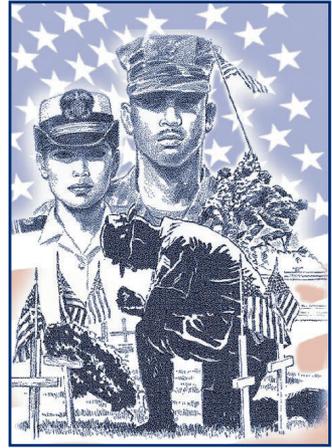


**PUBLIC SECTOR  
EMPLOYMENT  
BENEFITS**

*for*



**VETERANS  
&  
MILITARY  
PERSONNEL**

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## **A Message from President Mary E. Sullivan**

*CSEA extends its gratitude for the service and sacrifice of all veterans and active military personnel. With the support of the CSEA Veterans Committee, we have compiled this booklet as an overview of the rights and benefits available to our CSEA members in their civilian lives as public sector employees in the State of New York.*

**TABLE OF CONTENTS**

Introduction .....1

I. Pre-Employment Rights and Benefits for Veterans and  
Military Personnel.....4

II. Benefits for Veterans and Military Personnel While in  
Civil Service .....9

III. Retirement Benefits.....22

IV. Non-Employment Related Provisions .....24

V. Enforcement.....25

VI . “FAQs” .....26

VII. Appendix.....29



## INTRODUCTION

The purpose of this booklet is to outline the rights and benefits veterans and activated military personnel receive in relation to their public employment in New York State. The booklet is divided into sections as follows: (1) the benefits veterans receive when entering civil service with the State, a municipality, or other public employer; (2) the rights of veterans and activated military personnel during the course of employment with a public employer; and (3) the rights veterans and activated military personnel receive upon retirement from public employment.

## A REVIEW OF FEDERAL AND STATE STATUTES

The primary focus of this booklet is for those employed in New York State as public employees; thus, the principal basis for benefits and entitlements comes from New York State Civil Service Law and/or New York State Military Law. In addition, there are several federal statutes that may come into consideration where the benefits under those statutes exceed those offered by New York State laws. This section will present a brief synopsis of these statutes.

- **New York State Laws**

Veterans, defined by statute as those persons having served in the United States Armed Forces in time of war (using the most updated definition of “time of war” per federal statute), receive certain benefits to assist them with entry into civil service in New York State as well as to advance their careers as civil servants and to insure enhanced service credits upon retirement through the applicable pension or retirement system. These benefits are outlined in a number of different statutory provisions including the New York State Civil Service Law, New York State Military Law, New York State Retirement and Social Security Law, and the New York State Education Law.

In addition to protections provided to veterans, New York State public sector employees are afforded certain employment protections

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## CSEA Legal Department

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while absent on military duty under New York State Military Law §§242 and 243.

Sections 242 and 243 cover public officers or employees, meaning every person “who receives any pay, salary or compensation of any kind from the state or a municipal corporation or other political subdivision thereof” or who “is in any department of the state or in the service of any public authority” with the exception of a person holding an appointment to the exempt class “whose appointment is terminated or whose position is filled by other than a substitute appointee” while the exempt class employee is performing military service. N.Y. Mil. L. §242(1)(a).

The type of military duty covered by the statute is any military duty performed in the service of the State or the United States. N.Y. Mil. L. §242(1)(b). Advance training duty in the armed forces reserves is covered, but “routine reserve officer training corps training” is not covered. However, for those who enter the military as full-time active duty personnel, the coverage is broader, and includes “initial full-time training duty or initial active duty training” for U.S. Militia or Armed Forces. N.Y. Mil. L. §243(1)(b).

In addition to the employment-related benefits and protections for public sector employees contained in §§242 and 243 (see Section II, below, for details), the New York State Soldiers’ and Sailors’ Civil Relief Act (NY SSCRA) provides for reemployment of individuals returning to their careers in the private sector upon release from military duty. N.Y. Mil. L. §317. The protections mirror those afforded to individuals employed in the private sector under the federal statute Servicemembers Civil Relief Act (SCRA) and are similar to those afforded public sector employees under provisions of N.Y. Military Law and corresponding sections of federal law (see discussion of USERRA, below). Notably, there is the distinct added benefit to private sector employees of a one-year prohibition against discharge, except for cause, notwithstanding the length of military service leave. N.Y. Mil. L. §317(4).

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In addition, the New York Human Rights Law has been

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## Public Sector Veterans & Military Personnel

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amended to prohibit discrimination and acts of reprisal based on state or federal military service or reserve status. The protections are broad and cover areas including employment, housing, and lending. N.Y. Exec. L. §§291, 292, 296.

- **Federal Laws**

The Federal Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted in 1994 to expand and clarify the employment rights available to veterans and employees under the Veterans Reemployment Rights Act (VRRRA). The purpose of the statute is to encourage non-career military service, to minimize disruptions to “civilian careers,” and to prohibit discrimination against any person because of his/her service in the military. The statute is broad, covering any person employed by any employer — not merely civil servants. 38 U.S.C. §§4303(3), (4). The USERRA provides the baseline of rights; state statutes can provide greater benefits, as can local law, an employment contract, a collective bargaining agreement, or employers’ policies, plans, or practices. (The VRRRA still governs employment actions prior to USERRA’s enactment date of December 1994.) Specifically, USERRA protects against discrimination and acts of reprisal where reserve status or military service in the uniformed service is a motivating factor. 38 U.S.C. §4311.

As defined by USERRA, “uniformed service” includes the United States Armed Forces, the Army National Guard, the Air National Guard, the commissioned corps of the Public Health Service, and any other category of persons designated by the President during war or emergency. 38 U.S.C. §4303(16). Thus, for protections relating to service in the State Militia or other active duty in the service of the State, the public employee must look to the protections of New York State Military Law.

