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Reemployment Rights for Public Employees in Michigan

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1.18: USERRA and Other Laws

2.0: Paid Leave

Reemployment Rights

Codified at Section 35.352 of Michigan Compiled Laws, Michigan law provides as follows concerning reemployment rights for public employees after voluntary or involuntary military service:

Sec. 2.

(a) Any public employee who leaves a position while this act is in effect, or who left such position prior to such effective date but not earlier than June 27, 1950, whether voluntarily or involuntarily, in order to perform military duty, or who was performing

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.

military duty on June 27, 1950, and who is relieved or discharged from such duty under honorable conditions, and makes application for reemployment within 90 days after he is relieved from military duty or from hospitalization continuing after discharge for a period of not more than 1 year shall—

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

(b) In the case of any person who is entitled to be restored to a position in accordance with the provisions of this act, if it is determined that the department or agency with which such person was employed immediately prior to his entry upon training and service aforesaid—

- (1) Is no longer in existence and its functions have not been transferred to any other agency, or
- (2) For any reason it is not feasible for such person to be restored to such department or agency,

it shall be determined whether or not there is a position in any other department or agency of the same public employer for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto or less seniority than the employee returning from military service. In any case in which it is determined that there is such a position, such person shall be restored in service and appointed to such position by the department or agency in which such position exists.³

This law applies to employees of the State of Michigan and its political subdivisions (counties, cities, school districts, etc.). The Legislature enacted this section in 1951, 43 years before Congress enacted the Uniformed Services Employment and Reemployment Rights (USERRA). As I explained in Law Review 104, Congress enacted USERRA in 1994, as the complete rewrite of the Veterans' Reemployment Rights (VRR) law, which Congress originally enacted in 1940. The VRR law has applied to the federal government and to private employers since 1940, but it did not apply to state and local governments until 1974, 23 years after the Michigan Legislature enacted this provision.

³ MICH. COMP. LAWS § 35.352 (2022).

As I explain in Law Review 77, there are five eligibility criteria for reemployment rights under USERRA. The person must have left the civilian position of employment for voluntary or involuntary uniformed service and must have given the employer prior oral or written notice. The person's cumulative period or periods of uniformed service, relating to that employer relationship, must not have exceeded five years. The person must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge, and the person must have made a timely application for reemployment. If the period of service was more than 180 days, the individual can wait up to 90 days, after the date of release from service, to apply for reemployment.

As I explain in Law Review 201, all involuntary service and some voluntary service are exempted from the computation of the five-year limit. But section 35.352 of the Michigan law contains no explicit durational limit. A Michigan public employee who has exceeded the five-year limit would at least arguably have the right to reemployment under the state law. Section 4301(a) of USERRA [38 U.S.C. 4301(a)] provides that USERRA does not supersede a state law that provides *greater or additional rights*.

Section 35.352(a) provides that the 90-day deadline to apply for reemployment can be extended to one year if the veteran is hospitalized, after release from active duty. Section 4312(e)(2)(A) of USERRA [38 U.S.C. 4312(e)(2)(A)] provides that the 90-day deadline can be extended up to ***two years*** if the veteran is hospitalized or *convalescing* from a service-connected injury or illness. Section 4302(b) of USERRA [38 U.S.C. 4302(b)] provides that USERRA overrides a state law that purports to limit rights granted by USERRA. Under the Supremacy Clause (Article 6, Clause 2) of the U.S. Constitution, federal law trumps conflicting state law.

