Colorado Legislature Clarifies State Paid Military Leave Requirement

Local government employers often employ persons who are also members of the Colorado National Guard or military reserves. When these employees are required to take leave for training or active service, employers must look not only to federal law but also to Colorado statutes that provide specific leave entitlements. A common question we get via the CIRSA Liability Hotline is whether these employees are entitled to any paid leave for their military leave of absence. Under Colorado law the answer is "Yes," and public employers should be aware of a bill recently signed by Governor Polis that clarifies the state law entitlements for such a leave of absence, including the amount of required paid leave.

Many public entity personnel policies include provisions that mimic the leave requirements of C.R.S. Section 28-3-601 ("Section 601"). Until recently, Section 601 stated that members of the National Guard or military reserves are entitled to 15 days of leave annually for training or active service "without loss of pay," in addition to continuation of benefits, rights of reinstatement, and other protections.[1] If your policies are like most of the CIRSA members' policies we've seen, they probably make express reference to this 15-day paid leave rule.[2] They probably also mimic the requirements of C.R.S. Section 28-3-602 ("Section 602") which state that if the required military leave of absence is longer, the employee is entitled to unpaid leave of absence for all additional service.

With the passage of House Bill 23-1045, the Colorado Legislature has clarified that the employee's annual paid leave entitlement is "the equivalent of three weeks of work" on the employee's regular work schedule, rather than "fifteen days." The Bill took effect March 10, 2023, and applies to all leave requests after that date. In addition to this clarification, House Bill 23-1045 adds an express statement that an employee who is taking a required military leave of absence is entitled to use any paid leave available to the employee or to use unpaid leave.

It's important for employers to recognize that the change from "fifteen days" to "the equivalent of three weeks" could affect your leave practices. For example, if your entity has an employee whose regular work schedule is eight hours per day, Monday through Saturday, their paid leave entitlement under Section 601 would be the equivalent of three weeks of such work (i.e., 18 days) rather than fifteen days. Similarly, if your employee worked five 10-hour shifts each week, their paid leave entitlement would the equivalent of three weeks of that schedule, not subject to reduction to a "standard" eight-hour day. On the other hand, if your entity has an employee who regularly works 30 hours a week, their paid leave entitlement would be the equivalent of three weeks of that schedule.

House Bill 23-1045 also clarifies that an employee on required military leave is entitled to use any available paid leave or use unpaid leave. In what is perhaps the most common scenario, the employer will grant and the employee will use paid military leave for the first fifteen days of training or service, and thereafter decide whether to use other paid leave, or go unpaid. However, one interpretation of the new language in House Bill 23-1045 is that the employee may elect to go unpaid for some or all their first period of training in the leave year and use their paid leave entitlement for other training or service later in the year. This scenario may occur infrequently, but your entity should be prepared to address it should the request arise.

In addition to Section 601 and other requirements of state law,[3] employers must be familiar with employee rights under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) and military leave rights under the federal Family and Medical Leave Act (FMLA). The USERRA grants certain reemployment and health and pension plan coverage rights and prohibits employment discrimination based on past, present, or future military service, but does not contain paid leave requirements. There's no obligation under the FLSA to pay employees during military leave, except that deductions from salaries of exempt employees who take military leave for a partial workweek are not permissible because they violate the salary basis test of the FLSA.[4] In practical terms, if the leave begins and ends during the initial 3-week period of the leave, then the FLSA requirement will be satisfied by the pay the municipal employer is already obligated to pay under state law. However, if the leave ends outside of the 3-week period, then the employer may not deduct amounts from the exempt employee's salary for days not worked during the partial workweek. However, the municipal employer is permitted to offset amounts received by the employee from the military employer during the partial workweek.

For example, if an exempt employee is ordered to 28 days (4 weeks) of military training/service beginning on (the first) Wednesday and ending on the (fifth) Wednesday, state law requires that the employee must be paid for the first 3 weeks of leave (first to second Wednesday; second to third Wednesday; third to fourth Wednesday). Unless the employee elects to use paid leave for the fourth Thursday and Friday, the employee will go without local government pay for those days. However, assuming the employee will be returning to work immediately after the training/service on Thursday of the fifth week, the employee must be paid for Monday, Tuesday, and Wednesday of the fifth week, subject to offset for amounts received by the employee from the military employer attributable to those days.

Detailed discussion of USERRA and FMLA—which both grant employment protections for unpaid leave for uniformed services members—is beyond the scope of this update. Members are encouraged to consult with their entity attorney and human resources staff and consultants to ensure your military leave policies are up-to-date and consistent with applicable law.

If you have any questions regarding the above article, please contact Sam Light, CIRSA Deputy Executive Director/General Counsel, at saml@cirsa.org, or Nick Cotton-Baez, CIRSA Associate General Counsel, at nickc@cirsa.org.

Note: This article is intended for general information purposes only. Military leave requirements are technical, and employers are responsible for ensuring their policies and practices are in compliance with applicable federal and state laws. Readers should consult with their entity's own counsel for legal advice on specific issues.

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1. *Section 601 also states "[t]he employer shall allow the leave if the required military service is satisfactorily performed, which is presumed unless the contrary is established."*
2. *The following language, based on one CIRSA member's policies, is typical: "The City/Town provides employees with paid leave for a maximum of fifteen (15) working days per calendar year for active duty or training with the National Guard or any branch of the U.S. Armed Forces."*
3. *The full text of Section 601, as well as related Colorado statutes contained in C.R.S. Sections 28-3-601 through 28-3-612 concerning extended and emergency military leave, reinstatement rights and related provisions can be found at this link.*
4. 29 CFR § 541.602

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