Military leave of absence documentation

Number: AGO 2020-04

Date: June 16, 2020

Subject:
Military leave of absence documentation

Robert F. Rosenwald, Jr.
First Assistant City Attorney, City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139

Dear Mr. Rosenwald:

This office has received your letter on behalf of the City of Miami Beach requesting an opinion regarding leaves of absence for public officials and employees pursuant to section 115.07, Florida Statutes, as follows:

> 1. When municipal officers and employees have taken leaves of absence for military, naval, or National Guard duties, may the municipality require such officers and employees to submit official documentation of the hours spent on duty for the purpose of properly compensating them for up to 240 working hours under section 115.07, Florida Statutes?
>
> 2. If so, what kind of documentation is appropriate (*e.g.*, official orders or an appropriate military or naval certification)?

In sum:

> 1. The City of Miami Beach may require officers and employees to provide documentation of the hours spent on military or guard duty for the purpose of facilitating the provision of rights and benefits guaranteed by section 115.07, Florida Statutes.
>
> 2. This office cannot recommend the kind of documentation the City may request, but a Department of Defense regulation under federal law may be a useful model.

Since 1937, multiple provisions in chapter 115, Florida Statutes, Florida have provided officers or employees of state and local governments the right to return to such employment after completing military service. In addition, section 115.07, Florida Statutes, guarantees that when officers and employees take leaves of absence for military or National Guard duty, they are entitled to be paid for up to 240 hours annually. The statute provides, in part:

> 115.07 Officers and employees' leaves of absence for reserve or guard training.—
> (1) All officers or employees of the state, of the several counties of the state, and of the municipalities or political subdivisions of the state who are commissioned reserve officers or reserve enlisted personnel in the United States military or naval service or members of the National Guard *are entitled to leaves of absence from their respective duties, without loss of vacation leave, pay, time, or efficiency rating, on all days during which they are engaged in training* ordered under the provisions of the United States military or naval training regulations for such personnel when assigned to active or inactive duty.
> (2) Leaves of absence granted as a matter of legal right under the provisions of this section *may not exceed 240 working hours* in any one annual period. Administrative leaves of absence for additional or longer periods of time for assignment to duty functions of a military character shall be without pay and shall be granted by the employing or appointing authority of any state, county, municipal, or political subdivision employee and when so granted shall be without loss of time or efficiency rating.1

(Emphasis added.)

Question 1

You state that the City would like to institute a policy requiring servicemembers to provide the City with documentation verifying the hours spent on duty to ensure they are properly paid under the statute. You indicate that time spent on military assignment or training can be "fluid," meaning that orders to report for duty can regularly change or be cancelled. For example, employees have notified the City of their scheduled dates for service-related leave but subsequently failed to inform the City that the orders had changed. In such situations, the hours originally scheduled as leave under section 115.07 may be incorrectly attributed to their 240-hour limit, although the servicemember did not actually take the leave of absence. Orders are apparently provided to servicemembers orally or by e-mail, and it may be difficult for them to reconstruct the hours they served if an issue arises many months later. Documenting the time spent on leave would alleviate this problem.

Federal law

An analysis of your request requires consideration of both federal and state law. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. Part III, chapter 43, a federal law that applies to all employers, both public and private, provides that members of the uniformed services have the right of reemployment without loss of rights and benefits after being called away for military service, from short-term training to long-term military deployment. 2 The State of Florida has adopted USERRA in section 115.15, Florida Statutes.

USERRA does not require employers to pay servicemembers for time spent on leave. But the federal law does have provisions and regulations that are useful to review that address the documentation servicemembers are requested or required to provide when returning to employment following periods of duty or training. These apply only when such service has

exceeded 30 days. 3 Notwithstanding this, a regulation promulgated by the Department of Defense regarding compliance with USERRA, 32 C.F.R. § 104.6(a)(2)(iii)(B)(2), provides:

> When the period of service exceeds 30 days from civilian employment, the Service member is required to provide documentation of service performed if requested by the employer.
> (i) As a matter of policy the Military Departments strongly recommend Commanders and Service members provide verification of uniformed service absence to civilian employers *regardless of the duration of service upon request*. Failure of an employee to comply with this recommendation[] does not[] affect the legal responsibilities of the employer under USERRA including prompt reemployment.
> (ii) Types of documentation satisfying this requirement are detailed in 20 CFR part 1002.

(Emphasis added.)

Under 38 U.S.C. § 4302, state and local governments may not impose a "policy, plan, practice, or other matter" that "reduces, limits, or eliminates" any right or benefit provided by USERRA, but they may enact one that provides a right or benefit that is "more beneficial to, or is in addition to," the rights provided under USERRA. You indicate that the City does not seek documentation for the purpose of reemployment but instead to ensure that servicemembers will be paid for time spent on military leave in compliance with state law. Accordingly, a local law, policy, plan, or practice seeking documentation to track servicemember absences to implement the added benefit of leave with pay under state law would not be a limitation or restriction of rights or benefits ensured by USERRA.

State law

It appears that a law or policy requiring documentation would also be permissible under state law, for the following reasons.

Article VIII, section 2(b) of the Florida Constitution provides:

> Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and *may exercise any power for municipal purposes except as otherwise provided by law.* …

(Emphasis added.) Section 166.021(3), Florida Statutes, provides that "the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except … (b) Any subject expressly prohibited by the constitution," or "(c) Any subject expressly preempted to state or county government by the constitution or by general law."