The Servicemembers Civil Relief Act (SCRA) provides for the temporary suspension of civil judicial and administrative proceedings and transactions that may adversely affect the civil rights of service members during their military service. 50 App. U.S.C. §§501 *et seq.*

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As with USERRA, the type of military duty covered does not include state military service.

## **SECTION I: PRE-EMPLOYMENT RIGHTS AND BENEFITS FOR VETERANS AND MILITARY PERSONNEL**

This section will discuss the benefits available to veterans and military personnel when they are initially entering public sector employment. Outlined within this section are provisions of New York State Civil Service Law that provide veterans and active duty military personnel with additional, different, or enhanced opportunities to meet the eligibility requirements for civil service positions, compared to the opportunities provided to non-military/non-veteran applicants.

### **INITIAL APPOINTMENTS TO THE COMPETITIVE CLASS WITHOUT EXAMINATION**

New York State Civil Service Law provides the opportunity for disabled veterans to enter public sector jobs in the competitive class of the civil service, without having to compete in the competitive examination for the position. N.Y. Civ. Serv. L. §55-c (employment of veterans with disabilities by the state); N.Y. Civ. Serv. L. §55-a (employment of people with disabilities by municipalities). When a veteran has served in the United States Armed Forces during a time of war, and has been certified by an Employee Health Services doctor as physically or mentally disabled, s/he will receive “55-c” status. This status allows for an appointment to a position that has been removed from the competitive class and placed in the non-competitive class. Following the initial appointment, the disabled veteran would be required to take and pass promotional examinations, just like any other employee. The flaw in this provision is that, even where a veteran applies for and is granted 55-c status, there must be an available position that has been classified as “55-c fillable” to which the 55-c eligible veteran can be appointed.

### **ADDITIONAL CREDIT ON EXAMINATIONS**

The New York State Constitution provides veterans the right to

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## Public Sector Veterans & Military Personnel

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receive additional credits in an examination for a civil service position. N.Y. Const. Art. V, §6. The criteria for receiving this credit are the following: (1) veteran status (service in the Armed Forces in time of war, using most updated definition of “time of war”); (2) honorable discharge or honorable release; (3) resident of New York State at the time of application for appointment. N.Y. Civ. Serv. L. §85. Where the veteran received the minimum passing score on the examination, s/he will receive five additional points on the examination or two and one-half points on a promotional examination.

Disabled veterans who obtain the minimum passing score are entitled to ten additional credits on an entry-level examination and five additional credits on a promotional examination. Classification as a “disabled veteran” is based on the three criteria delineated above, plus certification by the U.S. Veterans Administration that the veteran possessed a war-incurred disability rated at 10% or greater. The disability must exist at the time credits are received toward examination or retention. In addition, the disability must be certified as a permanently stabilized condition of disability, or the examination by the Veterans Administration must have taken place within one year from the date additional credits are claimed.

The purpose of this statute is to assist veterans to obtain permanent appointment to or promotion within the public service. Once the veteran has received a permanent appointment with the use of additional credits, s/he cannot claim additional credits for any other examination. The right to additional credit is with regard to any permanent appointment in “the civil service.” This means that the veteran may use credits only once, regardless of whether the veteran is employed in State service or with a municipality or public authority (e.g., if credit is received toward a permanent appointment in State service, the veteran cannot claim credit in a municipal examination).

If the appointment does not mature into a permanent appointment, or if the veteran is terminated either at the end of the probationary period or resigns before or at the end of the probationary period, the veteran is deemed not to have obtained a permanent appointment and the credits can be used for another examination.

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## CSEA Legal Department

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Also, if the veteran's standing, or relative standing, on the eligible list remains unchanged by the additional credit, the veteran is deemed not to have used the credit.

The claim for additional credits may be made any time between the date of application for examination and the date the eligible list is established. In any event, the period during which the veteran may provide documentation will not be less than two months. The claim for credits may be withdrawn any time prior to permanent appointment or promotion. Withdrawal must be made in writing to the appropriate Civil Service Commission. The decision to withdraw the claim for additional credit is irrevocable with respect to that particular examination.

### **EXTENSION OF TIME TO APPLY FOR EXAMINATION/MAKEUP EXAMINATION**

There are multiple provisions of law that impact applications for, and taking of, competitive examinations for positions with the State or a municipal subdivision.

If a person serving on active duty in the United States Armed Forces is discharged from active duty during or after the time period for filing an application for a competitive examination, s/he will be allowed to file an application for the examination no later than the last date to file or not later than 10 business days prior to the examination, whichever is later. If the applicant is qualified, s/he will be allowed to sit for the examination. N.Y. Mil. L. §243-c. If a member of the United States armed forces has filed an application to compete in a competitive examination, but is prevented from taking any part of the examination as a result of military active duty, the state or municipal civil service commission must schedule a makeup examination. N.Y. Mil. L. §243-b(1).

If a member of the organized militia, reserve armed forces, or United States armed forces missed the deadline to file an application for an examination as a result of military active duty other than for training and is still on active duty when the examination date arrives, the State or municipal civil service commission must allow

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## Public Sector Veterans & Military Personnel

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the individual to compete in a scheduled makeup examination. N.Y. Mil. L. §243-b(2). Alternatively, where that individual missed the application deadline but has returned from active duty before the administration of the competitive examination, the individual must be granted a waiver of the application requirement and allowed to compete in the examination. N.Y. Mil. L. §243-b(3).

