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Differential Pay and Military Leave for Public Employees in Wisconsin

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1.18: USERRA and Other Laws

2.0: Paid Leave

Wisconsin Annotated Statutes section 230.315 provides as follows concerning differential pay for state employees who are called to military service:

(1) Subject to sub. (3), a state employee who is activated to serve on military duty in the U.S. armed forces shall be paid his or her state salary, less any military pay and housing allowances that he or she receives, during the period in which the employee is on military duty in the U.S. armed forces, unless the military pay and housing allowances equal or exceed his or her state salary, and shall accumulate sick leave and paid annual leave of absence as though no interruption in service has occurred if all of the following apply:

(a) On or after January 1, 2003, the employee is activated to serve, or is serving, on military duty in the U.S. armed forces, other than for training purposes.

(b) On the date on which he or she is activated, the employee is either a member of the Wisconsin national guard or a member of a reserve component of the U.S. armed forces or is recalled to active military duty from inactive reserve status.

(c) The employee has received a military leave of absence under s. 230.32 (3) (a) or 230.35 (3), under a collective bargaining agreement under subch. V of ch. 111, or under rules promulgated by the division or is eligible for reemployment with

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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the state under s. 321.64 after completion of his or her service in the U.S. armed forces.

(2) Subject to sub. (3), on or after January 1, 2003, a state employee who is required to serve, or who is serving, in the U.S. public health service and who is on detail with any of the U.S. armed forces shall be paid his or her state salary, less any federal pay and housing allowances that he or she receives, during the period in which the employee is detailed for duty with any of the U.S. armed forces, unless the federal pay and housing allowances equal or exceed his or her state salary, and shall accumulate sick leave and paid annual leave of absence as though no interruption in service has occurred.

(3)

(a) Except as provided in par. (b), beginning on the day in which a state employee is activated to serve on military duty in the U.S. armed forces or to serve in the U.S. public health service, the employee shall receive the pay and benefits authorized under sub. (1) or (2) for a period of not more than 179 days. If a state employee is eligible to receive pay and benefits for military service under s. 230.35 (3) (a) or a collective bargaining agreement under subch. V of ch. 111, the state employee shall become eligible to receive the pay and benefits authorized under sub. (1) or (2) only after receiving the pay and benefits for military service under s. 230.35 (3) (a) or a collective bargaining agreement under subch. V of ch. 111.

(b) The governor, by executive order, may extend the period that an employee receives the pay and benefits under par. (a) up to a period of 2 years from the date on which the person is activated to serve on military duty in the U.S. armed forces or to serve in the U.S. public health service. The governor may make up to 3 additional extensions under this paragraph, each of which may not exceed a period of 2 years. Any extension granted by the governor under this paragraph may apply to an individual employee or to a group of employees, as determined by the governor.

(c) No employee who is eligible to receive the pay and benefits under sub. (1) or (2) may receive the pay or benefits for any service in the U.S. armed forces or the U.S. public health service for any such service before January 1, 2003.

(4) An appointing authority shall permit a state employee who is eligible to receive the pay and benefits authorized under sub. (1) or (2) and who has completed his or her duty with the U.S. armed forces or the U.S. public health service to use up to 160 hours of accumulated paid leave before the employee resumes employment with the state. Any accumulated paid leave that is used under this subsection must be used no later than 30 days after the employee has completed his or her duty with the U.S. armed forces or the U.S. public health service. If, after using any such accumulated paid leave, an employee has any accumulated paid leave remaining that was accumulated while on duty with the

U.S. armed forces or the U.S. public health service, the appointing authority shall permit the employee to carry over the leave into the next year for use in that year.³

Section 230.32 provides for an employee's restoration after military leave. However, there are a couple provisions (in italicized font below) that run afoul of USERRA and are therefore void.

(1) Any classified employee of this state, except a limited term employee, who enlists, is ordered or is inducted into active service in the armed forces of the United States or who is requested to work for the federal government during a national emergency or a limited national emergency, shall be restored to the same or similar position in the classified service and his or her employment shall be deemed not to have been interrupted by such leave except for the receipt of pay or other compensation and accumulation of sick leave and vacation for the period of such absence, unless the employee qualifies to receive pay and benefits under s. 230.315, and the employee shall be given all other benefits of seniority, status, pay, pay advancement, performance awards and pension rights under ch. 40 as though the state employment was continuous, if:

(a) The employee presents to the appointing authority a certificate or other evidence that he or she has satisfactorily completed the period of training or service, and discharge is other than dishonorable or other than by reason of the sentence of a general court martial, or other than on the ground of being a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authorities, or other than as a deserter or of an officer by the acceptance of a resignation for the good of the service.

(b) The period of service is not more than 4 years unless involuntarily retained for a longer period.

(c) The employee is still qualified to perform the duties of such position.

