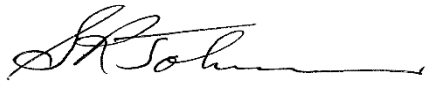




MILITARY LEAVE POLICY & PROCEDURE	
<b>Policy #:</b> To be assigned.	<b>Authority:</b> Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA); 29 Del.C. Chapter 5105; M.R. 5.5.1.1, 5.5.1.6, 5.6
<b>Effective Date:</b> November 20, 2019	<b>Supersedes:</b> N/A
<b>Application:</b> Executive Branch Agencies	<b>Signature:</b> 

**1. POLICY PURPOSE STATEMENT**

This policy sets forth the State of Delaware’s (State) policy and procedures to comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA) to address the employment and reemployment rights of employees who serve in the military and prohibit employer discrimination based on military service or obligation.

**2. SCOPE**

This policy applies to all Executive Branch Agency employees<sup>1</sup> who perform active military service under the provisions of any national military service or training act, or who voluntarily serve in the Armed Forces of the United States in time of war, or in such types of service as regulation may prescribe.

**3. DEFINITIONS AND ACRONYMS**

- **Application for Employee Salary Continuation** – a form an eligible employee must file to request continuation of his/her State base salary less any military compensation when called to active military service for any operational mission to augment active forces.
- **Application for Military Leave** – a verbal or written statement for reemployment provided to the Agency Human Resources office after periods of State of Delaware service of more than 180 calendar days.
- **Appropriate Officer** – a commissioned, warrant or non-commissioned officer.

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<sup>1</sup> USERRA rights are not diminished because an employee holds a temporary, part-time, probationary or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, non-recurrent period, and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. (20 C.F.R. § 1002.41)

- **Employee Salary Continuation** – a benefit provided to eligible State employees called to active military service for any operational mission to augment active forces as ordered may be eligible for continuation of their State base salary less any military compensation received.
- **Escalator Principle** – the starting point in determining the proper reemployment position. The reemployment position is the one the service member would have attained if his or her continuous employment had not been interrupted due to uniformed service. It encompasses what his or her seniority, status and pay rate would be had there been no absence for military service.
- **Line of Duty** – does not include training or education periods. Training and educational periods include, but are not limited to, the weekend National Guard/Reserve training and two (2)-week training periods.
- **Military Leave** – when an employee of the State is called to service or voluntarily enters the armed forces of the United States or the National Guard of the State.
- **Qualifying Services:**
  - a. Active duty
  - b. Active duty for training
  - c. Inactive duty training (when reservists train one (1) weekend per month and two (2) weeks per year)
  - d. Full-time National Guard duty
  - e. Examination to determine fitness for any of the above types of duty
  - f. Funeral honors duty performed by National Guard or reserve members
  - g. Duty performed by intermittent employees of the National Disaster Medical System (NDMS) which is part of the Department of Homeland Security – Emergency Preparedness and Response Directorate (FEMA), when activated for a public health emergency and approved training to prepare for such service.
- **Reasonable Efforts** – actions, including training, that do not cause undue hardship to the employer.
- **Uniformed Services:**
  - a. Army, Navy, Marine Corps, Air Force or Coast Guard
  - b. Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve or Coast Guard Reserve
  - c. Army National Guard or Air National Guard
  - d. Commissioned Corps of the Public Health Service or
  - e. Any other category of individuals designated by the President of the United States in time of war or emergency.

- **Uniformed Services Employment and Reemployment Rights Act (USERRA)** – the federal law that establishes rights and responsibilities for Uniformed Service members and their civilian employers.

