performance of military service. If the employee has a disability that was incurred or aggravated during the performance of uniformed service, the employer must make reasonable efforts to accommodate the disability and to help the employee become qualified to perform the duties of the reemployment position.

If the disabled person cannot become qualified for the reemployment position despite reasonable efforts by the employer to accommodate the employee, USERRA indicates that employee must be reemployed in a position according to the following priority: (a) a position that is equivalent in seniority, status, and pay to the escalator position, or (b) a position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case. Such a position may be a higher or lower position, depending on the circumstances.

13. Airline Defenses to Reemployment

Q60. Does USERRA provide airlines with any defenses to reemployment?

A: Yes. Reemployment of a person is excused if an employer's circumstances have changed so that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example. Employers are also excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Q61. Does USERRA recognize an employee's waiver of rights?

A: Yes. If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority. At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. The employer bears the burden of proving that the person knowingly waived entitlement to the specific rights and benefits.

A notice of intent not to return can waive only leave-of-absence rights and benefits. It cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights after service.

Q62. What is the burden of proof when an airline asserts defenses such as changed circumstances, undue hardship or waiver of rights under USERRA?

A: Employer defenses to reemployment are affirmative ones and the employer carries the burden of proving them by a preponderance of the evidence.

14. Military Leave and the Probationary Pilot

Q63. How are probationary pilots treated under USERRA?

***A:** USERRA rights are not diminished because an employee holds a probationary employment position. If consistent with Company practices regarding other types of leave, a pilot who has not completed his or her probationary period prior to a MLOA may still be required to complete any remaining probationary period and requirements upon return to work after the MLOA. In such a case, the probationary period may be tolled during military leave, or extended to meet the requirements of the probationary evaluation period.

15. Jumpseat Privileges

Q64. Do my jumpseat privileges continue while I am on military leave?

***A:** A Company may continue jumpseat privileges (including access to CASS and KCM) during military service. To maintain access to CASS a pilot may be required to keep the Company posted with a current and valid passport and an FAA First Class Medical Certificate. A carrier may maintain jumpseat privileges unchanged for short term military leave (less than 31 consecutive days) but provide jumpseat privileges on a more restrictive basis during periods of long term military leave (more than 30 days).

16. Travel Pass Privileges

Q65. Do travel pass privileges continue while a pilot is on military leave?

***A:** An airline may continue travel pass privileges during periods of military service. Travel privileges may also continue to be extended to eligible family members, domestic partners and friends, and pilots on a MLOA may receive allotments of buddy and vacation passes similar to pilots on active status.

17. Pension/Retirement Plans

Q66. Does USERRA protect pension and retirement benefits?

A: Yes. Upon reemployment after military service, a service member is treated as not having incurred a break in service with his or her employer for purposes of participation, vesting and accrual of pension and retirement benefits. USERRA treats each period of military service as a continuous, uninterrupted period of employment with the employer maintaining the retirement plan in determining eligibility for participation in the plan, the vesting of accrued benefits and the accrual of service credits, contributions and elective deferrals under the plan.

Q67. Does the time immediately following military service, but prior to reporting back to work, count for purposes of pension and retirement benefits?

A: Yes. Depending on the length of military service, you are entitled to take one to ninety days following military service before reporting back to work or applying for reemployment. This period of time is treated as continuous service with your employer for purposes of participation, vesting and accrual of benefits under the employer's retirement plans.

Q68. What happens if I am hospitalized for an injury incurred during military service?

A: If you are hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during military service, you are entitled to report back to work at the end of the time period needed for your recovery from the illness or injury. This period, which may not exceed two years from the date you completed military service, is treated as continuous service for purposes of participation, vesting and accrual of benefits under the employer's retirement plans.

Q69. What types of plans are covered under USERRA?

A: USERRA protections apply to any plan (other than the government's Thrift Savings Plan) that provides retirement income to employees or that defers payment of income to employees upon termination of employment, or later. This includes defined benefit plans, defined contribution plans, and profit-sharing plans.

Q70. Who is responsible for funding any plan obligation in order to provide pension benefits attributable to military service?

