101.8

MEMO TO: All Staff

FROM: Karen Kiley

DATE: February 26, 1991

SUBJECT: Employment Rights of Military Reservists

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Recently there has been an increase in the number of requests for information concerning the employment rights of military reservists called to active duty in the Persian Gulf.

Attached are several articles covering various aspects of reservists' rights under federal law. The question/answer format of the Commerce Clearing House material has proved particularly helpful in pinpointing specific information related directly to the Persian Gulf situation.

I would appreciate any information you might be able to provide on policies of individual properties we represent.

Any questions, please let me know.

kmk
Attachments

NCESGR FACT SHEET
November 1, 1990

SUBJECT: RETURNING TO YOUR OLD JOB FOLLOWING ACTIVE DUTY FOR THE MIDDLE EAST CRISIS

FACTS: Reservists and members of the National Guard who leave civilian jobs to go on active duty during the Middle East crisis have the right to return to those jobs when they are released from active duty. The Veterans Reemployment Rights (VRR) Act (38 U.S. Code Subsections 2021-2026) provides reemployment protections for reservists and guardsmen when they are voluntarily or involuntarily recalled to active duty. This fact sheet discusses reemployment for reservists and members of the National Guard being released from active duty (other than active duty for training).

A. APPLICATION. To have reemployment rights, you must apply for reemployment after your release from active duty. You must apply within 31 days if mobilized for 90 days or less, and that 31 days may also apply would you be extended past 90 days. In other cases, you must apply within 90 days. In all cases, you should apply for reemployment as soon as possible after your release.

You may apply for reemployment by going to your place of employment and speaking to someone in authority or by sending a letter to your employer. No specific form is required, but you must advise your employer:

(1) I used to work here,
(2) I left my job to enter military service, and
(3) I have been released from active duty under honorable conditions and I want my job back.

It's a good idea to give your employer a copy of your discharge certificate (DD-214 or DD-220). If available, these documents show the dates and the character of your discharge.

Applying for reemployment does not mean that you have to complete the forms a new job applicant must fill out, or that you must wait for the next available job opening. Your employer should reinstate you as soon as you apply. Although your employer may not be able to put you back to work the day you apply, the reemployment process should not take more than two weeks. You should, however, be reinstated in other benefits of employment, such as group health insurance, as soon as you apply.

B. POSITION. As long as the job you left was not temporary, you are entitled to the same position or a position similar to the one you left, with the same seniority, status, and rate of pay you would have had if you had not left for military duty. For example, if you would have received an automatic promotion or pay raise while you were in military service, you should receive the promotion or raise, and the effective date would be the date you would have received it if you had not been away. On the other hand, if you would have been laid off while you were gone, the position you are entitled to may be in layoff status with the

same layoff benefits and recall rights you would have had if you had never left for active duty.

The "same seniority that you would have had had you not been absent" also means that if your employer's pension plan is based upon the length of time you work for the company, your employer should give you credit. You should not have to work any additional time to retire than you would otherwise have.

If you were a probationary employee or in a training program, you are entitled to be reinstated in the probation period or the training program. When you complete the remainder of the probation period or the training program, you should be given the position, seniority and the rate of pay you would have had if you had completed the probation period or training program on the original schedule.

C. ADDITIONAL INFORMATION.

1. Employees who are injured or disabled on active duty have additional rights. The time to apply for reemployment may be extended by a period of hospitalization for up to one year. In addition, employees who can no longer perform the duties of their old job because of a service related injury or disability may request reemployment in any other position with the employer which the employee is able to perform.

2. There are limits to the amount of active duty a reservist or member of the National Guard may perform and still have reemployment rights. Reservists and guardsmen mobilized under Presidential Authority for DESERT SHIELD need not worry about those limits as long as they remain on active duty under President Bush's mobilization authority and they apply for reemployment within the appropriate time when released. Others on active duty (other than for training) are limited to not more than four years of active duty since their hire, unless they are unable to obtain their release.

3. Reservists reemployed following active duty are entitled to a period of protection from discharge without cause. During that period, your employer will have to prove that other employees are fired for the same reasons, and that you actually did what the employer accuses you of doing.

4. The employer-employee relationship can be complicated and varies from business to business. In addition, there can be many changes during an absence--businesses are sold and reorganized, assembly lines are automated and position descriptions are changed. Still, most reservists who left other than temporary positions will have reemployment rights and benefits upon their return from active duty.

For information or assistance on job rights, reservists and their employers may contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) toll-free at (800) 336-4590 or the nearest office of the Veterans' Employment and Training Service, U.S. Department of Labor.

September 13, 1990

Tax Guide

Weekly Alert

In this issue:

1 — Employers must offer continued health coverage to reservists called to active duty

Group health plans are required to offer continuation coverage to certain employees and their families who have lost coverage as a result of a "qualifying event." A qualifying event includes termination of the employee's employment or reduction of hours. The penalty for failure to offer continuation coverage under these rules, known as "COBRA" requirements, is an excise tax that may be imposed on the employer or the plan administrator. (¶ H-2970 *et seq.*)

In the wake of the current call-up of reservists for active duty in the military due to the crisis in the Persian Gulf, questions have been raised about the impact of the COBRA continuation coverage rules concerning these employees and their families. If group health plan coverage provided by an employer is terminated as a result of a military call-up, does COBRA require that the reservist (and members of his family) be offered continuation coverage?