There is no explicit preemption language in the Constitution or in chapter 115 that would

preclude a local government from establishing a recordkeeping procedure to fulfill its obligation to determine an employee's eligibility for the rights and benefits provided in section 115.07. For purposes of comparison, section 110.219, Florida Statutes, dealing with general policies regarding attendance and leave for state employees, provides:

> (4) Each agency shall keep an accurate record of all hours of work performed by each employee, as well as a complete and accurate record of all authorized leave which is approved. The ultimate responsibility for the accuracy and proper maintenance of all attendance and leave records shall be with the agency head.

In implementing the recordkeeping provision of section 110.219(4), the Department of Management Services, has enacted a rule applicable to state agencies regarding state employees taking military leaves of absence. Under Florida Administrative Code rule 60L-34.0062(1) and (4), when the servicemembers enumerated therein are ordered to active military duty under section 115.09, Florida Statutes, which authorizes leaves of absence with pay for active military service for up to 30 days, the rule provides:

> The leave of absence shall be verified by official orders or appropriate military certification, which shall be filed in the employee's personnel file.

The existence of statutory and regulatory requirements for recordkeeping by state agencies with regard to military leaves of absence supports a conclusion that a municipality may enact a comparable ordinance or policy implementing section 115.07 without running afoul of any provisions within chapter 115. *See City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 928 (Fla. 2013) ("[W]here concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory field, 'a municipality's concurrent legislation must not conflict with state law,'" quoting *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1992)). To preclude conflict with state law, an ordinance cannot defeat a servicemember's right to vacation leave, pay, time, or efficiency rating based upon failure to provide documentation when it is not readily available or does not exist. Such rights are guaranteed by section 115.07, Florida Statutes, and there is no language therein authorizing an employer to restrict or deny them.4

As an example, under USERRA, servicemembers are required to provide their employers with documentation to be eligible for reemployment after leaves of absence greater than 30 days. Notwithstanding this,

> (3)(A) … the failure of a person to provide documentation … shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person [is not eligible for reemployment, the employer] may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.
> * * *
> (4) an employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily

available.

38 U.S.C. § 4312(f).

Accordingly, the City may establish a municipal policy or procedure to implement its statutory obligation to provide paid leave to servicemembers pursuant to section 115.07, Florida Statutes, by outlining the kind of documentation the servicemember must supply to establish eligibility under the statute.5 The City cannot, however, condition the provision of rights guaranteed by the statute on compliance with a requirement for such documentation if the documentation is not readily available or does not exist.

Question 2

Although the City of Miami Beach may require documentation to support payment of servicemembers under section 115.07, Florida Statutes, it is not the role of this office to determine what documentation the City might request. It may be useful to look to Department of Labor regulations, which enumerate the kinds of documentation that can be used under USERRA to establish eligibility for reemployment after service of more than 30 days. *See* 20 C.F.R. Chapter IX, § 1002.123.

Conclusion

It is my conclusion that the City of Miami Beach may enact an ordinance or establish a policy requiring servicemembers to provide documentation to the City to facilitate compliance with the leave provisions of chapter 115, Florida Statutes.

Sincerely,

Ashley Moody
Attorney General

AM/tebg

_____

1 In addition, section 250.48, Florida Statutes, applies to state-ordered duty and provides that members of the National Guard employed by the state or a county, municipality, or school district are entitled to up to 30 days leave “without loss of pay, time, or efficiency rating” when called to duty for an event, disaster, or operation under section 250.28 or 252.36. Under section 115.14, Florida Statutes, state, county, and municipal employers have the discretion to provide reservist employees with differential pay after the 240-hour ceiling has been reached, which refers to the difference between a servicemember’s military pay and civilian pay.

2 *See* 32 C.F.R. § 104.6(a)(2)(iii)(B)(2),

3 *See* 38 U.S.C. § 4312(f).

4 *See, e.g., Brennan v. City of Miami*, 146 So. 3d 119 (Fla. 3d DCA 2014). In that case, the City of Miami required employee veterans to submit Department of Defense service discharge records when seeking preference in promotion as a veteran permitted by section 295.09, Florida Statutes (2012). The City denied veteran preference to a former Marine Reservist because he did not provide a particular active-duty discharge record. The Third District concluded that he was wrongfully denied the veteran preference, observing that section 295.09 did not require documentation, nor did the applicable administrative rule. The court stated that a municipality may not enact legislation concurrent with a state statute if it conflicts with the statute, and that a local provision cannot "'stand as an obstacle to the execution of the full purposes of the statute.'" *Id.* at 124 (quoting *City of Palm Bay*, 114 So. 3d at 928 (citing 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012)).

5 Other jurisdictions that have established policies requiring documentation for military leave with pay include Indiana (Ind. Military Leave Responsibilities & Procedures, p. 4: "Employees who are members of the Armed Forces Reserves of the Indiana National Guard are entitled to not more than fifteen (15) calendar days leave in each calendar year in which military service … is performed, without loss of pay or vacation time. To receive pay, the employee is required to submit a written order or official statement requiring the military duty. Paid military leave is charged in accordance with the military orders for each day the employee is scheduled to work during the dates of the orders."); North Carolina (N.C. State Human Resources Manual, Military Leave, § 5, p. 91: "The employing agency shall require the employee, or an appropriate officer of the uniformed service in which such service is performed, to provide written or verbal notice of any service. For periods eligible for military leave with differential pay, the agency shall require the employee to provide a copy of the Leave and Earnings Statement or similar document covering the period eligible for differential pay."); and Virginia (Va. Dept. of Human Resource Mgmt. Policies & Procedure Manual 4.50, Agency Responsibilities, p. 13: "Agencies should establish guidelines for employees to follow for submitting requests for military leaves of absence and for monitoring such leaves to ensure that no more than 15 work days … with pay are granted for military training and active duty in a federal fiscal year.").