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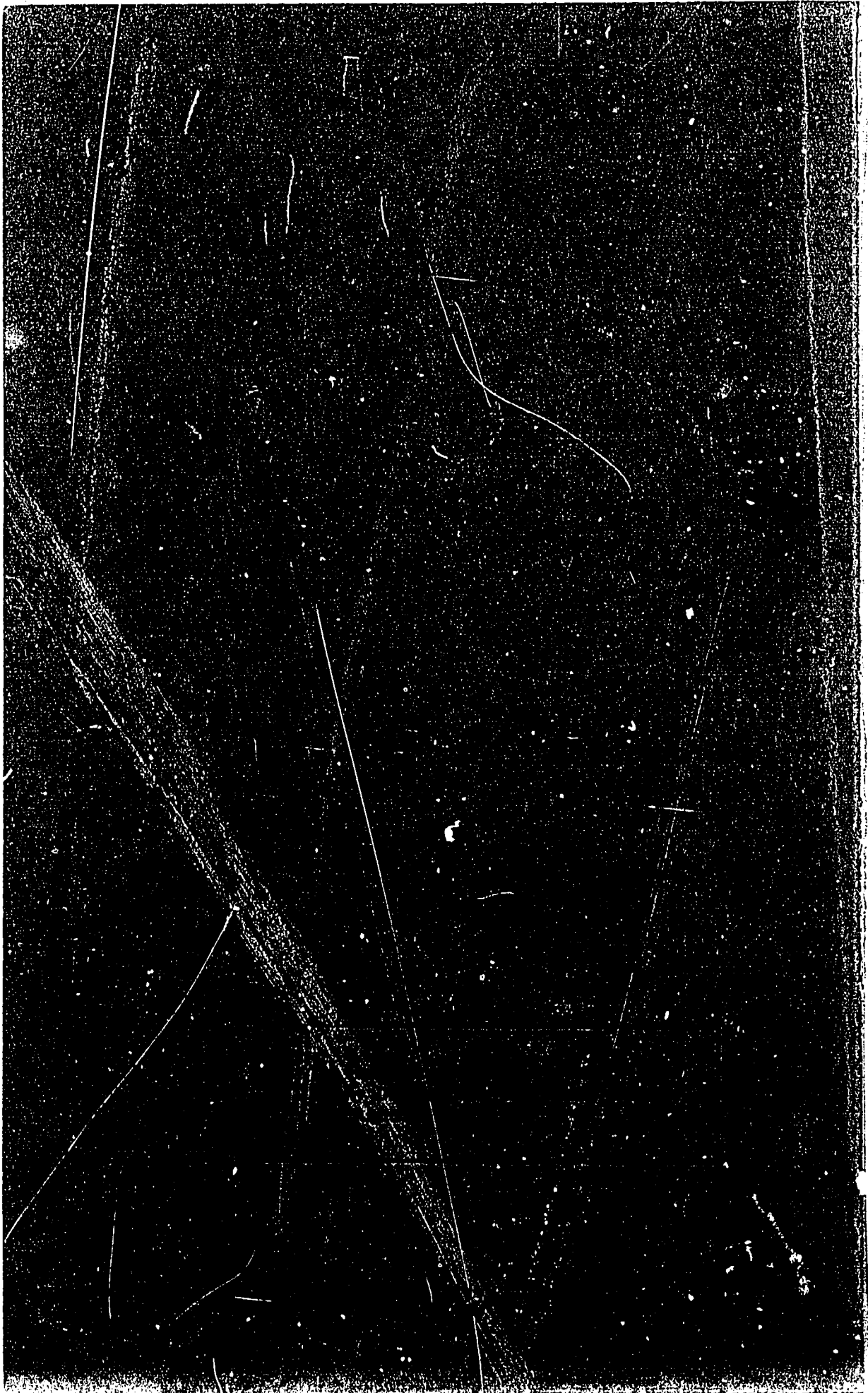
This handbook is designed to assist those who are concerned with veterans' reemployment rights, including veterans, their counselors, and former employers, as well as union and government officials. After presenting a brief historical background, the handbook describes the existing rights and the persons eligible for them, enforcement procedures, and damages which can be assessed. The relevant section of the Selective Service Act is appended.  
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# VETERANS REEMPLOYMENT RIGHTS HANDBOOK

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U.S. DEPARTMENT OF HEALTH,  
EDUCATION & WELFARE  
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## PREFACE

This Handbook is published by the Office of Veterans' Reemployment Rights in cooperation with the Office of the Solicitor, U. S. Department of Labor.

It replaces previous editions and is designed to assist those who are concerned with the reemployment rights of veterans. Veterans and others having rights under these laws, their counselors, their former employers, their unions, the staff of the Office of Veterans' Reemployment Rights, and others who may be affected by questions in this field should find this guide useful.

These rights are governed by public laws as interpreted by court decisions. The Department of Labor and the Office of Veterans' Reemployment Rights do not have authority to issue administrative rulings having the effect of law in this field. The answers given are based on the Department's analysis of the statutes, the court decisions, and the intent of the Congress as reflected in the legislative history.

Further information about reemployment rights may be obtained at any of the Area Offices listed on the inside back cover.

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## CHAPTER I

### Historical Background

*"If any man shall be sent forth as a souldier and shall return maimed hee shall be maintained competently by the Collonie during his life."*

With that statement, the Pilgrims of Plymouth Colony enacted into law the first veterans' benefit recorded in America. The year was 1636 and the Colony was engaged in a conflict with the Pequot Indians. History shows that since that first simple declaration of concern, the American people have continued and strengthened their efforts to compensate for the losses and to minimize the disadvantages suffered by those who have responded to the Nation's call to serve.

The United States, with its position of world leadership and the resulting need for a large military establishment, still depends on the citizen soldier to meet its military commitments. As was the case in 1776, when the Nation was born, the major portion of our armed forces is made up of men and women who have left their homes and jobs to serve for a short period and who then return to their civilian pursuits. The American people are no less concerned today for the welfare of these citizens. Through the years that concern has been expressed in the creation of numerous rights and benefits which overcome many of the problems military service has caused.

From the Revolution to the War Between the States, when the country was primarily agricultural, assistance to veterans in the field of employment was limited to land-grant bounties. In the 1860's, however, aid in securing Federal employment was added to the assistance provided and became an established practice following World War I.

With the growing interest in job security during the 1930's the Nation began to think about a new approach to employment guarantees for veterans. In the 1940 Congressional hearings on the peace-time draft, Senator Thomas of Utah stated the basic philosophy of the reemployment program as follows:

"If it is constitutional to require a man to serve in the armed forces, it is not unreasonable to require the employers of such men to rehire them upon the completion of their service, since the lives and property of the employers as well as everyone else in the United States are defended by such service."

Accordingly, the reemployment rights concept was enacted into law as one of the compulsory features of the Selective Training and Service Act of September 16, 1940. That Act provided reemployment rights for persons inducted for military training and service after May 1, 1940. During the same period, on August 27, 1940, the Army Reserve and Retired Personnel Service Law was enacted to provide reemployment rights for members of Army Reserve components of the land or naval forces who were on active duty on that date. The

Service Extension Act of 1941 gave enlistees the same rights as those granted earlier to inductees.

As the demands of the war effort increased, reemployment rights coverage was broadened to include Reserve Officers of the United States Public Health Service who were called to active duty after November 11, 1943 (Public Health Service Act of 1944) and members of the Merchant Marine who entered the service after May 1, 1940 (Merchant Marine Act of 1943).

The full impact of reemployment rights was not felt until the end of hostilities, when vast numbers of veterans returned from military service and sought to pick up their civilian pursuits. It then became evident that the requirements of the statute would affect the entire field of industrial relations, involving employment practices, business policies, and collective bargaining agreements between labor and management. With millions of veterans seeking restoration to their former positions, it was not long before judicial guidance was required to clarify the intent and meaning of the statute. In May 1946 the Supreme Court settled the much-argued question of superseniority when, in its first decision involving reemployment rights, *Fishgold v. Sullivan Drydock & Repair Corp.*, it stated:

“ . . . . he 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 war. . . . He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of those provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. . . . .”

The wording of this historic decision gave new direction to the reemployment rights program and established that utmost care was required to determine the position in which a returning veteran should be reemployed. The “escalator” principle is now embodied in the statute itself, in language declaring it to be the sense of the Congress that the veteran should be restored “in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the Armed Forces until the time of his restoration to such employment.”

The Selective Service System had been charged with the responsibility of administering the reemployment provisions from the date of their enactment, but in March 1947 the Secretary of Labor assumed the obligation. Since the basic statutes (with the exception of the Merchant Marine Act, which terminated July 25, 1947) were still in effect, the Secretary established within the Department a unit to provide the assistance required. That unit is the Office of Veterans' Reemployment Rights.

Section 9 of the Selective Service Act of June 24, 1948, provided rights similar to those established by the earlier statutes, with the important addition

of a reemployment provision for disabled veterans. On June 23, 1950, the Congress extended the Selective Service Act of 1948 for one year.

On June 19, 1951, recognizing the Nation's increasing military commitment because of the Korean Conflict, the Congress enacted amendments which continued the reemployment rights provisions indefinitely. The new law, known as the Universal Military Training and Service Act, also provided rights for reservists who perform training duty and for rejectees.

The Reserve Forces Act of August 9, 1955, authorized a substantial build-up in the reserve forces and provided, in section 262(f), reemployment rights for persons who enlist in the Ready Reserve and perform three to six months (now, not less than three consecutive months) of initial active duty for training. Amendments to the Act effective September 10, 1960, brought National Guardsmen and reservists under the same sections of the law and made it explicit that there was to be no loss, either of vacation or of seniority, status, or rate of pay, as a result of their absence for training duty.

The importance of reemployment rights to military training programs and to the Nation's defense posture was dramatically illustrated at the time of the Berlin Crisis in 1961, and again in the Cuban Missile Crisis of 1962, when thousands of guardsmen and reservists were called from their jobs to active duty. Further amendments effective August 1, 1961, provided an extension of reemployment rights protection for veterans who would otherwise have been adversely affected by the previous limitation of protection to those who had not exceeded four years on active duty. These amendments also defined the conditions under which persons leaving employment to be examined for military service would have reemployment rights.

Amendments effective August 17, 1968, further relaxed the four-year limitation on active duty to protect certain veterans who exceed that limitation by extending their enlistments or accepting recalls to active duty, where the extension or recall is at the request and for the convenience of the Federal Government.

Another amendment effective August 17, 1968 made it clear and explicit that a reservist or Guardsman cannot be discharged from his employment, or denied promotion or any other employment benefit or advantage, because of his reserve or Guard membership or any obligation that such membership entails.

In review, reemployment rights have played a key role in this country's military manpower procurement programs since before World War II. As has been the case throughout its history, the United States depends on its civilian population to augment the ranks of the armed forces when increased military commitments must be met.

The interruption of civilian employment presents a problem not only to the worker performing military service but also to his employer, his fellow employees, his union, and his community. Attitude surveys have shown that prompt return to his employment after his military service is one of the rights most cherished by the citizen soldier. The interests of the industrial and



business communities are best served when the return is accomplished with a minimum of disruption. The reduction of misunderstandings through the proper administration of the reemployment statute is therefore of national concern.

The Secretary of Labor, through the Office of Veterans' Reemployment Rights, Labor-Management Services Administration, seeks to provide prompt and effective assistance and information to all members of the community affected by the reemployment statute. When disputes arise, the Office applies its specialized knowledge of the law and of industrial relations in efforts to achieve amicable solutions. In the relatively few cases where amicable solutions are not reached, resort to the courts may become necessary.

## CHAPTER II

### Who Has Reemployment Rights

The reemployment statute provides protection to individuals whose civilian employment is voluntarily or involuntarily interrupted by active military duty, by reserve training activities, or by reporting for examinations to determine their fitness for military service.

**Inductees and Enlistees.** The statute makes no distinction between persons who are drafted and those who choose to enlist in the armed forces. Failure to accord statutory reemployment rights protection to volunteers would penalize them for their willingness to serve their country and would hamper the recruitment programs of the military services.

**Reservists and National Guardsmen.** National Guardsmen and reservists, including officers, who perform active duty, active duty for training, or inactive training duty are protected by the statute. Their protection encompasses initial periods of active duty for training, weekly and weekend training duty, annual tours of training duty such as summer encampments and cruises, and special courses of instruction or attendance at service schools, as well as military service pursuant to call-ups for active duty. National Guardsmen have the same rights as reservists except when they perform State duty of an internal nature which is not subject to Federal control, such as emergency duty in floods or riots. When performing such State service they are not within the protection of the Federal statute, although they may be protected by State or local law.

**Branches of Service.** The reemployment statute applies in the same manner to service in any branch of the armed forces, whether such service is in the Army, the Navy, the Marine Corps, the Air Force, or the Coast Guard. The provisions of the statute relating to reservists and National Guardsmen also apply, without distinction as to branch of service, to service in the reserve components of the Army, the Navy, the Marine Corps, the Air Force, and the Coast Guard, including the Army National Guard and the Air National Guard. In addition, the statute expressly confers reemployment rights upon persons who leave their positions for the purpose of performing active duty in the Public Health Service, voluntarily or involuntarily, in response to an order or call to active duty.

**Reporting for Examination.** In addition to providing reemployment rights to employees who actually enter upon active duty, the statute also accords protection to employees who leave their positions in order to report for the purpose of being inducted into, entering upon, or determining by examination their fitness to enter upon active duty in the armed forces. If the employee is rejected for military service, or if his entrance upon active duty is delayed by the military authorities, he is entitled to return to his position. If he is hospitalized incident to the examination or rejection, he is entitled to reemployment after his discharge from such hospitalization.

**Conscientious Objectors.** Conscientious objectors have reemployment rights if they are actually sworn into military service, even though they are assigned

only to non-combatant duty. If they are not sworn into military service, but are assigned to civilian service and work under civilian direction, they do not come within the protection of the reemployment statute.

**Military Academies.** Students at the military academies do not have reemployment rights. Attendance at such academies is not considered military training or service for the purposes of the reemployment statute.

**R.O.T.C.** Reserve Officer Training Corps training does not confer reemployment rights, but an R.O.T.C. member may have such rights when he performs advanced training duty as a member of a reserve component of the armed forces.

### EXAMPLES

(1) Employee A is draft-exempt by virtue of his age and previous military service, but is a voluntary member of the local unit of the Air National Guard, in which he is a commissioned officer. The unit is ordered up for a year of active duty in the Berlin Crisis, and he leaves his position as Personnel Manager at K Company in response to those orders.

None of these facts would exclude him from the protection of the reemployment statute. The same result would follow if, instead of being called up with a unit, he had volunteered for or requested active duty on an individual basis.

(2) Employee B leaves his job as a tool and die maker at L Company in response to an order from his draft board to report for induction. His pre-induction examination discloses certain questions about his past which the military authorities want to investigate before deciding whether to induct him, and he is sent home to await the outcome of the investigation. The day after returning home, he reports back to L Company for reemployment.

He is entitled to return to his job pending a decision by the military as to inducting him. If he is ultimately rejected for induction, he will have reemployment rights as a rejectee. If he is accepted, performs military service, and meets the other conditions of eligibility in the law, he will have reemployment rights as a veteran.

(3) Miss C, a Mexican citizen employed in the Los Angeles office of M Bank, enlists in the Women's Army Corps where she serves as a translator.

Neither her sex, nor her foreign citizenship, nor her voluntary enlistment will preclude her from having statutory reemployment rights at M Bank.

(4) Mr. N operates a gasoline service station with only three employees. One of them, D, is a member of the Ready Reserves, but has not been fulfilling his obligation to attend weekend drills, so is ordered up for 45 days of training duty as a penalty.

The law applies equally to all employers irrespective of the number of employees, and to all military training duty regardless of whether it is imposed as a penalty or not.

(5) Employee E satisfies his draft board that he is a bona fide member of a religious group which opposes the bearing of arms, so he is inducted for non-combatant duty only and assigned to work in a military hospital.

Since he is actually sworn into military service and serves subject to military orders, his service is of the kind that creates reemployment rights. However, this would not be the case if his conscientious objection had been to all military service and he had been assigned to work in a civilian or Veterans Administration hospital under civilian direction, for example.

(6) Employee F joins a St. Louis unit of the Missouri National Guard. He works for P Corporation on the night shift and the unit drills every Wednesday night. A few months later he is ordered up for six months of initial active duty for training. The following spring, after he has returned to work, the Mississippi River overflows its banks at St. Louis and the Governor of Missouri calls up F's unit to fight the flood and preserve law and order.

The Federal reemployment statute protects F after each of his Wednesday evening drills and after his six months of initial active duty for training, but not after the call-up by the Governor. The only statutory reemployment protection he would have in connection with the flood duty would be under the applicable Missouri law, if any.

(7) In order to qualify for higher rank in the Naval Reserve, Employee G requests orders to attend a four-month communications school run by the Navy, and asks his employer, Q Company, for a leave of absence to attend that school. The orders are issued, he attends the school, and he reports back to Q Company as soon as he returns home.

He is entitled to return to his job. The voluntary character of his training duty does not bar him from statutory reemployment rights protection.

## CHAPTER III

### Positions Giving Rise to Rights

**Employment Relationship.** In order to be protected by the reemployment statute, an employee must have left a position in the employ of an employer with intent to perform military training or service, or to be examined for such training or service. An employer-employee relationship must have existed, as distinguished from the relationship between partners in a business and from the relationship between an independent contractor and the firms for which he performs work. However, the Congress intended that the surrounding facts should be liberally construed in determining whether the necessary employer-employee relationship existed.

