

GUIDELINES ABOUT
EMPLOYMENT OPTIONS AND BENEFITS
WHEN ORDERED TO FEDERAL ACTIVE DUTY MILITARY SERVICE

INFORMATION FOR
STATE EMPLOYEES WHO ARE
MEMBERS OF THE NATIONAL GUARD AND RESERVE

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The Uniformed Services Employment and Reemployment Rights Act¹ (USERRA) provides reemployment rights for members of the National Guard and Reserve who are called to active duty military service. In addition, various state laws and policies govern treatment of State employees when they leave and return to employment in a State agency.

Employees ordered to active duty should consult with their agencies' personnel staff for answers to many specific questions. Some common concerns are addressed in this guide. Additional resources for further information are listed in each section. This material is provided for informational purposes only and should not be considered legal advice. Furthermore, Congress or the Montana Legislature could act quickly to change laws regarding benefits for people who are called to active duty military service.

REEMPLOYMENT RIGHTS

1. What rights does a person have under USERRA?

USERRA provides certain reemployment rights to civilian employees who are called into active duty provided they meet certain eligibility requirements. Generally, USERRA requires that a person must:

- hold or have applied for a civilian job;
- have given written or verbal notice to an employer prior to leaving a job;
- not have exceeded a 5-year cumulative limit on periods of service (except some periods of service, as specified under § 1002.103 U.S.C., do not count toward the however, service performed during time of war or national emergency is exempt from this year limit);
- have been released from service under conditions other than dishonorable;
- report back to a civilian job in a timely manner or submit a timely application for reemployment. *For service periods up to 30 consecutive days, a person must report back for the first regularly scheduled work period on the first full calendar day following completion of service, transportation home, plus an 8-hour rest period. For service periods 31-180 days, a person must submit a written or verbal application for reemployment no later than 14 days after completion of service. After service periods of 181 days or more, a person must submit an application for reemployment no later than 90 days after completion of service. These deadlines may be extended to accommodate a person who was hospitalized or convalescing from an injury or illness that occurred during the active duty military service.*

If a returning employee meets the above requirements, USERRA requires that employers provide four basic entitlements. They are:

- prompt reinstatement;
- accrued seniority, as if continuously employed;
- training or retraining and other accommodations; and
- special protection against discharge, except for cause.

¹ Generally, see Title 38, Part III, Chapter 43, U.S.C.

2. Are employees called to active duty entitled to have their same job back when they return?

USERRA does not necessarily require a person be reemployed in the same job. If the period of service was less than 91 days, a person is entitled to the job he or she would have attained without the absence for military service, provided the person is, or can become qualified for that job. If unable to become qualified for a new job after reasonable efforts are made by the employer, an employee is entitled to the job he or she left.

For periods of service of 91 days or more, an employer may reemploy a person in a position that would have been attained, a position left, or a position of like seniority, status, and pay.

A person must be or become qualified to do the job to have reemployment rights, but USERRA requires that employers make a reasonable effort to qualify a person. This means retraining or other actions that do not cause undue hardship to the employer. If a person cannot become qualified after reasonable efforts are made, and if not disabled, the person must be employed in any other position of lesser status and pay, which he or she is qualified to perform, with full seniority.

USERRA also requires that employers make reasonable efforts to accommodate a person with a disability if the person incurred or aggravated the disability during military service. If a person returns from military service, and is suffering from a disability that cannot be accommodated in a position the person previously held, an employer is required to reemploy the person in another position that he or she is qualified to perform.

Further information:

Contact the National Committee for Employer Support of the Guard and Reserve by calling (800) 336-4590 or online at www.esgr.org

HEALTH CARE BENEFITS

1. Do activated employees need to do anything about their health care benefits before they leave?

Yes, they need to examine their options below and complete an Active Duty Benefits Election Form. This form should be completed only if the employee is called to active duty for more than 31 days. Upon return from active duty, the employee will need to complete the Active Duty Reinstatement Form. These forms are available on the Health Care and Benefits Division [website](#). You may also obtain the forms by contacting Health Care and Benefits Division.

