

## Do You Have to Provide Paid Military Leave?

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- Most employers know that under federal law they have to provide job protected, unpaid military leave to their employees. There are, of course, various requirements and standards, but assuming those are met, employees may take leave for the reserves, to serve on active duty, to serve during national emergencies, etc. But does that leave ever have to be paid? The answer may surprise you.
- While USERRA (the Uniformed Services Employment and Reemployment Rights Act) only requires that unpaid leave be granted, it also states that if an employer provides a “benefit of employment” to employees on “comparable,” nonmilitary leave, then that benefit of employment must also be provided to the employee on military leave. A recent decision by the Third Circuit Court of Appeals addressed that issue.
- In that case, an employee of FedEx served in the U.S. Navy Reserves and was granted and took unpaid leave many times for that service. The employee later filed a class action lawsuit against FedEx, arguing that because FedEx paid employees for time missed for jury duty, illness and bereavement leave, among other reasons, paid leave was a “benefit of employment” that it was required to provide him for his military duty.

FedEx argued that paid leave was not a “benefit of employment” that had to be offered to military members under USERRA, since USERRA made military leave unpaid. However, the Court rejected that argument, holding that term “benefit of employment” includes a vast array of benefits, including compensation during leave. Thus, the Court held that “USERRA does not allow employers to treat servicemembers differently by paying employees for some kinds of leave while exempting military service.”

The Court did not rule specifically on whether military leave was comparable to any paid leave offered by FedEx, and sent the case back to the trial court to consider that issue. That court will look at the purpose of the leave, the ability of the employee to choose when to take the leave, the duration of the leave, and other factors. However, one could see a strong argument being made that jury leave, for example, is comparable to military leave. Both are to perform a public service, both are required (the military member cannot refuse to report and the citizen cannot fail to show up for jury duty), and both are typically not on the employee’s schedule, but the governments.

Updates on this topic will be posted on our website once the trial court rules on the remanded case above, and if and when the Third Circuit weighs in again. But, in the meantime, employers should examine their leave policies and determine whether they are treating military leave differently than other types of leave. For example, do you provide paid jury, bereavement, or sick leave, but only unpaid military leave?

If so, you should consider whether you want to adjust some of your policies so that they are the same before you get sued for violating USERRA. One option is to remove the other paid leave (such as jury leave) and make it unpaid. Another would be to provide paid military leave for the same number of days that you provide other paid leave (such as where you pay for X number of days of jury leave).

Contact Scott at sleah@tuckerlaw.com to help you determine whether your policies expose you to risk and what alternatives make sense for your business.