

Military Leave for Public Employees in Colorado

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1.8: USERRA and Other Laws

2.0: Paid Leave

Colorado law has provisions for military leave of state and political subdivision employees that, though largely mirroring the Uniformed Services Employment and Reemployment Rights Act (USERRA), in part appear to be in violation of that federal statute.

Colorado Revised Statutes sections 28-3-601 through 608 address service in the armed forces of the state's public employees, including a provision for paid leave for up to 15 days during service in the armed forces for Reserve Component members. The first section addresses public employees' annual military leave and reads as follows:

(1) Subject to the conditions prescribed in sections 28-3-601 to 28-3-607, any officer or employee of the state or of any political subdivision, municipal corporation, or other public agency of the state who is a member of the National Guard or any other component of the military forces of the state organized or constituted under state or federal law or who is a member of the reserve forces of the United States, organized or constituted under federal law is entitled to leave of absence from his or her public office or employment without loss of pay, seniority, status, efficiency rating, vacation, sick

¹ 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. For 45 years, I have collaborated 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 38 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 <mailto:swright@roa.org>.

leave, or other benefits for all the time when he or she is engaged with such organization or component in training or active service ordered or authorized by proper authority pursuant to law, whether for state or federal purposes, but not exceeding fifteen days in the leave year established by the employer. Such leave shall be allowed if the required military service is satisfactorily performed, which shall be presumed unless the contrary is established.

(2) Such leave shall not be allowed unless the officer or employee returns to his or her public position immediately on being relieved from such military service and not later than the expiration of the time limited in subsection (1) of this section for such leave, or is prevented from so returning by physical or mental disability or other cause not due to his or her own fault, or is required by proper authority to continue in such military service beyond the time limited in subsection (1) of this section for such leave.

COLO. REV. STAT. § 28-3-601 (2022). The subsequent section addresses public employees' extended military leave and provides:

If any such officer or employee is required by proper authority to continue in such military service beyond the time for which leave with pay is allowed, he or she is entitled to leave of absence from his or her public office or employment without pay for all such additional service with right of reinstatement thereafter upon the same conditions as provided in section 28-3-604 for reinstatement after active service in time of war or other emergency.

COLO. REV. STAT. § 28-3-602 (2022). The subsequent section addresses public employees' emergency military leave and provides:

Subject to the conditions prescribed in this section, any officer or employee of the state or of any political subdivision, municipal corporation, or other public agency of the state who engages in active military service in time of war or other emergency declared by proper authority of the state or the United States, for which leave is not otherwise allowed by law, is entitled to leave of absence from his or her public office or employment without pay during such service with right of reinstatement as provided in section 28-3-604.

COLO. REV. STAT. § 28-3-603 (2022). The next section addresses reinstatement and provides:

(1) Except as otherwise provided in sections 28-3-601 to 28-3-607, upon the completion of such service, such officer or employee shall be reinstated in the public position which he or she held at the time of entry into such service or a public position of like seniority, status, and pay if such is available at the same salary which he or she would have received if he or she had not taken such leave upon the following conditions:

(a) That the position has not been abolished or that the term thereof, if limited, has not expired;

- (b) That he or she is not physically or mentally disabled from performing the duties of such position;
- (c) That he or she makes written application for reinstatement to the appointing authority within ninety days after discharge from hospitalization or medical treatment which immediately follows the termination of and results from such service, but such application shall be made within one year and ninety days after termination of such service, notwithstanding such hospitalization or medical treatment;
- (d) That he or she submits an honorable discharge or other form of release by proper authority indicating that his or her military service was satisfactory.

(2) Upon such reinstatement, the officer or employee shall have the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if he or she had been actually employed during the time of such leave. No officer or employee so reinstated shall be removed or discharged within one year thereafter, except for cause and after notice and hearing; but this shall not operate to extend a term of service or office limited by law.