2. Will an activated employee receive Federal Medical and Dental Health Care Benefits?

A National Guard or Reserve member called to federal active duty for 31 days or more will receive federal medical and dental coverage for the employee and dependents starting on the first day of active duty. This is comprehensive coverage and will meet most needs. Additional information about this coverage is available through the Montana National Guard or reserve unit. An employee who is called to federal active duty for less than 31 days is eligible to receive the state contribution to the employee's health care benefits. During that time, they will likely want to continue State plan coverage.

3. If an employee waives State health care benefits while on active duty, what happens when the employee returns?

a. If in a leave without pay status while absent, the State Plan will reinstate an employee and any dependents who were previously covered upon the employee's return to work without any applications or waiting periods for pre-existing conditions -- except those conditions in effect at the time of departure. The employee must return to work from active duty within the timelines outlined by USERRA and provide the State with documents that show when active duty ended.

b. If an employee terminates State employment, and is reemployed, the employee will be a new member to the State Health Plan and must meet all pre-existing condition waiting

periods. However, if a rehired employee obtains State coverage within 63 days of loss of active duty coverage (or any other coverage) the rehired employee may not have a waiting period on a pre-existing condition. Any previous health care coverage of a year or more without a 63-day break eliminates the pre-existing condition waiting period.

4. If an employee wants to keep State health care benefits while on active duty, what options are available?

a. If in a leave without pay status, an employee may continue health and dental coverage under the State Health Plan for a period of up to 18 months. Please note: Conditions arising from acts of war are not covered.

i. If an employee's active duty call up is less than 31 days, the State will pay the State contribution during that time, and the employee will only be obligated for the employee's share.

ii. If an employee's active duty call up is for 31 days or more, the State does not pay the State contribution to the employee's health care coverage. Since the military covers an employee and dependents during a longer call up, the employee will not, in most cases, need to continue state coverage. See question 8 for payment options, if you choose to continue.

b. If an employee terminates State employment, he or she may continue COBRA coverage. Please note: Conditions arising from acts of war are not covered.

If an employee terminates employment, continues coverage under COBRA, and returns to state employment within 63 days of the end of the 18 months of coverage allowed under COBRA, the reinstated employee's coverage with the State Plan will be reinstated with no pre-existing condition waiting period.

5. What are an activated State employee's Flexible Spending Account (FSA) options?

a. As a special accommodation to State employees called to active duty, activated employees may continue any existing Flexible Spending Account (medical or dependent care) regardless of whether they choose to continue core medical and dental benefits. A call-up is a qualifying event allowing a change in the annual election, which will change the monthly contribution. See question 8 for options for making FSA contribution payments. Call Health Care and Benefits Division at (406) 444-7462, (800) 287-8266, or TTY (406) 444-1421 for more information.

b. An employee can terminate the FSA. If terminated, only eligible expenses incurred before termination can be reimbursed from the account. Those expenses need to be submitted within three months of termination. FSA benefits may be reactivated upon return to work within the time frames allowed by USERRA.

6. What are an activated employee's life insurance options?

Federal life insurance benefits are available for individuals called to active duty, and we understand that life insurance on the lives of dependents may also be offered soon. Additional information about this coverage is available through the Montana National Guard or reserve unit. Your State Employee life insurance benefit options are as follows:

a. Group life and accidental death and dismemberment (AD&D) insurance benefits on activated employees and their dependents may be retained for up to one year -- regardless of whether they keep health and dental benefits. Employees who are called up for less than 31 days and are keeping core medical and dental benefits must also keep core life insurance benefits of \$14,000. To keep optional life insurance benefits, the employee will need to make out-of-pocket payments for any benefits costs in excess of the State's contribution toward benefits (which is provided during a call up of less than 31 days). See Question 8 for payment options.