**Temporary and Other Than Temporary Positions.** One of the conditions of eligibility for rights under the reemployment statute is leaving employment in "other than a temporary position" for the purpose of military service, training, or examination. The Act does not define the phrase "other than temporary," but court decisions have made it clear that it has a broader meaning than the words "permanent" and "regular." The determining factor is whether the employment is reasonably expected to be continuous for an indefinite period rather than casual and nonrecurrent. The length of the employment prior to military service is not decisive in determining whether it was temporary or other than temporary. The labeling of the position or the employment as "temporary" by the employer or the union does not make it "temporary" within the meaning of the statute.

A position is "temporary" for the purposes of the Act only where the facts surrounding the employment indicate that it was mutually understood to be limited to a specific, brief, and nonrecurrent project or period of time, and was not expected to be continuous for an indefinite period. The exclusion of "temporary" positions from the protection of the statute is to be narrowly construed.

The phrase "position other than a temporary position" in the Act refers to the totality of the employee's relationship or tenure with the employer, and not to his tenure in a specific assignment or job or to the permanence of that job itself. An employee whose "position" is other than temporary can occupy a particular job temporarily, or can occupy a particular job that is only temporary. Conversely, an employee's "position" can be merely temporary although the job on which he is working might itself be permanent.

**Probationary Positions.** Under many collective bargaining agreements and some personnel policies adopted unilaterally by employers, new employees are classified as "probationary" for a specified period of time, during which they may be under special scrutiny and certain company benefits or contractual rights may be withheld from them. The usual expectation in these situations is not that the employment is limited to a specific term, but rather that it will continue indefinitely if the employee performs in a satisfactory manner during

his probationary period. Most probationary positions are therefore within the protection of the reemployment statute.

Where an employee is not protected by any form of job tenure or security, he is employed "at will" in the sense that the employer is free to terminate the employment at any time. In this sense, most employment is employment at will, and probationary employment is merely a special case in which the employer's freedom to terminate at will is limited to a specified period. It was clearly not the intent of the Congress to deny reemployment rights protection merely because the employment was "at will." The usual probationary position cannot be considered any more "temporary" than any other employment at will would be.

The use of the term "probationary" or the like in a collective bargaining agreement or personnel manual does not make the employee's position "temporary" for the purposes of the reemployment statute, any more than the use of the word "temporary" itself does.

**Apprentice and Trainee Positions.** Where an employee is in an apprenticeship or training program for the purpose of acquiring skill and knowledge through work experience and training that will qualify him for a higher position with the employer or as a journeyman in the trade, the presumption is that his position is other than temporary. Such programs ordinarily contemplate a continuing or recurrent employment relationship of indefinite duration.

**Part-Time and Seasonal Positions.** The mere fact that the employee works on a part-time rather than a full-time basis does not make his position temporary within the meaning of the Act. If the position involves the performance of continuing services for an indefinite period, it is considered other than temporary, regardless of the number of hours worked per day or per week.

Employment that is seasonal in nature, but is reasonably expected to be recurrent from season to season on the basis of contract, custom, or practice, is other than temporary for the purpose of the reemployment statute.

**Elective Positions.** The mere fact that an employee was elected to his position by a group of voters, such as the board of directors of a corporation, would not exclude that position from protection under the reemployment statute. Even where he was elected for a specified term and the term expires during his military absence, he is entitled to reinstatement in the position if there has been an established practice of reelecting the same individual. If an employment relationship exists, it makes no difference whether the hiring is done by an individual or by the majority vote of a group.

In some situations involving elected officers, it may be that no employment relationship exists. A member of the board of directors of a corporation, elected by the stockholders, is not necessarily an "employee" of the corporation in his capacity as a director even though he receives fees from the corporation for acting in that capacity. However, if the same individual also holds an office or position, either elective or appointive, in which he performs employee-type duties for the corporation for pay, as where the president, general manager, treasurer, or other officer is also a member of the board of

directors, then the reemployment statute would protect him as far as the "employment" elements of his overall position are concerned. Thus, even if he is not entitled to resume his seat on the board, he would be entitled to resume his duties and pay as general manager, for example.

There may be situations where the employee was elected to his position for a specified term and there was no established practice to justify an expectation of reelection. If he returns from military service before the term has expired, he is entitled to finish out the balance of the term for which he was elected. If the term expires before he returns and he is not reelected, he is not entitled to reinstatement in the elective position. The applicable reasoning here is not that the position was temporary, but that the veteran has not met one of the qualifications for holding it; namely, the approval of voters.

An employee may hold special rights with his employer, such as temporary "superseniority" and the right to represent employees in grievance proceedings, through election to a union office involving no pay from the union. The reemployment statute does not impose obligations upon unions as such, except where they themselves function as employers, and if such an elected union officer loses the continued approval of the union during his absence for military service, the law does not entitle him to resume these special rights with the employer upon his return.

**Contract Positions.** Some employment is under individual contracts of employment which may be for a specified time after the date of execution or for a specified number of months of employment, not necessarily consecutive. A veteran employed under such a contract before entering military service has reemployment rights where the contract period has not yet expired upon his return or where it is customary for the contract to be renewed upon expiration.

**Government Positions—Federal, State, and Local.** Employees of the Federal Government are protected by the reemployment statute. However, the administering agency for the reemployment rights of such employees is the United States Civil Service Commission rather than the Office of Veterans' Reemployment Rights.

Employees of States or their political subdivisions, including school districts and other municipal corporations, are not covered by the mandatory provisions of the Act. However, the Federal statute does contain a provision in which the Congress suggested that States and their political subdivisions enact their own statutes and ordinances, or adopt suitable personnel regulations, to provide reemployment rights for these employees, and this has been done in many instances.

## EXAMPLES

(1) Employee A is on layoff from his job with P Company because of slow business conditions. He has recall rights by virtue of his seniority, but does not expect to be recalled in the near future so enlists in the Navy to get his military obligation out of the way.

A position in layoff status with recall rights based on a collective bargaining agreement or on custom and practice is a "position" protected by the reemployment statute.

(2) Mr. B. operates a small insurance agency with the aid of a secretary hired and paid by him. His only compensation is in the form of commissions on various kinds of policies he sells for the Q Group of insurance companies. By agreement with Q, he sells no other insurance, uses Q's name in his advertising, and is required to follow detailed business procedures prescribed by Q. He holds a commission in the local reserve unit and goes on active military duty when that unit is called up for service in the Cuban Missile Crisis.

On these facts, the presumption would be that he is an employee of Q within the meaning of the reemployment statute, and not a true independent contractor. The result would be different if he also sells substantial amounts of insurance for other companies and generally exercises a greater degree of independence in operating the agency. Questions like this are to be resolved by a consideration of all the surrounding facts.

(3) Employee C leaves his job at R Company to enlist in the Air Force, and Employee D is hired to replace him. A few months later D is drafted or himself enlists. D returns from military service before C does and applies to R Company for reemployment.

The mere fact that D was hired as a military replacement does not make his position a temporary one. When C returns, his rights to the particular job will be superior to D's, but D may then be entitled to another job of comparable seniority, status, and pay.

(4) Two weeks after he is hired at S Corporation, Employee E receives induction orders from his draft board.

The fact that he has worked only two weeks does not by itself make his position temporary. However, if he had received the induction orders or had enlisted before applying for employment, and had asked to work only until he actually entered military service, his position would be considered only a temporary one.

(5) Building Contractor T has a force of supervisory employees who remain with the firm continuously from project to project, but it hires its skilled craftsmen and its laborers at the site for one project at a time and it is only coincidence if any of them work for T on more than one project. Midway through an office building project, Supervisor F and Laborer G leave T's employ to enter military service and the building is completed before they return.

F's position is other than temporary and leads to reemployment rights. G's position no longer exists when he returns and he is not entitled to reemployment with T.

(6) Employee J is a Loader at U Department Store's warehouse, but is working as a Truck Driver during the Christmas rush, with the expectation of returning to his Loader job when the emergency is over. He is drafted and returns from military service in February two years later.



His status in the Truck Driver job is temporary and his reemployment rights are based on the Loader job. The same result would occur if he had been assigned to the Truck Driver job only for the duration of the regular incumbent's absence because of vacation or illness.

(7) According to the collective bargaining agreement between Manufacturer X and the union, new employees are considered "temporary" until they have worked 60 days on the job. During that period they are evaluated by supervision in terms of their acceptability as permanent members of the work force, and some are dropped as unsuitable during or at the end of their 60 days. They are required to join the union within 30 days after being hired. Employee K is drafted, after working 25 days and before joining the union, and X's personnel department records his departure as "Terminated—military service."

None of these facts would prevent K's position from being other than temporary within the meaning of the reemployment statute. The 60 working days constitute a not unusual type of probationary period.

(8) For about two years Employee L, a high school student, has worked for Y Supermarket as a Produce Clerk Trainee after school hours and on Saturdays. His hours of work have fluctuated between 15 and 30 per week. On graduation from high school he enlists in the Marine Corps.

Although this is a fluctuating, part-time, trainee position, it is not temporary for the purposes of the Act and will serve as a basis for reemployment rights if L seeks reemployment at Y and meets the other conditions of eligibility on returning from military service.

(9) Each year Cannery Z employs a canning crew for approximately four months during the harvest season, and its practice is to offer reemployment to members of the previous year's crew when the new season begins if they are available. Employee M works on the crew through one season but is on a six-month tour of initial active duty for training with his National Guard unit when the next harvest season begins. He returns in the middle of the busy season and applies to Z for reemployment.

These circumstances show that his seasonal position was other than temporary. His right to it would therefore be protected by the statute.

(10) Cashier N, at the time he leaves his salaried appointive position at XYZ Bank to go on active military duty, also holds an elective position on the bank's Board of Directors, for which he receives an annual director's fee. The directors are elected annually by the stockholders, and N is replaced on the board in the elections held during his military absence. He returns from service and meets the statutory conditions of eligibility.

The reemployment statute entitles him to be restored to the Cashier position but not to resume his seat on the Board of Directors.

(11) For the last five years Miss O has taught French at a private school under successive one-year contracts. In order to perform a special assignment for the Army in Vietnam, she accepts a reserve commission and goes on active duty.

Her position with the school is other than temporary for the purpose of reemployment rights, in view of the reasonable expectation, based on past practice, that it would have continued to be renewed year by year but for the interruption by military service.

## CHAPTER IV

### Purpose in Leaving Position

To be entitled to the protection of the reemployment statute, the employee must have left his position in order to perform military training or service in the armed forces, or in order to be examined for such training or service. The service, training, or examination must be the purpose, objective, motive, and cause for leaving the position. However, it does not have to be the only consideration involved in the employee's departure. The existence of subsidiary or additional motives or purposes would not affect his statutory reemployment rights.

If an employee leaves his position entirely for reasons unrelated to military service and then later enters the armed forces, he will not be entitled to statutory reemployment rights. In this connection, however, it is important to note that an employee who is on layoff with recall rights, on leave of absence, on strike, or the like still holds a "position" even though he is not actually working on the job. He can leave a position in layoff, leave, or strike status and still become eligible for reemployment rights.

The statute does not specify any limit on the amount of time that may elapse between the time the employee leaves his position and the time his military service actually commences. It is a matter of intent and not a matter of time. It is recognized that employees entering military service will often need time to get their affairs in order, and that the amount of time needed for these preparations will vary from case to case. Sometimes the actual induction or enlistment may be delayed for weeks or even months by the military authorities or for other reasons. Where there is an unusual delay, the causes of that delay and what they show about the employee's intent, rather than the amount of time elapsing, would determine whether he meets the statutory requirement.

The statute does not require the employee, as a condition of eligibility for reemployment rights, to notify his employer or labor organization that he is leaving his position for military service. Of course, it is good practice to give the employer and the union ample notice, and this may prevent unnecessary delay or misunderstanding when the employee returns for reinstatement. There is one situation in which the law does impose a notice requirement; a reservist or National Guardsman performing military training duty (as distinguished from initial active duty for training of not less than three consecutive months) has to request leave of absence, which the employer then has to grant, for the period or periods required to perform such training duty.

The signing of a "quit slip" or "resignation" by the employee, or the recording of his departure as a "quit" or "termination," does not defeat his statutory reemployment rights if in fact his purpose in leaving is to perform military training or service or to report for a pre-military physical examination.

The necessary purpose and intent must exist at the time the employee leaves his position, and must be maintained until it is consummated or until it is

frustrated by the military authorities. A decision to enlist instead of awaiting induction as originally planned, or to enter a branch of service other than the one originally contemplated, would not amount to a break in the required continuity of intent.

If the employee, after leaving his position with intent to enter military service, seeks and takes a permanent position with a different employer, these actions would show an abandonment of his original purpose, and a subsequent enlistment would not lead to reemployment rights with the earlier employer. However, it would be incorrect to say that acceptance of any other job after leaving a position with an earlier employer will preclude reemployment rights with that earlier employer. An employee whose induction has been unforeseeably delayed, for example, can seek and take temporary interim employment with other employers without abandoning his original purpose of entering military service, and therefore without forfeiting future reemployment rights with the earlier employer. Whether the employee's intention was to take only temporary employment pending induction must be determined from the facts.

### EXAMPLES

(1) On Saturday morning A, an employee of M Company in Chicago, gets a letter from his draft board back home in Arkansas directing him to report there for induction two weeks from the following Wednesday. He leaves immediately without informing M Company. After three days of unexcused absence, during which M makes unsuccessful efforts to contact him at his last known address, A is terminated in accordance with the labor agreement. Two years later he shows up at M's plant and claims reemployment rights. He produces separation papers from the Army showing appropriate dates and character of military service, together with the letter from the draft board.

The facts show that he actually left his position with intent to enter military service and is otherwise eligible under the law. His termination under the labor agreement has no effect on his reemployment rights.

(2) Employee B has been out on strike against his employer, N Company, for about two months. Unable to foresee the date or the terms of the strike settlement, he has gone to work for Employer O in the meantime. B is also a Ready Reservist, and while working for O he is ordered to six months of initial active duty for training. A few weeks after this active duty for training commences, the strike at N Company is settled on terms permitting the striking employees to resume their employment with uninterrupted seniority by reporting back to N Company for work within a week. B does not contact N Company or report back until he returns from military service four months later.

He left a position with N Company to enter military service within the meaning of the statute and none of the other facts noted would prevent him from having reemployment rights there. He may also have reemployment rights

with Employer O, in which event he will be entitled to make an election between N and O after he returns. The same considerations would apply if, instead of being on strike, he had been on layoff from N Company and had been sent a recall notice while in military service.

(3) Employee C tells his supervisor at P Company that he is quitting to visit his aged parents in Florida for a couple of weeks and then enlist in the Air Force. He spends two weeks in Florida and another two weeks in Acapulco, then returns home and enlists. However, the Air Force enlistment quota is temporarily filled and he is told that his entry on active duty will be postponed for several weeks, so he takes a job driving a taxicab for Q Company in order to keep himself productively occupied in the meantime. He does not actually go on active duty with the Air Force until about three months after he left P Company.

He left his job at P Company with intent to enter military service and did nothing thereafter which was inconsistent with that intent. Neither his quitting, nor the existence of other motives, nor his acceptance of temporary employment elsewhere while awaiting orders to active duty will prevent him from qualifying for statutory reemployment rights with P Company.

(4) Mr. D, an accountant in the employ of R and S, a public accounting firm, leaves his position with the stated intent of enlisting in the Navy, where he has been promised a high rating and a chance to further his education. The Navy rejects him because of a congenital back defect, whereupon he tries the Army with the same result. He then immediately reports back to R and S requesting reinstatement, five weeks after the firm has replaced him with a new employee.

Mr. D maintained his intent until it was frustrated and is entitled to prompt reinstatement in his job.

(5) Employee E is criticized by his foreman at T Plant and tells his co-workers that he is fed up and will quit his job if it happens again. It does happen again and he does quit. For a few weeks he tries without success to find suitable employment elsewhere, so he decides to enlist in the Army. After completing his active military duty he claims reemployment rights at T Plant on the ground it was his last employer before military service.

He is not entitled to reemployment because he did not leave his position at T Plant for the purpose of entering military service.

(6) Rate Clerk F joins an Air National Guard unit which meets the third weekend of every month for two days of flying time and military training. He informs the personnel department of his employer, X Company, of this obligation and all goes well for a while. Then X Company runs into a heavy workload situation which requires its Rate Clerks to work on Saturdays. F does not show up for Saturday work on his training duty weekend and is discharged by his supervisor for this unexcused absence.

The discharge is contrary to F's statutory rights and cannot stand. The notice that F gave X Company when he joined the Air National Guard unit is a sufficient request for military leave to cover all of his weekend training duty

meetings as long as they continue to be scheduled for the times stated. It is not necessary to make a separate request for leave to the employer for each session attended.

(7) At noon on a hot summer day, G walks off the job at Y Company without a word to anybody. He immediately goes downtown and joins the local reserve unit, which the President has just called up for a year of active duty in Alaska. A couple of days later the unit departs and G goes with it.

Neither his mixed motives nor his failure to tell Y Company what he was doing will prevent him from having reemployment rights with Y Company when the unit returns. However, if the call-up had been for two weeks of military training duty at a summer encampment in Alaska, instead of for a tour of active duty, G's failure to request a leave of absence from Y Company would exclude him from statutory protection.

## CHAPTER V

### Duration and Character of Military Service

In adopting the concept of statutory reemployment rights, the Congress had in mind the citizen soldier who interrupts his civilian career to serve his country in uniform, rather than the professional military man who pursues a full-time career in the armed forces. There was also an intent to limit this statutory protection, by and large, to those whose conduct in military service does not reflect discredit upon themselves or their country. Along with these considerations, there has been a widespread feeling in relatively peaceful times that the civilian employers and fellow employees of these citizen soldiers should not be kept in suspense indefinitely while awaiting their possible return.

Accordingly, the reemployment statute sets certain limits on the amount of active military duty an employee may perform without removing himself from its protection, and prescribes a minimum standard of quality that his military service must meet.