#### 4. POLICY

- a. It is the policy of the State to comply with USERRA, which is a federal law that establishes rights and responsibilities for members of the Armed Forces, including the National Guard and Reserve. USERRA ensures that these service members are not disadvantaged in their civilian careers because of their service, are promptly reemployed in their civilian job upon their return from duty, and are not discriminated against in employment because of their military status or obligations.
- b. An eligible employee shall be paid to attend training camp or special duty on orders as a member of the military reserves of the United States or the National Guard, not to exceed 112.5 hours (37.5-hour weekly schedule) or 120 hours (40-hour weekly schedule), on a pro-rata basis, in any calendar year. For employees employed less than full time, the maximum number of hours for which the employee is eligible to be paid shall be determined on a pro-rata basis. Such military or special duty leaves shall not be deducted from annual leave or in any other way result in loss of privileges or compensation to said employee. If the active duty tour extends beyond the number of hours for which the employee is eligible to be paid, the portion of the leave beyond that time period shall be without pay.
- c. An employee called to active military service for any operational mission to augment active forces as ordered may be eligible for continuation of their State base salary, less any military compensation received. See the “[Military Leave: Employee Salary Continuation Operating Procedure](#)” for further guidance.
- d. In general, reemployment rights are extended under USERRA to employees who have been absent from their positions because of service in the uniformed services, provided all of the following eligibility criteria are met:
  - 1) The employee (or an appropriate officer of the uniformed service) must have given prior verbal or written notice of the impending service to their Agency Human Resources (HR) office and/or Supervisor,
  - 2) The employee’s cumulative period or periods of service shall not have exceeded five (5) years,<sup>2</sup>

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<sup>2</sup> USERRA establishes the cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights to five (5) years. There are important exceptions to the five-year limit, including initial enlistments lasting more than five (5) years, periodic National Guard and Reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency.

- 3) The employee must have completed the period of service without having received a punitive or other than honorable discharge or having been dismissed or dropped from the rolls of the uniformed service, and
  - 4) The employee must have made a timely application for reemployment or have been timely in reporting back to work.
- e. Advance Notice

The employee, or an appropriate officer of the uniformed service, must notify the State that the employee intends to perform military service. The employee's notice to the State may be either verbal or written; however, an employee is not required to ask for or get the Agency HR office's permission. An employee should provide notice as far in advance as is reasonable under the circumstances. The Department of Defense strongly recommends advance notice be provided at least 30 days prior to departure when it is feasible to do so. However, no notice is required if military necessity prevents the giving of the notice or the giving of the notice is otherwise impossible or unreasonable.

f. Return Timeframes

To be eligible for protection under USERRA, the employee must report back to work or apply for reemployment within the following guidelines:

- 1) 1-30 days of service: Report next scheduled workday after safe travel and eight (8) hours of rest.
  - 2) 31-180 days of service: Apply within 14 days after completion of service.
  - 3) 181+ days of service: Apply within 90 days after completion of service.
- g. Reemployment

- 1) Upon completion of a period of service in the uniformed services, the employee shall be promptly reemployed in accordance with the following order of priority:
  - a) In the position that s/he would have attained had it not been interrupted by military service with the same seniority, status and pay, as well as other rights and benefits determined by seniority, or
  - b) In the position of employment in which s/he was employed on the date of the commencement of his/her military service, only if s/he is not qualified to perform the duties of the position referred to in subparagraph (a) after reasonable efforts by the Agency HR office to qualify the employee.

- 2) A request for reemployment need not follow any format. Employees may apply verbally or in writing to their supervisor or Agency HR office. If the period of service exceeds 30 days, s/he must provide documentation to establish all of the following:
  - a) Reemployment application is timely,
  - b) Employee has not exceeded the total time limit, currently five (5) years, on the duration of service, and
  - c) The employee's separation or dismissal from service was not disqualifying.
- 3) Documents that satisfy the requirement that the employee establishes eligibility for reemployment after more than 30 days of service include:
  - a) Department of Defense Form DD-214 Certificate of Release or Discharge from Active Duty,
  - b) Copy of duty orders prepared by the facility where the orders were fulfilled and carrying an endorsement indicating completion of the described service,
  - c) Letter from the commanding officer of the Personnel Support Activity or someone of comparable authority,
  - d) Certificate of completion of military training school,
  - e) Discharge certificate showing character of service, and
  - f) Copy of extracts from payroll documents showing period of service.
- 4) The types of documents necessary to establish eligibility for reemployment will vary from case to case. Not all these documents are available or necessary in every instance to establish reemployment eligibility. If an employee does not provide satisfactory documentation because it is not readily available or does not exist, the Agency must still promptly reemploy the individual.
- 5) If the employee has a disability incurred in, or aggravated during, the period of service, the employer must make reasonable efforts to accommodate that disability to perform the duties of his/her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employing Agency HR office to accommodate the disability, and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The Agency HR office must make reasonable efforts to accommodate the employee's disability and to help the employee perform the duties of one of these positions:
  - a) A position that is equivalent in seniority, status and pay to his/her position, or
  - b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status and pay. Note that a position that is the nearest approximation to the

equivalent position may be a higher or lower position, depending on circumstances.

