

What Employers Need to Know About USERRA

March 19, 2024

Littler[®]

Compliance **HR**

Today's Webinar Host:

Stephanie Zielinski
Marketing Director | ComplianceHR



Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

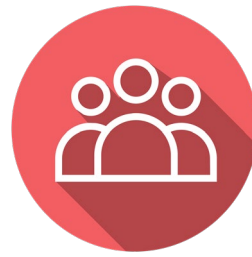
What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



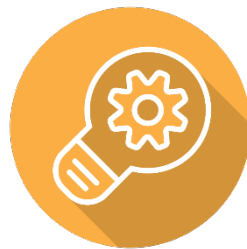
Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



The Document Center

Efficiently generate state and federal compliant documents throughout the employee lifecycle

Compliance Essentials



Compliance HR PolicySmart™
Changing the way companies create and maintain compliant handbooks

Creating and maintaining compliant handbooks is a daunting task. Your company's employee handbook is an invaluable tool that helps shape company culture, communicates operational policies, and minimizes the risk of employment-related legal liability. A well-written and legally compliant handbook is essential to keeping the HR process running smoothly, and most employees would agree that keeping up with federal, state, and local employment laws can seem overwhelming.

PolicySmart™ takes handbooks to the next level.

PolicySmart™ is an intuitive handbook compliance tool that provides employers with national and state-specific templates, a unique compliance timeline, and so much more.

Fueled by the subject matter expertise of Littler, the world's largest employment law firm and built on Nacora's AI-powered platform, PolicySmart™ allows users to easily create and maintain legally compliant handbooks that are cost-effective, up-to-date, and delivered on-demand.

- Federal and State Compliant Templates:** A comprehensive library of federal and state-specific templates, as well as policy templates that are fully customizable, depending on your workforce and operational needs.
- Innovative Compliance Timeline:** Provides an up-to-date timeline of important legal changes that will soon take effect in your selected jurisdictions, helping to ensure that policies are updated at the right time.
- Handbook Policy Checklists:** Gain access to jurisdiction-specific checklists that tell employers which policies are required by law to appear in their handbook and who is covered by each policy.
- Automated Monthly Emails:** Receive a summary and analysis of relevant legal developments that impact your workplace, with guidance on how to revise policy language.



Compliance HR Reference Center
The Comprehensive Solution for Employment Law and Common Compliance Questions

Last year, thousands of employment law requirements were created and overhauled. Monitoring compliance across all jurisdictions is an incredibly difficult task, but the Reference Center is here to help.

Answer your compliance questions with the Reference Center

ComplianceHR is committed to innovation. To better suit your workflow, we have created the Reference Center. This solution provides you with a simple way to answer your compliance questions, easily find content on several employment law topics, and even provide deeper content that bridges multiple employment law topics.

Your organization needs a proactive strategy instead of a reactive approach to compliance. The Reference Center provides state and local information for a variety of topics, such as final pay, FMLA, minimum wage, predictive scheduling, and workplace policies, among many others.

Fueled by the subject matter expertise of Littler, the world's largest employment law firm, the Reference Center is a critical tool for your HR and legal teams.

- Local, State and Federal Information**
A comprehensive library of state and national information that bridges a variety of compliance topics to ensure you're able to access important data.
- Wide Range of Compliance Topics**
From COVID-19 to final pay, FMLA to state changes, pay frequency to an call, organizations of any size and in any sector can benefit from this information.
- Streamlined Workflow**
The Reference Center is designed to help people across your organization quickly find answers to their questions, whether they're on a centralized legal team or an HR team distributed across the country.

PolicySmart provides you with:

- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

The ComplianceHR Reference Center provides you with:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
 - Leave, final pay, FMLA, minimum wage, and more

When coupled, these two solutions provide you with comprehensive compliance program support

Sign Up for a Demo

Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link at the top of your screen
3. Visit the link in the Resources panel

Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

ComplianceHR Demo & Free Trial:

<https://compliancehr.com/webinar-demo/>

Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

ComplianceHR & USERRA

Our solutions provide national and state employee handbook checklists and templates in addition to comprehensive national and state labor law guides.

Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents

Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.¹¹³⁰

§ 3.9(I) Military-Related Leave.....	215
§ 3.9(I)(i) Federal Guidelines on Military-Related Leave.....	215
§ 3.9(I)(ii) State Guidelines on Military-Related Leave.....	216
§ 3.9(I)(iii) Local Guidelines on Military-Related Leave.....	219

NATIONAL HANDBOOK CHECKLIST

This checklist is intended to be used in conjunction with the National Handbook Template. The National Handbook Template includes policies derived under federal law and optional policies employers may find helpful in conveying operational and other information to employees. Optional policy templates that are not prompted by a specific legal requirement include “N/A” in the “Covered Employers” column. Policies that express an employer’s legal obligation (e.g., FMLA and **Military Leave**), this checklist provides the employer coverage and handbook notice requirements established in those laws. Please note that state or local laws may have differing or stricter requirements than federal law and/or what is included in an optional policy template.

Employers should refer to the state specific they operate to determine whether an exce example, the overtime policy in the Nation in accordance with federal law. For states overtime requirement), there is a suppleme

Military Leave

Not Required

Employers must provide to persons entitled to rights and benefits under **USERRA** a [notice of the rights, benefits, and obligations of such persons and such employers](#).

The notice requirement may be met by posting the notice where employers customarily

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) applies to all public and private employers with one or more employees.

§ 3.9(I) Military-Related Leave

§ 3.9(I)(i) Federal Guidelines on Military-Related Leave

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see [LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES](#).

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to “serve” in the “uniformed services.” USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees

¹¹³⁰ CAL. LAB. CODE § 230.1(b)(1).

¹¹³¹ CAL. LAB. CODE § 230.1(b)(2).

¹¹³² CAL. LAB. CODE § 230.1(b)(3).

¹¹³³ CAL. LAB. CODE § 230.1(e).

employees a continuation of health benefits for the 24 months of military leave (at the employee’s expense) and protects an employee’s pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a “floor” with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.¹¹³⁵

§ 3.9(I)(iii) Local Guidelines on Military-Related Leave

San Francisco’s Military Leave Pay Protection Act (MLPPA) requires covered employers to provide up to 30 days of supplemental pay to employees on military leave. The MLPPA covers employers with 100 or more employees, regardless of where they work. For the ordinance to apply, an employee must work in San Francisco, be a member of the reserve corps of the U.S. armed forces, National Guard, or other U.S. uniformed service organization, and be absent from work for military duty.

While covered employees are on leave for military duty – which the ordinance allows to be taken in daily increments of one or more days at a time – for up to 30 days in any calendar year, their employers must provide supplemental compensation representing the difference between the employee’s gross military pay and gross pay the employee would have received had they worked their regular work schedule. As of the date of publication, the city’s Office of Labor Standards Enforcement has not issued guidelines regarding calculating supplemental compensation or processing employee requests, but additional guidance is expected. The MLPPA is enforced by the Office of Labor Standards and provides for monetary penalties for violations.¹¹⁵⁸

Presented by:



Bradford Kelley

Shareholder

Littler | Washington D.C.

