Does USERRA Require Paid Leave for Service in the Military and Reserves? The Potential Answer May Surprise You.

Dani Williams

Most employers are well aware that the Uniform Services Employment and Reemployment Rights Act, ("USERRA") requires businesses to grant protected leave to employees called to active duty or engaged in reserve training. However, most employers have only provided unpaid leave, assuming that USERRA did not require paid leave to employees who may be gone for lengthy periods, and who receive pay from the military while on leave. One employer in Pennsylvania was unpleasantly surprised when a federal Court of Appeals ruled that it may in fact be required to provide paid leave for shorter term military leave, contrary to its policy. *Travers v. Federal Express Corporation*, 8 F.4th 198 (3rd Cir. 2021).

Employers have long argued, with some support at the federal district court level, that USERRA did not require paid leave because (1) such paid leave is not a "right and benefit" as understood under USERRA, and (2) such leave is not "comparable" to other forms of leave for which the employer does provide pay. In *Travers*, the federal district court initially agreed with the first line of argument, and held that FedEx was not required to provide paid military leave, even though it offers other forms of paid leave. However, the Third Circuit reversed, based on its reading of USERRA's language stating that employees taking military leave are "entitled to such other rights and benefits" provided to employees of similar status who take leave under any applicable "contract, policy, practice or plan."

FedEx argued that the "rights and benefits" that it offers to all employees should be classified by type, such as military leave, paid sick leave, or paid jury duty leave, and that it was not in violation of USERRA because it does not offer "paid military leave" to any employee. Applying logical reasoning that summons memories of the LSAT, the Court instead classified employees absent on military leave as Group 1 and employees absent on any other type of leave as Group 2. It reasoned that the leave itself cannot be the right or benefit because the words "rights and benefits" are qualified by "other." It concluded that "absence from the job" is common to both groups, and therefore "[s]omething the employer offers to Group 2 but denies to Group 1 becomes the comparator for a USERRA differential treatment claim." Because that something includes pay, the Court reversed on FedEx's Motion to Dismiss and remanded the case for further proceedings. The parties had not yet raised the factual issue of whether military leave was comparable to FedEx's other forms of leave.

The Third Circuit is not alone in concluding that pay is one of the "rights and benefits" that USERRA may require employers to provide. However, the Seventh Circuit, while arriving at the same

conclusion in *White v. United Airlines, Inc.*, 987 F.3d 616 (2021), touched on the comparability issue that the Third Circuit did not reach. The Court noted that the district court's premature decision left open the question of whether "any leave of absence for which his employer provides paid leave is comparable to any given stretch of military leave," pointing to three factors published by the Department of Labor in its implementing regulations, and remanded the case for further proceedings.

The issue of whether other paid leave is "comparable" to military leave is a factual inquiry, on the basis of which the Ninth Circuit decided the recent case of *Clarkson v. Alaska Airlines, Inc.,* 59 F.4th 424 (9th Cir. 2023). The Court determined that other types of leave were comparable to short-term military leave periods of thirty days or less. Conversely to the Third and Seventh Circuits, after deciding the comparability issue, the Ninth Circuit remanded to the district court to determine, in the first instance, whether pay is one of the "rights and benefits" guaranteed by USERRA, citing both *Travers* and W*hite.*

These rulings, and the absence of contrary appellate authority in other Circuits, leave employers guessing at whether pay is in fact one of the rights and benefits to which employees taking military leave may be entitled, and also to consider what paid leave policies are comparable. While the Ninth Circuit's holding was limited to thirty days, USERRA provides job protection for leave of up to five years. The limits of what amount of that leave might be comparable for purposes of pay are unknown, considering that it is not uncommon for employers to provide more than four weeks of paid vacation leave, twelve or more weeks of paid parental leave, jury duty leave with no specified duration, and even recent trends toward unlimited leave policies.

One fundamental difference between military leave and other types of leave, not considered by the Ninth Circuit, is that most employees are unable to earn a salary from another source while on leave. This raises the question of whether such leave is truly comparable, or could be made incomparable by specifying that other leave policies do not provide pay when an employee is being paid a wage or salary to perform work for another entity. Given these developments, we recommend that any employer, whose policy is not to provide paid military leave, consult with employment counsel to consider this or other possible revisions to existing non-military leave policies in a manner that creates clear differences from military leave.

Danielle M. Williams
Willcox Savage
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
dwilliams@wilsav.com
(757) 628-5574