If an applicant participates in an examination for a competitive position and is prevented from completing the examination due to being called up for active duty, s/he can request to take a comparable examination; the request must be made within 90 days after termination of military service. N.Y. Mil. L. §243(7-b). If s/he passes the examination, his or her name is either inserted on the eligible list, if that list still exists, or placed on a special eligibility list, if the list has expired or a person who would have been lower on the list than the military applicant has been appointed and provided that the soldier-applicant's name would have been reached for certification between the date s/he entered military service and the date of the passage of the comparable examination. A special list will exist for two years from the date the name was placed on the special eligibility list. Any person appointed from this list is deemed to have been appointed as of the earliest date of any other eligible person on the regular examination list who was lower on the original list (i.e., lower in rating) than the applicant who was activated for military service would have been if s/he had been placed on the original list. This "deemed appointed" date is used for purposes of seniority credit as well as training and experience credit for promotion and seniority in the event of suspension or demotion.

### **ELIGIBLE LISTS**

A person on an eligibility list retains rights on the list while on military duty. N.Y. Mil. L. §243(7). If the person's name on the list is reached while the person is on military duty, the name is placed on a special eligibility list in the order of his/her original standing, provided that the request to be placed on the special list is made when the person's military duty ends but also while the list is still in effect. The name will then remain on the special eligibility list for two years after

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## CSEA Legal Department

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the termination of military duty. If the person is appointed from this special list, s/he is deemed to have been appointed from the earliest date s/he became eligible for appointment (e.g., when his/her name was first reachable on the regular list) for purposes of seniority credit; service credit is still determined by the actual date of appointment.

Notably, a person can be appointed from an eligible list while serving in the military. Should such an appointment occur, the period of time the employee is absent for military service will be considered as “satisfactory” service toward the probationary period. N.Y. Mil. L. §243(9). But remember that, for teachers, the period of probation can be “extended by the local board of education for a period not to exceed one year from the date of termination of military duty.” N.Y. Mil. L. §§243(9-a) or (19).

### **PHYSICAL EXAMINATION**

If a position requires a physical examination, any physical disability or disease sustained by an applicant by reason of serving in the military will not disqualify him or her from the position unless the disability would prevent the person from performing the duties of the position. N.Y. Mil. L. §243(10).

### **AGE**

Where there is a statutory age requirement for an examination or appointment to a position (e.g., police officers), the time spent on military duty will not be included in determining the age of the applicant or eligibility for the examination, provided the length of military service to be subtracted is no more than six years. N.Y. Mil. L. §243(10-a).

## **SECTION II: BENEFITS FOR VETERANS AND MILITARY PERSONNEL WHILE IN CIVIL SERVICE**

This section will discuss the benefits available to veterans and active duty military personnel while those individuals are employed in a civil service position. Outlined within this section are statutes that confer employment benefits on veterans as a result of their status as former military personnel. This section also covers civil servants who are called up for active military duty. Outlined here are the benefits available to these service members while they are out of work as a result of that military service, as well as some benefits they receive when they return to work following the call up.

### **NEW YORK STATUTES**

- **Military Leave**

New York Military Law provides that any covered officer or employee is entitled to a leave of absence for purposes of “the performance of ordered military duty and while going to or returning from such duty.” This provision includes attendance at service schools and the performance of full-time training duty. (As noted, N.Y. Mil. L. §242 does not include initial training for reservists; section 242[3] does cover such initial training when the employee is entering into full-time active duty.) For the §242 protections to apply, the absence from employment by a reservist to attend covered service schools (e.g., advanced trainings) may not exceed six months.

The most important statutory benefit in these instances is that the absence for military service is not considered to be a break in service. N.Y. Mil. L. §§242(4), 243(6). Thus, a returning employee is entitled to all the benefits s/he would have received if s/he had remained as a regular employee for the period of absence.

The employee shall not “be subjected, directly or indirectly, to any loss or diminution of service time, increment, vacation or holiday privileges, or any other right or privilege, by reason of such absence, or be prejudiced, by reason of such absence, with reference

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to continuance in office or employment, reappointment to office, reemployment, reinstatement, transfer or promotion.” N.Y. Mil. L. §242(4); *see also*, N.Y. Mil. L. §§243(4), (5). Upon reinstatement after military service, the employee shall receive the same rate of compensation as if the employee had remained in the position with satisfactory service during the period of absence.

### ***Leave with Pay***

In addition, the reservist-employee is entitled to payment of his or her salary while on active duty (including going to and returning from active duty) “not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year and not exceeding thirty days or twenty-two working days, whichever is greater, in any one continuous period of absence.” N.Y. Mil. L. §242(5). The entitlement to payment of salary for a defined period is independent of the employee’s right to any vacation time accrued. The employee is entitled to receive vacation separately and in the same manner as any other employee. An employer cannot require the employee to use leave credits while absent for military duty. The employee does not accrue sick leave or vacation benefits, however, during the period of military service.

In contrast to reservists, an employee who leaves public employment to enlist in full-time active duty will be entitled to reinstatement benefits, but is not entitled to salary or compensation during military absence. N.Y. Mil. L. §243(16).

### ***Supplemental Leave with Pay***

An employer is permitted to provide paid leave in excess of the statutory grant, by way of a collective bargaining agreement. To this end, the Attendance Rules for State employees who are not Management/Confidential have been amended to provide the extended benefit of supplemental military leave with pay for those who serve following September 11, 2001. N.Y. Civ. Serv. L. App. §21.15 (non-Management/Confidential employees). Under these provisions, State employees may receive an additional thirty days, or twenty-two

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## Public Sector Veterans & Military Personnel

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working days, of pay for a total of up to sixty days (forty-four working days) of paid military leave.

### ***Reinstatement***

Application for reinstatement must be made within 90 days of the end of military duty. N.Y. Mil. L. §243(2). The employer (appointing body or officer) has the discretion to reinstate the employee any time after the 90-day period or within one year after the termination of military duty. This is most likely a result of the fact that §243 was originally intended to cover long-term/full-time active duty enlistees, which would require the employer to move other employees for coverage purposes (or, possibly, hire temporary employees) and which would require rearrangement once the returning employee gave notice of the intent to return. There is no corresponding provision contained in §242, most likely because that section was originally intended to cover reservist active duty, which generally is of shorter duration and for a well-defined time period for which military orders are received and presented to the employer. However, cases interpreting both §242 and §243 apply the 90-day limit and require that an employer reinstate the employee so long as the request to return to work is made during that time frame.

