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(updated December 2022 – no changes in the law)

Paid Military Leave for Public Employees in North Carolina

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

1.8: USERRA and Other Laws

2.0: Paid Leave

North Carolina General Statutes, Section 127A-116 provides as follows concerning *paid* military leave for employees of the state and its political subdivisions:

The Governor or the Governor's designee shall promulgate appropriate policy and regulations relating to leaves of absence for short periods of military training and for State or federal military duty or special emergency management service of all officers and employees of the State and its political subdivisions, including officers and employees of public educational facilities under the sponsorship of the State, without loss of pay, time or efficiency rating.³

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 N.C. GEN. STAT. § 127A-116 (2022).

Below is the pertinent section of the *North Carolina Administrative Code (NCAC)*. Although section 127A-116 gives the Governor the authority to promulgate policy for political subdivisions of the state (counties, cities, school districts, etc.) as well as the state government itself, this administrative regulation appears to apply only to the state itself. It appears that the political subdivisions have discretion with respect to granting paid military leave for their employees. Some subdivisions are more generous than others:

(a) Military leave with pay for training shall be granted to members of the Uniformed Services who are full-time or part-time employees with a permanent, trainee, time-limited or probationary appointment for up to 120 working hours (prorated for part-time employees) during the Federal fiscal year beginning October 1 and ending on September 30, for

(1) active duty for training; and

(2) inactive duty training. If the drill is not scheduled on the employee's off-days, the employee may request that the work schedule be rearranged, or the employee may use any unused portion of the 120 hours leave with pay, vacation leave, or leave without pay.

(b) Military leave with pay shall be granted to members of the Civil Air Patrol as defined in Rule .0821 of this Section.

(c) An employee shall be granted necessary time off when the employee must undergo a required physical examination relating to membership in a reserve component without charge to leave.

(d) Military leave with pay shall be granted to members of the State Defense Militia as defined in Rule .0820 of this Section.

(e) The total active and inactive duty shall not exceed five years plus any additional service imposed by law.⁴

Subsection (e) is poorly drafted and confusing. Inactive duty training and active duty for training performed by National Guard and Reserve personnel do not count toward the five year limit on the permissible cumulative duration on periods of uniformed service, relating to a specific employer relationship, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Please see Law Review 201 at www.roa.org/lawcenter for a definitive summary of what counts and what does not count with respect to USERRA's five-year limit.

⁴ 25 N.C. ADMIN. CODE 1E.0804 (2022).

A separate section of the administrative code, Section .0805, provides for additional periods of entitlement for reserve components:⁵

Periods of entitlement for military leave with pay for members of the uniformed services reserve components for each period of involuntary service are as follows:

(1) Members of the National Guard shall receive full pay for activities in the interest of the State usually not exceeding one day, when so ordered by the Governor or his authorized representative;

(2) Members of the uniformed services reserve shall receive full pay for active state duty or federal duty for periods not exceeding 30 consecutive calendar days. For periods in excess of 30 days, employees shall be entitled to military leave with differential pay between military basic pay and regular state pay for any period of involuntary service if military pay is the lesser. Military leave for active state duty shall be considered separate from and in addition to military leave which may be granted for other purposes.⁶

Section .0809 of the administrative code, while partially duplicative with rights afforded to servicemembers by USERRA, provides for retention and continuation of benefits for public employees:

During the period of reserve active duty, whether receiving full State pay, differential pay, or no pay, no employee shall incur any loss of state service or suffer any adverse service rating. The employee shall continue to accumulate sick and vacation leave, aggregate service credit, and receive any promotion or salary increase for which otherwise eligible. Prior to the 30 days of full pay and the differential, the employee may choose to retain vacation, exhaust vacation, or be paid in a lump sum up to a maximum of 240 hours. If the employee is FLSA non-exempt, any accumulated compensatory time may also be exhausted prior to exhausting leave or may be paid in a lump sum for accumulated vacation.⁷

⁵ This section and below is written by First Lieutenant Tara Buckles. Tara, a life member of ROA, is a First Lieutenant in the Marine Corps. Tara holds a B.S. in Business Administration with a second major in Public Policy from the University of North Carolina at Chapel Hill. She graduated cum laude from the University of Pittsburgh School of Law in May 2022 and sat for the Texas bar exam. After passing the bar exam, she will go on active duty in the Marine Corps. Military title is used for identification only. The views expressed in this article are the views of the author, and not necessarily the views of the Marine Corps, the Department of the Navy, the Department of Defense, or of the U.S. Government.

⁶ 25 N.C. ADMIN. CODE 1E.0805 (2022).

⁷ 25 N.C. ADMIN. CODE 1E.0809 (2022).

Access the North Carolina General Statutes 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 North Carolina General Statutes for yourself online, for free, at <https://www.ncleg.gov/Laws/GeneralStatutes>. To find section 127A-116 discussed in this article, follow the link and type “127A-116” into the Citation Lookup bar, and click “Get PDF”. You can find a public version of the entirety of the North Carolina Administrative Code for yourself online, for free, at <http://reports.oah.state.nc.us/ncac.asp>. To find the sections discussed in this article, follow the link and select “Title 25 State Human Resources” → “Chapter 01 Office of State Human Resources” → Scroll to “Subchapter 1E Employee Benefits” → select the relevant section.

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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 eight⁸ 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.

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

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 20002⁹

⁹ You can also contribute on-line at www.roa.org.