For Whom the Leave Tolls: Short-Term Paid Military Leave and USERRA

Bradford J. Kelley*

ABSTRACT

Those who serve in the military in the National Guard or Reserves must balance civilian life in addition to their service duties, including time away from a civilian job. To help service members strike that balance, Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). USERRA protects service members from workplace discrimination based on their military service or affiliation. The law also provides employees with a variety of leave entitlements for absences related to military service. However, courts remain unclear as to whether USERRA requires employers to provide short-term paid military leave if they provide paid leave for comparable non-military absences, such as for jury duty, sick time, vacation, or bereavement. Although USERRA does not impose a general mandate for employers to pay all service members taking military leave, it does mandate service members be treated equally to other workers. Notwithstanding this requirement, many companies do not provide service members with paid leave when they take short-term military leave even when they do provide paid leave to workers taking similar forms of non-military leave.

This Article argues that USERRA's plain language, purpose, history, and implementing regulations require employers to provide short-term paid military leave if they provide paid leave for comparable non-military absences. First, this Article begins by exploring the genesis of employment law protections for service members, including the early history of these laws and their original purpose. Next, this Article examines specific

* Bradford J. Kelley is Chief Counsel to U.S. Equal Employment Opportunity Commission (EEOC) Commissioner Keith E. Sonderling and an adjunct professor at The Catholic University of America's Columbus School of Law. Prior to joining the EEOC, he was a Senior Policy Advisor in the U.S. Department of Labor's Wage and Hour Division. Before becoming an attorney, Bradford was a U.S. Army infantry and intelligence officer; he is also a veteran of the Iraq War. The views and opinions set forth herein are the personal views and opinions of the author and do not necessarily reflect views or opinions of the EEOC or any Commissioner.

USERRA, regulatory, and state law protections relevant to the military short-term paid leave debate. The Article then shifts to examining the application of these authorities by courts and identifies some of the salient coverage gaps created by judicial precedents. Finally, this Article asserts that USERRA mandates short-term paid military leave contrary to these precedents and offers some positive suggestions on how to ameliorate these pay disparities in the future.

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I. INTRODUCTION

Perhaps rather surprisingly, a significant number of companies in recent years have failed to provide military reservists short-term paid military leave even when they provide paid leave to workers when they take comparable forms of non-military leave, such as jury duty, vacation, funeral leave, or sick time.[1] This failure raises an important question about the extent to which federal law actually protects military service members in the civilian workplace.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), it is unlawful for employers to discriminate against service members based on their military service, including military leave obligations.[2] In addition to providing service members a right to reemployment and protections against discrimination when they are working,[3] USERRA requires employers to give service members on military leave the same "rights and benefits" as non-military employees taking similar kinds of leave.[4] In other words, USERRA requires employers to treat military leave no less favorably than other comparable forms of non-military leave. The U.S. Department of Labor ("DOL") has issued a regulation including guidance for what constitutes a comparable form of leave under USERRA, but the current guidance is vexing and unclear.[5]

The issue of whether USERRA's definition of "rights and benefits" includes short-term paid military leave has generated a flurry of litigation recently.[6] Before 2021, district courts across the country rendered mixed decisions as to whether USERRA requires employers to provide paid

1. *See* Davis Winkie, *How Courts May Make Paid Military Leave as Common as Paid Sick Leave*, MIL. TIMES (Apr. 13, 2021), bit.ly/3lPIgHS.

2. *See* USERRA § 4311(a), 38 U.S.C. § 4311(a) (1994). USERRA prohibits discrimination and retaliation in employment based on past, present, or future participation in the military.

3. *See id.*

4. *Id.* § 4316(b)(1)(B).

5. *See* 20 C.F.R. § 1002.150(b) (2006). *See also* Jonathan A. Segal, *Questions and Answers About DOL's Final USERRA Orders*, 52 No. 3 PRAC. L. 23, 23 (2003) (suggesting that USERRA is unclear).

6. *See* Susan Gross Sholinsky et al., *Seventh Circuit Holds That USERRA May Require Paid Leave During Short-Term Military Leave*, EPSTEIN BECKER & GREEN, P.C. (Mar. 8, 2021), https://bit.ly/3lNeB25. *See also infra* Part IV.

leave, and similar class actions are pending in states across the country.[7] In 2021, the U.S. Courts of Appeals for the Seventh and Third Circuits both held that USERRA requires employers to provide pay for military leave in the same fashion that they provide paid short-term leave for jury duty, vacation, sick leave, and other absences.[8] Now that at least two decisions have been issued by circuit courts, similar rulings and interpretations are likely to be issued in other jurisdictions. Ultimately, these subsequent decisions could revolutionize the way that military leave programs are administered across industries.[9]

However, some federal courts have declined to follow this trajectory, thereby creating inconsistencies in the case law.[10] Most notably, in 2021, a federal district court in Washington rejected a plaintiff's USERRA suit because military leave is longer, more frequent, and serves a different purpose than leave for illness, vacation, jury duty, and bereavement.[11] Accordingly, the court held that short-term paid military leave was not required under USERRA even though employers provided comparable forms of non-military leave. At the time of this writing, the issue remains largely unsettled and the case law developing in federal district courts is increasingly inconsistent.[12]

Even with these outliers, the Seventh and Third Circuit decisions favoring service member employees will increase attention concerning unpaid short-term military leave, especially interest from plaintiff's

7. *See* Robert T. Quackenboss & Katherine P. Sandberg, *Seventh Circuit Ruling Means Retailers May Need to Provide Paid Leave Under USERRA*, HUNTON ANDREWS KURTH LLP (Apr. 6, 2021), https://bit.ly/3PW7ceS (noting that the rise in litigation on this issue might result in split decisions among the circuit courts). *See also Seventh Circuit Rules USERRA May Require Employers to Provide Paid Military Leave*, AKIN GUMP (Feb. 12, 2021), https://bit.ly/3lNQdxi (noting that whether the "rights and benefits" protected by USERRA include paid leave was an open question, with district courts reaching different conclusions) [hereinafter *USERRA May Require*].

8. *See* White v. United Airlines, Inc., 987 F.3d 616, 621–23 (7th Cir. 2021); Travers v. Fed. Express Corp., 8 F.4th 198, 208–09 (3d Cir. 2021).

9. *See* Joe Skinner, *The Challenges of Military Leave Administration*, TALENT MGMT. & HR (July 27, 2021), https://bit.ly/3yYaEzu (noting the potential sea change) [hereinafter Skinner, *The Challenges*].

10. Nicholas Anaclerio & Aaron A. Bauer, *Seventh Circuit Clips United's Wings, Holding USERRA May Require Paid Leave to Reservists*, NAT'L L. REV., Apr. 26, 2021, at 3 (contending that the "federal appellate authority in this area . . . remains to be developed" and that "[a] few federal district courts have . . . provided some additional, albeit not entirely consistent, direction").

11. *See* Clarkson v. Alaska Airlines, Inc., No. 2:19-CV-0005-TOR, 2021 WL 2080199, at *4–9 (E.D. Wash. May 24, 2021).

12. *See id.*; *see also* Joe Skinner, *Up in the Air: Does USERRA Require Paid Leave?*, AIRWAYS MAG. (Aug. 14, 2021), https://bit.ly/3wVUB3S [hereinafter Skinner, *Up in the Air*].

lawyers.[13] Tellingly, in the wake of the recent circuit court decisions, some companies have settled military short-term paid leave claims and changed their military leave policies rather than continuing to litigate these disputes.[14] Considering these developments, companies should pay special attention to the recent circuit court rulings—the potential exposure arising from any noncompliant policies is amplified by the fact that USERRA is an often overlooked, yet far-reaching employment statute.[15]

Since World War II, the Supreme Court has liberally construed veterans' employment statutes to strongly favor veteran employees.[16] Equally significant, USERRA has no statute of limitations and no exhaustion requirement, applies to virtually all employers and employees, and allows the recovery of attorney fees and liquidated damages for willful violations.[17] Furthermore, short-term paid military leave cases are considered particularly vulnerable to class action treatment because leave policies are usually applied across large segments of the workforce and the interpretation of USERRA's "rights and benefits" provision involves a common question of law.[18] Besides these significant litigation consequences, employers confronted with potential USERRA claims could also face reputational harm due to the public's unprecedented support for veterans, which may damage the company's reputation, revenues, and personnel recruiting efforts.[19]

This Article argues that short-term paid military leave is required by USERRA if employers provide paid leave for comparable non-military absences. This argument is strongly supported by USERRA's highly

13. Richard G. Rosenblatt & Jason J. Ranjo, *Third Circuit Joins Seventh Circuit in Holding Paid Leave May Be Required During Military Service*, MORGAN LEWIS (Aug. 13, 2021), https://bit.ly/3GD00A9.

14. *See* Winkie, *supra* note 1 (noting that Walmart settled a class action suit in 2021, offering up to $14 million to approximately 7,000 National Guard and Reserve troops who were employed by the corporation; Walmart also updated its policies to include short-term paid military leaves as part of the settlement agreement).

15. *See* Jason Ranjo & Kurt Perhach, LAW360, *What Employers Still Don't Get About Benefits for Veterans* (Jan. 13, 2020, 4:25 PM), https://bit.ly/3lLafsk; *see also* Skinner, *The Challenges*, *supra* note 9 (noting that USERRA is wide-ranging and generous to employees).

16. *See* Bradford J. Kelley, *All Quiet on the Employment Front: Mandatory Arbitration Under the USERRA*, 34 HOFSTRA LAB. & EMP. L.J. 367, 371 (2017) [hereinafter Kelley, *All Quiet*].

17. *See id.* at 398. *See also infra* Part II.C.

18. *USERRA May Require*, *supra* note 7, at 2. *See also* Huntsman v. Sw. Airlines Co., No. 19-CV-00083, 2021 WL 391300, at *13 (N.D. Cal. Feb. 3, 2021) (certifying a class of nearly 7,000 Southwest Airlines workers in a suit accusing the airline failed to pay employees who take short-term military leave as it does for other types of leave and concluding plaintiff's claims are common to the class, which includes pilots, flight attendants, ramp agents, and other airline employees).

19. *See* Ranjo & Perhach, *supra* note 15.

unique legislative history and reinforced by the U.S. Supreme Court's noteworthy, liberal approach to veterans' employment rights and statutory construction. Part II of this Article discusses USERRA's background, including its distinctive history and intent. This Part further discusses analogous USERRA laws at the state level and modern employment-related problems that service members face in the post-9/11 military. Against this backdrop, Part III examines the unresolved landscape of paid short-term military leave actions brought under USERRA, and the various approaches taken by federal courts. Then, Part IV argues the specific reasons USERRA requires that employers provide paid short-term military leave if providing comparable paid non-military leave, and outlines the critical policy reasons supporting this approach, including underlying recruitment and retention concerns. Finally, Part V contains suggestions to ameliorate the problem of short-term paid leave for service members, including legislative amendments, regulatory revisions, and potential state-level action.

II. BACKGROUND OF USERRA

To understand the debate over short-term paid military leave under USERRA, it is important to contextualize the statute through its unique history. This Part will review USERRA's history, including its predecessors, how it operates, and how it is interpreted by the Supreme Court. Against this backdrop, this Part will contend that USERRA's history and construction reflect the legislature's intent to extend service members broad protections and impose stringent standards on employers. Additionally, this Part will provide an overview of analogous USERRA laws at the state level. Finally, this Part will examine modern employment problems military members face, especially in a post-9/11 employment market.

A. Employment Protections Before USERRA

Although Congress enacted USERRA in 1994, the first federal legislative effort to extend reemployment protections to military members occurred during World War II when Congress passed the Selective Training and Service Act of 1940 ("STSA").[20] Specifically, the STSA required employers to keep positions open for military members called

20. *See* Kelley, *All Quiet*, *supra* note 16, at 372.

away for military service,[21] and provided veterans returning to civilian life reemployment in positions of "like seniority, status, and pay."[22]

Congress modified and renamed the STSA several times, eventually transforming it into the Veterans Reemployment Rights Act ("VRRA") during the Vietnam War.[23] Congress specifically revised the VRRA to provide greater protections for service members chiefly in response to reports that service members, especially National Guard members and Reservists, faced increased employment discrimination that had not been adequately addressed through previous legislative attempts.[24] This discrimination was mainly evidenced by terminations due to military obligations or the denial of promotions.[25] To provide enhanced protections, the VRRA allowed veterans to ask for leaves of absence from private employers to go on active duty. The VRRA guaranteed the veteran the same position upon return, with the same seniority, status, pay, and vacation as if they had not been absent.[26]

In the early 1970s, as the Vietnam War was ending and conscription was replaced with an all-volunteer force, the U.S. Department of Defense ("DOD") adopted a new strategy known as the "Total Force Policy," which increased reliance on the National Guard and Reserve.[27] Unlike the

21. Initially, the STSA only applied to those drafted into military service; however, Congress passed the Service Extension Act in 1941, thereby expanding the STSA's reemployment provisions to individuals who voluntarily left their jobs to enter the service. *See* Service Extension Act of 1941, Pub. L. No. 77-213, § 7, 55 Stat. 626, 627 (repealed 1956).

22. Rogers v. City of San Antonio, 392 F.3d 758, 764 (5th Cir. 2004) (quoting Jesse H. Jones.; Pub. Res., Pub. L. No. 54-783, § 8, 54 Stat. 885, 890 (1940)).

23. *See* Daniel J. Bugbee, *Employers Beware: Violating USERRA Through Improper Pre-Employment Inquiries*, 12 CHAP. L. REV. 279, 282 (2008). *See also* Matt Crotty, *The Uniformed Services Employment and Reemployment Rights Act and Washington State's Veteran's Affairs Statute: Still Short on Protecting Reservists from Hiring Discrimination*, 43 GONZ. L. REV. 169, 174 (2008) (stating that "during the Cold War, the [STSA] underwent a series of modifications including the Selective Service Act of 1948 and the Universal Military Training and Service Act of 1967").

24. *See* Kelley, *All Quiet*, *supra* note 16, at 372. The Senate Report noted that the "'[employment] practices that discriminate against employees with reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and others have been discharged because of these obligations.'" *See* Monroe v. Std. Oil Co., 452 U.S. 549, 557–58 (1981) (quoting S. REP. NO. 1477, at 1–2 (1968)). The House Report similarly indicated that these were the purposes and effects of the legislation. *See id.* at 558 (citing H.R. REP. NO. 1303, at 3 (1968)).

25. *See* Kelley, *All Quiet*, *supra* note 16, at 372.

26. *See* Woodman v. Off. of Pers. Mgmt., 258 F.3d 1372, 1375–76 (Fed. Cir. 2001) (quoting USERRA § 2024(d), 38 U.S.C. § 2024(d) (1994)).

27. *See* Lisa Limb, *Shots Fired: Digging the Uniformed Services Employment and Reemployment Rights Act Out of the Trenches of Arbitration*, 117 MICH. L. REV. 761, 765 (2019).

Vietnam War, which largely exempted Reserve and National Guard forces from combat deployments, the Total Force Policy was intended to amplify the National Guard and Reserve, integrating them more closely with regular active-duty forces.[28] During this time, Congress realized that the VRRA was too difficult for employers and employees to understand and that it was "sometimes ambiguous, thereby allowing for misinterpretations."[29] According to Congress, these misinterpretations viewed the law too narrowly and thwarted service members' ability to vindicate their rights. Congress therefore felt the need "to restate past amendments in a clearer manner and to incorporate important court decisions interpreting the law," while simultaneously correcting the misinterpretations.[30] To enable this novel strategy and address the new realities of military policy, Congress replaced the VRRA by enacting USERRA in 1994.[31]

B. USERRA

Because previous legislative attempts were inadequate, Congress enacted USERRA. Congress's chief purpose in enacting USERRA was to "prohibit discrimination against persons because of their service [or status] in the uniformed services."[32] USERRA symbolizes Congress's promise that service members would not suffer employment repercussions because of their military service.[33] Additionally, Congress intended for USERRA to encourage non-career military service and minimize employment disadvantages and disruptions due to military service.[34] To accomplish these objectives, Congress designed USERRA to provide critical protections—USERRA prohibits discriminatory actions by an employer against the service member employee, provides reemployment rights upon return from military duty, and preserves employment benefits for those on

28. *See* Kelley, *All Quiet*, *supra* note 16, at 372–73.

29. *See* 139 Cong. Rec. 8975 (1993) (also noting that VRRA was too "complex and difficult to understand."*); see also* Konrad S. Lee, *"When Johnny Comes Marching Home Again" Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 254 (2008)*;* H.R. REP. NO. 103-65 (1993), *reprinted in* 1994 U.S.C.A.A.N. 2449, 1993 WL 235763, at *18 [hereinafter H.R. REP. NO. 103-65].

30. *See* 137 CONG. REC. 11313 (1991).

