

Seventh Circuit Holds That USERRA May Require Paid Leave During Short-Term Military Leave

March 8, 2021

By [Susan Gross Sholinsky](#), [Dean L. Silverberg](#), and [Amanda M. Gómez](#)

Among other provisions, the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) mandates that covered employers generally must provide employees on USERRA leave with the same “rights and benefits” granted employees who take short-term leave for other, **comparable** purposes, which could include jury duty, sick time, or bereavement leave. Recently, the United States Court of Appeals for the Seventh Circuit became the first federal appellate court to hold that USERRA’s “rights and benefits” language includes *paid* leave. Accordingly, an employer that provides compensation for **comparable**, non-military leaves of absence must also do so for USERRA leave. Although only employers in Illinois, Indiana, and Wisconsin are bound by the Seventh Circuit’s decision, all employers should pay attention to this ruling because class actions and other suits addressing the issue are pending in courts nationwide.

The Seventh Circuit case, [White v. United Airlines, Inc.](#), was brought as a class action by Eric White, a United Airlines pilot who also served on reserve duty for the U.S. Air Force and who, over the course of his employment with United, had taken a number of short-term military leaves. White challenged United’s policy, contained in a collective bargaining agreement, of paying pilots during short-term leaves of absences taken for certain other purposes (such as jury duty and sick leave), but not for military leave. He also asserted that the airline’s policy of not providing paid military leave adversely affected the rights of service members under the company’s profit-sharing plan, which credits pilots with a share of the airline’s profit based on the wages they earn. As these credits are determined by wages, pilots who take paid sick or jury duty leave earn credit toward their profit-sharing plan, while pilots who take short-term military leave do not.

Preliminarily, the three-judge panel of the Seventh Circuit hearing the case ruled that White’s claim concerning the profit-sharing plan “rises or falls with his paid-leave claim. Both hinge on whether United’s pilots are entitled to their wages while on military leave.” Turning to the pivotal question of whether paid leave counts as one of the “rights and benefits” of employment protected under USERRA, the court sided with White’s argument that, as a matter of law, the term “embraces paid leave.” In so ruling, the court rejected the airline’s numerous arguments for construing the language “rights and benefits” more narrowly, including the company’s assertion that a broad interpretation of

the term “would effect a costly sea-change for public and private employers, essentially making [the court’s] interpretation an ‘elephant[] in [a] mousehole[].’” (Citation omitted.) Noting that fewer than “one percent of employees in the national economy are reservists (citation omitted),” the court dismissed as overblown the airline’s claim that construing the term “rights and benefits” to include paid leave would have dire consequences.

Notably, however, the court’s ruling that paid leave was covered by USERRA’s “rights and benefits” language did not end the inquiry as to whether White and the putative class were entitled to paid military leave. Rather, whether the employees’ military leave was indeed “comparable” to other types of short-term leave for which United’s pilots were paid remained unresolved. Deeming this inquiry a question of fact, rather than one of law, the court instructed: “White must show that any leave of absence for which his employer provides paid leave is comparable to any given stretch of military leave.”

Accordingly, the court remanded the case to the District Court for the Northern District of Illinois to resolve this issue. Although the lower court previously had determined that military leave was not comparable to, for instance, jury duty leave because military service was voluntary, the Seventh Circuit disagreed with this reasoning, explaining that:

Comparability analysis is not affected by the fact that the servicemember has voluntarily signed up for military service (and thus will be eligible for military leave at some point). For almost 50 years now, the United States has had an all-volunteer force. Instead, what matters is an employee’s control over the *timing* of her leave of absence—*i.e.*, whether she has the option to choose *when* to take a given stretch of leave.

In assessing comparability, the appeals court directed the lower court to consider (i) the duration of the leave (which “may be the most significant factor to compare”), as well as (ii) the purpose of the leave and (iii) “the ability of the employee to choose when to take the leave.” (Citations omitted.)

Finally, in a footnote, the court noted White’s additional argument that he and his fellow reservists should receive their full pay while on military leave, rather than merely the differential between their regular compensation and the ostensibly smaller stipend they receive from the military for performing their reserve duties.¹ The court declined to resolve this issue because United did not address it on appeal. However, the Seventh Circuit noted that, according to White’s allegations, while the government provides a modest stipend for jury duty service, “United pays employees their full salaries and wages during jury-duty leave without any offset.”

It may be a while before the case returns to the district court. On February 17, 2021, United Airlines filed a [Petition for Rehearing](#) with the Seventh Circuit, requesting that all

¹As the court explained: “Although the amount of pay White receives from the military is not included in the record before us, the parties’ submissions imply that the sum is less than the compensation White would otherwise receive from United for the same period.”

11 judges of the court review the case. As of this writing, the court has not ruled on whether to grant the company's petition.

Prior to *White*, district courts have been split on the question of whether the “rights and benefits” protected by USERRA include paid leave. For example, two Pennsylvania district courts came to opposite conclusions within a year of each other. [*Scanlan v. American Airlines Grp., Inc.*](#) held that an employer's failure to pay reservists the difference between their civilian pay and their military pay was a violation of USERRA if the employer provided paid leave to employees during other, comparable types of leave. [*Travers v. FedEx Corp.*](#), however, concluded that Congress unambiguously intended USERRA to exclude paid military leave. *Travers* currently is [on appeal](#) to the U.S. Court of Appeals for the Third Circuit, which reportedly will hear oral arguments next month.

Further, several similar class actions have been filed, including one against Southwest Airlines. As in *White*, the employees in [*Huntsman v. Sw. Airlines Co.*](#) claim that the company violated USERRA by providing paid jury duty, bereavement, and sick leave to employees, but not paid military leave. On February 3, 2021, the Northern District of California [certified](#) a class of over 6,700 current and former Southwest employees, including both active and retired pilots, flight attendants, mechanics, and customer support representatives who took short-term military leaves. This district court concluded that “the common issues identified by plaintiff [Huntsman], whether paid leave is a ‘right and benefit’ . . . and whether short-term military leave is comparable to other forms of paid leave, can be resolved on a class-wide basis.”

The current flurry of litigation may well result in a split among the courts of appeals, which, in turn, could eventually result in a final resolution of the issue by the U.S. Supreme Court.

What Employers Should Do Now

- Employers within the jurisdiction of the Seventh Circuit (Illinois, Indiana, and Wisconsin) should pay particular attention to further developments in the *White* case. In the meantime, considering the nationwide litigation trend on this issue, all employers—especially those with a large cohort of reservists—may want to review and perhaps revise their current policies. For instance, if a jury duty, bereavement, or sick leave policy currently offers pay without a specific duration, employers may want to consider amending the policy to provide a finite timeframe during which compensation will be provided. Employers should also consider whether they want to supplement leaves for which employees receive a stipend, such as jury duty, or provide the employee's full compensation, in addition to the stipend.

Be aware, however, that, even if such a revised policy is deemed lawful going forward, it may not absolve an employer of liability for practices found to have violated USERRA under its prior policy. As a result, employers may want to consult with counsel before revising their USERRA policies or other “comparable” policies.

- Be sure to communicate to employees in writing any changes affecting the company's paid leave policies.

For more information about this Advisory, please contact:

Susan Gross Sholinsky

New York
212-351-4789

sgross@ebglaw.com

Dean L. Silverberg

New York
212-351-4642

dsilverberg@ebglaw.com

Amanda M. Gómez

New York
212-351-4711

amgomez@ebglaw.com

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

© 2021 Epstein Becker & Green, P.C.

Attorney Advertising