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BLOGS

Leave

USERRA Does Not Require Paid Military Leave...Or Does It?

The landscape of federal military leave law may be shifting. In the past three years, four federal appellate courts have held that an employer may be required to offer paid leave for an employee's military service where the leave is comparable to paid leave offered by the employer for non-military reasons. Employers in these jurisdictions and other jurisdictions should consider reviewing their leave and paid leave policies with legal counsel to assess their potential obligations.

The federal Uniformed Services Employee and Reemployment Rights Act (USERRA) provides, in relevant part:

[A] person who is absent from a position of employment by reason of service in the uniformed services shall be:

1. deemed to be on furlough or leave of absence while performing such service; and
2. 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 commencement of such service or established while such person performs such service.

In a case before the Third Circuit Court of Appeals, *Travers v. Fed. Express Corp.*, 8 F.4th 198 (3d Cir. 2021), the employer, who was sued for allegedly violating USERRA, argued that its policy of offering only unpaid military leave did not treat military members less favorably because its policy did not offer a certain benefit – here, paid military leave – to non-service members while denying that same benefit to service members. The Third Circuit Court of Appeals rejected the employer's argument, reasoning that non-service members would never be eligible for military leave and, therefore, Congress must have intended USERRA to require employers to provide military leave benefits for service members that were equivalent to other non-military forms of leave that the employer made available to non-military employees.

In *White v. United Airlines, Inc.*, 987 F.3d 616 (7th Cir. 2021), the Seventh Circuit Court of Appeals held that USERRA requires employers to maintain a military leave policy that is as generous as the employer's other comparable leave policies –

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even when the other leave policy requires leave to be paid under state or local law. The Court emphasized, however, that the military leave and non-military leave must have a similar duration to be comparable. The Court grounded its opinion in the U.S. Department of Labor's regulations implementing USERRA, which provide that an employee on USERRA leave must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. The regulation provides that, to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors, such as the purpose of the leave and the ability of the employee to choose when to take the leave, should also be considered. Notably, the Seventh Circuit mentioned its deference to the U.S. Department of Labor regulations under the *Chevron* deference standard. Because the U.S. Supreme Court overturned its earlier *Chevron* deference ruling in June of this year in the cases of *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, it is not clear whether earlier appellate rulings turning on the U.S. Department of Labor regulation and deference to that regulation might be revisited.

In *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424 (9th Cir. 2023), the Ninth Circuit Court of Appeals found that, because military leaves may vary in duration, an employer cannot categorically treat all military leaves as unlike other forms of paid leaves just because military leave can sometimes extend up to multiple years. Rather, employers must determine whether a particular employee's use of military leave is comparable to another form of non-military leave on a case-by-case basis. The court explained, "while an 'extended' military leave is not comparable a 'two-day funeral leave, it is entirely possible that a two-day military leave is comparable to a two-day funeral leave." The Court also noted, remanding the case for further proceedings, that comparability of leaves is a factual finding for the jury.

In *Myrick v. City of Hoover, Alabama*, 69 F.4th 1309 (11th Cir. 2023), the Eleventh Circuit Court of Appeals went even further, affirming summary judgment in favor of police officers who served as military reservists. The officers argued they were treated less favorably in violation of USERRA when their employer, a city government, granted them 168 hours of paid military leave, during which they continued accruing other benefits, but offered "paid administrative leave" for other situations – for example, where officers were placed on indefinite leave due to an ongoing investigation concerning the officer – that sometimes lasted up to 16 months. The court explained that USERRA's legislative history shows Congress' intent that employers who offer various amounts of paid leave benefits for non-military leave must afford those on USERRA military leave the *most favorable treatment* under the employers' other leave programs. In this case, because the city had afforded other officers paid administrative leave, plus benefits, for up to sixteen months on multiple occasions, the city was also obligated to pay officers on military leave for up to sixteen months, plus benefits.