

Employee Benefit ■ Plan Review

USERRA May Require Employers to Provide Paid Military Leave, Circuit Court Rules

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In *White v. United Airlines, Inc.*,¹ the U.S. Court of Appeals for the Seventh Circuit held that the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) requires employers to provide short-term paid military leave, if they provide paid leave for comparable non-military absences, such as for jury duty or bereavement leave.

USERRA requires that employees on military leave receive the same non-seniority-based “rights and benefits” as similarly situated employees on comparable forms of leave.

Prior to *White*, some district courts held that paid leave is not a “right” or “benefit” within the meaning of USERRA, whereas two courts in the Eastern District of Pennsylvania reached opposite conclusions on this issue a year apart.

The potential impact of the *White* decision on employers with large reservist workforces is significant, as the denial of paid leave is a prime candidate for class action treatment.

BACKGROUND

The Seventh Circuit became the first court of appeals to address the question of whether Section 4316(b) of the USERRA provides a right to paid military leave.

USERRA is a federal law designed to encourage military service by reducing the negative impacts such service can have on civilian

careers.² At issue in *White* is a provision of USERRA that generally requires an employer to provide an employee who misses work due to military service with the same non-seniority-based “rights and benefits” as the employer provides to employees on comparable forms of non-military leaves of absence.³

USERRA defines “rights and benefits” as including:

any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations and the opportunity to select work hours or location of employment.⁴

Prior to the Seventh Circuit’s decision in *White*, whether the “rights and benefits” protected by USERRA include paid leave was an open question, with district courts reaching opposite conclusions.

For example, in June 2019, in *Scanlan v. American Airlines Grp., Inc.*, a judge in the

Eastern District of Pennsylvania denied an employer's motion to dismiss, finding that an employer's failure to pay reservists the difference between their civilian pay and their military pay stated a viable claim under USERRA if the airline provided paid leave to employees on comparable forms of non-military leave.⁵

One year later, in *Travers v. FedEx Corp.*, a different judge in the Eastern District of Pennsylvania granted an employer's motion to dismiss, expressly rejecting the *Scanlan* court's reasoning and ruling that Congress "unambiguously excludes paid military leave from the 'rights and benefits' employers must provide equally to reservists and non-reservists."⁶

THE WHITE DECISION

In *White*, the Seventh Circuit held the opposite of *Travers*, finding that, as a matter of law, paid leave falls within the "rights and benefits" guaranteed by USERRA if an employer provides paid leave for comparable non-military absence. The court explained the language of USERRA should be interpreted broadly, rejecting United's position that Congress intended to exclude paid leave entirely from USERRA. The *Travers* decision is currently being appealed to the U.S. Court of Appeals for the Third Circuit, setting up a potential circuit split on this issue.⁷

Whether two forms of leave are actually comparable under USERRA is a separate question that the *White* court refrained from deciding without discovery. In determining whether two forms of leave are comparable, the regulations direct employers to consider:

- (1) The duration of the leave;
- (2) The purpose of the leave; and
- (3) The ability of the employee to choose when to take the leave, with duration being the most important factor.⁸

As interpreted by *White*, the comparability analysis should take into consideration not whether the employee has the ability to "choose when to take leave" by voluntarily joining the military, but rather whether the employee has control over the timing of his or her military leave of absence – i.e., whether he or she has the option to choose when to take a given stretch of leave.⁹ Because employees protected by USERRA (primarily members of the National Guard and Army Reserve) often take military leaves that are sporadic or of short duration (for example, to conduct funeral duties or attend periodic training), military leave is often compared to jury duty, bereavement leave and sick leave.

CONCLUSION

The *White* decision should be reviewed by employers with a large workforce in the National Guard and Army Reserve. While paid jury duty and sick leave policies are relatively common (and sometimes required by state or local law), paid military leave policies are much less common. Moreover, because leave policies are often applied across large swaths of the workforce, and because the interpretation of USERRA's "rights and benefits" provision is a common question of pure law, claims for paid military leave are a prime candidate for class action treatment.

Employers should follow future developments on this issue closely.

Indeed, the same day the Seventh Circuit issued its decision in *White*, a court in the North District of California certified a class of potentially thousands of pilots and other employees of Southwest Airlines who claim their employer violated USERRA by providing paid jury duty, bereavement and sick leave, but

not paid military leave.¹⁰ In certifying the class, and without deciding the issue, the district court noted that whether paid leave is a "right and benefit" of employment under USERRA presents a pure question of law. And just a few weeks prior, Walmart agreed to pay \$10 to \$14 million to thousands of potential class members making similar claims.¹¹

In view of *White* and the recent litigation activity involving paid military leave, employers should follow future developments on this issue closely. 🌐

NOTES

1. *White v. United Airlines, Inc.*, No. 19-2546, 2021 U.S. App. LEXIS 2973 (7th Cir. Feb. 3, 2021).
2. 38 U.S.C. § 4301.
3. 38 U.S.C. § 4316(b)(1)(B).
4. 38 U.S.C. § 4303(2).
5. 384 F. Supp. 3d 520, 525-528 (E.D. Pa. 2019).
6. No. 19-6106, 2020 U.S. Dist. LEXIS 127045, at *6 (E.D. Pa. July 20, 2020).
7. Federal agencies tasked with implementing USERRA have made pronouncements that appear to be consistent with the *Travers* court's decision. See, e.g., 20 C.F.R. § 1002.7(c) ("USERRA does not require an employer to pay an employee for time away from work performing service"); 20 C.F.R. § 1002.7(d) ("[E]ven though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year"); U.S. Dep't of Justice, *Employment Rights of the Nat'l. Guard and Reserve*, p. 31 (USERRA "requires only an unpaid leave of absence").
8. 20 C.F.R. § 1002.150(b).
9. *White*, 2021 U.S. App. LEXIS 2973, at *19.
10. *Huntsman v. Southwest Airlines Co.*, No. 19-cv-00083, 2021 U.S. Dist. LEXIS 20856, at *45 (N.D. Cal. Feb. 3, 2021).
11. *Tsui v. Walmart Inc.*, No. 1:20-cv-12309 (D. Mass. Dec. 31, 2020).

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