- h. If an employee's most recent period of service in the military was more than 30 days, s/he must not be discharged, except for cause, for:
  - 1) 180 days after the employee's date of reemployment if his/her most recent period of uniformed service was more than 30 days, but less than 181 days; or
  - 2) One (1) year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days.
- i. Employees may continue all State benefits while on military leave spanning more than 30 days. For their group health benefits, the State's share of medical benefits will continue for the first two (2) years of active duty military absence, provided the employee submits a monthly payment for their employee share of the cost of elected coverage by the first of the month for the month of coverage to their employing Agency. After two (2) years, employees would be responsible for the full premium to continue coverage. Dental and vision insurance may be continued while on active military leave for two (2) full years, provided the total employee cost is paid by the first of the month for the month of coverage to the employing Agency. Supplemental benefits can be continued, but payment must be arranged to pay the vendor directly. Critical illness losses that are a direct result of war would not be covered per the terms of the certificate. Those would need to be reviewed on a case-by-case basis. Life insurance may be eligible to continue coverage like those individuals on leave. Group Universal Life coverage through the State's vendor would be continued at 100% but billed directly to the employee/customer. In general, if employees elect to discontinue coverage by not paying their cost, insurances will be canceled until the employee returns to work. Coverage may be resumed with no waiting period upon returning to active employment.
- j. While receiving military salary continuation or taking an unpaid military leave of absence, State employees will not accumulate holidays, annual leave or sick leave, but will be credited with State Service time when they return to active employment. Employees will resume accrual of annual and sick leave from the time they return to work.
- k. An employee who suffers a serious illness or injury in the line of duty that is caused or contributed by war or an act of war (declared or not), who is a member of the United States Military or National Guard or Reserves, may be granted up to six (6) months of paid time off from work for medical procedures or operations required as a result of the serious illness or injury without using sick or annual leave. See the "[Military Serious Illness or Injury Operating Procedure](#)" for further guidance.

## 5. PROCEDURES

### a. Employee Responsibilities

- 1) Provide verbal or written notice of military duty and military orders to the supervisor and/or Agency HR office as soon as possible.
- 2) For periods of military duty of two (2) weeks or more, provide contact information and elections regarding paid leave and benefits in writing to Agency HR office.
- 3) Report any change or extension of military duty to the Agency HR office as soon as possible and provide any updated military orders.
- 4) If employees elect to discontinue coverage by not paying their cost, insurances will be canceled until the employee returns to work. Coverage may be resumed with no waiting period upon returning to active employment.

For periods of duty of more than 30 calendar days, provide Form DD-214 Certificate of Release or Discharge from Active Duty or other written documentation from the military unit that reflects the date of release from active duty, upon return to work or as soon as practical afterward. Other written documentation includes: Copy of duty orders prepared by the facility where the orders were fulfilled and carrying an endorsement indicating completion of the described service; Letter from the commanding officer of the Personnel Support Activity or someone of comparable authority; Certificate of completion of military training school; Discharge certificate showing character of service; Copy of extracts from payroll documents showing period of service.

- 5) Employees seeking reinstatement to State employment after a period of active duty of more than 180 calendar days must make their requests in accordance with USERRA.

### b. Agency Responsibilities

- 1) For military leave of more than two (2) weeks, employing Agencies should provide employees with an informational letter to inform them of their rights, status and obligations.
- 2) Remain in contact with employees on military leave to determine whether military leave status remains the same.
- 3) Should an employee's military leave span two (2) calendar years, the military leave is to be paid at the beginning of the new calendar year if the employee has remained in contact with the Agency HR office and has provided current military orders. The paid leave shall not exceed the time on military leave or the military benefit of 15 workdays or pro-ration thereof for part-time employees.

