

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 635 Military Affairs

SPONSOR(S): Scionti and others

TIED BILLS: IDEN./SIM. BILLS: CS/CS/SB 206

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Military & Local Affairs Policy Committee	12 Y, 0 N, As CS	Fudge	Hoagland
2)	Economic Development & Community Affairs Policy Council		Fudge	Tinker
3)	Full Appropriations Council on Education & Economic Development			
4)				
5)				

SUMMARY ANALYSIS

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) provides employment rights to servicemembers and prohibits employment and reemployment discrimination against persons because of their active duty, reserve, or National Guard service. However, USERRA standards do not apply to state active duty.

The bill updates references and implements additional employment protections for servicemembers ordered into state active duty. The bill provides that returning servicemembers are entitled to seniority accrued prior to deployment, any additional seniority that would have been attained during the time of deployment, and any additional rights and benefits that would have accrued to the member because of seniority.

The bill requires a returning servicemember to promptly notify their employer of their intent to return to work and provides limited exceptions to the right to reemployment. Employers are prohibited from discharging reemployed servicemembers, for a period of one year, except for cause. Moreover, a servicemember cannot be required to use leave for periods of deployment. However, a servicemember may use accrued leave for time away for state active duty.

The bill also removes the requirement that a member be employed for at least one year prior to being ordered into state active duty before he can pursue action for violations of his employment rights. A civil penalty of up to \$1,000, per violation is available for violations of federal law and ch. 250, F.S., affording protections to servicemembers.

The bill is effective on July 1, 2009.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) provides employment rights to servicemembers and prohibits employment and reemployment discrimination against persons because of their active duty, reserve, or National Guard service. USERRA applies to all employers regardless of size and protects any past or present member of the uniformed service; applicant for membership in the uniformed service; and anyone obligated to serve in the uniformed service. The Act prohibits an employer from denying: initial employment, reemployment, retention in employment, promotion, or any benefit of employment because of that members status in the uniformed service.

However, USERRA standards do not apply to state active duty because the definition of "uniformed services" only includes National Guard and Air National Guard members engaged in active duty for training, inactive duty training, or full-time National Guard duty.

##### *Reemployment*

USERRA right to reemployment encompasses two guarantees. First, returning military personnel who (a) gave advance notice of military leave to their employer; (b) were on military leave of less than five years; and (c) submitted a timely request for reemployment "shall be entitled" to reemployment.<sup>1</sup> Second, it requires that the servicemember be promptly reemployed in a position of employment according to certain criteria.

##### *Exceptions to Reemployment*

Once reemployed, the member cannot be terminated, except for cause:

- (1) Within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
- (2) Within 180 days after the date of such reemployment, if the persons period of service before the reemployment was more than 30 days but less than 181 days.

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<sup>1</sup> 38 U.S.C. § 4312

## *Enforcement Rights*

The U.S. Secretary of Labor investigates complaints by servicemembers who believe that employers have violated their USERRA rights. If the secretary determines that a violation has occurred, the secretary will encourage voluntary resolution with an employer to restore the servicemember's USERRA rights. If no agreement can be reached, the secretary notifies the member that he or she can proceed against the employer. The member may request that the case be referred to the U.S. Attorney General for evaluation and enforcement. The member may also file a complaint directly against the employer, in lieu of the evaluation by the secretary or the Attorney General. Remedies include: equitable and injunctive relief; make-whole compensation; liquidated damages; and attorney's fees, expert witness fees, and costs.

## *Florida Uniformed Servicemembers Protection Act*

Florida also provides civil protection for the rights of military servicemembers while they are on active duty through the Florida Uniformed Servicemembers Protection Act (the Act).<sup>2</sup> A member of the reserve component of the Armed Forces may not be denied employment or retention in employment, or any promotion or advantage of employment.