In the event that an employee resigns from a position during full-time military duty or within six months prior to the start of full-time military duty, that employee may be reinstated (in the discretion of the appointing body) within one year after the date of resignation, not counting the time the employee was in military service. N.Y. Mil. L. §243(2)(b). If reinstatement occurs under this provision, the employee is considered not to have had a break in service.

### ***Evaluations and Probation During Military Duty***

An employee absent for military duty shall receive credit for an efficiency rating during his or her absence equal to the average of his or her last three efficiency ratings prior to military service. N.Y. Mil. L. §243(8). This averaged rating will not be less than a passing grade or less than the rating received on the final evaluation prior to military

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service. And, upon return, the employee is entitled to all increments and other salary increases s/he would have received had s/he been continuously employed in the civil service.

Probationary employees who enter military service before the end of the probationary period are deemed to have provided satisfactory service for the period of absence. N.Y. Mil. L. §243(9). With regard to teachers, however, the period of probation can be “extended by the local board of education for a period not to exceed one year from the date of termination of military duty.” N.Y. Mil. L. §§243(9-a) or (19).

### ***Abolition of Positions***

If the competitive class position occupied by the employee is abolished while the employee is on military duty, the employee’s name will appear on a list of preferred eligibles. N.Y. Mil. L. §243(11). For non-competitive class positions -- those positions not covered by §243(11) -- the employee whose position is abolished or ceases to exist while s/he is absent on military duty may file a written request within 90 days of termination of military service asking to be placed on a military re-employment list for the same or similar position. N.Y. Mil. L. §243(12). The employee’s name will remain on the list for four years from the termination of military duty. Any refusal to accept employment to a similar position results in the person’s name being removed from the list. Employees who held temporary positions when they were activated for military service are placed on this same military re-employment list. N.Y. Mil. L. §243(13).

### ***Pension and Retirement Contributions***

An employee who is called up for military service may continue to have deductions made from salary or other compensation toward any pension or retirement system. N.Y. Mil. L. §242(6)(a). In the event that the amount to be contributed exceeds the amount of compensation to which the employee is entitled during his or her absence (even when this is the entire amount to be contributed such as for those employees who enlist for full-time active duty and

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## Public Sector Veterans & Military Personnel

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are, therefore, receiving no pay from the employer), the employee may elect to pay the additional amount. N.Y. Mil. L. §§242(6)(a), 243(4). In the case of a member of the Teachers Retirement System whose contract of employment expires while serving military duty, the employee can pay both the employee and employer contributions. N.Y. Mil. L. §243(4).

Payments of contributions to pension and retirement systems may be made at any time during military duty or within five years after the termination of military service. N.Y. Mil. L. §242(6)(b), §243(4). If the employee dies while in military service, payment may be made by the beneficiary or legal representative of the employee's estate "within one year following proof of such death." So long as these payments are made, the period of absence due to military service will be counted toward total service under the pension and retirement plan. N.Y. Mil. L. §242(6)(c), §243(4). The employee or his or her beneficiary is entitled to the benefits of the retirement or pension system, with the exception of accidental disability retirement and accidental death benefits. N.Y. Mil. L. §242(6)(d), §243(4), §244.

### ***Death Benefits***

Recent amendments to the New York Retirement and Social Security Law, the Education Law (New York State Teachers' Retirement System), and the New York City Administrative Code effectively overrule the provisions of §§242, 243, and 244 of the Military Law that exclude accidental death benefits from the benefits awarded to the surviving spouses and dependents of public employees on leave for active military duty in some circumstances. 2005 N.Y. Laws ch. 105. According to these amendments, accidental death benefits will be paid as though the member of the retirement system died as a result of an accident "sustained in the performance of duty," where (1) the member was on the payroll when ordered to active duty with the United States Armed Forces for purposes other than training and (2) the member died while engaged in that active military duty.

Corresponding amendments have been made to the sections

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of the New York Retirement and Social Security Law, the Education Law, and the New York City Administrative Code so that ordinary death benefits and guaranteed death benefits are also payable on behalf of members of these systems who die while absent from public employment as a result of active duty in the armed forces for non-training purposes. 2005 N.Y. Laws ch. 105.

Retirement benefits will be more fully discussed below.

### ***Dependent Health Insurance***

In conjunction with the payment of accidental death benefits through the pension or retirement system as outlined above, for those employees who are covered by the New York State Health Insurance Plan (also known as NYSHIP or the Empire Plan), qualified surviving spouses and dependents will be eligible for continued health insurance benefits under that plan if the member dies while on active duty, other than for training, in the United States armed forces. N.Y. Civ. Serv. L §§165, 165-a.

The qualified surviving spouse and dependents of another specific group of veteran public employees receive an enhanced entitlement to the continuation of health insurance through the Empire Plan. Generally, survivors of public employees are usually entitled to elect to continue health insurance, so long as the employee possessed ten years of public service. Surviving spouses and dependents of employees who served on active duty during the Persian Gulf crisis are entitled to elect to continue health insurance after the death of the employee, regardless of the ten-year rule. N.Y. Civ. Serv. L. §165-a.

### ***Employee Insurance Policies***

There are several statutory provisions that regulate the impact of active duty military service on employee insurance policies. Distinctions are made between the types of policies (e.g., life insurance vs. health insurance) and the type of military service (e.g., service in the armed forces vs. state militia).