Yes, says IRS. A group health plan must offer the reservist and the reservist's spouse and dependent children (if they are covered under the plan) an election to continue coverage at their own expense. Moreover, each qualified beneficiary must be furnished with a notice of their COBRA rights.

Military health coverage doesn't affect rights. Continuation coverage doesn't have to be offered to a qualified beneficiary who receives coverage under another group health plan (as long as the succeeding coverage contains no limitation or exclusion based on a preexisting condition). But the definition of group health plan does not include plans provided by the Federal government as an employer.

Route to: _____

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Thus while a reservist may receive health coverage as an active duty member of the uniformed services and a reservist's family member may receive health coverage under CHAMPUS (a secondary payer for dependents of active duty reservists who have been on active duty for at least 30 days), these military health plans are not "group health plans" for purposes of the COBRA cutoff rule.

Employer may voluntarily maintain coverage. IRS is aware that many employers are voluntarily maintaining full coverage under their group health plans for reservists and their families, with no increase in employee contributions. These plans will not have to offer the reservists or their family members a COBRA election. In addition, employer contributions for the cost of that coverage will continue to be excludible by the reservists. (Notice 90-58, 9/7/90; 1990-40 IRB)

Other issues may be addressed. Nancy Marks of the IRS Chief Counsels office is reported to have told a recent conference that IRS is identifying employee benefits issues arising out of the call-up of reservists. Rather than issue one comprehensive piece of guidance, notices will be released as issues are resolved.

observation: Weekly Alert will monitor and report on significant notices as they are released.

2 — Net operating loss carryover in bankruptcy cases—proposed regs

If an ownership change of a loss corporation occurs, the taxable income of that loss corporation for any post-change taxable year can be offset by pre-change net operating loss carryovers only to the extent of the "section 382 limitation." The section 382 limitation is generally based on a percentage of the value of the "old loss corporation" at the time of the ownership change but is adjusted to take into account recognized built-in gains and Code Sec. 338 gains recognized after the ownership change.

The section 382 limitation does not apply after an ownership change of a loss corporation under the jurisdiction of a court in a bankruptcy or similar case immediately before the ownership change, if certain other requirements are met. This exception applies only if the corporation's pre-change shareholders and qualified creditors (determined immediately before the ownership change) own at least 50% of the loss corporation's stock (or stock of a controlling corporation, if also in bankruptcy) immediately after the ownership change and as a result of being pre-change shareholders or qualified creditors immediately before the ownership change. (¶ F-7848)

Proposed regs dealing with the bankruptcy exception have just been issued. (Prop TD, 9/6/90) According to IRS, the relief provided for bankruptcy reorganization is intended to apply only where pre-change shareholders and qualified creditors maintain a substantial continuing interest in the loss corporation. Because this continuity requirement could be easily circumvented through the issuance of options, the regs provide option attribution rules that apply for purposes of determining whether the stock ownership requirements are satisfied. (Preamble, Prop TD)

Options (and similar interests) are generally deemed exercised if their exercise would cause the pre-change shareholders and qualified creditors to own less than the required 50% of the loss corporation's stock. (Prop Reg § 1.382-3(c))

Temp Reg § 1.382-2T(h)(4)(i) provides attribution rules for options. (See ¶ F-7839.1) The newly proposed regs say that the option attribution rules don't apply to an option created by the confirmation of a plan of reorganization (including an option created under the plan), but only until the time that the plan of reorganization becomes effective. (Prop Reg § 1.382-2T(h)(4)(x)(J))

The proposals are to be applicable to ownership changes and testing dates after Sept. 4, '90 (Preamble, Prop TD)

3 — Multinational taxpayers—simultaneous audit program extended to Mexico

Businesses with substantial operations in the U.S. and abroad may find themselves faced with a coordinated audit examination. Over the

LES ASHER

Les Asher, senior partner of Asher, Gittler, Greenfield, Cohen & D'Alba, Chicago, Illinois, died of a stroke while on vacation in Stratford, Ontario, Canada.

At the time of his death, Les was General Counsel of the Illinois AFL-CIO and Senior General Counsel of the Service Employees International Union. During his career he represented the AFL-CIO and a number of its affiliates and local unions. Les was a member of the LCC Board of Directors since its inception in 1983.

THE CALL TO ACTIVE DUTY: EMPLOYMENT RIGHTS OF RESERVISTS AND NATIONAL GUARD MEMBERS UNDER FEDERAL LAW

Karin Feldman & Paul Whitehead
United Steelworkers of America Legal Department
Pittsburgh, PA

With a military buildup continuing in the Persian Gulf, tens of thousands of Reservists and National Guard personnel now serve on active duty. Among them are many union members whose job and benefit rights are affected.

Employees may enjoy protection under various sources. Applicable to all workplaces is the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §2021 et seq. (VVRA), covering U.S. military personnel -- including Reservists and members of the National Guard -- serving anywhere in the world. In addition, collective bargaining agreements and state laws may also provide protections beyond those of the VVRA.

The VVRA covers all public and private employers regardless of size. In the private sector, it also applies to successors; if a business is sold while an employee is absent on military duty and the business remains generally the same, the purchaser must reinstate the returning employee.

This article reviews statutory rights that apply when the employee leaves for and is away on active duty, and most of all, when the employee returns to the workplace.

