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Walmart Deal Could Signal New Wave Of Military Leave Claims

By **Joe Skinner** (October 28, 2021, 2:01 PM EDT)

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Companies outside of the commercial aviation industry may have been able to look the other way as much of the industry over the last several years became mired in class actions alleging wages owed in connection with unpaid military leaves.

The Uniformed Services Employment and Reemployment Rights Act, or USERRA, is often an afterthought in human resources departments. The hyper-regulated airline industry may seem a world apart from the legal landscape facing more, well, grounded employers.

Plus, the immediate demands of employers' pandemic responses, with furloughs and worker shortages and vaccine policies, have understandably dominated the spotlight.

News that the world's largest private employer — Walmart Inc. — recently settled its own USERRA class action for an eight-figure sum, then, may serve as both a wake-up call and a harbinger of what is to come. The $10 million settlement in Tsui v. Walmart approved by the U.S. District Court for the District of Massachusetts earlier this month stems from allegations made by a class of approximately 7,500 current and former Walmart employees going back to 2004.

The workers claim that the company failed to pay full — or, in some instances, any — wages to employees who took military leaves of less than 30 days.[1] In response to the suit, Walmart bolstered its military leave policy in January to provide full pay for military leaves of up to a month, and partial pay for leaves of up to a year.

Employers may be puzzled by what, exactly, was wrong with Walmart's prior practice.

Until the airline lawsuits began stacking up in 2018 and 2019, employers and military reservists alike seemed to have accepted the general premise that military leave need not be paid. USERRA itself is explicit in its pronouncement that service members are entitled to five years of cumulative unpaid leave.

What, then, would cause a company like Walmart to settle the lawsuit without fighting?

The Airline Litigation

The argument for paid military leave — first advanced widely in the airline cases — is based on a

provision of USERRA requiring that employees absent for military leave receive at least the same rights and benefits as employees absent for other comparable types of leave. Historically, employers have understood that mandate to apply to questions like an employee's eligibility for vacation accrual and bonus payments during a military leave.

Plaintiffs now argue that the same provision creates an entitlement to paid short-term military leave benefits, because their employers offer paid leave benefits for a variety of other purposes — including bereavement, jury duty, vacation and sickness.

The notion of short-term military leave — as opposed to long-term military leave — is a distinction airline employers make for administrative purposes, but which plaintiffs are using to try to demonstrate that short periods of military leave are similar in their nature to the types of paid leave that most employers have offered for decades, whether by choice or, increasingly, by law.

The airlines chose to fight the lawsuits and have largely followed the same playbook. Early motions to dismiss were based on a complex statutory argument asserting that the phrase "rights and benefits" in USERRA does not encompass the possibility of an entitlement for paid leave.

Most district courts rejected those arguments, apart from the U.S. District Court for the Northern District of Illinois in White v. United Airlines Inc. in 2019,[2] and the U.S. District Court for the Eastern District of Pennsylvania in Travers v. FedEx Corp. last year.[3] Both district court dismissals were subsequently overturned, however, by the U.S. Courts of Appeals for the Seventh and Third Circuits, respectively.[4]

The appellate reversals, more than anything else, fueled suggestions that paid leave entitlements under USERRA are now more than mere theoretical possibilities. The critical analysis of comparability between the types of leave, however, remains largely undecided.

Arguments hashing out the similarities and dissimilarities between military leave and bereavement leave (or jury duty, vacation or sick leave) involve factual inquiries that were premature at the motion to dismiss phases of the airlines' cases. The only court thus far to reach the merits of the comparability analysis — the U.S. District Court for the Eastern District of Washington, in Clarkson v. Alaska Airlines Inc.[5] — granted summary judgment in favor of the employer in May.

The Eastern District of Washington found that military leave is not at all similar in duration, frequency and purpose to the paid types of other leave identified by the plaintiffs. That decision is now on appeal in the U.S. Court of Appeals for the Ninth Circuit.[6]

The result in Washington state was welcome, but not surprising, to the other airlines watching the progress of that test case with bated breath as their own lawsuits remain in discovery.

Military leave utilization in the airline industry — particularly among pilots, but also among aircraft mechanics — occurs at a frequency that is likely unmatched in any other industry.

The military is a major pipeline for commercial airline talent, and many pilots remain active in the Air National Guard or U.S. Army Reserve well into their civilian careers. Scheduling flexibility inherent to the profession creates the opportunity and incentive for pilots to manage a civilian career and a military career simultaneously, with both careers providing pay and lucrative retirement benefits.

USERRA's five years of leave entitlement can easily turn into eight, 10 or even 12 years of job-protected, retirement-creditable leave when employees serve under the authority of exempt orders, which do not count against an employee's cumulative limit.

Accordingly, pilots active in the Guard or Reserve commonly take dozens of short-term military leaves in the span of a year,[7] and they may repeatedly deploy for months or years at a time throughout their civilian careers.

In fact, many new-hire pilots may prefer to focus heavily on their military careers after obtaining a seniority number at a commercial airline, because USERRA's "escalator principle" ensures that their position and schedule bidding opportunities will improve during their protected absence.

These realities, with which airlines have been dealing for decades, make for strong arguments as to why military leave is different in its very nature from paid leave for jury duty, bereavement, sickness or vacation. Thus, the airlines are hopeful that their forthcoming summary judgment motions will be met with the same success as that of Alaska Airlines in Washington state.

Key Considerations for Employers

Broad pronouncements about whether USERRA requires paid military leave are still premature. The Alaska Airlines decision in Washington state gives reason for employer optimism, but its appeal is still being briefed at the Ninth Circuit, and the other district courts considering the same arguments in the context of different airlines may come out the other way.