A: The employer is responsible for funding a retirement plan to provide benefits that are attributable to the employee's period of military service. In the case of a defined contribution plan, once the service member is reemployed, the employer must contribute its employer make-up contribution for the employee, if any, in the same manner and to the same extent that it allocates the amounts for other employees during the period of

service. The employer must also contribute the employee's make-up contributions, and elective deferrals, if any, in the same manner and to the same extent that it allocates the amounts for other employees during the period of service.

In the case of a defined benefit plan, the employee's accrued benefit will be increased for the period of military service once he or she is reemployed and, if applicable, has repaid any amounts previously paid from the plan, and made any employee contributions that may be required to be made under the plan. The employer is required to make any pension contributions that it would have made had the employee not been absent due to military leave.

Q71. If I am reemployed with my pre-service employer, is the retirement benefit the same as if I had remained continuously employed?

A: The amount of your pension benefit depends on the type of pension plan. If you are a participant in a defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, your benefit will be the same as though you had remained continuously employed during the period of military service. In a defined contribution plan, the benefit may not be the same as if you had remained continuously employed, even though you and your employer make up all contributions or elective deferrals attributable to the period of service, because you are not entitled to forfeitures and earnings (or losses) that may have accrued during the period of military service.

Q72. I withdrew money from my defined benefit plan during my military service. Can I repay the plan upon reemployment?

A: Yes. If prior to reemployment and in connection with your military service, you withdrew all or part of your accrued benefit from a defined benefit plan, you may repay the withdrawn amounts when reemployed. The repayment amount would include interest that would have accrued had the benefits not been withdrawn. The repayment period starts on the date of reemployment and continues up to three times the duration of the military leave, but not longer than five years (or such longer time as may be agreed to between you and your employer), provided you are employed with the employer during this period.

Q73. I participate in a defined contribution plan. Is my employer required to make employer contributions to the plan while I am on military leave?

A: No. The employer is not required to make plan or contractually-required employer contributions to the plan while you are on military leave. However, upon your reemployment after military leave, your employer is required to make its non-elective employer contribution to the plan no later than 90 days after your reemployment date, or when contributions are normally due for the year in which the military service was performed. If it is impossible or unreasonable for the employer to make a timely contribution, the employer must make the contribution as soon as practicable. If the defined contribution plan is contributory and the employer contribution is contingent on your

contribution, the employer is required to make contributions only to the extent that you make the contributions.

Q74. How is compensation calculated for military leave for purposes of determining retirement benefits?

A: In many pension plans, the employee's compensation determines the retirement benefit or the amount of the retirement contribution. When an employee's compensation is used to determine a retirement benefit, the calculation of compensation during the period of military service is based on the rate of pay the employee would have received from the employer had he or she remained continuously employed. When the employee's rate of pay is not reasonably certain, the employee's compensation during the period of military service is computed on the basis of the employee's average rate of compensation during the 12-month period immediately preceding the employee's period of military service. In the event the employee's period of employment immediately preceding military service was less than 12 months, then the employee's compensation would be based on the employee's average rate of pay during the shorter period.

A rate of pay qualifies as "reasonably certain" if there is a high probability an employee would have been paid at that rate but for his or her absence for a period of military service. The employee thus might have a reasonably certain rate of pay during the military service period even when the rate is variable, rather than fixed. Types of wages other than basic pay, such as overtime compensation or

shift differential pay, which an employee would have earned had the employee not been absent for military service, must be included in computation of the employee's reconstructed compensation.

At some airlines, the calculation of compensation, as well as changes in flight crew status (seat position), during the period of military leave for purposes of determining pension benefits are specifically addressed in the collective bargaining agreement.

Q75. I participate in my employer's 401(k) plan. Can I make-up salary deferral contributions that were not made during my military leave?

A: Yes. Upon reemployment you may, but are not required to, make up missed contributions or salary deferrals in any contributory plan in which you participate. Makeup contributions or elective deferrals may be made over a period of time that is three times the duration of your military service, but no longer than five years, with the repayment period starting on the date of reemployment. During this period, makeup contributions and elective deferrals may only be made while you are employed with your employer.

Q76. Do I pay interest when I make up missed employee contributions or elective deferrals?

