

LAW REVIEW¹ 0816
April 2008

Enhanced Leave Entitlement for Gamily Caregivers of Wounded Warriors

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1.1 – USERRA Coverage

5.5—Other Military Service and Family Obligations

Section 585 of the Fiscal Year 2008 National Defense Authorization Act amends the Family Medical Leave Act (FMLA) of 1993 to provide up to 26 weeks of "servicemember family leave" to an eligible employee who is the spouse, parent, son, daughter, or next-of-kin of a covered servicemember. The 26 weeks includes the basic 12 weeks of FMLA leave already authorized by law—you don't get to add the 26 weeks to the 12 already authorized.

Under the FMLA, an employee of a medium to large employer—generally those with 50 or more employees—is entitled to up to 12 weeks of unpaid leave (in a 12-month period) for the birth or adoption of a child, the serious health condition of the employee, or for the employee to care

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

for the serious health condition of his or her spouse, son, daughter, or parent. 29 U.S.C. 2612(a)(1).

If you visit the wounded warriors at the Walter Reed Army Medical Center or any large military medical facility, you will find many spouses and parents accompanying and assisting their injured relatives. Many of these folks have had to set aside their own jobs to be at the military medical facility. The military doctors and nurses will tell you that these spouses and parents are not only helpful but in some cases almost indispensable. As I explained in Law Review 98, the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to these family caregivers. They are not considered to be "members of the uniformed services," and their caregiving work does not amount to "service in the uniformed services" for USERRA purposes.

To have the right to unpaid leave under the FMLA, an employee must have been employed by that employer for at least 12 months and must have worked at least 1,250 hours for that employer during the 12-month period immediately preceding the leave. 29 U.S.C. 2611(2)(A). Please note that this new amendment does not change this basic eligibility criterion for FMLA leave.

I have heard from an Army widow who lost her job with a major university. She started a new job shortly before her husband (an Army Sergeant) deployed to Iraq. He was horribly burned when an improvised explosive device went off, and he was evacuated to the Brooke Army Medical Center in Texas. She traveled to Texas to be with him while he lingered for two weeks. She was fired when she missed one more day of work to attend his funeral. She did not have rights under the FMLA because she had not been working for the university for at least one year, and the new amendment does not change the one-year rule.

The one-year rule has a disparate impact on military spouses, especially spouses of career active duty personnel. The military family must expect a Permanent Change of Station (PCS) move every three years or so. When the servicemember is transferred to a new duty station, the non-military spouse must often give up his or her civilian job to keep the family together at the new assignment.

I am pleased that Congress has at least made an effort to help the family caregivers of wounded warriors, but I am disappointed that the new legislation does not address the scenario I first raised in Law Review 0736 (July 2007) involving this Army widow. On the other hand, I also understand that enacting significant legislation is sort of like eating an elephant—you must do it one bite at a time. The effort continues.

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This article is one of 1800-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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