31. In enacting USERRA, Congress emphasized its continuity with the VRRA and with the body of caselaw that had developed under USERRA's predecessor statutes. *See* United States v. Ala. Dep't of Mental Health and Mental Retardation, 673 F.3d 1320, 1329 n.6 (11th Cir. 2012).

32. USERRA § 4301(a), 38 U.S.C. § 4301(a) (1994).

33. *See* Andrew P. Sparks, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act*, 61 HASTINGS L.J. 773, 775 (2010).

34. *See* 38 U.S.C. § 4301(a).

military leave.[35] In recommending passage of the bill, the Committee on Veterans' Affairs emphasized that it "intend[ed] that these anti-discrimination provisions be broadly construed and strictly enforced."[36] Congress also emphasized that the substantial amount of case law that had developed under USERRA's predecessors remained in full force and effect if it was consistent with USERRA.[37]

The DOL's Veterans Employment and Training Service ("VETS") is authorized to investigate and resolve USERRA complaints.[38] There are generally two options for a service member to assert their rights under USERRA. First, service members may file complaints with VETS.[39] If VETS is unable to resolve the complaint, the matter may be referred to the U.S. Department of Justice ("DOJ") which may bring a civil action against a private, state, or local government employer on the service member's behalf.[40] Alternatively, USERRA plaintiffs may pursue civil actions directly in court.[41] USERRA offers remedies such as equitable relief, lost wages and benefits, attorney's fees and costs, and liquidated damages if the employer is willfully noncompliant.[42]

C. Why USERRA is a Consequential Employment Statute

In brief, USERRA contains several unique protections making it more consequential than other employment anti-discrimination statutes. First, USERRA applies to all employers in the United States.[43] Specifically, USERRA applies to *all* public and private employers regardless of size, including federal and state governments and employers with only one employee.[44] In 2022, the Supreme Court held that USERRA

35. *See id*. *See also* 20 C.F.R. § 1002.1 (2022).

36. H.R. REP. NO. 103-65, *supra* note 29, at *23.

37. 20 C.F.R. § 1002.2 (2022).

38. *See* 38 U.S.C. §§ 4321–4327.

39. *See* 38 U.S.C. § 4322. DOL requires that the complaint include the employer's name and address, a summary of the basis for the complaint, and a request for relief. *See* 20 C.F.R. § 1002.288 (2022).

40. Department of Justice handles USERRA claims involving private employers as well as state and local governments whereas the Office of Special Counsel, in conjunction with DOL, investigates and enforces USERRA claims involving federal government employers. *See* 38 U.S.C. § 4324.

41. *See* 38 U.S.C. § 4323(a)(3); 20 C.F.R. §§ 1002.288, 1002.303 (2022). This option essentially bypasses the VETS process, meaning that a service member does not need to file a complaint with VETS regarding the alleged discrimination.

42. *See id.* § 4323(d)–(e), (h).

43. USERRA defines "employer" as an "entity that pays salary or wages for work performed or that has control over employment opportunities," including an "entity to whom the employer has delegated the performance of employment-related responsibilities." *Id.* § 4303(4)(A).

44. *See id*.; 20 C.F.R. § 1002.34 (2022). Unlike the 15-employee threshold in Title VII, *see* 42 U.S.C. § 2000e(b), and the Americans with Disabilities Act, *see* 42 U.S.C. §

allows for the same private right of action for claims against state employers as it does for claims against private employers.[45] The statute also covers foreign employers conducting business within the United States as well as most American companies doing business abroad.[46] In addition, the law covers employers who are successors-in-interest, even if the successor-in-interest to the original employer does not have notice of potential reemployment claims at the time of the merger, acquisition, or any other type of succession.[47] USERRA's broad definition of an employer also means that the statute has wide-ranging joint employer liability, meaning multiple employers may be liable for violations.[48] Additionally, Congress's broad remedial scheme for USERRA allows suit in any federal district court where an employer has a place of business.[49]

Second, and related to the sweeping employer coverage, USERRA applies to all employees who serve in the uniformed services, which is very broadly defined.[50] USERRA's definition of employee includes past and present members of a uniform service, as well as those who have applied for membership.[51] USERRA covers virtually all employees, including employees that are part-time, temporary, seasonal, and even those on probationary status.[52] USERRA touches every phase of the employment life cycle: hiring, retention, promotion, reemployment, and

12111(5)(A), USERRA applies to an employer with just one employee. *See* Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992). Therefore, while other federal employment laws will not apply to some small businesses, these businesses will almost surely fall within USERRA's scope.

45. *See* Torres v. Tex. Dep't of Pub. Safety, No. 20-603, 2022 U.S. LEXIS 3221, at *30 (S.Ct. June 29, 2022) (holding that state employers do not have sovereign immunity from USERRA suits because of the federal government's broad war powers).

46. *See* 20 C.F.R. § 1002.34 (2022); *see also USERRA: Insulate Your Business from Violation Liability*, J.D. SUPRA: BAKER DONELSON (Mar. 17, 2021), https://bit.ly/3LXExD1.

47. *See* 20 C.F.R. § 1002.36 (2022). Under USERRA, whether the entity is a successor in interest is determined by using a multifactor test applied on a case-by-case basis provided in the regulations. *See* 20 C.F.R. § 1002.35 (2022).

48. *See* 38 U.S.C. § 4303(4)(A)(i). DOL's USERRA regulations include a joint employer section explaining that "an employer includes not only the person or entity that pays an employee's salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities." *See* 20 C.F.R. § 1002.37 (2022).

49. *See* 38 U.S.C. § 4323(c)(2).

50. *See* 38 U.S.C. § 4303(3) (defining employee); 38 U.S.C. § 4303(13) (stating that "service in the uniformed service" includes, among other things, active duty, active duty for training, full-time National Guard duty, and fitness for duty examinations).

51. *See* 38 U.S.C. § 4303(3).

52. *See* 20 C.F.R. § 1002.41 (2022). However, the regulation excludes employment that was for "a brief, nonrecurrent period [with] no reasonable expectation that the employment would have continued indefinitely or for a significant period." *Id.*

other employment benefits. Unlike other employment statutes, USERRA offers no exemption for executive, managerial, or professional employees.[53]

Third, USERRA has no exhaustion requirement, meaning that a plaintiff is not required to file a complaint with VETS or any other federal agency before filing a lawsuit.[54] As such, USERRA violations often move at a faster pace than other employment protection statutes. Furthermore, USERRA expressly "supersedes any State law (including local law or ordinance), contract, agreement, policy, plan, practice, or other matters that reduces, limits, or eliminates in any manner any right or benefit provided by" USERRA.[55] Importantly, this provision applies to all employment contracts, including collective bargaining agreements, that provide service members with fewer benefits.[56]

Fourth, USERRA has no statute of limitations and expressly prohibits courts from applying a state statutory limitations period so USERRA claims may arise from alleged conduct that occurred over a decade ago or potentially longer.[57] In 2008, Congress responded to courts applying a four-year federal limitations period by amending USERRA to clarify there is no time limit to file suit.[58] As a practical consequence, this has led to lawsuits that are difficult for employers to defend because of evidentiary problems that naturally occur with the passage of time, such as the unavailability of documents and witnesses' fading memories.[59] Because of USERRA's lack of a statute of limitations, the equitable doctrine of laches provides the employer's only defense to a stale claim.[60] However, the laches defense is also difficult to establish because employers must show

53. *See* 20 C.F.R. § 1002.43 (2022).

54. *See* 38 U.S.C. § 4323(b)(1); 20 C.F.R. § 1002.303 (2022).

55. 38 U.S.C. § 4302(b).

56. *See id*. *See also* RICHARD ROSENBLATT & JASON RANJO, LAW360, 3RD CIRC. RULING SHOWS EMPLOYER RISK IN UNPAID MILITARY LEAVE 3 (2021) (briefly explaining why employers need to be cognizant of unionized employees).

57. *See* 38 U.S.C. § 4327(b) (stating "there shall be no limit on the period for filing the [USERRA] complaint or claim"); 20 C.F.R. § 1002.311 (2022).

58. *See* Pub. L. 110–389, § 311(f)(1), 122 Stat. 4163 (2008). Now, "[i]f any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of [USERRA], there shall be no limit on the period for filing the complaint or claim." 38 U.S.C. § 4327(b).

59. *See* Ranjo & Perhach, *supra* note 15. *See also* Travers v. FedEx Corp., 567 F. Supp. 3d 542, 552 (E.D. Pa. 2021) (rejecting employer's argument that USERRA plaintiff's fifteen-year delay in filing USERRA short-term paid military leave lawsuit was prejudicial because critical documents may have been destroyed and witnesses' memories had faded and concluding these contentions were "speculative").

60. *See* 20 C.F.R. § 1002.311 (2022) (noting that courts have recognized that the equitable doctrine of laches is available for USERRA claims).

that the plaintiff's delay in filing suit was both inexcusable and prejudicial to the employer's defense.[61]

Fifth, courts have broad authority to protect the rights and benefits of those covered by USERRA, including the recovery of attorney fees, expert witness fees, and other litigation expenses as well as liquidated damages for willful violations.[62] Essentially, liquidated damages double the award to a successful plaintiff. The DOL regulations specify that any wages, benefits, or liquidated damages awarded to USERRA claimants "must not diminish[] any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employer)."[63] Therefore, USERRA claims may be exceptionally costly, especially given the absence of a statute of limitations causing significant exposure based on the accumulation of years of potential damages. Moreover, USERRA gives courts wide-ranging equitable powers to protect the rights and benefits of those covered by the statute; these equitable powers include the issuance of temporary or permanent injunctions, temporary restraining orders, and contempt orders.[64] As part of its broad remedial scheme, USERRA forbids assessing fees or costs against any person claiming rights under the statute.[65] The Seventh Circuit has even held that USERRA claimants are not required to pay the court fee for filing a complaint based on USERRA's plain language and congressional intent to minimize litigation costs for veterans.[66]

Sixth, USERRA plaintiffs may have an easier path alleging class-wide discrimination claims because many of the policies provide the common questions of law or fact necessary for a class to be certified under the federal rules of civil procedure.[67] Practitioners have explained that this is especially true with short-term leave litigation because leave policies are often applied across large segments of the workforce, and because the interpretation of USERRA's "rights and benefits" provision is a common

61. *See, e.g.*, *Travers*, 567 F. Supp. at 545–52 (denying employer's motion to dismiss USERRA short-term paid military because court needed factual development and discovery to determine whether a fifteen-year delay was inexcusable and prejudicial).

62. *See* 38 U.S.C. §§ 4323(d)(1)(C), (h); 20 C.F.R. § 1002.312(d) (2022).

63. 20 C.F.R. § 1002.312(d) (2022).

64. *See* 20 C.F.R. § 1002.314 (2022).

65. *See* 38 U.S.C. § 4323(h)(1); 20 C.F.R. § 1002.310 (2022).

66. *See* Davis v. Advoc. Health Ctr. Patient Care Express, 523 F.3d 681, 685 (7th Cir. 2008).

67. *See* FED. R. CIV. P. 23. *See also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011) (noting the requirement for some "glue" that holds together class members' claims for relief and produces common answers to questions).

question of pure law.[68] As a corollary, discovery for USERRA cases may be especially time-intensive and expensive since the claims are frequently brought as class actions. For this reason, employers often try to settle USERRA suits early, not only because of the costs associated with prolonged discovery and motion practice, but also due to the possibility of large jury awards if the employer is found to be at fault at trial.

Seventh, statutory interpretation by the Supreme Court demonstrates that USERRA is substantially more protective than other workplace anti-discrimination laws.[69] Historically, the Court has construed USERRA and its predecessors strongly in favor of the veteran plaintiff. Most notably, in *Fishgold v. Sullivan Drydock & Repair Corp*., the Court explained that the veteran "who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job."[70] The Court stressed that a liberal construction benefiting veterans was therefore necessary.[71] Importantly, the *Fishgold* Court explained that instead of reading various sections in a vacuum, separate provisions should be treated as "parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits."[72] On a more functional level, this canon of construction does not simply serve as a tie-breaker between plausible arguments; rather, the Supreme Court has emphasized that any "interpretive doubt is to be resolved in the veteran's favor."[73] Recognizing this clear guidance, lower courts and agencies such as DOL have consistently followed the Supreme Court's guidance by liberally construing USERRA and its regulations.[74]

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68. *See USERRA May Require*, *supra* note 7; *see also* Huntsman v. Sw. Airlines Co., No. 19-CV-00083, 2021 WL 391300, at *13 (N.D. Cal. Feb. 3, 2021) (concluding plaintiff's claims are common to the class, which includes about 7,000 airline workers).

69. *See* Kelley, *All Quiet*, *supra* note 16, at 374.

70. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946). The Court also noted that the protections were designed to ensure that a veteran employee was "to gain by his service for his country an advantage which the law withheld from those who stayed behind." *Id.*

71. *Id*. at 285.

72. *Id*. Significantly, the statutory canon applies broadly, including to the interpretation and reconciliation of separate subsections of veterans' rights statutes. The Court mandated that courts "construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold*, 328 U.S. at 285; *accord* King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (holding, in interpreting USERRA's predecessor statute, that a court must "follow the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context" (citations omitted)).

73. Brown v. Gardner, 513 U.S. 115, 118 (1994).

74. *See, e.g*., Hill v. Michelin N. Am., Inc., 252 F.3d 307, 312–13 (4th Cir. 2001) ("Because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries.").

Eighth, notwithstanding the significant litigation ramifications, employers facing USERRA claims simultaneously risk serious reputational damage.[75] Because of existing overwhelming support for military members and veterans, any perception of being hostile or unsupportive may adversely impact employer revenues, recruitment efforts, and business reputation.[76]

D. State USERRA Laws

USERRA's sweeping protections establish a floor for service members' rights, not a ceiling. As such, many states have enacted laws extending greater employment protections for military service members.[77] Historically, National Guard members called to most forms of state active duty were not covered by USERRA, so state laws have been essential in protecting the civilian job rights of National Guard members.[78] For instance, Washington State's Veterans and Veterans' Affairs statute mirrors the federal USERRA law and establishes certain rights and responsibilities under state law for uniformed service members and their civilian employers.[79] Many state USERRA laws provide service members with more protections than those enumerated in the federal USERRA.[80]

DOL's USERRA regulations state that the "interpretive maxim [favoring veterans shall] apply with full force and effect in construing USERRA and these regulations." Uniform Services Employment and Reemployment Rights Act of 1994, As Amended, 70 Fed. Reg. 75,245, 75,246 (Dec. 19, 2005) (codified at 20 C.F.R. pt. 1002) [hereinafter USERRA Fed. Reg.].

75. *See* Ranjo & Perhach, *supra* note 15.

76. *See id*.

77. *See* John F. Beasley Jr. & Marisa Anne Pagnattaro, *Reemployment Rights for Noncareer Members of the Uniformed Services: Federal and State Law Protections*, 20 LAB. LAW. 155, 169 (2004) (noting that the range of protections varies significantly by state).

78. *See* USERRA § 4303(13), (15), 38 U.S.C. § 4303(13), (15) (1994) (defining "state active duty" under USERRA); *see also* VETERANS EMP. AND TRAINING SERV., U.S. DEP'T OF LAB., NEW COVERAGE FOR CERTAIN STATE ACTIVE DUTY UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS 1, https://bit.ly/3LVUtpk. In January of 2021, Section 4303 of USERRA "was amended to extend employment and reemployment rights to members of the National Guard performing certain types of duty under state authority." *Id*. Pursuant to this amendment, "members of the National Guard serving on State Active Duty: (a) for 14 days or more, (b) in support of a national emergency declared by the President under the National Emergencies Act, or (c) in support of a major disaster declared by the President under Section 401 of the Stafford Act, are now covered under USERRA." *Id*.

79. WASH. REV. CODE § 73.16.005 (2022). *See also* Crotty, *supra* note 23, at 179.

80. *See generally* George R. Wood, Littler Mendelson, P.C., *A Guide to Leave Under the Uniformed Services Employment and Reemployment Rights Act* (last visited June 18, 2022), https://bit.ly/38y5Ztm (discussing various state USERRA laws); *see also* Ranjo & Perhach, *supra* note 15 (discussing New York's USERRA as an example of a more beneficial law than the federal USERRA because the New York law provides

For example, in addition to the damages allowed under the federal USERRA, Oklahoma's USERRA statute allows for actual, compensatory, and punitive damages.[81] Some state USERRA laws even impose criminal penalties. For instance, Virginia's USERRA statute provides that employers violating USERRA are guilty of a misdemeanor and may be fined or imprisoned for up to 30 days, or both.[82]

In addition to offering more expansive damage recovery, many states have also prioritized issuing clear guidance on their USERRA laws. Since the 1960s, Washington's Attorney General has issued opinion letters in response to questions on the state's USERRA law application.[83] Likewise, Oklahoma and South Carolina's Attorneys General have responded to inquiries concerning how their state USERRA laws apply.[84]

E. Modern Problems for Military Members and Veterans

There has been a significant increase in veteran discrimination since USERRA's enactment, especially in more recent years.[85] Scholars and politicians consistently recognize that the 9/11 terrorist attacks and wars in Afghanistan and Iraq have detrimentally impacted veteran employment.[86] In late 2021, the U.S. Equal Opportunity Commission ("EEOC") issued guidance on veterans' discrimination, noting that post-9/11 veterans returning from lengthy deployments have experienced higher unemployment rates than the general population and other

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reemployment rights for all service members regardless of whether the service member provides advance notice to their employer).