- 4) Employees may not move on and off payroll at will throughout their leave of absence, using either annual leave or military leave in minute amounts to sandwich in periods of otherwise unpaid leave, for the purpose of accumulating and/or extending benefits (holiday pay, health insurance, etc.).
  - 5) While on military leave without pay for less than 30 days, annual and sick leave will continue to accrue. The payment at the beginning of the new calendar year will not entitle the employee to either holiday pay or additional vacation or sick leave accrual. An employee's period of military leave will be counted as covered service with the State for pension eligibility, vesting and benefit accrual purposes.
  - 6) While receiving military salary continuation or taking an unpaid military leave of absence, State employees will not accumulate holidays, annual leave or sick leave, but will be credited with State Service time when s/he returns to active employment. Employees will resume accrual of annual and sick leave from the time s/he returns to work.
  - 7) Monitor unpaid military leaves of absence to determine when employees are nearing the exhaustion of five (5) cumulative years. Send required documentation outlined in this policy to the Delaware Department of Human Resources (DHR) Employee Relations (ER) Manager to determine if the employee is entitled to reemployment.
- c. Five (5)-Year Service Limit
- 1) If an Agency HR office believes an employee has met the five (5)-year service period, it must provide the following documents to the DHR ER Manager for review:
    - a) Official military orders
    - b) Any written or documented communication with the employee
    - c) Leave records covering the military absence
  - 2) Once official orders are reviewed, the Agency HR office will receive written notification from DHR confirming that the employee has met or exceeded the cumulative five (5)-year period of military leave covered under USERRA.

## **6. EXCLUSIONS OR EXCEPTIONS**

### **a. Reasonable Expectation of Continued Employment**

The State is exempt from reemployment obligations if the employee's pre-service position is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.



- b. Retired Uniformed Services members are not eligible for paid military leave.
- c. Military Leave without Pay may be used by temporary, seasonal, casual or emergency employees.
- d. Reemployment rights are terminated if the employee is:
  - 1) Separated from uniformed service with a dishonorable or bad conduct discharge,
  - 2) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service,
  - 3) A commissioned officer dismissed by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President, or
  - 4) A commissioned officer dropped from the rolls due to absence without authority for at least three (3) months; separation by reason of a sentence to confinement adjudged by a court-martial; or a sentence to confinement in a federal or state penitentiary or correctional institution.

## **7. DISSEMINATION AND TRAINING**

- a. The Agency HR office shall provide current employees a review of this policy and procedure within 30 days of its effective date and shall provide employees who are new to their respective Agencies a review of this policy and procedure within 30 days of the employee's hire date.
- b. Employees must read and acknowledge receipt of this policy in the Delaware Learning Center, or if not applicable by other means within 30 days of its effective date.

## **8. FORMS ASSOCIATED WITH THIS POLICY**

- [Military Leave FAQs](#)
- [Military Leave: Employee Salary Continuation Operating Procedure](#)
- [Military Leave Employee Salary Continuation Form](#)
- [Military Serious Illness/Injury Operating Procedure](#)
- [Military Serious Illness/Injury – Leave Request Form](#)

## **9. ASSOCIATED POLICY/REGULATIONS/INFORMATION**

- a. [FMLA Policy and Procedure](#)

## b. References:

- 1) United States of America, *Uniformed Services Employment and Reemployment Rights Act (USERRA)*, Pub. Law No. 103-353, October 13, 1994
- 2) U.S. Department of Labor, *Uniformed Services Employment and Reemployment Rights Act of 1994 Final Rules*, Federal Register, Vol. 70, No. 242, December 19, 2005
- 3) U.S. Department of Defense, Employer Support of the Guard and Reserve (ESGR), Employer Resource Guide, 2011
- 4) Merit Rule 5.6.1 ([State of Delaware Merit Rules](#))
- 5) 29 *Del.C.*, Section 5905
- 6) Employee State Salary Continuation Standard Operating Procedure for Employees on Authorized Military Leave – 29 *Del.C.*, Sections 5105(b) & (c)
- 7) Federal Code, Title 20, Chapter IX, Part 1002

## c. Resources:

*Delaware Commission of Veterans Affairs*  
Website: [www.veteransaffairs.delaware.gov](http://www.veteransaffairs.delaware.gov)  
Phone: 1-800-344-9900

*Employer Support of the Guard and Reserve*  
Website: [www.ESGR.mil](http://www.ESGR.mil)  
Phone: 1-800-336-4590

*Delaware Department of Labor*  
Website: [www.delawareworks.com/veterans](http://www.delawareworks.com/veterans)  
Phone: 1-877-872-5627

*Personnel Locators*  
Army: 1-800-318-5298  
Air Force: 1-210-565-2660  
Navy: 1-901-874-3383  
Marines: 1-800-268-3710  
Coast Guard: 1-202-493-1697

*This policy is not intended to create any individual right or cause of action not already existing and recognized under State and Federal law.*