**Service Limits.** The three major categories of military training or service, for the purposes of the reemployment statute, are active duty, initial active duty for training, and active or inactive military training duty. Separate sets of rights and restrictions are provided for each of these categories. Active duty normally lasts two years for inductees, usually involves commitments of either three or four years for enlistees, and may be for varying periods of time in the case of reservists or National Guardsmen who are called up or recalled for extended active duty. Initial active duty for training of not less than three consecutive months is an obligation of reservists and guardsmen who have not previously served on active duty. It is usually for a six-month period but may be for as little as three or as long as eighteen months under present practices. Military training duty includes annual two-week summer encampments and cruises, weekly and weekend drills or training meetings, attendance at service schools for refresher training or the upgrading of military skills, and the like. It is performed by National Guardsmen and Ready Reservists, including those whose membership or participation is voluntary as well as those who are required to maintain active membership in a reserve component for certain periods of time after completing their tours of active duty or initial active duty for training.

The only one of these categories on which specific time limits are imposed for reemployment rights purposes is active duty. A reservist or guardsman does not normally perform more than one tour of initial active duty for training. There is no specific limit on the number of times or the cumulative amount of time a reservist or guardsman may absent himself from his employment to perform military training duty. Time spent on initial active duty for training or on military training duty cannot be added to time spent on active duty in

determining whether the statutory time limits on active duty have been exceeded.

The reemployment statute permits an employee to serve a total of four years on active duty between June 24, 1948 and August 1, 1961, and a total of four years on active duty after August 1, 1961, without loss of reemployment rights protection. In each case, these limits are extended if additional active duty is performed involuntarily.

The basic four-year limitation on active duty after August 1, 1961 is extended to five years if the active duty in excess of four years after August 1, 1961 is at the request and for the convenience of the Federal Government. This permits an individual on active duty to extend his active duty *voluntarily* without forfeiting his reemployment rights, if the Government asks him to extend it and the voluntary extension does not bring his total active duty after August 1, 1961 above the five-year total. In determining what constitutes a request by the Government for such an extension, the law is to be liberally construed in favor of the veteran.

In addition, in certain circumstances, the basic four-year limit on active duty after August 1, 1961 is extended for a reservist or guardsman who voluntarily or involuntarily enters upon active duty, other than for determining physical fitness or for training, or whose active duty is voluntarily or involuntarily extended. Such an entry or extension must occur during a period when the President is authorized to order Ready Reserve units or individual reservists or guardsmen to active duty, and the extension is limited to the period of time for which the President may order such active duty. The President had authority from October 15, 1966 to June 30, 1969 to call up Reserve units to active duty. The employee's release from such additional active duty must have occurred on or after August 17, 1968. Finally, the additional active duty must have been at the request and for the convenience of the Federal Government. Here again, the law is to be construed liberally in the veteran's favor.

In applying these provisions of the statute, the number of enlistments, reenlistments, or other tours of active duty is irrelevant, and it does not matter whether the active duty is served continuously or in two or more tours interrupted by return to civilian status. What is important is the total or aggregate time spent on active duty.

It is essential to note that these limitations apply only to active duty performed after the employee leaves the employment to which he claims restoration. Active duty performed before the employment relationship began does not count toward the years of active duty for which the employee is permitted to absent himself from the employer in question.

The way in which these active duty limitations operate is illustrated in Examples (1) through (10) below.

**Satisfactory Service.** In order to qualify for protection under the reemployment statute, inductees performing active duty must "satisfactorily" complete their period of training and service. Enlistees, reservists, and guardsmen



performing active duty must be released from such active duty "under honorable conditions." Guardsmen and reservists performing initial active duty for training must perform "satisfactory" service. There are no comparable requirements in the provisions establishing reemployment rights after other military training duty.

Service leading to a discharge or release that is "honorable," "general," or "under honorable conditions" is considered "satisfactory" and meets the statutory standard. Service leading to a discharge or release that is "other than honorable," "undesirable," for "bad conduct," or "dishonorable" does not meet that standard.

Medical discharges and hardship discharges are normally honorable or under honorable conditions.

Anyone being released from active duty is entitled to receive a certificate or other document from the military authorities indicating the character of his service. Often this will not be a discharge certificate, because he may still have an active reserve obligation which precludes an actual discharge as long as that obligation exists. He will normally receive a Department of Defense form which shows the dates and character of his military service and other information, but the issuance of this form may be delayed. In any event, no particular form is necessary to constitute an acceptable certificate for the purpose of reemployment rights. A certificate may or may not be issued to a reservist or guardsman completing initial active duty for training. In the absence of an actual certificate, the nature or content of the orders releasing him from such initial active duty for training may be informative enough to establish his entitlement.

Examples (11) through (13) below are illustrative of questions that may arise regarding the character or quality of the employee's military service.

### EXAMPLES

(1) Shoe Clerk A leaves his job at Haberdashery K to join the Army and enlists for three years on April 1, 1958. When this enlistment expires he reenlists for four years beginning April 1, 1961. He is honorably discharged March 31, 1965, and applies to K for reemployment a couple of weeks later.

He is entitled to reinstatement because his active duty before August 1, 1961 did not exceed four years and his active duty after August 1, 1961 did not exceed four years.

(2) Shoe Clerk B leaves his job at L Department Store to join the Army and enlists for three years on February 1, 1959. When this enlistment expires he reenlists for four years beginning February 1, 1962. He is honorably discharged January 31, 1966 and promptly applies to L for reemployment.

He is without statutory reemployment rights because the active duty he performed after August 1, 1961 exceeded four years as a result of his own voluntary action in reenlisting.

(3) Employee C is drafted October 15, 1961. After serving about 18 months he decides he likes the military life and enlists for a three-year period beginning April 20, 1963. However, he gets a hardship discharge October 30, 1964 when his father dies and leaves the family without a breadwinner, and in November 1964 he applies to his preservice employer for reinstatement.

He has statutory reemployment rights because his active duty did not in fact exceed four years. However, if C had served out the full term of his enlistment, he would not have been protected by the reemployment statute, because he would have exceeded four years on active duty as a result of his voluntary enlistment. The 18 months served as a draftee count toward the four years. Although the voluntary enlistment was for only three years, it is that voluntary act which would have caused him to serve in excess of four years altogether had it not been for the hardship discharge.

(4) D enlists in the Air Force for four years on March 1, 1962 and becomes an airplane mechanic. Because of a critical shortage in that occupational specialty, he is asked on January 10, 1966 to extend his enlistment for a four-month period, and agrees to do so. He is honorably discharged on June 30, 1966 and applies to his preservice employer on July 15, 1966 for reinstatement.

D has full statutory reemployment rights. The four-month extension which caused him to exceed the four-year limitation, though voluntary, was at the request and for the convenience of the Government.

(5) As a recent direct enlistee in the Ready Reserve, E receives orders to perform six months of initial active duty for training beginning June 15, 1962 and leaves his job at Company M for that purpose. Shortly before his six months are up, he gets a "Dear John" letter from his girl friend and decides to enlist for four years of active duty beginning December 1, 1962. He is honorably discharged November 30, 1966 and applies to Company M for reemployment just after Christmas.

E has not exceeded the statutory four-year limitation. Initial active duty for training does not count toward the time limit on active duty.

(6) F leaves his job with N Company to enlist in the Army for three years which end September 1, 1962. Instead of returning to N Company after completing that enlistment, he gets a job with O Company where he works for a couple of years. The local Army recruiter promises him a high non-commissioned rating if he will reenlist, so he leaves O Company and signs up for a four-year enlistment. He completes that enlistment honorably and on schedule and promptly applies for reemployment at O Company. O Company refuses to reemploy him on the ground that he has had more than four years of active duty after August 1, 1961.

F has reemployment rights with O Company. The active duty he performed under his earlier enlistment, before he was employed by O Company, does not count as far as O Company is concerned.

(7) Laborer G quits his job at P Steel Corporation on October 10, 1961 and enlists for four years in the Marine Corps. After serving about two

years, he goes AWOL, is apprehended by the military police three months later, and is sentenced to a month of confinement. On completing the sentence he returns to active duty and his conduct thereafter is exemplary. He receives a discharge under honorable conditions on February 9, 1966 after performing the four years of creditable active duty for which he had signed up, although the discharge date is four years and four months after the active duty began. He applies to P for reemployment on February 15, 1966.

G is not considered to have exceeded the four-year limitation, since it is a limitation on the amount of active duty and not on the total amount of time elapsing.

(8) Employee J leaves his position at R Company to enlist in the Army. After four years on active duty ending May 12, 1960, he is reinstated by R Company and joins the local National Guard unit. On August 10, 1961 his unit is called to active duty for one year in the Berlin Crisis. He is released from active duty on August 9, 1962 and applies to R Company for reemployment on August 20.

J did not exceed four years on active duty before August 1, 1961 and he did not exceed four years on active duty after August 1, 1961. R Company is therefore obligated to reemploy him. It was primarily to protect veterans in situations like J's that the second four-year limitation was added to the statute in 1961. The answer would be the same if his return to active duty on August 10, 1961 had been voluntary.

(9) Employee V works as an Office Manager for Employer S until drafted on October 1, 1961. He is released from active duty on September 30, 1963 and looks around unsuccessfully for civilian employment to his liking. He asks some of his friends about the possibilities at S's establishment, but does not actually apply for reemployment there. On December 1, 1963 he enlists in the Air Force for four years, but loses one eye in an explosion at his air base and receives a medical discharge on March 20, 1965. He applies to S for reinstatement on April 10, 1965.

V is entitled to reinstatement in his job. He has not actually exceeded four years on active duty altogether, even though he would have done so if his original expectation and intent on reenlisting had been carried out. The law entitled him to a 90-day period after his first release from active duty in which to make up his mind about seeking reinstatement at that time, and by reenlisting within that period he kept alive the possibility of future reemployment rights with Employer S.

(10) Employee W leaves his position at T Company in 1952 to enlist in the Army for three years. After his honorable discharge in February 1955 he does not apply for reemployment at T Company but takes a job with X Company instead. In June 1956 he quits his job at X Company and is rehired at T Company as a new employee. On April 10, 1957 he leaves this job to enlist in the Army again. He is honorably discharged on April 9, 1961 and makes a timely application to T Company for reemployment.

The total of seven years of active duty does not exclude W from statutory protection in 1961, because his first employment relationship with T Company ended when he failed to seek reinstatement there in 1955 and an entirely new one started in June 1956. He did not exceed four years on active duty while absent from this new employment relationship with T Company, so he is entitled to reinstatement in 1961.

(11) Employee AB quits his job as a Janitor for KL Company to enlist in the Navy on May 1, 1965. He "washes out" after six weeks at the Naval Training Station and receives a General Discharge on June 10, 1965. He applies to KL Company for reemployment on August 5, 1965, but does not want to show his discharge papers to KL's personnel office. KL refuses to reemploy him without seeing the papers and he complains to the Office of Veterans' Reemployment Rights. An official of the Office certifies to KL Company on August 20, 1965 that he has seen AB's discharge papers and that they show active duty from May 1, 1965 to June 10, 1965 and a General Discharge.

AB is entitled to reinstatement. The short duration and premature termination of his active duty do not rule him out. The law does not require him to show his discharge papers to the employer, although most veterans have no objection to doing so and delays in establishing eligibility can be avoided thereby. KL is entitled to know the basic facts and dates establishing AB's right to statutory protection, but the government official's certification will serve that purpose.

(12) Employee CD is discharged from the Army on March 5, 1966 under "other than honorable" conditions because of certain alleged misbehavior while in uniform. He applies to his preservice employer, MN Railroad, on March 30, 1966, for reinstatement but is turned down because of the character of his discharge. On May 15, 1967, after an appeal by CD, a military review board decides that the evidence did not warrant an "other than honorable" discharge and issues to CD a discharge "under honorable conditions." On May 25, 1967 he presents this upgraded discharge to MN and again requests reemployment.

Since he had made a timely application to MN for reemployment in 1966, had diligently pursued his appeal, and now has a "satisfactory" type of discharge, CD is entitled to reemployment promptly after May 25, 1967. However, the law will not support a claim by CD against MN for wages or other benefits lost between his actual discharge on March 5, 1966 and his reapplication on May 25, 1967. Until the latter date, he had not met the statutory conditions of eligibility.

(13) EF, a reserve officer completing a one-year tour of active duty, receives orders relieving him from active duty as of September 1, 1963 and indicating that he is entitled to a certificate of satisfactory service. He is sent home after being told that the certificate will be mailed to him. His military records are placed in the wrong file at the separation point and the certificate does not reach him until May 1, 1964, after he has written two letters on the

matter to the military. In the meantime, he applies to OP Company, his pre-service employer, for reinstatement on September 20, 1963.

OP is obligated to reemploy EF promptly after his application on September 20, 1963, inasmuch as his orders themselves are sufficient evidence of satisfactory service without waiting for the administrative error in the issuance of his certificate to be corrected.

## CHAPTER VI

### Applying for Reemployment

**After Active Duty.** An inductee, enlistee, reservist, National Guardsman, or other veteran returning from active military duty, in order to bring himself within the protection of the reemployment statute, must apply to the employer for reemployment within 90 calendar days after his release from active duty, or from hospitalization continuing after such release for not more than one year. This does not mean that he must return to work within the 90 days. All he has to do within that period is to make the application. The statute does not specify any time limit on the period which may elapse between the date of his application and the date he returns to work. It is sufficient that he be willing to return to work within a reasonable time after applying. What is a reasonable time would depend on the veteran's intent and the reasons for the delay.

The 90-day period begins to run as of the calendar day after the date of release. If the last day of the application period falls on a Sunday, a holiday, or another non-workday, an application made on the next actual working day will be considered timely.

The request for reemployment may be made orally or in writing, expressly or by implication, and in person or otherwise. No special form or procedure is required by law.

It must be made to the employer or to an agent of the employer who has actual or apparent responsibility for receiving applications for employment. If there has been a change in ownership or management, the successor in interest is the employer to whom the application should be made.

An application for reemployment made by a serviceman before his separation from active duty constitutes a continuous application which is effective as of when he is released from active duty. However, where the veteran has made such an application, he should inform his employer, within a reasonable time after his release from active duty, of his availability for reemployment, so as to make it clear that he made the application in good faith and has not abandoned it.

The veteran is not required to identify the particular position for which he is applying or to which he believes he is entitled. A request for "reemployment" is enough. A request for reemployment in a position to which the veteran believes himself entitled is a valid application for reemployment even if that belief is mistaken. However, a mere inquiry about employment possibilities, unless it would reasonably convey the idea of a claim for reemployment, is not enough.

The veteran should identify himself as a former employee returning from military service, though there are circumstances in which it is not necessary for this to be done expressly, as in the case of a small organization where the employer could reasonably be expected to know about the veteran's previous employment and his military service without being told.

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The laws allows the veteran a fixed time within which to apply and he is entitled to the full use of it. He cannot be compelled to apply within less than the statutory period. During his 90 days he can seek and take employment elsewhere or do anything else he wishes, provided that such actions are followed by a proper application or an assertion of his statutory claim within the 90-day period. If he applies to his preservice employer and that employer refuses to reinstate him or takes no action on the application, the veteran does not lose his reemployment rights by subsequently going to work elsewhere.

The 90-day period begins and continues to run even if the employer is not in active operation because of a strike, a vacation shutdown, a lack of business, or other reasons, and even if the veteran's seniority is not sufficient to entitle him to return to active work immediately.

If the veteran is hospitalized upon or immediately after his release from active duty, his 90-day period does not begin to run until the day after he is released from hospitalization, provided that the hospitalization period and the application period do not exceed one year and 90 days altogether. The veteran need not be actually hospitalized at the time of his release from active duty, and though the condition requiring hospitalization must exist at that time, it need not be service-connected. The hospital need not be a Government-operated one. In many situations, outpatient treatment would amount to hospitalization for the purpose of postponing the start of the 90-day application period.

In any situation the facts are to be liberally construed in favor of the veteran in determining whether he has made an adequate and timely application for reemployment.

**After Initial Active Duty for Training** A reservist or member of the National Guard who is ordered to perform an initial period of active duty for training of not less than three consecutive months has a 31-day period in which to apply for reemployment. His 31 calendar days begin to run on the day after his release from that active duty for training. If he is hospitalized incident to such active duty for training, his 31-day period commences the day after his discharge from hospitalization, or one year after his scheduled date of release from active duty for training, whichever is earlier. Except for these differences, the discussion above on applying after active duty is also applicable with respect to applying after initial active duty for training.

**After Training Duty** The statute does not require an "application for reemployment" in the case of a reservist or National Guardsman who performs weekly or weekend training duty, performs annual training duty such as summer encampments and cruises, attends a special course of instruction at a service school, or is hospitalized incident to such training duty. However, it does provide that he is subject to the employer's usual rules with respect to absence from scheduled work, if he fails to "report for work" at his "next regularly scheduled working period" after the last day he reasonably needs, following his release from training duty, for returning from the training site to his place of employment. Delay in reporting back is excusable if it is due to factors beyond the employee's control. If he is hospitalized incident to the

training duty, the date by which he must report for work is postponed accordingly, up to a maximum of one year after his release from training duty.

**After Examination or Rejection** An employee who leaves his position in order to take a pre-induction or other examination to determine his physical fitness for military training or service is subject to the same provisions on reporting back for work that apply to employees returning from military training duty. The same is true of an employee who leaves his position to report for induction or other active duty but is rejected for military service. Such employees must report back at their "next regularly scheduled working period" after being examined or after being officially notified of their rejection, or else they become subject to the employer's usual rules with respect to absence from scheduled work. Due allowance must be made, of course, for any necessary travel time and for delays due to factors beyond the employee's control.

