

DE-2017-LV¹
(checked November 2022 – No changes)

Military Leave under Delaware Law

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.8: USERRA and Other Laws

2.0: Paid Leave

Delaware law, codified in the Delaware Code Annotated Title 29 Section 5105, provides as follows concerning the rights of state employees who leave their state jobs for voluntary or involuntary military service:

(a) In the case of any employee of this State who is called to the service of or voluntarily enters the armed forces of the United States or the National Guard of the State, when in continuous active service, the state agency, board, department or other employing officer or agency of this State employing such employee shall grant to such employee a leave of absence which shall cover the entire period of such employee's service, *not*

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find approximately 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of about 1300 of the articles. In our "state laws" section, we have an article for each state about the state laws that grant paid military leave and other benefits, over and above USERRA, to employees of the state and (often) to employees of the state's political subdivisions. This article is a rewrite of our Delaware article.

² 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 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 35 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 or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

exceeding 5 years or until the term of service to which such employee has been called or volunteered has been terminated. Upon the completion of such leave of absence and service, such employee shall be reinstated in the position held at the time that such leave of absence was granted, and such employee shall be continued in employment under the same terms and conditions as if such employee had been in the continuous service of such employing agency during the period of the leave of absence.

(b) Any employee of the State taking a leave of absence authorized by subsection (a) of this section who, as a member of the Delaware National Guard or a United States military reserve organization, has been ordered to active duty to augment active forces for any operational mission, shall continue to receive that employee's own state compensation during the initial period of active duty prescribed by the military, to be reduced by any military compensation received. While on such leave of absence, for a period not to exceed 2 years, the employee and the employee's dependents shall continue to receive benefits provided under the State's group health insurance plan, provided that the employee continues to pay any employee-share premium for such plan. The Department of Human Resources shall develop any rules and regulations necessary to implement the provisions of this subsection. These rules shall make it the responsibility of the employee to initiate the claim and supply the required military pay information. The State shall be responsible for collecting information relating to State compensation. Claims shall be filed within 90 days of release from active duty or passage of this legislation, whichever is later.

(c) For the purpose of subsection (b) of this section state compensation shall be limited to base salary. Military compensation shall include base salary, basic allowance for quarters (BAQ), basic allowance for subsistence (BAS), hazardous duty pay and all other supplemental compensation.

(d) In the event that any state employee who shall have entered the armed services under a leave authorized by subsection (a) of this section shall have been employed in any agency of the state government having a pension plan for employees or which shall come under any pension plan enacted or to be enacted by the General Assembly of the State, the time spent by such employee in the armed services shall accrue to such employee's benefit in establishing such employee's right to a pension. If during the time any such employee shall be in the armed services the total time spent actually as an employee plus the time spent in the armed services shall equal that period of time necessary to establish the right to retirement and to a pension, such employee shall upon application to the proper agency having jurisdiction be entitled to retirement and the pension prescribed by the rules of that agency in the same manner and with the same effect as if such employee had spent all of the required time in the actual employment of that agency.

(e) This section shall be retroactive to protect the rights of any employee who shall have qualified as provided in this section prior to April 24, 1945, and such employee shall be entitled to all such pension money as shall have accrued since the time of having so qualified.

Any person who may be appointed to replace any employee referred to in subsections (a)-(e) of this section shall be appointed only for the period covered by the leave of absence granted pursuant to subsection (a) of this section.

DEL. CODE ANN. tit. 29, § 5105 (2022) (emphasis added). A separate section of Delaware law, Title 14 Section 1327, governs reemployment rights for teachers and other education employees who leave those jobs for military service:

(a) If a regularly appointed and employed principal, teacher or other employee of a school district is called to the service of or voluntarily enters the armed forces of the United States of America or the National Guard of this State when in continuous active service, the school board shall grant to such principal, teacher or other employee a leave of absence which shall cover the period of military service, not to exceed 3 years, or until the term of service to which he or she has been called is terminated, and upon the completion of the leave of absence reinstate such principal, teacher or other employee in the position which he or she held at the time that the leave of absence was granted. The contract with such principal, teacher or other employee shall continue in force under the same conditions as if the principal, teacher or other employee had been in the continuous service of the board during the period of the leave of absence; provided, such regularly appointed and employed principal, teacher or other employee has received a certificate of satisfactory completion of military service.

(b) Any principal, teacher or other school employee taking a leave of absence authorized by subsection (a) of this section who, as a member of the Delaware National Guard or a United States military reserve organization, has been ordered to active duty to augment active forces for any operational mission, shall continue to receive the principal's, teacher's or other school employee's state compensation during the initial period of active duty prescribed by the military, to be reduced by any military compensation received. While on such leave of absence, for a period not to exceed 2 years, the employee and the employee's dependents shall continue to receive benefits provided under any applicable group health insurance plan offered by the school district, provided that the employee continues to pay any employee-share premium for such plan. The Department of Human Resources shall develop any rules and regulations necessary to implement the provisions of this subsection. These rules shall make it the responsibility of the employee to initiate the claim and supply the required military pay information. The State shall be responsible for collecting information relating to state compensation. Claims shall be filed within 90 days of release from active duty or passage of this legislation, whichever is later.

(c) For the purpose of subsection (b) of this section state compensation shall be limited to the state share of the base salary as calculated from the appropriate salary schedule, administrative supplements and all other stipends. Military compensation shall include base salary, basic allowance for quarters (BAQ), basic allowance for subsistence (BAS), hazardous duty pay and all other supplemental compensation multiplied by the ratio of state compensation to total compensation.

(d) The person who may be appointed to replace the principal, teacher or other employee shall be appointed only for the period covered by the leave of absence.

DEL. CODE ANN. tit. 14, § 1327 (2022).

Relationship between USERRA and Delaware law

Delaware Code Title 29, Section 5105 is generally consistent with USERRA, with one exception. Section 5105(a) provides that the period of military service may not exceed five years. Under section 4312(c) of USERRA, there is a cumulative five-year limit, but there are also nine exemptions—kinds of service that do not count toward exhausting the individual's limit.³ If the individual's service was more than five years, but the exemptions under section 4312(c) bring the person within the five-year limit, the person has the right to reemployment under USERRA, Delaware law notwithstanding. Delaware law cannot take away federal USERRA rights.

Under section 5105(b), a state employee who is away from his or her state job is entitled to differential pay (the regular state compensation minus the military compensation, if the regular state compensation is greater) for up to two years. USERRA does not require an employer to pay differential pay, so this is an example of a state law that provides greater or additional rights and is not superseded by USERRA.

Under Title 14, Section 1327, the permissible military leave period for a teacher or other school employee is “not to exceed 3 years.” Of course, this three-year limit is inconsistent with USERRA and void. Section 1327 accords the teacher who is away from his or her teaching job for military service the right to differential pay for up to two years.

Access the Delaware 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 a public version of the entirety of the Delaware code for yourself online, for free, at <https://delcode.delaware.gov/>. To more quickly access Title 14

³ Please see Law Review 16043 (May 2016).

Section 1327 discussed in this article, follow this link and scroll to section 1327 or click the hyperlink at the top of the page: <https://delcode.delaware.gov/title14/c013/index.html>. To more quickly access Title 29 Section 5105 discussed in this article, follow this link and scroll to section 5105 or click the hyperlink at the top of the page: <https://delcode.delaware.gov/title29/c051/index.html>.

Please join or support ROA

This article is one of 2,300-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 more than a century old—it was established on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight⁴ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002⁵

⁴ Congress recently established the United States Space Force as the 8th uniformed service.

⁵ You can also contribute on-line at www.roa.org.