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## Public Sector Veterans & Military Personnel

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For members of the state militia who are activated in the service of the State for purposes other than training, the premiums for up to the cost of \$400,000 of coverage under Servicemembers' Group Life Insurance, in which military personnel are entitled to enroll, will be reimbursed by the State. N.Y. Mil. L. §210. In addition, accident and health insurance policies for these activated service members cannot lapse or be forfeited for non-payment of premiums for a period of sixty days of active duty, so long as notice is provided to the insurer within thirty days after active duty begins. N.Y. Mil. L. §316(3).

For members of the United States Armed Forces or the National Guard who are activated for purposes other than training, life insurance policies cannot lapse or be forfeited for nonpayment of premiums during the period of military service, plus two years. N.Y. Mil. L. §316(1), (2). Health insurance policies cannot be cancelled for a period of eighteen months, but the employee may be required to pay up to 102% of the cost of the premiums upon return from military duty. N.Y. Mil. L. §316(1) incorporating policies covered by 50 U.S.C. §594(c) that, in turn, refers back to the standards under USERRA at 38 U.S.C. §4301 *et seq.* This is the same time period for which an employee who is off the payroll may elect to continue coverage under COBRA by paying 100% of the cost of coverage.

Activated members of the Armed Forces or National Guard Reserves are entitled to ask for individual accident and health insurance policies to be suspended while on military service. N.Y. Ins. L. §§3216(c)(13), (c)(14). Requests for suspension of policies must be made in writing. Requests for resumption of coverage must be made within sixty days after termination of active duty. When the policy resumes, the insurer can exclude conditions that arose during the period of active duty that have been determined by the Secretary of Veterans Affairs to have been incurred "in the line of [military] duty." The only waiting period that may be imposed is the continuation of one that was imposed when the policy was initiated and which was not complete prior to the requested suspension for active duty. The period of suspension is limited to a maximum of no more than four years of active duty.

***Continuing Education/Licensing Requirements***

A person who is licensed, registered or certified in a profession or occupation prior to entering into the active military service of the State or the United States will not be required to comply with New York State continuing education requirements while in military service. N.Y. Mil. L. §308-a. In addition, anyone who is called to active duty and whose license, registration, or certification for his or her profession or occupation is due to expire while on active duty will receive an automatic extension for the period of active duty, plus twelve months following release from duty. N.Y. Mil. L. §308-b. However, these provisions do not extend limited permits or credentials issued under the Education Law.

• **Other Benefits During Employment**

In addition to benefits and entitlements while on leave as a result of active military duty, New York law provides other employment-related benefits to those who have served in the military, as discussed below.

***Paid Holidays***

Public employee-veterans and those who have been honorably discharged after service of a period of active duty in the United States Armed Forces are entitled to paid leave on Memorial Day and Veterans' Day. N.Y. Pub. Off. L. §63. The statute excepts from this condition employees whose absence would "endanger the public safety or the safety or health of persons cared for by the state" and provides that individuals denied paid leave on this basis must be provided with paid leave on an alternate day.

Those public employees who were members of the national guard, naval militia, or reserves at a time when the United States was not at war, and who were honorably discharged, are entitled to a paid leave of absence on the Fourth of July. N.Y. Mil. L. §249.

## ***Layoff***

Veterans receive additional seniority in the event of a layoff. Generally, a veteran will be credited with two and one-half years' (thirty months') additional seniority. A disabled veteran will be credited with five years' (sixty months') additional seniority. Notably, the spouse of a veteran with a one hundred percent (100%) military service-related disability will be granted five years' (sixty months') additional seniority credits in their stead. N.Y. Civ. Serv. L. §85(7) sub.5.

In a layoff situation, veterans in the labor class in State service can receive a transfer to any similar vacant position, if the veteran can locate a vacancy. In municipal civil service, this benefit applies to those in both the non-competitive and labor class. In the case of such a transfer, the veteran will receive the same compensation s/he had previously received.

## ***Retention Rights***

Veterans in the non-competitive class of the civil service receive tenure in their positions and cannot be summarily disciplined or dismissed. They are afforded the same protection in law as permanent competitive class employees and must receive statements of charges and an opportunity for a hearing before any action can be taken to terminate them. To receive this benefit, the veteran need only have been honorably discharged after service in time of war.

## ***Education***

War veterans must be granted a leave of absence of up to four years to continue their education under the Servicemen's Readjustment Act of 1944 (the G.I. Bill). N.Y. Mil. L. §246. In order to be reinstated to employment, an application must be made within 60 days of completion of the course of study.

### ***Flag Display***

All employees, regardless of military service or veteran status, whether public sector or private sector, are protected against discrimination, discharge, or retaliation as a result of displaying an American flag at their workstation or on their person while at work, unless the display of the flag “substantially or materially” interferes with the employee’s job duties. N.Y. Labor L. §215-c. A lawsuit claiming that this provision has been violated may be filed within two years of the alleged violation, and must be filed after notice of the complaint has been provided to the State Attorney General.

### **FEDERAL STATUTES**

- **Military Leave**

In the area of military leave, federal law provides a slightly different set of benefits to those activated for military duty in the service of the United States. USERRA applies to all employers, public or private, regardless of size. This federal statute provides a “floor” below which benefits to employees activated for military duty may not fall. Where New York law fails to cover a topic, or where the time to file a claim under New York law has lapsed, USERRA provides an additional or alternative avenue of relief.

To be eligible for reemployment rights under USERRA, the reservist-employee may be absent for voluntary military leave for no more than five years; there is no time limit with respect to involuntary leave. The reservist-employee is required to provide the employer advance verbal or written notice (as soon as possible after receiving orders) for a military duty leave of absence. If advance notice is not given, the employee risks losing his or her rights under USERRA.

If the reservist-employee is called to active duty for a period of more than thirty days, the employer has the right to request formal documentation of the military orders. In addition, the employer may contact the military commander to determine whether duty could be rescheduled; if duty cannot be rescheduled, the employer must allow

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## Public Sector Veterans & Military Personnel

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the reservist-employee to perform his or her ordered military duty.

