

## Right to Paid Military Leave Is a Matter of State Law, not USERRA

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Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments

1.6—USERRA statute of limitations

1.8—Relationship between USERRA and other laws/policies

***Miller v. City of Indianapolis*, 281 F.3d 648 (7<sup>th</sup> Cir. 2002).**<sup>3</sup>

### A dispute about the interpretation of state law is not a USERRA question.

Nathan Miller and the other plaintiffs in this case were, at the time the case was brought, suppression firefighters for the City of Indianapolis and active members of the National Guard or Reserve. Under Indiana law, they were entitled to 15 days of *paid* military leave per year.<sup>4</sup>

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

<sup>2</sup> BA 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 34 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 VRRRA 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 VRRRA 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 at Tully Rinckey PLLC (TR), 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 (May 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an "of counsel" role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> This is a 2002 decision by the United States Court of Appeals for the 7<sup>th</sup> Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The citation means that you can find this decision in Volume 281 of *Federal Reporter Third Series*, starting on page 648.

<sup>4</sup> Indiana Statutes, section 10-2-4-3. Please see the "State Leave Laws" section of our website for an article for each state about the state laws that grant state and local government employees limited periods of paid military leave.

This dispute was about the interpretation of the word “day” for purposes of computing an individual employee’s right to paid military leave, in the context of an employee who works an unusual job schedule.

Suppression firefighters in Indianapolis work a 24-hour job shift, from midnight to midnight. As a city policy, and as an interpretation of the state law, Indianapolis interpreted the term “15 days” as 15 eight-hour periods, or 120 hours of paid military leave.<sup>5</sup> Under this interpretation, a suppression firefighter who missed a 24-hour job shift was charged with 24 hours of paid military leave, out of the entitlement to 120 hours per year. Under this interpretation, missing five 24-hour shifts for military service would exhaust the firefighter’s entitlement to paid military leave for the year.

Miller and the other firefighters claimed that Indianapolis’ limited interpretation of the Indiana state law violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>6</sup> The District Court held and the Court of Appeals affirmed that the plaintiffs had failed to establish a USERRA violation, although they might have a viable complaint that the Indianapolis policy violated the Indiana state law. The interpretation of the state law is a state law question, for state courts to resolve, not a federal USERRA question. I believe that the 7<sup>th</sup> Circuit got it right on this issue.

The 7<sup>th</sup> Circuit noted that Minnesota’s intermediate appellate court had held that, under Minnesota law, a Minnesota city was required to pay a firefighter for 24 hours for every 24-hour shift the firefighter missed because of military service, up to 15 days per year.<sup>7</sup> On the other hand, Indiana’s intermediate appellate court had recently upheld a limited interpretation of “15 days”—an interpretation that was very similar to Indianapolis’ interpretation.<sup>8</sup>

USERRA applies to the Federal Government, the states, the political subdivisions of states (like the City of Indianapolis), and private employers, regardless of size. USERRA gives the employee the right to *unpaid but job protected* leave for service in the uniformed services. This includes but is not limited to inactive duty training (drills) and annual training periods typically performed by members of the Reserve Components.<sup>9</sup> USERRA also applies to longer periods of voluntary or involuntary active duty performed by Reserve Component members, and it applies to persons who enlist in the Active Components of the armed forces and who are away from their civilian jobs for up to five years (sometimes longer) of active duty.

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<sup>5</sup> Section 291-210 of the Municipal Code of the City of Indianapolis provided: “in accordance with state law, a maximum of fifteen (15) eight-hour working days of paid military leave shall be granted.”

<sup>6</sup> USERRA is codified in title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-35).

<sup>7</sup> See *Howe v. City of St. Cloud*, 515 N.W.2d 77 (Minn. App. 1994).

<sup>8</sup> See *Koppin v. Strode*, 761 N.E.2d 455 (Ind. Ct. App. 2002).

<sup>9</sup> Our nation has seven Reserve Components. In order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard.

Under section 4302 of USERRA,<sup>10</sup> this federal law is *a floor and not a ceiling*. Section 4302(a) provides that USERRA does not supersede a state law, a local ordinance, a collective bargaining agreement or other contract, or a voluntary employer policy or practice that provides *greater or additional rights or benefits* to those who are away from work for uniformed service. A state law that provides a limited period of *paid* military leave is an example of a state law that provides greater or additional rights and is therefore not superseded.

Section 4302(b) provides that USERRA supersedes state laws, local ordinances, collective bargaining agreements and other contracts, policies, practices, and other matters that limit USERRA rights or that impose additional prerequisites on the exercise of USERRA rights. The Department of Labor (DOL) USERRA Regulation explains the relationship between USERRA and state “paid military leave” laws:

If an employer provides a benefit that exceeds USERRA’s requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.<sup>11</sup>

The Indiana law granting paid military leave is not preempted or superseded by USERRA, but that does not mean that the interpretation of the state law is a USERRA question. To the extent that Indiana law gives National Guard and Reserve members rights and benefits that are over and above USERRA, the interpretation of that state law is a state law question for state courts to address. USERRA is not implicated unless the state law purports to reduce USERRA rights or to impose additional prerequisites upon the exercise of federal rights.

### **Equitable doctrine of laches applies to USERRA cases.**

Miller and the other plaintiffs also complained that fire department leaders (including the Chief) had expressed irritation about work they had missed because of Reserve Component training and service and had pressured them to quit Reserve Components. The plaintiffs complained about conversations and events in 1969, 1970, and 1983 and about fire department leaders who were deceased by the time this lawsuit was brought. The 7<sup>th</sup> Circuit held that these claims were barred by the equitable doctrine of laches. The decision includes the following instructive paragraph:

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<sup>10</sup> 38 U.S.C. 4302.

<sup>11</sup> 20 C.F.R. 1002.7(d).

Furthermore, we conclude that these claims are barred by the doctrine of laches, which is “principally a question of inequity of permitting a claim to be enforced. *Lingenfelter v. Keystone Consolidated Industries*, 691 F.2d 339, 340 (7<sup>th</sup> Cir. 1982). Laches is based not on simply the passage of time, as is a statute of limitations, but rather upon changes of conditions or relationships. *Galliher v. Caldwell*, 145 U.S. 368 (1892). There must be a showing of both a lack of diligence on the part of the plaintiffs and prejudice to the defendants. See *Costello v. United States*, 365 U.S. 265 (1961). The plaintiffs bear the burden of explaining their delay in bringing suit.<sup>12</sup>

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<sup>12</sup> *Miller v. City of Indianapolis*, 281 F.3d 648, 653 (7<sup>th</sup> Cir. 2002).