### EXAMPLES

(1) Bus Driver A is drafted into the Army from his job with K Lines. A few days after returning from military service two years later, he goes to K's Employment Office, identifies himself as a former employee just out of military service, and requests reinstatement. He is given an employment application form to take home, complete, and mail back with a recent photograph attached, and is told that K lines will let him know about reemployment after they have received the completed form. Before returning the form, A spends several weeks looking for employment elsewhere, but does not find anything satisfactory, so on the 95th day after his release from military service he mails the completed written application back to K Lines. The company informs him that he has waited too long to submit the application.

A had made a timely and sufficient application to K Lines for reinstatement even without completing and returning their form. A returning veteran who requests reemployment is not a new applicant for original employment and does not have to follow the procedures or meet the conditions required of new applicants. A's timely and legally sufficient application still places on K Lines the obligation to take whatever affirmative steps are necessary to offer him proper reemployment.

(2) B, a Computer Programmer for L Gas and Electric Company, is drafted into military service. Two years later, on March 20, 1966, he is released from active duty and L Company hears about this through mutual acquaintances. L urgently needs an experienced Computer Programmer and sends a registered letter to B's home asking him to report for work on April 5. B does not reply, but goes to California to visit his brother for six weeks and look for employment there. In the meantime, L hires someone else for the job. B returns home and applies to L on June 1 for reemployment.



B has made a timely application for reinstatement and is entitled to the job. A veteran's preservice employer cannot require him to apply before his 90 days are up.

(3) The day before Serviceman C is scheduled to be released from three years on active duty, a physical examination reveals that he has tuberculosis. He elects to accept release from active duty and be treated at a private hospital, where he is hospitalized for 51 weeks. Two weeks after he is discharged from the hospital he applies to his preservice employer, M Company, for reinstatement.

The application is timely even though not made within 90 days after the date of C's release from military service. It was made within 90 days after his release from hospitalization. The hospitalization was for a condition existing prior to his release from active duty, began promptly after his release from active duty, and did not last for more than a year.

(4) Soda Clerk D is released from active duty on April 15, 1966. On April 25, 1966 he is injured in an automobile accident which keeps him in the hospital until August 1, 1966, on which date he applies to his preservice employer, Drug Store N, for reemployment.

D has not made a timely application and is not protected by the reemployment statute. The condition requiring hospitalization did not exist prior to his release from military service, so he is not entitled to the extended application time. He could have contacted Drug Store N from the hospital by mail, telephone, or telegram within his 90-day period to request reemployment after his recuperation, and his failure to do so has cost him his reemployment rights.

(5) Loom Operator E returns from active duty to find Textile Mill O, which he had left to enter military service, temporarily shut down for lack of business. E later writes a letter to the mill, postmarked within 90 days after his release from military service, in which he requests reinstatement on the recall list. Four months later the mill gets some orders and recalls its laid-off employees in seniority order.

E made a timely and sufficient application for reinstatement, was thereupon entitled to restoration on the recall list with his preservice seniority date, and is entitled to resume work before any Loom Operator with a later seniority date is recalled.

(6) Inspector F leaves his position with P Watch Company to enter military service. While he is in service, the company goes out of the watch business because of foreign competition, converts itself to a holding company, and sells its plant and equipment to Q Company, which promptly reopens the plant for the manufacture of timing devices for the Armed Forces. By agreement with the union at the time of the sale, P Company terminates all of its plant employees with severance pay in amounts proportional to their length of service, and Q Company agrees to hire all of P's Inspectors as new employees when the plant reopens. Six months after Q Company commences production, F returns from military service, and within 90 days thereafter he applies to Q

Company for reemployment and to P Company for "whatever rights he has with P Company as a returning veteran."

He is entitled by law to the severance pay from P Company and to employment with Q Company with seniority dating from when it commenced production at the plant. In the circumstances it would have been pointless to request "reemployment" with P Company. As far as the Inspectors are concerned, Q Company is a "successor in interest" of P Company within the meaning of the reemployment statute.

(7) Employee G leaves his position as a Mechanic in the employ of R Motors to enlist in military service for four years. About a month before the expiration of his enlistment, he writes R Company a letter informing them that he will be released from military service October 28, 1966, and asking them to consider the letter his application for reinstatement and to let him know when he should return to work. R Company does nothing in response to the letter. G does nothing either, until on February 1, 1967, the 96th day after his release from active military duty, he visits the shop and finds a stranger working in his job. He claims that he had applied for reinstatement and asks what the story is. R Company replies that since he did not show up within 90 days after October 28, 1966, they assumed he was not interested.

G still has reemployment rights with R Company. The application he made while still in military service was sufficient, and there is no evidence that he abandoned it or that he did not make it in good faith.

(8) Employee AB also leaves his position at R Motors to enlist for four years, along with his friend G in Example (7). AB is released from active duty October 28, 1966 along with G. Unlike G, he telephones R Company on November 1, 1966 and asks for Mr. R, the owner, but the office girl tells him Mr. R. is out. AB asks her to have Mr. R. return the call. As in G's case, AB does nothing more until February 1, 1967, when he accompanies G to the shop. R Company gives AB the same answer it had given G. In AB's case, R Company had received correspondence from the Department of Labor on November 4 advising them that AB was being separated from military service and had expressed an interest in reemployment with them.

AB is also without statutory reemployment rights at R Company. His telephone call to the office girl was not a sufficient application for reinstatement because he did not tell her why he wanted to speak with Mr. R. The Department of Labor's correspondence to R Company was not an application on the veteran's behalf.

(9) Veteran CD, who leaves his job at Department Store S in response to induction orders and completes two years of honorable military service on March 10, 1967, telephones the company's personnel office on March 20, 1967 and asks to speak with the Personnel Director. The office secretary answers the telephone, informs CD that the Personnel Director is out, and asks if he would like to leave a message. CD tells her that he is back from military service and

would like to return to his job after resting and relaxing for another week or two, and he asks her to have the Personnel Director advise him when he should come back to work. Nothing more happens, so on April 17, 1967, CD takes a job driving a taxi while waiting for word from Store S. On June 15, 1967, more than 90 days after his release from military service, CD still has not heard from the store, so he goes in to see the Personnel Director, who informs him that they never had any intention of reemploying him and that it is now too late for him to press a claim under the law anyway.

CD had made a timely and adequate application to Store S for reinstatement and the responsibility for making the next move was theirs. He is entitled to reinstatement and to damages equal to the difference between what he would have earned if Store S had promptly reemployed him and what he did earn in the cab-driving job from about April 1, 1967, when he was ready to return to work, until he is properly reinstated.

If CD had waited until October 1, 1967, for example, to check with Store S as to what the trouble was, the same answer would apply. However, a court could deny or reduce the amount of the damages if it felt that CD had been to some extent responsible for their accrual.

(10) New Car Salesman FG, an employee of Midville VW, Inc., receives orders to report for induction on May 17, and leaves the job for this purpose. He is neither inducted nor rejected, but is sent home to await the outcome of an investigation of his U. S. citizenship and his previous employment in Germany. He arrives home the afternoon of May 18 and reports back to Midville VW on May 19, explaining what has happened and asking to go back to work. The company wants to know on what basis he is claiming reemployment rights at that time.

FG has statutory reemployment rights either as a temporary rejectee or as a returning examinee. Some investigations of suitability for induction can take months or even years to complete and the law was not intended to keep reemployment rights in suspense until the final outcome is known. Final rejection, final completion of the examination, or final acceptance followed by military service would provide a new basis for rights.

(11) Employee H leaves his job at X Factory to go on a two-week summer encampment with his reserve unit from Saturday, July 7, to Sunday, July 22, after requesting a military leave of absence from X. He drives his car to the training site and starts home on July 22, but has an accident on the way back and therefore does not arrive until the afternoon of Wednesday, July 25. He reports to X for work Thursday morning, July 26.

H is entitled to return to his job. The delay caused by the traffic accident was due to factors beyond his control.

(12) J, the brother of H in the previous example, also works for X Factory. He is a member of the same reserve unit and requests a leave of absence for the same summer encampment. He flies back from camp by way of Chicago, but stops over there and visits with friends for a week. He arrives home Monday, July 30, and reports to X for work on Tuesday, July 31, but is

told that he no longer has a job there in view of the well-known rule of X's whereby any employee absent more than three workdays without permission is considered to have quit.

J exceeded the statutory time limit for reporting back, and he exceeded it by more than the amount of unauthorized absence permitted without penalty under his employer's established rules. Therefore, the reemployment law does not protect him against the usual penalty imposed by the employer for such unauthorized absences. The statutory time limits do not include delay that is purely for the employee's personal convenience and within his control. However, if the company rule had provided only for some lesser penalty, such as suspension for a certain period without pay, then J's termination by X would have been contrary to the statute.

(13) Veteran K returns to his preservice employer, Public Accounting Firm Y, on September 1, 1966, which is 30 days after his release from active military duty, and he meets all the other conditions of eligibility in the statute. K requests reinstatement, but he also asks Y for an immediate ten-month leave of absence to attend Z University and complete the requirements for a master's degree in business administration under the GI Bill of Rights. Y is willing to grant such an educational leave, as it has routinely done in the past for employees seeking that degree, but advises K that it will cause him to lose his protection under the reemployment statute. K expresses a contrary opinion but goes ahead and takes the leave. On June 30, 1967 he reports back to Y with his new diploma in hand, but Y says it unfortunately cannot use any more accountants at that time.

K is legally in the same situation he would be in if he had returned to work in September 1966 instead of going on educational leave. He was not necessarily entitled by law to the educational leave, although refusal to grant it might have been discriminatory against him as a veteran in view of Y's routine practice of granting similar leaves to other employees. However, the leave was in fact granted, and K evidently has complied with all nondiscriminatory conditions imposed by Y on the taking of such leaves. Refusal to restore him to his position upon his return from Z University is equivalent to discharging him without cause, and the law protects him against discharge without cause for one year after his reinstatement. (See Chapter XIII.) In this situation, K was, in effect, reinstated on September 1, 1966, though in educational leave status by mutual consent rather than on the job. Although his special statutory protection against discharge without cause will end August 31, 1967, he will continue to be protected against discrimination after that date. (See Chapter XIII on this point also.)

## CHAPTER VII

### Applicant's Qualifications

One of the statutory conditions to be met by a veteran applying for reinstatement is that he be qualified to perform the duties of the position to which the law otherwise entitles him. Whether or not the veteran is qualified to perform such duties is a question of fact to be resolved in the light of all of the surrounding circumstances. It is presumed, until facts proving the contrary are presented, that a returning veteran still possesses the qualifications to perform the duties of his preservice position. Where his seniority would have entitled him to an advanced position if he had not been absent for military service, it is a question of fact whether he already possesses the other qualifications for reemployment in the advanced position or needs further training or experience first, and if so, how much.

A change in the veteran's physical condition during his military absence is not considered to affect his qualifications unless it substantially impairs his ability to perform the duties in question or creates a safety hazard for himself and other employees. A detailed discussion of disabled applicants for reemployment and their rights is found in Chapter XII, "Disabled Applicants."

The matter of being qualified for the position is not solely a question of the veteran's physical condition. It may also involve job requirements, standards of performance or education, statutory or regulatory restrictions such as being of a certain age or marital status or possessing a certain kind of license or bond, and other conditions related to the total employment situation.

In general, shortcomings displayed by the employee before military service cannot serve as grounds for refusing to reinstate him, if he was kept on the job despite such shortcomings. Of course, there may be situations in which certain disqualifying facts could not reasonably have been discovered before the employee's departure for military service, and in that event, the preexisting defects could be urged as a bar to reinstatement. Each case must be resolved on the basis of its own facts, including the employer's past actions in similar or related situations.

If the veteran's preservice skills have been blunted by disuse during his military absence, but he can be expected to regain his former proficiency within a reasonable time after reemployment, he meets the statutory requirement of being qualified to perform the duties of the job.

If the requirements or content of the particular job have been changed to some extent, and the change is not simply a discriminatory attempt to bar the veteran's reinstatement, he must be able to meet the changed requirements just as the other employees did, within a reasonable time after his return to work.

If the veteran possesses the minimum qualifications needed to perform the duties of the job to which he is otherwise entitled, the fact that the incumbent may be better qualified for those duties does not defeat the veteran's right to the job.

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The question of qualification relates to the requirements of the position to which reemployment is appropriate. If it is established or agreed upon the veteran's return from military service that the requirements of the otherwise appropriate job have been increased beyond his skill or the skill he could be expected to attain within a reasonable time, he is entitled to a job requiring skill comparable to that required in his former job at the time he left it, and carrying like seniority, status, and pay. (See Chapter IX, "Position To Be Supplied.")

### EXAMPLES

(1) Employee A, who is not a high school graduate, leaves his job with Employer P for military service and is inducted January 10, 1965. On January 1, 1967, P establishes high school graduation as a requirement for all employees hired after that date. A is released from active duty January 9, 1967 and applies to P for reemployment January 20, 1967.

A does not have to meet the new requirement since he is not a new applicant for employment.

(2) Stewardess B leaves Q Air Lines to enlist in military service for three years, and while in service she marries an Air Force pilot. On being discharged from military service she applies to Q for reemployment, but Q has a rule, to which it has never made exception, that a stewardess must remain unmarried or lose her job.

B is not entitled to reinstatement as a stewardess. She no longer possesses the qualifications required to remain in that job. However, if Q Air Line has a policy, practice, or contract provision whereby stewardesses who marry are entitled to other jobs with the company, B would be entitled to reemployment in a different job accordingly.

(3) Branch Manager C is drafted into the Army from his position with R Finance Company. A month later, an audit clearly establishes that C had systematically embezzled about \$18,000 of R's funds over a period of time.

On returning from military service, C will not be considered qualified to perform the duties of his preservice position or of any other position with R Company which involves access to its funds. For that matter, since discharge is a usual and reasonable penalty in such situations, C will not have any reemployment rights at all with R. Mere unsubstantiated suspicion of embezzlement, however, would not justify a denial of reinstatement.

(4) Ledger Clerk D leaves his job at T Warehousing Company to enlist in the Navy, and returns four years later seeking reinstatement. In the meantime, T has installed some new bookkeeping machines with which D is unfamiliar. When the machines were installed, the other Ledger Clerks were all given two weeks of training in their use and operation.

T Company cannot deny D reinstatement on the ground that he lacks the necessary qualifications without first providing him with the same training, in addition to any reasonable period he needs for regaining his former skills.

(5) Mr. U operates a non-union barber shop with five barbers, one of whom is Employee E. E leaves for military service in 1965 and is replaced by a new barber, F. F is an excellent barber and has a lot of friends who start coming to U's shop for their hair cuts. A few months later the men decide to join the union, the shop is organized, and U agrees to use only union barbers in the future. In the meantime the legislature enacts a licensing law requiring all barbers to pass a health examination and obtain a license from a State Board if they wish to practice their trade after January 1, 1967. E returns from military service and applies for reinstatement on February 15, 1967. With appropriate expressions of regret, U declines to reemploy E in view of all these developments.

In this situation, E is entitled to a reasonable time in which to get the necessary State license before the question of his qualifications is determined. He must be willing to comply with requirements in the collective bargaining agreement as to union membership on the same terms that would have applied to him had he been present when the shop was organized. The fact that F may be a better barber or may draw in more customers is immaterial.

(6) Dock Loader G, whose preservice job with V Trucking Company involved constant heavy lifting, returns from military service and applies for reemployment two months later. V's company physician examines him and finds a pronounced hernia condition. G does not consider the condition serious, but his own doctor agrees with V's company physician that G should have an operation to correct the hernia before doing any more heavy lifting.

Although G is not qualified to return to his job at the time he applies for reinstatement, this does not mean that he is unqualified for restoration to the employment relationship in the broad sense. He is entitled to reinstatement in whatever status an employee of V would hold if that employee had developed a similar condition off the job. This might well be sick leave status, paid or unpaid.

(7) H, an employee in W Radio Corporation's labor pool, enters military service from a job which requires extensive walking and lifting. While in military service he loses a leg and suffers a back injury, so is no longer qualified to work in W's labor pool. However, the normal line of progression at W's plant is from the labor pool to sedentary positions on the TV assembly line, and if H had not been absent in military service his seniority would have entitled him to move up to one of these assembly line positions which became vacant while he was gone. At the time H applies for reemployment he is qualified for the duties of the assembly line job despite his disabilities.

H is entitled to the assembly line job. He is qualified for his "position" even though he is not qualified for his exact preservice job.

(8) J leaves his position as Assistant Sales Manager for Beer Distributor X to go on active military duty. On being released from active duty he attempts to set up a rival firm of his own, solicits some of X's key employees to go to work for him, and makes derogatory remarks to several of X's customers about X and its product. However, his efforts to obtain the

necessary financing fall through and he applies to X for reinstatement within the 90-day period allowed by law.

Loyalty to the employer is one aspect of being qualified for reinstatement and the cumulative effect of J's activities is certainly one of disloyalty. However, mere attempts by J to obtain employment with a rival firm, and mere expressions of disagreement with X, would not have amounted to disloyalty sufficient to destroy J's reemployment rights.



## CHAPTER VIII

### Changes in Employer's Circumstances

The statutory obligation to reemploy exists "unless the employer's circumstances have so changed as to make it impossible or unreasonable" to reemploy the veteran. In view of the remedial purposes of the Act, this exception must be narrowly construed and the burden of proving its applicability is on the employer. It was included in the Act primarily to relieve the preservice employer, or his successor in interest, of the obligation to create an unnecessary job in order to accommodate the veteran.

There is no comparable "changed circumstances" provision, either expressed or incorporated by reference, in the sections of the law pertaining to reemployment rights after training duty (other than initial active duty for training of not less than three months), examination, or rejection.

The change must be in the employer's circumstances, as distinguished from the circumstances of the other employees. If a position exists to which the veteran is otherwise entitled under the law, the fact that other employees may be disadvantaged by his reinstatement does not make it impossible or unreasonable to reinstate him.

The impossibility or unreasonableness of reemployment is determined as of the time the veteran applies for reinstatement. Conditions existing at some time during his absence, but no longer existing at the time of his return, would not make it impossible or unreasonable to reemploy him.