bkelly@littler.com



James McGehee

Associate

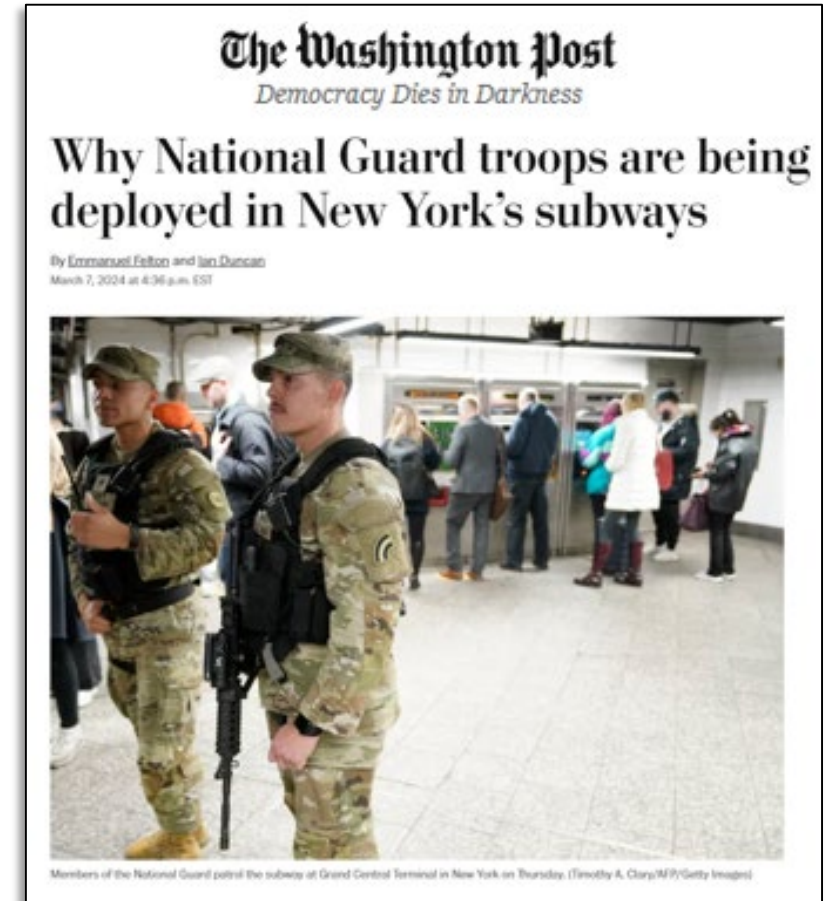
Littler | Dallas

jmcgehee@littler.com

THE RESERVE COMPONENTS

THE NATIONAL GUARD

- State-based military force that can be activated for federal missions
- Army National Guard and Air National Guard
- Half a million strong



THE RESERVE COMPONENTS

THE RESERVES

- Entirely federal, unlike Guard
- Each branch has a reserve component
- Total strength of around 750,000

3 Reserve soldiers from Fort Moore killed in drone attack at Jordan base

By COREY DICKSTEIN AND MATTHEW ADAMS
STARS AND STRIPES • January 29, 2024



WHAT IS USERRA?



The Uniformed Services Employment and Reemployment Rights Act

Basic premises

- Employees on military leave are to be treated as if they had not taken leave and remained continuously employed.
- Employees returning from military leave are entitled to be treated as if they had never left.
- Employees on military leave are not entitled to be treated any better than if the employee had not taken military leave.

TOP 10 THINGS TO KNOW ABOUT USERRA

1. History and Purpose
2. Structure
3. Coverage
4. Anti-Discrimination
5. Military Leave
6. Reemployment Rights
7. Benefits
8. Service-Connected Disabilities
9. Related State and Local Laws
10. The Stakes for Employers

1. USERRA'S HISTORY AND PURPOSE

- Selective Training and Service Act of 1940
- Vietnam-era Veterans Reemployment Rights Act
- USERRA, enacted in 1994, arose from transition to an all-volunteer force



1. USERRA'S HISTORY AND PURPOSE



1. Encourage noncareer service in the military by eliminating or minimizing the disadvantages to civilian careers and employment;
2. Minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, fellow employees, and communities by allowing for prompt reemployment; and
3. Prohibit discrimination because of their service in the military.

1. USERRA'S HISTORY AND PURPOSE

- “This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”
 - Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946)
- Courts cite Fishgold to construe USERRA in favor of its military beneficiaries.



