

Military Leave for Public Employees in Wyoming

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1.18: USERRA and Other Laws

2.0: Paid Leave

Wyoming Statutes section 19-11-108 provides for paid military leave for employees of the state and its political subdivisions:

(a) Any member of the national guard of any state or United States military forces reserve who is an officer or employee of this state or any political subdivision, municipal corporation or any public agency or entity of the state, including community colleges, shall be given a military leave of absence with pay at the regular salary or wage which the employee normally receives, not to exceed fifteen (15) calendar days in any one (1)

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 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.

calendar year to perform service in the uniformed services in addition to any other leave or vacation time to which the person is otherwise entitled.³

(b) Subject to the conditions prescribed in paragraphs (c)(i) through (v) of this section, any officer or employee of the state or any political subdivision, municipal corporation or public agency of the state who has been employed for one (1) year and who is a member of the national guard of any state or any other component of the military forces of a state, a member of the reserve forces of the United States or who is inducted into the military service of the United States, is entitled to leave of absence from his public office or employment without pay but without loss of seniority, status, efficiency rating, vacation, sick leave or other benefits while he is engaged in active military training or service ordered or authorized by proper authority pursuant to law exceeding fifteen (15) days in any calendar year. Such leave is in addition to any other military leave or vacation time to which the officer or employee may be entitled by law if the required military service is satisfactorily performed, which is presumed unless the contrary is established.

(c) Upon completion of service as provided by subsection (b) of this section, the officer or employee shall be reinstated to the public position held at the time of entry into service or a position of like seniority, status and pay, if available, upon the following conditions:

(i) The position has not been abolished or the term thereof, if limited, has not expired;

(ii) He is not physically or mentally disabled from performing the duties of the position;

(iii) He makes written application for reinstatement to the appointing authority within thirty (30) days following release from military service or within ninety (90) days after discharge from hospitalization or medical treatment which immediately follows the termination of, and results from, the service but not to exceed one (1) year and ninety (90) days after termination of service notwithstanding hospitalization or medical treatment;

(iv) He submits an honorable discharge or other release by proper authority indicating his military service was satisfactory; and

³ This section leaves some ambiguity in terms of what a "calendar day" means. It is not clear whether employees are charged for days they would otherwise have off despite their military service, or whether those days are to be counted.

(v) The military service does not exceed five (5) years plus any period of additional service imposed by law.

(d) Upon reinstatement, the officer or employee has the same rights with respect to accrued and future seniority, status, efficiency rating, vacation, sick leave and other benefits as if he had been actually employed during the time of leave. During the absence, the state of Wyoming or a political subdivision shall discontinue its share of payments for social security, insurance of any type and state retirement unless the employee elects to contribute to the state retirement plan during his absence and the job or office remains open pending his return in which case the state of Wyoming or a political subdivision will likewise contribute its share. No officer or employee reinstated shall be removed or discharged within one (1) year thereafter except for cause, after notice and hearing, but this shall not operate to extend a term of service or office limited by law.

(e) This section shall be liberally construed in favor of the member of the national guard of any state or United States military forces who is an officer or employee of this state or any political subdivision, municipal corporation or any public agency of this state.⁴

Subsection (a) of section 19-11-108 is the only meaningful part of the whole section. Subsection (a) gives public employees in Wyoming the right to 15 days of *paid* military leave per year. The rest of section 19-11-108 simply restates, or in some cases misstates, the rights that these public employees already have under a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA applies to state and local governments, as well as private employers and the federal government.

In at least three respects, section 19-11-108 wrongfully purports to limit USERRA rights. First, this state provision purports to limit reemployment rights to persons who worked for the state or political subdivision employer for at least a year before the period of military service. USERRA has no such requirement—you can start a new job on Monday and get mobilized on Tuesday and have reemployment rights under USERRA. There is, however, a proposed amendment to this statute in 2023 that would make it applicable to employees who have been employed less than a year.

Second, section 19-11-108 provides that the individual does not have the right to reemployment if he or she is physically or mentally disabled from performing the duties of the position of employment. Section 4313(a)(3) of USERRA [38 U.S.C. 4313(a)(3)] applies to the situation of the returning veteran with a service-connected disability, such as loss of a limb or post-traumatic stress syndrome. The employer is required to make reasonable efforts to accommodate the disability in the position of employment that the veteran would have attained if continuously employed. If the disability cannot be reasonably accommodated in that position, the employer must reemploy the disabled veteran in another position for which he or

⁴ WYO. STAT. ANN. § 19-11-108 (2022).

she is qualified, or can become qualified with reasonable employer efforts, and that provides like seniority, status, and pay, or the closest approximation thereof consistent with the circumstances of the case. I invite the reader's attention to Law Reviews 121, 135, 199, and 0640, concerning disabled veterans and USERRA.

