

Military Leave of Absence

In accordance with the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and State Law, the district, upon advance notice by the employee, shall grant leave of absence to its employees who are ordered to duty or volunteer for qualifying military service.

1. Qualifying Military Service defined

Qualifying military service under USERRA means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty.

2. Notice

Employees must give notice to their immediate supervisor of their intention to take military leave. Pursuant to USERRA, the employee's notice may be either verbal or written. No advance notice is required if military necessity prevents the giving of notice, or the giving of notice is otherwise impossible or unreasonable under the circumstances.

3. Employment Rights

Time during which an employee is absent for qualifying military service shall not constitute an interruption of continuous employment in the district and no such employee shall be subjected, directly or indirectly, to any loss or diminution of time, service, increment, vacation, or holiday privileges, or any other right or privilege, by reason of such absence; nor shall any employee be prejudiced by reason of such absence with reference to continuance in employment, reemployment, reinstatement, transfer, or promotion.

4. Salary/Compensation

For each pay period an employee is absent for qualifying military leave, the district will compensate the employee for the difference between what the employee would have earned with the district (excluding extra duty assignments) for all scheduled work during that pay period, and the employee's base military pay for that period, if the employee's compensation from the district would be higher than his or her base military pay. In order to receive such compensation, it shall be the responsibility of the employee or the employee's designee to provide the Business Manager with documentation demonstrating the employee's base military pay for each pay period.

5. Use of Accrued Leave

Pursuant to USERRA, the employee will be permitted, upon request, to use any accrued personal leave with pay during the period of military service in order to continue his or her civilian pay. The district may not require the employee to use accrued personal leave. The employee is not entitled to use accrued sick leave during the period of military service.

6. Health Insurance

An employee who has coverage under a health plan in connection with employment with the district who notifies the district that he or she will be away from work performing qualified military service is entitled to elect continued health insurance coverage through the district. Although USERRA permits the district to charge the employee up to 102% of the entire premium if the period of service (as called for in the individual's military orders) is for more than thirty days, the district will pay the insurance premium during the employee's military leave in the proportion provided for in the employee's contract until the first of the following occurs:

- a. The employee returns to work after service
- b. The employee allows the deadline for an application for reemployment to pass without having made such an application

- c. Twenty-four (24) months have passed since the employee left his or her employment with the district for qualified military service

7. Retirement Benefits

Pursuant to USERRA, the employee does not forfeit any benefits already accrued, and an employee need not requalify for participation in the pension plan because of absence for military service.

- a. District employees participate in the South Dakota Retirement System (“the plan”). The plan is a mandatory contribution defined benefit plan, whereby a retiring employee receives a monthly benefit computed on a formula that includes years of company service and average compensation for the highest three years of compensation.
- b. Continued Eligibility. If the amount paid to the employee pursuant to section (D) makes the employee eligible to participate in the plan pursuant to SDCL 3-12, both the district and the service member shall continue to make contributions to the South Dakota Retirement System and the employee will receive credited service during their qualifying military service.
- c. Elected payment into plan during service. A service member whose compensation pursuant to section (D) above does not make the employee eligible for participation in the plan pursuant to SDCL 3-12, may receive credited service during qualifying military service if both the employer and employee contributions are made by the employee pursuant to SDCL 3-12-85.
- d. USERRA requirements. If the service member’s pay pursuant to section (D) does not make the service member eligible to participate in the plan while they are on military leave and the service member does not elect to make payments to the plan while on leave pursuant to SDCL 3-12-85, USERRA requires that a returning veteran who is reemployed with the district and who meets the USERRA eligibility criteria be given the opportunity to make up missed employee contributions to the plan and purchase service credit for the period of qualifying military service. Such make-up contributions must be made within the period that begins on the date of reemployment and extends for three times the period of service, but not more than five years. If the employee elects to make up contributions under the plan, the district will also make up its contribution to the plan. For the purposes of computing an employer’s liability or the employee’s contributions, the employee’s compensation during the period of service shall be computed as the rate the employee would have received but for the period of uniformed service.
- e. State Law Requirements. SDCL 3-12-86 provides that a reemployed service member shall receive credited service for military leave without contribution by the employee or the district if the member returns to work with a participating unit (i.e., an employer who participates in the South Dakota Retirement System) within one year from the member’s date of discharge and remains employed with a participating unit for at least one year. Service credit will not be granted pursuant to SDCL 3-12-86 for any voluntary extension of military service at the instance of the member beyond the initial period of enlistment, induction, or call to active duty.

