
Does USERRA Require Paid Military Leave? Some Federal Courts Seem to Think So

November 2021

Two U.S. Courts of Appeal have ruled that the Uniformed Services Employment and Reemployment Rights Act (USERRA) may require employers to provide paid leave to employees who are absent from work due to protected military leave, despite the absence of any provision in USERRA that specifically requires employers to provide such paid leave.

These federal courts, which cover Illinois, Indiana, Wisconsin, Pennsylvania, New Jersey, Delaware, and the Virgin Islands, have held that USERRA's mandate that military leave be accorded the same "rights and benefits" as comparable nonmilitary leave may require an employer to provide paid military leave to the same extent that it provides paid leave for other absences, such as jury duty and sick leave.

This Aon bulletin discusses:

- The background on USERRA's obligations relating to military leave;
- The recent USERRA litigation;
- Determining whether USERRA leave is comparable to other types of leave; and
- What employers should do now.

Background on USERRA Obligations Relating to Military Leave

USERRA protects employees serving in the uniformed services by:

- Aiming to eliminate or minimize disadvantages to civilian careers and employment that can result from such service;
- Providing for prompt reemployment; and
- Prohibiting discrimination by employers because of such service.

While USERRA applies to all private and public employers regardless of size, USERRA does not by its terms require employers to offer paid military leave. While many employers choose to provide paid leave to employees on USERRA leave, USERRA has not generally been interpreted to require such paid leave.

Recent USERRA Litigation Holds Paid Leave Is a 'Right or Benefit' Under USERRA

Two federal Courts of Appeal have interpreted Section 4316 of USERRA as requiring paid military leave, depending on employer policies and practices for other leaves of absence. USERRA Section 4316 states that an employee on leave under USERRA is entitled to the same non-seniority “rights and benefits” provided to other employees on leave who have similar seniority, status, and pay. USERRA defines the term “**rights and benefits**” to include any “advantage, profit, privilege, gain, status, account, or interest” that accrues by employment contract or employer policy, plan, or practice.

The Third and the Seventh Circuit Courts of Appeal have interpreted the phrase “rights and benefits” in USERRA to include the right to paid leave, at least to the extent that the employer offers paid leave for other “comparable” short-term absences such as jury duty, bereavement leave, or sick leave. Plaintiffs in these cases challenged employer policies that provided paid leave for some short-term absences — such as jury duty, bereavement, or sick leave — but not for short-term military service. The plaintiffs argued that paid leave was a “right and benefit” protected by USERRA and that the employer’s failure to provide paid leave for employees on short-term military service violated USERRA.

In *White v. United Airlines*, the Seventh Circuit ruled that paid leave fell within the set of “rights and benefits” protected by USERRA and remanded the case for the district court to determine whether any of the paid leave provided by United Airlines is comparable to military leave. Similarly, in *Travers v. Fed. Express Corp.*, the Third Circuit applied the same reasoning and held that USERRA directs employers to provide paid leave to employees on military leave when the employer does so for other types of comparable leave. Following remand, the plaintiffs in these cases will need to convince the district courts that military leave is comparable to other types of paid leave made available by their employers.

One large employer recently received final approval to settle a similar class action suit. In *Tsui v. Walmart Inc.*, from the U.S. District Court for Massachusetts, plaintiffs alleged a violation of USERRA because the retailer provided fully paid leave for jury duty and bereavement leave but did not provide fully paid leave for short-term military leave (i.e., leave lasting 30 days or fewer). As part of the settlement, Walmart will pay between \$10 and \$14 million in compensation. Walmart established a new military leave of absence policy in 2021 that provides fully paid leave for employees who take up to 30 days of military leave per calendar year, and differential pay after 30 days for up to 12 months.

Determining Whether USERRA Leave Is ‘Comparable’ to Other Types of Leave

Department of Labor regulations identify several factors that can determine whether two types of leave are comparable, including the duration of the leave (which might be the most significant factor), the purpose of the leave, and the employee’s ability to choose when to take the leave. A U.S. District Court recently applied these factors in *Clarkson v. Alaska Airlines, Inc.* earlier this year.

In *Clarkson*, the court determined that jury duty, bereavement, and sick leave were not comparable to military leave, primarily emphasizing significant differences in both the longest and average duration of leave and frequency of usage. The court determined that a significant purpose of military leave was to “allow employees to pursue a parallel career” separate from the airline, in contrast to the purpose of jury duty, bereavement, or sick leave. The *Clarkson* court also determined that employees taking reserve leave exercise some ability to schedule their leave, which is less likely to occur for the other

types of leave. Finally, the *Clarkson* court found that the airline automatically granted military leave, while other types of paid leave were subject to approval.

What Employers Should Do Now

Determining comparability requires a fact-specific analysis of the employer's compensation policies and practices and could also depend on usage patterns of its employee population.

Employers in the states where these rulings apply should review their military leave policies and other leave policies to consider potential risk under USERRA if there are any disparities. In particular, treatment of short-term military leave should be compared to other leaves that are typically of shorter duration, such as jury duty, bereavement leave, union duty leave, and sick leave.

Employers should also continue to monitor developments in USERRA litigation, especially in the Third, Seventh, and Ninth Circuits. *Clarkson* has been appealed to the Ninth Circuit, while *White* and *Travers* have been remanded to district courts within the Seventh and Third Circuits, respectively.

Resources

White v. United Airlines is available [here](#).

Travers v. Fed. Express Corp. is available [here](#).



About Aon:

[Aon plc](#) (NYSE: AON) exists to shape decisions for the better — to protect and enrich the lives of people around the world. Our colleagues provide our clients in over 120 countries with advice and solutions that give them the clarity and confidence to make better decisions to protect and grow their business.

Follow Aon on [Twitter](#) and [LinkedIn](#). Stay up-to-date by visiting the [Aon Newsroom](#) and sign up for News Alerts [here](#).