A: No. Your payments may not exceed the amount you would have been permitted or required to contribute had you remained continuously employed during your period of military service. Consequently, you are neither required nor allowed to pay interest when making up contributions or salary deferrals.

Q77. What Internal Revenue Code limits apply to my makeup contributions?

A: Makeup contributions are subject to the limitations under Code Sections 415(c) and 402(g) that would have applied during the period of military leave. The returning veteran designates the specific year or years the contributions cover and the 415(c) and 402(g) limits for that specific year apply to the makeup contribution.

Q78. In a 401(k) plan, who decides whether the reemployed employee's 401(k) contribution is a makeup contribution or a current elective deferral?

A: The employee designates what period(s) the contributions cover.

Q79. When must an employer make up matching contributions to a 401(k) plan or make up non-elective contributions to a 401(k) plan or other defined contribution plan?

A: The employer does not have to begin the makeup contributions until the employee returns to employment after military service. The employer's makeup contribution period is equal to three times the period of qualified military service – not to exceed five years. If the employer contributions were contingent on the employee making elective contributions and the employee makes up the missed contributions, the employer must make up its contributions over the same period the veteran uses to make the makeup deferrals. If the employee does not make up his or her contributions, the employer is not required to make employer contributions that were contingent on the employee contribution.

Q80. Do I have to continue to make payments on my 401(k) loan while I am on military leave?

A: Maybe. A 401(k) plan may, but is not required to, suspend loan repayments during military leave. Check with the plan administrator to find out if this is allowed under your 401(k) plan.

Q81. What happens to my 401(k) loan when I am reemployed?

A: You must resume loan repayments when the military service ends. The loan payment frequency and amount must be at least equal to the pre-military schedule. You must repay the full loan amount (including interest accrued during the military service period) by the end of the maximum term for the original loan plus the military service period. The interest accrued on the loan during the military service period is generally limited to no more than 6%. You must supply a copy of your military orders to the plan administrator and you must ask that the 6% interest rate limit be applied to your loan.

Q82. Do I have to show proof of being eligible for reemployment in order to reinstate my pension benefits?

A: Yes. If your absence for military service exceeded 90 days, your employer may delay making retroactive retirement contributions until you provide satisfactory documentation showing eligibility for reemployment.

18. Vacation Accrual and Use

Q83. Can I use accrued vacation leave during military service?

A: Service members must, at their request, be permitted to use any vacation, annual or similar leave with pay during the period of service.

Q84. If an employer provides full or partial pay to a pilot on a MLOA, is that employer also required to provide the non-seniority benefits ordinarily granted to similarly-situated employees on a furlough or non-military leave of absence?

A: Yes.

Q85. Can the airline force me to take vacation leave to cover my military service?

A: No. Service members cannot be forced to use vacation time to cover military service.

Q86. Do I continue to accrue vacation leave while on a military leave of absence?

A: Generally, employees are not entitled to accrue more vacation or similar paid leave while away on military service. Nevertheless, should an employer permit employees on comparable leaves of absence to accrue additional vacation, annual or similar time off, that further leave time would be considered a non-seniority benefit that the employer must also provide to an employee on a MLOA.

19. Sick Leave Accrual and Use

Q87. Can the airline require me to use airline sick leave during military service?

A: No.

Q88. Can I elect to use airline sick leave while on a MLOA?

A: Generally, no. Sick leave is not considered comparable to annual or vacation leave under the USERRA regulations since it is intended to provide an income when an employee or family member is ill, and the employee is unable to work. An exception to this rule could occur if similarly situated employees on a non-military furlough or leave of absence were permitted to use paid sick leave, or permitted to use sick leave for any reason.

Q89. Does sick leave continue to accrue during a MLOA?

***A:** If similarly situated employees on a comparable leave of absence continue to accrue additional sick leave, then military service members should be similarly treated. A best practice is to provide that military service members continue to accrue sick leave while on a MLOA from airline duty.

20. Family and Medical Leave Act (FMLA)

Q90. How is my eligibility for FMLA leave determined upon return from a MLOA?

***A:** FMLA eligibility requirements are evaluated for a pilot returning from a MLOA as if the pilot had been continuously employed during the MLOA. An employee returning from a MLOA will be credited with the hours of service that he or she would have worked but for the period of military service.