8. Reemployment Rights

Pursuant to USERRA, an employee who leaves employment with the district for qualified military service will generally be entitled to reemployment, provided he or she meets the following USERRA eligibility criteria:

- a. The employee must have given the district prior oral or written notice of the impending service.
- b. The employee’s cumulative period or periods of service, relating to the district, shall not have exceeded five (5) years.
- c. 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.

- d. The employee must have made a timely application for reemployment or have been timely in reporting back to work. The following criteria will be applied to determine whether the employee's application for reemployment or report back to work will be considered timely:
 - 1) 1-30 days of service. After a period of less than 31 days of service, the employee is required to report for work by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.
 - 2) Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's 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.
 - 3) Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service.

9. Disability Incurred or Aggravated

The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service. The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

10. Failure to comply

Failure to timely report for work or to reapply does not automatically terminate an employee's reemployment rights. However, the district will treat the employee's failure to report or reapply as an unexcused absence under the district's personnel policy.

11. Exceptions

Pursuant to USERRA, an employee who leaves employment with the district for qualified military service is not entitled to reemployment in the following limited circumstances:

- a. If the employee's pre-service position of employment "was for a brief, nonrecurring period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."
- b. The employee is no longer qualified for the prior position as a result of a disability, and reemployment imposes an undue hardship on the district; or
- c. The district's circumstances have changed so much that reemployment of the person would be impossible or unreasonable.

12. Protection for Discharge

Under USERRA, a reemployed employee may not be discharged without cause for one (1) year after the date of reemployment if the person's period of military service was for more than 180 days or for six (6) months if the person's period of military service was for 31 to 180 days. Employee's who serve for 30 or fewer days are not protected from discharge without cause under USERRA, but may have rights under their contract with the district.

13. Reemployment Position

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of the employee's military service.

14. 1 to 90 days of Service

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

- a. in the job the person would have held had the person remained continuously employed, so long as the person is qualified after reasonable efforts by the employer to qualify the person; or (B) in the position of employment in which the person was employed on the date of the commencement of the military service, only if the person is not qualified to perform the duties of the position referred to in subparagraph (C) after reasonable efforts by the district to qualify the employee.
- b. If the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable efforts by the district, the person is to be reemployed in a position that is the nearest approximation to the positions described above which the person is able to perform, with full seniority.

15. 90 or more days of Service

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

- a. 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 for the job or can become qualified after reasonable efforts by the district to qualify the person; or (B) in the position of employment in which the person was employed on the date of the commencement of the military service, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (C) after reasonable efforts by the district to qualify the person.
- b. If the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable efforts by the district, the person is to be reemployed in a position that is the nearest approximation to the positions described above which the person is able to perform, with full seniority.

16. Disabled Veteran's Rights

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

- a. The district must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.
- b. If, despite reasonable accommodation efforts the person is not qualified for the position in (A) due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the district.
- c. If the person does not become qualified for the position in either (A) or (B), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (B) terms of seniority, status, and pay.

17. Rights of Reemployed Persons

a. Seniority Rights

Pursuant to USERRA, 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. A right or benefit is seniority based if it is determined by or accrues with length of service. Accordingly, the length of uniformed service will be added to the length of the reemployed service members actual employment service with the district for

purposes of determining the employee's rights with respect to sabbatical leave, early retirement, tenure, reduction in force, and FMLA leave.

b. Nonseniority Rights

Pursuant to USERRA, reemployed service members are entitled to all benefits not based on seniority in the same manner as a similarly situated employee on a leave of absence or furlough would be able to accrue under other district policy. Because the district does not permit employees on other similar leaves of absence to accrue sick, professional, personal, or bereavement leave, service members will not accrue these leaves during their period of service. However, service members who become reemployed with the district during the academic year shall be credited a pro rata allocation of sick days beginning on the first day of reemployment.

c. Reinstatement of Health Insurance Benefits

Upon reemployment, neither a waiting period nor exclusion may be imposed upon reinstatement of health plan coverage of any person whose coverage was terminated by reason of the military service. However, an exception to this exists with respect to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service connected.

Legal References: SDCL 3-12-47 (54) Uniformed Services Employment & Reemployment Rights Act of 1994

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