

USERRA CHECKLIST

USERRA rights. Is the employee entitled to USERRA rights?

All of the following must be satisfied:

- Reason for absence is military service
- No dishonorable discharge or noncovered termination
- Employer had received advance written or verbal notice of military service before such service commenced (unless impossible or unreasonable to give such notice)
- Rights are available only for cumulative military service that does not exceed 5 years (subject to exceptions for certain service that will be taken into account even if the 5-year limit is exceeded) (separate 5-year limit with respect to each employer)
- Person resumes employment in accordance with USERRA procedures
- No USERRA-permitted exceptions to reemployment apply

(Note: If the employee is not entitled to USERRA rights, then the rest of this checklist is not applicable to that person, except possibly suspension of loan repayment.)

Eligibility and vesting. Treatment of employee's military service period

- No break in service is incurred as a result of a USERRA-covered military service period (applies to eligibility and vesting)
- Treat USERRA-covered military service as service with employer to determine eligibility service and vesting service

Entry into plan. When does the employee re-enter (or initially enter) the qualified plan?

- Generally, entry is immediate upon return
- If employee would not have otherwise entered the plan until a date that follows reemployment (taking into account the treatment of the USERRA-covered military service as service with the employer), then no participation rights until the normal entry date
- Above rules apply even if plan did not exist at time military service period commenced.

Make-up benefits. What make-up benefits are owed to the employee?

- Defined contribution plan: make up any employer contributions that would have been allocated to the employee's account had the military service period been service with the employer
 - Forfeitures that would have been allocated to participant may be disregarded
 - Make-up contribution need not be adjusted for an assumed investment earnings rate
- Defined benefit plan: increase accrued benefit to the level it would have been had the military service period been service with the employer
- To determine make-up allocations or benefits, "compensation" during the military service period is the amount that would have been earned under the rate of pay in effect at time military service period began (or actual compensation from employer for immediately preceding 12 months, if rate of pay cannot be determined)
- If a defined contribution plan includes a 401(k) arrangement or other contributory feature, employee has right to make up elective deferrals or other participant contributions that were permitted or required with respect to such military service period
 - Report make-up elective deferrals as separate line item in Box 12 of current year's Form W-2

- Any matching contributions that would have been provided on make-up elective deferrals or other participant contributions must be contributed by the employer
- Make-up contributions/benefits described above are subject to applicable limits that were in effect in the year(s) they relate to
- Make-up contributions/benefits described above are not subject to nondiscrimination testing, coverage testing

Deductions. When is the employer entitled to a deduction for its make-up contributions?

- Generally in the tax year in which the employer makes the contribution, even if it relates to a prior year
- May be deducted for prior tax year if made by due date (including extensions) for filing employer's tax return for that year, provided contribution is made on account of that prior tax year (or earlier year); otherwise, deduction taken for current tax year
- Subject to the deduction limits in effect for the year that the make-up contribution relates to, regardless of year deduction is actually claimed

Participant loans. During a military service period, is the employee's repayments on a loan from the plan suspended?

- If suspension of payments is permitted, payments need not resume until military service period ends
- May apply to a non-USERRA-covered military service period
- Military service period may be disregarded in determining maximum repayment period (i.e., loan term may be extended by length of military service period)
- When payments resume, they must be at the same level and frequency as before the suspension, or the payment amount may be adjusted to take into account the period for which no payments were made

Procedures. Does the plan have written USERRA procedures?

- No specific statutory requirement for such a policy, but can facilitate Compliance

Disclosure. Have ERISA disclosure requirements been satisfied?

- Upon reemployment, provide the summary plan description (SPD) or updated SPD and any summaries of material modifications (SMMs) to the latest SPD
- If the individual is a participant during the military service period (i.e., has accrued benefits in the plan), any updated SPDs or SMMs provided during that military service period should be sent to the last known address.