81. *See* OKLA. STAT. tit. 44, § 4323(D) (2022).

82. *See* VA. CODE ANN. § 44-98 (2022).

83. *See, e.g.*, Op. Wash. Att'y Gen. No. 65 (1961), 1961 WL 62899 (answering the question of whether "a state employee who takes a leave of absence because of being called to active duty in the military service [should] be entitled, on his return to state employment, to seniority credits for the time he has spent in the service"); Op. Wash. Att'y Gen. No. 180 (1962), 1962 WL 70454 (answering several questions regarding veterans' preference in public employment and military probationary status).

84. *See, e.g.*, Op. Okla. Att'y Gen. No. 2010-3 (2010), 2010 WL 1180223, at *2; Op. S.C. Att'y Gen. No. 100 (1980), 1980 WL 81935 (responding to inquiry of whether an officer is entitled to receive his full, normal civilian pay, without taking into account any military compensation that he may receive).

85. *See* Bradford J. Kelley, *Veterans Employment Discrimination Guidance Updated*, MIL. TIMES (Feb. 3, 2021), https://bit.ly/3N82OGS [hereinafter Kelley, *Veterans Employment Discrimination*]. *See also* Michael De Yoanna, *As Troops Face Mounting Demands to Serve in Crises, Civilian Employers are Firing Them*, TASK & PURPOSE (July 10, 2022), https://bit.ly/3QicGQf (noting that between 2004 and 2020, DOJ filed 109 USERRA lawsuits and resolved 200 complaints either by consent decrees or private settlements).

86. *See id.*

veterans.[87] The EEOC's guidance also explained that veterans routinely face discrimination because of mental or physical disabilities.[88] In many cases, civilian employers are often indifferent, dismissive, and sometimes even hostile to the wartime experiences of their veteran employees.[89] Furthermore, veterans are regularly stereotyped as unstable and broken after experiencing war.[90] This stereotyping is often reflected and reinforced in popular culture, especially in movies and television shows depicting veterans as damaged and volatile.[91] Although some of these depictions may arguably have helped facilitate an important dialogue about the raw nature of wartime experiences, they have simultaneously imposed the unintended consequence of adversely impacting the employment prospects of veterans.[92]

Recently, Reservists and National Guard members have been the most adversely impacted military population because they are required to balance civilian life, including time away from a civilian job, and combat deployments.[93] Indeed, over the past two decades, about half of the troops deployed to Iraq and Afghanistan have been from the National Guard and Reserves.[94] Generally, ordinary military duty for Reservists consists of one weekend per month plus a two-week period each year.[95] If they are deploying to a combat zone, they are usually required to participate in four to eight weeks of training beforehand.[96] As a result, a twelve-month deployment often means these service members spend over a year and a half away from their families, placing a substantial strain on familial relationships. If called up to active duty, most National Guard members and Reservists make a base pay of around $3,000 per month; when not on active duty, National Guard members earn around $200 for a weekend of

87. *EEOC Efforts for Veterans with Disabilities*, EEOC (Nov. 27, 2020), https://bit.ly/3M1gyCR [hereinafter *EEOC Efforts*].

88. *See id.*

89. Kelley, *Veterans Employment Discrimination*, *supra* note 85.

90. *See id.*

91. *See id.*

92. *See* Keith E. Sonderling, *Facing Down Job Discrimination Against Vets*, ATLANTA J.-CONST. (July 24, 2021), https://bit.ly/38wdZLg [hereinafter Sonderling, *Facing Down*] (discussing how these representations of the harsh realities of modern warfare have made it more difficult for veterans to get promoted or hired).

93. *See id.*; Mike Cerre, *After Wars in Iraq and Afghanistan, Rethinking How National Guard Members Are Deployed*, PBS (July 5, 2021, 6:50 PM), https://to.pbs.org/3GwhC0l.

94. *See* Cerre, *supra* note 93.

95. *See* Miller v. City of Indianapolis, 281 F.3d 648, 649 (7th Cir. 2002).

96. *See* Kelley, *All Quiet*, *supra* note 16, at 406.

drills.[97] In most cases, the military pay for National Guard members and Reservists is below what they would earn in their civilian job.[98]

In the immediate aftermath of 9/11, the military increasingly relied on its National Guard and Reserve forces for a variety of critical functions, including essential military readiness,[99] often requiring National Guard members to participate in state emergency response, disaster relief, and law enforcement missions in addition to combat deployments and the requisite training duties.[100] Since 9/11, more than a million Reserve and National Guard members have been mobilized, and nearly 1,300 have been killed in combat.[101] Consequently, service members have increasingly struggled with reintegrating into the workforce, as evidenced by disproportionately high unemployment rates among veterans compared to their civilian counterparts.[102] This is also reflected in the growing numbers of workplace-related complaints filed with DOL and DOD.[103] One practitioner explains that Reservists and National Guard members deal with a particularly challenging transition after returning from combat because they frequently leave the familiar military support system shortly thereafter.[104] Moreover, the fact that a significant number of service members reside in rural or suburban locations far from large military resource centers complicates the transition and makes it more difficult for them to access mental health treatment for conditions like post-traumatic stress disorder.

The COVID-19 pandemic has further exacerbated the employment issues many military members face, especially National Guard members confronted with even longer deployments and periods of activation.[105] Since the pandemic, National Guard members and Reservists have been called to administer tests and vaccines, volunteer at food banks across the

97. *See* Laura Reiley, *The Rising Cost of Being in the National Guard: Reservists and Guardsmen Are Twice as Likely to Be Hungry as Other American Groups*, WASH. POST (June 22, 2021, 3:33 PM), https://wapo.st/3x2M4fz.

98. *See id*. (explaining that many civilian employers do not pay National Guard members their wages during absences or even to keep the civilian jobs open for their return).

99. Lee, *supra* note 29, at 248 (explaining that the reliance on these forces for essential military readiness reached "unprecedented levels" after 9/11).

100. *See* Kelley, *All Quiet*, *supra* note 16, at 378–79.

101. *See* Jeffrey E. Phillips, *Employers Must Support Reserve and Guard Who Are Helping in This Crisis*, THE HILL (Mar. 21, 2020, 3:02 PM), https://bit.ly/38w7LLk.

102. *See EEOC Efforts*, *supra* note 87.

103. *See* Kelley, *All Quiet*, *supra* note 16, at 380. *See also* De Yoanna, *supra* note 85 (discussing how in 2020 the DOD initiated 944 new complaint investigations in addition to the 164 cases still under investigation from the year before).

104. *See* Kelley, *All Quiet*, *supra* note 16, at 378.

105. *See Reiley*, *supra* note 97.

country, and quell civil unrest.[106] In addition to their more traditional duties such as responding to natural disasters like floods and wildfires, COVID-19 has also caused these forces to be called upon to serve as teachers, janitors, and bus drivers.[107]

Despite USERRA's strong protections against hiring or re-employment discrimination, employers often fear that they will not be able to afford the cost of an employee's time away for deployment or training or that they will not be able to rehire a veteran who returns from service.[108] Additionally, according to Pentagon reports, more than 10% of returning service veterans struggle with reemployment and exercising their USERRA rights.[109] Some commentators have noted that many employers believe that the unexpected and disruptive schedules that Reservists and National Guard troops maintain pose impossible workplace challenges.[110]

Ultimately, these modern problems have negatively impacted retention and recruitment for the military. Indeed, every branch of the military has struggled with retention and recruitment in recent years.[111] Notwithstanding USERRA's employment protections, many Reservists and National Guard members fear losing their jobs upon deployment, causing many of these service members to seek new jobs.[112] The COVID-19 pandemic has worsened the military's recruitment problems by complicating the military's recruitment efforts in schools and at public events due to widespread closures and cancellations.[113] Consequently, COVID-19 has caused the military to rely even more heavily on Reservists and the National Guard.[114]

The current situation is the epitome of a catch-22. On the one hand, the country increasingly relies on service members for combat operations and other critical functions such as responding to hurricanes and administering COVID-19 vaccines. But, on the other hand, this increased

106. *See id*; *accord* Sonderling, *Facing Down*, *supra* note 92.

107. *See* Hannah Knowles & Karoun Demirjian, *Omicron Slammed Essential Workers. So the National Guard Became Teachers, Janitors and More.*, WASH. POST (Feb. 18, 2022, 6:00 AM), https://wapo.st/3lVW9nZ.

108. *See* Kelley, *All Quiet*, *supra* note 16, at 379.

109. *See id.* at 379–80.

110. *See id.* at 380; *see also* Reiley, *supra* note 97 (noting that "[s]ome of Guard members and reservists' financial precariousness is because employers are tired of giving them the time off. All those absences put extra pressure on other workers and bosses.").

111. *See* Lisa Limb, *Shots Fired: Digging the Uniformed Services Employment and Reemployment Rights Act Out of the Trenches of Arbitration*, 117 MICH. L. REV. 761, 782 (2019).

112. *See* Lee, *supra* note 29, at 250.

113. *See* Lolita C. Baldor, *Army Offers Recruits up to $50K Bonus as Pandemic Takes Toll*, ARMY TIMES (Jan. 12, 2022), https://bit.ly/3GvDxVz.

114. *See* Knowles & Demirjian, *supra* note 107 (noting that National Guard roles have grown as COVID-19 has largely redefined national security protection measures).

reliance engenders a fear among employers that they cannot afford the costs associated with military leave. As a consequence, service members are discriminated against at the workplace and routinely fear that they will lose their jobs, which hampers military recruitment efforts and retention. Accordingly, short-term paid military leave must be provided under USERRA.

III. USERRA AND SHORT-TERM PAID MILITARY LEAVE

A. USERRA Provisions

Against USERRA's background discussed in Parts I and II, short-term military paid leave litigation focuses on two specific statutory provisions. The first is § 4316(b)(1), which entitles employees taking military leave to the "other rights and benefits" their employers give other employees taking similar leaves.[115] More specifically, § 4316(b)(1) states:

> [A] person who is absent from a position of employment by reason of service in the uniformed services shall be—
>
> (A) deemed to be on furlough or leave of absence while performing such service; and
>
> (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.[116]

In a nutshell, § 4316(b)(1) establishes an equality rule undergirding USERRA and requiring equal treatment for veterans.[117] Section 4316(b)(1)'s equality rule is part of USERRA's core tenet of "equal, but not preferential" treatment for Reservists, which most federal circuit courts recognize.[118] In doing so, Congress aimed to guarantee a level of equal treatment regarding military and non-military leaves while striking a proper balance between service member benefits and business costs.[119] Courts have emphasized that USERRA does not allow the judiciary to

115. USERRA § 4316(b)(1), 38 U.S.C. § 4316(b)(1) (1994).

116. *Id.*

117. *See* Jolley v. Dep't of Hous. & Urb. Dev., 299 F. App'x 966, 968 (Fed. Cir. 2008) (discussing the equality rule).

118. *See, e.g.*, Crews v. City of Mt. Vernon, 567 F.3d 860, 865 (7th Cir. 2009); Dorris v. TXD Servs., LP, 753 F.3d 740, 745 (8th Cir. 2014) (collecting cases and explaining the equal-but-not-preferential-treatment rule within the context of Supreme Court precedent).

119. *See* Rogers v. City of San Antonio, 392 F.3d 758, 769–70 (5th Cir. 2004).

modify or reframe the statute's equal treatment guarantee and important balance.[120]

The Senate report on the bill that became § 4316(b)(1) explained that the law would re-codify the equality rule that workers on military leave are entitled to the same "rights and benefits" as workers who take other forms of leave.[121] The Senate report elaborated that it "would codify court decisions that have interpreted current law as providing a statutorily-mandated leave of absence for military service that entitles service members to participate in benefits that are accorded other employees."[122] Similarly, the House Report also stated that the bill had the same purpose and effect.[123] In adopting § 4316(b), Congress stressed that "to the extent the employer policy or practice varies among various types of non-military leaves of absence, the *most favorable* treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid."[124]

The second USERRA provision at issue is § 4303(2), which defines "other rights and benefits" as:

> the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.[125]

Section 4303(2)'s legislative history confirms that "rights and benefits" is "broadly defined to include *all attributes* of the employment relationship . . . ."[126] The House Report states that "[t]he list of benefits is illustrative and not intended to be all inclusive."[127] Section 4303(2) was specifically amended in 2010 to change the parenthetical from "other than wages or salary for work performed" to the more inclusive language in the

120. *See id.* at 770.

121. *See id*.

122. S. REP. NO. 103-158 (1993).

123. *See id*. at 767–68. The bill was described as providing for "[r]ights, benefits, and obligations of persons absent from employment for service in a uniformed service." H.R. REP. NO. 103-65, *supra* note 29, at *8.

124. H.R. REP. NO. 103-65, *supra* note 29, at *33–34; *see also* 20 C.F.R. § 1002.150(b) (2022).

125. USERRA § 4303(2), 38 U.S.C. § 4303(2) (1994).

126. H.R. REP. NO. 103-65, *supra* note 29, at *21 (emphasis added).

127. *Id.*

current form.[128] Congress inserted the more inclusive language solely to overrule an Eighth Circuit decision that held that § 4311, USERRA's anti-discrimination rule, did not bar wage discrimination for working employees.[129] The definition of rights and benefits embraces not only wages or salary for work performed but much more. Because the definition uses the words "including" and "includes," the words following "including" and "includes" are simply illustrative of the expansive language "the terms, conditions or privileges of employment" which comes before the illustrations.[130] Likewise, several courts have explained that § 4303(2)'s definition of rights and benefits "is intentionally framed in general terms to encompass the potentially limitless variations in benefits of employment."[131]

B. DOL's USERRA Regulation: Comparability Analysis

Once USERRA became law, after notice and comment, DOL promulgated final regulations that purport to carry out the statute's congressional command.[132] At the outset, DOL's USERRA regulations emphasize that the "employee must be given the *most* favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services."[133] The rule's preamble explains that if the employer offers more than one kind of non-military leave and varies the level and type of benefits provided according to the type of leave used, "the comparison should be made with the employer's most generous form of comparable leave."[134]

DOL's USERRA regulation identifies several non-exhaustible factors to evaluate whether non-military leave is comparable to military leave.[135] Those factors include the duration of the leave, purpose of the

128. Section 4303(2) originally included the more limiting phrase "(other than wages or salary for work performed)." *See* Travers v. Fed. Express Corp., 8 F.4th 198, 206 (3d Cir. 2021) (quoting Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2(a), 108 Stat. 3149, 3150 (1994)). However, Congress later deliberately expanded the definition of rights and benefits by replacing "other than" with the word "including". *See* Haley v. Delta Airlines, Inc., No. 1:21-CV-1076, 2022 WL 950891, at *5 (N.D. Ga. Mar. 29, 2022).

129. *See* 156 Cong. Rec. S7656-02 (daily ed. Sept. 28, 2010); Gagnon v. Sprint Corp., 284 F.3d 839, 853 (8th Cir. 2002); *see also* Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 526 (E.D. Pa. 2019).

130. *Scanlan*, 384 F. Supp. 3d at 526.

131. Carder v. Cont'l Airlines, Inc., 636 F.3d 172, 182 (5th Cir. 2011).

132. *See* USERRA § 4331(a), 38 U.S.C. § 4331(a) (1994). "Under 38 U.S.C. § 4331, the Secretary of Labor, in consultation with the Secretary of Defense, is authorized to promulgate regulations to implement USERRA." *Scanlan*, 384 F. Supp. 3d at 526–27.

133. 20 C.F.R. § 1002.150(b) (2022) (emphasis added).

