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Military Leave for Public Employees in Maryland

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1.18: USERRA and Other Laws

2.0: Paid Leave

Maryland law provides for up to 15 days of paid military leave "for military training or active military duty in a Reserve unit of the armed forces or in the organized militia."³ This entitlement only applies to employees of the State of Maryland. Counties, municipalities, and other political subdivisions are free to confer or to decline to confer paid military leave, at local option.

It is unclear how the 15 day entitlement is computed. Section 1-201 of the Maryland State Personnel and Pensions Code defines "day" and "days": "Unless specifically provided otherwise, in this Division I of this article a reference to a "day" or "days" means a calendar day or calendar

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 (VRRRA—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 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, 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.

³ MD. CODE ANN., STATE PERS. & PENS. § 9-1104 (LexisNexis 2022).

days.”⁴ However, this does not clarify the question of whether all days count, or only regular workdays. For example, Reservist Joe Smith performs 12 days of annual training with his Reserve unit, from Monday, Oct. 1, through Friday, Oct. 12. Mr. Smith does not normally work weekends in his civilian job at the Maryland Department of Taxation. Do Saturday (Oct. 6) and Sunday (Oct. 7) count in exhausting Mr. Smith's entitlement to 15 days of paid military leave?

Maryland law also provides for differential pay for state employees who are called to lengthy active duty periods. This is codified in the State Personnel and Pensions Code Section 9-1107:

(a) This section applies to all employees, except temporary employees, of all units in the Executive, Judicial, and Legislative branches of State government, including any unit with an independent personnel system.

(b) Military administrative leave may be provided to an employee subject to this section who:

(1) is on active military duty on July 1, 2003; or

(2) is activated for military duty on or after July 1, 2003.

(c)

(1) An employee who is eligible to receive military administrative leave under this section is entitled to leave in an amount sufficient to compensate the employee, during each pay period for which the employee is eligible to receive military administrative leave under this section, for the difference between the employee's active duty base salary paid by the federal government and the employee's State base salary or direct wages.

(2) Compensation provided under this subsection may not exceed an employee's State base salary or direct wages.

(d) An employee eligible to receive military administrative leave under this section who is activated for military duty on or after July 1, 2003, shall elect to use either military administrative leave or paid leave as provided in § 9-1104(3) of this subtitle.

(e) The Department shall keep a record of the use of military administrative leave under this section.⁵

⁴ MD. CODE ANN., STATE PERS. & PENS. § 1-201 (LexisNexis 2022).

⁵ MD. CODE ANN., STATE PERS. & PENS. § 9-1107 (LexisNexis 2022).

Relationship Between Section 38-103 and USERRA

Maryland law also provides for state retirement credit for military service that interrupts the individual's career as a state government employee. That law contains a limitation that, under some circumstances, violates the Uniformed Services Employment and Reemployment Rights Act (USERRA).

(a) This section applies only to a member of a State or local retirement or pension system who:

(1) does not withdraw any of the member's accumulated contributions, unless the member redeposits the sum withdrawn as provided under subsection (b) of this section;

(2) within 1 year after the member leaves military service, is employed by the State or a political subdivision of the State;

(3) does not take any employment other than the employment described in item (2) of this subsection, except for temporary employment after the member:

(i) applied for reemployment in the member's former classification or position in the State service; and

(ii) was refused immediate reemployment for causes beyond the member's control; and

(4) applies for service credit with the State or local retirement or pension system in which the member held membership before the member's military service began.

(b) If a member of a State or local retirement or pension system who is absent from employment for military service withdraws any of the member's accumulated contributions and redeposits the sum withdrawn with regular interest into the State or local retirement or pension system, the member, if otherwise qualified, is entitled to the benefits of this section as if the withdrawal had not been made.

(c) Except as otherwise provided in this subtitle, a member of a State or local retirement or pension system who is actively reemployed under subsection (a)(2) of this section retains the status and rights as a member during a period of absence from employment for military service.

(d)

(1) Subject to paragraph (2)(i) of this subsection, a member of a State or local retirement or pension system shall receive service credit for a period of absence from employment while in military service if:

(i) the employment of the member under subsection (a)(2) of this section is active or the employee is reinstated as a regular employee on a leave of absence; and

(ii) membership in a State or local retirement or pension system is a requirement of employment.

(2)

(i) For an absence for military service, service credit for the military service may not exceed 5 years.