State Retirement Credit for Public Employees

Michigan law provides as follows concerning state retirement credit for public employees whose careers as public employees are interrupted by military service:

- (1) A member of the retirement system who, while an employee of this state, was or who is drafted or enlisted into active military or other armed service of the United States government during time of war, or a member who is drafted or enlisted into active armed service during time of peace, and who returns for reemployment as a state employee within 6 months after the member's discharge from active service, or if hospitalized at date of discharge, returns for reemployment as a state employee within 6 months after release from the military facility, shall have all that active service credited as a member of the retirement system, in the same manner as if the member had served the state uninterruptedly but not more than 5 years of that service may be credited to a member. During the period of active service, and until return to state employment, the member's contributions to the employee's savings fund shall be suspended and the balance in the employees' savings fund standing to the member's credit as of the last payroll date preceding the leave of absence from the service of the

member's department shall be accumulated at regular interest. If the member withdraws all or part of the accumulated contributions from the employees' savings fund, the active service shall not be credited until the member returns to the fund all amounts the member withdrew, together with regular interest computed from the date of withdrawal to the date of repayment.

(2) On or after January 1, 1978 a member of this retirement system who does not meet the requirements of subsection (1) and who was drafted, enlisted, inducted, or commissioned into active duty with the military or other armed service of the United States government may elect to receive service credit for not more than 5 years of active duty upon request and payment to the retirement system of an amount equal to 5% of the member's full-time compensation for the fiscal year in which payment is made multiplied by the years of service that the member elects to purchase up to the maximum. Service shall not be credited if it is or would be credited under any other federal, state, or local publicly supported retirement system, but this restriction does not apply to those persons who have or will have acquired retirement eligibility under the federal government for service in the reserve. Armed service shall not be credited under this subsection until the member has accumulated the number of years of credited service needed to vest in the retirement system. Armed service under this subsection shall not be creditable to a member on deferred retirement status under section 20(4) before May 18, 1978. For purposes of computing payment under this subsection, the compensation amount used shall not be less than the highest fiscal year compensation previously received by the member.

(3) A person who was in the employ of the Michigan employment service on January 1, 1942, the date on which the employment service and its personnel were taken over by the United States employment service, and who continued in the employ of the United States employment service or who was temporarily taken out of the United States employment service for service in the war manpower commission or other government agency engaged in the prosecution of the war and later returned to the United States employment service, and whose service to the state, United States government, and state again was continuous and who was in the employ either of the United States employment service or of this state on November 16, 1946, the date on which the employment service was returned to the state, and who reentered state service on or before that date, shall upon his reentry into the state service become an original member of the retirement system, and shall receive full service credit for the period during which the personnel of the Michigan employment service was taken over by the United States employment service.

(4) A person who entered into the employ of the Michigan employment service while the employment service was under the United States employment service and who retires after April 30, 1978, may receive service credit for the service under the United States employment service by contributing to the retirement system contributions the person would have made from July 1, 1943, to November 16, 1946, as if that service

were rendered as a state employee, plus the interest with which the contributions would have been credited from the January following the year of employment to the date of repayment. The salary on which contributions are based shall be the salary received as a state employee on November 16, 1946.

(5) A member who has prior service is entitled to credit for that prior service if at the time of retirement the member has 15 or more years of total service, of which the last 5 are continuous years of service and if the member contributions equal the contributions made or that would have been made for not less than 15 years of membership service. In the computation of unpaid member contributions, the contribution rate will be computed on the member's salary level at retirement or date of payment, whichever first occurs.⁴

Section 38.18 attempts to limit credit to *involuntary* service in peacetime, or voluntary or involuntary service in peacetime or in wartime. USERRA applies to voluntary as well as involuntary service, in peacetime as well as wartime. The Michigan law is preempted by federal law insofar as it purports to deny credit for a period of uniformed service on the basis of the service having been voluntary and during a time of peace.

Section 38.18(2) of the Michigan law provides that the period of active military service for which the employee may receive state retirement credit may not under any circumstances exceed five years. Under some circumstances, this five-year limit is preempted by USERRA. As I explained in Law Review 201, all involuntary service and some voluntary service are exempted from the computation of the five-year limit under USERRA. Thus, under some circumstances federal law requires the state of Michigan to accord state retirement credit for more than five years of military service.