134. USERRA Fed. Reg., *supra* note 74, at 75,262.

135. *See* 20 C.F.R. § 1002.150(b) (2022).

leave, and whether the employee can decide when they can take the leave.[136] Of those factors, the duration of the leave "may be the most significant."[137] DOL's regulations provide a single example of an absence that is not comparable to extended military leave based on duration: "a two-day funeral leave."[138]

Moreover, Congress intended for service member employees to receive the most favorable benefits granted under comparable forms of leave, "regardless of whether the non-military leave is paid or unpaid."[139] DOL later issued further USERRA regulations and purposefully excluded whether the payment of non-military leave should be a factor when assessing the comparability of leave.[140]

C. State USERRA Paid and Unpaid Leave Laws

In recent years, a growing number of states have enacted legislation to provide greater leave benefits for veteran and active duty military employees.[141] Over a dozen state USERRA laws require employers to provide service members with unpaid leave.[142] However, a growing number of states continue to enact military paid leave laws. For instance, Washington state's USERRA statute offers public employees up to three weeks of paid leave every year for mandatory military duty, exercises, or training.[143] Likewise, just last year, the Oklahoma legislature revised its USERRA law to require paid leave for both public and private sector employees under some circumstances.[144]

Most significantly, Connecticut's USERRA law as of January 2022 requires employers to grant paid leave to employees in any Reserve component or in the National Guard who are ordered to perform military

136. *See id*.
137. *Id.*
138. *Id.*
139. H.R. REP. NO. 103-65, *supra* note 29, at *33–34.
140. *See* Brill v. AK Steel Corp., No. 2:09-CV-534, 2012 WL 893902, at *8 (S.D. Ohio Mar. 14, 2012) (explaining that DOL "declined to include as a factor in determining the comparability of leave whether the non-military leave is paid or unpaid" when enacting subsequent regulations (quoting USERRA Fed. Reg., *supra* note 74, at 75,264)).
141. *See* George Wood, *Veterans Day: Going Beyond Giving a Day Off*, JD SUPRA (Nov. 7, 2019), https://bit.ly/3sLr2PI.
142. *See id*.
143. *See* WASH. REV. CODE § 38.40.060 (2022).
144. *See* OKLA. STAT. tit. 72, § 48.1 (2022). Under this law, private employees who serve in the Reserves or any other military component are granted leave when they are ordered to active or inactive military service. *See id*. § 48. The law requires the employer to either pay the employee an amount equal to the difference between their regular private sector fully pay and their military base pay. *See id*. Public employees on leave for military service receive full pay for the first 20 days of leave, may be paid only the difference between the guard wages and their regular pay thereafter. *See id*.

duty during regular working hours, including training and meetings.[145] The state law further shields service member employees from any adverse impact on their employment status and related leave privileges for taking military leave.[146] The Connecticut law is the most far-reaching and protective state law for military leave in the country at this time.

Because more legislative activity is occurring at the state level and because state laws must be more protective than USERRA, state law will remain an important consideration for businesses in the future. Given the broad definition of employer and the attendant, wide-ranging employer liability under USERRA, in conjunction with its state analogues, companies that operate in multiple states should pay particular attention to each state's legislative activity.

IV. THE LEGAL LANDSCAPE: A REVIEW OF THE CASE LAW INVOLVING SHORT-TERM PAID MILITARY LEAVE

Even though case law regarding paid short-term military leave under USERRA is minimal, a growing number of courts nationwide have addressed the concern. Litigation is expected to sharply increase in the future.[147] This Part reviews and deconstructs these precedents. This Part then dissects recent appellate cases analyzing USERRA issues that have created an unclear legal landscape for future USERRA claims.

A. Pre-2021 Case Law

Before 2021, courts struggled to address the short-term paid military leave issue because of the lack of prior judicial guidance, so they mainly relied on similar cases analyzing precedent statutes.[148] *Waltermyer v. Aluminum Co. of America* is particularly illustrative.[149] In this seminal case, the Third Circuit held that employees on military leave during company-paid holidays were entitled to pay under the VRRA. The court compared the military leave to leave for jury duty, court testimony, or illness—which were paid.[150] The service member in this case took a two-week leave for his annual military training. The majority, in comparing

145. *See* CONN. GEN. STAT. § 27-33a (2022).

146. *See id*. § 27-33a(b).

147. *See* Rosenblatt & Ranjo, *supra* note 13 (noting that the recent circuit court decisions "will likely lead to more litigation around unpaid military leave").

148. *See, e.g*., Brill v. AK Steel Corp., No. 2:09-CV-534, 2012 WL 893902, at *5 (S.D. Ohio Mar. 14, 2012) (explaining that "[c]ase law regarding whether military leave is comparable to jury duty/witness leave is sparse, and binding case law is virtually non-existent").

149. *See generally* Waltermyer v. Aluminum Co. of Am., 804 F.2d 821 (3d Cir. 1986). *Waltermyer* was decided under the VRRA. *See id.* at 821.

150. *Id.* at 824–25.

military leave to jury duty and sick leave, described the duration of military training as "short."[151] The Third Circuit expressly recognized "equality as the test," and explained that workers taking military leave must receive holiday pay on the same terms as workers receiving non-military leave that day.[152] The court acknowledged that short-term military leave had many of the same characteristics as the other types of leave, including jury duty, and recognized that paid leave is a right or benefit.[153] This case is especially instructive because § 4316(b)(1) was intended to codify that decision.[154] Indeed, *Waltermyer* was cited with approval in the House and Senate Reports accompanying USERRA as well as in the preamble found in the statute's implementing regulations.[155]

Another instructive case is *Schmauch v. Honda of America Manufacturing*, which decided whether extending an employee's attendance improvement program by the amount of time the employee is on military leave violates USERRA and the Family and Medical Leave Act.[156] In *Schmauch*, the plaintiff argued that he was denied a benefit, in violation of USERRA § 4311, when the defendant extended his attendance improvement program by the amount of his military leave.[157] The defendant argued that failing to extend his attendance improvement program by that time would afford the plaintiff special treatment.[158] However, the court disagreed because employees on jury duty leave did not have their attendance improvement programs extended.[159] Although *Schmauch* was decided under § 4311, rather than § 4316's "rights and benefits" definition, the court denied the defendant's motion for summary judgment, concluding that it did not provide a "satisfactory explanation for why it treated its employees differently depending on which

151. *Id.* at 825.

152. *Id.* at 824–25.

153. *Id.* at 825.

154. *See* H.R. REP. NO. 103-65, *supra* note 29, at *33–34 ("The Committee intends to affirm the decision in *Waltermyer* . . . that, to the extent the employer policy . . . varies among various types of non-military leaves . . . the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid."); *see also* Brill v. AK Steel Corp., No. 2:09-CV-534, 2012 WL 893902, at *8 (S.D. Ohio Mar. 14, 2012) (explaining that *Waltermyer* and USERRA's legislative history is useful in analyzing whether military leave is comparable to jury duty and witness leave, especially since the "case law . . . is sparse, and binding case law is virtually non-existent").

155. *See* Duffer v. United Cont'l Holdings, Inc., 173 F. Supp. 3d 689, 705 (N.D. Ill. 2016).

156. *See* Schmauch v. Honda of Am. Mfg., 295 F. Supp. 2d 823, 827 (S.D. Ohio 2003).

157. *See id*. at 836–37.

158. *Id.*

159. *See id*. at 837.

sovereign—the judicial branch or the executive branch—calls upon them."[160] The court further explained that it did "not believe there is a justifiable distinction. Both military leave and jury duty are compulsory, beyond the control of the employee, and may last for a comparable amount of time."[161] DOL selectively cited to *Schmauch* in its regulations to reiterate the mandate that an employee on military leave is entitled to the greatest benefits afforded under a comparable form of leave, and that an "employer improperly treated jury duty more favorably than military leave."[162]

Turning to the lack of short-term paid military leave specifically, one of the first federal district court decisions to examine short-term paid military leave under § 4316(b) was *Brill v. AK Steel Corp*.[163] In this case, the trial court considered whether paid leave for jury duty was a non-seniority-based benefit to which the plaintiff would also be entitled to while fulfilling military service pursuant to § 4316(b).[164] In *Brill*, the service member plaintiff's military leave periods generally lasted no more than four weeks (three to five days for weekend drills, one day for funeral duty, and two to four weeks for annual training), although he also took two leaves of approximately one year each when deployed to Iraq and later Afghanistan.[165] After analyzing USERRA's legislative history and case law, the court held that jury duty leave was comparable to military leave. The court explained that both may last for significant periods of time and are intended to fulfill civic duties.[166]

Although the employer argued that the leaves were not comparable because the government pays service members more than jurors, the court rejected this, explaining the difference amounted to only a small overpayment.[167] Further, the court rejected the employer's argument that the plaintiff would be treated preferentially because he would receive a windfall by collecting his military pay in addition to his regular salary.[168] The court explained that the employer would not provide the plaintiff any

160. *Id.*

161. *Id.*

162. USERRA Fed. Reg., *supra* note 74, at 75,262 (explaining the premise of *Waltermyer*); *see also* Brill v. AK Steel Corp., No. 2:09-CV-534, 2012 WL 893902, at *8 (S.D. Ohio Mar. 14, 2012) (stressing that DOL's "specific inclusion of [*Schmauch*] in the Federal Register for that proposition evidences at least the Department's approval of the notion that jury duty and military leave may be comparable").

163. *See Brill*, 2012 WL 893902, at *6.

164. *See id*.

165. *See id*. at *1 & n.2.

166. *See id*. at *8 (explaining that it was appropriate to consider the legislative history because USERRA was unclear).

167. *See id*. at *6.

168. *See id*.

benefit not already provided to employees on jury duty or witness leave.[169] Instead, paying the plaintiff his full salary for the time spent on military leave would fully comply with USERRA's mandate to give the service member employee the most favorable treatment given for any other comparable form of leave.[170]

Another useful case is *Tully v. Department of Justice*, in which a Federal Bureau of Prisons employee, Matthew Tully, appealed a Merit Systems Protection Board decision denying him holiday pay while on military leave.[171] While Tully served in the U.S. Army for two and a half years in the 1990s, 27 holidays elapsed. Tully argued that USERRA mandated pay for the missed holidays. After the Merit Systems Protection Board denied his payment request, Tully appealed, claiming violation under § 4316(b)(1)(B) because other employees had received paid holiday leave. The Federal Circuit Court of Appeals affirmed the Board's decision denying Tully's holiday pay request.[172] It held that Tully's two-and-a-half-year leave was incomparable to the typically brief absence for court proceedings as jurors or witnesses, reasoning that the duration factor "reflects a significant difference in the character of the two forms of leave."[173] Courts trying to reconcile *Tully* with *Waltermyer* and *Brill* have stressed that the single absence in *Tully* of two-and-a-half years was far longer than any single absence in *Waltermyer* and *Brill*, and there were no short-term absences at issue in *Tully*.[174]

In the immediate years before 2021, whether the "rights and benefits" protected by USERRA included paid leave was still mostly an open question, with district courts reaching opposite conclusions. For example, in the 2019 case *Scanlan v. American Airlines Group., Inc*., the Eastern District of Pennsylvania denied an airline employer's motion to dismiss.[175] The court found that an employer's failure to pay Reservists the difference between their civilian and military pay stated a viable claim under USERRA if the airline provided paid leave to employees on comparable forms of non-military leave.[176] The *Scanlan* court specifically held that the definition of "rights and benefits" contained in § 4303(2) is defined "extremely broad[ly]" to cover "'the terms conditions, or privileges of

169. *See id*.
170. *See id*.
171. *See* Tully v. Dep't of Just., 481 F.3d 1367, 1368 (Fed. Cir. 2007).
172. *See id*.
173. *Tully*, 481 F.3d at 1371.
174. *See, e.g.*, Duffer v. United Cont'l Holdings, Inc., 173 F. Supp. 3d 689, 689 (N.D. Ill. 2016).
175. *See* Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 531 (E.D. Pa. 2019).
176. *See id.* at 527.

employment,'" with illustrations that make clear that "rights and benefits" include paid leave.[177]

One year later, however, in *Travers v. FedEx Corp.*, a different judge in the Eastern District of Pennsylvania granted an employer's motion to dismiss, and expressly rejected the *Scanlan* court's reasoning.[178] In so doing, the court observed that Congress "unambiguously excludes paid military leave from the 'rights and benefits' employers must provide equally to reservists and non-reservists."[179] Accordingly, these pre-2021 cases are demonstrative of the struggle that courts encountered when addressing the short-term paid military leave issue.

B. The Circuit Courts Weigh In

Since 2021, the federal circuit courts have ruled on USERRA appeals. With conflicting opinions among the circuit courts, these decisions have created persistent uncertainty. This uncertainty has caused some companies to settle military short-term paid leave claims rather than continue litigating.

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

In February of 2021, the Seventh Circuit issued its decision in *White v. United Airlines, Inc.*, which marked the first time a federal circuit court addressed whether § 4316(b) provides a right to short-term paid military leave.[180] The plaintiff, a United Airlines pilot who had taken periods of short-term military leave to complete reserve duty in the Air Force, filed a class action lawsuit challenging the airline's policy of providing pilots pay during short-term leaves, such as jury duty and sick leave, but not for military leave.[181] The district court dismissed the plaintiff's complaint, fearing that the action would create a universal requirement that private employers compensate military leave, contrary to the prevailing understanding of USERRA.[182] Alternatively, the district court held that jury duty and military leave were not comparable under USERRA as a matter of law. Critically, the district court's opinion failed to analyze USERRA's text or history in reaching its conclusion.

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177. *Id.* at 526 (quoting USERRA § 4303(2), 38 U.S.C. § 4303(2) (1994)).

178. *See* Travers v. FedEx Corp., 473 F. Supp. 3d 421, 434–36 (E.D. Pa. 2020), *vacated sub nom*, Travers v. Fed. Express Corp., 8 F.4th 198 (3d Cir. 2021).

179. *Id.* at 425.

180. *See* White v. United Airlines, Inc., 987 F.3d 616, 621 (7th Cir. 2021); *see also USERRA May Require*, *supra* note 7.

181. United also maintained a profit-sharing plan that credited pilots based on the wages they earned whether from working or from paid leave. *See White*, 987 F.3d at 619.

182. *See* White v. United Airlines, Inc., 416 F. Supp. 3d 736, 739–40 (N.D. Ill. 2019), *rev'd*, 987 F.3d 616 (7th Cir. 2021).

Subsequently, a three-judge panel of the Seventh Circuit reversed and remanded to continue discovery.[183] The Seventh Circuit broadly interpreted § 4303(2)'s definition of "rights and benefits" to include compensation during leaves of absence. Specifically, the court explained that the statutory definition of "rights and benefits" includes all "terms, conditions, or privileges," with no express limitations carved out.[184] The court noted that Congress used expansive and illustrative words in the statutory definition, most notably such words as "any" and "including."[185]

After concluding that USERRA's definition of "rights and benefits" includes paid leave, the Seventh Circuit rejected United's arguments for construing the definition's plain language more narrowly.[186] Specifically, the court rejected United's argument that a broad interpretation "would effect a costly sea-change for public and private employers, essentially making [the Court's] interpretation an 'elephant[] in [a] mousehole[].'"[187] The court stressed that "USERRA mandates only equality of treatment; it does not specify how generous or how parsimonious an employer's paid leave policies must be."[188] The court also rejected United's dire predictions about the potential administrative and financial burdens on employers. The court emphasized that such concerns were overstated because less than 1% of employees in the national economy were Reservists and, of those, some were sure to work for employers who already provided paid military leave.[189]

Without concluding whether short-term military leave was comparable to the other types of short-term leave paid by United, the Seventh Circuit remanded the case to resolve the issue, stating the inquiry was a question of fact.[190] Additionally, the Seventh Circuit strongly rejected the trial court's point that military leave is incomparable to jury duty because joining the military is voluntary whereas jury duty is compulsory.[191] In critiquing the district court's seeming suggestion that service members therefore brought disfavored employment status upon themselves, the Seventh Circuit explained: "This logic both ignores the text of the regulation and impermissibly penalizes servicemembers for joining the military, in direct contravention of USERRA's core

183. *See White*, 987 F.3d at 621.
184. *Id.*
185. *Id.*
186. *See id*. at 623–25.
187. *Id*. at 624 (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001)).
188. *Id.* at 624.
189. *See id*. at 625.
190. *See id*. ("Discovery may reveal that all, none, or only part of those obligations are comparable to jury duty or sick leave (or other short-term obligations)[.]").
191. *See id*.

purpose."[192] The Seventh Circuit concluded that the crux of voluntariness is the employee's control over the timing of the leave.[193]

Finally, the Seventh Circuit declined to address whether USERRA required United to pay the plaintiff his full regular pay or just the differential between his regular pay and his military pay.[194] However, the court mentioned that employees on short-term leave for jury duty receive a modest government stipend without any offset from their employers, which suggests that USERRA might require similar treatment for employees on military leave.[195] Because this point was left unresolved, practitioners have noted that "*White* could be the catalyst for opportunist litigants to challenge those policies as insufficient—both in terms of the amount and duration of pay," given that many large employers maintain military leave policies offering differential pay.[196]

On the same day the Seventh Circuit decided *White*, the Northern District of California certified a class of nearly 7,000 Southwest Airlines workers in a USERRA suit accusing the airline of failing to pay employees who take short-term military leave as it does for other types of comparable leave, including jury duty leave, bereavement leave, and sick leave.[197] In certifying the class, the district court noted that whether paid leave is a "right and benefit" of employment under USERRA presents a pure question of law and concluded that the plaintiffs' claims were common to the class, which included pilots, flight attendants, ramp agents, and other airline employees.[198] The Ninth Circuit later denied Southwest's appeal from the district court's class certification decision without opinion.[199]

2. *Travers v. Federal Express*

In August 2021, the Third Circuit became the second federal circuit court to address whether USERRA provides a right to paid military leave

192. *Id.*

193. *See id*. (stressing that the decision to voluntarily serve in the military does not impact the comparability analysis).

