

Paid Military Leave and Employment Preference for Oregon Public Employees

By First Lieutenant Tara Buckles², USMCR

1.8: USERRA and Other Laws

2.0: Paid Leave

Paid Military Leave

Oregon Annotated Statutes, section 408.290 provides for 15 days of paid leave as follows for employees of the state or its political subdivisions:

- (1) Except as provided in subsection (2) of this section, for initial active duty for training and for all periods of annual active duty for training as a member of the National Guard, National Guard Reserve or of any reserve component of the Armed Forces of the United States or of the United States Public Health Service, any officer or employee of the state, or of any county, municipality or other subdivision of the state, is entitled, upon application therefor, to a leave of absence from duties for a period not exceeding 15 days in any one training year, without loss of time, pay or regular leave and without impairment of efficiency rating or other rights or benefits to which the officer or employee is entitled.
- (2) Unless the officer or employee has been employed by the state or by any county, municipality or other political subdivision of the state for a period of six months next preceding application, no officer or employee is entitled to receive pay for any period during which the officer or employee is on military leave.

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. 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 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.

(3) As used in this section, “training year” means the federal fiscal year for any particular unit of the National Guard or a reserve component.³

This statute itself does not provide a definition of “days” that can be used to determine which days of military leave are eligible for paid leave. However, the Court of Appeals of Oregon heard a case in 1978 in which it explained that “a public employee is entitled to only one military leave for a period of not more than 15 consecutive calendar days without loss of salary or other rights and benefits.”⁴ In that case, an employee served on active duty with the Oregon Air National Guard for three five-day periods, Monday through Friday. His employer paid his wages for 11 days for the period covering the first 15 days he was gone, but declined to pay him for an additional four days that occurred after the initial 15 day period.⁵

For example, based on this ruling, it would seem that if Cpl. Jones had 5 days of leave in January, 5 days of leave in July, and 5 days of leave in November, that he would only be able to receive paid leave for one 5 day period. The court in Smith also noted that there are multiple Oregon Attorney General Opinions and pieces of legislative history that support this approach.⁶

The Oregon Annotated Statutes section 408.240 (updated in September 2021) provides for reemployment of servicemembers and programs for supplemental pay:

(1)

(a) Whenever a public officer or employee leaves a position, whether voluntarily or involuntarily, in order to perform military duty, the office or position may not become vacant, nor shall the officer or employee be subject to removal as a consequence of leaving the position. Unless the officer or employee dies, resigns or is relieved or discharged from such duty under other than honorable conditions, during the term for which the officer or employee was elected, appointed or employed, the officer or employee shall be considered absent on leave until release from active service has permitted the officer or employee to resume the duties of the office or position.

(b) While absent on leave, a public officer or employee may, but is not absolutely entitled to, receive the pay or other emolument of the office or position, and shall not become liable, as an officer or employee, on an official bond or otherwise, for the acts or omissions of any other person.

(2) Subsection (1)(a) of this section does not apply unless the officer or employee, upon the termination of military duty, is qualified to perform the duties of the office or position, and makes application within 90 days after the officer or employee is relieved

³ OR. REV. STAT. § 408.290 (2022).

⁴ *Smith v. School Dist.*, 34 Ore. App. 424 (Or. Ct. App. 1978).

⁵ *Id.*

⁶ *Id.*

from military duty, or from hospitalization continuing after discharge for a period of not more than one year. If the officer or employee is not qualified to perform the duties of the office or position by reason of the officer's or employee's service, but is qualified to perform the duties of any other public position, the officer or employee shall be restored to the other position, the duties of which the officer or employee is qualified to perform, as will provide the officer or employee like seniority, status and pay, or the nearest approximation thereof, consistent with the circumstances in the case.