WHEN THE EMPLOYEE LEAVES FOR ACTIVE DUTY

When employees respond to a Presidential call-up, the VVRA entitles them at a minimum to be treated like other employees taking a leave of absence. For example, under the VVRA, an employer is required to give the departing military member at least the same continued health and life insurance coverage as it gives to employees who are on a leave of absence for any other reason. Obviously, if a labor contract or benefit agreement requires an employee called to military duty to be treated better than a leave-of-absence employee, the employee is entitled to that improved treatment.

Even if an employer provides no health coverage for employees on leave of absence, it must nevertheless allow departing Reservists or Guard employees (and their beneficiaries) to elect **COBRA continuation coverage. IRS Notice 90-58 (September 7, 1990).** Under COBRA's general

rules, employees called to active duty may buy up to 18 months of COBRA coverage and they will enjoy this right in addition to any military health coverage.

If an employer provides some continued health coverage that nevertheless lapses within 18 months of the employee's departure, COBRA rights apply for at least the remaining balance of the 18 month period. Where there is dual coverage--both from the military and an employer - -the employer plan is generally the primary payer of benefits. There are, however, certain exceptions to this rule.

The VVRA does not require an employer to provide wage differential payments to make up for lower military pay.

WHEN THE EMPLOYEE RETURNS TO THE WORKPLACE

The Right to Reinstatement

Upon completing their military duty, returning veterans are entitled to reinstatement to their civilian jobs so long as those jobs meet simple requirements. Generally, reinstatement applies to any job in an employment relationship "other than a temporary position." The temporary position exception is narrowly construed, however.

The employer must reinstate the returning veteran who: (1) is released from active duty with a certificate of at least satisfactory service (this excludes dishonorable discharge); and (2) notifies the employer of his or her intention to return to work within either 31 days of discharge, if the period of active duty was 90 days or less, or 90 days of discharge, if the period of active duty was longer than 90 days. Returning employees must notify their employers, either orally or in writing, that they have been released and are ready to return to work. If they do not do so before the end of the 31 or 90 day period, they may lose their rights under the VVRA.

Employers must reinstate employees to the positions they would be holding if they had not been called to active duty. As the Supreme Court noted in Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946), a returning employee "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the [absence]." Obviously then, returning veterans are statutorily entitled to bump back into the jobs they would have held had they never left.

The VVRA now codifies this "escalator principle." Just as the escalator may go up, entitling a returning employee to a position with increased wages or benefits, so too it can go down if the employer's business suffered during the employee's absence. For example, if the returning veteran would have been laid-off during the absence and, at the time of return, is still not eligible for recall, the employer need only place the individual in layoff status.

Most importantly, the returned veteran is entitled to seniority credit for the period of absence and, as detailed in the next section below, the right to certain benefits that are "perquisites of seniority", that is, rewards for long service as opposed to short-term compensation.

Non-injured returning veterans are presumed physically fit to perform their job upon reinstatement. If an employer has reasonable doubts, it may attempt to show that the veteran's fitness has declined substantially. Employers may require a physical examination at no cost to the employee where physical ability is subject to reasonable doubt or a physical is routinely required of employees returning from a leave of absence.

Even if a service-connected disability prevents an employee from performing the job held

before the absence, the employee must, if qualified to perform other jobs, be offered a job closest in seniority, status and pay to that held before the employee left. For injured employees, the 31 and 90 day time limits referred to above begin to run upon their release from hospitalization. In any event, they must return to work within one year of their discharge from active duty.

Under the VVRA, a returning employee need not be reinstated if business circumstances have changed so dramatically as to render reinstatement impossible or unreasonable. This exception is narrowly interpreted, but would presumably apply where the employer totally shut down its operations during the employee's absence.

After reinstatement, an employee may never be denied "any promotion or other incident or advantage of employment" due to military service.

Pension, Vacation and Other Benefits for Returning Employees

For pensions, vacation, supplemental unemployment benefits, severance, and other benefits characterized as "perquisites of seniority," the VVRA provides protections going well beyond the principle that treatment be equivalent to leave-of-absence employees.

For traditional defined benefit plans, it is virtually certain that returning employees must receive credit for the period of absence for all purposes under the plan. In the landmark case of Alabama Power Company v. Davis, 431 U.S. 581, 594 (1977) the Supreme Court announced that "... pension payments are predominantly rewards for continuous employment.... Protecting veterans from the loss of such rewards when the break in their employment resulted from their response to the country's military needs is the purpose of [the law]." Moreover, multiemployer plans may be required to credit absence, including for benefit accrual purposes, even when no contributions were made during the absence. See, e.g., Imel v. Laborers Pension Trust Fund for Northern California, 904 F.2d 1327 (9th Cir. 1990). In addition, many pension plans explicitly provide service credit (or at least prevent a break) for time spent in the military.

For defined contribution plans, there is less certainty. Where such plans qualify under Section 401(a) of the Internal Revenue Code and constitute pension plans under Section 3(2) of ERISA, a persuasive argument can be made that they are generally rewards for length of service. Under the principles of Alabama Power v. Davis, it is our view that returning veterans should receive contributions for military service under many defined contribution plans even where not expressly provided. Nevertheless, practitioners must be aware of the troubling and contrary view of the Sixth Circuit in Raypole v. Chemi-Trol Chemical Co., Inc., 754 F.2d 169 (1985). Court decisions will obviously vary with the workings of each plan.

