

What Employers Should Know About Paid Military Leave Trend

By **Robert Duffy and Brenna Wildt** (February 8, 2022)

In February 2021, the U.S. Court of Appeals for the Seventh Circuit issued^[1] a groundbreaking decision in *White v. United Airlines Inc.*,^[2] in which it became the first federal appellate court to address the issue of pay for employees who take military leave pursuant to the Uniformed Services Employment and Reemployment Rights Act, or USERRA.

In its decision, the Seventh Circuit held that if an employer provides pay during other comparable employee absences, it must also provide pay during a military leave.

More recently, another federal appellate court and several district courts have either decided or are currently deciding employee claims for paid military leave under USERRA.

These cases, which demonstrate a growing acceptance of claims for paid military leave if the employer provides for paid leave in other circumstances, underscore the need for employers to review their military leave and paid leave policies and determine whether to update them as necessary to comply with applicable law.

The Seventh Circuit's View

USERRA mandates that employers provide the same rights and benefits — i.e., terms, conditions and privileges of employment — to employees on military leave as they do for employees on comparable nonmilitary leave.

Interpreting that provision in *White*, the Seventh Circuit determined that an employer must provide pay during an employee's military leave if it provides pay during other comparable employee absences.

The court stopped short of determining what exactly constitutes a leave comparable to short-term military leave, which determination it left for the lower court to decide on remand. It did however deny United Airlines' petition for rehearing of its decision.

The Third Circuit's View

In August of last year, the U.S. Court of Appeals for the Third Circuit became the second federal appellate court to address the issue of paid military leave. In *Travers v. Federal Express Corp.*,^[3] it rendered a ruling quite similar to that of the Seventh Circuit in *White*.

In *Travers*, a FedEx employee and U.S. Navy Reserve member brought suit on behalf of himself and a class of employees who, like him, received no pay from FedEx during periods of military leave. He asserted that because FedEx paid employees during periods of absence due to jury duty, illness and bereavement, among other reasons, it also needed to pay employees who were on military leave.

The U.S. District Court for the Eastern District of Pennsylvania rejected this claim, holding



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that paid leave was not a right and benefit under USERRA.

On appeal, however, the Third Circuit found otherwise and held that paid leave is indeed a right and benefit under USERRA. Accordingly, the court focused its inquiry on whether FedEx "extends a right and benefit in the form of pay to the group of employees who miss work for nonmilitary reasons, but then denies pay to the group absent for military service."

In doing so, the court recognized that USERRA rights and benefits refer to a wide range of benefits, including payment during leave. The court ultimately concluded that "best understood, USERRA does not allow employers to treat service members differently by paying employees for some kinds of leave while exempting military service."

Like the Seventh Circuit did in *White*, the Third Circuit in *Travers* declined to address the issue of whether military leave was in fact comparable to any of the paid leave that FedEx provides in other circumstances, but left that question for the district court to decide on remand.

The Eastern District of Washington

Although neither of the lower courts in the *White* or *Travers* cases have yet rendered a decision about what types of employer-paid leave are comparable to military leave, in May of last year, a Washington federal district court did address this issue.

In *Clarkson v. Alaska Airlines Inc.*,^[4] the U.S. District Court for the Eastern District of Washington considered whether the airline violated USERRA by failing to pay pilots full wages while on military leave, while paying wages to employees during other types of leave — such as bereavement, sickness, vacation and jury duty.

In its analysis of this issue, the court applied the U.S. Department of Labor's implementing regulations^[5] related to USERRA rights and benefits, and focused on its three comparability factors: (1) duration of the leave; (2) purpose of the leave; and (3) ability of the employee to choose when to take the leave.

Concerning duration, the evidence demonstrated that jury duty, sick and bereavement leaves generally lasted three to five days, with the longest leave lasting six days. On the other hand, military leaves were longer and generally lasted for nine days or more, with the longest military leaves lasting between 58 and 185 days. Similarly, the majority of pilots only used bereavement or jury duty leave once, while the number of military leaves taken was between 17 and 47 leaves per pilot.

Finally, the average number of sick days per pilot was 33, compared to an average of 359 days of military leave per pilot during the period. Based on these differences, the district court concluded that the military leave was not comparable to jury duty, sick or bereavement leave in terms of duration or frequency.