For example, let us take the hypothetical Joe Smith, hired by the state of Michigan in September 2000. A year later, after the terrorist attacks of Sept. 11, 2001, Mr. Smith enlists in the Marine Corps Reserve. Mr. Smith leaves his job in January 2002 to attend his six months of initial active duty training in the Marine Corps Reserve, returning to work in July 2002. This period of required Reserve training does not count toward Mr. Smith's five-year limit. In January 2003, Mr. Smith is involuntarily called to active duty until January 2004. This period of involuntary service is also exempted from Mr. Smith's USERRA limit. In January 2004, at the end of the involuntary call-up, Mr. Smith elects to remain on active duty, voluntarily, for another five years, until January 2009, when he is released from active duty under honorable conditions and makes a timely application for reemployment with the state of Michigan. Mr. Smith returns to work and remains continuously employed until September 2030, when he retires with 30 years of state service. Under these circumstances, USERRA requires Michigan to credit Mr. Smith for the entire 61/2 years that he was away from work for military service, early in his state career. Under the Supremacy Clause of the U.S. Constitution, federal law trumps conflicting state law.

⁴ MICH. COMP. LAWS § 38.18 (2022).

Differential Pay and Paid Leave

Section 32.273a of Michigan Compiled Laws permits but does not require Michigan's cities, villages, townships, and counties to pay differential pay to their employees who have left their jobs for military service. That section also permits but does not require cities, villages, townships, and counties to grant a few days of paid military leave for National Guard or Reserve training:

(1) A local unit of government may provide by ordinance or resolution or through personnel policy a differential pay program or for a specific number of paid days of leave for employees of the local unit of government who request or are required to take a leave of absence to enter into active service in a uniformed service as those terms are defined in section 3.

(2) As used in this section:

(a) "Differential pay program" means a program through which the local unit of government agrees to pay during the leave of absence all or a part of the difference between the amount the employee is paid by the local unit of government and the amount the employee receives through his or her uniformed service if the amount paid by the local unit of government exceeds the amount paid by the uniformed service.

(b) "Local unit of government" means a city, village, township, or county.⁵

The state of Michigan does not give state employees the right to paid military leave.

Access the Michigan General Laws 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 Michigan General Laws for yourself online, for free, at

[https://www.legislature.mi.gov/\(S\(3pexr4wk4jbduhm0ishdoee2\)\)/mileg.aspx?page=chapterindex](https://www.legislature.mi.gov/(S(3pexr4wk4jbduhm0ishdoee2))/mileg.aspx?page=chapterindex). Click the following links for the respective sections of the Michigan Law addressed in this article.

To access 35.352:

[https://www.legislature.mi.gov/\(S\(3pexr4wk4jbduhm0ishdoee2\)\)/mileg.aspx?page=getObject&objectName=mcl-35-352](https://www.legislature.mi.gov/(S(3pexr4wk4jbduhm0ishdoee2))/mileg.aspx?page=getObject&objectName=mcl-35-352).

⁵ MICH. COMP. LAWS § 32.273a (2022).

To access 32.273a:

[https://www.legislature.mi.gov/\(S\(3pexr4wk4jbduhm0ishdoee2\)\)/mileg.aspx?page=getObject&objectName=mcl-32-273a](https://www.legislature.mi.gov/(S(3pexr4wk4jbduhm0ishdoee2))/mileg.aspx?page=getObject&objectName=mcl-32-273a).

To access 38.18:

[https://www.legislature.mi.gov/\(S\(3pexr4wk4jbduhm0ishdoee2\)\)/mileg.aspx?page=getObject&objectName=mcl-38-18](https://www.legislature.mi.gov/(S(3pexr4wk4jbduhm0ishdoee2))/mileg.aspx?page=getObject&objectName=mcl-38-18).

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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 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 eight⁶ 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 20002⁷

⁶ Congress recently established the United States Space Force as the 8th uniformed service.

⁷ You can also contribute on-line at www.roa.org.