With respect to vacations, returning veterans are typically eligible under the VVRA for credit for their military absence to qualify for a greater number of vacation weeks. However, since a 1975 Supreme Court ruling in Foster v. Dravo Corp., 420 U.S. 92 (1975), court decisions have tipped against veterans who seek a vacation in the year of their departure (or return) when they have not otherwise met vacation eligibility requirements. Numerous courts have pointed to hours-worked requirements to find that vacation pay is short-term compensation and not "a perquisite of seniority."

As with vacations, returning veterans have won severance pay and supplemental unemployment benefit credits for their military time. An early severance pay case is Accardi v. Pennsylvania Railroad Company, 383 U.S. 225 (1966). The leading decision on supplement unemployment benefits is Coffy v. Republic Steel Corp., 447 U.S. 191 (1980).

For other benefits generally, the Supreme Court adopted a two-part test in Alabama Power v. Davis to determine whether a particular benefit was "a perquisite of seniority" to which the

and after he has time to get home. Again, if the worker is delayed for reasons beyond his control he may not be penalized as long as he reports to work within a "reasonable time" after the time usually needed to get home. Even if hospitalized incident to training, the worker must report to work within one year of being released from training in order to preserve his right to reemployment.

Finally, suppose a worker is disabled incident to training to the extent that he is no longer qualified to do the job he left to go into training. If that worker is qualified to hold some other position with the employer, the worker is to be offered that position, and if the worker requests, he must be employed at that position. Employment in this manner should be to a position which will give the worker the same seniority, status, and pay that he had, or the "nearest approximation thereof" consistent with the circumstances in the worker's case (.05).

One worker wanted to reschedule his work in order to avoid a conflict with his training exercises. The employer scheduled him for 40 hours a week and allowed him to switch hours with other employees. However, management did not cooperate any further. The Supreme Court ruled that the company had satisfied its obligation to the reservist. The employee had no right to work 40 hours a week, and his inability to change hours was due to the fact that other employees did not want to switch. The employer did not have to accommodate his training obligations any further (.15).

.05 Law.—VEVRAA, Sec. 2024(d).

.15 *Monroe v. Standard Oil Co.*, (U.S.; 1981) S. Ct., 91 LC ¶ 12,796.

Reservists

¶ 391

Besides providing reemployment rights to those who enter the armed forces, the VEVRAA provides reemployment rights, and other employment rights, to those who enter the "reserves." Most broadly, the Act specifically states that no one may be denied retention in employment, promotion or any other advantage of employment just because they are a member of the reserves (.05). More specifically, the Act lays out the reemployment rights of those reservists who have to be away from work for training, and of those reservists who are called to active duty.

Take the case of the reservist who is called to active duty for an initial training period of more than three months. After his *satisfactory release* from active duty, such a reservist has *thirty one days* to apply for reemployment at his old job. If he does, he is entitled to all the reemployment rights that returning veterans get that are described at ¶ 377.

Any reservist in this situation may not be fired without cause for *six months* after his reemployment. Also, if a reservist in this situation is hospitalized as a result of his

training, he has *thirty one days* after his discharge from the hospital, as long as his hospitalization is for not longer than *one year* after his discharge from active duty, to apply for reemployment (.10).

Reservists who are ordered to active duty for *less* than *three months* have the same reemployment rights as those just described as applying to reservists who [illegible] active duty for training for a period of *longer* than *three months* (.15).

What about reservists who enter active duty for more than three months, for purposes other than training? Reservists in that situation, [illegible]hey enter active duty at a time when the President is authorized to order units of the Ready Reserve to active duty, shall have the same reemployment rights as those discussed at ¶ 377, with the same "duration of service" requirements as those applicable to those who are *called* to active duty, as described at ¶ 382.

However, in the case of reservists in this situation, the "duration of service" limitations are extended to include that additional time in active duty during which the President still has authority to call the Ready Reserve to active duty.

And finally, with regard to reservists who voluntarily extend their active duty or enter active duty voluntarily, they will have reemployment rights only to the extent that this extra service is at the request of, and for the convenience of, the federal government (.20).

The *amount of leave time* an employee may request for reserve training is not specifically limited in the section of the Act that guarantees reemployment for reservists who seek a leave of absence for military training. In noting this lack of any time limitation, one federal district court held that an employer acted unlawfully when discharging a Coast Guard reservist who took unauthorized training leave, even though the employee had voluntarily requested the training assignment on his own [illegible] training was unrelated to his Guard duties and the employee did not need the time to satisfy any mandatory training or promotional requirements (.21).

In determining whether a reservist's request for training leave would be protected under the Act, some courts have adopted a "reasonableness test" for evaluating the request. In light of the fact that the Act fails to include any time restrictions, the Eleventh Circuit Court of Appeals has ruled that any judicial inquiry into the reasonableness of leave requests should be limited and extremely deferential to the employee's rights. Thus, the court held that an Army reservist's request for a one year leave of absence for training to be a licensed practical nurse in the Army reserve was reasonable. The appeals court noted that it was improper to examine the voluntariness of the reservist's request or to review the personnel needs of the military. Instead, the reservist's request should be presumed reasonable and this presumption will be overcome generally through some showing of bad faith in the conduct of the employee or the existence of alternatives for the training. The court noted that the Army reservist acted in a wholly forthright and good faith manner in requesting the leave, and, while a one year's leave would create a burden on the employer, there were no alternatives for the training. Such a burden on the employer was not sufficient for a finding that the leave request was not reasonable (.23).