COLO. REV. STAT. § 28-3-604 (2022). Section 28-3-604 violates USERRA in two important respects. Section 604(b) provides that the returning veteran is not entitled to reemployment if he or she is physically or mentally disabled from performing the duties of the pre-service position. Federal law imposes on the employer the duty to make reasonable efforts to accommodate a service-connected disability of the returning veteran. If the disability cannot be reasonably accommodated in that particular position of employment, the employer must reemploy the returning veteran in another position for which the veteran is qualified, or can become qualified with reasonable employer efforts, and that provides like seniority, status, and pay, or the closest approximation consistent with the circumstances of the veteran's situation. *See* 38 U.S.C. 4313(a)(3).

Section 604(c), like 38 U.S.C. 4312(e)(2)(A), deals with the situation wherein the returning veteran is hospitalized or convalescing from a service-connected injury or illness immediately after release from active duty. The state law provides that, in these circumstances, the deadline to apply for reemployment (normally within 90 days after release from service) can be extended up to one year and 90 days. The federal provision allows the ill or injured veteran to apply for reemployment up to two years after release from the period of service, if the veteran is hospitalized or convalescing for that long. Of course, the more generous federal provision must prevail.

Section 4302(b) of USERRA [38 U.S.C. 4302(b)] provides that USERRA supersedes state laws that purport to limit USERRA rights or that impose additional prerequisites upon the exercise of federal USERRA rights. Article VI, Clause 2 of the U.S. Constitution (commonly called the "Supremacy Clause") provides that federal law trumps conflicting state law. *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

The next section of the statue addresses a public officer's certificate for reinstatement:

Any public officer elected or appointed for a definite term who, before the expiration of such term, returns from military service under leave of absence without pay, in lieu of making written application for reinstatement as provided in section 28-3-604, shall file in the same office where his or her official oath is filed, within forty-five days after termination of such military service, a verified certificate that he or she has complied with the conditions for reinstatement prescribed in section 28-3-604, and he or she shall thereupon be deemed to have resumed his or her office.

COLO. REV. STAT. § 28-3-605 (2022). The following section addresses public pension rights retained:

Any public officer or employee receiving leave of absence under the preceding sections and having rights in any state, municipal, or other public pension, retirement, or relief system shall retain all such rights accrued up to the time of taking such leave and shall have all rights subsequently accruing under such system as if he or she had been actually employed during the time of such leave. Any increase in the amount of money benefits accruing with respect to the time of such leave is dependent upon the payment of any contributions or assessments, and the right to such increase is dependent upon the payment of such contributions or assessments within such reasonable time after the termination of such leave and upon such terms as the authorities in charge of the system may prescribe.

COLO. REV. STAT. § 28-3-606 (2022). The next section addresses public employees' substitute during service:

If a public officer or employee is absent with leave under the provisions of the preceding sections and if it is necessary in the public interest to provide for the performance of the duties of his or her position during such absence, the authority having power to fill a vacancy in the position may appoint a substitute, to be known as acting incumbent, who shall qualify as required for the regular incumbent, shall receive the same compensation as fixed by law or otherwise such compensation as may be fixed by proper authority, and shall have all the power and perform all the duties of the position until the return of the regular incumbent; except that this shall not preclude the making of any other provision for the discharge of the duties of the position which may be otherwise authorized by law.

COLO. REV. STAT. § 28-3-607 (2022). The final section provides for the supplemental nature of the aforementioned sections:

The rights and privileges granted by sections 28-3-601 to 28-3-607 are supplementary to and not exclusive of any other rights or privileges conferred by law on public officers or employees but shall not obtain in any case where the military services are constitutionally or legally incompatible with the public office or employment.

COLO. REV. STAT. § 28-3-608 (2022).

Access the Colorado Statute on Your Own

We do our best to keep these state law articles up-to-date and provide the most relevant sections of the applicable statute for you to review. Nonetheless, we still recommend you consult the most recent version of the law to make sure nothing has changed from what we discussed in this article. You can find the most recent version for yourself online, for free, at <https://leg.colorado.gov/agencies/office-legislative-legal-services/2022-crs-titles-download>. When you click this link, you will be brought to a page with a list of Titles available for download. The relevant statutes discussed in this article can be found in Title 28, and begin with Section 28-3-601.

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