

**EL DORADO UNION HIGH SCHOOL DISTRICT
ADMINISTRATIVE REGULATION**

All Personnel

**MILITARY LEAVE
AR 4161.5 / 4261.5 / 4361.5**

Note: Employment and reemployment rights of employees who take military leave of absence are protected by the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USC 4301-4333. In cases where state law provides greater protections to employees, state law shall supersede federal law. The district may not refuse to grant military leave, regardless of the length of employment or whether the employee volunteers for military service or is called up involuntarily.

The USERRA applies to all employees, except for persons employed for a brief, nonrecurrent period for which there was not reasonable expectation that such employment would continue indefinitely or for a significant period. It appears that the statute includes temporary certificated and short-term classified employees, unless the employee meets the above-state exception. When determining whether a temporary or short-term employee is covered, districts are advised to consult legal counsel.

20 CFR 1002.149-1002.150 and 1002.210-1002.213 and guidelines issued by the Veterans' Employment and Training Service (VETS) of the U.S. Department of Labor, A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act, clarify that federal law generally protects seniority-based benefits (i.e., a right or benefit that is determined by or that accrues with length of service) that would have accrued "with reasonable certainty" had the employee remained continuously employed. Non-seniority-based benefits are generally protected to the same extent that those benefits are preserved during comparable kinds of leave under local policies or state law. The district also should consult legal counsel regarding any questions about entitlements to benefits.

Note that in cases where state law provides greater protections to employees, state law supersedes federal law. In addition, the district ~~also~~ should consult its collective bargaining agreements to determine if the bargaining agreements provide greater military leave benefits than provided by law.

Military leave shall be granted in accordance with applicable state and federal law to employees performing military duties on a voluntary or involuntary basis in a uniformed service, including active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, examination to determine fitness for duty, and performance of funeral honors duty. (*Education Code 44800; Military and Veterans Code 395, 395.01, 395.02, 395.05, 395.1, 395.2, 395.9; 38 USC 4301, 4303, 4316*)

(cf. 4161/4261 - Leaves)

(cf. 4361 - Leaves)

NOTIFICATION OF LEAVE

Any employee who needs to be absent from the district to fulfill military service shall provide advance written or verbal notice to the Superintendent or designee, unless the giving of such notice is precluded by military necessity or is otherwise impossible or unreasonable. (*38 USC 4312; 20 CFR 1002.85, 1002.86*)

SALARY/COMPENSATION

An employee shall receive his/her salary or compensation for the first 30 calendar days of any one absence for military leave or during one fiscal year, under any of the following conditions: *(Military and Veterans Code 395.01-395.05, 395.03; Education Code 44018)*

1. Active Military Training or Exercises: The employee is granted a temporary military leave of absence to engage in ordered military duty for purposes of active military training, encampment, naval cruises, special exercises, or like activity as a member of the reserve corps or force of the United States Armed Forces, National Guard, or Naval Militia, provided that: *(Military and Veterans Code 389, 395, 395.01)*
 - a. He/she has been employed by the district for at least 1 year immediately prior to the day the military leave begins.
 - b. The ordered duty does not exceed 180 calendar days, including time involved in going to and returning from such duty.
2. Active Military Duty: The employee is on military leave, other than a temporary leave, to engage in active military duty as a member of the reserve corps or force of the United States Armed Forces, National Guard, or Naval Militia, provided that he/she has been employed by the district for at least 1 year immediately prior to the day the military leave begins. *(Military and Veterans Code 389, 395.02)*
3. War or Other Emergency: The employee, however long employed by the district, is a member of the National Guard who is engaged in military or naval duty during a state of extreme emergency as declared by the Governor or during such time as the National Guard may be on active duty in situations described in Military and Veterans Code 146, including travel time to and from such duty. *(Military and Veterans Code 395.05)*

<p><i>Note: Pursuant to Military and Veterans Code 395 and 395.01, the district has discretion as to whether or not to compensate employees for military leave for periods of inactive duty training.</i></p>

4. Inactive Duty Training: The employee is a member of the reserve corps or force of the United States Armed Forces, National Guard, or Naval Militia who is engaged in temporary inactive duty training, provided that he/she has been employed by the district for at least 1 year immediately prior to the day the military leave begins and the ordered duty does not exceed 180 days, including time involved in going to and returning from such duty.

Note: When calculating whether the employee has been employed by the district for a minimum of 1 year for purposes of determining the employee's right to a paid military leave of absence pursuant to items #1, 2, and 4 above, an Attorney General opinion (77 Ops.Cal.Atty.Gen. 209 (1994)) states that prior military service is to be counted as public agency service (i.e., the military service is "tacked on" to the amount of time employed in the district), even when a period of time lapses between the military service and district employment. However, an employee may not "tack on" prior employment in another district (18 Ops.Cal.Atty.Gen. 178 (1951)).

In determining length of district employment when necessary to determine eligibility for compensation for military leave, all recognized military service performed during and prior to district employment shall be included.