194. *See id.* at 623 n.2 (declining to resolve issue because United did not address it on appeal).

195. *See id*.; *see also* Richard G. Rosenblatt & Jason J. Ranjo, *Seventh Circuit: Paid Leave May Be Required During Military Service*, MORGAN LEWIS (Feb. 8, 2021), https://bit.ly/3z4yaJx.

196. *See* Rosenblatt & Ranjo, *supra* note 13.

197. *See* Huntsman v. Southwest Airlines Co., No. 19-CV-00083, 2021 WL 391300, at *1 (N.D. Cal. Feb. 3, 2021).

198. *See id.* at *4.

199. *See* Huntsman v. Southwest Airlines Co., No. 21-80010, 2021 U.S. App. LEXIS 7057, at *1–2 (9th Cir. Mar. 10, 2021) (stating "[t]he court, in its discretion, denies the petition for permission to appeal the district court's February 3, 2021 order granting class action certification").

in *Travers v. Federal Express Corp*.[200] There, the plaintiff served in the Navy Reserve while working for FedEx. The plaintiff brought a putative class action challenging FedEx's leave policy of providing paid leave during periods missed for illness, bereavement, jury duty, and other reasons but not for military leave.[201] The district court dismissed the plaintiff's claims, concluding that paid military leave was never required under USERRA because it was not a defined "right and benefit" under the statute.[202]

On appeal, the Third Circuit unanimously reversed, holding that paid leave is a "right and benefit" under USERRA.[203] At the outset, the Third Circuit acknowledged USERRA's statutory history and its role as part of a long tradition of congressional acts designed to protect service members who were called for military service and then returned to their civilian jobs.[204] The court then turned to the statutory text and explained that § 4316(b)(1) sets forth a basic formula whereby employees on military leave must receive the same rights and benefits as employees on leave for other reasons.[205] The court dismissed the disagreement between the parties over what constitutes a "right or benefit" under USERRA, explaining that the proper comparison is between two groups: (1) employees who are absent because of military service; and (2) employees of "similar seniority, status, and pay" who are absent for any other reason.[206] The court stressed that the focus must be on who receives the benefit: "Something the employer offers to Group 2 but denies to Group 1 becomes the comparator for a USERRA differential treatment claim."[207]

Next, the court concluded that the "right and benefits" under USERRA's § 4303(2) cover a vast array of benefits, including paid leave.[208] The court also rejected a few of FedEx's textual arguments seeking to narrow USERRA's scope as conflicting with the statutory language and the legislative history.[209] Like *White*, the Third Circuit in *Travers* emphasized that Congress drafted a broad definition

200. *See* Travers v. FedEx Corp., 473 F. Supp. 3d 421 (E.D. Pa. 2020), *vacated sub nom.* Travers v. Fed. Express Corp., 8 F.4th 198 (3d Cir. 2021).

201. *See Travers*, 8 F.4th at 199.

202. *See id.*

203. *See id.*

204. *See id*. at 200–01.

205. *See id*. at 202.

206. *Id.* The plaintiff argued the benefit included paid leave, meaning pay received while absent from work while FedEx argued that it never provided anyone paid leave, but offered "pay for certain specific kinds of time away from the job, such as 'paid sick leave' or 'paid jury-duty leave.'" *Id.*

207. *Id.* at 203.

208. *See id*. at 204–05.

209. *See id*. at 205–06.

encompassing wide-ranging benefits that are illuminated, not restricted, by the examples listed.[210] The court explained that the expansion of employee benefits in the decades since USERRA was enacted did not impact that broad definition, because new uses may be adopted as the world changes even though the statute's meaning remains fixed from the time.[211] According to the court, Congress specifically included a definition with varying levels of precision.[212]

Finally, the court noted that the codified statutory purposes of USERRA and the pro-veteran canon supported this broad reading.[213] More specifically, the court noted that FedEx's policy of providing paid non-military leave but not paid military leave "directly disadvantages those who take military leave."[214] For these reasons, USERRA requires equal treatment of service members and bars employers from offering paid leave but exempting military leave. As in *White*, the Third Circuit held that comparability of the types of leaves offered was for the district court to determine on remand.[215]

*C. Post-*White *and* Travers *Decisions: An Unsettled Legal Arena*

The first federal district court to substantively address the issue of paid short-term military leave after *White* was the Eastern District of Washington in *Clarkson v. Alaska Airlines, Inc*.[216] The plaintiff, a pilot and member of the Washington Air National Guard, alleged that Alaska and Horizon airlines violated § 4316(b)(1) by treating short-term military leave less favorably than other comparable leaves, including jury duty, bereavement, sick leave, or vacation.[217] After denying a motion to dismiss on the pleadings, the district court certified a class. Following discovery, the district court granted summary judgment to the defendant airlines, concluding that non-military leaves were not comparable to military leave as a matter of law.[218]

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210. *See id*. at 206 (underscoring that the "common understanding of the examples selected paints a broad understanding that includes pay while on leave").

211. *See Travers*, 8 F.4th at 207–08.

212. *See id*. at 208 (explaining that the definition's varying levels include specific versus general).

213. *See id*. at 208 n.25.

214. *Id.*

215. *See id*.

216. *See generally* Clarkson v. Alaska Airlines, Inc., No. 2:19-CV-0005, 2021 WL 2080199 (E.D. Wash. May 24, 2021). This decision was issued after *White* but before the *Travers* decision.

217. *See id.* at *1–2.

218. *See id*. at *8–9.

The *Clarkson* court first addressed how to determine the proper metric for comparing the duration of the leaves.[219] The Court held that the category of military leave must be analyzed in a general manner, meaning that short-term and long-term leave must be considered together.[220] In doing so, the court rejected an individualized approach that would consider each specific military leave period as either long-term or short-term based on its length alone. From a practical standpoint, this general approach means all military leaves are considered based on the duration of long-term military leaves for which a class may not even be seeking recovery. The court acknowledged that cases from some federal circuit courts found duration to focus on individual military leaves but declined to apply these principles because the Ninth Circuit had not addressed the issue and a general approach was more appropriate in a class claim.[221]

The *Clarkson* court also emphasized the need to examine the frequency with which the leave was taken.[222] The court recognized that DOL's comparability regulation does not specifically reference frequency but explained that, because the factors are non-exhaustive, frequency may be useful in a class setting.[223] The *Clarkson* court also differentiated the Seventh Circuit's decision in *White*, noting that that appeal involved the "rights and benefits" issue at the motion to dismiss phase whereas the *Clarkson* case was decided on summary judgment.[224]

The *Clarkson* court next turned to the discovery from the class period regarding the duration of leaves.[225] Instead of focusing on the average duration of military leave, the court analyzed the longest periods of long-term military leave.[226] For these reasons, the court determined that there were "significant differences in duration and frequency," so military leave was not comparable to jury duty, bereavement leave, and sick leave.[227]

After concluding that the durations of the leaves were not comparable, the court then addressed the purpose of the leaves.[228] Curiously, the court determined that the purpose of military leave is to

219. *See id*. at *4.

220. *See id*.

221. *See id*. at *5 (noting that case law in the Seventh, Fifth, and Federal Circuits supported the plaintiff's position).

222. *See id*.

223. *See id*.

224. *See id.* at *3 (explaining that "[p]laintiff's claims survived a motion to dismiss because the Court was unable to decide the 'rights and benefits' issue without further evaluation of evidence outside the pleadings. The present motion for summary judgment provides the evidence needed." (citation omitted)).

225. *See id*. at *5.

226. *See Clarkson*, 2021 WL 2080199, at *5–6.

227. *Id.* at *6.

228. *See id*. at *6–7.

allow the pilots to pursue "parallel careers" and "earn additional income."[229] In contrast, the court stated that the purpose of jury duty is to fulfill a compulsory duty to the courts while bereavement leave allows an employee time to grieve the death of a loved one.[230] According to the court, sick leave is also distinct because it is designed to "protect passengers and other employees from illness and to ensure the pilot is mentally and physically fit to fly."[231] The court then explained that vacation leave was likewise distinguishable because its purpose is to allow time for rest, recuperation, and prevent burnout.[232] In contrast to sick leave and vacation leave, the court noted that military leave is physically and mentally demanding.[233]

Finally, the *Clarkson* court addressed pilots' ability to take leave, concluding that because the pilots have more control and flexibility over their military leave, it is incomparable to jury duty, bereavement, and sick leave.[234] The court explained that the pilots usually get their military duty schedules months in advance and can reschedule their leave if necessary, whereas jury duty, bereavement, and sick leave typically occur with minimal to no notice, which makes advance planning for those leaves more difficult.[235] Additionally, the court distinguished military leave by noting that it is automatically granted whereas bereavement, sick leave, and vacation are not.[236]

For these reasons, the *Clarkson* court concluded that the non-military leaves were incomparable to military leave as a matter of law and therefore granted summary judgment in favor of the defendant airlines.[237] This case is currently being appealed to the Ninth Circuit, so a circuit split is certainly possible.[238] Nevertheless, the trial court's decision was immediately categorized as a win for employers.[239]

After *Clarkson*, federal district courts nationwide continue to reach divergent decisions on short-term military paid leave, mainly at the

229. *Id.* at *7.
230. *See id*.
231. *Id*.
232. *See id*.
233. *See id*.
234. *See id*. at *8.
235. *See id*.
236. *See Clarkson*, 2021 WL 2080199, at *8.
237. *See id*. at *14.
238. *See generally* Pl.'s Notice of Appeal, Clarkson v. Alaska Airlines, Inc., No. 21-35473 (9th Cir. June 22, 2021).
239. *See* Carmen N. Decot (Couden), *Federal Court Rules Military Leave Is Not Comparable to Other Types of Employer-Provided Paid Leaves*, FOLEY (June 7, 2021), https://bit.ly/3PqJXJD.

summary judgment stage of litigation.[240] For instance, in *Synoracki v. Alaska Airlines, Inc*., the Western District of Washington granted summary judgment to the airline in a class action by pilots that also served in the Air Force Reserves who were seeking sick leave and vacation accruals during periods of military leave.[241] Relying mainly on *Clarkson*, the court held that military leave was not comparable to absences for jury duty. As in *Clarkson*, the court emphasized both the frequency and duration of military leave, noting that the plaintiff was called for military duty about 70 times during the class period, with five of those leaves lasting more than six months.[242] In contrast, the court noted that no pilot had been absent for jury duty for longer than 20 consecutive days during the class period, and the average jury duty leave was less than three days.[243] Based on a narrow reading of USERRA, the court held that sick leave is not covered by § 4316(b)(1)(B) because sick leave entitlements are not previously earned and sick leave does not generally benefit the employer.[244] Alternatively, the Court held that sick leave was distinguishable from military leave because it must be earned before it is used and capped, whereas military leave is unlimited and extends well beyond the maximum sick time cap.[245]

However, the federal district court in *Myrick v. City of Hoover, Alabama* reached an opposite conclusion at summary judgment.[246] There, the plaintiffs were police officers for the City of Hoover who also served in the Alabama National Guard and Reserves. The litigation involved paid administrative leave and military leave. The city broadly defined paid administrative leave to cover absences caused by inclement weather, jury duty, voting, court hearings, and participation in job-related training or an internal investigation.[247] The officers exhausted their paid leave when they were called to military service and entered non-pay status so that their

240. *See id*.

241. *See* Synoracki v. Alaska Airlines, Inc., No. C18-1784, 2022 WL 1746777, at *2 (W.D. Wash. May 31, 2022).

242. *See id*. at *5. The Court chiefly relied on *Clarkson* to determine the proper metric the proper metric for comparing the duration of the leaves. The Court claimed that there was nothing in USERRA or its implementing regulations that indicated courts should not be looked at generally. *See id*. at *6.

243. *See id*. at *5.

244. *See id*. at *6–7 (describing sick leave as a form of deferred compensation).

245. *See id*. at *7. The decision is currently on appeal to the Ninth Circuit. *See* Pl.'s Notice of Appeal, Synoracki v. Alaska Airlines, Inc., No. 22-35504 (9th Cir. June 29, 2022).

246. *See generally* Myrick v. City of Hoover, No. 2:19-cv-01728, 2022 WL 892914 (N.D. Ala. Mar. 25, 2022).

247. *See id*. at *3.

annual leave, personal leave, and sick leave did not accrue.[248] Furthermore, the officers did not receive holiday pay when entering non-pay status.

The officers sued the city, contending that its policy of providing paid non-military leaves violated USERRA.[249] Both parties moved for summary judgment. The court granted the officers' motion, concluding that the purpose and control factors favored the officers while the duration factor favored the city.[250] The court noted that the duration factor is usually more significant than the purpose and control factors but concluded that the duration of average military leave and average administrative leave was "not so different that the duration factor must drive the Court's analysis."[251] The court further explained that the temporal outliers such as active-duty military leave and paid administrative leave, were generally comparable in duration, even though the average military leave for training was three times longer than average administrative leave.[252] In reaching its conclusion, the court emphasized that USERRA requires the city to provide the officers the "most favorable treatment accorded to" city employees who use administrative leave.[253] *Myrick* is currently on appeal to the Eleventh Circuit, once again making the possibility of a circuit split viable.[254]

In the wake of *White* and *Travers*, some companies decided to settle military short-term paid leave claims rather than continue litigating. Most notably, Walmart agreed to pay between $10 million and $14 million to settle USERRA class action claims in *Tsui v. Walmart Inc*.[255] In that case, 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.[256] Under the settlement, Walmart agreed 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.[257] In addition, under the terms of the settlement, Walmart changed its military leave policy to guarantee full pay to employees who take up to one month of military

248. *See id*. at *5.
249. *See id*.
250. *See id*. at *10.
251. *Id.*
252. *See id*.
253. *Id.* (citing 20 C.F.R. § 1002.150(b) (2022)).
254. *See generally* Pl.'s Notice of Appeal, Myrick v. City of Hoover, No. 22-11621 (11th Cir. May 11, 2022).
255. *See Is There a New Requirement to Pay Employees on Military Leave?*, AKERMAN (Feb. 22, 2021), https://bit.ly/3yVHwZs [hereinafter AKERMAN].
256. *See id*.
257. *See* AKERMAN, *supra* note 255.

leave and to make employees who take longer military leaves (up to one year) eligible for partial wages.[258]

However, many other companies, especially those within the airline industry— which employ a significant number of service members—are reluctant to settle.[259] Because USERRA contains no statute of limitations, many companies will be deterred from settling due to enormous liability risks.[260] With that said, the recent circuit court decisions strongly signal that these cases will not likely face early dismissal, thereby encouraging earlier settlement discussions.[261]

The unsettled legal landscape regarding paid military leave will continue to present challenges for employers and military service members alike, especially since several appeals have been filed. At this point, it seems fairly settled that paid leave is a right or benefit under USERRA that must be offered equally and such lawsuits cannot be dismissed via a motion to dismiss.[262]

V. THE CASE FOR SHORT-TERM MILITARY PAID LEAVE

Any employer policy or practice that fails to provide fully-paid leave to service member employees taking short-term military leave denies these employees the same rights and benefits, including compensation, that the company provides to employees who take comparable forms of non-military leave.[263] In doing so, many companies are subverting Congress's original intention in passing USERRA.[264]

This Part argues that federal courts should unequivocally recognize the viability of short-term paid leave claims under USERRA. This conclusion is consistent with the statute's language and legislative history. Furthermore, this Part establishes how practitioners and the courts should

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258. *See id.*

259. *See* Joe Skinner, *Walmart Deal Could Signal New Wave of Military Leave Claims*, LAW360 (Oct. 28, 2021, 2:01 PM), https://bit.ly/385lzMM [hereinafter Skinner, *Walmart Deal*].

260. *See id*. (arguing that the consequences for the airline industry of losing their lawsuits or settling are equally severe because "[c]ommercial pilots at major carriers have significant earning potential, pilots use military leave frequently, and USERRA contains no statute of limitations to cut off liability").

261. *See* Brett W. Tobin, *The Seventh Circuit Fires a Warning Shot: "Rights and Benefits" Includes Paid Military Leave When Employers Offer Pay for "Comparable Absences"*, 2021 WIS. L. REV. FORWARD 101, 108 (2021).

