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**Clear Policies Can Prevent Fire Departments from Violating
USERRA Protections**

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*Editor’s Note:* This article is part of a [series of articles](http://lexipol.com/author/curt-varone) in which [Curt Varone](https://www.lexipol.com/author/curt-varone/) will address questions on important fire service legal issues. If you would like to submit a question, please email Shannon Pieper at spieper@lexipol.com*.*

**QUESTION:** We have a member who returned from three years of active-duty military service. She is now taking issue with the fact that she needs to train and requalify on fire apparatus. She has been a member of the department for four years, but for three of those years she was deployed. We’ve also received some new apparatus during her absence. Can we require her to requalify?

**ANSWER:** You are confronted with two potential issues right off the bat: gender discrimination and military discrimination. The potential gender discrimination will rest on whether she is being treated differently than [similarly situated](https://www.lexipol.com/resources/blog/disciplining-similarly-situated-employees-in-the-fire-service/) males. The potential military discrimination falls under the [Uniformed Services Employment and Reemployment Rights Act](https://www.dol.gov/agencies/vets/programs/userra) (USERRA) and will rest on whether she is being treated differently than similarly situated non-service members. The solution to both is to ensure you have a clear policy that addresses the training and requalification of personnel returning from a prolonged absence, and that supervisors follow that policy in a consistent manner.

The USERRA aspects of the case are a bit more complicated, and worth spending more time on. USERRA prohibits discrimination against a uniformed service member on account of their service. Most of the [fire service USERRA cases](https://www.firelawblog.com/tag/userra/) fall into one of two categories:

1. An allegation that a member was disadvantaged because of their military service (e.g., the member was harassed; subjected to increased scrutiny; disciplined; transferred to a less desirable position/assignment; not hired; passed over for promotion; or suffered a reduction in compensation, benefits or seniority).
2. An allegation that the department did not accommodate the member’s absence when it came time for promotion (i.e., while I was away there was a promotional exam and when I returned you did not allow me to take it or make some arrangement for me to have taken it during my deployment).

I have not seen any cases alleging that mandating a returning service member attend refresher training is a violation of USERRA. It is reasonable for a fire department to require someone who has been away from line firefighting for any reason to refresh on necessary skills, as well as undergo a [fitness-for-duty medical](https://www.lexipol.com/resources/blog/understanding-firefighter-return-to-duty-policies/), SCBA fit test and related processes. However, such refresher training cannot be something that only applies to those returning from a military-related absence. If your department has never required such refresher training for those who were absent for an extended period due to injury, illness, leave of absence (e.g., [pregnancy](https://www.lexipol.com/resources/blog/do-fire-departments-have-to-provide-light-duty-for-pregnant-firefighters/), family leave) or perhaps assignment to a non-response position (dispatch, fire prevention, light-duty, etc.), and now seeks to impose it for the first time, it can be argued that you are now imposing such a requirement because of this particular firefighter’s military service. That risks violating USERRA.

As mentioned above, the key to resolving a potential discrimination claim, whether gender-related or USERRA-related, is to ensure the department has a policy addressing lengthy absences irrespective of the reason for the absence. Problems arise when the department lacks a policy and it appears the requirement is being imposed because of someone’s gender, military service or other protected reason.

For those who may be interested, here are some of the key provisions in USERRA to consider:

**38 USC §4303. Definitions**

For the purposes of this chapter—

(2) The term “benefit”, “benefit of employment”, or “rights and benefits” means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

(9) The term “qualified”, with respect to an employment position, means having the ability to perform the essential tasks of the position.

(10) The term “reasonable efforts”, in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.

**38 USC §4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited**

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

**38 U.S. Code § 4316 - Rights, benefits, and obligations of persons absent from employment for service in a uniformed service**

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

CURT VARONE has over 40 years of fire service experience and 30 as a practicing attorney licensed in both Rhode Island and Maine. His background includes 29 years as a career firefighter in Providence (retiring as a Deputy Assistant Chief), as well as volunteer and paid on call experience. He is the author of two books: Legal Considerations for Fire and Emergency Services, (2006, 2nd ed. 2011, 3rd ed. 2014, 4th ed., 2022) and Fire Officer’s Legal Handbook (2007), and is a contributing editor for Firehouse Magazine writing the Fire Law column.