For classified employees, 30 days' compensation shall be 1 month's salary. For certificated employees, 30 days' compensation shall be 1/10th of the employee's annual salary. (*Education Code 45059*)

Note: An Attorney General opinion (19 Ops.Cal.Atty.Gen. 132 (1952)) states that certificated employees ordered to perform military service are not entitled to compensation during non-teaching, non-paying months of the year.

Certificated employees shall not be entitled to compensation during non-teaching, non-paying months of the year.

The 30-day pay entitlement is the maximum allowance which shall be paid for any one military leave or during any one fiscal year, unless otherwise authorized by the Governing Board pursuant to Military and Veterans Code 395.03 or Education Code 44018.

During the period of military leave, an employee may, upon his/her own request, use any vacation or similar paid leave accrued before the commencement of the military leave. The district shall not require the employee to use such leave. (*38 USC 4316; 20 CFR 1002.153*)

BENEFITS

An employee may elect to continue his/her health coverage during the military leave. The maximum period of coverage for the employee and his/her dependents shall be either 24 months from the beginning of the leave or until the day after the employee fails to apply for or return to employment, whichever is less. (*38 USC 4317; 20 CFR 1002.164*)

An employee on military leave may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave are so required. (*38 USC 4316*)

An employee absent for 30 days or fewer shall not be required to pay more than the employee share for such coverage. An employee absent for 31 days or more may be required to pay not more than 102 percent of the full premium under the plan. (*38 USC 4317; 20 CFR 1002.166*)

MILITARY LEAVE (continued)

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Any employee called into active military duty as a member of the California National Guard or a United States Military Reserve organization shall receive, for up to 180 calendar days, the difference between the amount of his/her military pay and the amount the employee would have received from the district and all benefits that the employee would have received if he/she had not been called to active military duty, unless the benefits are prohibited or limited by vendor contracts.

VACATION AND SICK LEAVE ACCRUAL

An employee on temporary military leave under the conditions described in item #1 Active Military Training or Exercises, in the section entitled "Salary/Compensation" above, shall continue to accrue the same vacation, sick leave, or holiday privileges to which he/she would otherwise be entitled if not absent. *(Military and Veterans Code 395)*

(cf. 4161.1/4361.1 - Personal Illness/Injury Leave)

(cf. 4261.1 - Personal Illness/Injury Leave)

An employee on military leave who is serving in active duty in time of war, national emergency, or United State military or police operation shall not accrue sick leave or vacation leave during the period of such leave. *(Military and Veterans Code 395.1)*

However, an employee who is a National Guard member on active duty as described in item #3 War or Other Emergency, in the section entitled "Salary/Compensation" above, shall not suffer any loss or diminution of vacation or holiday privileges because of his/her leave of absence. *(Military and Veterans Code 395.05)*

PENSION PLAN SERVICE CREDIT

Pension plan service credit and vesting shall continue during an employee's military leave as though no break in service has occurred. Payment of employer and employee contributions shall be made in accordance with law for members of the State Teachers' Retirement System and Public Employees' Retirement System. *(Education Code 22850-22856; Government Code 20990-21013)*

EMPLOYMENT STATUS

Absence for military leave shall not affect the classification of any certificated employee. In the case of a certificated probationary employee, the period of such absence shall not count as part of the service required to obtain permanent status, but shall not be construed as a break in the continuity of service for any purpose. *(Education Code 44800)*

(cf. 4116 - Probationary / Permanent Status)

REINSTATEMENT RIGHTS

At the conclusion of the military duty, an employee shall be promptly reinstated in the position held at the beginning of the military leave, at the salary to which he/she would otherwise have been entitled, except under the conditions noted below. (*Education Code 44800; Military and Veterans Code 395, 395.2; 38 USC 4304, 4313; 20 CFR 1002.180-1002.181*)

(*cf. 4030 - Nondiscrimination in Employment*)

(*cf. 4031 - Complaints Concerning Discrimination in Employment*)

An employee who performs active military duty in time of war, national emergency, or United Nations military or police operations has a right to return to his/her position within 6 months of an honorable discharge or placement in inactive duty. Reemployment rights shall not be extended to any such employee who fails to return within 12 months after the first date upon which he/she could terminate or could cause to be terminated his/her active service. (*Education Code 44800, Military and Veterans Code 395.1*)

When an employee has been on military leave for reasons other than war or national emergency, the time frame for reinstatement shall depend on the length of military service as follows: (*38 USC 4312; 20 CFR 1002.115, 1002.118*)

1. For a leave of 30 days or fewer, the employee shall report for duty no later than the beginning of the first full work day following the completion of military service, provided the employee has a period of 8 hours to rest following transportation to his/her residence.
2. For a leave of 31–180 days, the employee shall submit a written or verbal complete an application for reinstatement not later than 14 days after the completion of military service
3. For a leave of more than 180 days, the employee shall submit a written or verbal application for reemployment within 90 days after the completion of military service.