21. Health Benefits

Q91. Does USERRA require continuation of health insurance coverage when an employee takes a MLOA?

A: Yes. USERRA, at 38 U.S.C. § 4317, requires the continuation of health plan benefits for employees who leave civilian jobs to perform military service. If an employee has coverage under a health plan with the employer, the plan must permit the employee to elect to continue coverage for the employee and dependents during periods of military leave. However, USERRA does not require an employer to allow an employee to initiate new health insurance coverage at the beginning of a MLOA if the employee did not previously have health insurance coverage. Additionally, USERRA does not require an employer to establish a health plan if there is no existing health plan coverage, or where there is a plan, to provide any particular type of coverage.

Q92. What health insurance coverage is required when the MLOA is for more than 30 days?

A: The health plan must allow employees performing military service for more than 30 days to elect COBRA-like continuation of coverage under a health insurance plan in which they have coverage in connection with their employment. If the plan offers coverage for dependents, the employee may continue dependent coverage during military leave. Reservists who become eligible for TRICARE benefits when issued a delayed-effective-date active duty order may also elect to continue health plan coverage.

Q93. If I elect continuation of health coverage during my MLOA, how long am I covered under the employer's health plan?

- A:** The maximum period of continued health plan coverage required for an employee and the employee's dependents is the lesser of:
- 24 months, beginning on the first day of absence for military service, or
 - the period of military service, beginning on the first day of absence for military service and ending on the day after the employee fails to timely apply for or return to reemployment.

Q94. What health insurance coverage is required when an employee performs military service for less than 31 days?

- A:** For military service of less than 31 days, health insurance coverage is required to be provided as if the service member had remained employed.

Q95. What types of health plans are covered by USERRA?

- A:** USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee's health services are provided or the expenses of those services are paid. With respect to group health plans, USERRA applies not only to plans covered by ERISA, but also to non-ERISA plans.

Q96. What is the cost to the employee to continue health insurance coverage?

- A:** If the duration of the military leave is 30 days or less, the employee cannot be required to pay more than the regular employee share of the premium, if any, for continued health plan coverage. If the

employee's military service is for 31 days or more, the employee may be required to pay up to 102% of the full premium for the coverage, which represents the employer's share and the employee's share of the premium, plus 2% for administrative costs. Plan administrators may develop reasonable procedures for payment of premiums, consistent with the terms of the health plan.

Q97. How do I elect continuing health plan coverage?

A: USERRA does not address how employees going on military leave elect continuing health coverage. Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan.

Q98. What happens if I do not give advance notice of my military leave and as a result do not elect continuing health coverage?

A: If you leave employment for military service without giving advance notice of service, the plan administrator may cancel your health plan coverage upon your departure from employment. However, if your failure to give advance notice of service is excused under USERRA because advance notice was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate your health coverage retroactively upon your election to continue coverage and payment of all unpaid amounts due. You cannot be required to pay an administrative fee for reinstatement of coverage.

Q99. What happens if I give advance notice of my military service, but do not make an election to continue health coverage?

A: If you leave employment for military service for a period of service in excess of 30 days after giving advance notice, but you do not make an election regarding continuing health coverage, the plan administrator may cancel your health plan coverage upon your departure from employment. However, the plan administrator must reinstate coverage, without charging a reinstatement fee, if you later elect continuation of coverage. If the plan has reasonable rules regarding the period in which an employee may elect continuing coverage, the plan administrator must allow retroactive reinstatement of coverage to the date of your departure if you pay all unpaid amounts due within the period established by the plan.

If the plan does not have rules, the plan must permit retroactive reinstatement of coverage to the date of departure upon your election and payment of all unpaid amounts at any time during the coverage continuation period described in Q93 above (24 months, or the period of military leave, if shorter).

Q100. Will my coverage be cancelled during my military leave if I do not pay the premiums?

A: Plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long

as those rules do not conflict with any provision of USERRA.

Q101. If my health insurance coverage was terminated during my MLOA, is coverage required to be reinstated upon my reemployment?

