

Employers' Obligations to Reservists Under Federal Law

September 17, 2001

In the wake of the recent tragic events experienced by our country, 50,000 members of the Armed Forces Reserves will be called to duty. It is therefore an appropriate time to revisit the rights and obligations of employers under the Veterans Re-employment Rights Act and the Uniformed Services Employment & Re-employment Rights Act, which apply to all employers, both public and private.

This memorandum does not purport to discuss every detail of the Acts, but is merely intended to highlight the primary rights and obligations of employers whose employees may be called to active duty in the coming weeks and months. The Acts require all employers to grant to reservists who are called into active duty and employees who voluntarily enlist, a leave of absence for the duration of such duty, for a period not exceeding five years. Upon the expiration of the leave of absence, an employer is obligated to restore the individual to his or her former position or to a **"position of like seniority, status, and pay."** An employer is excused from this specific-position reinstatement only when the circumstances make it impossible or unreasonable to do so (e.g., by reason of disability sustained by the employee or a change in circumstances of the employer). If the individual is not qualified to perform the duties of his or her former position by reason of disability sustained during service, but is qualified to perform the duties of any other position, an employer must offer employment. Specifically, if the individual requests, the employer must offer to the individual the position which he or she is qualified to perform which will provide him or her with like seniority, status, and pay, or its nearest approximation consistent with the circumstances of each individual's case. To be eligible for these rights, the reservist must meet three criteria. **First**, he or she must notify the employer of his or her call to duty, rather than merely not reporting to work on the day of the call-up. **Second**, upon completing the service, the individual must make an application for re-employment within 90 days after separating from the service, or within one year of being released from hospitalization sustained as a result of such service. **Third**, the individual must have satisfactorily completed his or her service obligations and been released under honorable conditions (including general, medical, and hardship discharges). These rights are granted to all non-temporary employees, regardless of whether they are employed on a full-time or part-time basis, and regardless of the type of job performed. If an individual is employed for a temporary period of time (temporary being determined on a case-by-case basis), no re-employment rights apply. An employee on a fixed-term contract (e.g., one year or seasonal) is entitled to re-employment rights only within the time frame of the contract, unless it is customary for the contract to be renewed at the expiration of its term. In such case, his or her job restoration rights would be extended. An employer is not obligated to continue the salary or wages of reservists on active duty, nor is an employer obligated to supplement their military pay. An employer may, however, do so at its discretion if it so chooses. Once an individual has been granted a leave of absence for military service, an employer must treat him or her in the same manner as any other employee on a leave of absence. For example, if an employer routinely extends insurance coverage to the employee and/or dependents for a certain period of time during a leave of absence, it must uniformly extend such rights to the reservists and/or their dependents. An employer must allow a reservist to participate in insurance and other benefits offered by it pursuant to established rules regarding general leaves of absence. Specifically with regard to health insurance, employers must offer a reservist continuous coverage for up to 18 months at the employee's cost. An employer may not require the person to pay more than the employee share for that coverage if the period of military service does not exceed 31 days. If the service extends beyond the 31 days, an employer may require the employee to pay not more than 102 percent of the full premium under the plan. It is also important to note that an employer may not impose an exclusion or waiting period when a covered individual is re-

Continued

employed unless the condition is service-connected. Similarly, all family members who have coverage under the plan will not have an exclusion or waiting period upon re-employment. . Employers must offer re-employed reservists pension plan benefits as if no break in employment during the time of military service has occurred. Further, an employer may not cause an employee to forfeit any benefits that may have already accrued to the individual under the plan and may not require a returning employee to re-qualify for participation in the plan. An employer must place an individual returning from a military leave of absence in his or her former job or one with like seniority, status, and pay. In addition, the employer must place the employee at the compensation level which he or she would have attained in the absence of the military leave. That is, an employer must add any automatic pay increases to the individual's pay level. It is important to note that the Acts prohibit an employer from discharging a reservist without cause in the first twelve (12) months after he or she returns from active duty. This is true even if an employer may have deliberately preserved an at-will employment standard in its employment documents or contracts. While the reservists are gone on active duty, it is likely that most employers will need to have their job duties performed by other individuals. Those substitute employees should be clearly informed that the reservists have a right to re-employment. Employers should document such right and require substitute employees to sign a document indicating their understanding that they are working in their position on a temporary basis and can be removed at the will of the employer. Employers taking this action will help to defeat claims by temporary substitute employees, who may assert that they were wrongfully demoted, discharged, or laid off by the employer upon the reservists' return.. There are many more details to the Veterans Re-employment Rights and the Uniformed Services Employment and Re-employment Rights Acts which could take a great many words to explain. This memorandum is simply intended to highlight certain key areas to alert employers of their general obligations under the Acts. Specific situations must be addressed individually because of the wide variety of circumstances which may exist under this statute in light of the unprecedented circumstances for which service people are being called to duty. The federal agency which administers the Acts is the United States Department of Labor's Office of Veterans Re-employment Rights. The telephone number for the Detroit office of this agency is: (313) 876-5613.

If you have any questions or concerns regarding rights or obligations under this statute, or if there are specific circumstances you wish to discuss, please contact Kevin M. McCarthy at (616) 383-5844, e-mail: mccarthy@millercanfield.com; or Kara K. Zech at (616) 383- 5824, e-mail: zech@millercanfield.com.