

## **MILITARY LEAVE AND REEMPLOYMENT PROTECTION**

### **Senate Bill 994 as passed by the Senate First Analysis (2-26-02)**

**Sponsor: Sen. Arthur Miller, Jr.  
House Committee: Veterans Affairs  
Senate Committee: Senior Citizens and  
Veterans Affairs**

#### ***THE APPARENT PROBLEM:***

In the wake of the terrorist attacks on September 11, 2001, the governor has called the National Guard into active state service. Among the guard's responsibilities are protecting airports; border crossings in Detroit, Port Huron, and Sault Ste. Marie; Biopart Corporation in Lansing (the sole producer of the anthrax vaccine); and guard installations in Lansing and throughout the state. The emergence of these new, though once traditional, homeland security duties has greatly increased the presence and role of part-time guard members, who often must take a leave of absence from their civilian professions to fulfill their required military duties. As a result legislation has been introduced to ensure that state laws provide adequate protections for military veterans returning to the workforce upon completion of their duties.

#### ***THE CONTENT OF THE BILL:***

Senate Bill 994 would amend Public Act 133 of 1955, which provides for reemployment protection for persons called into military service. Under current law, no employee who requests from his or her employer a leave of absence for the purposes of being inducted into service, entering service, determining physical fitness to enter, or performing training duty, may be denied leave. The bill would modify this provision to specify that an employee requesting leave for the purposes of being inducted into or entering active service, active state service, or service of the U.S., for the purposes of determining his or her physical fitness to enter the service, or for performing training duty as a member of the military, could not be denied leave.

In addition, current law states that following an employee's release or rejection from military service, he or she must be reinstated without a reduction in seniority, status, or pay, if the employee applies to his or her employer within 15 days after release or

rejection. The bill would rewrite this provision. Under the bill, if the person were qualified, he or she would be reemployed in the position in the following order of priority:

- Following service of 1 to 90 days, the position that he or she *would have had*, had his or her employment not been interrupted by the military service, if the person were qualified for that position.
- Following service of 1 to 90 days, if the person were *not* qualified for the position that he or she would have had, and the employer makes a reasonable effort to qualify the person for that position, the employee would be reemployed in the position that he or she held when the service began.
- Following service of 91 or more days, if the employee were not qualified for the position that she held just prior to service, and cannot become qualified through the reasonable efforts of his or her employer, the employee would then be reemployed in a position of lesser status or pay.

Furthermore, the bill specifies that a person who is reemployed would be entitled to the seniority, and other rights and benefits determined by seniority, that he or she had when he or she left for military service, in addition to any seniority, rights, and benefits that he or she would have received had his or her employment not been interrupted by the military service. The person would also be entitled to other rights and benefits, not determined by seniority, that are provided to similar employees who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect when the service began or established while the person was in service.

The bill states that a person would not be entitled to be reemployed if he or she were absent from the

employment for a cumulative period exceeding five years because of his or her military responsibilities. However, the five-year period of service would not include the following:

- Any service that is required, beyond five years, to complete an initial period of obligated service.
- Any service during which the person was unable to obtain orders releasing him or her from a period of service before the expiration of the five-year period, and the inability to obtain such a release was not the fault of the person.
- Any service to fulfill the ready reserve training requirements (10 U.S.C. 10147), to fulfill the responsibilities of the National Guard (32 U.S.C. 502 (a) or 503), or to fulfill additional training requirements determined and certified by the appropriate service secretary to be necessary for professional development or for completion of skill training or retraining.
- Any service performed by a member in active duty, active service, active state service, or service of the United States if the member is ordered or retained pursuant to certain federal laws; any provision of law because of a war or national emergency declared by the president, the Congress, or the governor; or in support of a critical mission or requirement of the uniformed services, determined by the appropriate service secretary.

Under the bill, an employee would not be entitled to the protections of the act if his or her military service were terminated due to a dishonorable discharge, dismissal under other than honorable discharge, or dismissal due to a court martial or presidential order.

MCL 32.273

### **BACKGROUND INFORMATION:**

When members of the military are called into service, other than for "state" service called by the governor, they are entitled to reemployment protection under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), Part III of Title 38 of Chapter 43 of the United States Code. The act does not apply when the state calls up members of the National Guard. In such instances, state law provides employment protection to its guard members. The bill would enact provisions similar to those in the USERRA regarding reemployment.

To be protected by the act, members must hold a civilian job; must have given written or verbal notice to his or her employer prior to leaving for military service, except when precluded due to military necessity; must not have been in service for a cumulative five-year period; must have been released from service other than a dishonorable discharge; and must, in a timely manner, report back to the civilian job or submit an application for reemployment. Similar to the bill, the USERRA contains several exceptions to the five-year time limit regarding the length of military service.