If the ultimate question of liability for unpaid military leave remains up in the air, what should we make of Walmart's decision to settle its case while the airlines have collectively steeled themselves for an existential fight?

Employers of all sizes and in all industries ought to consider the following takeaways:

A leave comparability analysis may yield differing results at different employers.

It may be a mistake to assume that the courts' conclusions with respect to the airlines will translate to all employers. Military leave utilization in the airline industry is markedly different than military leave utilization in other industries.

An employer with relatively few employees active in the armed services — and where those employees generally utilize military leave once a month surrounding weekend training drills — may struggle to differentiate those military leaves from the paid types of other leave they provide.

Employers should assume, for the time being, that a proper comparability analysis will be highly case- and employer-specific. Important variables include, among others:

- The frequency with which their service member employees utilize military leave;
- The average duration of those military leaves;
- The frequency and duration with which their employees utilize paid types of other leave;
- The extent to which employees control the timing and utilization of the various types of leave;

- The extent to which paid types of other leave are required by law as opposed to granted voluntarily; and

- The purposes for which the various leaves were designed to facilitate.

The costs and incentives to litigate versus settling a USERRA lawsuit will also vary among employers.

For the airlines, the consequences of losing their lawsuits would be severe. Commercial pilots at major carriers have significant earning potential, pilots use military leave frequently, and USERRA contains no statute of limitations to cut off liability.

Yet, the prospect of settling the cases is equally untenable, with enormous past liability on the table and an uncertain enforcement scheme clouding their future practices. The airlines have little choice but to fight.

Other employers, though, like Walmart for instance, may have relatively limited liability associated with these lawsuits. A $10 million settlement is not insignificant but, for a company with over 1 million domestic employees and a temporal class stretching back over 15 years, that figure is a comparative bargain.

Employers with lower wage rates and fewer service member employees may find settlement more attractive than a protracted legal battle.

Some types of employers have more liability exposure than others.

On the spectrum of employer attractiveness for plaintiffs filing USERRA lawsuits, the airline industry sits as far to one side as possible. Its workforces have the ideal combination of factors, including high military leave utilization, large headcounts and massive wage rates.

The Walmart settlement may represent the beginning of a second wave of USERRA lawsuits filed at employers with just one or two of those ideal factors present. Smaller employers that employ high percentages of service members, such as fire and police departments or security firms, could be susceptible to claims as well.

Employers should be cognizant of nonfinancial considerations as well.

Class action employment lawsuits are never welcome news for a company's public relations managers, but USERRA lawsuits may be particularly unpalatable. A desire to support U.S. service members may motivate some employers to settle quietly, or even take proactive measures to prevent such litigation from the start.

Walmart's promise to pay full wages to employees who take up to a month of military leave, and partial wages for leaves of up to a year, position the company as a supporter of our country's service members. Providing a similar benefit to employees voluntarily, and not as a condition of a settlement, could send an impactful message.

Final Thoughts

Courts have not yet established a blanket entitlement to paid military leave. Wise employers, however,

will think proactively about contingency plans and potential risk.

The outcomes of the airline cases will be instructive as to both of those topics, but manufacturers, retailers and service-sector employers must examine their own military leave policies in the context of their individual workforces.

Adopting a paid military leave policy may head off future exposure, but it will not extinguish past liability — which, again, may stretch decades given USERRA's lack of a statute of limitations. Moreover, paid military leave policies providing less than full pay for all protected military leave could still be vulnerable to attack.

Plaintiffs attorneys have hinted at rules of reasonableness with respect to the extent of any paid leave entitlement required by USERRA, but any such framework would not be immune to additional challenges by employees.

Is it sufficient to provide paid military leave in a duration equal to what is offered for paid bereavement leave, or should it be a duration equal to what is offered for paid vacation? Or, for that matter, should it be the sum duration of all the paid leave offerings an employer provides?

Questions like these reflect the reality that there is no simple, one-size-fits-all approach to address the Pandora's box that has opened in the world of military leave. Whether employers choose a wait-and-see approach or proactively implement new policies, the rules of the game are still being written.

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Disclosure: Skinner previously served as lead counsel in the labor and employment law department at FedEx Express where he advised on the Travers case mentioned in this article.

[1] Tsui v. Walmart Inc., Case No.1:20-cv-12309 (D. Mass.).

[2] White v. United Airlines, Inc., 416 F. Supp. 3d 736 (N.D. Ill. 2019).

[3] Travers v. FedEx Corp., 473 F. Supp. 3d 421 (E.D. Pa. 2020).

[4] White v. United Airlines, Inc., 987 F.3d 616 (7th Cir. 2021); and Travers v. Fed. Express Corp., 20-2703 (3d Cir. Aug. 10, 2021).

[5] Clarkson v. Alaska Airlines, Inc., No. 2:19-CV-0005-TOR (E.D. Wash. May 24, 2021).

[6] Clarkson v. Alaska Airlines, Inc., No. 21-35473 (9th Cir.).

[7] "Regarding frequency, of the Alaska pilots who took military leave in the relevant class period, the average total number of military leaves was 47 and the average number of military leave days was 511.Id.at 23, ¶ 40. Of the Horizon pilots who took military leave in the relevant class period, the average

total number of military leaves was 17 and the average number of military leave days was 560. Id.at 24, ¶ 43." Clarkson v. Alaska Airlines, Inc., No. 2:19-CV-0005-TOR, 2021 WL 2080199, at *6 (E.D. Wash. May 24, 2021).