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Military Leave – Part One

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❖ Introduction

The [Uniformed Services Employment and Reemployment Rights Act of 1994](#) applies to all public, private, and federal employers. It mandates that returning service members are to be re-employed in the position that they would have attained had they not been absent for military service, with full seniority, status and pay. The USERRA performs four key functions:

1. It guarantees returning veterans a right of reemployment after military service. 38 U.S. Code § 4312.
2. It prescribes the position to which such veterans are entitled upon their return. 38 U.S. Code § 4313.3.
3. It prevents employers from discriminating against returning veterans because of their military service. 38 U.S. Code § 4311.

4. It prevents employers from firing without cause any returning veterans within one year of reemployment. 38 U.S. Code § 4316.

It should be noted that Federal intelligence services, including the FBI, are exempt from the USERRA. [*Dew v. U.S.*](#), #98-6102, 192 F.3d 366, 1999 U.S. App. Lexis 23710, 162 LRRM (BNA) 2327 (2nd Cir.). See [5 U.S. Code § 2302\(a\)\(2\)\(C\)\(ii\)](#).

State and local agencies may not limit the number of employees who choose to serve as military reservists. The Fourth Circuit struck down Baltimore city's limit on number of police officers who could be military reservists and awarded damages to an officer for lost benefits that he would have earned. [*Kolkhorst v. Tilghman*](#), 897 F.2d 1282 (4th Cir. 1990); cert. denied 502 U.S. 1029, 112 S.Ct. 865 (1990).

This is a short summary of federal law, applicable to military reservists. ^[1] State and local laws and collective bargaining agreements may offer additional benefits and protections, but cannot limit federally protected rights.

Part One addresses leave for calls to active service, military training activities and harassment. Part Two discusses the rights and obligations of returning reservists.

❖ **Calls to active service**

- ***Notice***

Persons going on military leave are not required to give their employers notice prior to departure, but may be required to do so to claim any nonfederal benefits not required by U.S. Code, state statutes or local ordinances (such as continued pay differential, if offered).

- ***Earnings***

Employers are not required to continue the pay of a reservist, or pay the differential. Many governmental entities, cognizant of the financial hardships placed on reservists due to home mortgages, car payments and other obligations, have chosen to continue certain benefits and pay wage differentials. This benefit may be created by a statute, ordinance, personnel rules or a collective bargaining agreement.

Since 2009 eligible civilian employees of the federal government receive a supplemental payment equal to the amount by which their civilian basic pay exceeds their military pay and allowances allocable to the given period. ^[2]

Some employers include military housing allowances when computing pay differentials. However, an Ohio arbitrator held that, in the absence of specific language in the bargaining agreement, pay differentials given to sheriff's officers on military leave should include housing allowances in the computation only for those who incur additional housing expense when serving on military leave. [*Franklin Co. Sheriff's Office and FOP L-9*](#), 117 LA (BNA) 1821, FMCS Case #02/05119-6 (Goldberg, 2002).

In granting 15 days of paid military leave a year, the Indiana Legislature intended to treat all public employees equally. Management's policy of paying up to 120 hours of military leave per year, regardless of shift length, treated all public employees the same; management's definition of a "day" as 8 hours did not conflict with state law or treat unfairly firefighters who work 24 hours on, 48 hours off. [*Koppin v. Strode*](#), #49A02-0103-CV-148, 761 N.E.2d 455, 2002 Ind. App. Lexis 29 (Ind. App. 2002).

In Minnesota, public agencies must count time that police officers and firefighters spend on military leave towards their base hours for purposes of computing overtime. State law provides that military duty for public employees shall be without loss of pay. [*Boelter v. City of Coon Rapids*](#), 67 F.Supp.2d 1040, 1999 U.S. Dist. Lexis 14788 (D.Minn. 1999).

Moreover, Minnesota firefighters on military leave are entitled to be paid for 24-hours for each duty day missed. An employment agreement cannot supersede state law. [*Howe v. City of St. Cloud*](#), #C3-93-1949, 515 N.W.2d 77 (Minn. App. 1994).

- ***Health coverage***

As regards to health benefits, under [38 U.S. Code §4317](#), reservists covered by an employer-sponsored health plan can elect continued coverage for themselves and their covered dependents.

- (a) The maximum coverage period under such an election is the shorter of the 18-month period beginning
 - (i) on the individual's date of absence or

- (ii) the period ending the day after the date on which the person fails to apply for or return to employment.
- (b) The employee can be required to pay 102 percent of the premium for the continued health coverage, determined in the same way as optional COBRA coverage under [§4980B\(f\)\(4\)](#) of the Internal Revenue Code.
- (c) However, an individual who performs service in the uniformed services for 30 days or less cannot be required to pay more than the employee share, if any, for such coverage.
- (d) Unless the plan specifies multi-employer allocation, the last employer is liable.
- (e) If coverage is terminated due to military service, no exclusion or waiting period can be imposed on the person's return to employment. This provision does not apply to injuries or illnesses determined by the Secretary of Veterans Affairs to have been incurred or aggravated during service in the uniformed services.

