

## **Military Leave for Public Officers and Employees in Georgia**

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

1.8: USERRA and Other Laws

2.0: Paid Leave

Georgia law generally mirrors the tenets of the federal Uniformed Services Employment and Reemployment Act (USERRA) for employees of the state of Georgia and its political subdivision. However, Georgia law further sets out terms for agencies and entities providing continuing full or differential pay during activations, including state grants to reimburse entities that continue the pay of employees called to the colors. The Georgia law also establishes means for contributing to employee pension plans.

The full Georgia Code, section 38-2-279 follows:

“(a) Definitions. As used in this Code section, the term:

“(1) ‘Ordered military duty’ means any military duty performed in the service of the state or of the United States including but not limited to attendance at any service school or schools conducted by the armed forces of the United States by a public officer or employee as a voluntary member of the National Guard or of any reserve force or reserve component of the armed forces of the United States pursuant to orders issued by competent state and federal authority.

“(2) ‘Public officer or employee’ means every person, by whatever title, description, or designation known, who receives any pay, salary, or compensation of any kind from the state, a county, municipal corporation, or any other political subdivision or who is in any department of the state, but shall not include persons employed by the state, a county, municipal corporation, or any other political subdivision on a temporary basis.

“(b) Every public officer or employee shall be entitled to absent himself or herself and shall be deemed to have a leave of absence from duties or service as a public officer or employee while engaged in the performance of ordered military duty and while going to and returning from such duty. Notwithstanding Code Section 45-5-1 or any other provision of law, a public office shall not be considered vacated or abandoned by a public officer while on ordered military duty.

“(c) Leave of absence while attending service schools. Every public officer or employee who is or becomes a voluntary member of any force of the organized militia or of any Reserve force or Reserve component of the armed forces of the United States shall be entitled to absent himself

or herself and shall be deemed to have a leave of absence from duties or service as a public officer or employee while in attendance as a member of such force or reserve component at any service school or schools conducted by the armed forces of the United States for a period or periods up to and including six months and while going to and returning from the school or schools, notwithstanding that orders for such attendance are or may be issued with the consent of the public officer or employee. **However, no public officer or employee shall be entitled to absent himself or herself in excess of a total of six months during any four-year period.\***

“(d) Employment rights. Time during which a public officer or employee is absent pursuant to subsections (b) and (c) of this Code section shall not constitute an interruption of continuous employment and, notwithstanding any general, special, or local law or any city charter, no such officer or employee shall be subjected directly or indirectly to any loss or diminution of time, service, increment, vacation, holiday privileges, or any other right or privilege by reason of such absence or be prejudiced with reference to continuance in office or employment, reappointment to office, reemployment, reinstatement, transfer, or promotion by reason of such absence.

“(e) Every public officer or employee shall be paid his or her salary or other compensation as such public officer or employee for any and all periods of absence while engaged in the performance of ordered military duty and while going to and returning from such duty, not exceeding a total of 18 days in any one federal fiscal year. In the event the Governor declares an emergency and orders any public officer or employee to ordered military duty as a member of the National Guard, any such officer or employee, while performing such duty, shall be paid his or her salary or other compensation as a public officer or employee for a period not exceeding 30 days in any one federal fiscal year.

“(e.1)(1) On and after July 1, 2002, every public officer or employee may be paid by the government employer the difference between his or her government salary and his or her military salary for any or all periods of absence while engaged in the performance of ordered military duty and while going to and returning from such duty, after expiration of the payment period provided for in subsection (e) of this Code section.

“(2) To the extent that funds are appropriated or otherwise made available to the Department of Community Affairs for such purpose, the department may provide grants to counties, municipal corporations, and other political subdivisions to reimburse them for their costs incurred under paragraph (1) of this subsection. The department shall provide by rule for the administration of such grant program; and such rules shall provide for pro rata distribution in the event that the funds available are insufficient to reimburse all such costs.

“(f) Rights and contributions under retirement systems.

“(1) The amount of required contributions to any pension or retirement system of which a public officer or employee, absent while engaged in the performance of ordered military duty, is a member shall be deducted from the salary or other compensation paid to such public

officer or employee as a public officer or employee as provided in this Code section. If the required contributions exceed the amount of such salary or other compensation to which a public officer or employee is entitled while engaged in the performance of military duty, the amount of the salary or other compensation shall be applied upon the required contributions; and the public officer or employee shall have the right to pay to the pension or retirement system the amount by which the contributions exceed the salary or other compensation. The public officer or employee shall also have the right to pay to the system, for any period of such absence during which he or she shall receive no salary or other compensation as a public officer or employee, the amount that he or she would have contributed to the system if he or she had been present and continuously engaged in the performance of the duties of his or her position during such period.

“(2) Payments made pursuant to paragraph (1) of this subsection, other than those deducted from his or her salary or other compensation as an officer or employee, may be paid from time to time at any time while engaged in ordered military duty or within five years after the date of termination of the ordered military duty or, in the event of the death of the public officer or employee while engaged in ordered military duty, the payments or any part thereof may be made by the named beneficiary or the legal representative of the public officer’s or employee’s estate within one year following proof of such death.

“(3) To the extent that contributions made pursuant to paragraphs (1) and (2) of this subsection are paid, the period of absence while engaged in the performance of ordered military duty shall be counted in determining the length of total service under the pension or retirement system.

“(4) While engaged in the performance of ordered military duty, any such public officer or employee or his or her beneficiary, as the case may be, shall be entitled to all the benefits of the pension or retirement system of which such public officer or employee is a member, except accidental disability retirement and accidental death benefit.

“(g) Notwithstanding the provisions of Chapter 14 of Title 50, an agency, as defined by subsection (a) of Code Section 50-14-1, shall be authorized to conduct meetings by telecommunications conference in the event that one or more of the agency’s members is on ordered military duty at the time of such meeting, provided that any such meeting is conducted in compliance with such chapter. The members of the agency, including those on ordered military duty, shall be authorized to participate and make decisions during such a telecommunications conference.

“(h) Exception as to draftees, etc. This Code section shall not apply to:

“(1) Any public officer or employee who was or is involuntarily transferred, assigned, drafted, or inducted to or into any of the forces of the organized militia or any of the Reserve forces or Reserve components of the armed forces of the United States; or “(2) Any public officer or employee who was or is inducted into the armed forces of the United States, but not as a

member of any force of the organized militia or of any Reserve force or Reserve component of the armed forces of the United States." (Georgia Code, section 38-2-279.)

**\*Note:** The final sentence of section 38-2-279(c) (italicized and bold above) purports to limit permissible military leaves of absence for service schools to six months during any four-year period. That limitation is contrary to 38 U.S.C. 4312(h), a subsection in the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Under Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause"), the six-month limitation in section 38-2-279(c) is void. Under USERRA, the right to an unpaid military leave of absence is limited only by the five-year limit set forth in section 4312(c), and these service schools typically do not count toward the five-year limit. Please see Law Review 201 for a definitive discussion of USERRA's five-year limit.

Georgia can lawfully limit the amount of *paid* military leave that it will grant but it cannot limit an employee's federal statutory right to *unpaid* military leave.