

## Blog Post

# Is There A New Requirement To Pay Employees on Military Leave?

February 22, 2021

A few recent cases may have savvy employers rethinking their military leave policies and choosing to pay employees on short-term military leave to the same extent they voluntarily pay employees benefits for other leaves of absence, such as jury duty, bereavement, and sick leave.

The Uniformed Services Employee and Reemployment Rights Act (USERRA) mandates that public employers pay for employees' short-term military leave, but is silent as to the issue of pay by private employers. Pursuant to such language, it long has been interpreted that private employers are not similarly obligated to pay employees on military leave. However, some recent cases addressing USERRA's anti-discrimination provision, which mandates that military leave be accorded the same "rights and benefits" as comparable, nonmilitary leave, may well indicate a trend leaving private employers on the hook for pay during military leave to the same extent the employer is providing paid leave for other reasons.

In *White v. United Airlines, Inc.*, the Seventh Circuit held that USERRA's mandate that military leave be accorded the same "rights and benefits" as comparable nonmilitary leave *does* require a private employer to provide paid military leave to the same extent that it provides paid leave for other comparable absences. In that case, a United Airlines

---

### Related Work

Labor and Employment  
Wage and Hour

---

### HR Defense Blog

Akerman Perspectives  
on the Latest  
Developments in Labor  
and Employment Law

[Visit this Akerman blog](#)

pilot and U.S. Air Force reservist alleged that United Airlines and its parent company unlawfully failed to pay employees during short-term military leaves (while paying employees who took other types of leave, such as jury duty or sick leave) and failed to credit employees for such time in a profit-sharing plan. While the case was dismissed at the district court level, in a matter of first impression for the federal courts of appeals, the Seventh Circuit reversed and remanded back to the district court. We await the district court's reconsideration.

In another recent case, Walmart agreed to pay between \$10 million and \$14 million to settle similar class action claims. In *Tsui v. Walmart Inc.* (D. Mass. 2020), a U.S. Army reservist alleged that Walmart violated USERRA by failing to offer proper compensation to employees who took short-term military leave while paying employees their full salary for jury duty and bereavement leave. Under the settlement, Walmart committed to set aside at least \$10 million to pay back those employees who took military leave since 2004, with a settlement cap of \$14 million. In addition, under the settlement, Walmart changed its military leave policy to guarantee full pay to employees who take up to one month of military leave and to make employees who take longer military leaves (up to one year) eligible for partial wages. Because this was a settlement, we do not have the benefit of seeing how the district court ultimately would have ruled.

Based on these recent cases, risk-averse employers who offer any voluntary (not statutorily mandated) paid leave to employees, including for jury duty, bereavement, sick leave, or other time off, may wish to start offering equivalent levels of paid leave to employees on military leave—at least until the issue is resolved in the circuit courts, or possibly the Supreme Court. For example, where an employer offers employees up to three (3) days of paid bereavement leave per year, that employer should consider also offering up three (3) days of paid military leave per year. Such risk-averse practices

should particularly be considered for employers operating in the Seventh Circuit, which includes Illinois, Indiana, and Wisconsin.

For assistance with updating leave policies and procedures, contact your Akerman attorney.

---

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.