Third, Wyoming's section 19-11-108 requires the returning veteran to apply for reemployment within 30 days. Under USERRA, the deadline to apply for reemployment is 90 days after release from a period of service of 181 days or more, and the deadline can be extended up to two years if the veteran is hospitalized or convalescing from a service-connected injury or illness.

Section 4302(b) of USERRA provides that USERRA supersedes a state law that purports to limit USERRA rights or to impose an additional prerequisite upon the exercise of those rights. Article VI, Clause 2 of the U.S. Constitution (commonly referred to as the "Supremacy Clause") provides that federal law trumps conflicting state law.⁵ Section 19-11-108 fails under the Supremacy Clause insofar as it purports to limit USERRA rights.

Additional Benefits for Employees⁶

Wyoming has enacted the following provision, Section 19-11-109, allowing an employee to maintain their civilian insurance plan:

(a) The provisions of this section shall be applicable to any group life insurance, group insurance, family group, blanket and franchise health and accident insurance and health care services plan provided by any private or public employer in this state.

(b) Any employee shall have the right to maintain the insurance or plan coverage enumerated in subsection (a) of this section by furnishing his employer with sums equal to that which would have been deducted from his compensation for such coverage. Upon timely receipt of the employee's contributions required by the insurance policy or plan provisions, the employer shall provide the applicable insurer or health maintenance organization with those contributions plus an amount equal to what the employer would have contributed during the period of service in the uniformed services. The employee shall notify his employer of his election to continue insurance or plan coverage at the time he enters service in the uniformed services.

⁵ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁶ This section and below is written by First Lieutenant Tara Buckles. 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.

(c) Family members or dependent children of an employee who are covered by any insurance policy or plan enumerated in subsection (a) of this section who are subsequently called to service in the uniformed services shall continue to be considered family members or dependents under the provisions of the policy or plan without any lapse of coverage, provided that all required contributions are paid in accordance with the policy or plan provisions.

(d) Any employee who leaves employment to perform service in the uniformed services and who reapplies for coverage after release shall be reinstated, including all of his family members and dependents previously covered, with the group insurance program or medical and health care coverage without any clause or restriction because of a preexisting condition.

(e) This section shall not be construed to invalidate the provision of any life insurance policy excluding or restricting coverage in the event of death.

(f) This section shall not invalidate any legitimate exclusions to coverage of any policy or plan enumerated in subsection (a) of this section.⁷

Wyoming also protects an employee's supplemental earnings benefits under the Worker's Compensation Act:

(a) Any employee receiving supplemental earnings benefits pursuant to the provisions of the Worker's Compensation Act who is called to service in the uniformed services, is found to be medically deployable militarily and is subsequently deployed, shall, at his option, be allowed to suspend any such benefit payments for which he would otherwise be eligible during his period of service in the uniformed services.

(b) The director of the office of workers' compensation of the department of workforce services shall, by rule, prescribe the method by which such employee may request the suspension of benefits.

(c) The employee shall be restored to the same benefits he would have received had he not been called to duty in the uniformed services, provided he makes an application to resume such benefits after his release from service in the uniformed services or release from hospitalization incidental to his service in the uniformed services.⁸

Wyoming also permits an employee to continue their contributions to the employee retirement system during a period of uniformed service:

⁷ WYO. STAT. ANN. § 19-11-109 (2022).

⁸ WYO. STAT. ANN. § 19-11-110 (2022).

Any employee may, at his option, pay the required employee contributions to the retirement system, pension fund or employee benefit plan applicable to his employment during his period of service in the uniformed services if the payment of contributions is permitted by the Internal Revenue Code. The employee shall timely furnish his employer with sums equal to that which would have been deducted from his compensation for retirement system coverage as required under the public retirement system or employee benefit plan. Upon receipt the employer shall remit the employee contributions to the applicable system or plan, including the employer contributions that would have been contributed on behalf of the employee. The employee shall notify his employer of his election to pay the required employee contributions to the applicable system or plan at the time he enters service in the uniformed services.⁹

Access the Wyoming 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 Wyoming Statutes for yourself online, for free, at <https://www.wyoleg.gov/StateStatutes/StatutesConstitution>. Once at that page, select the link for “Wyoming Statutes Annotated” which will take you to LexisNexis. If you have an existing LexisNexis account, you will have to log out in order to use this link. From there, type “WY – Wyoming Statutes Annotated” into the search bar. The select “Title 19 Defense Forces and Affairs” → “Chapter 11 Military Service Member Protections” → select the section you want to read.

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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

⁹ WYO. STAT. ANN. § 19-11-113 (2022).

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 eight¹⁰ 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:

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¹⁰ Congress recently established the United States Space Force as the 8th uniformed service.

¹¹ You can also contribute on-line at www.roa.org.