(3) Except as otherwise provided in this subsection, subsection (1) of this section does not apply if the total of the officer's or employee's military duty exceeds five years. Subsection (1) of this section is applicable with regard to military duty that exceeds five years if the period of additional duty was:

- (a) Imposed by law;
- (b) Due to inability of the officer or employee to obtain orders relieving the officer or employee from active duty;
- (c) Voluntary service overseas; or
- (d) Voluntary service within the United States during or in response to an emergency or disaster declared by local, state or federal government.

(4) Notwithstanding subsection (1) of this section:

(a) The State of Oregon shall continue coverage under an employer-sponsored health plan to a public officer or employee of the State of Oregon and any other individual provided coverage under the officer's or employee's plan on the day before the date the officer or employee goes on leave for a period not exceeding a total of 24 months while the public officer or employee is absent on leave.

(b) An employer other than the State of Oregon may provide coverage under an employer-sponsored health plan to an officer or employee and any other individual provided coverage under the officer's or employee's plan on the day before the date the officer or employee goes on leave for the period during which the officer or employee is absent on leave.

(5)

(a) The State of Oregon, a county, a municipality or another political subdivision of the state may establish and administer a donated leave program that:

(A) Allows an officer or employee who is absent on leave to receive donated leave; and

(B) Allows an officer or employee to voluntarily donate vacation time to an eligible officer or employee who is absent on leave.

(b) An officer or employee who is absent on leave and who receives donated leave under paragraph (a) of this subsection may receive an amount of donated leave that supplements any compensation received for performing military duty, but may not receive more than the amount of base salary the officer or

employee was earning on the date the officer or employee began the leave of absence.

(c) This subsection does not apply to a leave of absence under ORS 408.290.

(6) The State of Oregon, a county, a municipality or another political subdivision of the state may establish and administer a program that allows an officer or employee who is absent on leave to receive an amount of pay or other emolument that supplements and exceeds any compensation received for performing military duty, provided the amount received by the officer or employee under this subsection does not exceed the amount of base salary the officer or employee was earning on the date the officer or employee began the leave of absence.⁷

Section 408.240 must be read together with the federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁸ USERRA applies to state and local governments, private employers, and the Federal Government. USERRA accords the right to unpaid but job-protected military leave to persons who have left civilian jobs to perform voluntary or involuntary service in the uniformed services, as defined by USERRA.

USERRA is a floor and not a ceiling on the employment and reemployment rights of veterans and Reserve and National Guard personnel. USERRA does not supersede a state law that provides greater or additional rights.⁹ However, USERRA supersedes a state law that purports to limit USERRA rights or that imposes an additional prerequisite on the exercise of USERRA rights. Here, subsections (2) and (3) appear to run afoul of USERRA in regards to the time required to apply for reemployment and the five year limit on service.

Initial Employment Preference

Oregon also provides for veterans' preference in obtaining initial public employment:

(1) A public employer shall grant a preference to a veteran or disabled veteran who applies for a vacant civil service position or seeks promotion to a civil service position with a higher maximum salary rate and who:

(a)

- (A) Successfully completes an initial application screening or an application examination for the position; or
- (B) Successfully completes a civil service test the employer administers to establish eligibility for the position; and

⁷ OR. REV. STAT. § 408.240 (2022).

⁸ 38 U.S.C. 4301-35.

⁹ 38 U.S.C. 4302(a).

(b) Meets the minimum qualifications and any special qualifications for the position.

(2) The employer shall grant the preference in the following manner:

(a) For an initial application screening used to develop a list of persons for interviews, the employer shall add five percentage points to a veteran's score and 10 percentage points to a disabled veteran's score.

(b) For an application examination, given after the initial application screening, that results in a score, the employer shall add the preference to the total combined examination score without allocating the preference to any single feature or part of the examination. The employer shall add five percentage points to a veteran's score and 10 percentage points to a disabled veteran's score.

(c) For an application examination that consists of an interview, an evaluation of the veteran's performance, experience or training, a supervisor's rating or any other method of ranking an applicant that does not result in a score, the employer shall give a preference to the veteran or disabled veteran. An employer that uses an application examination of the type described in this paragraph shall devise and apply methods by which the employer gives special consideration in the employer's hiring decision to veterans and disabled veterans.