2. USERRA'S STRUCTURE

USERRA has four primary components:

§ 4311

Prohibits discrimination and retaliation motivated by military service

§ 4312

Outlines employees' reemployment rights and obligations

§ 4313

Outlines the positions to which returning employees are entitled

§ 4316

Defines seniority and non-seniority rights held by employees who take military leave

2. USERRA'S STRUCTURE

Enforcement



DOL VETS: Investigates and conciliates complaints. Can refer to DOJ.



DOJ: Charged with litigating USERRA claims.



OSC: Litigates USERRA claims for federal employees before MSPB.

Unlike Title VII, the ADA, and the ADEA, USERRA has no exhaustion requirement, and an employee need not file a complaint with DOL VETS before filing suit.

3. COVERAGE

USERRA applies:

- To all employers, regardless of size.
- Employees and applicants.
- To voluntary or involuntary “service” in the “uniformed services.”
- “Uniformed Services” = all federal military service branches and several federal emergency response organizations.
- “Service” = active duty, training, national guard duty, Reserve duty, fitness for duty examinations, certain other activities.

QUESTION

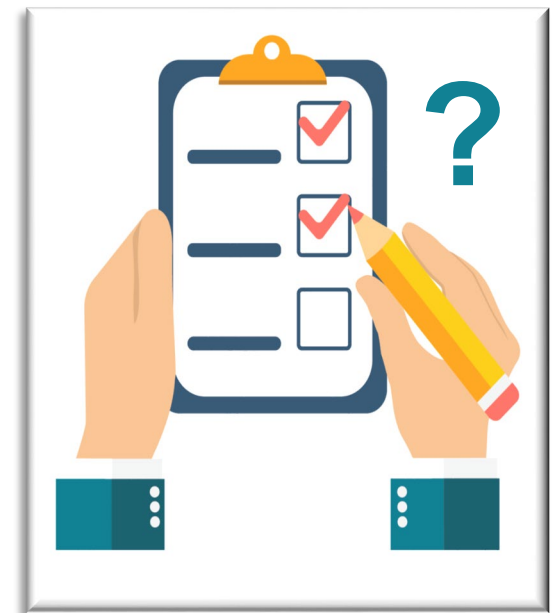
Is the following statement true or false: Like the Fair Labor Standards Act (FLSA), USERRA includes exemptions for certain employees that fall under “white collar” exemptions.



QUESTION

G.I. Jo has been employed for 8 months. She tells her employer that she has applied to serve in the Air National Guard. Fearing that she will miss a lot of work due to basic training and possible training and deployments, the employer fires her.

- Is she protected as an applicant to the military?
- Is the employer's action legal?



4. ANTI-DISCRIMINATION PROTECTIONS

- Protection is broad
 - Applies to applications, hiring, promotion, reemployment, termination, benefits and participation in investigations
 - Includes employees who voluntarily apply for military service
- Hostile work environment
 - In 2011, Congress added language to USERRA to allow hostile work environment claims



4. ANTI-DISCRIMINATION PROTECTIONS

- Courts draw from Title VII case law in analyzing what constitutes an adverse employment.
- Causation
 - Employee must show that military or veteran status was a substantial or motivating factor in the adverse action.
- EEOC has shown interest in USERRA
 - Issued 3 USERRA guidance documents in 2020



5. MILITARY LEAVE

- USERRA generally provides protected leave for up to 5 years of federal military service per employer.
- Employee must provide proper notice to employer
 - May be oral or written
 - Employer cannot require employee to provide written notice or fill out forms
 - Notice not required in certain circumstances
 - No time frame for providing notice, but DOD recommends service members provide at least 30 days' notice when feasible.



QUESTION

Is the following statement true or false: An employee is required to train with the National Guard and will be absent from work for 5 days. Does the employee have to notify the employer in advance?



5. MILITARY LEAVE



- Employee not required to accommodate employer's scheduling needs when it comes to timing, frequency, or duration of leave.
- Employee not required to get employer's permission before going on leave.