A request by a National Guardsman for three years' leave to accept a high level post was, however, *per se* unreasonable. Not only was the length of time a burden to the employer, but the request also reflected bad faith on the employee's part. In this case the Eleventh Circuit set a definite three-year limit beyond which any leave request would be unreasonable (.22).

Other federal courts have ruled that a request for reserve leave must be reasonable both in the context of the reservist's military obligation and the requirements of the employer. Thus, the requirements of the employer in conducting business are also relevant to the reasonableness of a request. A request for leave to serve the obligatory two-week training period is in and of itself reasonable. Training duty does not have to be required to qualify for protection, but there may be some obligation on the employee to attempt to schedule military training or other duty at a different time if available. Length of time for the request and whether the leave is an extension of duty is also relevant to the reasonableness inquiry. A request made as early as possible will be more reasonable than one made at the last minute. It is also relevant whether the employee previously knew that a leave or extension was a possibility (.23).

Reasonableness also should take into account the legitimate needs of the employer, the courts have ruled. Relevant to the employer's needs are the special needs for the particular employee requesting leave, the employer's ability to find a substitute to assume the employee's duties, special circumstances concerning the work load during the particular period for which the leave is requested, and the extent of the additional costs incurred by the employer to accommodate the leave request. Also relevant is the clarity with which the employer has informed its employees of its policy on the duration, repetition, timing and notice required for reserve duty leaves. Although an employer must make reasonable accommodations to permit its employees to take leave for voluntary reserve duty, it need not accede to every leave request, particularly where the request would require the employee to be absent from work for an extended period of time, during periods of the employer's acute need or when, in light of prior leaves, the requested leave is cumulatively burdensome (.23).

Along the lines of reasonable conduct on the employee's part, a federal appeals court found that fifteen minutes notice to an employer of a National Guardsman's pending three weeks voluntary military leave was not adequate. The guardsman had other options by way of giving notice, and his failure to do so was unreasonable and justified his termination (.24).

In summary, a reservist's request for military leave should be granted unless the employee's conduct renders the request unreasonable. Thus, a city police department could not deny a police officer's request to join an active military reserve unit because the department had a policy that only one hundred employees would be allowed to join the reserves, a federal appellate court ruled. The department's policy violated the Verteran's Reemployment Rights Act (VRRA), the court concluded. When the police officer requested leave for annual military training, the police department denied his request and directed him to remove himself immediately from active reserve status. The court ruled that the department's written order instructing the officer to either withdraw from the reserves or face dismissal "strikes to the very heart of [the Act's] prohibition against terminating an employee because of his reservist training obligations." The department's policy of limiting to one hundred the number of officers that may belong to the reserves was "unreasonable *per se*," the court explained (.25).

Although a reservist may not be fired solely because of his military obligations, if other reasons exist for the termination and a non-reserve employee would have been fired for the same conduct, reserve status will not protect the reservist from being fired, ruled a federal appeals court. In this case, the reservist attended a weekend of inactive duty training rather than working mandatory overtime for his employer. He was terminated for valid reasons of tardiness and absenteeism since these problems preceded his reserve status by two years, the court found. The court noted that other

employees had been disciplined or fired for missing scheduled overtime on Saturday and that this reservist had not given adequate notice of his intended absence fo reserve duty. The evidence showed valid, non-pretextual reasons for terminatio having little if anything to do with reserve obligations, the court concluded (.24).

The following example shows how reservist rights apply to vacation benefits a a union contract.

Example.—Two men who worked for the same company were members of the Coas Guard Reserve. And as such they had to spend two weeks each summer performing activ duty for training.

One summer, the two were given leave from work for active duty during a two-wee period which included the Fourth of July. When they returned they found that they had n received pay for the Fourth of July. The Fourth, however, was one of nine paid holida established by the union contract the two men worked under.

The reason the two men weren't paid for the Fourth was that neither had worke during the week in which the holiday fell or during the payroll period immediate preceding the holiday. Their union contract specifically stated that if employees didn't wo during one of those two time frames they were not entitled to holiday pay.

The reservists sued, claiming that, despite the wording of their collective bargaini agreement, the VEVRAA entitled them to pay for the Fourth of July. And the federal cou in which they brought their suit agreed with them. The two reservists had to be treated their company as though they were really at work during the time they were gone, reason the court (.25).

The Persian Gulf Callup—In the following interview William Bolls, Regior Administrator, U.S. Department of Labor, Veterans Employment and Training S vice, summarizes employers' obligations in te context of President Bush's callup military reservists on August 22, 1990. Mr. Bolls' comments were made in consu with the regional Solicitor's Office, in an interview by CCH on August 27.

Because this callup authority was issued under 10 U.S.C. 673(b), section 2024 of the Veterans Reemployment Rights Act, 38 U.S.C. 2024(g), comes into play. Th section gives reemployment rights to reservists and National Guardsmen who called up pursuant to an order under 10 U.S.C. 673(b). Section 2024(g) provides th the reemployment rights of these reservists and National Guardsmen are the same the reemployment rights of reservists and National Guardsmen who go on initial act duty for training. Thus, all the rights, obligations, and benefits that flow to persons v go on initial active duty for training flow to these individuals, as well. Mr. B discusses in detail what these rights, obligations, and benefits mean to the nati employers.

