

Military Leave for Public Employees in Kentucky

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1.18: USERRA and Other Laws

2.0: Paid Leave

Kentucky law has a provision for reemployment rights for employees of the state and its political subdivision and a separate provision for paid military leave.

The law providing for employees of the state and its political subdivisions who leave their jobs for voluntary or involuntary military service predates the application of federal reemployment rights laws to the states. As such, Kentucky's law gives state employees a six-year window of military service through which the state allows for reemployment.

That portion of Kentucky's statute is codified at Section 61.373 in the Kentucky Revised Statutes and provides for the restoration of public employees to their position after military duty and the right to leave of absence:

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.

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.

(1) Any public employee who leaves a position after June 16, 1966, voluntarily or involuntarily, in order to perform military duty, and who is relieved or discharged from such duty under conditions other than dishonorable, and who has not been absent from public employment due to military duty in time of war or national or state emergency for a period of time longer than the duration of the war or national or state emergency plus six (6) months or in time of peace for a period of time not longer than six (6) years, and makes application for reemployment within ninety (90) days after he is relieved from military duty or from hospitalization or treatment continuing after discharge for a period of not more than one (1) year:

(a) If still physically qualified to perform the duties of his position, shall be restored to such position if it exists and is not held by a person with greater seniority, otherwise to a position of like seniority, status and pay;

(b) If not qualified to perform the duties of his position by reason of disability sustained during such service, the public employee shall be placed in another position, the duties of which he is qualified to perform and which will provide him like seniority, status and pay, or the nearest approximation thereof consistent with the circumstances of his case.

(2)

(a) Officers and employees of this state, or any department or agency thereof, shall be granted a leave of absence by their employers for the period required to perform active duty or training in the National Guard or any reserve component of the Armed Forces of the United States.

(b) Upon the officer's or employee's release from a period of active duty or training, except as provided in KRS 61.394, he or she shall be permitted to return to his or her former position of employment or a position with equivalent seniority, status, pay, and any other rights or benefits that would have been bestowed if he or she had not been absent.

(c) An officer or employee who is not permitted to return to his or her former position may appeal the dismissal in accordance with KRS Chapter 18A.

(3) In the case of any person who is entitled to be restored to a position in accordance with KRS 61.371 to 61.379, if the personnel board finds that the department or agency with which such person was employed immediately prior to his military duty:

(a) Is no longer in existence and its functions have not been transferred to any other agency; or

(b) For any reason it is not feasible for such person to be restored to employment by the department or agency, the board shall determine whether

or not there is a position in any other department or agency of the same public employer for which the person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the board determines that there is such a position, the person shall be restored to the position by the department or agency in which the position exists.³

The federal reemployment statute (USERRA) has applied to the federal government and to private employers since 1940, but it did not apply to state and local governments until 1974. This 1966 state law was especially relevant at a time before the federal reemployment statute applied to state and local governments. But the law is still relevant. For one thing, this section's limit on the duration of the period of service is six years. Under the federal law, the limit is generally five years, with certain exemptions. See Law Review 201.

Kentucky law provides as follows concerning paid military leave for employees of the state, codified in §61.394 of the Kentucky Revised Statutes:

(1) All officers and employees of this state, or of any department or agency thereof who are members of the National Guard or of any reserve component of the Armed Forces of the United States, or of the reserve corps of the United States Public Health Service, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave, impairment of efficiency rating, or of any other rights or benefits to which they are entitled, while:

(a) In the performance of duty or training in the service of a state or of the United States under competent orders as specified in this section;

(b) Physically disabled as a result of an injury, illness, or disease incurred or aggravated in the line of duty while performing active-duty or inactive-duty training; or

(c) Entitled to incapacitation pay pursuant to 37 U.S.C. sec. 204.

Leave pursuant to paragraphs (b) and (c) of this subsection shall not exceed six (6) months unless approved by the employee's appointing authority.

(2) In any one (1) federal fiscal year, officers or employees, while on military leave, shall, upon request, be paid their salaries or compensations for a period or periods not exceeding twenty-one (21) calendar days. Any unused military leave in a federal fiscal year shall be carried over to the next year. Any unused military leave shall expire two (2) years after it has accrued.⁴

This section was recently updated, effective July 14, 2022. The new legislation added sections (b) and (c).

³ KY. REV. STAT. ANN. § 61.373 (LexisNexis 2022).

⁴ KY. REV. STAT. ANN. § 61.394 (LexisNexis 2022).

Access the Kentucky Code 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 Kentucky Revised Statutes for yourself online, for free, at <https://apps.legislature.ky.gov/law/statutes/>. To access Section 61.373 and Section 61.394 discussed in this article, follow the link above, select “Chapter 61 – General provisions as to offices and officers – Social security for public employees – employees retirement system” → Scroll down to the section you wish to read.

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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 eight⁵ 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.

⁵ Congress recently established the United States Space Force as the 8th uniformed service.

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Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002⁶

⁶ You can also contribute on-line at www.roa.org.