For reemployment rights to be barred under the "changed circumstances" provision, the impossibility or unreasonableness must apply not only to the position the veteran left for military service but also to any position he would have attained but for his military absence and to all positions of like seniority, status, and pay.

The "changed circumstances" provision may come into play in some situations where there has been a sale, transfer, or reorganization of all or a part of the employer's business, where the business has changed drastically in nature or in size, or where the veteran's old job has been abolished.

The incorporation, reorganization, sale, transfer, or merger of the preservice employer's business is not ordinarily such a change in the employer's circumstances as to make it impossible or unreasonable to reinstate the veteran. If the business still exists with substantially the same activity on substantially the same scale and requires services substantially similar to those rendered by the veteran, it is not impossible or unreasonable to reinstate him.

The Act expressly extends the reemployment obligation to successors in interest of the preservice employer. It does not define the term "successor in interest," but an employer may be a successor in interest for the purpose of inheriting the reemployment obligation without necessarily being a successor in interest in other senses or for other purposes. Where the preservice employer is still in existence but a successor in interest has taken over a part of its business,

the veteran would have a choice between the two employers if he would have had such a choice had he been present when the change occurred. He may have a right to employment with the successor in interest and also a right to certain monetary benefits, such as severance pay, from the preservice employer, again depending on the rights he would have had by contract or practice if he had been present when the change occurred. A careful scrutiny of the surrounding facts in the particular case is necessary to determine whether there is a successorship and where the obligations lie.

If the veteran's preservice position has been abolished during his military absence, it does not have to be reestablished in order to provide him with reemployment. However, if a position of like seniority, status, and pay still exists and he is qualified to perform the duties of this position, reemployment cannot be denied on the ground that it would be impossible or unreasonable. The veteran's rights are not limited to the exact job he left. Where the preservice position has been abolished and an established seniority system exists, the veteran's status under the "changed circumstances" provision is determined by an examination of what his employment history would have been under the established seniority system if he had not been absent for military service.

A mere change in the title of the preservice position, or its evolution or alteration through the addition or subtraction of certain duties, does not warrant the conclusion that it has been abolished where there is a substantial identity of function or a dominant likeness between the preservice position and a still existing position. If the veteran can be expected to demonstrate the qualifications needed for the altered position after a reasonable period of instruction or familiarization, it is not impossible or unreasonable to reinstate him.

A mere decline in the volume of the employer's business does not make it impossible or unreasonable to reinstate the veteran unless it has wiped out all positions encompassing his preservice duties, all positions to which he would have advanced or transferred if his employment had continued without interruption by military service, and all positions of like seniority, status, and pay. Of course, where an established seniority system exists, a decline in business may result in a situation where the veteran's right is only to be reinstated on the rolls in layoff status, with the right to return to work when his name is reached for recall. He would be subject to this result or any other result that would have become applicable to him under the established seniority system had he remained present and available for work.

Organization of the employer's establishment by a labor union while the veteran is in military service, and adoption of a collective bargaining agreement altering the terms and conditions of employment previously applicable to his old job, would not be such a change in the employer's circumstances as would make it impossible or unreasonable to reinstate the veteran. After reinstatement, of course, the veteran would be subject to the terms of contracts entered into between management and labor to the same extent as employees who remained on the job, but he would not be bound by any agreements discriminating against veterans as a group.

## EXAMPLES

(1) Announcer A leaves his position with Radio Station FM to enter military service. During his absence in military service, FM is sold to a new owner who converts it from a classical music station to one which emphasizes rock-and-roll music and newscasts. As attrition occurs among the announcers, the new owner replaces them with disc jockey types, and by the time A returns from military service, all of his former fellow announcers have quit for employment elsewhere.

The new owner inherits the old owner's reemployment obligation as a successor in interest for that purpose. A is entitled to a reasonable time to demonstrate proficiency as a disc jockey or newscaster. These jobs are not so different from what he was doing before military service that it would be impossible or unreasonable to reemploy him.

(2) B is the only embalmer employed by P and Q Funeral Directors, a partnership, in Flatville, a midwestern farming community. B is drafted into military service and C is hired to replace him. Later P and Q, realizing that most of their potential prospects are moving to the cities or retiring to Florida, consolidate their operations with those of R, a funeral director in an adjacent county, forming PQR Funeral Parlors, a corporation, which will do all of its embalming at R's establishment in Tuxedo Junction. R has been employing two embalmers, D and E, but PQR needs only two embalmers altogether and it is agreed that each component firm shall supply one of them, so C and E are kept on the rolls of PQR and D is dropped inasmuch as R considers him less competent than E. This is the situation when B returns from military service and applies to PQR for reemployment.

B is entitled to reinstatement. PQR Corporation is the successor in interest of the P and Q partnership. The bringing in of an additional owner, the change in the location of the job, and the hardship on C or E that may result from B's reemployment are not enough, separately or cumulatively, to make it impossible or unreasonable to reinstate B.

(3) S Pharmaceutical Company loses Chemist F to the military when he is drafted. While he is gone, an extremely tight labor market develops in F's particular specialty, and in order to keep the position filled S lures Chemist G away from a competitor by giving him a two-year contract of employment. F returns from military service and applies for reemployment at a time when G's contract still has a year to run. S Company cannot use them both and if it lets G go it will have to pay him a year's salary.

The existence of the contract with G cannot bar F's statutory reemployment rights on the ground that his reemployment would be impossible or unreasonable. The basic purpose of the statute cannot be frustrated by a practice of entering into employment contracts with other employees.

(4) In T Steel Company's union contract there is a provision whereby any employee who remains in continuous layoff status for two years shall lose his seniority and recall rights and shall be deemed terminated. Crane Helper H

leaves his job at T's plant to enlist in military service for three years. Six weeks later there is a mass layoff at the plant because of a decline in sales, and Crane Helpers above the position H would occupy on the seniority roster are laid off. T's recovery is so slow that they remain on layoff for two years and are terminated under the contract. A few months later, with T's production still at a low ebb, H completes his three years of active duty and applies for reinstatement, contending that the contractual two-year cutoff provision could not run against him while he was in military service.

In these circumstances, since H clearly would have lost his seniority and been terminated under the established seniority system even if he had not been in military service, it would be considered impossible or unreasonable to require T Company to reinstate him as if his seniority had continued unbroken.

(5) U Company operates office and apartment buildings under management contracts with the owners, using its own employees. Elevator Operator J leaves his job in one of these buildings to enter military service, and while he is gone its manually operated elevators are replaced with automatic ones of the push-button type. For that reason, U Company declines to reemploy him when he returns from military service and applies. The same kind of change has been occurring in most of the other buildings managed by U Company, but there are still a few where the elevators are manually operated.

J is entitled to one of the remaining elevator operator jobs even though it is in a different location. However, if there is an established company-wide seniority system and J's seniority, including his military service time, is less than the seniority of any elevator operator who is still working, it would be considered unreasonable to reinstate him in one of the remaining elevator operator jobs.

(6) One division of W Packing Company operates a tuna cannery in a seacoast town, and another division of W Company operates a vegetable cannery 25 miles inland. K, a production line employee at the tuna cannery, leaves for military service. While he is in service, W Company goes out of the tuna business because of Japanese competition and puts its seacoast cannery up for sale. In closing out that operation, W Company agrees with the union that the employees of the tuna cannery will be given priority, in line with their seniority at the tuna plant, for openings at the vegetable cannery in jobs for which they are qualified. If hired there they are to come in as new employees, and if not hired there within six months after the closing of the tuna cannery, whether through lack of openings or by their own choice, they are to receive severance pay in the amount of three months' wages. K returns from military service and contacts W Company for reemployment eight months after the tuna operation has ceased. Of the five cannery workers who had been junior to him at the tuna plant, two were hired on the production line at the vegetable cannery within the six-month period and three elected to take severance pay.

K is entitled to choose between the job he could have had and the severance pay he could have received. The reemployment obligation rests on the company as a whole and not just on the division where he had worked

before military service. The fact that he was in military service throughout the contractual period for making a choice prevents it from being considered impossible or unreasonable to allow him to make his choice after that period has expired.

(7) Route Salesman L, who is compensated strictly on a commission basis plus expenses, operates out of X Cosmetics Company's regional headquarters in Bigtown, calling on retailers in several counties in the northwestern part of the state. He leaves for military service after training a new employee to take over his route and introducing him to the customers. During his absence X Company's business expands and the territories of the various route salesmen are subdivided and realigned. The salesmen build up personal followings in their new territories, gaining new customers and losing some old ones to the competition. When L returns from military service and applies for reemployment, his former route no longer exists, and those of his former customers who still buy X's products are spread over the territories of three other salesmen.

It is not impossible or unreasonable to reinstate L in this situation. Although his exact former position is no longer identifiable in the changed circumstances, other positions exist which are of like seniority, status, and pay, and he is entitled to a route which will provide him with earnings opportunities comparable to those he would have had if his employment had continued uninterruptedly.

(8) While Employee M is in military service, his preservice employer, Y Woolen Mills, is organized by a union and his type of job comes within the bargaining unit. A union shop clause is adopted which requires all employees to join the union within 30 days in order to remain on the rolls. Several months later the union goes out on a strike which is still in progress when M returns from military service and applies for reinstatement. He declares, however, that he intends to join the union and honor the picket line.

None of these changed circumstances make it impossible or unreasonable for Y to reinstate M in the same status that the other striking employees have. His absence in military service throughout the 30-day period for joining the union excuses him from meeting that requirement until 30 days after he returns to work. He cannot be compelled to cross the picket line, or to resume work before the strike is over, in order to preserve his statutory reemployment rights.

(9) Employee N is laid off by Z Company but has recall rights under the established seniority system. A month later he enlists in military service for three years without informing Z Company, and a year after the start of his active duty Z Company sends a recall notice by registered letter to his last known address. He does not respond, and in the absence of any response within 10 days, Z Company strikes his name from its rolls in accordance with its established practice. He applies for reinstatement a week after completing his enlistment.

It is not impossible or unreasonable to reemploy N with his original seniority date. His failure to keep the company informed of his whereabouts,

or to respond to the recall notice, is excused by the fact that he was in military service.

(10) Mr. SR operates the Star Shoe Repair Shop. His only employee, O, leaves for military service and SR hires FG to replace him. FG is a family man with eight children and a sick wife, and is also a steadier and more careful workman than O. O completes his military service and makes a timely application for reinstatement, but SR pleads that he needs only one employee and that it would be unfair and unreasonable to reemploy O and throw FG out on the street.

The impossibility or unreasonableness of reemployment must relate to changes in the employer's circumstances and not to hardships on other employees. The fact that the incumbent is a more satisfactory employee does not defeat the veteran's reemployment rights. O is entitled to the job.

## CHAPTER IX

### Position to be Offered

The statute provides that an eligible veteran who left a position to enter military service shall be restored to "such position" or to "a position of like seniority, status, and pay." However, this does not necessarily mean the exact job he left or a job like that one. In its first decision interpreting the reemployment statute, the Supreme Court established what is known as the "escalator" principle, and it has repeatedly reaffirmed and refined that principle in subsequent decisions. Under the "escalator" principle, the position to be offered is the veteran's "escalator" position; that is, the position he would hold if the employment relationship had continued without interruption by military service. This could be his preservice position, a better position, an inferior position, or no position at all. In order to determine what such position is, it is necessary to reconstruct the veteran's employment history as it would have been but for his absence in military service. In situations involving the statutory alternative of restoration to a "like" position, the "likeness" in seniority, status, and pay is evaluated in terms of the escalator position rather than the exact preservice job.

The word "position," in this context, refers to more than just the job. It embraces all aspects of the employment relationship, including seniority and its perquisites, status, and rate of pay. Pay, as perhaps the most important feature of the position, is discussed separately in Chapter X. Seniority and seniority rights, which result from and largely depend upon contract provisions or established practices in the particular employment, are discussed separately in Chapter XI. The statutory concept of "status" is broad enough to include both pay and seniority, as well as other attributes of the position such as working conditions, opportunities for advancement, job location, shift assignment, rank or responsibility, etc. Where such matters are not controlled by seniority or where no established seniority system exists, they can be viewed as matters of "status." In a determination of whether an alternative position offered is of "like seniority, status, and pay," all of the features that make up its "status" must be considered, in addition to the seniority and the rate of pay that are involved.

Often, where the veteran claims an escalator position that involves advancement to a higher classification than he held when he left for military service, it cannot be absolutely certain that the "escalator" would have carried him to that position even if he had remained actively employed. The advancement may have required an exercise of judgment by the employer, the making of a choice by the veteran, or both, and many other things may have happened which did not in fact happen because the veteran was not there. If absolute certainty were required, the escalator principle would be a nullity. On the other hand, mere conjecture and the mere possibility that certain events might have occurred are not enough. The Supreme Court has dealt with this problem by

adopting a middle course and requiring a showing of probability or reasonable certainty that the claimed advancement would have occurred. Light may be thrown upon what the employer would have done by an examination of the collective bargaining agreement, if any, and of the employer's past practices in designating employees for promotion, particularly at the time when the claimed job was filled. The possibility that the veteran might not have elected to accept the higher position will not defeat his seniority rights.

In other situations, it may be clear enough that the veteran would have been promoted if he had been present, with the benefit of additional training, experience, and qualifications he would have acquired, but his absence in military service may have prevented him from actually acquiring these additional qualifications. Where the veteran is not actually qualified to perform the duties of a higher position to which the law would otherwise entitle him, his right on being reemployed is to be placed in the highest position in the line of progression for which he is actually qualified, to be given the opportunity to acquire the necessary further qualifications under the same conditions that would have applied if he had remained present, and then, on acquiring these further qualifications, to be placed in the position he would have reached sooner but for his absence in military service. Once he has acquired the qualifications, he does not have to await a vacancy in that position; and if there is an established seniority system providing for job seniority in the particular position, his job seniority date must be adjusted to give him the ranking on the job seniority list that he would have had if his acquisition of the necessary qualifications had not been delayed by military service.

A clear illustration of this principle would be the case of a veteran who occupied an apprentice position when he left for military service, under a bona fide formal apprenticeship leading to journeyman status after a specific amount of training and experience in various stages of the apprenticeship. He should be restored as an apprentice at a level reflecting the training and experience he had when he left, plus appropriate credit for any like or related training and experience he acquired in military service. When he completes the remainder of the apprenticeship program and qualifies as a journeyman, he is entitled to journeyman seniority retroactive to the date he would have completed the program and qualified as a journeyman if he had not entered military service. Formal apprenticeships, of course, are not the only types of training programs which employees leave for military service. If the trainee is not required to progress through a specified number of hours or days of experience and training in various aspects of the position, it is not proper to delay the veteran's placement in the position he would have reached but for his absence in military service. The determining factor in each case is whether he is actually qualified for the actual duties of that position, and if not, how long it reasonably should take him to become qualified.

The same principle applies, of course, where the advancement would have occurred not through an apprenticeship or training program, but through an established seniority system or other practice under which promotion to successively higher positions requires certain minimum amounts of experience



in one or more positions lower down the ladder. The veteran's rights are not limited to the position next above the one he left for military service. If the "escalator" would have carried him up through several levels, he has statutory rights at each of those levels, including appropriate retroactive seniority adjustments at each step.

Where the position to which the veteran is entitled is his preservice position but the content or duties of that position have changed during his absence for military service, he is entitled to reinstatement in the changed position and to a reasonable time in which to acquaint himself with the new duties. Where the veteran is entitled to a higher position than the one he left, but by contract or practice such promotions are subject to a later on-the-job trial period following which an unsuccessful promoted employee is demoted or returned to the position he held before, the veteran is entitled to placement in the higher position subject to the trial period. However, before beginning his trial period, he would be entitled to such time and assistance as are reasonably necessary in order to recover from any loss of skill occurring because of his absence from employment.

The "escalator" created by an established seniority system is not a one-way street. It can stand still or move downward, as well as move upward, during the veteran's absence for military service. There may have been layoffs, recalls, transfers between lines of progression, departments, or plants, and displacements or "bumpings" in which he would have participated had he remained present. Some collective bargaining agreements provide for termination without further recall rights if the employee has been on continuous layoff for a certain period of time. The veteran's escalator history, which determines his proper placement, involves a tracing or reconstruction of what his movements would have been in all of these respects if he had not been absent in military service, as indicated by the established seniority rules and by what happened to nonveteran employees whose seniority was comparable to his. The veteran is entitled to the presumption that he would have made timely responses to all recall notices and the like that he would have received if he had been present.

Sometimes the veteran returns from military service to find his preservice position occupied by an employee who was senior to him before he left. If the senior employee would have "bumped" the veteran out of the job even if the veteran had not vacated it to enter military service, the veteran cannot object to the situation, since the law does not "freeze" the status quo existing at the time of his departure. However, if the senior employee obtained the position solely because of the veteran's absence, the veteran has a legally superior claim to it in view of the tracing or reconstruction required under the "escalator" principle.

Where an employee leaves a job to enter military service and is replaced by another employee who subsequently leaves the same job to enter military service himself, both employees may have reemployment rights. As between the two veterans, the one who left the job first would of course have priority over the other, but this does not necessarily mean that the other veteran would

be without reemployment rights. If the replacement returns from military service first, he is entitled to restoration in the position, subject to the possibility of being displaced by the veteran who left the position first when and if he returns; and the replacement would then have recourse to whatever "bumping" rights into other jobs the established rules and practices may provide for employees who themselves are "bumped."

Where an employee leaves for military service while serving out an initial period of employment in probationary status, and that probationary period involves special observation and evaluation of his suitability to become a regular member of the employer's work force, it is proper to reinstate him in probationary status at the point he had reached in the probationary period before he left. The employer is entitled to continue its observation and evaluation of the veteran, in a nondiscriminatory manner of course, for the balance of the established probationary period before according him the seniority and status of a regular employee. However, upon successfully completing the remainder of the probationary period and thereby demonstrating his suitability, the veteran is entitled to the seniority he would have established if his completion of the probationary period had not been delayed by military service, and to all rights and benefits flowing from such seniority.