What employment status will reservists have while on military duty?

They are on a statutory military leave of absence, regardless of what th company's policy might otherwise provide.

What is an employer required to tell an employee who has been called up

The employer has no obligation to tell the employee anything. It is certainly if the employer makes the reservist feel comfortable in knowing that there will b position available upon return from reserve duty, so long as the individual meets statutory requirements for reinstatement. But there is no legal duty to say thi anything else.

[The next page is 527-3.]

Must the employer continue paying the employee a salary while on militar leave of absence?

No. Many companies do voluntarily continue paying the employee, but there is r statutory obligation to do that.

Does the employer have any obligation to make up lost wages to a employee who will be taking a pay cut because of the callup?

There is nothing under the VRR statute that requires making up any p differential.

Once the employee returns, is there any backpay entitlement?

No.

Must the employer continue health benefits for the employee and/or depe dents?

That involves an interplay with the benefits that the individual gets while in t military. As we understand it, reservists called to active duty are covered by milita health benefits, as are their dependents. In any event, there is an obligation on the p of the employer to treat these reservists the same as other classes of people on leave absence. Additionally, the provisions of COBRA may come into play [see furt discussion, back page].

What happens when the reservists come back?

They would, at that time, be entitled to pick up medical and health coverage a the time they return, including dependent coverage.

So they would be effectively covered as of the day they return to work?

Right.

Does the employer have to give the returning reservist the same job back

The same job or one of similar seniority, status and pay.

What if there is no similar position available, and the closest position 'step down?'

One of the things that the act requires, when necessary, is that if another perso occupying the reservist's job--or a job of similar status and pay--then the reservi entitled to that job, even if it means bumping or otherwise removing the reserv replacement.

The employer, however, does have the right to replace the reservist w the reservist is gone?

The employer certainly can do that, but it is purely temporary.

And the reservist can bump into the prior position upon returning?

That's correct--although the employer does have the option of placing the rese in a job of like seniority, status and pay.

There is a provision in the statute which states that an employer does not ha reemploy a reservist if the employer's circumstances have so changed as to r reemployment impossible or unreasonable.

This has been interpreted to apply, however, only if the position and the inc ual in that position both would have been eliminated as a part of the emplo changed circumstances.

That provision has also been interpreted to mean that if a current employee has to be bumped in order to put the reservist back at work, then that provision does *not* apply, and the reservist must be put back to work.

So it is up to the employer to juggle the extra replacement employee?

That's correct.

How long must an employee be employed to be entitled to reemployment rights?

There is no time test. The test is whether or not the employee is other than temporary. A person could have worked for a week at the time he is called up, or could have worked only a couple of days. As long as that person is hired to work for an indefinite period, then that person is other than temporary. A temporary employee, of course, has no right to reemployment after returning from active duty.

What would be a temporary position?

Somebody who is hired by a company like UPS or a department store for the Christmas rush, or a vacation replacement who knows that at the end of a finite period of time he or she no longer has a job. Someone who was hired for a specific purpose for a short-term time period is a temporary employee.

Is an employee on probation considered a a "temporary" employee?

A probationary employee is not a temporary employee.

Let us say that during the time that a probationary employee is on military leave, the probationary period expires. Does the employee come back as a nonprobationary employee?

The answer to that question requires a case-by-case determination as to whether the probationary employee is in training. If the probationary period is merely a length of service requirement, the probationary period need not be completed. If the probationary period is a period of training, however, then the returning employee can be required to finish probation.

How long must the employer hold open the employee's job?

Under the section that we are talking about, the reservist must apply for reemployment within 31 days of discharge from duty. Failure to apply within this time period eliminates reemployment rights. One of the prerequisites to having reemployment rights is application within the statutory time frame.

What effect will the callup have on an employee's seniority rights?

Seniority rights, and anything associated with seniority, continue to accrue while the employee is on active duty as if the employee had never left. This is what is known as the escalator clause. While somebody is on active duty, the benefits that flow from seniority continue to accrue as if the employee had never left.

Pension rights are an example. A reservist's pension rights with a civilian employer continue to accrue while on active duty. That means, for example, that to the extent the employer has to make contributions to the pension plan on behalf of that person, the employer is obligated to do that. To the extent that it is a contributory plan, in the sense that the employee must also make contributions, then upon return the employee must make up those contributions if he or she wants that period of time credited.

In other words, the employee would have an obligation to make those contributions retroactively?

That is correct, but only if the pension plan required employee contributions in the first place.

What about the situation where an employee is due for a raise while on active duty?

That gets into the question of whether the raise is based on merit or simply time on the job. If it is based purely on time on the job, then military service is counted as if the person had never left. If, on the other hand, it is a true merit based raise, a person's time in the military will not count toward a merit increase.

Suppose an employee was up for promotion before being called up. Upon return, must the promotion be granted?

If the person would have been promoted but for the absence, then upon returr that person is entitled to that promotion retroactively.

Let's say the promotion would have included a pay raise. Is the employee also entitled to the salary increase retroactively?

No, not retroactively. The employer does not have to pay for a period that the employee did not work.