6. REEMPLOYMENT RIGHTS

- Employer obligations
 - Must “promptly” reemploy upon return or re-application
 - USERRA REGULATIONS: “Promptly” depends on amount of time on leave, but no more than two weeks, absent unusual circumstances.



6. REEMPLOYMENT RIGHTS

- Employee obligations
 - Timely return from leave and apply for reemployment
 - Employer may request documentation of release from service (if 30 or more days), but cannot delay or deny leave if documentation not readily available
 - Must not be discharged from service under disqualifying conditions



6. REEMPLOYMENT RIGHTS

- The “Escalator Principle”
 - A returning service member is required to be reemployed in the position he or she would have attained “with reasonable certainty” (“high probability”) had the employee remained continuously employed.
 - The escalator may go up, down, or stay the same.

6. REEMPLOYMENT RIGHTS

- Applying the “Escalator Principle”
 - Works well in union or strict seniority environments.
 - More difficult in non-seniority based environments.
 - Applies to layoffs, RIFs and downsizings (but be wary of position eliminations in non-seniority based environments).



QUESTION

Employer requires all entry-level employees to spend 2 years in Grade 1 before automatically moving to Grade 2. GI Jo spends 1 year in Grade 1 before a year-long deployment. When she returns, she is denied a promotion to Grade 2 and told she must spend another year at Grade 1.

- Does she have a USERRA claim?

Same as above, except employees can promote to Grade 2 only after passing a test. Upon her return, GI Jo fails the test. She believes she would have passed had she not been deployed.

- Is this a USERRA violation?



QUESTION

Due to reduced revenues, employer decides to eliminate 50% of its supervisory force at its production plant. Management selects lay offs based on the employees' last two performance reviews. GI Jo is deployed and thus only received one performance review in the last two years. When she returns, she is informed that her position has been eliminated.

- Does she have a claim under USERRA?



7. BENEFITS

- Leave generally unpaid
- Healthcare: 24 months of COBRA-like coverage
- No required contributions to pension funds by employer during leave
- No vacation or sick leave accrues during leave
- Employee may use vacation or sick leave, but cannot be required to do so



7. BENEFITS

- USERRA defines “benefits” broadly
- Two types of benefits under USERRA:
 1. **Seniority Based Benefits:** Benefits that accrue with, or are determined by, longevity of employment.
 - Escalator principle applies to all seniority based benefits.
 - Examples: Vacation accrual vesting; sick leave accrual vesting; attendance bonuses.
 - An employee who is reinstated from military service is entitled to all seniority-based benefits that the person had when the leave started, along with those that accrued during leave.



QUESTION

Two weeks after she is hired, GI Jo, a full-time employee, is deployed for a year. When she returns, she applies for FMLA leave for a non-service-related health condition. The employer denies her FMLA leave, explaining she is not eligible because she has worked at least 1,250 hours in the past 12 months.

- Is this a USERRA violation?



7. BENEFITS

2. Non-Seniority Based Benefits: Any benefit that is not seniority based.

- Non-seniority based benefits include performance bonuses; merit-based payments; or other compensation an employer voluntarily provides.
- An employee on leave for military service is entitled to those non-seniority based benefits the employer voluntarily provides to persons on a leave that is “comparable” to military leave.

QUESTIONS

- Do you provide paid leave to individuals on military leave?
- Do you provide paid leave for jury duty or vacation?



7. BENEFITS

- Hot topic: Must short-term military be paid?
 - Question asks whether short-term military leave is comparable to other forms of voluntarily paid civilian short-term leave
 - Requires a case-by-case analysis of the comparability factors is necessary to determine whether two types of leave are comparable.
 - Duration of the leave
 - Purpose of the leave
 - Ability of employees to choose when they take leave



7. BENEFITS

9th Cir.: Clarkson v. Alaska Airlines, Inc. (2023)

- Reversed district court decision holding, regardless of circumstances, that jury duty and bereavement leave are not comparable to military leave.
- Courts must compare leaves based on whether they are short-term or long-term.
 - Comparability is a question of fact.