Moreover, if a member of the Florida National Guard is ordered into state active duty, an employer may not discharge, reprimand, or in any other way penalize the member because of his or her absence by reason of state active duty.<sup>3</sup> If a servicemember, who has been employed for at least 1 year prior to being ordered into state active duty, believes these provisions have been violated and the Adjutant General certifies that there is probable cause to believe there has been a violation, the member may bring civil action against the employer. If the employee receives judgment in his or her favor, the employer is liable for actual damages or \$500, whichever is greater, as well as attorney's fees and costs.

## *Employment Discrimination and Reemployment in Florida*

Any servicemember who seeks or holds an employment position may not be denied employment or retention in employment, or any promotion or advantage of employment, because of any obligation as a member of a reserve component of the Armed Forces.

## **Effect of Proposed Changes**

The bill updates references to the Manual for Courts-Martial and the Uniform Code of Military Justice to reflect the most current version, 2008.

## *Reemployment Requirements for Servicemembers*

The bill requires the member of the National Guard to promptly notify the employer of his or her intent to return to work. However, an employer is not required to allow a member to return to work if: circumstances have changed; employment would create an undue hardship; the employment from which the member left is for a brief nonrecurrent period with no reasonable expectation that such employment will continue indefinitely or for a significant period; or the employer had legally sufficient cause to terminate the member prior to deployment on state active duty. The burden is on the employer to show the existence of such factors. A returning member of the National Guard may not be discharged from employment for a period of one year after the date the member returns to work, except for cause.

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<sup>2</sup> § 250.481, F.S.

<sup>3</sup> § 250.482, F.S.

Section 250.482, F.S., is amended to provide reemployment guarantees for members who served on state active duty to include:

- Seniority accrued prior to deployment and any additional rights;
- Any additional seniority that would have been attained during the time of deployment; and
- Any additional rights and benefits that would have accrued to the member because of seniority.

The bill also protects the reemployed members from termination, except for cause. While cause is not defined, federal courts have concluded that similar language under USERRA must be "liberally construed and strictly enforced for the benefit of those who left private life to serve their country."<sup>4</sup>

#### *Use of Leave Time for State Active Duty*

The bill prohibits employers from requiring members to use vacation, annual, compensatory, or similar leave, for periods of employment for state active duty. However, a member may use such leave to cover the time the member was deployed on state active duty.

#### *One-Year Employment Requirement for Civil Actions*

The bill also removes the requirement that a member be employed for at least one year prior to being ordered into state active duty before he can pursue action for violations of his employment rights. Therefore, regardless of the length of prior employment, a member may pursue relief for violations of employment rights.

#### *Civil Penalties for Violations of Laws Affecting Servicemembers*

The bill provides a civil penalty of up to \$1,000 per violation if any person violates any provision of federal law or ch. 250, F.S., affording protection to servicemembers.

### **B. SECTION DIRECTORY:**

- Section 1: Amends s. 250.35, F.S., to update references.
- Section 2: Amends s. 250.482, F.S., providing certain protections to members called to state active duty.
- Section 3: Amends s. 250.82, F.S., provides penalties for violations.
- Section 4: Provides an effective date of July 1, 2009.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

- 1. Revenues:  
None.
- 2. Expenditures:  
None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

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<sup>4</sup> Duarte v. Agilent Techs., Inc., 366 F.Supp.2d 1039, 1046 (D.Colo.2005); Alabama Power Co. v. Davis, 431 U.S. 581, 584-85, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977).

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Some small businesses may be wary of hiring National Guard members in short-term or transient jobs because of the removal of the one-year employment requirement for eligibility to pursue civil relief.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 25, 2009, the Military & Local Affairs Policy Committee adopted an amendment that: requires a servicemember returning from state active duty to provide prompt notice to the employer of his or her intent to return to work; provides limited exceptions to the requirement that an employer must allow servicemembers returning from state active duty to return to work; specifies that a servicemember returning from state active duty may not be discharged for a period of one year, except for cause; and clarifies that a civil penalty of up to \$1,000 may be assessed for violations of the provisions of ch. 250, F.S., affording protections to servicemembers, as well as for violations of provisions of federal law protecting servicemembers.