Note: There is NO exclusion in the life insurance policy for deaths caused by acts of war. There IS a war exclusion in the Accidental Death and Dismemberment policy.

- b.** For activated employees only, BlueCross BlueShield of Montana (BCBSMT) agreed to allow continuation of group life insurance on dependents (who are not on active duty) beyond the initial one-year extension. Any dependent life insurance coverage (not AD&D) in effect at the time of activation, including Basic Dependent Life of \$2,000 on your spouse/\$1,000 on each child (Plan B) and Supplemental Spouse life (Plan D), may be kept for the duration of the activation by self-paying the benefits payment. See Question 8 for payment options.
- c.** At the end of the one-year extension of group life insurance coverage on an activated employee's life, group life insurance coverage (not AD&D) may be converted to individual coverage at conversion-policy premium rates. The conversion must occur within 31 days from the date eligibility or group coverage is lost. To accommodate activated employees, conversion requests may be signed in advance before leaving on active duty. They are available from Health Care and Benefits Division. Payments for a conversion policy must be paid directly to BCBSMT.
- d.** The timelines for reinstatement for each type of life insurance are listed in the table below. Activated employees returning after activation that is longer than 31 days must reinstate their life insurance benefits as indicated in the following graph:

Type of Life Insurance	Deadline for Reinstatement	If the deadline is not met
Basic Life	Automatically reinstated the first day back at work	N/A
Accidental Death & Dismemberment (AD&D)	Automatically reinstated the first day back at work	N/A
Optional Employee Plan C	Within 90 days of discharge from active duty	Requires proof of good health to reactivate this plan after the 90 day deadline
Optional Spouse Plan D	Within 90 days of discharge from active duty	Requires proof of good health to reactivate this plan after the 90 day deadline
Dependent Life B	Within 90 days of discharge from active duty	Not eligible to reactivate after the 90 day deadline
Long-Term Disability (LTD)	Within 90 days of discharge from active duty	Requires proof of good health to reactivate this plan after the 90 day deadline

For activated employees who do not request the extension of State life insurance benefits discussed in **a.** and **b.** above, group life insurance coverage on themselves and dependents will end at the end of the pay period of their last pay check. Life insurance benefits in effect at the time of call-up may be reinstated without application upon return to work within the time frames allowed by USERRA.

7. What happens to Long-Term Care (LTC) coverage?

- a. If in a leave without pay status,** an employee can continue to carry LTC on the employee and spouse and self-pay the benefits payment to Health Care and Benefits Division. Please note: Long-Term Care insurance does not cover disability caused by war (declared or undeclared) or any acts of war.
- b. If a person terminates State employment,** he or she may convert to an individual policy with the State's provider at the current rate.

8. What are an employee's payment options if State Employee Group Benefits are continued?

- Payment options include:
- ❑ pre-paying contributions for the remainder of the benefit year out of the last pay check (or pay checks if you receive more than one after call-up) *Contributions for medical and dental benefits and for up to \$50,000 of life insurance on the employee can be paid pre-tax. FSA contributions can also be taken pre-tax.*
 - ❑ having payments deducted from annual leave and/or accrued compensatory leave pay checks *Annual leave and/or accrued compensatory leave pay could be taken in pay-period amounts sufficient to make contribution payments. This also allows pre-tax payment of eligible contributions and FSA contributions.*

- ❑ self-paying contributions/FSA contributions to Health Care and Benefits Division – either initially or for later contributions which cannot be paid through the above options. ***These payments are all after tax – losing any pre-tax advantage.***

Further information:

Contact Health Care and Benefits Division at (406) 444-7462, (800) 287-8266, TTY (406) 444-1421, or email at benefitsquestions@mt.gov

LEAVE AND COMPENSATORY TIME

1. While serving on active military duty, can an employee request to take annual leave and compensatory time?

Yes. USERRA provides that employees may take annual leave and accrued compensatory time while serving on active military duty. Employees should request the use of annual leave or compensatory time through regular agency procedures.