A: Yes. If your health plan coverage was terminated because of military service, or by reason of becoming eligible for TRICARE benefits, your coverage must be reinstated upon reemployment. No exclusion or waiting period may be imposed upon reinstatement of coverage upon reemployment. However, a health plan is permitted to impose an exclusion or waiting period for coverage of illnesses or injuries determined by the Secretary of Veterans' Affairs to have been incurred in, or aggravated during military service.

If coverage under a health plan is terminated on becoming eligible for TRICARE benefits, but the delayed-effective-date active duty order that established such eligibility was cancelled before your duty started, your health plan coverage must be reinstated upon the expiration of your eligibility for TRICARE benefits. No waiting periods or exclusions may be imposed when coverage is reinstated.

Q102. Can I delay reinstatement of health insurance coverage after I am reemployed?

A: USERRA requires the employer to reinstate health insurance coverage upon request at reemployment. USERRA permits, but does not require, the employer to allow an employee to delay

reinstatement of coverage until a date that is later than the date of reemployment.

Q103. What other rights and benefits are protected by USERRA?

A: While on military leave, service members are entitled to the same non-seniority-based rights and benefits provided to employees on other leaves. For example, if an employer provides employees on other types of unpaid leave with continued life insurance, disability insurance or other benefits, these same benefits must be provided to employees on military leave. Service members may be required to pay the cost, if any, of any benefit to the extent that other employees on other types of unpaid leave are required to pay.

22. Protection from Discharge

Q104. Does USERRA provide protections from discharge after reemployment?

A: Yes. Under USERRA, a reemployed employee may not be discharged without cause for one year after the date of reemployment if the person's period of military service was for 181 days or more; or for 180 days after the date of reemployment if the person's period of military service was for 31 to 180 days. Cause for discharge may be based on conduct, or legitimate nondiscriminatory reasons. Persons who serve for 30 or fewer days are not protected by USERRA from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Q105. Does USERRA protect me from discharge while I am on a service related absence?

A: USERRA does not protect a service member against discharge from employment during a military leave of absence if similarly situated non-military personnel are subject to the same action. However, if there is a disparate impact upon military service personnel, a discharge during a service related leave of absence might be governed by USERRA's general rule prohibiting discrimination or acts of reprisal against persons who serve in the military, including but not limited to "retention in employment."

Q106. Under USERRA, what constitutes cause for discharge?

A: A pilot who is a current or former member of the uniformed services may be discharged from the airline for cause based on conduct, or for legitimate nondiscriminatory reasons. The employer bears the burden of proving that the pilot's conduct constituted cause for discharge, or that the pilot's job would have been eliminated, or that he or she would have been laid off regardless of military affiliation.

23. Protection from Discrimination and Retaliation

Q107. What anti-discrimination and anti-retaliation protections are provided by USERRA?

A: The law prohibits employers from denying employment, reemployment, retention, promotion, or any benefit of employment to an individual who is a past service member, current service member, and persons who apply to become a member of any branch of the uniformed services. USERRA also prohibits employment discrimination because of past, current, or future military obligations.

Q108. What is the standard and burden of proof for discrimination and retaliation claims under USERRA?

A: If an individual's past, present, or future connection with the service was a motivating factor in an employer's adverse employment action, the employer has committed a violation unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service. The veteran has the initial burden of proving his or her status or activity was protected by USERRA and was one of the reasons (but not necessarily the only reason) for an adverse employment action. The burden then shifts to the employer to prove by affirmative defense that it would have taken the adverse action in the absence of the person's service connection, or exercise of a USERRA right.

Q109. Are employers prohibited from retaliating against a service member who files a claim under USERRA?

A: Yes. Employers are prohibited from retaliating against any person who files a complaint under USERRA, or testifies, assists or otherwise participates in an investigation or proceeding under USERRA, or exercises any right provided by USERRA, whether or not that person has performed military service.

Q110. What are the rights of pilots who are service members while on strike or furlough?

A: A pilot on strike or furlough is considered an employee under USERRA. If the pilot is sent a recall notice during military service and is otherwise eligible, he or she is entitled to reemployment after

military service concludes even if that pilot has not timely responded to the recall notice. However, a pilot who is on strike or furloughed before or during military service who would not normally have been recalled to airline service had he or she remained in civilian employment is not entitled to reemployment simply because he or she was a covered employee under USERRA.

