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Paid Military Leave for Public Employees in Tennessee

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

1.8: USERRA and Other Laws

2.0: Paid Leave

Tennessee Code section 8-33-109 provides as follows concerning the right to paid military leave for employees of the state and its political subdivisions:

(a) All officers and employees of this state, or any department or agency thereof, or of any county, municipality, school district, or other political subdivision, and all other public employees of this state who are, or may become, members of any reserve component of the armed forces of the United States, including members of the Tennessee army and air national guard, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave or vacation, impairment of efficiency rating, or any other rights or benefits to which otherwise entitled, for all periods of military service during which they are engaged in the performance of duty or

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.

training in the service of this state, or of the United States, under competent orders; provided, that an officer or employee while on such leave shall be paid salary or compensation for a period, or periods, not exceeding twenty (20) working days in any one (1) calendar year, plus such additional days as may result from any call to active state duty pursuant to § 58-1-106. The military leave herein provided shall be unaffected by date of employment or length of service and shall have no effect on other leaves provided by law, regulation, policy or practice. After the twenty (20) working days of full compensation, any public employer may provide partial compensation to its employees while under competent orders. After the twenty (20) working days of full compensation, members of any reserve component of the armed forces of the United States, including members of the Tennessee army and air national guard, may use up to five (5) days of sick leave in lieu of annual leave for the purposes of not having to take leave without pay.

(b) Notwithstanding subsection (a), after the twenty (20) working days of full compensation, any educator who is a member of any reserve component of the armed forces of the United States, including members of the Tennessee army and air national guard, is authorized, but not required, to use any accumulated sick leave in lieu of annual leave for the purposes of not having to take leave without pay when called into active duty. Nothing in this subsection (b) prohibits an educator from using up to five (5) days of an initial allotment of sick leave pursuant to § 49-5-710(a)(3) in accordance with subsection (a). For purposes of this subsection (b), “educator” has the same meaning as defined in § 49-5-204(b).³

Section 8-33-109 of the Tennessee Code must be read together with the federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁴ USERRA applies to state and local governments as well as the Federal Government and private employers.

Under USERRA, an employee has the right to *unpaid but job-protected* military leave for voluntary or involuntary training or service in the uniformed services.⁵ The right to unpaid military leave under USERRA is essentially unlimited.⁶

USERRA also provides:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.⁷

³ TENN. CODE ANN. § 8-33-109 (2022).

⁴ 38 U.S.C. 4301-35.

⁵ 38 U.S.C. 4312, 4313.

⁶ 38 U.S.C. 4312(h).

⁷ 38 U.S.C. 4316(d).

Under section 4316(d), 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.⁸

USERRA is a floor and not a ceiling on the employment and reemployment rights of veterans and members of the reserve components. USERRA does not supersede a state law that provides *greater or additional rights*.⁹ USERRA supersedes a state law that purports to limit USERRA rights or that imposes additional prerequisites upon the exercise of USERRA rights.¹⁰

Tennessee Code section 8-33-109 provides greater or additional rights--the right to 20 working days of *paid* military leave and the right to use accrued sick leave during the period of service under certain circumstances. Accordingly, this Tennessee law is not superseded by USERRA.

Tennessee Employee Reemployment Statute¹¹

Tennessee Code Section 8-33-102 provides for reemployment after a discharge from service:

Any public employee who leaves a position or who left such position not earlier than June 27, 1950, whether voluntarily or involuntarily, in order to perform military duty, or who was performing military duty on June 27, 1950, and who is relieved or discharged from such duty under conditions other than dishonorable, and makes application for reemployment within ninety (90) days after such employee is relieved from military duty or from hospitalization continuing after discharge for a period of not more than one (1) year shall:

- (1) If still physically 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; or
- (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 such employee is qualified to perform as will

⁸ 20 C.F.R. 1002.153(a).

⁹ 38 U.S.C. 4302(a).

¹⁰ 38 U.S.C. 4302(b).

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provide the employee like seniority, status and pay, or the nearest approximation thereof consistent with the circumstances of the case.¹²

As Capt. Wright discussed in the previous section, these statutes must be read together with USERRA, which is a floor on the rights afforded to servicemembers. Here, this statute purports to limit USERRA by imposing an additional prerequisite on the exercise of USERRA rights. Namely, that a servicemember is entitled to be restored to their position if it exists, even if it is held by someone with greater seniority. An employee also has two years after a hospitalization to reapply for employment. See the ROA Law Center for many articles on the specific rights afforded to eligible servicemembers under USERRA.

Access the Tennessee Code 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 Tennessee Code for yourself online, for free, at <https://www.tncourts.gov/Tennessee%20Code>. To access Sections discussed in this article, click on the link that will take you to LexisNexis. From there, type “Tenn. Code ann. 8-33-109” into the search bar. The code section will immediately populate. Copy this process, exchanging out the numbers as appropriate, to see other sections discussed in this article.

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¹² TENN. CODE ANN. § 8-33-102 (2022).

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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
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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.