262. *See* Haley v. Delta Airlines, Inc., No. 1:21-CV-1076, 2022 WL 950891, at *4 (N.D. Ga. Mar. 29, 2022) (noting that the court was joining a "growing number of courts that have denied motions to dismiss similar claims on the grounds that paid leave is a right or benefit under § 4303(2) that must be offered equally under § 4316(b)(1)(B)").

263. *See* Tobin, *supra* note 261, at 108–09.

264. *See id*. at 109 (noting the risk of diluting the purpose of USERRA by not fully protecting the rights and benefits of Reservists and National Guard members).

approach the comparability analysis. Finally, this Part examines the compelling public policy arguments that militate against denying service members short-term paid military leave under the USERRA, including core military retention and recruitment concerns.

A. USERRA Requires Employers to Provide Paid Short-Term Military Leave

First, USERRA expressly mandates that military leave be accorded the same "rights and benefits" as comparable, non-military leave and requires employers to provide paid military leave to the same extent that it provides paid leave for other absences, such as jury duty, vacation, bereavement, and sick leave.[265] Section 4303(2) defines the term "rights and benefits" broadly, and short-term paid leave is included under this definition.[266] As the court held in *Scanlan*, § 4303(2)'s text is "unambiguous" that paid leave is a right or benefit.[267] The definition "includ[es] any advantage, profit, privilege, gain, status, account, or interest" of employment.[268] Receiving money from an employer for performing work or for leave is plainly an "advantage," "profit," "privilege," or "gain" of employment.[269] Section 4303(2)'s specific examples of "rights and benefits" confirm the same result.[270] These illustrations cover all manners of rights and benefits, including instances where workers get paid for not performing work, such as "severance pay, supplemental unemployment benefits, [and paid] vacations."[271]

The conclusion that USERRA requires employers to provide paid military leave to the same extent that it provides paid leave for other absences is consistent with Supreme Court precedent and Congress's explicit direction in enacting USERRA.[272] Specifically, courts must apply the pro-veteran canon of interpreting all relevant portions of USERRA as liberally as possible, including when reading separate provisions together.[273] The Supreme Court has held that the *Fishgold* canon is a

265. *See* USERRA § 4316(b)(1), 38 U.S.C. § 4316(b)(1) (1994).

266. *See id.* § 4303(2).

267. *See* Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 527 (E.D. Pa. 2019).

268. *Id.*

269. 38 U.S.C. § 4303(2).

270. *See id.; see also* Scanlan, 384 F. Supp. 3d at 527.

271. *Id.*

272. *See* Travers v. Fed. Express Corp., 8 F.4th 198, 209 n.25 (3d Cir. 2021) (noting that the codified statutory purposes of USERRA and pro-veteran canon support a broad reading of the statute).

273. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) (stating that USERRA's predecessor "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need" and that each provision must be

"guiding principle" that "govern[s] all subsequent interpretations of the re-employment rights of veterans."[274] Thus, when interpreting § 4316(b)(1)(B) and § 4303(2), the most liberal construction must be applied "as a harmonious interplay of the separate provisions permits."[275] Construing these two provisions as liberally as possible requires holding that paid leave is covered by the "rights and benefits" category and must be provided equally among military and non-military employees.[276] Moreover, even if §§ 4316(b)(1) and 4303(2) were somehow found to be ambiguous with respect to whether paid leave falls within the protected "rights and benefits" category, then longstanding canons of statutory interpretation direct that USERRA be interpreted liberally in favor of service members.[277]

Aside from USERRA's history and text, its legislative history and intent also strongly support this conclusion.[278] Section 4303(2)'s legislative history confirms that the "rights and benefits" in that section are "broadly defined to include *all attributes* of the employment relationship[.]"[279] Paid leave is plainly an attribute of the employment relationship. Congress also explained that the list of examples of "rights and benefits" was meant to be expansive and that the types of benefits listed in the statute were merely illustrative, not exhaustive.[280] This demonstrates that Congress wanted to ensure that no court would conclude that the list of rights and benefits should be read to implicitly exclude other examples that fall within § 4303(2)'s broad text.[281] Congress's intention is entirely consistent with § 4303(2)'s text, which repeatedly uses the words

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afforded "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits"); King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991) (holding that even if one textual provision undercuts the Court's reading in favor of the veteran, "we would ultimately read the provision in [the veteran's] favor under the [Fishgold] canon"); Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977); H.R. REP. NO. 103-65, *supra* note 29, at *19 (1993) (stating the Fishgold canon "remains in full force and effect" under USERRA and identifying this canon as the chief example of case law from USERRA's predecessor that must be followed); S. REP. NO. 103-158, at 40 (1993), *reprinted in* 1993 WL 432567 (same).

274. *Alabama Power*, 431 U.S. at 584.

275. *Fishgold*, 328 U.S. at 285.

276. *See Travers*, 8 F.4th at 209 n.25

277. *See* Brown v. Gardner, 513 U.S. 115, 118 (1994) (citing *King*, 502 U.S. at 220 n.9).

278. *See, e.g.*, Baker v. United Parcel Serv. Inc., No. 2:21-CV-00114-SMJ, 2022 WL 987927, at *3 (E.D. Wash. Mar. 31, 2022) (discussing statutory history and intent).

279. H.R. REP. NO. 103-65, *supra* note 29, at *21 (emphasis added).

280. *See id*. (noting that "[t]he list" of examples of "rights and benefits" in § 4303(2) "is illustrative and not intended to be all inclusive").

281. *See* Baker v. United Parcel Serv. Inc., No. 2:21-CV-00114, 2022 WL 987927, at *4 (E.D. Wash. Mar. 31, 2022) (explaining that Congress did not intend for courts "to read in exceptions that simply are not there").

"includes" and "including" to convey that § 4303(2) is "extremely broad" and "[t]he examples mentioned are not exclusive."[282] Therefore, in its most detailed description of § 4303(2) and its accompanying text, Congress clearly stated that § 4303(2) covers all fringe benefits of the employment relationship, which naturally includes paid leave.

Furthermore, Congress's statements on the equality rule embodied in § 4316(b)(1)(B) similarly emphasize that employees on military leave must receive the full set of rights and benefits that employees on comparable leaves receive. Congress explained that it "intend[ed] to affirm the decision in *Waltermyer* that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave . . . ."[283] Congress's deliberate choice of the words "most favorable treatment" demonstrates that it wanted *Waltermyer*'s equality principle to apply broadly so that service members were guaranteed the full range of rights and benefits workers on comparable leaves receive.[284] On a more practical level, if workers on comparable leaves get paid, but service members on military leave do not, it places military members in a demonstrably inferior position. This is certainly not the equal status that Congress expressly mandated when it enacted § 4316(b)(1)(B) and codified *Waltermyer's* equality principle with such expansive text.[285] It is important to stress that USERRA's § 4316(b)(1) firmly establishes an equality principle rather than a ceiling or floor for benefits.[286] Equal treatment exists only if those employees on short-term military leave have the same rights and benefits as other employees in comparable situations.[287]

B. The Comparability Analysis

Because the critical analysis of comparability between the types of leave remains mostly undecided, the crux of many future USERRA paid

282. Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 526 (E.D. Pa. 2019).

283. H.R. REP. NO. 103-65, *supra* note 29, at *33 (1993) (emphasis added) (citation omitted); *accord* S. REP. NO. 103-158, at 58 (1993); 20 C.F.R. § 1002.150(b) (2022).

284. *See* Haley v. Delta Airlines, Inc., No. 1:21-CV-1076, 2022 WL 950891, at *4 n.2 (N.D. Ga. Mar. 29, 2022).

285. *See* 20 C.F.R. § 1002.150(b) (2022); *Scanlan*, 384 F. Supp. 3d at 527 (noting that Section 4316(b)(1) "of course, only requires employees on military leave to be provided with comparable rights and benefits").

286. White v. United Airlines, Inc., 987 F.3d 616, 624 (7th Cir. 2021).

287. *See* Travers v. Fed. Express Corp., 8 F.4th 198, 209 (3d Cir. 2021); *Scanlan*, 384 F. Supp. 3d at 528 ("Equal treatment exists only if those employees on short-term military leave have the same rights and benefits as employees in comparable situations.").

short-term military leave cases will focus on the comparability analysis.[288] This comparability analysis requires a fact-intensive inquiry into non-exhaustive factors contained in USERRA's regulations, including the duration, purpose, and voluntariness of the leaves of absence.[289] Ultimately, the non-military leave at issue in most of the litigation—jury duty, vacation, bereavement, and sick leave—are comparable to military leave.

As a threshold matter, the DOL regulation emphasizes that employees on military leave are to receive the most favorable treatment given for any comparable type of leave.[290] The preamble to the rule reiterates this approach, explaining that if the employer has more than one kind of non-military leave and varies the level and type of benefits provided according to the type of leave used, "the comparison should be made with the employer's most generous form of comparable leave."[291] In *White*, the Seventh Circuit strongly emphasized that courts must be mindful of this "core purpose" of USERRA when evaluating the specific factors.[292]

1. Duration of the Leave

The first factor in DOL's comparability analysis considers the duration of the leaves that service members typically take.[293] Practitioners have noted that even though the factor may appear straightforward, it is in fact challenging because the time Reservists require for military leave may vary widely, with some Reservists regularly serving just two days at a time, and others being on duty for year-long deployments.[294] DOL's regulations provide only one example of an absence that is not comparable to an extended military leave based on duration: a two-day funeral leave.[295] This example specifically refers to an "extended" military leave, thereby strongly suggesting that a two-day funeral leave or a similar type of leave is in fact comparable.[296]

288. *See* Skinner, *Walmart Deal*, *supra* note 259 (noting that future litigation will focus on the comparability analysis).

289. *See* 20 C.F.R. § 1002.150(b) (2022).

290. *See id.*

291. USERRA Fed. Reg., *supra* note 74, at 75,262.

292. White v. United Airlines, Inc., 987 F.3d 616, 625 (7th Cir. 2021).

293. *See* 20 C.F.R. § 1002.150(b) (2022).

294. *See* Nicholas Anaclerio & Aaron A. Bauer, *Seventh Circuit Clips United's Wings, Holding USERRA May Require Paid Leave to Reservists*, NAT'L L. REV. (Apr. 26, 2021), https://bit.ly/3wRRVUI.

295. *See* 20 C.F.R. § 1002.150(b) (2022).

296. *See id*.

Unfortunately, some courts and practitioners have conflated "duration" and "frequency."[297] The DOL regulation makes no mention of "frequency" as a relevant factor whereas other USERRA provisions and DOL implementing regulations do, thus demonstrating that frequency and duration are in fact distinct factors.[298] In *Won v. Amazon.com Inc.*, the court flatly rejected Amazon's attempt to conflate frequency and duration, concluding that Amazon's argument "commits a linguistic misstep" by comparing the separate factors.[299] The court underscored that "[n]othing in USERRA says that employers must provide equal treatment unless a service member serves too much."[300]

Generally, the duration of jury duty leave, vacation, sick leave, and bereavement leave are all comparable to the duration of short-term military leave.[301] Each of these types of leaves most commonly last several days, and usually do not last more than a couple of weeks.[302] Some courts have recognized that, as with military leave and jury duty, falling sick and being forced to take sick leave is beyond the employee's control and can last just as long.[303] In *Brill*, a federal district court held that where military leaves "generally last between three and five days, or two and four weeks at the longest," that "[s]uch a length may be comparable to the duration of jury duty."[304]

Additionally, even though duration is the most significant factor, it should not drive the analysis as the purpose and control factors may outweigh duration. *Myrick v. City of Hoover, Alabama* is instructive on this point and provides a useful roadmap for analyzing duration.[305] As

297. *See, e.g.*, Clarkson v. Alaska Airlines, Inc., No. 2:19-CV-0005, 2021 WL 2080199, at *7 (E.D. Wash. May 24, 2021).

298. *See* 38 U.S.C. § 4312(h) ("[T]he timing, frequency, and duration of" a service member's military service "shall not be a basis for denying [certain] protection[s]."); 20 C.F.R. § 1002.104 (2022) ("[E]mployee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service."). *See also* Won v. Amazon.com, Inc., 2022 WL 3576738, at *11 (E.D.N.Y. Aug. 19, 2022) ("Frequency is not mentioned in 20 C.F.R. § 1002.150(b) and is not a synonym for duration, but Amazon uses it interchangeably with duration when discussing the amount of time Won must take off compared with a typical juror.").

299. *Won*, 2022 WL 3576738, at *11 (explaining that duration is defined as "a portion of time which is measurable or during which something exists, lasts, or is in progress" whereas frequency is the number of repetitions of a periodic process in a unit of time).

300. *Id.*

301. *See* Duffer v. United Cont'l Holdings, Inc., 173 F. Supp. 3d 689, 705 (N.D. Ill. 2016) (noting that "jury duty and sick leave also can last months in certain cases").

302. *See id*.

303. *See id.*

304. Brill v. AK Steel Corp., No. 2:09-cv-534, 2012 WL 893902, at *6 (S.D. Ohio Mar. 14, 2012).

305. *See* Myrick v. City of Hoover, No. 2:19-cv-01728, 2022 WL 892914, at *10 (N.D. Ala. Mar. 25, 2022).

discussed, the court found that the purpose and control factors favored the USERRA plaintiffs while the duration factor favored the employer, because "the duration of average military leave and average administrative leave is not so different that the duration factor must drive the Court's analysis."[306] The court's analysis of the temporal outlier types of leave along with the court's strong emphasis that employers must provide USERRA plaintiffs the most favorable treatment when comparing leaves provides a helpful template for other courts to follow.[307]

2. Purpose of the Leave

Second, the DOL factor analyzing the purpose of leave militates in favor of short-term military paid leave.[308] The purpose of military service is to serve the country.[309] This conclusion is undeniably consistent with USERRA's text, legislative history and purpose, and Supreme Court precedent.[310] The *Clarkson* court's determination that the primary purpose of military leave is to pursue "parallel careers" in the military and earn additional income is misguided and wrong.[311] This determination suggests that service members invited unfavorable employment status upon themselves by choosing to join the military.[312] Such tortured reasoning ignores the regulation's text and impermissibly penalizes service members for joining the military, in direct contravention of USERRA's fundamental purpose.[313] Indeed, narrowly defining the purpose of military leave in this way ensures that military leave could never be comparable to any other type of leave.

Jury duty and military service undoubtedly share the same purpose: to perform service for the government and for the benefit of society. Both

306. *Id.* at *9 (stressing that "[c]onsidered together, the regulatory factors indicate that the City's administrative leave and its military leave are comparable in purpose and control and minimally comparable in duration, with average military leave for training lasting three times longer than an average administrative leave").

307. *See id*.

308. *See* 20 C.F.R. § 1002.150(b) (2022).

309. *See* Scott T. Sturkol, *If You're Wondering Why it's Important to Serve, Just Ask the Veterans Serving Today*, AIR MOBILITY COMMAND (Nov. 10, 2010), https://bit.ly/3Gyr4jW.

310. *See, e.g.*, Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) (noting that "[t]his legislation is to be liberally construed for the benefit of those who left private life *to serve their country* in its hour of great need" (emphasis added)).

311. Clarkson v. Alaska Airlines, Inc., No. 2:19-CV-0005, 2021 WL 2080199, at *7 (E.D. Wash. May 24, 2021).

312. *See* White v. United Airlines, Inc., 987 F.3d 616, 625 (7th Cir. 2021) (rejecting similar argument on appeal).

313. *See id*.

are clearly civic duties.[314] Courts routinely recognize the similar purposes of military service and jury duty.[315] Moreover, when enacting the regulations, DOL selectively cited cases decided under USERRA and its predecessor statutes to illustrate the rights and benefits established under the Act.[316] When reiterating its mandate that an employee on military leave is entitled to the greatest benefits afforded under a comparable form of leave, DOL cited *Schmauch* for the proposition that an "employer improperly treated jury duty more favorably than military leave."[317] At minimum, DOL's specific inclusion of this case in the Federal Register evidences its belief that jury duty and military leave may be comparable.[318] Practitioners have noted that in *White*, the Seventh Circuit signaled that jury duty and sick leave compare to military leave for conferring comparable benefits.[319]

Generally, sick leave, bereavement, and vacation all share a common public safety function. Sick leave protects the health of coworkers and the public who might be endangered if illnesses spread.[320] Likewise, bereavement leave ensures stability in employees' mental health while grieving.[321] Further, vacation leave prevents burnout by providing employees with the opportunity to rest and recuperate.[322] Some courts have found that military leave serves a public safety function because military leave to train for deployment or to serve in military conflicts keeps employees safe from potential harm.[323] Thus, all of these types of leave share a common purpose with military leave in that they support the overall public good.