In cases where reporting within the periods specified in items #1 and #2 above is impossible or unreasonable through no fault of the employee, he/she shall report as soon as possible after the expiration of the period. (*38 USC 4312; 20 CFR 1002.115, 1002.117*)

An employee who is hospitalized for, or convalescing from, an illness or injury incurred in or aggravated during the performance of military service shall report for duty or submit an application for reinstatement at the end of the period that is necessary to recover from such illness or injury, but no more than 2 years after the completion of military service unless circumstances beyond the employee's control make reporting within the 2-year period impossible or unreasonable. (*38 USC 4312; 20 CFR 1002.116*)

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(cf. 4032 - Reasonable Accommodation)

Upon receiving an application for reinstatement, the Superintendent or designee shall reinstate the employee as soon as practicable under the circumstances of his/her case, but within a time period not to exceed 2 weeks, absent unusual circumstances. (20 CFR 1002.181)

If the employee's previous position has been abolished, he/she shall be reinstated in a position of like seniority, status, and pay, if such position exists, or to a comparable vacant position for which he/she is qualified. (Military and Veterans Code 395, 395.1; 38 USC 4313; 20 CFR 1002.192)

An employee failing to apply for reemployment within the appropriate period does not automatically forfeit his/her rights, but shall be subject to the Board's rules governing unexcused absences. (38 USC 4312)

The Superintendent or designee may elect not to reinstate an employee following military leave if any of the following conditions exists:

1. The district's circumstances have so changed as to make such re-employment impossible or unreasonable, such as a reduction in force that would have included the employee. (38 USC 4312; 20 CFR 1002.139)
2. The accommodation, training, or effort described in 38 USC 4313(a)(3), (a)(4), or (b)(2)(B) would impose an undue hardship on the district as defined in 20 CFR 1002.5 or 1002.198. (38 USC 4312; 20 CFR 1002.139)
3. The employee's position was for a brief, nonrecurrent period and there was not reasonable expectation that such employment will continue indefinitely or for a significant period. (38 USC 4312; 20 CFR 1002.139)
4. The employee's cumulative length of absence and length of all previous military leave while employed with the district exceeds 5 years, excluding those training and service obligations specified in 38 USC 4312(c). (38 USC 4312; 20 CFR 1002.99-1002.103)
5. The employee was separated from military service with a disqualifying discharge or under other than honorable conditions. (Military and Veterans Code 395.1; 20 USC 4304, 4312; 20 CFR 1002.134-1002.138)

NOTICES

Note: The Veterans Benefits Improvement Act of 2004 (P.L. 108-454, Section 203) added 38 USC 4334 which requires employers to post a notice of rights and benefits as provided below. The U.S. Secretary of Labor has provided a sample notice listing these rights which is available on the Department of Labor's USERRA web site and in a final rule issued as an appendix to 20 CFR Part 1002 (added by Federal Register Vol. 70, No. 242, December 19, 2005), effective January 18, 2006.

The Superintendent or designee shall provide employees a notice of the rights, benefits, and obligations of employees granted military leave and of the district under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USC 4301-4334. (38 USC 4334)

This requirement may be met by posting the notice where the district customarily places notices for employees. (38 USC 4334)

(cf. 4112.9/4212.9/4312.9 - Employee Notifications)

Legal Reference:

EDUCATION CODE

- 22850-22856 Pension benefits, STRS members on military leave
- 44018 Compensation for employees on active military duty
- 44800 Effect of active military service on status of employees
- 45059 Employee ordered to military/naval duty - computation of salary

GOVERNMENT CODE

- 18540 Definition of armed forces
- 18540.3 Recognized military service
- 20990-21013 Pension benefits, PERS members on military leave

MILITARY AND VETERANS CODE

- 146 Events justifying calling of militia into active service
- 389 Definition of temporary military leave
- 394 Nondiscrimination based on military service
- 395-395.9 Military leave

UNITED STATES CODE, TITLE 38

- 4301-4334 Uniformed Services Employment and Reemployment Rights Act of 1994

CODE OF FEDERAL REGULATIONS TITLE 20

- 1002.1-1002.314 Uniformed Services Employment and Reemployment Rights Act of 1994

COURT DECISIONS

- Wright v. City of Santa Clara (1989) 213 Cal.App.3d 1503
- Bowers v. San Buenaventura (1977) 75 Cal.App.3d 65

ATTORNEY GENERAL OPINIONS

- 77 Ops.Cal.Atty.Gen. 209 (1994)
- 69 Ops.Cal.Atty.Gen. 185 (1986)
- 63 Ops.Cal.Atty.Gen. 924 (1978)
- 19 Ops.Cal.Atty.Gen. 132 (1952)
- 18 Ops.Cal.Atty.Gen. 178 (1951)

Management Resources:

U.S. DEPARTMENT OF LABOR PUBLICATIONS

- A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA), rev. April 2005

NATIONAL SCHOOL BOARDS ASSOCIATION PUBLICATIONS

- The Uniformed Services Employment and Reemployment Rights Act (USERRA), NSBA Federal File: Guidance on Federal School Law, 2003

WEB SITES

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U.S. Department of Labor, USERRA: <http://dol.gov/vets/programs/userra>

National Committee for Employer Support of the Guard and Reserve:

<http://www.esgr.org>

National school Boards Association: <http://www.nsba.org>