

3rd Circ. Ruling Shows Employer Risk In Unpaid Military Leave

By **Richard Rosenblatt and Jason Ranjo** (August 31, 2021, 5:00 PM EDT)

The U.S. Court of Appeals for the Third Circuit held on Aug. 10 in *Travers v. Federal Express Corp.* that paid leave is among the rights and benefits that the Uniformed Services Employment and Reemployment Rights Act requires for employees on military leave if an employer provides paid leave to employees on comparable, nonmilitary leave types, such as jury duty and sick leave.

The ruling, which is the second by a federal appeals court to hold so after the U.S. Court of Appeals for the Seventh Circuit's Feb. 3 decision in *White v. United Airlines Inc.*, will likely precipitate more litigation around unpaid military leave, making it critical for employers to review their policies to limit risk.



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The Court Holds That USERRA Supports Paid Leave As a Right and Benefit

Gerard Travers served in the U.S. Naval Reserve while working for FedEx. He received no compensation from his civilian employer during periods of military leave.

As alleged, however, FedEx paid employees during periods missed for jury duty, illness and bereavement, among other reasons.

Travers challenged FedEx's military leave policy on behalf of a putative class, but the U.S. District Court for the Eastern District of Pennsylvania dismissed his claims last July, holding that paid leave was not a right and benefit under USERRA.

The Third Circuit reversed.

The Third Circuit rejected FedEx's argument that the benefit at issue was paid military leave, as opposed to paid leave generally.

The court found that this reading "veers away from the text of USERRA," which "describes a process for evaluating alleged disparate treatment of service members on military leave," and does not "create a class of rights and benefits."

In other words, the court disagreed with FedEx's reliance on "extra-textual labels" —i.e., the distinction between paid leave and paid military leave — and focused its inquiry on whether USERRA



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extends a right and benefit in the form of pay to the group of employees who miss work for non-military reasons, but then denies pay to the group absent for military service.

The Third Circuit held that the statutory phrase "benefit of employment" — as defined by USERRA to mean "terms, conditions, or privileges of employment" — includes a vast array of benefits, including compensation during leave.

This broad reading of USERRA mirrors the one taken in *White*, though the Third Circuit's opinion contains no substantive discussion of the Seventh Circuit case.

Both courts, however, also rejected a number of similar text-based arguments seeking to narrow USERRA's reach as conflicting with the ordinary meaning of the statutory language and the legislative history.

According to the Third Circuit,

It all tells the same story: Congress enacted a broad definition encompassing a wide range of benefits illustrated, not exhausted, by a list of examples.

Further, the court concluded:

Best understood, USERRA does not allow employers to treat servicemembers differently by paying employees for some kinds of leave while exempting military service.

Notably, the Third Circuit declined to address the issue of whether military leave was, in fact, comparable to any paid leave type offered by FedEx.

As in *White*, the court concluded that the question was "for the District Court to determine on remand."

So the case will return to the U.S. District Court for the Eastern District of Pennsylvania to determine whether paid leaves for jury duty, bereavement leave and the like are sufficiently similar to military leave.

Takeaways

Employers are increasingly offering paid time off for nonmilitary leaves, including paid sick leave and parental leave.

In certain industries and with certain employers, military leave has lagged behind, creating potential liability. The recent federal appeals court decisions in *Travers* and *White* have only brought the issue to the forefront.

Since the Seventh Circuit's decision in *White*, plaintiffs around the country have commenced putative class actions against employers in various industry sectors, including airlines and retailers.

The Third Circuit's decision in *Travers* could proliferate litigation focused upon whether employers are providing pay for leave types that are comparable to military leave.

If they are, and other courts adopt the holdings of *Travers* and *White*, then employers will likely have to pay for military leaves.

The anticipated litigation will focus not only on whether employers are paying employees on military leave and comparable leave types, but also whether the differential pay offered by many employers is sufficient under USERRA.

So even employers that have been providing paid military leave for years may still have potential exposure if they have not been providing full pay to service members when such a benefit is afforded to employees on comparable nonmilitary leave types.

If there was any question before, it is now clear that paid leave — and perhaps not only differential pay — may be required for employees on military leave.

The primary issue then is whether certain nonmilitary leave types are comparable to military leave.

This requires a fact-intensive inquiry into a nonexhaustive list of factors contained in USERRA's regulations.

One factor is the purpose of the leave, e.g., to allow for the performance of a public service.

Another factor is the ability of the employee to choose when to take the leave, which was used by at least one court to differentiate military leave taken by certain service members with control over their military duty schedules and other leave types with less flexibility, including jury duty and bereavement leave.

However, according to USERRA's regulations, the duration of the leaves is "the most significant factor to compare."

Amplifying the potential cost and liability exposure that may arise without such a review is the fact that USERRA generally has no statute of limitations, creating extended damages periods that potentially cover outdated policies that may have been brought into compliance a decade ago.

All this makes it critical for employers to review their leave policies.

For example, it is relatively common for employers to offer full pay to employees for time spent on jury duty. And some employers do not cap this benefit at a certain duration, even though jury duty commitments typically do not extend beyond a few weeks.

In this situation, employers may wish to consider equalizing these leave types by either increasing the amount of time service members receive paid military leave or capping the paid leave benefit for jury duty.

This same analysis should also be performed for benefits provided to unionized employees, as USERRA expressly supersedes any employment contract, including collective bargaining agreements, that provide fewer benefits to service members.

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