LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

December 13, 2024

Is USERRA a Paid Leave Statute? No, But It Sometimes Requires Paid Leave

Is USERRA a paid leave statute? If you answered, "No," you're correct. But you'd be just as correct if you responded, "I'm not sure," or "No, but," or "It depends…" How could such a seemingly straightforward question not have an equally straightforward answer?

First off, USERRA is, strictly speaking, not a paid leave statute because it doesn't create an employer obligation to pay wages during an employee's covered military absence except that such employees may use accrued PTO at their option.

The reason it's not so simple is that USERRA requires that employees on military leave are entitled to "other rights and benefits…as are generally provided by the employer to employees having similar seniority, status, and pay who are on furlough or leave of absence..." 38 U.S.C. Sec. 4316(b)(1)(B).

In recent years, plaintiffs in several jurisdictions have successfully argued that this "other rights" provision can be used to require employers to match paid leave benefits provided under certain specific programs (whether written or unwritten), such as jury duty leave, witness leave, or administrative investigative leave, to employees on military leave.

When determining whether an employer's existing non-military paid leave programs are sufficiently comparable to the employee's use of military leave such that the paid benefit ought to be matched, courts have compared the durations of leave, purposes of leave, and the ability of employees to choose when leave is taken.

In the case of *Myrick v. City of Hoover*, the Eleventh Circuit recently found that jury duty leave and other short-term administrative leaves were sufficiently similar to a reservists' typical military leave obligations in duration, purpose (legal compliance/civic duty), and the (in)ability of employees to schedule the obligation that the City could not refuse to pay its employees taking similarly short-term military leaves. More surprisingly, the Eleventh Circuit also found that the City's occasional use of long-term paid administrative leave (average duration, 16 months) were not outliers, but a program suitable to create a comparative obligation for employees on leave for active-duty obligations (average duration, 21 months).

The Eleventh Circuit's decision is on trend with other recent decisions from the Third, Seventh, and Ninth Circuit Courts of Appeal. This is a developing theory of recovery under USERRA, and I would not be surprised to see a circuit split emerge that has to be resolved by the Supreme Court, though that ultimate resolution would likely be a decade out.

In the meantime, employers should be cautious about designating military leaves as unpaid and should examine existing paid leave programs and other instances where employees have received unearned paid leave. In light of the *Myrick* decision, Alabama employers in particular (who are

legally required to grant uncapped paid jury duty leave to full-time employees) should carefully evaluate the facts and circumstances to determine whether it is necessary to extend paid leave to employees with short-term military absences like those frequently associated with Reservist and National Guard duties.

If you have any questions or would like additional information, please contact Whitney Brown at 205-323-9274 or wbrown@lehrmiddlebrooks.com.