Can an employee take paid vacation time already earned while on military leave?

Voluntarily, yes. A reservist can opt for that, but cannot be forced to do that.

Do these same protections apply if an employee is a civilian who volunteers as opposed to a reservist or guardsman being ordered to report for duty?

Section 2024(g) specifically says reemployment protections apply for militar service "whether or not voluntarily." Any individuals who are volunteering are als covered.

What about the case where an employee is called up and serves the require time--but then volunteers to remain longer than required. Do the same protec tions still apply?

The statute talks about somebody who is called up for 90 days. At this point w are not in a position to discuss what will happen if there is an extension beyond 9 days, although we do not see how someone who is involved in this callup and who extended would lose his or her reemployment rights.

Suppose the employee being called up is "irreplaceable." Can the employe get any type of waiver for the employee?

No. There are many police forces in this country that are facing that exa situation. The answer is no. Everybody goes and everybody is entitled to come back.

Are all businesses treated the same, regardless of size?

There is no limitation on size as to who is covered. The statute covers state, loca federal and private employers of all sizes.

In a business with 4 employees, 2 are called up. Does that employer face the san obligations as the owner of a business with 400 employees that has 2 called up?

Yes, that's exactly right.

To be entitled to reemployment, does the employee need to be released with an honorable discharge?

No. The statutory criteria is that the employee has to receive a certificate of satisfactory service. This would include something less than honorable, like for instance under honorable conditions. But not bad conduct or dishonorable discharges.

Can the employer ask for proof of satisfactory service upon the employee's return?

Yes.

While on active military leave, the employee is injured. Is there a limit on the time for rehabilitation and on how long the employer must leave the job open?

The statute provides an additional year if the employee has been hospitalized or injured while on active duty. So the employer would be required to reinstate the reservist up to one year after the employee is injured, and the employee would have 31 days after being able to return to work to reapply for the job.

Suppose, as the result of an injury, the employee can't physically perform the job anymore?

The statute provides that the person be given another job that the person can perform that is closest in seniority, status and pay to the prior job.

While the employee is on military leave, the employer sells the business. Does the new owner have any reemployment obligations?

There is an obligation on the part of a successor-in-interest to reemploy the reservist. He has exactly the same obligations as the predecessor employer.

Let us say the reservist is on strike when called up and, while he is on military leave, the strike is settled. Must the employer reemploy the returning striker?

If the employee would have gone back when the strike was over, yes. If the strike is settled while the employee is gone, the presumption is that he or she would have opted to go back to work and is entitled to go back to work.

What are the rights of reservists who are on layoff status when called up?

If a reservist is called while on layoff status, and that person would have been recalled while he or she was gone, he or she is entitled to come back to a working position. On the other hand, if during the time the person is gone, the company had a layoff that would have included this individual, then the individual comes back to layoff status.

What if the position the employee occupied before the callup was eliminated during the leave period?

If the person would have been moved into another position with the company, that person is entitled to the other position. If it is determined, however, that the elimination of the position would have eliminated the individual as well--and let's say the person would have received severance pay--then the person comes back without reemployment rights but is entitled to severance pay. This goes back to the concept of the escalator principle that reconstructs what would have happened if the person had not gone on leave.

What kind of notice must the employee give before leaving?

There is no notice requirement for somebody who goes on active duty.

The employee can just leave without a word to the employer, and still be entitled to reemployment rights?

That's correct. Obviously, the Labor Department does encourage giving notice tc the employer. Problems can result when the person just disappears for three months then returns and says "Hey, I'm back." That person still has rights. The case law establishes that. But giving no notice does not necessarily help the situation.

What kind of notice are employees required to give upon their return?

They have to make application for reinstatement within 31 days of discharge from reserve duty. In essence, this means the reservist must let somebody in authority know he or she is back from military service and wants to go back to work.

Can the employee make application orally?

Yes. There is no form, no written requirement. It can be done by phone, but it ha to be done in such a manner that the employer is made aware that this is a returnin reservist who wants to return to work.

How long after the reservist reapplies must the employer put the perso back to work?

As soon as possible, within reason.

Does the employee have to to back to work immediately?

Again, this is a matter of being reasonable. Some negotiation might be appropr ate. If somebody returns on Thursday and says, "Hey I'm back," and the employe says, "Can you go back to work tomorrow?"--which is Friday--then the questio whether the reservist can say, "Hey, listen, how about if I come back on Monday," really something that will have to be worked out. There is no requirement one way c the other.

Can state and local laws establish greater or additional rights?

Greater, but not lesser rights. For example, many states entitle reservists to 1 days pay while on reserve duty. If the employee has not otherwise used up 14 days i reserve duty during the year, then it is conceivable that the person would be entitle under state law, to pay from the employer. That is an example of a greater right tha has been established by state law.

What are some of the more common violations by employers?

There is always the failure to reinstate. Many employers just do not know the obligations. Problems also arise in regard to what is the proper position an employee entitled to. For example, we see employers improperly putting the person on a differe shift simply because it is easier to do that than putting him or her back on the shift l or she was on before. Other common violations involve pay increases or promotions th would have occurred in the interim, or pension benefits that should have continued accrue.

What types of penalties can be imposed for violations?