### EXAMPLES

(1) P Nut and Bolt Company operates six production lines with an Inspector at the end of each. Inspector A leaves his job on Line 2 to enter military service. During his absence, new electronic analyzing machines are installed on Lines 1 through 5 and the incumbent Inspectors on these lines are trained in the use of these machines, given the new title of Quality Control Technician, and raised to the next higher pay grade. A returns from military service and P offers him the Inspector position on Line 6.

This is an inadequate offer of reinstatement. A's escalator history would place him on one of the other lines in one of the upgraded jobs, and the Line 6 job is not like these upgraded jobs in seniority, status, and pay. A is entitled to be trained in the use of the new machines, upgraded to Quality Control Technician, and paid accordingly.

(2) The facts are the same as in Example (1). In addition, each production line, including its Inspector or Quality Control Technician, gets a group production bonus which has been consistently higher on Lines 1 and 2 than on the others because of more modern machinery, a better lighted working area, and a generally higher caliber of employees. When A rejects the offer of reemployment on Line 6, P Company offers him the Quality Control Technician job on Line 4.

The offer is still not adequate because the upgraded Line 4 job is not of like status and pay to the upgraded Line 2 job.

(3) B is the second most senior Class B Mechanic at Q Telephone Company's Intown garage when he leaves for military service. After his departure, Q Company opens a new garage in Suburbia needing six Class A Mechanics, and staffs it by offering Class A Mechanic jobs at the new location to the Class B Mechanics working at the old garage by starting at the top of the Intown Class B seniority roster and going down the roster until it gets six volunteers. In this manner, the new jobs go to the men who were Numbers 3, 4, 8, 9, 10, and 12 on the Intown Class B list. B returns from military service and requests a Class A Mechanic job at the Suburbia garage, which is only a few blocks from his home. He had signed a bid for a Class A vacancy that arose at the Intown garage shortly before he left for military service, but had lost out to a senior bidder.

B is entitled to the Class A suburbia job, and if the Class A roster at the new garage was made up to recognize previous Class B rank on the old job, he should be placed at the top of it. The surrounding facts establish a probability or reasonable certainty that he would have volunteered for the new assignment if he had been present at the time, and Q Company's manner of staffing the new garage establishes a reasonable certainty that he would have been asked. A difference in one or more of the stated facts would not necessarily change the result; the question would still be whether the surrounding facts, viewed in their totality, point to the necessary probability or reasonable certainty.

(4) Junior Welder C leaves his job with R Aircraft Company to enter military service. While he is gone, R Company's airframe business dwindles, but it goes into the business of manufacturing space capsules on a large scale and sets up a new division 20 miles away to handle this work. R Company selects Junior Welders, Journeyman Welders, and Senior Welders for the new division from among those in the airframe division on the basis of many factors including age, home address, its evaluation of their capabilities, and their willingness to transfer to the new division without any carryover of seniority from the old division. Among the Junior Welders selected are some who are senior to C and some who are junior to him, and no discernible objective pattern emerges in the selection process. The space capsule business grows rapidly and promotions in the new division come fast, so that by the time C returns from military service and applies for reinstatement, several employees who had been junior to him in the old division have advanced to Senior Welder in the new division. At the same time there have been some promotions in the old division because of the depletion of its ranks to staff the new one, and R Company offers C a Journeyman Welder job in the old division, which is the position to which his airframe division seniority would have carried him had he remained working there. However, he believes that future prospects of job security and advancement are greater in the new division and claims a right to a Senior Welder job there, although it is farther from his home than the airframe plant is.

In these circumstances the company's offer complies with C's rights and his claim cannot prevail. He is claiming a reconstructed employment history which rests more on conjecture and mere possibility than on predictability, probability, and reasonable certainty.

(5) D, who has a 1-A draft classification and believes he is about to receive induction orders, is an Apprentice Chef at S Resort Hotel. After completing one year of the four-year formal apprenticeship, he enlists in the Army for three years on being assured by the recruiter that he will be sent to the Army's Cooks' and Bakers' School and assigned to culinary duties. This happens, he proves to be an apt student and an excellent cook, and he serves for approximately two years as Assistant Head Cook for the Headquarters Officers' Mess in Saigon. When he returns to S Hotel and applies for reinstatement, a bona fide evaluation of his military training and experience, in terms of its relevance to resort hotel cooking and menu planning, establishes its equivalence to the second and third years of the apprenticeship.

D is entitled to reinstatement as a fourth-year apprentice. On completing the remainder of the apprenticeship one year later, he is entitled to a Journeyman Chef's rating with the seniority he would have established in that position if his apprenticeship had proceeded without interruption by military service.

(6) T Arms Company manufactures small arms for hunters and police departments at its home office and plant in Massachusetts. E is a traveling salesman for T Company who calls on sporting goods dealers in the northeastern states. There is no established seniority system applicable to the salesmen. E leaves for military service. The need for military weapons is so great that T Company discontinues production for the hunting trade. It does not need traveling salesmen for its dealings with the military, but it still maintains a corps of traveling salesmen, some of whom are hired while E is in military service, to call on police departments in an expanding pistol and riot gun business. When E returns and applies for reinstatement, T Company refuses on the ground that his job no longer exists.

Although his exact former job no longer exists, jobs of like status and pay do still exist, and unless T Company can show by a reconstruction that a different result would have occurred, E is entitled to the existing territory most nearly corresponding to his former one, although he will be calling on police departments instead of on sporting goods dealers as in the past.

(7) Under U Company's collective bargaining agreement, layoffs, recalls, and "bumping" rights are governed by job group seniority, and all jobs are classified by group, from Group 1 jobs at the lowest level to Group 8 jobs at the top. Thus, when a Group 8 employee who has previously established seniority in Group 7 is laid off in a reduction in force, he can bump anybody in Group 7 whose Group 7 seniority date is later than his own, and so on down the line. Employee F, who had been hired in a Group 2 job and had gone directly from there to a Group 5 job, leaves his Group 5 job for military service. Shortly before he returns there is a layoff in Group 6 which would have led to F's being bumped out of his Group 5 job had he been present, and at the same time everybody in Group 2 is laid off.

F's right is to reinstatement in layoff status, with recall rights to Group 5 in line with his original Group 5 seniority date and recall rights to

Group 2 in line with his original plant seniority date. He cannot bump anybody out of a Group 2 job because all of them are already on layoff. He cannot bump anybody out of jobs in Group 4, 3, and 1 because he had never established job group seniority in any of those groups and there is no showing that he would have established such seniority if military service had not intervened.

(8) Machine Helper G leaves his job at VC Storm Door Company to enter military service. He is the most senior Helper. VC's labor agreement with the union provides that when a Machine Operator vacancy occurs it shall be offered to the most senior Helper, subject to a 30-day trial period in the Operator position. If the promoted employee does not measure up during that period he goes back to his Helper job and cannot be again considered for promotion within twelve months. Soon after G's departure a Machine Operator job becomes vacant and is filled by the Helper next below G in seniority, who survives the 30-day trial period and is confirmed in the job. In the next year's contract negotiations, this system of filling vacancies is dropped in favor of one whereby job vacancies are posted for bidding and are awarded to the senior bidder if, in VC Company's judgment, his ability and physical fitness are equal to those of the other bidders. Three vacancies occur under the new system and only one of them goes to the senior bidder. When G returns and applies for reinstatement, VC Company refuses to place him in a Machine Operator job on the ground that there are no vacancies, and tells him he will be considered along with the other bidders if he bids when the next vacancy occurs.

G is entitled to reinstatement as a Machine Operator because, if he had remained working, he clearly would have obtained that position when the first vacancy after his departure arose. At that time, the old system was still in effect. He is entitled to a reasonable time to demonstrate his ability to handle the job. In the circumstances, 30 days would probably be considered a reasonable time for this purpose even though the old 30-day system is no longer in effect. This reasonable time would not begin to run until after G has had a fair chance to refamiliarize himself with the work following his military absence.

(9) When drafted, H is a Clerk at W Department Store in the Men's Clothing Department. He gets a hardship discharge after a year in the Army and applies for reemployment. W places him as a Clerk in its Hardware Department where the immediate pay is higher, but his prospects of advancement are lower there because he knows nothing about hardware and there are a couple of other young hardware clerks ahead of him, both in knowledge of the hardware business and in length of service with the company. He objects to the assignment and insists on going back to the Men's Clothing Department.

W Company has not complied with H's rights because the Hardware Department position is not equivalent to the Men's Clothing Department position in "status." An increase in pay cannot overcome a decrease in status so as to make the alternative position one of "like seniority, status, and pay." The "likeness" must exist in all three respects.

(10) Jobs at X Company are filled by bidding on posted vacancies and the senior bidder is normally selected. Layoffs and recalls are by company seniority and a senior employee who is laid off from his own job can "bump" a junior employee out of a lower rated job if he is qualified to perform the duties of the lower job. J leaves his job as an Assembler "B" to enter military service. It is posted for bids and awarded on that basis to Laborer K, who has greater company seniority than J but had failed to bid on the "B" job when it was awarded to J. J returns from military service to find K in the "B" job and is told that he will have to settle for a Laborer's job because K has greater seniority.

Since K would not have obtained the job if J had not left it for military service, K's greater seniority must yield to J's statutory right to be reinstated to the position he would still hold if military service had not intervened.

(11) The facts are the same as in Example (10), except that K, instead of being only a Laborer at the time J enters military service, is in the higher position of Assembler "A." During J's absence K is laid off as an Assembler "A" and exercises his bumping rights into an Assembler "B" job, displacing the Assembler "B" with the least company seniority as provided by the contract. J, had he been present, would have been bumped out of the "B" job because he would have had the least company seniority of all the "B" Assemblers.

In these circumstances, J cannot displace K on returning from military service. His right is to exercise his own bumping privileges into a Laborer job, with recall rights to the Assembler "B" position in line with his preservice company seniority date. Numerous variations on this problem of veterans versus senior employees may arise. In all of them, the central point is that the senior employee cannot gain any priority over the veteran solely because of the situation created by the veteran's absence for military service.

(12) Switchman L leaves his job with Railroad Y in response to induction orders, and Switchman M is hired to replace him. M is also of draft age but succeeds in enlisting in the local National Guard unit. After working 16 months for Y, M is ordered to six months of initial active duty for training with his unit. M returns first and applies for reinstatement, but Y, having heard from L that he expects to be home in a couple of months, refuses to reemploy M.

M is entitled to reemployment, even though he will have to defer to L when L returns and makes a timely application. At that time, it will still be improper to lay M off if there are any Switchmen working in the seniority district who are junior to him in terms of original hiring dates as Switchmen.

## CHAPTER X

### Rate of Pay to be Provided

Pay is an integral part of the position guaranteed by the reemployment statute. As with seniority and status, the veteran's entitlement is generally to the pay rate or wage scale he would have reached if his employment had continued without interruption by military service, rather than the rate at which he was being paid in his preservice position. The reconstruction required under this "escalator" principle may show that his proper rate is higher than, the same as, or lower than the rate he was receiving before.

Although most questions about pay under the statute are concerned with the proper rate of pay for the veteran, the term "pay" has a wider meaning. It includes all elements of total compensation, such as traveling expenses, drawing accounts, bonuses, and shift premiums, as well as hourly rates, piece rates, salaries, and commissions. If the rate of pay assigned to the veteran is correct, but the job assigned to him yields less total pay than his "escalator" position would provide, his rights are not being complied with.

Where the rate of pay is an attribute of the position as such, the veteran is entitled to the current rate of his "escalator" position, including all changes in that rate occurring during his military absence.

He is entitled to all general, across-the-board, and cost-of-living increases which he would have received but for his absence in military service.

Productivity increases and "annual-improvement-factor" increases that are based on actual or assumed increases in production as a result of mechanical or managerial improvements, and are not related specifically to additional experience, skill, or past work of individual employees, are a component of the general wage rate to which the veteran is entitled upon his return.

In some wage programs, periodic "step" increases are provided on the basis of continuous employment, length of employment, seniority, or other factors relating essentially to the mere passage of time. Since the veteran would have received these automatic increases if he had remained present, they must be included in his rate of pay when he returns.

In other wage programs the increases, whether periodic or not, may depend upon individually demonstrable or measurable increases in the skill, ability, or qualifications of the individual employee, or upon merit ratings or evaluations of the individual employee's performance. The law does not entitle the veteran to increases of this type immediately upon his reinstatement, but if it can be shown after a reasonable adjustment period in the job that his skill and performance measure up to those of other employees who have received the merit increases, he should be given the increases. A formal apprentice training program, with different wage rates payable at different stages of the apprenticeship, would be one illustration of this. A formal individual merit rating program, adhered to in practice, would be another. If the veteran had job-rated training or experience in military service, that training and experience should

be evaluated and taken into consideration in determining where he fits into the wage progression system upon his return.

Where the pay system purports to condition the increases on factors such as increased skill, qualifications, or merit, it is necessary to examine carefully the actual practices followed under the system as well as the stated terms. For example, if "merit" increases have been consistently awarded to all employees without individual evaluations, or if it appears that their essential purpose is to reduce employee turnover or to compensate for the fact that promotions are few and far between the increases must be considered as in fact automatic. If the increases purport to be based on additional skill that is presumed to develop from stated amounts of additional experience on the job, but in practice have been granted despite temporary transfers or other absences from the job, it would appear that mere seniority or length of employment is the essential and decisive criterion, both for fixing the veteran's rate of pay on his return and for fixing the date of his next increase.

An examination of the facts sometimes reveals that the true criterion for pay increases has been actual time worked on the job, as distinguished from mere passage of time on the one hand and from measurably increased skill and ability on the other. In determining whether the veteran is entitled to the pay increases in this kind of situation, he is to be credited with the time he would have actually worked on the job if he had not been absent in military service. Pay is governed by the "escalator" principle, and that principle treats the veteran as if he had remained present and working in line with his seniority, not as if he been on a leave of absence.

In certain unusual positions, which are often of a professional, managerial, or promotional nature, the duties and scope of the position vary with the special skills, abilities, training, and capacity of the incumbent, and the pay is fixed in relation to the individual holding the job rather than in relation to the job itself. In these circumstances, a veteran returning to the position would not be entitled to the incumbent's rate of pay if it is higher than the veteran's preservice rate, nor would he be limited to the incumbent's rate if it is lower. Ordinarily the proper rate would be his preservice rate, adjusted by any general or cost-of-living increments added during his absence.

If the veteran needs further training and experience in order to become qualified for the "escalator" position to which he is otherwise entitled, and if it is proper to place him temporarily in a lower position for this purpose, it is also proper to pay him temporarily at the current rate of the lower position, as in the case of a formal apprenticeship interrupted by military service. However, in a situation involving a reasonable and relatively brief retraining period in a lower job than the veteran had held before military service, payment of the wage or salary of the higher job during the retraining period would be required.



## EXAMPLES

(1) N Products, Inc. manufactures plastic dinnerware in three large forming machines. The Operator of each machine receives \$5.00 for each gross of plates, cups, or saucers produced on his machine, with a minimum guarantee of \$3.00 per hour. Operator A leaves for military service and these rates remain unchanged while he is gone. However, business increases and N adds another forming machine which takes up less space than the others and turns out a more uniform product with a lower proportion of rejects, but its capacity is only two-thirds that of any of the older machines. When A returns, N has an opening on the new machine and assigns A to it, with the same piece rate of \$5.00 per gross and guaranteed hourly minimum of \$3.00 per hour that he had before. A objects on learning that despite the lower proportion of rejects, he can earn, even after retraining, an average of only \$4.00 per hour on the new machine, as against the \$4.50 per hour that he had been averaging before military service.

Unless it can be shown that A would have been assigned to the new machine at the time it was installed if he had been present instead of in the Armed Forces, his assignment to the new machine does not comply with his statutory rights. Although the rates are the same, the total earnings yielded are inferior to those he would get on his old machine, so the position assigned is not one of like pay in comparison with his preservice position, which in this case is also his "escalator" position.

(2) After the events described in Example (1), Employee B, a Helper on one of the machines, leaves for military service. The Helpers have a piece rate of \$3.75 per gross with a guaranteed minimum of \$2.25 per hour, but B has consistently averaged about \$3.50 per hour. During his absence the plant is organized by a union which dislikes the piece rate system, and under the ensuing labor agreement, that system is discontinued and replaced by a provision putting all Helpers on an hourly rate of \$3.00, which is a little more than their average earnings as a group had been before. B returns from military service and objects to his reinstatement at \$3.00 per hour, inasmuch as he had been averaging \$3.50 before he left.

The \$3.00 hourly rate is his proper rate of pay. The reemployment statute does not insulate him against nondiscriminatory changes in the pay system or the pay rates occurring during his absence, and there is no evidence that the changeover to a simple hourly rate basis discriminated against B as a veteran or veterans as a class.

(3) C leaves his job as a Garbage Collector with X Sanitary Services to enter military service. He has been receiving a wage of \$2.00 per hour, but in order to find a replacement for him X has to pay the replacement \$2.50 per hour. When C returns and applies for reemployment, X says it is glad to have him back, discharges his replacement to make room for him, and offers him a raise to \$2.25 per hour.

He is entitled to the \$2.50 rate that his replacement was receiving. In the circumstances, the \$2.50 rate would be considered an attribute of the job itself and not a rate that was peculiar or personal to the incumbent.