24. How USERRA Rights are Enforced

Q111.How are USERRA rights enforced?

A: The Department of Labor’s Veterans’ Employment and Training Service (VETS) administers USERRA. VETS investigates complaints and attempts to resolve them. The courts also play a role in enforcing USERRA rights. More specific information on obtaining assistance, enforcement and investigation may be found in USERRA, at 38 U.S.C. §§ 4321 – 4323, in the Department of Labor regulations, at 20 C.F.R. §§ 1002.277 – 1002.314, in the questions and answers below, and in the list of resources that appear in the Appendices to this Guide.

Q112.How do I file a complaint with VETS under USERRA?

A: A complaint may be filed with VETS either in writing, using VETS Form 1010, or electronically using VETS Form e1010. The instructions and forms can be accessed at <http://www.dol.gov/elaws/vets/userra/1010.asp>. The person filing the complaint should be prepared to include the name and address of the employer, a summary of the basis for the complaint, and a request for relief.

Q113.How does VETS investigate USERRA complaints?

A: The law gives VETS a right of access to examine and duplicate any documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview any persons with information relevant to the investigation. The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Q114.What happens if VETS does not resolve a USERRA complaint against an employer?

A: Persons whose complaints against a private employer that are not successfully resolved by VETS may request that their complaints be referred to the Office of the U.S. Attorney General for possible representation.

Q115.Does the Attorney General's office provide representation in all cases?

A: The Attorney General's office evaluates claims on a case by case basis. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

Q116.Must I file my USERRA complaint with VETS?

A: Filing of complaints with VETS is optional; the employee may choose to bypass VETS and pursue a claim in court with private counsel.

Q117.How do I pursue a USERRA claim on my own?

A: Individuals have the option to retain counsel and file a private court action under USERRA. Employers can be sued under USERRA by the government, or by a veteran in a private suit in federal district court if the veteran has chosen not to file a complaint with VETS, has chosen not to request that VETS refer their complaint to the Attorney General, or has been refused representation by the Attorney General.

Q118. Is there a statute of limitations for filing a claim under USERRA?

A: If an employer violates USERRA by taking an adverse employment action such as refusing to provide reemployment, the Department of Labor has taken the position that there is no statute of limitations for USERRA's protections. There is support for this position in the 2008 amendments. However, the Department of Labor acknowledges that there are unsettled questions regarding application of the general federal four-year statute of limitations, and some tribunals have applied contractual principles to USERRA in some cases. A pilot seeking to avail himself or herself of USERRA's protections is well advised to timely act and exercise due diligence in protecting his or her rights.

Q119. What damages are available under USERRA?

A: A federal court may order an employer to comply with the provisions of USERRA. The court may require an employer to compensate the veteran for lost wages and benefits. An award of back pay or lost benefits may be doubled if the Court determines that the employers' failure to comply with law was "willful." Willful behavior is defined as a knowing

or reckless disregard for the law. Veterans who file private USERRA suits are, by law, exempt from court fees or costs. Awards of attorney fees, expert witness fees, and other litigation expenses to successful veterans who retain private counsel may be made under USERRA at the discretion of the court.

25. The Role of State Laws

Q120. Can state laws provide lesser, or greater, employment (or reemployment) rights to veterans than USERRA?

A: State laws cannot mandate lesser rights or benefits than those provided in USERRA because federal law sets the floor in the areas covered by USERRA. However, many states have laws that provide rights for veterans that are superior or in addition to USERRA's provisions. The appropriate state agencies may be able to provide help in locating veteran's right statutes and laws currently applicable in your local jurisdiction. A summary of certain state laws applicable to veterans is attached as an Appendix to this Guide.

26. Military Service and Collective Bargaining Agreements

Q121. What is the role of a collective bargaining or pilot working agreement under USERRA.