The employer is not required to pay the reservist-employee while the employee is absent for military service. However, individual employers may offer differential pay or a specific number of military leave days. (New York Military and Civil Service Laws contain such provisions, as discussed elsewhere in this text.) Reservist-employees are entitled to compensation for accrued personal, sick and/or vacation days. A person leaving for uniformed service may use any vacation, annual, or similar leave with pay prior to beginning military leave. An employer cannot require that paid accruals be used during the period of military service.

For absences of less than thirty-one days, the employer must continue health insurance coverage as if the reservist-employee were still working. In the event that the absence exceeds thirty days, the employer must continue health insurance coverage for up to eighteen months, if requested by the employee. But, the employee may have to pay up to 102% of the premium for coverage.

Upon completion of military duty, the employee must apply for reinstatement to his or her former position as follows:

- For service from one to thirty days, the employee does not need to provide formal notice, but must be available to return to work by the eighth hour after returning from duty (generally the next work day, and taking a reasonable commuting time into consideration).
- For thirty-one to one-hundred-eighty days' service, the employee must apply for reinstatement within 14 days of completion of military duty.
- For service in excess of one-hundred-eighty days, the employee must apply for reinstatement within ninety days after completion of military duties.
- If the employee incurs a disability during military service, he

## CSEA Legal Department

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or she has up to two years to apply for reinstatement. The employer must also make reasonable accommodations for the disability upon the employee's return to work, where necessary.

The employee should be reinstated to his/her former position. If the former position is unavailable, the employee must be offered a similar position. Notably, reinstatement is not required where the employee was dishonorably discharged from military duty.

The period of military duty must be counted as "covered service" with the employer for purposes of eligibility for, vesting in, and accrual of employment benefits. To this end, the period of active duty is not considered to be a break in service.

An employee reemployed under this statute may be discharged only for cause during the first year after reemployment, where service was for more than 180 days, or during the first 180 days after reemployment, if service was for more than 30 days but less than 181 days. This provision is the main advantage of USERRA over State law for public sector employees.

Bear in mind that an employee who is absent by reason of qualifying military service and who knowingly provides written notice of his/her intent not to return to employment following service is not entitled to the benefits conferred by USERRA. However, the employer must prove that written notice was provided and that the employee was aware of the rights of reemployment that were being waived.

- **Family Medical Leave**

The Family and Medical Leave Act of 1993 (FMLA) was recently amended as part of a broader revision of several federal statutes on behalf of military families. The amendments created two new types of FMLA leave entitlement: "qualifying exigency leave" and "servicemember family leave."

"Qualifying Exigency Leave" delineates a new, non-medical, basis upon which an eligible employee may take up to 12 weeks of

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## Public Sector Veterans & Military Personnel

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FMLA leave in a 12-month period. This type of leave may be taken to address needs arising from the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty. It is intended to provide the family with an opportunity to prepare for the service member's deployment, whether that means getting paperwork in order, making alternate childcare arrangements, or simply spending time with the service member.

Employers may require certification to support a request for exigency leave in the form of either: (1) a copy of the covered military member's active duty orders, or (2) a signed statement from the employee describing the request for leave.

"Servicemember Family Leave" allows an eligible employee who is the spouse, son, daughter, parent, or "next of kin" (nearest other blood relative – siblings, grandparents, aunts, uncles, or first cousins) of a service member to take up to 26 workweeks of leave during a 12-month period in order to care for a covered service member with a serious injury or illness incurred in the line of active military duty and for which the service member is: (1) undergoing medical treatment, recuperation, or therapy; (2) otherwise in outpatient status; or (3) otherwise on the temporary disability retired list. This provision applies to all members of the United States Armed Forces, including members of the National Guard and Reserves. However, in the event that the service member has retired or been discharged from military service, the service member is not eligible unless s/he is on the temporary disability retired list.

The 26 workweeks is the maximum total leave that may be taken for all FMLA-qualifying reasons in any 12-month period. In other words, if the employee had already taken 12 weeks of leave to care for a newborn, the employee could take up to an additional 14 weeks to care for a covered service member. However, this type of leave is a "per-service member, per-injury" entitlement. In other words, if the same service member has a subsequent injury in a different 12-month period, the family member will be eligible for 26 additional weeks of leave. Also, if the family has multiple service

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members, the family will be eligible for up to 26 weeks of leave for each covered service member who suffers a qualifying injury.

### **SECTION III: RETIREMENT BENEFITS**

With respect to retirement benefits, there are statutory enhancements for certain groups of employees who served on military active duty that allow credit for time on active duty without the employee making a contribution to the pension or retirement system and that, in certain circumstances, allow for benefits in excess of what would otherwise be the maximum retirement benefit.

#### **BUYING BACK SERVICE CREDIT**

As noted earlier, in general a member of a retirement or pension system may elect to contribute to the system for the period of military absence, with some restrictions. This is commonly referred to as “buying back” service credit. The right to contribute is limited to a maximum of five years’ voluntary service, unless service in excess of five years is during a time of war or national emergency as declared by the President. N.Y. Mil. L. §243(1)(b); §243(4).

Recently, New York Retirement and Social Security Law was amended to permit all veterans who were honorably discharged from military duty, regardless of when they served or whether they faced active combat, to purchase up to three years of added credit in a public retirement system, representative of their military service. N.Y. Retire. & Soc. Sec. L. §1000. This allows those who are already members of the retirement system, whose service was not previously eligible, to buy back time now. It also permits new public employees to join a retirement system and, after five years of service and participation in the retirement system, purchase up to three years’ additional credit for military service. The cost of purchasing the credit will be dependent upon the Retirement System Tier: 3% for Tiers 1 through 5 or 6% for Tier 6 onward.

