

## Military leave for Public Employees in South Dakota

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1.8: USERRA and Other Laws

2.0: Paid Leave

South Dakota does not have a law currently on the books that addresses military leave. The prior statute was repealed effective July 1, 2012 and has not been replaced.<sup>3</sup> There is one section of the South Dakota Administrative Code that discusses military service leave, but it is essentially useless:

An employee may use up to 40 hours of accumulated sick leave annually for any military-related service as a member of the military reserve or national guard.<sup>4</sup>

A similar section of the South Dakota Administrative Rules provides:

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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. 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.

<sup>3</sup> The law that was repealed was Section 3-6-22 of the South Dakota Codified Laws.

<sup>4</sup> S.D. ADMIN. R. 55:09:04:05 (2022).

Military leave for training may not be granted to an employee who is on vacation leave and terminating employment. Military leave for training may not be accumulated. A temporary employee is not entitled to military leave for training. A new employee on six months probationary status is not considered a temporary employee. The appointing authority shall maintain a record of military leave taken with the regular vacation and sick leave account of each state employee. An employee requesting military leave for training shall obtain a written order or letter from the commander of the employee's reserve or national guard unit showing the dates of the training period. This notice shall be submitted to the appointing authority 15 days before the date of the employee's departure for training.<sup>5</sup>

These sections are essentially meaningless because a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA) gives employees the right to time off from their civilian jobs for voluntary or involuntary service in the uniformed services, including National Guard and Reserve training, and the right to time off without pay under USERRA is essentially unlimited. The state cannot mandate that an employee use their accumulated sick leave when on military leave; however the employee could choose to do so under this provision.<sup>6</sup>

USERRA applies to state and local governments, as well as private employers and the Federal Government. Section 4302(a) of USERRA [38 U.S.C. 4302(a)] provides that USERRA does not override or supersede a state law that provides greater or additional rights. For example, most states provide, by state law, for a limited period (usually 15-30 days) of paid military leave for state and local government employees who are members of the National Guard or Reserve.

Because states are not required by USERRA to grant paid military leave at all, it is permissible for a state to limit the duration of the paid military leave period, but a state has no constitutional authority to limit the duration of an unpaid military leave under USERRA. National Guard and Reserve training periods frequently last longer than 15 days per year, and when National Guard and Reserve personnel are mobilized or volunteer for active duty, it is usually for a year or more.

Section 4302(b) of USERRA [38 U.S.C. 4302(b)] provides that USERRA overrides a state law that purports to limit USERRA rights or that imposes an additional prerequisite upon the exercise of those rights. Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause") provides that federal law trumps conflicting state law.<sup>7</sup>

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<sup>5</sup> S.D. ADMIN. R. 55:09:04:08 (2022).

<sup>6</sup> Under section 4316(d) of USERRA, the employee has the option to exhaust all or part of his or her annual leave or vacation balance during the period of uniformed service. Under USERRA, the employee is not entitled to use sick leave during the period of service.

<sup>7</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

Outside of these two administrative rules, there is a section of the South Dakota employee handbook that discusses military leave:

Permanent employees are entitled to Military Training Leave of up to 15 days per calendar year. Employees requesting military leave for training must obtain a written order from the commander of their reserve or National Guard unit indicating dates of the training period. This notice is to be submitted to your supervisor at least 15 calendar days prior to the date of your departure for training.<sup>8</sup>

This paragraph is poorly written and vague. It apparently means that a state employee is entitled to 15 days of paid military leave for training as a member of the National Guard or Reserve, but that is not clear. As stated above, under USERRA,<sup>9</sup> employees of states, political subdivisions of states, the Federal Government, and private employers are entitled to essentially unlimited unpaid but job-protected leaves of absence for service in the uniformed services, including voluntary or involuntary active duty as well as training duty in the National Guard or Reserve.

To the extent that the quoted paragraph of the Employee Handbook purports to apply to unpaid military leave, it is void for several reasons:

- a. South Dakota has no right to limit unpaid military leave to 15 days per year.
- b. South Dakota has no right to limit unpaid military leave to "permanent employees."
- c. South Dakota has no right to limit unpaid military leave to training duty in the National Guard or Reserve.
- d. South Dakota has no right to demand that the employee provide at least 15 days of notice.
- e. South Dakota has no right to demand that the employee provide a written military order signed by the employee's military commander.

To the extent that South Dakota is providing paid military leave to its employees who are members of the National Guard or Reserve, South Dakota can put these conditions upon the right to paid leave under state policy but not upon the right to unpaid but job protected leave under USERRA.

If this paragraph governs the right to paid military leave under state policy, it should be amended to clarify the meaning of "up to 15 days per calendar day." Does that mean 15 workdays that the employee missed because of military training in the National Guard or Reserve? Do weekends count?

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<sup>8</sup> SOUTH DAKOTA STATE EMPLOYEE HANDBOOK (2022), <https://bhr.sd.gov/Forms/Policies/Handbook.pdf>.

<sup>9</sup> 38 U.S.C. 4301-35.

For example, Josephine Smith is a petty officer in the Navy Reserve and an employee of the State of South Dakota. Her civilian work schedule calls for 40 hours per week, or eight hours per day, Monday through Friday. She does not ordinarily work on Saturdays or Sundays.

Josephine has Navy Reserve annual training orders for 12 days, from Monday, August 7 through Friday, August 18, 2022. She is on annual training duty on Saturday, August 12 and Sunday, August 13, as part of this 12-day annual training tour. If she had not been on Navy Reserve duty for this period, she would not have been expected to work on August 12 or August 13. Do those two days count toward exhausting her entitlement to 15 days of paid military leave? Has she burned up 12 days of the 15-day entitlement, or only ten days?

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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 South Dakota Codified Laws for yourself online, for free, at [https://sdlegislature.gov/Statutes/Codified\\_Laws](https://sdlegislature.gov/Statutes/Codified_Laws). You can check to see if Section 3-6-22 has been reenacted in any way at this link. You can also find the most recent State Employee Handbook by following the first link at this page: <https://bhr.sd.gov/policies-forms/>. The South Dakota Administrative Rules can be found at: <https://sdlegislature.gov/Rules/Administrative>. Scroll down to “55:09” and select the relevant section.

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<sup>10</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>11</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).