Concerning leave purpose, the district court determined that a primary reason for military leave is to allow pilots to pursue parallel careers in the military and earn additional income. In contrast, it found that the purpose of jury duty is to fulfill a required duty, the purpose of bereavement is to grieve the death of a loved one, and the purpose of sick or vacation leave is to allow time for rest.

Additionally, bereavement, sick, and vacation leaves have a purpose to protect airline passengers, by ensuring that pilots are mentally and physically fit to fly. Based on these

additional differences, the district court concluded that the military leave was not comparable to these other forms of leave in terms of purpose.

Finally, concerning the ability of the pilots to choose when to take leave, the district court noted that military leave was automatically granted by the airlines while the other forms of leave were subject to approval.

Additionally, while military leave is scheduled in advance, bereavement, sick and jury duty leave are typically needed in connection with unexpected circumstances and often have to be taken with minimal opportunity for rescheduling. The district court therefore concluded that the military leave was not comparable to these other forms of leave in terms of the ability to choose when to use leave.

After reviewing these three comparability factors, the court dismissed the pilots' claim that the airline violated USERRA when it did not pay them wages during military leave. It's important to note, however, that the district court's decision is not the final word on this issue as it is now on appeal to the U.S. Court of Appeals for the Ninth Circuit, with a decision expected sometime this year.

Paid Military Leave Suits Popping Up Across the Country

The above cases are part of a pattern of paid military leave claims that are being brought in various federal courts across the country.

For example, in *Scanlan v. American Airlines Group Inc.*,^[6] before the Eastern District of Pennsylvania, a class of American Airlines pilots have recently defeated a motion to dismiss their claims that the airline is violating their USERRA rights by not paying for short-term military leave or crediting short-term military leave in its profit-sharing plan.

And in *Weaver v. Southwest Airlines Co.*,^[7] before the U.S. District Court for the District of Massachusetts, a class of Southwest Airlines employees is claiming that the airline illegally denied employees on military leave the same access to COVID-19-related extended paid sick leave as those employees who were not on military leave.

These paid military leave claims have also taken hold against employers outside of the airline industry. In that regard, in *Tsui v. Walmart Inc.*,^[8] before the District of Massachusetts, a class of Walmart employees brought a claim against the company, alleging that it violated USERRA by not providing any compensation to employees who take a few days of military leave even though it pays employees their full salary when they take a short amount of time off for jury duty or bereavement.

The lead plaintiff also asserted that Walmart either failed to pay employees when they took four or more days of military leave, or only paid them partial wages during their military leave depending upon how much they were being compensated by the military. In response, Walmart settled the case for a payment of \$10 million dollars, which was approved by the district court in October of last year.

Walmart has also now revamped its military leave policy, which as of Jan. 1 guarantees full pay for employees who take up to one month of military leave, and provides for partial wages for military leaves taken of up to one year's duration.

Next Steps for Employers

We recognize employers are stressed dealing with the panoply of employment issues that have arisen out of the pandemic. Nonetheless, given the growth in claims for paid military leave, another issue that deserves employers' attention is to determine whether their employees may be eligible for paid leave or benefits during military leave.

To that end, employers should review other types of leave for which they provide pay or benefits and determine whether that paid leave is comparable in duration, purpose and controllability to military leave. If it is, employers may have an obligation to provide the same pay and benefits to employees on military leave.

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[1] <https://www.quarles.com/publications/legal-update-pay-for-military-leave-gaining-federal-court-support/>.

[2] <https://www.law360.com/articles/1351948/attachments/0>.

[3] <https://cases.justia.com/federal/appellate-courts/ca3/20-2703/20-2703-2021-08-10.pdf?ts=1628614818>.

[4] https://www.law360.com/dockets/download/60ac1ca636eba905b3523201?doc_url=https%3A%2F%2Fecf.waed.uscourts.gov%2Fdoc1%2F19514063585&label=Case+Filing.

[5] <https://www.ecfr.gov/current/title-20/chapter-IX/part-1002/subpart-D/subject-group-ECFR445761424bb812c/section-1002.150>.

[6] <https://www.law360.com/articles/1270734/attachments/0>.

[7] <https://www.classaction.org/media/weaver-v-southwest-airlines-co.pdf>.

[8] https://assets-global.website-files.com/5ec18264cf86972ffa7a1a2f/60522d83e00c707a5b14892d_Walmart%20Complaint%20-%20Filed.pdf.