A: Compliance with USERRA is required independent of any collectively-bargained-for rights. The rights protected by USERRA act as a legal baseline, or a floor. A collective bargaining or pilot working agreement may provide greater rights or benefits than USERRA provides, such as superior contract

rights or practices that are generally applicable to leaves of absence. A collective bargaining or pilot working agreement may also provide additional rights and benefits to veterans in areas that are not covered by USERRA.

Q122. May a collective bargaining agreement or pilot working agreement, or airline policies and practices, impose more restrictive conditions on the exercise of a right protected by USERRA?

- A.** No. USERRA supercedes contracts, agreements, policies and practices that limit any right or benefit under USERRA, or establish prerequisites that are additional to those required by the Act to exercise rights under USERRA. For example, because oral applications for reemployment are permitted under the Act, USERRA has been found to replace and employer's practice of conditioning reemployment on submission of a written application.

Q123. What role, if any, does USERRA play with regard to the calculation of annual bonus or profit sharing payments for pilots who missed airline pay or credit during periods of military leave?

- *A:** Under USERRA, returning service members are entitled to all rights and benefits based on seniority that they would have received with reasonable certainty had they remained continuously employed. A right or benefit is not considered seniority-based under USERRA if it is compensation for work performed or made available without regard to length of employment. During periods of military service veterans must be treated as if they are on a leave of absence from the airline and they

are entitled to participate in any non-seniority-based benefits made available to other employees on non-military leaves of absence. Some airlines provide computed service credits or imputed income to cover airline time military service members missed while on military leave for purposes of calculating annual bonus or profit sharing payments. The answer in each case will require consideration of the agreements and practices in place at that carrier.

27. Conclusion and contact information

Q124. Where can I find more information about USERRA?

A: The Appendices to this Guide contain a link to a copy of the USERRA regulations and links to resources for use by ALPA Members and MECs.

Appendix A – USERRA Law and Regulations

USERRA, Public Law 103-353, as amended (Current Version):

<https://www.dol.gov/vets/usc/vpl/usc38.htm>

USERRA Regulations (Current Version):

<https://www.gpo.gov/fdsys/granule/CFR-2011-title20-vol3/CFR-2011-title20-vol3-part1002>

USERRA Regulations (2005 Final Rule and Federal Register Notice with Preamble discussion):

<https://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>

Appendix B – List of Resources for use by ALPA Members and MECs

Department of Labor Online Resources

DOL USERRA Home Page and Index (start here):

<https://www.dol.gov/vets/programs/userra/index.htm>

The following can be reached through the Home Page Index –

DOL USERRA Resources page:

<https://www.dol.gov/vets/programs/userra/resources.htm>

“Know your rights:”

<https://www.dol.gov/vets/programs/userra/aboutuserra.htm>

USERRA Compliance Overview and DOL contact information:

<https://www.dol.gov/vets/programs/userra/compliance.htm>

DOL USERRA Advisor (learn about eligibility and how to file a claim): <https://webapps.dol.gov/elaws/vets/userra/mainmenu.asp>

USERRA Final Rule and Poster:

<https://www.dol.gov/vets/programs/userra/poster.htm>

Other USERRA Resources

The **Employer Support of the Guard and Reserve (ESGR)**, a Department of Defense program, was established in 1972 to promote cooperation and understanding between Reserve Component Service members and their civilian employers and to assist in the resolution of conflicts arising from an employee’s military commitment. ESGR is supported by a network of more than 3,750 volunteers in 54 committees located across all 50 states, the District of Columbia, Guam-CNMI (Commonwealth of the Northern Mariana Islands), Puerto Rico, and the U.S. Virgin Islands.

<https://esgr.mil/>

ESGR also publishes an Employer Resource Guide (in cooperation with DOL):

<http://www.esgr.mil/Portals/0/volunteer%20resources/fact%20sheets/Employer%20Resource%20Guide.pdf>

The **U.S. Department of Justice**, Washington, DC, handles USERRA claims involving private employers. The Department has an online Veteran Question/Complaint Form for USERRA violations or suspected violations:

<https://www.justice.gov/servicemembers>

Appendix C – Listing of State Veterans Laws

A good source of USERRA law review articles and a compilation of related state laws is the **Reserve Officers Association Law Center**

http://www.roa.org/page/Subject_Index

<http://www.roa.org/page/StateLawIndex>