(4) O Transit Company has a contract with the union representing its Garage Mechanics whereby "merit" raises of ten cents per hour are to be granted after every six months of "satisfactory employment," until the employee reaches the top of the rate range for his job. Mechanic D, whose job carries a rate range of \$3.00 to \$3.80 per hour, leaves for military service on April 1, 1964, three months after attaining the \$3.10 rate. During his military service, increases in the rate range are negotiated, and it has become \$3.50 to \$4.30 by the time he returns from a three-year military absence and applies for reinstatement on April 1, 1967. O Company offers him reemployment at \$3.60, reflecting the negotiated increases, but he holds out for \$4.20 on the ground that he should also have six periodic "merit" increases to reflect the three years he spent in military service.

To resolve this disagreement it is necessary to determine what the words "satisfactory employment" have meant in practice. Suppose that the facts are as follows: O Company's practice has been to require semiannual reports every June 30 and December 31 from the Garage Foreman on each Mechanic, on a simple form showing only whether the man's work has been "satisfactory" or "unsatisfactory." Those rated "satisfactory" were immediately granted the ten-cent raises. In the only case where the report showed "unsatisfactory" the Mechanic was promptly discharged. Two of the Mechanics had been absent from the garage for extended periods, one for an emergency four-month detail as a Bus Driver and another for a six-week personal leave to visit his dying mother in California, without suffering any delay in their next raises.

In these circumstances, D would be entitled to be reemployed at \$4.20 in April 1967 and, if rated "satisfactory" on June 30, to be raised to \$4.30 in July 1967. The facts would indicate that the six-month "step" increases are, in reality, awarded not for measured increases in skill or ability or even for time actually worked on the job, but simply for continuing in O Company's employment.

(5) The facts are the same as in Example (4), except that O Company's uniform practice is to grant the periodic "merit" increases automatically on every six-month anniversary of the Mechanic's employment, up to the mid-point of the rate range. Further increases above that point depend upon detailed six-month reports by the Foreman on each Mechanic's performance, and these reports are subject to review under the grievance procedure when a ten-cent raise has been denied. During D's three-year absence, there are five instances in which the raise is denied; grievances are filed through the union in all five cases but the company prevails in four of them. However, the Mechanics whose raises are denied are not discharged.

In this situation, D is not entitled to the raises above the mid-point of the rate range and his proper rate immediately on reinstatement is \$3.90, even

though it could have reached \$4.20 had he not been absent in military service. However, if it can be shown after a reasonable period of adjustment in the job that his performance is equal to that of other employees who are receiving \$4.20, he should receive the increase to \$4.20.

(6) Illustrator E, whose salary has just been raised to \$180 per week, leaves his position at Q Greeting Card Company to enter military service. Q Company gives salary increases of \$15 a week to each of its Illustrators after each year of employment, and when E returns on June 1, 1966 after two years in the Army he claims the right to a salary of \$210 per week instead of the \$180 that he is offered. Q Company maintains that the increases are given in recognition of the additional artistic facility and familiarity with its requirements that flow from experience on the job, although it undertakes no specific evaluation of the employee's work before raising his salary. In practice, Q Company always counts actual weeks worked or paid for, excluding unpaid absences for sick leave, educational leave, personal leave, layoff, or any other reason, in determining the date of the employee's next raise. It develops that in 1965 there was a four-month period during which all of Q Company's Illustrators were laid off without pay as the result of a fire which destroyed its offices and design studios, and their next raises were delayed accordingly.

E is entitled to be reemployed at \$195 a week and to be raised to \$210 a week four months later. Here, the criterion for the raises is time actually worked on the job, as distinguished from measurable and measured increases in the skill of the individual employees. In such situations, the veteran is entitled to count the time he would have actually worked on the job if he had not been absent in military service.

## CHAPTER XI

### Seniority and Seniority Rights

The seniority protected by the reemployment statute is, in one sense, the relative rank or standing of an employee in relation to his fellow workers in the same category, group, or area of competition. In another sense, it is a measure of certain rights which the employee has with his employer, apart from any competitive significance in relation to other employees. In both cases, it is earned on the basis of time in the employ or continuity of service with the employer. It may be defined in terms of starting dates, numbers on a list, duration of employment, or otherwise.

The statute uses the term "seniority" in several places but does not define it. The law does not create a system of seniority, but merely recognizes the significance of existing seniority systems. A system of seniority and seniority rights may be a product of collective bargaining with a union or of unilateral action by the employer, or may be grounded on custom or practice alone. The system may include several different kinds of seniority, such as plant, departmental, and occupational seniority, with weight given to each kind for various specified purposes.

In each case, the principles to be applied under the statute are the same. Early interpretations by the Supreme Court, subsequently approved and embodied in the statute by Congressional action, made it clear that the veteran not only keeps the seniority he has at the time he leaves for military service, but also continues to accrue seniority during his military absence, to the same extent that he would have been able to accrue further seniority if he had remained present. Included in his military absence are the time between leaving the employment and entering military service, the time he is in military service, and the time between release from military service and return to employment.

Seniority by itself, in the general abstract sense, has no significance. In protecting the veteran's seniority, the law also protects the rights and immunities that are based on seniority and the perquisites and benefits that flow from seniority. The most common use of seniority is to determine who, among competing employees, is to receive a particular advantage not available to all employees, or who is to be subjected to a particular disadvantage that will not affect all employees, as in layoff and recall situations or in determining priority for advancement. Another common use is in determining the extent of certain benefits which increase as seniority increases, such as credits for employment in a pay progression system based on time in the position, credits for length of employment in a retirement system, or entitlement to longer vacations.

The veteran does not gain anything that can properly be termed "super-seniority." Veterans disabled while in military service have certain special statutory priorities which are discussed in Chapter XII, but no other veteran is entitled to any seniority or seniority right under the statute that he could not have attained if he had remained in his civilian employment. The veteran does

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not retain any seniority or seniority right under the statute that he would have lost even if he had not entered military service. For example, the veteran's seniority and recall rights would be extinguished during his military absence in a situation where there is a contract provision or an established practice which terminates the seniority and recall rights of any employee who has been in continuous layoff status for a certain period of time, and the veteran, in accordance with his seniority, would have been on layoff for that period of time even if he had not been in military service. The law does not insulate him against adverse effects on his seniority that would have occurred in any event. Furthermore, the statutory provision against discharge without cause for a certain period of time does not guarantee active employment throughout that period. The veteran may be laid off in seniority order and recalled in seniority order during his period of protection against discharge without cause.

However, the mere fact that the contract or the established rules of the employer do not provide for granting the veteran the seniority to which the law entitles him would not mean that his statutory rights amount to superseniority, properly speaking. Nor is it a case of superseniority where the veteran has to be given retroactive seniority in a position he would have filled sooner but for his absence in military service, but does not actually fill until he returns, or until he meets certain work requirements or passes certain examinations some time after his return. It is likewise not a case of superseniority where the veteran has statutory priority for a certain position over an employee whose seniority is greater than his, but whose assignment to that particular position would not have occurred but for the veteran's military absence.

What the law does is to take the existing seniority system as it finds it, including nondiscriminatory changes made in the system during the veteran's military absence, and to reconstruct the advances, retreats, transfers, and other movements he would have made under the established system or systems if military service had not intervened. Only by tracing or constructing this "escalator history" can the veteran's correct seniority standing be determined in the plant, in the department, in the job, or in any other respect. The escalator history may of course lead him to a different plant, department, or job than the one in which he was employed when he left for military service, and may demonstrate a right to a seniority date in the different assignment which is earlier than the date he actually enters upon that assignment after returning from military service. In this reconstruction of what the veteran's history would have been, the actual histories of fellow employees who remained in the employment may be a useful guide.

In constructing the veteran's escalator history, situations are encountered in which changes in position or pay rate depend partly on seniority and partly on other conditions which, because of his military absence, the veteran has not yet actually met. If he would have met these other conditions earlier but for his military absence, his escalator history continues beyond his reemployment and is not consummated until he has had a fair chance to meet the conditions in question and the detriment resulting from his military absence no longer

exists. Conditions such as passing an examination or completing a certain amount of qualifying work on the job would be a clear illustration of this. Even though he has the necessary seniority, the veteran is not entitled to the higher position, the new assignment, the higher rate of pay, or whatever is involved until the detriment has been overcome and the conditions other than seniority have been met.

From that point on, however, if the established seniority system gives any weight to seniority in the new position, department, pay step, or whatnot, he is entitled to the seniority therein that he would have established if his advancement had not been delayed by military service. In this sense, he is entitled to "retroactive" seniority. It is sometimes contended that a veteran with a problem of this type is claiming a right to substitute his military service for the established non-seniority qualifications or conditions. However, that is not the case at all. If it were, he would be entitled to the promotion, transfer, or pay raise immediately upon his return, without actually meeting those conditions.

Frequently the conditions on which a missed promotion or transfer depends, in addition to seniority, are such that it cannot be certain or beyond reasonable doubt that the veteran would have met them at all, or on any particular earlier date, if he had not been absent in military service. This is inevitably the situation where elements of employer discretion or employee choice are involved in the selection of employees for promotion or transfer. These uncertainties are inherent in the very fact that the parties must deal with an escalator history and not an actual history. The veteran was not actually present to be considered or to make choices, and nobody can be absolutely sure what would have happened if he had been present. He might have died, quit, or been discharged, or he might have become president of the company.

The existence of uncertainty does not vitiate the escalator principle. On the other hand, an escalator history cannot be constructed on the basis of mere conjectural possibilities. The standard prescribed by the Supreme Court in such situations is one of probability or reasonable certainty, both for determining whether the veteran would have been promoted or transferred and for determining his eventual seniority standing in the new position or department. In applying this standard, it is necessary to consider the veteran's preservice employment history, the formal rules in effect and the actual practices followed during his military absence, the actual movements of fellow employees during that absence whose seniority was comparable to his, and the actions and statements of the veteran and the employer at and after the time of his return.

Where unlimited employer discretion exists and has been exercised in practice, it may be impossible to establish that the veteran suffered detriment because of his military absence. Where the employer's discretion is subject to certain criteria or has been exercised according to certain criteria, it may well be possible to establish whether, and at least approximately when, those criteria would have been met by the veteran but for his military service.

Sometimes the detriment caused by military service may be cumulative, in the sense that the veteran's opportunity to meet the non-seniority conditions

for advancement after his return is lessened or even precluded, even though he would have met those conditions under the situation that existed during his absence. This could be the case where, according to the established seniority system, those who have advanced and established seniority in higher positions during his absence, though originally junior to him, have priority for the available work, even though it is substantially similar to the work the veteran was doing before and he is competent to perform it. In such a situation, the purpose of the statute would be frustrated unless the veteran is given priority for such work in accordance with his preservice seniority standing.

Where the contract or practice requires the completion of a probationary period before seniority is acquired, and the veteran leaves for military service before completing the probationary period, he is entitled, as a minimum, to restoration as a probationary employee and, upon satisfactory completion of the remainder of the probationary period, to the seniority date he would have established had he remained on the job, which is usually the original date of hire. This is the general rule where the purpose of the probationary period is to increase the employee's experience, training, and skill, or to evaluate his ability and attitude. However, if the probationary period in actual practice is merely a lapse of time, and all or nearly all probationers have attained seniority after a specific waiting period, the veteran should be considered to have completed his probation during his military absence and should be reemployed with full seniority.

The expiration of the veteran's one-year period of statutory protection against discharge without cause does not terminate the statutory protection of his seniority and his seniority rights. The Supreme Court has made it clear that this one-year provision is an additional special right conferred upon the veteran, and not a limitation of his seniority protection to one year. The expiration of the year does not open the door to discriminatory actions that would take away any of his reemployment rights. The same considerations would apply, of course, to the six-month period during which the statute protects reservists and National Guardsmen against discharge without cause after their return from initial active duty for training.

### EXAMPLES

(1) At the time Salesman A leaves his job at Clothing Store P to enter military service, he is fifth among its six salesmen in terms of continuous service. A recession is under way and he is not replaced. Mr. P., the owner, has never followed a seniority system. In periods of slow business he has simply dropped the salesmen he considers least desirable, who have not always been the least productive ones, and he has usually hired entirely new salesmen when business has picked up again. The recession deepens and he drops the men who had been second and sixth in continuous service. When A returns, only those who had been first, third, and fourth are still working at the store.

No seniority system exists and the law does not create one. Since the position still exists, A is entitled to reemployment even though the incumbents all have greater continuous service than he has. Whether anyone is to be dropped in order to make room for him, and if so, who, are matters for the employer to decide. A also cannot be discharged without cause within a year after his reinstatement.

(2) Under Employer Q's seniority system, seniority does not accrue during periods of unpaid layoff or leave of absence. Employee B, who has exactly two years of seniority, enlists in the Army for three years. During those three years he would have been laid off for a six-month period if he had remained a civilian, as was Employee C, who had one year of seniority at the time B left. When B returns and applies for reemployment, Q Company takes the position that since C, who has 3½ years of seniority, is the least senior man then working, B's only right is to reinstatement in layoff status with recall rights based on two years of seniority.

B would have accrued 2½ more years of seniority but for his three-year military absence, so he has 4½ years altogether and the law entitles him to precedence over C for the available work.

(3) At R Manufacturing Company, the union contract specifies that vacancies arising within a department shall be filled through a posting and bidding procedure under which preference is given to the bidder who has the most departmental seniority in that department, and then, if the job is not filled from within the department, to other bidders in the order of their plantwide seniority. Employee D, who has three years of plantwide seniority and three years of departmental seniority in Department 2, leaves for military service. At that time, Employee E, who works in Department 3, has two years of plantwide seniority and one year of seniority in Department 3. The first vacancy in the plant while D is gone arises in Department 3 and is awarded to E. D returns from military service and claims the job on the ground of his greater seniority.

The law does not support D's claim, because E would have prevailed by virtue of his greater departmental seniority in Department 3 even if D had been present and had signed the bid sheet for the vacancy.

(4) On the first workday of each calendar quarter, S Foundry, which operates on a two-shift basis, allows its employees to exercise shift choices on the basis of their plant seniority. Those with the most seniority get the shifts they want and the others have to take what is left. Laborer F, who has been employed for 18 months, all on the night shift, has put in a request for the day shift every calendar quarter but has always lost out to senior men. He is inducted into military service April 10, 1965 and applies for reinstatement on April 20, 1967. On April 1, 1967 a day shift assignment was awarded to a Laborer junior to F, and F claims that assignment.

He is entitled to exercise his seniority right to the day shift and can displace the junior employee. Reinstatement of his original seniority without the fruits growing out of that seniority would be an empty right and would not



comply with the law. It is reasonably certain, on the facts stated, that F would have claimed and obtained the day shift assignment if he had been present on April 1, 1967.

(5) Employee G starts working for T Company on June 1, 1950, is absent for military service from August 1954 to September 1956, is properly reinstated by T Company in 1956 with his June 1, 1950 seniority date, and remains continuously in their employ thereafter. In 1964, a revision in T Company's collective bargaining agreement provides that employees who have been employed by T Company at least 15 years on or before June 1 of any calendar year shall receive three weeks of vacation with pay in that calendar year, instead of the two weeks that had been their entitlement under previous contracts. The 1965 vacation check issued to G includes only two week's pay. T Company tells him that he will not be eligible for the third week of paid vacation until 1967 and that in any case, he has no standing to press a claim under the reemployment statute nine years after he was properly reinstated.

Since the length of an employee's vacation is directly related to length of employment, the benefit must be treated as an incident or perquisite of seniority, and G is entitled to the three-week paid vacation in 1965. The statutory protection of G's seniority rights did not end one year after his reinstatement simply because the company was thereafter legally free to discharge him without showing cause.

(For a further discussion of the effect of the reemployment statute on vacation rights, see Chapter XIV.)

(6) After eight months of employment at U Road Machinery Company, Riveter H, who is Number 19 on the departmental seniority roster, leaves for military service. Six months after his departure, there is a layoff in his department which reaches up to Number 15 on the roster. Business recovery is slow and the laid-off employees are recalled one by one. Number 20, who had 13 months of seniority at the time of the layoff, is recalled one year after the layoff. The labor agreement provides that when an employee has been laid off continuously for a period of time equal to his seniority at the time of his layoff, his seniority and recall rights shall be extinguished. When H returns after two years in military service, U Company reemploys him but does not restore his seniority. Nine months after his reemployment there is another layoff which reaches Number 25 on the roster. H, who is Number 30 on the roster on the basis of nine months of seniority, is among those affected, and he protests on the ground that he is still within his year of special statutory protection.

H's protest is valid but not for the reason he states. His escalator history shows that he would have had 14 months of seniority at the time of the first layoff, so that if military service had not intervened he would have been contractually entitled to recall before Number 20 was recalled. Therefore, H should have been reinstated at least as high as Number 19 on the roster, and that would have been sufficient to protect him against the second lay off.

However, if the first layoff had lasted 15 months, and Number 20 and those below him on the roster had not been recalled or offered rehire as new employees after losing their seniority, H would have had no seniority protection under the law and could not have challenged his layoff nine months after reemployment.

Furthermore, if the facts were as originally stated except that the second layoff was severe enough to reach employees above H's proper position on the roster, he could not object to his second layoff merely because it occurred within a year after his reinstatement. The law does not give him superseniority during that year; it merely protects him against discharge without cause.

(7) The collective bargaining agreement in effect at Plant V provides that employees elected to union office shall be placed at the top of their respective departmental seniority rosters during their one-year terms of office. Employee J leaves for military service and during his absence Employee K, who is junior to J on the department roster, is elected to the post of Shop Steward for the department. J returns from military service when K's term still has four months to run, but there has been a layoff and K is the only man junior to J who is still working. The Plant Personnel Director reinstates J in layoff status with his original seniority date but turns down J's claim that he should be allowed to displace K.

The Personnel Director's action is legally correct. Although J's seniority is adversely affected by the temporary advancement of K to a slot above J's on the roster, K's advancement occurred under a provision in the established seniority rules which was adopted for the bona fide and nondiscriminatory purpose of maintaining continuity in the administration of the contract. There is no reason to believe that K's election to the union post was in any way attributable to J's absence in military service, or that J would not have been laid off if he had been present instead of in military service.