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Previously, retirement system members with no less than ten

## Public Sector Veterans & Military Personnel

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years of service were able to purchase credit for up to three years of military service in the United States Armed Forces during a period of war, so long as the total credit received for military service under all relevant statutes did not exceed three years. N.Y. Mil. L. §244-a.

Both N.Y. Retire. & Soc. Sec. L. §1000 and N.Y. Mil. L. §244-a permit public employees who have not had an absence from public employment as a result of military service to purchase retirement credit for a portion of that service.

Those who purchased credit for war time service pursuant to N.Y. Mil. L. §244-a before the enactment of N.Y. Retire. & Soc. Sec. L. §1000 may request a recalculation of the cost of the credit, and a refund of any difference will be made. N.Y. Retire. & Soc. Sec. L. §1000(7).

### **NON-CONTRIBUTORY CREDIT**

Members of the Teachers' Retirement System may obtain credit for up to three years of military service in the Armed Forces during times of war after World War I -- specified as World War II, the Korean conflict, and 1961 to 1963 during the Vietnam era -- without making contributions to the retirement system, so long as the request for credit was made up to and including October 14, 1980. N.Y. Ed. L. §503. (A subset of this group, namely those who applied for the post-World War I credit by 1967, will receive a refund, in the event the employee had already made contributions under New York Military Law for the period of military service. N.Y. Ed. L. §503.)

For members of all state and local retirement systems (including police, fire, and teachers), as well as members of the retirement systems of the City of New York (including police, fire, and teachers), who were called to active duty in the Armed Forces between August 1, 1990 and January 1, 1993, no contribution will be required in order to receive credit in the applicable system for the period of unpaid military absence. N.Y. Mil. L. §243-a; §243-b.

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In addition, all members of state and local retirement systems

who have been called into active duty in the United States Armed Forces since September 11, 2001 and before January 1, 2006, and who are not receiving full pay from their respective employers, will be granted retirement system credit without employee contribution. N.Y. Mil. L §243-d.

### **SECTION IV: NON-EMPLOYMENT RELATED PROVISIONS**

In addition to the employment-related benefits discussed in the previous sections, any person activated for military duty should be aware that there are protections provided under both federal law (for active service in the United States Armed Forces) and State law (generally for service in the State Militia; sometimes in addition to the benefits provided under federal law for service in the Armed Forces) that are intended to protect civilian assets and civil rights during a period of absence because the individual would usually be unable to act on his/her own behalf.

The New York Soldiers' and Sailors' Civil Relief Act, contained in New York Military Law §§300 to 328, and its federal counterpart, the Servicemembers Civil Relief Act, codified in the United States Code at 50 App. U.S.C. §501 and following, memorialize these protections. A general list of the protections follows.

- Legal proceedings are to be stayed during military service, unless the subject matter of the legal proceeding is something not impacted by the individual's military service. Any person who is "secondarily liable," such as a spouse or dependent, may also ask for proceedings to be stayed.
- Statutes of limitation -- the periods of time within which legal claims may be filed -- will be "tolled" or extended by the period of military service.
- A court may not enter a default judgment against activated military personnel for failure to respond to a lawsuit or appear at a trial. Further, execution of judgments, court actions,

## Public Sector Veterans & Military Personnel

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attachments, and garnishments may be stayed by a court if the person is -- or was within sixty days prior -- in active military service.

- Under certain conditions, employees activated for military duty are protected against foreclosures on mortgages or installment payment agreements if they can show the ability to pay is “materially affected” by military service.
- Financial obligations such as taxes and insurance policies that require payment of premiums will all be held off until the individual returns from service. (There are some maximum time periods for this period of suspension of payment.)
- A person who is activated for military duty may terminate the lease for a home or business if the lease was entered into before the individual was called up for active duty.

The purpose of these statutes is not to give soldiers immunity from claims that arise against them, but to provide a fair opportunity to respond once military service has ended. In addition, the statutes attempt to provide some protection of soldiers’ rights and remedies during military absences, as well as a degree of peace-of-mind while in service, by protecting soldiers against hardship that might result from the performance of their military duties.

### **SECTION V: ENFORCEMENT**

In general, State statutes are enforceable by way of a petition filed under New York Civil Practice Law and Rules Article 78. The time frame in which such a claim must be filed is four months from the act that is the subject of the “complaint.” C.P.L.R. §217. However, there are some exceptions to this time frame where the relevant statute expressly provides for a different time period within which to file a complaint (e.g., two years to file a lawsuit alleging discrimination or retaliation for display of an American flag at work).

## CSEA Legal Department

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In addition, N.Y. Mil. L. §323-b, enacted in 2008, waives all court costs and filing fees for civil actions or proceedings brought in any court by an individual who is an active member of the organized militia, if the lawsuit relates to the individual's service in the organized militia or reserves and is based on provisions of NY SSCRA, New York human rights law relating to military status, or federal USERRA or SCRA provisions.

The federal USERRA statute provides for enforcement of the employment and reemployment rights created by the statute. 38 U.S.C. §§4322, 4323. There is no statute of limitations for USERRA claims. Consequently, since many of the benefits and protections under New York Military Law overlap with USERRA, a claim could likely be raised under the federal statute even if the four-month statute of limitations for the New York law violation has expired. Remember, however, that the key to USERRA is that the employee who will be absent for military duty must request that s/he receive the benefits applicable under the statute in order for its provisions to apply.

### **SECTION VI: "FAQs"**

► *If I am a public sector employee who is called to active duty in the armed forces and my active duty begins in one calendar year and continues into another, how much paid leave am I entitled to?*

Under New York law, all public sector employees are entitled to thirty days, or twenty-two working days, of paid leave during a single period of military absence. In the event that you receive thirty days of paid leave in one calendar year, but are still on military active duty when the new calendar year begins, you are not entitled to an additional thirty days of paid leave. However, each employee is entitled to use accruals during military absence; the employee cannot be required to do so but must be allowed to. In addition, each collective bargaining agreement may provide a paid leave benefit that is greater than the thirty days provided by statute.