- ***Combat deployment requirements***

Since the payment of earnings differentials are not required, public employers may choose to limit those payments to a designated crisis or defined period, to avoid similar claims during future peacetime periods when reservists might volunteer for optional, noncritical specialized training programs.

- ***Promotional rights***

In New York, a federal court upheld a jury award of double pay plus \$300,000 for emotional distress, to a FDNY promotional candidate who was denied a chance to make up a missed exam due to his military service.

The court also sustained his promotion without taking the test because of the city's refusal to offer a makeup exam. [Fink v. City of N.Y.](#), #97-CV-6314, 129 F.Supp.2d 511, 2001 U.S. Dist. Lexis 2290, 166 LRRM (BNA) 2923 (E.D.N.Y.).

A Florida arbitrator rejected a union grievance that management improperly allowed a sergeant, who was on military duty, to take a promotional exam at an off-site location. Federal laws protecting military leave rights supersede the bargaining agreement and

administrative rules. [Palm Beach County Sheriff's Office and PBC Police PBA](#), AAA Case #32-390-100713-04, 121 LA (BNA) 1624 (Smith, 2005).

- ***Vacation, pension accrual and other benefits***

Reservists may elect to use vacation benefits during periods of active duty, but may not be required to do so by the employer. Generally, this election is chosen only by employees who are not under a pay differential continuation plan.

The Labor Department's Rules on the USERRA provides that employees who are returning from military service are entitled to continued pension participation, vesting, and accrual of benefits without incurring a break in service. 20 CFR Part 1002, [70 \(242\) Fed. Reg. 75279](#) (Dec. 19, 2005).

Unpaid reservists should be given, at a minimum, the same benefits given other employees and their dependents when on maternity and other unpaid leave plans in effect. It is another matter for *paid* reservists. The fact that an employer allows workers to earn holiday benefits while on jury duty does not entitle an employee to accrue those benefits while on military leave. [Tully v. Dept. of Justice](#), #2007-3004, 481 F.3d 1367, 2007 U.S. App. Lexis 6440 (Fed. Cir. 2007).

The Fifth Circuit has distinguished seniority- and non-seniority-based rights and benefits accrued or lost by military reservists. In the case of non-seniority-based rights and benefits, employers must treat military reservists equally, but not preferentially. [Rogers v. City of San Antonio](#), #03-50588, 392 F.3d 758, 2004 U.S. App. Lexis 24831, 176 LRRM (BNA) 2129 (5th Cir. 2004).

❖ **Duration**

Public employers may not limit the duration of military leaves by restricting the periods that a pension can be earned. Federal law prevails. In New York, a federal court held that two consecutive leaves of absence for 14 and 13 months respectively for flight engineer training were reasonable. *Cronin v. Police Dept. of the City of N.Y.*, 675 F Supp. 847 (S.D.N.Y. 1987).

A federal court in California held that a four-year military leave was not unreasonable, despite fact that that the leave request was only for three years. *Lemmon v. Santa Cruz*

Co., 686 F.Supp. 797 (N.D. Cal. 1988). The court added its view that “the type, duration and frequency of any particular course of military training must also be presumed reasonable.” 686 F.Supp. at 854.

❖ Training activities

Although for nine years a city allowed police officers who missed their weekend work shifts while attending National Guard duties to make up the time on their scheduled days off, management was not obliged to continue that policy, because non-Guard employees who miss work for non-military activities are not provided with a comparable scheduling benefit. [*Crews v. City of Mt. Vernon*](#), #08-2435, 567 F.3d 860, 2009 U.S. App. Lexis 11718 (7th Cir.).

A Texas appellate court rejected the claim that a “vacancy” was created in the ranks when a senior police officer was called to temporary active duty in the military. However, a city may *temporarily* assign other officers to an open position caused by a military leave absence. [*McElroy v. City of Temple*](#), #03-03-00741-cv, 208 S.W.3d 471, 2006 Tex. App. Lexis 2056 (2006).

Federal law does not prevent disciplinary action for misconduct *unrelated to military service*. The Fourth Circuit has held that military training laws did not protect an employee who deliberately falsified his time card. [*Hill v. Michelin N.A.*](#), #00-2202, 252 F.3d 307 (4th Cir. 2001).

Federal courts will intervene if disciplinary action is a cover for wrongful discrimination. A court ordered reinstatement of an untenured Desert Storm veteran in Pennsylvania. His “suspension” pending an internal investigation was found to be pretextual discrimination. [*Simmons v. Didario*](#), #91-6719, 796 F.Supp. 166 (E.D.Pa. 1992).