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314. *See, e.g.*, Figgs v. GEO Grp., Inc., No. 1:18-cv-00089, 2019 WL 1428084, at *5 (S.D. Ind. Mar. 29, 2019) (noting that jury duty and military service are civic duties that benefit the country at large).

315. *See, e.g.*, Brill v. AK Steel Corp., No. 2:09-cv-534, 2012 WL 893902, at *6 (S.D. Ohio Mar. 14, 2012).

316. *See generally* USERRA Fed. Reg., *supra* note 74.

317. *Id.* at 75,262.

318. *See Brill*, 2012 WL 893902, at *8.

319. *See* Rosenblatt & Ranjo, *supra* note 13.

320. *See The Companies Putting Profits Ahead of Public Health*, N.Y. TIMES (Mar. 14, 2021), https://nyti.ms/3b8W8LD (citing studies showing that sick leave significantly reduces the spread of diseases).

321. *See* Marguerite Ward, *America's Lack of Bereavement Leave is Causing a Grief Crisis*, BUS. INSIDER (Feb 7, 2022, 11:59 PM), https://bit.ly/3zv7djK (discussing the purpose and benefits of bereavement leave).

322. *See* Jenny Gross, *The Limits of Vacation*, N.Y. TIMES (Aug. 14, 2021), https://nyti.ms/3PNNuB5.

323. *See* Myrick v. City of Hoover, No. 2:19-cv-01728, 2022 WL 892914, at *9 (N.D. Ala. Mar. 25, 2022) (concluding that the purposes of administrative leave and military leave are comparable).

3. The Ability of the Employee to Choose When to Take the Leave

Third, the employee's ability to choose when to take the leave strongly favors short-term paid military leave.[324] Importantly, the Seventh Circuit in *White* held that this factor does not concern the employee's choice to serve in the military. Rather, it should focus on the employee's control over timing their leave of absence.[325] When enacting USERRA, Congress specifically codified the *Waltermyer* holding that military leave shared the "essential features" of the exempt categories such that an employer could not deny holiday pay for employees who missed work in the week of the holiday because of military service.[326] The *Waltermyer* court emphasized that the National Guard members had no choice in selecting the weeks they would be on active duty and that their training time was compulsory, short, and set by their military superiors.[327] In the official commentary to the final rule, DOL summarized *Waltermyer* by stating that "the court found that because military leave was similarly involuntary, it was comparable to other types of involuntary absences from work and should be afforded the holiday pay."[328] Congress's and DOL's specific inclusion of this case in the congressional record and Federal Register supports the conclusion that this factor favors military members.

In the case of jury duty, bereavement leave, sick leave, and short-term military leave, the leave is ordinarily involuntary. Military leave occurs due to an employee's legal obligation to perform military service.[329] Similarly, bereavement leave occurs due to a death in the employee's family. Becoming ill and having to take sick leave is out of the employee's control and often lasts the same amount of time.[330] Even if employees maintain a degree of limited flexibility to reschedule these types of leaves, the decision to do so is usually caused by events beyond the employee's control.

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324. *See* 20 C.F.R. § 1002.150(b) (2022).

325. *See* White v. United Airlines, Inc., 987 F.3d 616, 625 (7th Cir. 2021) (clarifying that the factor is chiefly concerned with "whether she has the option to choose when to take a given stretch of leave").

326. *See* Brill v. AK Steel Corp., No. 2:09-cv-534, 2012 WL 893902, at *5 (S.D. Ohio Mar. 14, 2012).

327. *See* Waltermyer v. Aluminum Co. of Am., 804 F.2d 821, 824–25 (3d Cir. 1986).

328. USERRA Fed. Reg., *supra* note 74, at 75,264.

329. *See, e.g.*, Myrick v. City of Hoover, No. 2:19-cv-01728, 2022 WL 892914, at *9 (N.D. Ala. Mar. 25, 2022) (explaining that a person who has opted to be a member of a military reserve unit does not control their duty schedule).

330. *See* Duffer v. United Cont'l Holdings, Inc., 173 F. Supp. 3d 689, 705 (N.D. Ill. 2016).

Conversely, the fact that employees usually take vacation leave voluntarily should not be dispositive when evaluating this type of leave. In *Waltermyer*, the dissenting opinion criticized the majority's "involuntary absence concept" by expressly arguing that vacation leave is not involuntary.[331] The dissent claimed that the majority's opinion allowed for one group of workers to be absent during the week of a holiday and still collect the same holiday pay as the group on vacation.[332] Again, the House and Senate Reports accompanying USERRA and the preamble of the final rule all cited the *Waltermyer* majority opinion with approval.[333] Congress and DOL deliberately chose to not adopt the dissenting opinion in *Waltermyer*.

Additionally, jury duty has received the most focus in litigation regarding this factor.[334] Jury duty and short-term military leave are uncontrollable in timing.[335] Notably, jurors are compelled to perform jury duty as required by federal, state, or local law.[336] In *Waltermyer*, the Third Circuit recognized that short-term "military leave shares the essential features" of jury duty or testifying in court.[337] Likewise, an employee that has been subpoenaed as a witness is also legally compelled to act.

In *White*, the Seventh Circuit sharply criticized the district court's holding that all citizens are subject to jury duty whereas military duties are voluntarily joined.[338] The Seventh Circuit rejected the district court's suggestion that service members brought disfavored employment status upon themselves by volunteering to serve in the armed forces, stating: "This logic both ignores the text of the regulation and impermissibly penalizes service members for joining the military, in direct contravention of USERRA's core purpose."[339]

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331. *Waltermyer*, 804 F.2d at 827 (Hunter, J., dissenting).

332. *See id*.

333. *See* H.R. REP. NO. 103-65, *supra* note 29, at *33; S. REP. NO. 103-158, at *58 (1993), *reprinted in* 1993 WL 432567; USERRA Fed. Reg., *supra* note 74, at 75,262–64.

334. *See, e.g.*, Brill v. AK Steel Corp., No. 2:09-cv-534, 2012 WL 893902, at *6 (S.D. Ohio Mar. 14, 2012).

335. *See id.* ("Although military leave is arguably voluntary in the sense that service is not compulsory, the timing of specific leaves for annual training or weekend drills is involuntary, as is timing for jury duty."); Myrick v. City of Hoover, No. 2:19-cv-01728, 2022 WL 892914, at *9 (N.D. Ala. Mar. 25, 2022) ("[E]mployees have no control over when they are called to jury duty. Once called to duty, employees must comply with the trial schedule set by a court.").

336. *See, e.g.*, *Waltermyer*, 804 F.2d at 825 (explaining that the "government compels the employees' attendance and the worker, presumably, does not choose when to comply with this obligation").

337. *Waltermyer*, 804 F.2d at 825.

338. *See* White v. United Airlines, Inc., 987 F.3d 616, 625 (7th Cir. 2021).

339. *Id.*

C. Public Policy Concerns: Retention, Recruitment, and Related Issues

Denying short-term paid leave to military members but providing it to non-military employees for comparable purposes undoubtedly hurts military recruitment and retention efforts.[340] Ensuring that service members receive fair and equitable employment opportunities, including their terms of leave, is critical for military readiness.[341] Indeed, the Supreme Court has long recognized that service members' reemployment rights "provide[] the mechanism for manning the Armed Forces of the United States."[342] Undermining USERRA's protections by denying service members short-term paid leave while providing leave for non-military absences exacerbates the already tenuous economic situation of military members.[343]

First, military recruitment will suffer markedly.[344] President George Washington once stated, "[t]he willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive the veterans of earlier wars were treated and appreciated by their country."[345] In addition to preventing discrimination, USERRA is specifically intended to safeguard and advance a federal interest in military recruitment.[346] The decision to join the military or continue service is not made in a patriotic vacuum.[347] Indeed, scholars have noted that the main reason service members join, re-enlist, or leave the military is tied to their overall level of satisfaction with the military as an employer.[348] If USERRA's safeguards are undermined, financial constraints will deter potential recruits from military service,

340. Brief of Rsrv. Officers Ass'n as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 10, White v. United Airlines, Inc., 987 F.3d 616 (7th Cir. 2021) (No. 19-2546), 2020 WL 2144807, at *10.

341. *See id*.

342. Alabama Power Co. v. Davis, 431 U.S. 581, 583 (1977).

343. *See supra* Section III.E (discussing modern problems for military members).

344. *See* Brief of Rsrv. Officers Ass'n as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 14, Travers v. Federal Express Corp., 8 F.4th 198 (3rd Cir. 2021) (No. 20-2703), 2020 WL 6781424, at *14 (arguing that denying paid military leave will undermine recruiting efforts).

345. Kelley, *All Quiet*, *supra* note 16, at 404–05.

346. *Id.* at 405; *see also* Lee, *supra* note 29, at 276 (noting USERRA's goal of promoting enlistment in the uniformed services).

347. *See* Lisa Limb, *Shots Fired: Digging the Uniformed Services Employment and Reemployment Rights Act Out of the Trenches of Arbitration*, 117 MICH. L. REV. 761, 781 (2019).

348. *See* Marcy L. Karin & Katie Onachila, *The Military's Workplace Flexibility Framework*, 3 AM. U. LAB. & EMP. L.F. 153, 160 (2013).

especially in the Reserves and National Guard. Many individuals will decide not to serve at all.[349]

Second, retention will also suffer.[350] Presently, all branches of the military are facing mounting struggles with retention efforts to maintain qualified Reservists and National Guard members.[351] Allowing employers to use parsimonious and attenuated statutory interpretations to undermine the "rights and benefits" provided by USERRA would generate problems for service members, create a needless distraction, and hurt retention efforts.[352] Ultimately, inadequately enforced employment safeguards might become a tipping point for Reservists and National Guard members who are required to balance their military duties, civilian job responsibilities, and family obligations.[353]

The retention concern is especially troubling because modern warfare relies on sophisticated technological operations and intelligence-gathering, so modern military members must also be increasingly sophisticated.[354] Most USERRA short-term paid military leave plaintiffs are highly educated and well-trained pilots.[355] The military and civilian industries have both faced significant pilot shortages in recent years, especially in the wake of the COVID-19 pandemic.[356] The commercial airlines have pilot workforces that consist of high percentages of service members.[357] Indeed, the military has long been considered a major pipeline for the commercial airlines, and a significant number of pilots continue to serve in the Reserve or National Guard after rejoining or entering the

349. *See* Limb, *supra* note 347, at 781.

350. *See* Brief of Rsrv. Officers Ass'n as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 14, Travers v. Fed. Express Corp., 8 F.4th 198 (3rd Cir. 2021) (No. 20-2703), 2020 WL 6781424, at *14 (arguing that denying paid military leave will undermine recruiting efforts).

351. *See* Limb, *supra* note 347, at 782.

352. *See* Brief of Rsrv. Officers Ass'n as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 13, White v. United Airlines, Inc., 987 F.3d 616 (7th Cir. 2021) (No. 19-2546), 2020 WL 2144807, at *10.

353. Kelley, *All Quiet*, *supra* note 16, at 406; *see also* discussion *supra* Part II.E.

354. *See* Sparks, *supra* note 33, at 783 (explaining that modern warfare requires troops who are technologically astute and that these positions will likely require advanced degrees).

355. *See, e.g.*, Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 522 (E.D. Pa. 2019) (noting that plaintiff had served in the military since 1985 and was currently a Major General in the Air Force Reserve).

356. *See* Rachel S. Cohen, *Air Force Grapples with Enduring Pilot Shortage as Airlines Begin to Rehire*, AIR FORCE TIMES (June 22, 2021), https://bit.ly/3GwH5XG (noting that the military does not have an adequate number of pilots to meet its basic requirements so it needs to train and retain a set number in order to offset the retirements of more experienced officers).

357. *See* Skinner, *Up in the Air*, *supra* note 12.

civilian workplace.[358] If these pilots leave the military, there will be a significant void with their absence, especially the potential impact on combat operations as well as the leadership pipeline. On the other hand, if these pilots decide to stay in the military and resign from civilian airlines, the civilian airline pilot shortage will be worsened. In this regard, it is a lose-lose situation to deny paid short-term military leave when such leave is offered to non-military employees for comparable reasons.[359]

There is also a morale concern underlying company policies that deny paid short-term military leave. USERRA and its predecessor laws were specifically designed to improve the morale of service members. The importance of creating an overall climate that encourages service in the National Guard and Reserves—including both recruitment and retention—is critical since these forces operate in very tough environments often involving combat deployments or preparation. According to an amicus brief filed by the Reserve Officers Association in *White*, "[s]ervicemembers juggling a civilian career, family, and reserve duties need not be nickeled and dimed for brief leave benefits, while their civilian counterparts use them breezily."[360] Not only would that be unfair and unwarranted, "[i]t would be a tragedy if the men and women who have risked their lives for their fellow Americans were penalized as a result of their services in our Armed Forces."[361] Efforts to water down the equality rule, whether in the form of paid leave or any other right or benefit, would hinder recruiting and retention efforts while simultaneously degrading morale over the long run.[362]

As a corollary to the recruitment and retention problems, many companies that deny short-term paid leave for military members risk reputational harm. The risk of being perceived as unsupportive of service members could have significant consequences for companies, including deleterious effects on business revenues and recruitment initiatives.[363] In

358. *See* Skinner, *Walmart Deal*, *supra* note 259.

359. This lose-lose situation was evidenced in remarks made by Scott Kirby, the CEO for United Airlines, when he suggested that the military was to blame for the limited pool of pilots available to airlines. *See* James Clark, *United CEO Complains That the US Military Isn't Training Enough Pilots for Airlines to Poach*, TASK & PURPOSE (June 23, 2021, 9:02 AM), https://bit.ly/3t1uRjW.

360. Brief of Rsrv. Officers Ass'n as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 13, White v. United Airlines, Inc., 987 F.3d 616 (7th Cir. 2021) (No. 19-2546), 2020 WL 2144807, at *13.

361. 137 CONG. REC. 10703 (1991).

362. Brief of Rsrv. Officers Ass'n as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 14, White v. United Airlines, Inc., 987 F.3d 616 (7th Cir. 2021) (No. 19-2546), 2020 WL 2144807, at *14.

363. *See* Ranjo & Perhach, *supra* note 15.

this vein, companies risk deterring an enormously valuable hiring pool.[364] Veterans add incredible value to the workplace because of the professional skills and personal traits they acquired during their military service. For example, veterans have stellar leadership skills, are highly adaptable and responsive to challenges, are quick learners, and value teamwork and mentorship.[365] Research has confirmed that companies that hire veterans generate substantial business results because veterans perform at higher levels than their non-veteran counterparts and are more loyal to their places of employment.[366]

Finally, the policy arguments that requiring employers to provide short-term paid military leave will be burdensome and result in service member employees receiving preferential treatment by allowing them to receive a financial windfall are misguided and erroneous. In *White*, the Seventh Circuit soundly rejected the argument that requiring employers to provide short-term paid military leave will increase payroll burdens on small businesses, various industries, and state and local governments.[367] The Seventh Circuit stressed that such concerns were overstated because less than 1% of employees are Reservists and, of those, some likely work for employers who already provide paid military leave.[368] On a more pragmatic level, it is without merit to suggest that evenhandedly providing a right or benefit already widely offered to its civilian workforce to service member employees would be difficult.[369]

Courts have similarly rejected the argument that requiring employers to offer paid military leave will result in service members receiving preferential treatment by enabling them to obtain a windfall by receiving their military pay in addition to regular pay.[370] Most significantly, in *Brill*, the court expressly rejected this exact argument because the employer would not provide the USERRA plaintiff with any benefit that it did not already offer to employees absent for jury duty or witness leave.[371] The court underscored that paying the USERRA plaintiff a full salary while on

364. *See* Keith Sonderling, *Want to Thank Veterans for Their Service? Hire Them.*, SAN DIEGO UNION TRIB. (Nov. 10, 2021), https://bit.ly/3MTqMGy [hereinafter Sonderling, *Hire Them*].

365. *See id*.

366. *See id.*

367. *See* White v. United Airlines, Inc., 987 F.3d 616, 625 (7th Cir. 2021).

368. *See id.*

369. *See* Brief for Appellant at 7, White v. United Airlines, Inc., 987 F.3d 616 (7th Cir. 2021) (No. 19-2546), 2020 WL 2144807, at *7 (explaining that this is especially important considering that civilian employees make up the super majority of most workforces).

370. *See, e.g.*, Brill v. AK Steel Corp., No. 2:09-cv-534, 2012 WL 893902, at *6 (S.D. Ohio Mar. 14, 2012).