► *How does my military leave of absence impact my eligibility for*

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## Public Sector Veterans & Military Personnel

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### *medical leave under the Family Medical Leave Act?*

Under both federal and state law, employees who have been out of work as a result of active duty service in the military are to be treated as though there was no break in service. When such employees are reinstated, they are to receive all the benefits they would be entitled to if they had been continuously employed. Consequently, a returning service member would be entitled to FMLA leave if the hours s/he would have worked for the employer during the period of military service would have met the FMLA eligibility threshold. In other words, the hours the employee would have worked are counted toward whether s/he meets the 1250-hours in 12 months requirement.

► *Is there any absolute preference for Iraq War veterans, over other applicants, for a position or promotion?*

Absolute preferences are illegal. The hiring and promotion of veterans is encouraged, and there are statutory provisions that may grant additional credit on a competitive examination to a particular individual, but the employer may not be required to select a Iraq War veteran over another qualified applicant for a position or promotion.

► *What will happen to my health insurance while I am on leave?*

Your insurance will continue for as long as you are on the payroll. In addition, your employer may not cancel your policy for a period of eighteen months after you are no longer on the payroll. This is different from your ability to continue to pay for 100% of the cost of your insurance under COBRA because, regardless of whether you are able to pay the premiums, your employer cannot cancel the policy. (You will be obligated to pay up to 102% of the premiums when you return.) An alternative to continuing the policy is to make a request to suspend the policy during your absence. Upon reinstatement to employment, you will be entitled to resume the insurance policy with the same exclusions and waiting periods as were in place when the policy was suspended, with the possible exception of no coverage for any injury, disability, or condition that was incurred during military service.

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► *If I buy back service credit for years when I was serving with the military, does the military time I bought back add to my seniority for purposes of promotions, shift bidding, vacation bidding, or layoff protection?*

The effect of purchasing military service is to add to your service credit for purposes of retirement. The purchased military service time does not impact your on-the-job seniority. If you buy back time in the retirement system for a military absence from service with your current employer, federal and state law mandate that the time you were absent is not to be considered a break in service. Consequently, you are entitled to the seniority you would have if you had remained a regular employee for the period of your absence; that seniority would be used for purposes of promotions, bidding, and the like. Alternatively, if you buy back credit for years of active duty military service that took place prior to your employment with your current employer, your seniority is still based on your first date of service with your current employer; you do not receive additional on-the-job seniority. With regard to layoffs, veterans already receive additional service credit in layoff situations under New York law: thirty months for veterans, sixty months for disabled veterans, and sixty months for the spouse of a veteran with a 100% disability.

## **SECTION VII: APPENDIX**

### **STATUTES**

What follows is a list of references to the statutes discussed and cited within this booklet.

#### **GENERAL STATUTES**

New York State Constitution (N.Y. Const.)  
New York State Civil Service Law (N.Y. Civ. Serv. L.)  
New York State Civil Practice Law and Rules (N.Y. C.P.L.R.)  
New York State Corrections Law (N.Y. Corr. L.)  
New York State Education Law (N.Y. Ed. L.)  
New York State Executive Law (N.Y. Exec. L.)  
New York State Insurance Law (N.Y. Ins. L.)  
New York State Military Law (N.Y. Mil. L.)  
New York State Public Officers Law (N.Y. Pub. Off. L.)  
New York State Retirement and Social Security Law (N.Y. Retire. & Soc. Sec. L.)

#### **STATUTES WITH POPULAR TITLES**

New York State Soldiers' and Sailors' Civil Relief Act (NY SSCRA)  
codified at N.Y. Mil. L. §§300-328

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) 38 U.S.C. §§4301 et seq.

Veterans' Reemployment Rights Act (VRRRA) Pub. L. 93-508, Title IV, §404(a), December 3, 1974, 88 Stat. 1578 with additional materials now contained at 38 U.S.C. §§4301-4307

Soldiers' and Sailors' Civil Relief Act of 1940 amended in 2003, Pub. L. 108-189, and renamed the Servicemembers Civil Relief Act (SCRA) 50 App. U.S.C. §§501 et seq.

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The Servicemen's Readjustment Act of 1944 (The G.I. Bill of Rights) at Act of June 22, 1944, c. 268, 58 Stat. 284, as amended and now contained in 38 U.S.C. §§3701 et seq.

### **WEBSITES**

There are many useful websites for veterans, reservists, and military personnel. They are too numerous to list here. (A search of the terms "veteran" or "soldier" on any internet search engine will result in pages of websites.) However, what follows is a list of websites for State and Federal government agencies that contain the largest amounts of the most applicable information, as well as links to other sources.

NYS Division of Veterans Affairs <http://veterans.ny.gov>  
NYS Department of Labor [www.labor.state.ny.us](http://www.labor.state.ny.us)

U.S. Army [www.army.mil](http://www.army.mil)  
U.S. Navy [www.navy.mil](http://www.navy.mil)  
U.S. Air Force [www.af.mil](http://www.af.mil)  
U.S. Marine Corps [www.usmc.mil](http://www.usmc.mil)  
U.S. Coast Guard [www.uscg.mil](http://www.uscg.mil)  
National Guard [www.military.com](http://www.military.com)  
U.S. Army Reserve [www.usar.army.mil](http://www.usar.army.mil)  
Department of Veterans Affairs [www.va.gov](http://www.va.gov)  
Disabled American Veterans [www.dav.org](http://www.dav.org)  
Social Security Administration [www.ssa.gov](http://www.ssa.gov)

PL/09-000S/Veterans Booklet March 2019/MTW/#132090





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