(ii)

1. This subparagraph applies only to a member of a State system.

2. Subject to subparagraph (i) of this paragraph and in addition to any service credit received under paragraph (1) of this subsection, a member of the Maryland National Guard or of a reserve component of the armed forces of the United States who has been activated under Title 10 of the United States Code and who is on active or inactive duty for training that interrupts the member's service shall receive service credit at the rate of 4 months for each full year for military service, not to exceed a total of 36 months.

(e) A member of a State or local retirement or pension system who receives service credit for military service under this section may transfer the credit to another State or local retirement or pension system.

(f) The service credit for military service that a member of a State system receives under this section shall be applied to the individual's retirement allowance using the accrual rate at the time the individual retires from a State system.⁶

Under section 4318 of USERRA (38 U.S.C. 4318), an employee who leaves civilian employment for voluntary or involuntary service in the uniformed services is entitled to civilian pension credit for the time that the individual was away from work for service, provided the employee meets the USERRA eligibility criteria. USERRA applies to state and local governments, as well as private employers and the federal government. Section 4302(b) of USERRA [38 U.S.C. 4302(b)]

⁶ MD. CODE ANN., STATE PERS. & PENS. § 38-103(d)(2) (LexisNexis 2022).

provides that USERRA overrides a state law that purports to limit USERRA rights. Federal law trumps conflicting state law.⁷

Section 4312(c) of USERRA [38 U.S.C. 4312(c)] provides for a five-year limit on the duration of the individual's period or periods of uniformed service, relating to that employer relationship, but section 4312(c) also provides 8 statutory exemptions from the five-year limit. As I explain in Law Review 201 (available at www.roa.org), all involuntary service and some voluntary service are exempted from the computation of USERRA's five-year limit. Thus, under some circumstances an individual is entitled to more than five years of state pension credit for military service time, despite the provisions of section 38-103(d)(2) of the Maryland State Personnel and Pensions Code.

Let us take the hypothetical but entirely realistic Mary Jones. She works for the State of Maryland for her entire 35-year career, from September 2000 to September 2035. After the terrorist attacks of Sept. 11, 2001, Ms. Jones enlisted in the Maryland Army National Guard, and she remained in the Guard for a 25-year career, until she retired in October 2026. Ms. Jones was called to active duty for two years, involuntarily, from September 2003 to September 2005. She returned to work in October 2005, and she later performed four years of voluntary active duty, from September 2011 to September 2015. She also performed annual training with her National Guard unit (usually about two weeks but on a few occasions substantially longer) every year until she retired from the National Guard, and she performed inactive duty training (usually but not always on weekends) every month. Her involuntary call to active duty is excluded from the computation of her five-year USERRA limit, and her various tours of Reserve training duty are also excluded. Her four-year voluntary tour of active duty counts toward her five-year limit, but she has not exceeded the limit. USERRA entitles Ms. Jones to state pension credit for the entire 35-year period of her state employment—none of these military service periods interrupt her continuous accumulation of state pension credit.

As I have explained in Law Review 15116 (December 2015) and many other articles, a service member or veteran has the right to reemployment under USERRA if she or she meets five simple conditions:

- a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.⁸
- b. Must have given the employer prior oral or written notice.⁹

⁷ See Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause") and *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁸ 38 U.S.C. 4312(a).

⁹ 38 U.S.C. 4312(a)(1).

- c. Must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.¹⁰
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.¹¹
- e. After release from the period of service, must have made a timely application for reemployment with the pre-service employer.¹²

It is necessary to read a state law like section 38-103 together with USERRA, and this can get complicated.

Access the Maryland 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 Maryland Code for yourself online, for free, at <https://mgaleg.maryland.gov/mgaweb/Laws/Statutes>. From this link, you have to search for each individual section. For all sections discussed in this article, select the dropdown under “Articles” and click “State Personnel and Pensions”. Then select the dropdown under “Sections” and click the section you wish to read.

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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

¹⁰ 38 U.S.C. 4312(c). Under that subsection, there are nine exemptions—that is, there are nine kinds of service that do not count toward exhausting the individual’s five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of USERRA’s five-year limit.

¹¹ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges awarded by court martial for serious criminal misconduct and other-than-honorable administrative discharges.

¹² After a period of service of 181 days or more, the deadline to apply for reemployment is 90 days after the date of release. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

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 eight¹³ 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 20002¹⁴

¹³ Congress recently established the United States Space Force as the 8th uniformed service.

¹⁴ You can also contribute on-line at www.roa.org.