The act states that an employer is not required to reemploy a person if any of the following occur:

- The employer's circumstances have changed so much as to make such reemployment impossible or unreasonable.
- In the case of a member of the armed service with a disability as a result of the military service (and reasonable efforts have been made by the employer to accommodate the person), where such employment would impose an undue hardship on the employer.
- The employment from which the person leaves to serve is for a brief, nonrecurrent period, and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

The USERRA provides for an "escalator principle", similar to that found in the bill, when a member of the military is reemployed. This does not, however, necessarily apply to employees who were disabled while in the performance of his or her military service. The principle requires employers to reemploy employees who were in the military for fewer than 91 days in the position they *would have* attained, with reasonable certainty, had they remained continuously employed. In theory, a returning employee could be placed in a higher position or laid off, depending on the circumstances that occurred at the place of employment while he or she was in service.

If the member was in service for at least 91 days, he or she would be placed in the position he or she would have attained had he or she remained in continuous employment, or a position of equivalent seniority and pay, provided the employee is qualified, or is reasonably capable of becoming qualified, for the position. If the employee cannot become qualified for the above position, he or she is placed in the position he or she had prior to service, as long as he or she is reasonably capable of becoming qualified

for that position. Finally, if the person cannot become qualified for either of the above position, he or she is placed in any other position with similar seniority, status, and pay as the position he or she would have had if he or she had remained in continuous employment.

If a member of the military is unable to be reemployed in the position he or she would have attained or the position prior to service, even with the reasonable accommodation by the employer, due to a disability suffered while in service, the employer must reemploy the person in any other position of similar seniority, status, pay, and duties which, with reasonable accommodation by the employer, the employee could perform, of the nearest approximate position consistent with the employee's circumstances.

### ***FISCAL IMPLICATIONS:***

According to the House Fiscal Agency, the fiscal impact of the bill on the state or local units of government is indeterminate. The cost of reemploying state and local governmental workers is dependent on available positions, length of absence, potential level advancements, base salary, bargaining unit negotiated increases, and other economic factors. (2-25-02)

### ***ARGUMENTS:***

#### ***For:***

Current laws regarding the reemployment protections afforded to military veterans are designed to minimize the disadvantages and adverse affects that a member of the military often faces when he or she is called into duty and forced to take a leave of absence from his or her civilian position of employment. The bill strengthens these reemployment protections by following the "escalator principle", as found in the USERRA, when determining a person's position of employment. Current law states that when a person returns from such service, the employer is required to reinstate the person in his or her position of employment without a reduction of seniority, status, or pay. However, if a person is on military leave for a extended period of time and returns to his or her position upon completion of his or her military duties, that person has effectively been subject to reductions in seniority, status, and pay, when compared to the level of seniority and pay he or she *would have* received had he or she remained continuously employed. The bill would alleviate this problem by explicitly stating that the person would

be reemployed in the position of employment that he or she would have attained, if he or she was indeed qualified for that position, if that person had continued to remain employed. By providing this added protection, the bill ensures that members of the military will not see any reductions in pay, status, or seniority. This encourages civilian workers to join, or continue to serve in, the military, which is essential as the duties of state's military have expanded to meet the state's growing homeland security needs.

#### ***For:***

The bill enacts language similar to current federal law regarding the reemployment protections afforded to members of the military called into federal service. By doing this, the bill will bring more uniformity to the reemployment process by following current federal law. If a member of the military is on leave from his or her place of employment, the employer and employee must follow both state and federal laws. However, members of the National Guard may be called into service by the president or the governor. So, when a member of the National Guard seeks to return to his or her place of employment, the process by which he or she does so is dependent on the type of service involved. As a result confusion often results as to exactly when the employee must return to his or her place of employment, and what position he or she is placed in, and which set of laws apply to the situation.

#### ***Against:***

The bill does not contain a key provision in the federal act. Under federal law, an employer is not required to reemploy a person if the employer's circumstances have changed so much as to make the reemployment impossible or unreasonable. By not including a similar provision, the bill seems to require an employer to reemploy a person regardless of the employer's current situations. Would an employer be required to reemploy a returning veteran if it was faced with extreme financial stress resulting in layoffs, or if it merged with another company, which employed the veteran?

### ***POSITIONS:***

The Department of Military and Veterans Affairs supports the bill. (2-21-02)

The Michigan Chamber of Commerce supports the bill. (2-21-02)

The Department of Michigan Veterans of Foreign Wars supports the bill. (2-21-02)

The Polish Legion for American Veterans supports the bill. (2-21-02)

The American Legion Department of Michigan supports the bill. (2-21-02)

Analyst: M. Wolf

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.