2. While on active duty, can an employee elect to have annual vacation and compensatory time remain on the books?

Yes. As long as an employee is in on approved leave without pay, the employee may elect to have annual leave and compensatory time balances remain on the books.

3. Does an employee on leave without pay continue to earn sick and annual leave?

No. State employees do not accrue sick or annual leave while in a leave without pay status.

4. Can an employee use sick leave while on active duty?

Employees ordered to active duty are not eligible to use sick leave.

5. Can an employee called to active duty service cash out annual leave, sick leave, or compensatory time?

In order to cash out leave, an employee must terminate employment with the State of Montana.

6. Can an employee called to active duty use their 15 days of paid military leave?

Paid military leave is provided to attend active duty training, which includes regular encampments, training cruises, and similar active duty training programs. Use of military leave does not extend to active duty military service during a national emergency or war.

7. Does USERRA impact the rate at which an employee earns annual leave when the employee returns to State employment?

Time spent in active duty military service will be credited as time served in State government service for determining the rate an employee earns annual leave in the future.

Further information:

Contact the State Human Resources Division, Department of Administration at (406) 444-3871.

PAY AND PAY INCREASES

1. What will an employee's pay rate be upon reemployment?

An employee's rate of pay upon reemployment will be set as though the employee had not been on leave from state employment for active duty military service.

2. Will time spent on leave without pay count towards longevity?

Yes. Time spent in active duty military service will be credited as time served in State government for determining longevity provided the employee returns to work within the time periods outlined by USERRA.

Further information:

Contact the State Human Resources Division, Department of Administration at (406) 444-3871.

RETIREMENT

1. What about retirement benefits?

USERRA covers members of all public employees retirement systems. It requires that employers preserve pension benefits for qualified employees who are engaged in active duty military service. To be eligible to preserve pension benefits, an employee must report back to the employer within the timelines outlined by USERRA. If enacted, changes in federal and state law, such as those enacted during previous times of military action, also may affect an employee's pension rights.

Further Information:

Contact Montana Public Employee Retirement Administration (MPERA) at (406) 444-3154 or toll-free in the United States at (877) 275-7372. Request the Member Services Bureau.

DEFERRED COMPENSATION

1. What happens to an employee's deferred compensation?

Employees who are on an approved leave of absence may leave funds in the deferred compensation plan. Employees who wish to withdraw funds will need to demonstrate a financial hardship.

2. How does an employee demonstrate a financial hardship?

Being called to active duty military service by itself does not entitle a deferred compensation participant to a financial hardship withdrawal.

The IRS defines "financial hardship" as:

Severe financial hardship to the participant resulting from:

- a sudden and unexpected illness or accident of the participant or dependent;
- loss of the participant's property due to casualty; or
- other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant.

Circumstances that will constitute an unforeseeable emergency will depend upon the facts of the case.

To apply for a financial hardship withdrawal of funds from the deferred compensation plan, employees should:

- request an application from Great West Retirement Services, the deferred compensation plan's third party administrator at (406) 449-2408 or (800) 981-2786, which includes a letter describing the process;
- complete the application and describe the hardship;
- provide documentation of the hardship;
- complete the financial statement; and
- attach documentation of income and expenses.

3. Are there penalties for withdrawing deferred compensation?

There are no early withdrawal penalties, but there are tax consequences of making a financial hardship withdrawal of deferred compensation funds.

4. Can an employee who terminates employment with an agency withdraw from deferred compensation?

Yes. Employees may withdraw deferred compensation upon termination without demonstrating a financial hardship. However, there are tax consequences for any withdrawal of deferred compensation.

Further information:

Contact Great West Retirement Services at (406) 449-2408 or (800) 981-2786.

Subpart D - Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services: ecfr.gov/current/title-20/chapter-IX/part-1002/subpart-D