371. *See id*.

military leave would fully comply with USERRA's requirement to provide the service member employee the most favorable treatment given for any other type of comparable form of leave.[372] Moreover, both policy arguments against paid military leave ignore the fact that only military leave that is found comparable to non-military leaves of absence is required under USERRA.[373] Even if these policy concerns were not overblown courts have routinely held that USERRA's "unambiguous text" cannot be disregarded based on "speculation about any collateral consequences."[374] Finally, these policy arguments are outweighed by the fact that military short-term paid leave enhances efforts to recruit and retain service members, thus making the possibility of a draft unnecessary.[375]

VI. STRENGTHENING USERRA PROTECTIONS: SOME POSITIVE SUGGESTIONS

There are several recommendations that may improve the status quo. The first and most obvious solution to ensure that service members receive short-term paid leave under USERRA is a legislative solution: amend the statute. Another possible solution is for DOL to revise its USERRA regulation regarding the comparability analysis and provide additional guidance. Additionally, state action should also be considered to provide enhanced protections.

A. Amending USERRA

Since some courts have found that paid military leave is unavailable because it was not expressly listed in the statute, amending the statute is the most obvious solution. In *Travers*, the Third Circuit seemed to suggest Congress should do this when it noted that "Congress remains free to rebalance the scales."[376] Numerous scholars and practitioners have long believed that amending USERRA is long overdue. In 2021, an EEOC commissioner suggested that it is essential that USERRA—passed in 1994, well before the post-9/11 employment challenges—be revisited and amended by Congress because of the new obstacles that veteran employees face.[377] The USERRA amendment can simply specify that

372. *See id*.

373. *See* 20 C.F.R. § 1002.150(b) (2022).

374. Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 527 (E.D. Pa. 2019).

375. *See* Robert Iafolla, *Paid Military Leave Campaign Hopes for Another Court Win*, BLOOMBERG L. (Feb. 26, 2021), https://bit.ly/3BD91sp (citing interview with a drafter of USERRA who contends that any burden is offset by not reinstating the draft).

376. Travers v. Fed. Express Corp., 8 F.4th 198, 209 n.26 (3d Cir. 2021).

377. *See* Sonderling, *Facing Down*, *supra* note 92.

"rights and benefits" includes short-term paid military leave if comparable leave is provided for other absences. In a similar vein, Congress could amend USERRA to specify that there is a presumption in favor of finding comparability when assessing leaves. Such a presumption would be entirely consistent with USERRA case law and the regulations.

USERRA amendments have historically received widespread bipartisan support. For instance, a USERRA amendment that established the same standard for hostile work environment claims because of military status as that governing other employment discrimination laws received a unanimous vote in Congress and was signed into law by President Obama in 2011.[378] Although partisan gridlock seems to characterize Congress, the history of successful bipartisan USERRA amendments demonstrates that further amendments, especially fairly minor ones, are possible.[379]

B. Revise DOL'S USERRA Regulation and Provide Additional Guidance

Another potential solution is for DOL to revise and update the USERRA regulation regarding the comparability analysis.[380] Some practitioners have noted that DOL declined to specify what is a "comparable" form of leave when it last addressed comparability in 2005.[381] Inexplicably, in 2022, DOL again passed up an opportunity to provide much needed clarity regarding its comparability regulation even after indicating it would do so.[382] The administrative law process, particularly through the submission of public comments, may help improve the regulation by giving outside parties the opportunity to offer meaningful feedback, including the employer's perspective on comparability. Perhaps most importantly, the regulation should be revised to include specific examples of what types of leave are comparable. Additionally, the regulation should clarify that the frequency of military leave in general should not hinge on comparability factors and that the proper focus should be on comparing specific military absences of

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378. *See* Matthew F. Nieman, *New Law Expands USERRA to Recognize Hostile Environment Claims*, JACKSON LEWIS (Nov. 22, 2011), https://bit.ly/38SGRxF.

379. *See* Marcy L. Karin, *"Other Than Honorable" Discrimination*, 67 CASE W. RES. L. REV. 135, 188 (2016) (contending that "supporting the military community at work is one of the few areas where Congress has broken through the partisan deadlock in the past").

380. *See* Karin & Onachila, *supra* note 348, at 180 (arguing that agencies should "remain vigilant in updating regulations and agency interpretations").

381. *See* Segal, *supra* note 5, at 23, 25.

382. *See* Jacklyn Wille, *Feds Pass up Chance to Address Paid Military Leave Litigation*, BLOOMBERG L. (Apr. 21, 2022), https://bit.ly/3Q9P4wS (explaining how DOL initially requested an extension of time to file an amicus brief in the *Clarkson* appeal before the Ninth Circuit but then opting not to file a brief).

employees to other forms of leave offered by an employer. Finally, the regulation should also clarify how to distinguish between extended leave and short-term leave. DOL could also include a presumption in favor of finding comparability when assessing leaves.

Given the uncertain legal environment surrounding paid military leave, more guidance is undeniably needed. Federal and state agencies should prioritize issuing more guidance to provide clarity regarding the USERRA paid leave issue. An EEOC commissioner argued that "it is imperative that federal and state agencies engage in targeted outreach to ensure that veterans and employers know about these particular laws and how they apply."[383] One option to issue guidance in a faster manner and more efficiently would be for DOL's VETS to issue an opinion letter regarding paid military short-term leave under USERRA. In short, an opinion letter is an official written opinion from an agency on how a statute, its implementing regulations, and related case law apply to a specific situation presented by the person or entity requesting the opinion.[384] Opinion letters have long been recognized as a valuable resource for courts, employers, employees, unions, trade groups, practitioners, advocacy groups, and the general public.[385] DOL's Wage and Hour Division is perhaps the most well-known agency for issuing opinion letters, but a number of other agencies also issue opinion letters, including the EEOC and DOL's Office of Federal Contract Compliance Programs ("OFCCP").[386] One notable example of an agency that recently spearheaded an opinion letter program in order to provide the public with more guidance is DOL's OFCCP, the agency that enforces the non-discrimination and affirmative action requirements of federal contractors and subcontractors to the federal government.

Historically, OFCCP never issued opinion letters.[387] Recognizing that other DOL agencies had long issued opinion letters, in 2018 OFCCP issued a directive that established an opinion letter program where contractors could ask OFCCP for fact-specific guidance to rely upon in

383. Sonderling, *Facing Down*, *supra* note 92. *See also* Kelley, *Veterans Employment Discrimination*, *supra* note 85 (stressing the importance of engaging in targeted outreach to ensure that veterans know about these laws and how to seek enforcement).

384. *See* Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 MO. L. REV. 1171, 1175 (2021).

385. *See id*. (explaining that DOL has issued opinion letters for over 70 years).

386. *See id.*

387. *See id*. at 1188–89 (briefly discussing history of OFCCP's opinion letter program); *see also About Us*, OFF. OF FED. CONT. COMPLIANCE, U.S. DEP'T. OF LAB., https://bit.ly/3wZCGJz (last visited Feb. 1, 2022).

complying with its equal employment opportunity obligations.[388] OFCCP issued five opinion letters between 2017 and 2021, including an opinion letter on a DOD job training program for service members.[389] DOL VETS can use OFCCP's opinion letter program and successes with the program as a useful template. An opinion letter from VETS could be particularly helpful in clarifying the comparability analysis and the purpose of military leave. Another useful opinion letter could potentially address how to distinguish between extended leave and short-term leave.

Likewise, state agencies should also issue opinion letters. State agency USERRA opinion letters have proven incredibly valuable in providing needed clarity.[390] Importantly, the Attorneys General of Oklahoma, South Carolina, Washington, and California have issued several opinion letters responding to questions about military leaves of absence under state USERRA laws.[391] Because of the legion of benefits associated with opinion letters, federal and state agencies should strive to maintain or implement a robust opinion letter program.[392]

C. Tax Relief and Employer Incentives

In addition, Congress should consider offering employers some sort of business tax credit for losses or expenses directly caused by service members' military obligations and reemployment.[393] Generally, the employer's most common complaint is loss of efficiency and production

388. *Opinion Letter Frequently Asked Questions*, OFF. OF FED. CONT. COMPLIANCE, U.S. DEP'T. OF LAB., https://bit.ly/38VRHTq (last visited Feb. 1, 2022).

389. *Opinion Letters*, OFF. OF FED. CONT. COMPLIANCE, U.S. DEP'T. OF LAB., https://bit.ly/38wwGP5 (last visited Feb. 1, 2022).

390. *See* Jon Steingart, *Opinion Letters Can Be a Tool to Aid Employers' Compliance*, LAW360 (Feb. 16, 2022), https://bit.ly/3M5gstQ (interviewing author who contends that state-level USERRA opinion letters have been invaluable).

391. *See generally* Op. Okla. Att'y Gen. No. 88-103 (1989), 1989 WL 448402; Op. Okla. Att'y Gen. No. 83-32 (1983), 1983 WL 174906 (responding to inquiry regarding whether a municipality may require one of its employees, who is a member of the Oklahoma National Guard, to deduct weekend drills or training assemblies from the twenty calendar days authorized for full municipal pay); Op. Wash. Att'y Gen. No. 55 (1961), 1961 WL 62889 (concluding that a service member is entitled to salary step increases while on military leave); Op. S.C. Att'y Gen. Op. (Oct. 27, 2008) 2008 WL 4829838, at *1 (responding to inquiry of whether employees who are periodically activated for National Guard or Reserve duty and training for a brief period of time draw full-time pay while they are absent from work, especially if they are not taking vacation time); Op. Cal. Att'y Gen. No. 80-303 (1980), 1980 WL 96869 (concluding that public and private employers are required to excuse National Guard members to attend drills with unpaid leaves of absence and the service member employee cannot be required to use his or her own free time to compensate for any overtime or vacation time).

392. *See generally* Sonderling & Kelley, *supra* note 384.

393. *See* Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F. L. REV. 287, 341 (2007).

due to frequent and extended military service. As such, this solution would allow employers to mitigate their losses by providing tax relief, thereby offering employers economic incentives to hire and retain service members and generating compliance with USERRA.[394]

Fortunately, there is already a tax incentive bill being considered in Congress. To provide such tax incentives, the Reserve Employers Comprehensive Relief and Uniform Incentives on Taxes ("RECRUIT") Act of 2021 was introduced in the U.S. House to amend the Internal Revenue Code and specifically allow for a tax credit for employers of National Guard and Reserve service members.[395] This bill has bipartisan support, and the tax credit is designed to help employers offset the financial costs that arise when service member employees are absent. An identical companion bill was also introduced in the U.S. Senate with corresponding bipartisan support.[396] The executive director of the Reserve Organization of America hailed these bills as a "perfect example" of a bipartisan potential solution in the age of unprecedented partisanship.[397] The Enlisted Association of the National Guard of the United States also praised the legislation and stated that the organization "believes offering tax credits to companies will encourage them to hire National Guard and Reserve members."[398]

Ultimately, this solution is particularly promising because it would enable companies to mitigate any losses by providing tax relief. Indeed, these financial incentives may well spur companies to recruit, hire, and keep service member employees while simultaneously promoting compliance with USERRA.

D. State Action

Another course of action is for individual states to pass laws extending additional protection to veterans. USERRA sets baseline protections for military members and preempts state laws offering less. However, USERRA does not preclude states from granting greater protections. As discussed, many states already have some measures in place that are markedly similar to USERRA, but they vary considerably

394. *See id.*

395. *See* Reserve Employers Comprehensive Relief and Uniform Incentives on Taxes Act, H.R. 1854, 117th Cong. (2021).

396. *See* Reserve Employers Comprehensive Relief and Uniform Incentives on Taxes Act, S. 1178, 117th Cong. (2021).

397. Jeffrey Phillips, *Congress Showing Bipartisanship on Defense and Vets — Even if That's Not in the News,* THE HILL (May 28, 2021), https://bit.ly/3M2E1Ds.

398. ENLISTED ASS'N OF THE NAT'L GUARD OF THE U.S., STATEMENT ON RESERVE EMPLOYERS COMPREHENSIVE RELIEF AND UNIFORM INCENTIVES ON TAXES ACT OF 2021 2 (n.d.), https://bit.ly/3PN5E6K.

from state to state.[399] Connecticut's USERRA law provides a useful framework since it requires employers to grant a paid leave of absence to any employee who is required to attend military reserve or National Guard meetings or drills during regular working hours.[400]

State laws may prove especially important for National Guard members who deploy to combat and also take part in state emergencies, disaster relief, and law enforcement missions. State USERRA laws are equally important because historically National Guard duty performed as state active duty has not been covered under USERRA.[401] In any event, any federal solutions must account for corresponding state action.

E. Employer Actions: Revisiting and Revising Military Leave Policies

Regardless of any legislative or regulatory change, risk-averse employers should revisit their current military leave policies 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, vacation, bereavement, and sick leave.[402] This is especially important for employers that operate within the Seventh and Third Circuits.[403] Some companies have already changed their policies based on the evolving legal landscape. For instance, as part of the settlement in *Tsui v. Walmart Inc*., Walmart modified its military leave policy so that employees who take up to one month of military leave will receive full pay, and those who take longer military leaves will be able to receive partial compensation.[404]

Several practitioners have suggested that employers consider equalizing leave types by either increasing the amount of time service members receive for paid military leave or setting a cap for the paid leave for non-military leaves such as jury duty.[405] For instance, a company could develop a military leave policy where, if an employer offers employees up

399. *See generally* GEORGE R. WOOD, LITTLER MENDELSON, P.C., A GUIDE TO LEAVE UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (n.d.), https://bit.ly/38y5Ztm (discussing various state USERRA laws).

400. *See* CONN. GEN. STAT. § 27-33a (2022).

401. *See supra* note 78 and accompanying text.

402. *See* AKERMAN, *supra* note 255.

403. *See* Michael Bowling, *Not Currently Offering Paid Short-Term Military Leave? You May Need to Start*, JD SUPRA (Oct. 1, 2021), https://bit.ly/3wYJ2IV. The Seventh Circuit includes Illinois, Indiana, and Wisconsin. *See id.* The Third Circuit encompasses New Jersey, Pennsylvania, Delaware, and the Virgin Islands. *See id.*

404. *See* AKERMAN, *supra* note 255; *see also* Winkie, *supra* note 1. Walmart's new policy states that longer military leave is considered any military leave up to one year. *Id*.

405. *See* Richard Rosenblatt & Jason Ranjo, LAW360, *3rd Circ. Ruling Shows Employer Risk in Unpaid Military Leave* (Aug. 31, 2021), https://bit.ly/3osN7Ae (briefly explaining why employers need to be cognizant of unionized employees).

to three days of paid bereavement leave per year, that employer should also offer up to three days of paid military leave per year.[406] Placing caps on certain types of leave might be appealing to companies that offer full pay to employees on non-military leaves like jury duty leave.[407] Other practitioners have noted that employers consider whether they want to supplement leaves for which employees receive a stipend, such as jury duty, or provide the employees full compensation in addition to the stipend.[408]

A change in workplace policies would be fully consistent with many companies' missions to recruit and retain service member employees. Indeed, many companies have been at the vanguard of bridging the civilian-military divide, including efforts such as creating a military and veterans affairs office responsible for supporting veterans' recruitment and offering military fellowship programs.[409] A change in military leave policy would send a strong signal that service in the military is viewed by the company as a value added, and preemptively address any reputational harm that might arise with a potential USERRA claim.

VII. CONCLUSION

USERRA does not allow employers to treat service members differently by paying employees for some kinds of leave while exempting others from pay for their military service. The United States cannot necessarily guarantee service members a silver bullet to help them balance serving in the military with their civilian employment, but USERRA commands equal treatment. Ultimately, USERRA mandates that employers place military leave on equal footing with the most generous comparable leave they provide for other absences.

In the long run, legislative or regulatory changes and providing additional guidance may help encourage citizens to join, or stay in, the military and therefore make the possibility of a draft unnecessary. Moreover, adopting these approaches will arguably go far in giving

406. *See id.*

407. *See id.* (explaining that many companies do not set a time limit for jury duty leave because it frequently lasts a few weeks or more). The authors also explain that this same analysis should also be performed for benefits provided to unionized employees because USERRA expressly supersedes any employment contract, including collective bargaining agreements, that provide service members with fewer benefits. *See id.*

408. *See* Gross Sholinsky et al., *supra* note 6.

409. *See* Sonderling, *Hire Them*, *supra* note 364. For instance, JPMorgan Chase has a military and veterans affairs office responsible for supporting veterans' recruitment. *See id.* Meanwhile, United Health Group offers a military fellowship program, providing career skills training in finance, clinical operations and customer service. *See id.* In addition, Boeing utilizes a "military skills translator" that enables veterans to enter their specific military occupational code and then lists specific suitable available jobs. *See id.*

National Guard members and Reservists peace of mind: they will rest assured that when they sign up to serve in the military, their decision will be viewed by employers as a net positive, not as a detriment. In this same vein, employers should fully examine their policies concerning military leave and ensure that, to comply with USERRA's requirements, they properly compensate employees who take military leave as they would employees who take comparable types of leave.