3rd Cir.: Travers v. Federal Express Corp. (2021)

- Overturned district court decision dismissing claim at Rule 12 stage, holding that determination of comparability was inappropriate at that juncture.
- Remanded the case to the district court to determine comparability.

7th Cir.: White v. United Airlines (2021)

- Reversed district court decision holding that jury duty was not comparable to military leave.
- Did not decide whether military leave comparable to other types. Held issue should not be decided on Rule 12 motion.
 - Focus: Does an employee have control over the timing of when to take a leave of absence (i.e., can the employee choose when to take leave?)

11th Cir.: Myrick v. City of Hoover, Alabama (2023)

- Held military leave comparable to paid administrative leave, where city had paid for admin leave up to 16 months.
- Affirmed summary judgment in favor of USERRA plaintiffs.

QUESTION

Employees are entitled to an end-of-year performance bonus if they meet their sales quota. When employee goes on military leave in mid-November, they are on track to receive a bonus.

- If they do not return until February of the next year, are they entitled to the bonus?



8. PROTECTIONS FOR DISABLED EMPLOYEES

- USERRA's disability protections exceed those found in the ADA.
 - Covers any disability incurred or aggravated during military service. Disability need not “substantially limit” one or more of the individual's major life activities.
- Greater accommodation duties than the ADA.
 - E.g., if service member no longer qualified to perform escalator position due to disability, employer must make reasonable efforts to accommodate the disability and help the employee become qualified to perform a job with equivalent seniority, status, and pay to the escalator position.

9. STATE AND LOCAL LAWS

- USERRA establishes a floor but not a ceiling.
- Many state laws provide protections beyond USERRA.
 - Oklahoma
 - In addition to the damages allowed under the federal USERRA, Oklahoma's USERRA statute allows for actual, compensatory, and punitive damages.
 - Virginia
 - Employers violating USERRA are guilty of a misdemeanor and may be fined or imprisoned for up to 30 days, or both.

9. STATE AND LOCAL LAWS

San Francisco's Military Leave Pay Protection Act (MLPPA)

- Effective as of Feb. 19, 2023
- Requires employers with 100 or more employees (regardless of where the employees work) to supplement the pay of covered employees during a qualifying military leave for up to 30 days a calendar year
- Applies to part-time and temporary employees
- Supplemental compensation calculation

10. THE STAKES

1. Statute of limitations

- USERRA has NO statute of limitations
- Expressly prohibits courts from applying a state statutory limitations period
- Opens employers to outsized back pay awards and practical difficulties defending against dated allegations

Caveat: laches to bar stale suits

QUESTION

Employee took military leave in 1995. When they returned, they were told there was no longer a position for them since they had been gone too long. 30 years later, the employee learns about USERRA and decides to call an attorney.

- Can they sue?



10. THE STAKES

2. Broad remedial scheme

- USERRA allows recovery for lost wages and benefits, liquidated damages, and court's full use of equity powers
- Forbids assessment of fees or costs against any person claiming rights under statute



USERRA AND ARTIFICIAL INTELLIGENCE

SCENARIO: An employer notices the company's top performers tend to have no gaps in their resume. The employer instructs the HR team to use AI to screen out resumes with gaps of six months or more.

