

LAW REVIEW¹ 23010

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Paid Military Leave for State Employees Is Usually a Matter of State Law, and the State Laws Vary Greatly

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Subject Index Codes:

- 1.1.1.7—USERRA applies to State and local governments
- 1.3.2.10—USERRA’s furlough or leave of absence clause
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- 2.0—Paid military leave for government employees who are Reserve Component service members

Q: I am a Sergeant Major in the Army Reserve and a life member of the Reserve Organization of America.³ On the civilian side, I am a Nevada State Police officer.⁴ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and

¹ Please see www.roa.org/lawcenter. You will find more than 2,000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses’ Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997, and we add new articles each month. I am the author of more than 90% of the articles published so far, but we are always looking for “other than Sam” articles by other lawyers.

² BA 1973, Northwestern University; JD (law degree), 1976, University of Houston, LLM (advanced law degree), 1980, Georgetown University. I served on active duty and in the Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and I currently serve on the Executive Committee and as Chairman of the Membership Committee. I took part in the drafting of USERRA, to replace the 1940 reemployment statute, while employed as an attorney for the United States Department of Labor (DOL). I have also worked with USERRA and the predecessor reemployment statute as a Navy judge advocate, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and as an attorney for the United States Office of Special Counsel (OSC). For six years (June 2009 through May 2015), I was a full-time employee of ROA, serving as the first Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC. My paid ROA employment ended 5/31/2015, but I have continued many of the SMLC functions as a volunteer and ROA member. You can reach me by e-mail at SWright@roa.org.

³ In 2018, the members of the Reserve Officers Association amended the organization’s constitution and made all past and present uniformed services personnel (E-1 through O-10) eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name “Reserve Organization of America” (ROA) to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

⁴ The factual set-up for this article is hypothetical but realistic.

Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve our country in uniform.

I live in Reno, Nevada, which is near the California state line. I drill in a large Army Reserve unit that conducts most of its training at the Army Reserve Center in Reno. Of the members of our unit, about 40% live in Nevada, 40% in California, and the other 20% in various states. A colleague of mine, let us call her Mary Smith, lives in California and is a California State Police officer, and she is a member of the same Army Reserve unit in Reno.

Recently, our unit conducted its annual training at the National Training Center at Fort Irwin, California, and the training lasted for 30 days. Mary received her regular state pay, in addition to her military pay, for the entire 30-day period. I received my regular civilian pay for 15 workdays during the 30-day annual training period.

Why was Mary treated better than me? I would think that a federal law like USERRA would apply the same way all over the country.

Answer, bottom line up front:

Paid military leave for state and local government employees is generally provided by state law, not by USERRA, and some of those state laws are more generous than others. On our website, in the “State Leave Laws” section of our Service Members Law Center page, we have 54 articles about the paid-military-leave laws in each of the 50 states plus the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. We recently updated those articles in November-December 2022, and we included in each article a free link where you can check, next year or in some subsequent year, to see if the law has been amended.

Explanation

Employees of the State of Nevada who serve part-time in the National Guard or Reserve are entitled to 15 working days of paid military leave per fiscal year.⁵ California state employees are entitled to 30 calendar days of paid military leave per fiscal year.⁶

Q: What is the relationship between USERRA (a federal statute) and state statutes dealing with military leave?

A: Under section 4302 of USERRA, this federal law is *a floor and not a ceiling* on the employment and reemployment rights of those who are serving or have served our country in

⁵ NEV REV. STAT. ANN. § 281.145 (LexisNexis 2022).

⁶ CAL. Gov. CODE § 19775.1 (Deering 2022).

the uniformed services. A state law can provide *greater or additional rights* but cannot take away federal statutory rights under USERRA, and a state law cannot impose additional prerequisites on the exercise of federal USERRA rights or the enjoyment of federal USERRA benefits. Section 4302 provides:

Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person under this chapter.⁷

This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of such right or the enjoyment of any such benefit.⁸

Q: Are there any circumstances under which USERRA (the federal law) requires a civilian employer to grant *paid* military leave?

A: Yes, under USERRA's "furlough or leave of absence" clause, which provides as follows:

Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
(A) deemed to be on furlough or leave of absence during such service; and
(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the time of the commencement of such service or established while such person performs such service.⁹

If, and to the extent, that the employer grants paid leave for a comparable period of absence from the civilian job for a nonmilitary reason, like jury service, the employer is required, under USERRA, to grant paid military leave for such a period of uniformed service.¹⁰

Please join or support the Reserve Organization of America (ROA).

⁷ 38 U.S.C. § 4302(a).

⁸ 38 U.S.C. § 4302(b).

⁹ 38 U.S.C. § 4316(b)(1).

¹⁰ See *Travers v. FedEx Corp.*, 8 F.4th 198 (3d Cir. 2021); *White v. United Air Lines*, 987 F.3d 616 (7th Cir. 2021); See generally Law Review 21067 (October 2021).

This article is one of 2,000-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, and we add new articles 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national 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, ESGR volunteers, DOL investigators, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We supply information to service members, without regard to their membership status, or lack thereof, in our organization, but please understand that ROA members, through their dues and contributions, pay the cost of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any of our country’s eight uniformed services,¹¹ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.¹² Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve.

If you are eligible, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

Reserve Organization of America
1 Constitution Avenue NE
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¹¹ Congress recently created the United States Space Force as the eighth uniformed service.

¹² If you are under the age of thirty-five, you can become an associate member for free for five years or until you turn thirty-five, whichever comes first.

¹³ You can also contribute on-line at www.roa.org.