



# AT THE BAR WITH BOWDITCH

A Legal Blog for the Craft Brewing Community

## Servicemember Leave of Absences: Know Your USERRA Obligations

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When it comes to considering potential employment issues that could arise in your brewery, the list of possibilities may seem neverending. One issue that tends to come up less frequently than others is employee leave and reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). However, the fact that USERRA issues may not arise too often also means that they are even more likely to catch brewers and other small businesses unaware.

### WHAT IS USERRA?

USERRA is the federal law that sets out civilian employment and reemployment protections for uniformed servicemembers and veterans. Specifically, USERRA prohibits discrimination and retaliation against servicemembers and veterans at every stage of the employment process, from hiring to firing and everything in between.

USERRA also provides servicemembers the right to reemployment at their civilian job following a period of military service. For eligible employees, this right to reemployment requires the individual to be restored *not only* to the job they left or a comparable job, but the right to return to a position and level of benefits reflecting what that employee *would have obtained* if not for the service-related absence. This is often referred to as USERRA's escalator principle. Upon an employee's return to work, USERRA requires employers to provide the employee with any training or retraining necessary to integrate the employee into their position. USERRA generally protects an employee's right to reemployment using the escalator principle for up to a total of five years of military-related absence with a particular employer. USERRA also prohibits the termination of reemployed servicemembers without cause for specified periods of time following their return, depending upon the length of the service-related absence.

Businesses that run afoul of USERRA may be liable to the covered servicemember for injunctive relief, lost wages and benefits, and liquidated damages (i.e., double damages) for willful violations. Unlike other state and federal discrimination laws, USERRA does not set a limit on the amount of time an individual has to bring forth a claim nor does it require individuals to exhaust any administrative remedies prior to filing their lawsuit in court. Note, however, that some courts have limited USERRA claims to the four-year statute of limitations period generally applicable to

federal laws.

## HOW MUCH NOTICE DOES AN EMPLOYEE NEED TO GIVE WHEN THEY ARE GOING TO MISS WORK DUE TO THEIR MILITARY SERVICE?

While employees are generally required to provide their employers with advance notice of their military leave, there are exceptions for when notice is impossible, unreasonable or otherwise can't be given due to military necessity. Although the USERRA regulations strongly *recommend* employees provide their employers at least 30 days of advance notice, no amount of notice is specifically required.

In addition, an employee is not required to provide written notice of the need for military leave as verbal notice is sufficient. Such notice may come directly from the employee or from an authorized military officer. An employer may, however, request that the employee provide as much notice as possible.

## WHEN ARE YOU ENTITLED TO DOCUMENTATION FROM AN EMPLOYEE WHEN THEY MISS WORK FOR A USERRA-RELATED REASON?

Following periods of military service of 31 days or more, the returning employee must, upon request, provide an employer with documentation that establishes the length and character of their service. Documentation may include discharge papers, leave and earnings statements, school completion certificate, endorsed orders, or a letter from a proper military authority.

Additionally, the USERRA regulations strongly *recommend* that an employee provide their employer with verification of their service-related absence regardless of the duration of service (i.e., even if the absence is for less than 31 days). The USERRA regulations also provide that verification of an employee's absence will be provided by the military department upon an employer's request, regardless of the duration of service-related absence.

Thus, while an employee may not be required under USERRA to provide their employer with documentation relating to their military absences (where those absences are for less than 31 days), an employer can request that the employee does so and, if the employee fails or refuses to do so, the employer can request verification of the employee's service absence directly.

As brewers navigate the complex terrain of employment issues that can arise in any business, they should be sure not to misstep when dealing with USERRA's significant protections. Should you have any questions on complying with USERRA obligations or any other employment issue, please reach out to your Bowditch attorney.