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(Updated January 2023 – no changes to law)

Paid Military Leave for State and Local Government Employees in Utah

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1.18: USERRA and Other Laws

2.0: Paid Leave

Employees of the State of Utah are entitled to 15 days of *paid* military leave per year, for training activities in the National Guard or Reserve. Employees of county or municipal governments in Utah may be granted a like amount of paid military leave, at the discretion of the county or municipal government. The Utah Code, section 39-3-2 is as follows:

(1) All state employees who are members of the organized reserve of the United States armed forces, including the National Guard of this state, shall be allowed full pay for all time not in excess of 15 days per year spent on duty at annual encampment or rifle competition or other duties in connection with the reserve training and instruction requirements of the armed forces of the United States, including the National Guard of this state. This leave shall be in addition to any annual vacation leave with pay to which an employee may be entitled.

(2) County and municipal employees who are members of the organized reserve of the United States armed forces, including the National Guard of this state, may be allowed up to full pay for all time not in excess of 15 days per year spent on duty at annual encampment or rifle competition or other duties in connection with the reserve training and instruction requirements of the armed forces of the United States, including the National Guard of this state. *This leave is at the discretion of the employing county or municipality and, if granted, shall be in addition to annual vacation leave with pay.*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.

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³ UTAH CODE ANN. § 39-3-2 (LexisNexis 2022) (emphasis supplied).

Note: The Utah legislature has proposed a bill in 2023 that would renumber and amend the text of this section. The bill is titled "2023 Bill Text UT H.B. 67, UTAH 65TH LEGISLATURE - 2023 GENERAL ASSEMBLY". As of December 2022 it has only been introduced, so please check the status of this bill for the most updated law. If it passes, this section will be renumbered to 71A-8-102.

The Utah Administrative Code, section R477-7-10 also applies to the use of military leave:

Under Section 39-3-2, management shall grant up to 120 hours of paid military leave each calendar year to a benefited or non-benefited employee who is a member of the National Guard or Military Reserves and is on official military orders. Military leave for part-time employees is prorated to be no more than the average hours worked in the last 12 months, or if employed less than 12 months, the average hours worked since the date of hire.

- (1) An eligible employee may use any combination of military leave, accrued leave or leave without pay under Section R477-7-13.
- (2) An eligible employee may only use accrued sick leave if the reason for leave meets the conditions in Section R477-7-4.
- (3) An employee on military leave is eligible for any service awards or non-performance administrative leave the employee would otherwise be eligible to receive.
- (4) An employee shall notify management of official military orders as soon as possible.
- (5) Upon an employee's release from official military orders under honorable conditions, management shall place the employee in a position in the following order of priority.
 - (a) If the period of service was for less than 91 days, management shall place the employee :
 - (i) in the same position the employee held on the date of the commencement of the service in the uniformed services; or
 - (ii) in the same position the employee would have held if the continuous employment of the employee had not been interrupted by the service.
 - (b) If the period of service was for more than 90 days, management shall place the employee:

(i) in a position of like seniority, status, and salary, of the position the employee held on the date of the commencement of the service in the uniformed services; or

(ii) in a position of like seniority, status, and salary the employee would have held if the continuous employment of the employee had not been interrupted by the service.

(c) When a disability is incurred or aggravated while on official military orders, the employing agency shall adhere to the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4301, et seq.

(d) An employee is entitled to reemployment rights and benefits including increased pension and leave accrual to which the employee would have been entitled had the employee not been absent due to military service. An employee entering military leave may elect to have payment for annual leave deferred.

(6) In order to be reemployed, an employee shall present evidence of military service, and:

(a) for service less than 31 days, return at the beginning of the next regularly scheduled work period on the first full day after release from service unless impossible or unreasonable through no fault of the employee;

(b) for service of more than 30 days but less than 181 days, submit a request for reemployment within 14 days of release from service, unless impossible or unreasonable through no fault of the employee; or

(c) for service of more than 180 days, submit a request for reemployment within 90 days of release from service.⁴

This is not to say that an employee is only entitled to be absent 15 days from his or her state job for military training or duty. Under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), an employee is entitled to an essentially unlimited amount of unpaid but job-protected leave from his or her civilian job (federal, state, local, or private sector) for voluntary or involuntary duty or training in the uniformed services.⁵ USERRA does

⁴ UTAH ADMIN. CODE r. 477-7-10 (2022).