❖ Hostile work environment claims

Anti-retaliation provisions are a part of most federal laws enacted to protect employees from harassment and other discriminatory practices.^[3] The USERRA does not have such a section. A number of lawsuits have asked the courts to imply an anti-harassment prohibition. The First Circuit noted in 2010:

“Neither the Supreme Court nor any court of appeals has decided whether a hostile work environment claim is cognizable under USERRA.” [*Vega-Colon v. Wyeth Pharm.*](#), #09-1861, 625 F.3d 22, 32 (1st Cir. 2010).

Several circuit courts assumed, without deciding, that USERRA does provide for such a claim but they disposed of the claim on other grounds.^[4] In March 2011, the Fifth Circuit became the first federal appellate court to rule on the issue.

Several commercial airlines pilots alleged that management created a hostile work environment through a continuous pattern of harassment in which the airline had “repeatedly chided and derided [the] plaintiffs for their military service through the use of discriminatory conduct and derogatory comments regarding their military service and military leave obligations.”

The District Court rejected their claims.^[5] On appeal, the panel considered the statute’s legislative history and its underlying policy objectives to gain insight into whether Congress intended to create a cause of action under USERRA for harassment of service members. They wrote:

“Congress’s choice to not include the phrase ‘terms, conditions, or privileges of employment’ or similar wording in USERRA weighs in favor of the conclusion that USERRA was not intended to provide for a hostile work environment claim to the same extent as Title VII and other anti-discrimination statutes containing that phrase. .

“The lack of DoL regulations regarding harassment of private employees on the basis of military service also supports our determination ...

“To be clear, nothing in this opinion alters the ability of service members to sue under USERRA for the denial of contractual benefits of their employment on the basis of military service as defined in the statute. All that we hold is that service members may not bring a freestanding cause of action for hostile work environment against their employers.”

[*Carder v. Continental Airlines*](#), #10-20105, 2011 U.S. App. Lexis 5847 (5th Cir.).

❖ Notes

1. This article uses the generic word *reservists*, and includes members of an Army or Air National Guard component.

2. Section 751 of the Omnibus Appropriations Act of 2009; Public Law 111-8, codified at [5 U.S. Code §5538](#).
3. For list of statutory federal anti-retaliation provisions, see [Retaliatory Personnel Actions](#) in the Sep. 2009 AELE Monthly Law Journal at p. 202.
4. [Vega-Colon v. Wyeth Pharm.](#), #09-1861, 625 F.3d 22, at n.9 (1st Cir. 2010); [Dees v. Hyundai Motor Mfg.](#), #09-12107, 368 F.Appx. 49, at 53, 2010 U.S. App. Lexis 4064 (Unpub. 11th Cir. 2010); [Church v. City of Reno](#), #97-17097, 168 F.3d 498, 1999 U.S. App. Lexis 6724 (Unpub. 9th Cir. 1999); [Miller v. City of Indianapolis Fire Dept.](#), #01-2219, 281 F.3d 648, 2002 U.S. App. Lexis 2598 (7th Cir. 2002).
5. [Carder v. Continental Airlines](#), #H-09-3173, 2009 U.S. Dist. Lexis 110671, 187 LRRM (BNA) 3143 (S.D. Tex.).

❖ **Resources** (*Chronological*)

1. Article, Screening for Alcohol Misuse and Alcohol-Related Behaviors Among Combat Veterans, by Santiago, et al., 61 Psychiatric Serv. 75-581 (2010).
2. Report, [Combat Veterans](#): A Transition Guide for Veterans Beginning or Continuing Careers in Law Enforcement, IACP (2010).
3. Report, [Law Enforcement Leader's Guide on Combat Veterans](#), IACP (2010).
4. Report, [Employing Returning Combat Veterans](#): Findings and Recommendations from Field Research, IACP (2009).
5. Article, Military Psychology and Police Psychology: Mutual Contributions to Crisis Intervention and Stress Management, by Laurence Miller, 10 (1) Intern. J. of Emerg. Mental Health 9-26, PMID: 18546756 (2008). [Abstract](#).
6. Article, Combat and Operational Stress Control, by E.A. Brusher, 9 Intern. J. of Emerg. Mental Health, 111-122 (2007).
7. PowerPoint[®], Psychological Support to Army National Guard, Presentation to the Police Psychological Services Section, IACP Annual Conference, by Major Stephen F. Curran, Ph.D., Maryland Army National Guard. (2006).
8. Book, *Courage After Fire: Coping Strategies for Returning Soldiers and Their Families*, by Armstrong & Domenici, Ulysses Press, ISBN13: 978-1-56975-513-2 (2005).

9. Article, Chapter 21, Postintervention Strategies to Reduce Police Trauma, by Chris Dunning, in Police Trauma: Psychological Aftermath of Civilian Combat (at 269-289), Violanti & Paton (Eds.) Charles C. Thomas (1999). [Abstract](#).
10. Book: On Killing, The Psychological Cost of Learning to Kill in War and Society, by David Grossman, Little Brown, ISBN 978-0-316-04093-8 (1996).

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