(3) Preferences of the type described in subsection (1) of this section are not a requirement that the public employer appoint a veteran or disabled veteran to a civil service position.

(4) A public employer shall appoint an otherwise qualified veteran or disabled veteran to a vacant civil service position if the results of a veteran's or disabled veteran's application examination, when combined with the veteran's or disabled veteran's preference, are equal to or higher than the results of an application examination for an applicant who is not a veteran or disabled veteran.

(5) If a public employer does not appoint a veteran or disabled veteran to a vacant civil service position, upon written request of the veteran or disabled veteran, the employer, in writing, shall provide the employer's reasons for the decision not to appoint the veteran or disabled veteran to the position. The employer may base a decision not to appoint the veteran or disabled veteran solely on the veteran's or disabled veteran's merits or qualifications with respect to the vacant civil service position.

(6) Violation of this section is an unlawful employment practice.

(7) A veteran or disabled veteran claiming to be aggrieved by a violation of this section may file a verified written complaint with the Commissioner of the Bureau of Labor and Industries in accordance with ORS 659A.820.

(8) For purposes of this section, “disabled veteran” includes a person who is receiving service-connected compensation from the United States Department of Veterans Affairs under 38 U.S.C. 1110 or 1131.¹⁰

In order to be eligible for the benefits afforded under section 408.230, a veteran must meet the eligibility requirement provided in section 408.235:

(1) A veteran is eligible to use the preference provided for in ORS 408.230 for a civil service position for which application is made at any time after discharge or release from service in the Armed Forces.

(2) An individual is treated as a veteran for purposes of the preference provided for in ORS 408.230 if the individual:

(a) Meets the definition of “veteran” under ORS 408.225 except for the requirement that the individual was discharged or released under honorable conditions; and

(b) Submits a certification to the public employer that the individual is expected to be discharged or released from active duty under honorable conditions not later than 120 days after the submission of the certification.

(3) An individual is treated as a disabled veteran for purposes of the preference provided for in ORS 408.230 if the individual:

(a) Meets the definition of “veteran” under ORS 408.225 except for the requirement that the individual was discharged or released under honorable conditions; and

(b) Submits a certification to the public employer that the individual is expected to be medically separated from active duty under honorable conditions not later than 120 days after the submission of the certification.¹¹

The definition of “veteran” referenced above is as follows:

(f) “Veteran” means a person who:

¹⁰ OR. REV. STAT. § 408.230 (2022).

¹¹ OR. REV. STAT. § 408.235 (2022).

(A) Served on active duty with the Armed Forces of the United States:

- (i) For a period of more than 90 consecutive days beginning on or before January 31, 1955, and was discharged or released under honorable conditions;
- (ii) For a period of more than 178 consecutive days beginning after January 31, 1955, and was discharged or released from active duty under honorable conditions;
- (iii) For 178 days or less and was discharged or released from active duty under honorable conditions because of a service-connected disability;
- (iv) For 178 days or less and was discharged or released from active duty under honorable conditions and has a disability rating from the United States Department of Veterans Affairs; or
- (v) For at least one day in a combat zone and was discharged or released from active duty under honorable conditions;

(B) Received a combat or campaign ribbon or an expeditionary medal for service in the Armed Forces of the United States and was discharged or released from active duty under honorable conditions; or

(C) Is receiving a nonservice-connected pension from the United States Department of Veterans Affairs.¹²

Access the Oregon 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 Oregon Annotated Statutes for yourself online, for free, at

https://www.oregonlegislature.gov/bills_laws/pages/ors.aspx. To access the sections discussed in this article, select “Volume 10, Highways, Military” → “Title 33” → “Chapter 48” → Scroll to the relevant section. Do note that this online database is only updated every two years. However, there are instructions on that page for how to access the most up-to-date version of the law.

¹² OR. REV. STAT. § 408.225(f) (2022).

Please join or support ROA

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 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.