⁵ The only limit is USERRA's five-year limit, under 38 U.S.C. 4312(c). There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016).

not supersede a state law that provides *greater or additional rights*. Section 39-3- 2 provides additional rights—the right to *paid* military leave. Thus, section 39-3-2 is not superseded by USERRA.

A second section the Utah Code, section 39-3-1 addresses reemployment:

(1) A public employee, public officer, or legislative employee, as defined in Section 67-16-3, who enters active service in any branch of the armed forces of this state or of the United States shall be granted a leave of absence during that service.

(2)

(a) A person entitled to a leave of absence under this section shall be restored to the same position, or to a position equivalent to the same position, which the person held immediately prior to the commencement of active military service.

(b) A request for restoration of employment under this section must be submitted within 40 days after release from active service.

(c) Restoration of employment shall be made within 20 days after submission of the request to the employer.

(d) A person returning from active military service may not, without cause, be discharged or subjected to reduction of compensation for a period of one year following a return to employment under this section.

(3) A person returning to employment under this section:

(a) shall retain all personal, sick, and other leave to which the person was entitled immediately prior to the commencement of active military service;

(b) shall receive and earn benefits and compensation at a level not less than that to which the person would have been entitled had the officer or employee not been absent due to active military service; and

(c) may not be prejudiced, by the preservice employer or that employer's successor in interest, as to employment, appointment, reappointment, reemployment, or promotion by reason of the employee's active military service.

(4)

(a) No public employee, public officer, or legislative employee may be required to resign from, vacate, or forfeit a governmental office or position as a consequence of entering into active military service.

(b) A person in active military service is not considered to be holding an office or position of trust or employment under the United States government for purposes of determining whether that person is disqualified or prohibited from retaining a position or serving as a public employee, public officer, or legislative employee.

(c) Nothing in this section shall serve to extend a period of employment or term of office beyond that to which the affected person was elected or appointed. A person who is a legislator or public officer for a specific term by virtue of election or appointment is entitled to a leave of absence under this section for a period not to exceed the applicable term.

(5) A person denied restoration of employment or benefits given under this section may petition the district court of the county in which the person resides, or in which the denial occurs, to require the public employer to comply with the provisions of this section without delay. Fees or court costs may not be assessed against the petitioner. The court shall order a speedy hearing in the case and advance it on the calendar so far as reasonably possible. If the court determines that the petitioner is entitled to relief, the court shall order all appropriate relief, to include compensation for loss of wages and benefits and an award of attorneys' fees and costs.⁶

These state laws must be read together with USERRA. 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. Section 2(b) above purports to run afoul of USERRA because given the circumstances, an employee has more than 40 days to apply for reemployment. Under Section 4312(e) of USERRA, a timely application for reemployment is based on how long the employee's period of uniformed service was:

- Less than 31 days → "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence"
- More than 30 days but less than 181 → "submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible"
- More than 180 days → "not later than 90 days after the completion of the period of service"

⁶ UTAH CODE ANN. § 39-3-1 (LexisNexis 2022).

- If the service member is hospitalized or convalescing from an illness or injury incurred in or aggravated during the period of uniformed service → at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer or submit an application for reemployment with such employer. Such period of recovery may not exceed two years. Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

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.⁷ USERRA supersedes a state law that purports to limit USERRA rights or that imposes an additional prerequisite on the exercise of USERRA rights. Therefore, it seems like the requirement to apply within 40 days provides additional rights to servicemembers who have been gone less than 180 days, in which case it does not run afoul of USERRA. However, regarding employees who have been gone longer than 180 days or have been hospitalized, the state law would not be applicable and they would have a full 90 days, or two years, respectively, to reapply.

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Access the Utah 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 Utah Code for yourself online, for free, at <https://le.utah.gov/xcode/code.html>. To access Sections 39-3-1 and 2 discussed in this article, select Title 39 Militia and Armories → Chapter 3 Governmental Employees in Military Service → and select the relevant section. To access the Utah Administrative Code, visit <https://adminrules.utah.gov/public/home>. Once at that page, type "477-7-10" into the search bar. The website will then populate with results. Select the "Government Operations" Agency option. From there, a link to download a PDF of the administrative rule will be available.

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⁷ 38 U.S.C. 4302(a).

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.

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

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

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