There are no fines or penalties. If somebody is, in fact, entitled to a high position, a higher rate of pay or other benefits, then the employer is obligated to gra the pay increase or the promotion plus whatever lost wages have accrued in t interim, plus interest. It is a pure make-whole remedy.

The Labor Department points out that this callup does not affect the total amount of active duty an employee can serve while working for any one employer. What is the rule there?

Under this callup, the period of active duty the reservist will serve does not count toward any service limitations that otherwise exist in the statute.

Generally speaking, a person who serves on active duty can serve no more than 4, and in some circumstances, 5 years on active duty with a particular employer in order to have reemployment rights.

In other words, the whole concept was that a career military person was not entitled to reemployment rights if he went off and spent 20 years in the military. So there is what we call a "four-year service limitation." That can be extended by one year if the additional year is at the request and for the convenience of the military.

If, for example, the employee has already served 4 years on active duty, gets out of the service, and returns to the same employer, and then goes back on active duty voluntarily, that person would not have reemployment rights with that employer as long as the service was one day above the 4 years--or 5 years, depending on the circumstances.

However, the time spent in active military duty during this callup is specifically excluded from any calculation of service limitation.

So anybody who has already served that 4 years will still have reemployment rights if they are part of this callup?

That's right. In addition, there are two other protections of the statute that come into play, and that should be mentioned.

Section 2021(b)(3), 38 U.S.C 2021(b)(3), is an overall antidiscrimination provision covering reservists and National Guardsmen. It provides that they can't be fired, they can't be denied promotions or any other incident or advantage of employment because of their obligations as a reservist.

Thus even if an employer properly reemploys the reservist after this duty, he can't retaliate later on because of the inconvenience caused by this or any other duty served.

Also, there is a six-month protection against discharge without cause applicable upon reinstatement, which protects these reservists against any kind of discharge, without reference to the reserve obligation, if not for good cause.

.05 Law.—VEVRAA, Sec. 2021(b)(3).

.10 Law.—VEVRAA, Sec. 2024(c).

.15 Law.—VEVRAA, Sec. 2024(g).

.20 Law.—VEVRAA, Sec. 2024(b)(2).

.21 *Green v. Spartan Stores, Inc.*, (DC Mich; 1982) 95 LC ¶ 13,847.

.22 *St. Vincent's Hospital v. King*, (CA-11; 1990) 115 LC ¶ 10,066.

.23 *Gulf States Paper Corp. v. Ingram*, (CA 11, 1987) 106 LC ¶ 12,239; *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, (CA-3; 1989) 111 LC ¶ 11,129.

.24 *Burkard v. Post-Browning*, (CA-6 1988) 110 LC ¶ 10,770.

.25 *Kolkhorst v. Tilghman*, (CA-4; 1990) 114 LC ¶ 12,028.

.26 *Sawyer v. Swift & Co.*, (1988) 108 LC ¶ 10,278.

.27 *Hanning v. Kaiser Aluminum and Chemical Corp.*, (DC La.; 1977) 82 LC ¶ 10,070.

National Guard Duty

¶ 392

People who serve in the National Guard have reemployment rights. A person who enters full time training or other full time duty in the National Guard has the same

reemployment rights as a reservist who is called for an initial training period of more than three months (see ¶ 391), or as a person who is called for active duty for training in the armed forces for less than three months (see ¶ 390), as the person's applicable duty time may be.

And a person in the National Guard who enters "inactive duty training" has the same reemployment and seniority rights as a person called into the armed forces for inactive duty training (see ¶ 390) (.05).

As with reservists, there is a presumption that guardsmen's requests for leave are reasonable. However, a guardsman's request for three years' leave to serve in a high level post in the National Guard was *per se* unreasonable. The lengthy amount of time not only involved a burden to the employer, but also reflected possible bad faith on the worker's part (.10).

The rules regarding dismissal because of military obligations also apply to guardsmen. If the dismissal has nothing to do with the worker's activities as a guardsman, but instead is based solely on poor job performance, the firing is not unlawful. For instance, an employee who was not performing up to his employer's standards for resolving collections matters was justifiably discharged for unsatisfactory performance. Even though the employer had asked for a waiver of the worker's obligation to attend a two-week National Guard training program, the company showed its willingness to work around the worker's obligations if he had been able to perform the job satisfactorily (.15).

.05 Law.—VEVRAA, Sec. 2024(f).

.10 *St. Vincent's Hospital v. King*, (CA-11; 1990) 115 LC ¶ 10,066.

.15 *Crank v. ATR, Inc. dba Appalachian TV Rental*, (DC Ky; 1990) 115 LC ¶ 10,087.

Compliance Procedures

¶ 393

¶ 394 PRIVATE AND STATE GOVERNMENT SECTORS

What happens if a veteran who is entitled to reemployment at his old job with a state, private employer or political subdivision of a state is denied his reemployment rights?

The VEVRAA gives the federal district court in any district where the employer maintains a place of business the power to hear suits brought by complaining veterans concerning the denial of veterans' reemployment rights. And it gives those federal courts the power to order employers to compensate veterans for losses in wages and benefits that have been wrongfully denied.

Such an award does not mean that the veteran is not entitled to any further benefits or employment from the employer! Instead, awards like this are *in addition* to any continuing veterans' reemployment rights that may exist.

Also, any veteran who feels that he has been wrongfully denied benefits under the VEVRAA can go to the United States attorney in any district where the offending