- Which group might this disproportionately impact in a way that poses legal risk?
 - (a) Women (caretaking responsibilities)
 - (b) Disabled individuals
 - (c) Service members and veterans
 - (d) All of the above



10. THE STAKES

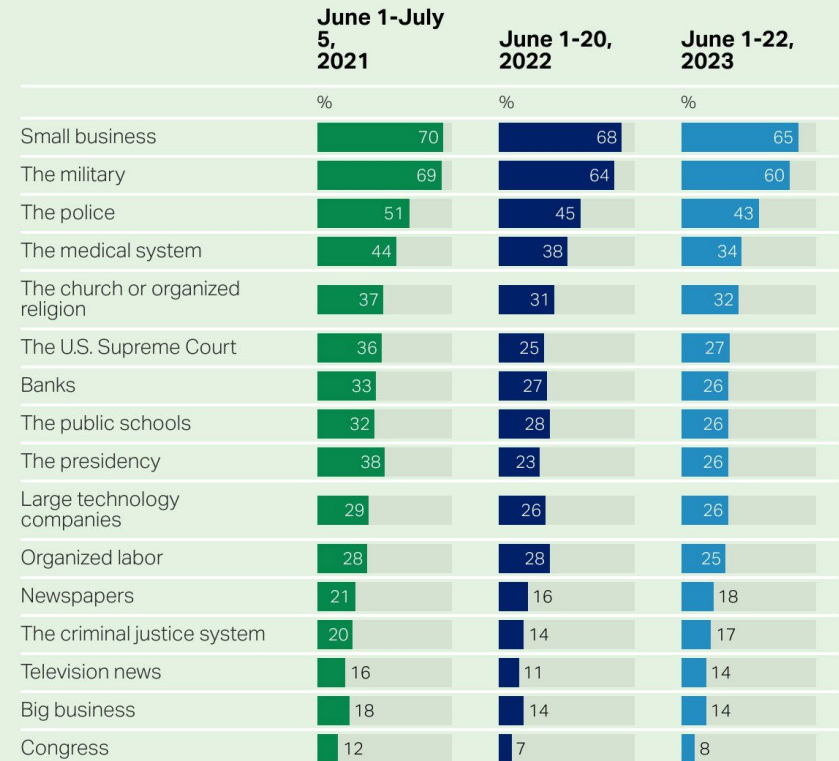
3. Severe reputational damage

In 2023, Gallup found historically low faith in U.S. institutions.

But a majority of Americans have confidence in the U.S. military. The only other institution sharing that level of support is small business.

Recent Trend in Americans' Confidence in Institutions

% Great deal/Quite a lot of confidence in each institution



GALLUP

10. THE STAKES

Torres v. Texas Dep't of Public Safety

- Army reservist exposed to toxic burn pits while deployed to Iraq
- Returning to work as state trooper, denied request to remain on force in administrative capacity as accommodation for his service-connected disability
- Jury returned \$2.49 verdict after a mere two hours of deliberation

[Military.com](https://www.military.com)

Army Reservist Awarded \$2.5 Million for Dismissal from Texas Trooper Job over Service-Connected Disability



Former Army Capt. Le Roy Torres, pictured with his wife Rosie following the signing of the PACT Act in August 2022, won a lawsuit Friday against the state of Texas for his dismissal for a service-related health condition. (Photo by Patricia Kime)

Takeaway #1—Why USERRA is so Consequential

- No Statute of Limitations
- No Exhaustion Requirement
- Broad Remedial Scheme
- Construed in favor of service members/veterans
- Other agencies interested in USERRA

Takeaway #2– What Employers Can do

- Policies
- Employee handbooks
- Situational awareness
- State and local laws
- Evolving case law
- DOD SkillBridge Program

Takeaway #3– Tough Law to Comply With

- Not much guidance
- DOJ, DOL, DOD, employer
- Statute and regulations tricky
- Novel arguments being raised

Takeaway #4– Future of USERRA

- USERRA has been amended several times over its lifespan
- 2004: Notice and extended health care continuation
- 2011: HWE protections added
- 2021: Includes coverage for National Guard members called to “state active duty” by their states’ governors
- Proposed amendments
- Tax relief/incentives
- USERRA for military spouses?
- Senate HELP Committee

Sign Up for a Demo

Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link at the top of your screen
3. Visit the link in the Resources panel

Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

ComplianceHR Demo & Free Trial:

<https://compliancehr.com/webinar-demo/>

Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

Thank you!

