

## Seventh Circuit Rules Employers Must Provide “Paid Military Leave” in Certain Circumstances.

In a case of first impression, the 7<sup>th</sup> Circuit held that the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.* (“[USERRA](#)”), may, in some circumstances, require employers to provide paid leave. This ruling applies to employees absent from work for military service, if their employers provide paid leave for comparable non-military absences, such as for jury duty or sick leave. [White v. United Airlines, Inc.](#) This case is unique for two reasons. First, USERRA cases rarely come to the courts. Second, the courts rarely hold that paid leave is required.

USERRA is a federal statute that protects the employment rights of current and former members of the U.S military. USERRA protects service members from discrimination in the workplace based on their military service or affiliation. At issue in *White* was a specific provision of USERRA that requires employers to provide employees absent from work due to military service “such other rights and benefits” as are generally provided by the employer to other similarly situated employees who take comparable non-military leaves of absence. 38 U.S.C. § 4316(b)(1).

### **White v. United Airlines, Inc**

Plaintiff, Eric White, was a United Airlines pilot and reserve member of the United States Air Force. United Airlines’

collective bargaining agreement provides pilots short term paid leave for absences due to jury duty and sick leave. It did not provide paid leave for military service. United also maintains a profit-sharing plan for its pilots. This plan credits pilots with a share of United's profits based on the wages earned during a fixed period. Pilots who took paid sick leave or paid leave for jury duty earned credit toward their profit-sharing plan, while pilots who took military leave did not.

White, who had taken periodic short-term leaves to complete his duties as a reservist, filed a class action suit against United Airlines under USERRA's provision requiring employers to offer the same "rights and benefits" to service members on military leave as they offer to employees on other similar types of leave. The trial court dismissed White's suit, holding that USERRA does not require pay for military leave under any circumstances. The trial court also held that jury duty and sick leave are not comparable to short-term military leave for purposes of determining whether similar "rights and benefits" should be offered.

The Seventh Circuit disagreed and remanded the decision for further hearing. The Seventh Circuit held that the language of USERRA should be interpreted broadly and that the plain language of the statute does require pay for military leave in cases where the employer offers pay for other, comparable types of leave.

The Court also rejected the argument that such leave would be a potential burden to employers. The Court

reasoned that less than one percent of employees in the national economy are reservists and that only military leave comparable in duration to nonmilitary leaves of absence is covered by USERRA. The Court did not address White's argument that he was owed his full wages while on military leave, as opposed to the difference between that amount and his military pay.

In remanding the case for further consideration, the Seventh Circuit instructed the trial court to clarify whether the employer's policy concerning leave for jury duty rendered such leave "comparable" for USERRA purposes to leave for military service. In determining whether the two types of leave are comparable, the Seventh Circuit directed the trial court 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.

### **Employer Takeaways**

While paid jury duty and sick leave policies are relatively common, paid military leave policies are uncommon. Employers should review their leave policies and they should be aware that if they are offering paid leave in certain circumstances, they may be required to provide paid military leave too.

"Paid leave" is coming to Illinois employers in a variety of guises. The City of Chicago requires paid sick leave. The CARES Act required paid leave during the COVID pandemic through December 31<sup>st</sup>. The American Rescue Plan will require paid leave for COVID related reasons

through September 30<sup>th</sup> if it passes Congress. The 7<sup>th</sup> Circuit's decision may have caught United Airlines by surprise, but it is part of a larger societal trend toward requiring employers to provide paid leave.

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