

**NJ-2021-LV<sup>1</sup>**  
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## **Paid Military Leave for Employees of the State of New Jersey**

By CAPT Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

1.18: USERRA and Other Laws

2.0: Paid Leave

New Jersey Annotated Statutes section 38:23-4 provides as follows concerning reemployment rights of persons who leave state or local government jobs for military service:

Every person holding office, position or employment, other than for a fixed term or period, under the government of this State or of any county, municipality, school district or other political subdivision of this State, or of any board, body, agency or commission of this State or any county, municipality or school district thereof, who after July first, one thousand nine hundred and forty, has entered, or hereafter shall enter, the active military or naval service of the United States or the National Guard, in time of war or an emergency, including a state emergency, or for or during any period of training, or

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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](mailto: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.

pursuant to or in connection with the operation of any system of selective service, or who, after July first, one thousand nine hundred and forty, has entered or hereafter, in time of war, shall enter the active service of the United States Merchant Marine, or the active service of the Women's Army Auxiliary Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy, shall be granted leave of absence for the period of such service and for a further period of three months after receiving his discharge from such service. If any such person shall be incapacitated by wound or sickness at the time of his discharge from such service, his leave of absence shall be extended until three months after his recovery from such wound or sickness, or until the expiration of two years from the date of his discharge from such service, whichever shall first occur.

In no case shall such person be discharged or separated from his office, position or employment during such period of leave of absence because of his entry into such service, or because of reasons of economy or efficiency or other related reason if entry into active military service in the Armed Forces of the United States, or the National Guard, was in time of war or an emergency, including a state emergency. During the period of such leave of absence such person shall be entitled to all the rights, privileges and benefits that he would have had or acquired if he had actually served in such office, position or employment during such period of leave of absence except, unless otherwise provided by law, the right to compensation. Such leave of absence may be granted with or without pay as provided by law. Such person shall be entitled to resume the office, position or employment held by him at the time of his entrance into such service, provided he shall apply therefor before the expiration of his said leave of absence. If the employer's circumstances have so changed for reasons of economy or efficiency or other related reason as to make it impossible or unreasonable for such person who entered service in time of war or other emergency to resume the office, position or employment held prior to entrance into such service, the employer shall restore such person to a position of like seniority, status and pay, or any position available, if requested by such person, for which the person is able or qualified to perform the duties. Upon resumption of his office, position or employment, the service in such office, position or employment of the person temporarily filling the same shall immediately cease. No person who, after entry into such service, shall have been separated from any such service by a dishonorable discharge shall be entitled to any of the rights, privileges or benefits herein conferred.<sup>3</sup>

This section of New Jersey law must be read together with the federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA is a floor and not a ceiling on the employment and reemployment rights of veterans and Reserve Component personnel. USERRA does not supersede a state law that provides greater or additional rights.<sup>4</sup>

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<sup>3</sup> N.J. STAT. ANN. § 38:23-4 (2022).

<sup>4</sup> 38 U.S.C. 4302(a).

USERRA supersedes a state law that purports to limit USERRA rights or that imposes an additional prerequisite on the exercise of USERRA rights.<sup>5</sup>

New Jersey Annotated Statutes section 38:23-1 provides as follows concerning the right of public employees to 30 days of paid military leave per year:

- a. A permanent or full-time temporary officer or employee of the State or of a board, commission, authority or other instrumentality of the State, or of a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve, United States Air Force Reserve or United States Marine Corps Reserve, or other organization affiliated therewith, including the National Guard of other states, shall be entitled, in addition to pay received, if any, as a member of a reserve component of the Armed Forces of the United States, to leave of absence from his or her respective duty without loss of pay or time on all work days on which he or she shall be engaged in any period of Federal active duty, provided, however, that such leaves of absence shall not exceed 30 work days in any calendar year. Such leave of absence shall be in addition to the regular vacation or other accrued leave allowed such officer or employee. Any leave of absence for such duty in excess of 30 work days shall be without pay but without loss of time.
- b. Notwithstanding subsection a. of this section, a full-time temporary officer or employee who has served under such temporary appointment for less than one year shall receive for the service hereinabove described leave without pay but without loss of time.<sup>6</sup>

Please note that the Legislature forgot to include the Coast Guard Reserve. New Jersey needs to amend section 38:23-1 to add the Coast Guard Reserve. Also, please note that Congress recently created the United States Space Force as the sixth armed force and the Space Force Reserve as the eighth reserve component of the armed forces. Instead of listing the reserve components, New Jersey should simply refer to “reserve components of the armed forces as defined by federal law.”

New Jersey Annotated Statutes section 38:23-3 provides as follows concerning the right of public employees to differential pay when they are away from their civilian jobs for military service:

Any officer, department, institution, committee, commission or other body of the state or any subdivision or municipality thereof, may pay in his or its discretion the whole or a part of the salaries or compensation of their employees or attaches during the time they are engaged in a branch of the military or naval service of the national government or of this state.

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<sup>5</sup> 38 U.S.C. 4302(b).

<sup>6</sup> N.J. STAT. ANN. § 38:23-1 (2022).

No greater portion of the salary or compensation of a commissioned officer as an employee of a department of the state or municipal government shall be paid to him under this section than will, when added to his salary as such commissioned officer, equal the amount paid to him by the state or municipal department before entering the military or naval service.<sup>7</sup>

### **Meaning of a “work day”<sup>8</sup>**

The statute itself does not define the term “work day” and how it is to be calculated in terms of paid military leave. This issue was addressed by the New Jersey Superior Court Appellate Division in *City of Perth Amboy v. Perth Amboy Police Benevolent Ass’n, Local 13*, 2019 N.J. Super. Unpub. LEXIS 1639. This case explained:

N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1 entitle public employees to leave for specified periods without a loss in pay or time for various types of military duty. Neither statute, however, specifies how pay and time for military leave is to be calculated. The statutes, therefore, do not preempt negotiation of the calculation method to be used to fulfill the statutory objectives. There is no express, specific, and comprehensive indication in the statutes that the Legislature intended to exclude the topic from collective bargaining

With this case in mind, it is best to look at your own employment contract, collective bargaining agreement, or local employee manual to see what agreement has been made. As of December 2022, there have been no legislative clarifications or opinions from the New Jersey Attorney General providing state-wide clarification.

### **Access the New Jersey Annotated 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 New Jersey Annotated Statutes for yourself online, for free, at <https://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>. To access Section 38:23 discussed in this article, click on the arrow next to the file labeled “New Jersey Statutes (Unannotated)” → click on the arrow next to the file labeled “New Jersey

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<sup>7</sup> N.J. STAT. ANN. § 38:23-3 (2022).

<sup>8</sup> This section 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.

General and Permanent Statutes" → click on the arrow next to the file labeled "Title 38 Militia"  
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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.

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1 Constitution Ave. NE  
Washington, DC 20002<sup>10</sup>

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<sup>9</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>10</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).