(d) The employee makes application for restoration within 180 days after release from such training or services, or hospitalization continuing after discharge because of injuries or sickness resulting from such training or service.

(e) The circumstances of the employing agency have not changed so as to make it impossible or unreasonable to so restore such employee.

(2)

³ WIS. STAT. § 230.315 (2022).

(a) Any employee with permanent status in class who leaves state service for the reasons specified in this section and who has used the yearly vacation in anticipation of a full year's employment is presumed not to have interrupted employment as far as vacation pay is concerned, and any portion of the vacation for which the employee was paid which is unearned at the time of being called to duty may be made up upon return to state service. If the employee does not return to the state service, the employee shall within 2 years after termination of leave repay the state the amount not earned. The application of this provision is retroactive to all state employees called to active duty under P.L. 87-117 (10 USC 263).

(b) Any classified employee who was serving the probationary period, except in the capacity of a substitute, when he or she left state service shall, under this section, be restored to that point of service in the probationary period as though state employment had not been so interrupted.

(c) Any classified employee who had attained restoration rights as a seasonal employee when he or she left state service shall, under this section, be restored to such seasonal position or eligibility as though the service or eligibility had not been so interrupted.

(3)

(a) Any classified employee who leaves state service and enters the armed forces of the United States shall, under this section, be granted written military leave of absence by the appointing authority. Notice of such leave from state service and the terms of any such leave shall be given in writing by the appointing authority to the administrator for purposes of record.

(b) Any classified employee who leaves state service for civilian employment in response to a specific request or order of the federal government or any of its agencies in connection with manpower redistribution and utilization shall, under this section, make written application to the appointing authority for civilian leave of absence presenting such specific request or order of the federal government as supporting evidence. Such civilian leave shall be allowed by the appointing authority and its terms, which shall conform to the rules of the administrator, shall be in writing. Notice of such leave from state service shall be made in writing by the appointing authority to the administrator for purposes of record.

(c) All such military or civilian leaves of absence as heretofore may have been granted are validated and shall be deemed to be sufficient and effective hereunder. Such leaves shall be recorded with the administrator.

(4) Any person appointed to fill the position of an employee on such military or civilian leave shall be designated as a substitute or replacement employee and upon the return and reemployment of the original employee the substitute employee shall be transferred to a similar position with the same employing agency if one is available, or if not, he or she shall be eligible for reinstatement or have the right of restoration in accordance with the rules of the director. The status of any person who is appointed to fill the place of an employee on military or civilian leave under this section shall be governed by the rules of the director pursuant thereto.

(5) The restoration of classified former employees of the state shall be governed by this section and by the rules of the director.

(7) Any employee who is absent from state service because the employee is in active service, as defined in s. 321.65 (1) (a), is entitled to all reemployment rights and benefits provided under s. 321.65.⁴

Section 230.315 must be read together with the federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁵ 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.⁶ USERRA supersedes a state law that purports to limit USERRA rights or that imposes an additional prerequisite on the exercise of USERRA rights.

First, Section 4312(e) of USERRA gives service members who have been hospitalized or convalescing from an illness or injury incurred in or aggravated during the period of uniformed service up to two years to reapply for employment, as opposed to the 180 days in the Wisconsin statute.

Second, Wisconsin purports to limit the amount of time an employee can be on military leave to four years in order to maintain their reemployment rights. However, section 4312(c) of USERRA provides a *five* year limit to protect a service members' reemployment rights. In addition, there are nine exemptions for kinds of service that do not count towards exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of USERRA's five year limit.

⁴ WIS. STAT. § 230.32 (2022).

⁵ 38 U.S.C. 4301-35.

⁶ 38 U.S.C. 4302(a).

Lastly, if the employee is no longer qualified for the position, the employer must take reasonable efforts to help the employee become qualified for the position. 20 C.F.R. § 1002.198 explains this:

§ 1002.198 What efforts must the employer make to help the employee become qualified for the reemployment position?

The employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

(a)

(1) “Qualified” means that the employee has the ability to perform the essential tasks of the position. The employee’s inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

- (i) The employer’s judgment as to which functions are essential;
- (ii) Written job descriptions developed before the hiring process begins;
- (iii) The amount of time on the job spent performing the function;
- (iv) The consequences of not requiring the individual to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

(b) Only after the employer makes reasonable efforts, as defined in § 1002.5(i), may it determine that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.⁷

You can also read more about the application of this provision in Law Review 14003 (January 2014).

Access the Wisconsin 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

⁷ 20 C.F.R. § 1002.198.

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 Wisconsin Statutes for yourself online, for free, at <https://docs.legis.wisconsin.gov/statutes/prefaces/toc>. To access Sections 230.32 and 230.315 discussed in this article, scroll down to the section on “State Personnel” and select “230. State employee relations”. From there, select the section you wish to read.

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

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