(8) Under Hotel W's contract with the service employee's union, there is a line of progression from Elevator Operator to Bell Hop to Doorman to Bell Captain, and in that line of progression the employee with the most seniority in a classification is entitled to fill the next vacancy that arises in the next higher classification, subject to a 30-day trial period in the higher paying job. Elevator Operator L, who is the senior Elevator Operator at the hotel, leaves for military service. During his absence there is considerable employee turnover, and Elevator Operator M, the employee just below L on the Elevator Operator roster, advances first to Bell Hop and then to Doorman.

When L returns and applies for reinstatement he is entitled to a Doorman job, subject of course to the 30-day trial period; and on successfully completing the trial period he is entitled to Doorman seniority ahead of M. Furthermore, if Doormen have the right, in the event of a reduction in force, to displace or "bump" into lower paying jobs in which they have previously established seniority, L could bump into a Bell Hop job in accordance with the Bell Hop seniority date he would have established if military service had not intervened, although he would be subject to a 30-day trial period as a Bell Hop

after doing so. If he proved inadequate as a Bell Hop, he could then bump back into the Elevator Operator position.

(9) There is a line of progression at X Telephone Company from Groundman to Lineman to Installer to Crew Chief. The labor agreement provides that company seniority shall prevail in the selection of employees for promotion if ability and physical fitness are relatively equal. In practice, X Company has always considered ability and physical fitness relatively equal if the senior employee has had at least a year of experience on the next lower job or has attended a two-week company training school for the job in question. After nine months of experience as a Groundman, N enlists in military service and is assigned to the Signal Corps. During his three-year military absence, two Groundmen junior to him advance first to Lineman and then, four months before N returns, to Installer. When N makes a timely application for reinstatement, X Company reinstates him as a Lineman in view of his Signal Corps experience, which both parties agree was the equivalent of six months of Groundman experience and six months of Lineman experience. N has more company seniority than any other Lineman, except one who has refused to accept promotion to Installer, and X Company promises to send him to its next Installer school.

The reemployment of N as a Lineman complies with his statutory rights for the time being. However, on completing the training at the Installer school or six more months of Lineman experience, whichever comes first, he will have met the conditions required for promotion to the Installer position he would have reached if military service had not intervened, and will then be entitled to promotion to Installer without having to wait for a vacancy in that position. The escalator principle is not limited to the first promotion that would have occurred but for military service and is not satisfied until all such promotions have been qualified for and obtained. If either or both of the two junior men advance to Crew Chief ahead of N by virtue of the head start they had in acquiring the necessary qualifications because of his absence in military service, the same principles would carry over and apply to his eventual advancement to Crew Chief. Only when that occurs will the detriment caused by his military service be overcome.

(10) Finance Company Y operates branch offices in several southwestern states. There is considerable movement of personnel between the different branch offices and it is usually necessary to move in order to be promoted. The established line of progression is from Collector to Customer Service Man to Assistant Manager to Office Manager to District Manager. In selecting employees for offers of promotion, Y Company considers length of service with the company and in the next lower position, appearance, education, and previous comparable experience with other employers, but relies mainly on largely subjective evaluations by its District Managers, and as often as not, the employee selected has not been the one with the greatest seniority or length of service. In perhaps 30% of the cases, the employee selected has turned down the promotion, usually because of unwillingness to move.

Employee O, Assistant Manager in the Cactusville office, is drafted. When he returns two years later, the Cactusville Office Manager position has just been filled by the employee who had been Customer Service Man in that office at the time of O's departure, and for some time the Office Manager in the nearby city of El Coyote has been a man who was not even in Y Company's employ when O left for military service. Y Company offers O a choice between reinstatement in his former position in Cactusville and transfer, with the usual moving expense allowance, to the only Office Managership currently open, which is in a new office being set up in Coronado City, two states away. He claims the Office Managership in either Cactusville or El Coyote since both of these positions are occupied by junior men, and contends that the Coronado City position would not be one of like seniority, status, and pay in view of the distance involved and the need to build up business there from nothing.

In this situation, in view of the company's established practices and the relatively little weight given to seniority, there is no probability or reasonable certainty that O would have been offered either of the positions he claims if military service had not intervened. Therefore, even though it may appear likely that he would have accepted the first of these two positions to be offered to him, he has no statutory right to any job other than the one he left, and X Company's offer is proper since it gives him the choice of returning to that position in Cactusville.

(11) Employee AB leaves for military service after completing three years of a formal four-year Pressman Apprenticeship program at Z Publishing Company. The labor agreement provides for seniority as a Journeyman Pressman as of the first date worked as a Journeyman. While AB is in military service, Apprentice CD, who had completed only two years of the apprenticeship by the time AB left, finishes the remaining two years and, in accordance with the established practice, immediately receives his Journeyman card from the union and begins receiving Journeyman wages from Z Company.

On returning from military service, AB is entitled to reinstatement as a fourth-year Apprentice, at fourth-year Apprentice wages. On completing his fourth year of apprenticeship, he will be entitled to Journeyman seniority dating from the date he would have completed the apprenticeship if military service had not delayed him, and placing him ahead of CD on the Journeyman roster. He will be entitled to Journeyman pay beginning with the first day he actually works as a Journeyman.

(12) The facts are the same as in Example (11). In addition, custom and practice have established a tacit agreement whereby, when there is a reduction in force, no Journeyman can be laid off until after all Apprentices have been laid off. Six months after AB returns to the apprenticeship, Z Company loses a major customer to the competition and finds it necessary to place all of its Apprentice Pressmen on a layoff expected to last for at least a year and perhaps forever. AB is laid off but CD, being a Journeyman, remains working.

AB protests and an investigation establishes that there is no substantial difference in Z Company's shop between the work actually performed by fourth-year Apprentices and the work performed by Journeymen.

In these unusual circumstances, AB should be allowed to continue working even if this would cause CD to be laid off. To hold otherwise would be to permit the compounding of the detriment caused by AB's service to his country, to such an extent that he might never be able to reach the position that would clearly have been his, rather than CD's, but for that military service.

(13) All new employees in the bargaining unit at PQ Company must survive a probationary period of 60 working days, within a six-month period but not necessarily consecutive, before they can acquire seniority or seniority rights, but if they meet this requirement their seniority becomes effective as of their date of hire. The supervisors observe and evaluate them closely during this period and perhaps 10% of those hired are dropped as unsuitable on or before their 60th day of work. New Employee EF is hired April 1, 1966, but leaves for military service after working 45 days in two months. During his absence there are no layoffs, 14 other new employees are hired, and 12 of them make the grade and establish seniority. All 12 of these men, as well as three probationary employees, are working when EF applies for reinstatement.

EF should be reinstated as a probationary employee with 45 working days completed. When and if he completes 15 more working days under non-discriminatory conditions without being dropped, he will be entitled to seniority and seniority rights dating from April 1, 1966. The running of the six-month period during which the 60 days must be worked is suspended during his military absence.

If there had been a reduction of the probationary period from 60 to 30 working days, for example, during his military absence, he should have been reinstated with an immediate seniority date of April 1, 1966.

(14) At RS Stamping Plant, where plant seniority determines order of layoff and recall and "bumping" rights, Press Feeder GH has a seniority date of August 15, 1964 and Press Feeder JK has a seniority date of November 15, 1964. The next higher job is that of Operator. In July 1965 an Operator vacancy is posted for bidding. GH fails to sign the bid sheet and the vacancy is awarded to JK as the senior bidder on July 20, 1965. On September 20, 1965 JK leaves for military service and his Operator job is again posted for bids. This time GH bids and the job is awarded to him. In February 1966 there is a temporary reduction in force and Set-Up Man LM, whose seniority date is January 10, 1962, exercises his bumping rights to take the Operator job, forcing GH to bump back down to Press Feeder. When JK returns from military service, LM is still working as an Operator and GH is still working as a Press Feeder.

JK can bump down into a Press Feeder job if his November 15, 1964 seniority date is sufficient for that purpose, but he cannot displace GH as a Press Feeder or LM as an Operator. LM would have displaced JK as Operator, instead of GH, if JK had not been in military service. However, JK's future

recall rights to the Operator job are superior to GH's despite the contractual provision whereby recall rights are determined by plant seniority, because GH would never have become an Operator but for JK's military absence. Therefore, when business picks up again and LM returns to the Set-Up Man position, JK, rather than GH, will be entitled to return to the Operator position.

## CHAPTER XII

### Disabled Applicants

The reemployment statute makes special provision for employees who are not qualified to perform the duties of the positions that would otherwise be due them, where the disqualification results from a disability sustained, aggravated, or manifested while the employee is in military service, on initial active duty for training, or on military training duty. Such an employee, if qualified to perform the duties of any other position in the employer's organization, is entitled to such other position "as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case."

Before the disability provision can come into play, it must be established or agreed that the veteran is not qualified to perform the duties of the position to which he would be entitled but for the disability or handicap. In relation both to that position and to any position claimed under the disability provision, the sole criterion of his qualifications is his actual ability to perform the duties of the job according to ordinarily applicable standards of performance and without unusual risk to the health or safety of himself and others. The possible effect of his disability or impairment on the cost of workmen's compensation insurance would not be a legitimate disqualifying factor.

The disability does not necessarily have to be "service connected" or "service aggravated" in the sense in which these terms are used by the Veterans Administration in determining eligibility for disability compensation. In other words, the military service does not have to be the cause of the disability. All that is necessary is that it be sustained, aggravated, or manifested during the military training or service. On the other hand, the sustaining, aggravation, or manifestation must occur during the military training or service itself, and not during the periods of military absence between leaving the position and entering military service or between being released from military service and applying for reemployment. The disability must exist at the time the employee applies for reemployment.

Neither the receipt nor the non-receipt of a medical discharge would be conclusive on the question of whether the veteran's statutory protection is under the disability provision or under the regular provisions of the statute. Physical ailments or defects which do not warrant a medical discharge might impair his ability to perform the duties of his civilian job. On the other hand, his loss of value to the Armed Forces, as evidenced by a medical discharge, would not necessarily affect his value in civilian employment.

The general rule against "superseniority" for veterans does not apply to bar the disabled veteran from jobs in other seniority groups, or in groups where there is no seniority system. The disability provision in the statute was designed to give the disabled employee, where necessary, rights he could *not* have gained by remaining in the employment. Reemployment of the disabled

veteran cannot be denied merely because no vacancy exists, or merely because the contract or practice does not give an employee a right to displace another or to move into another seniority area. However, the position claimed under the disability provision must be one that already exists somewhere within the organization; the employer does not have to create an unnecessary position to accommodate the disabled veteran.

The veteran who claims a different position under the disability provision must provide information on his education and experience and the extent and nature of his disability and his present capacities, but it is not his responsibility to identify the exact positions in the organization for which he is qualified, and which will come closest to providing him with the seniority, status, and pay of the position to which he would be entitled but for his disability. It is the employer's responsibility, because of his greater knowledge of the positions in his employment and their physical and mental demands, to survey those positions and provide the information about them which would indicate which one, if any, is most appropriate for the veteran under the statutory disability provision. Of course, the information provided by either party is subject to challenge by the other, like any other evidence.

The sustaining or aggravation of a disability during military service may not come to light until after the veteran applies for reemployment. The employer may require the veteran to undergo a pre-reemployment physical examination if the employer has an established practice of requiring such examinations of other employees returning from furlough or leave of absence, but the veteran is not in the position of a new applicant for employment, and the mere fact that new applicants must undergo physical examinations would not justify requiring the veteran to do so. In some cases, a service-incurred disability or aggravation may not come to light until after the veteran has been reinstated in his old position, or one of like seniority, status, and pay. This would simply indicate that he had been reinstated under a mutual mistake of fact, and that his true statutory rights were and are under the disability provision rather than the regular provisions of the law.

The opinion of the employer's physician is not conclusive as to the veteran's condition or as to his ability to perform the work in question. The findings of the company doctor may be accepted or refuted like any other evidence. Where the views of the company physician and the veteran's own physician are at variance, one device that may be used is to have the veteran examined by a third or "neutral" doctor mutually designated by the other two, perhaps on a shared-expense basis, after agreement by the veteran and the employer to be bound by the third doctor's findings.

A physical defect discovered after military service that would disqualify the veteran for initial hire does not necessarily disqualify him for reinstatement, either in his preservice position or in a different position under the disability provision, even if the defect existed before military service and was not aggravated during military service. Again, the veteran is not in the position of a new applicant for employment and the sole criterion is his actual ability to do



the job. Failure to discover a pre-existing defect before military service may have resulted, for example, from an incomplete or faulty physical examination at the time the veteran was originally hired, or from an incorrect statement made by him on his original employment application. In the latter event, the incorrect statement cannot be held against him as a "falsification" unless it appears not to have been made in good faith. If the employer discovered the defect before the veteran left for military service but condoned it by retaining him in the employment, that defect cannot be urged as a bar to the veteran's reemployment.

In addition to the reasonable reorientation period to which any veteran is entitled, a veteran with rights under the disability provision would be entitled to a reasonable amount of instruction in the duties of his new position.

In a case where the disability sustained in military service was of a temporary nature and full recovery was anticipated, and where another position existed the duties of which the veteran was capable of performing, the court held that he was entitled to interim employment in that position and to reemployment in his normal position when recovery was complete. If no other position had existed for which he was qualified, he presumably would have been entitled only to reinstatement in sick leave status until he had recuperated.

### EXAMPLES

(1) At the time he leaves for military service, A is a Milk Route Salesman for P Dairy Company. The Army doctor who examines him at the time of his release from active duty advises him that he has a hernia condition which will probably clear up in a few weeks without an operation. On applying to P Company for reinstatement, A is given the company's standard physical examination and the company physician marks his report "Do not hire—hernia." P Company tells A it will reemploy him only if he first has an operation to correct the hernia. A then consults his family physician, whose findings are substantially similar to those of the Army doctor. A's physician recommends that A should see him again in six to eight weeks and should not lift anything weighing over 70 or 80 pounds in the meantime, but does not place any other restrictions on his physical activities. As a Milk Route Salesman, A would hardly ever have to lift more than 40 pounds at any one time.

The weight of the evidence here indicates that A is still qualified to perform the duties of his preservice job, even though he probably would not be hired if he were a new applicant. Therefore the disability provision in the statute does not come into play and A's right is to prompt reinstatement as a Milk Route Salesman. This is true whether P Company is relying on the hernia condition as a reason for denying him that job, or whether A himself is contending that he should be given a different job under the disability provision. If the condition later worsens to the extent that A cannot perform his duties as a Milk Route Salesman, he will not have special rights under the

disability provision, because at the time he applied for reinstatement he was still qualified for his preservice job.

(2) While on a three-day pass, Serviceman B attempts to break up an altercation between two civilians and receives a severe knife wound in the left arm. Gangrene sets in, the arm is amputated above the elbow, and B is given a medical discharge. He applies for reemployment at Q Home Services, where he had been employed as a Painter and Paperhanger before military service. Since he is unable to perform the duties of a Painter and Paperhanger with only one arm, Q Company turns him down. However, B has a pleasant personality and a good knowledge of the home repair business, and Q Company has a job, currently being filled by a girl hired while B was in military service, which consists of answering the telephone and acting as Receptionist and Order Taker. Although this job is outside the bargaining unit and differs from B's preservice job in that the pay scale is less but employment is steadier, it appears that B could handle it very well if a shoulder-type telephone were installed.

Under the disability provision in the reemployment statute, B would be entitled to the job held by the girl, at the current rate of pay for that job. It does not matter whether his wound was suffered in line of duty or not, so long as it was suffered while he was in military service.

(3) C is released from active military duty in perfect health and goes to Plant R to apply for reinstatement in the assembly line position he had left for military service. After making application and agreeing with the Plant Superintendent that he will return to work the following Monday, he leaves the plant en route back to his car, but is struck by a hit-and-run motorist and suffers multiple fractures in the arms and chest.

This accident cannot lead to rights under the disability provision in the statute since it did not occur while C was in military service. Plant R is therefore not required to provide a different position for C even if his injuries result in permanently incapacitating him for the duties of his preservice job. His rights are the same as those that any other assembly line employee of the plant would have under the established contract provisions and practices, if injured in a comparable manner while going home from work.

(4) Delivery Truck Driver D leaves his job in the Shipping Department of S Department Store to join the Navy. The Navy assigns him to Shore Patrol duty at a missile launching base. During one of his tours of guard duty, a rocket explodes on the launching pad and a large piece of debris strikes him in the face, permanently impairing his eyesight. After his discharge from the Navy, he applies to S Company for reemployment, but under State law nobody can get a truck driver's license unless he has 20-20 corrected vision in both eyes, and D cannot meet this requirement. S Company offers to place and train him in an Inside Sales job in its Motor Accessories Department where, allowing for probable commissions, his total earnings would be likely to approximate those of the Truck Drivers, although the Inside Salesmen get shorter vacations and work a less desirable schedule than do the Truck Drivers, and unlike the Truck Drivers, are not covered by any collective bargaining agreement.

If, in terms of seniority, status, and pay, the Inside Sales job is the closest practicable alternative within the organization to the Truck Driver job for which D is clearly no longer qualified, the company's offer is in compliance with the law.

(5) When E was originally hired by T Company as an Assistant Credit Manager, one of the questions on the application form was, "Have you ever had any diseases, other than the usual childhood diseases"? E answered this question in the negative, and T Company's physician found no evidence to the contrary, so E was hired. After a couple of years on the job, E is drafted and sent to a combat zone, where he suffers what the Army diagnoses as a mild epileptic seizure. E gets a medical discharge after treatment and medication, and the Army doctors tell him he can lead a normal civilian life as long as he continues the medication, an opinion which is confirmed by his own physician shortly after he returns home. When E applies to T Company for reinstatement, he tells all this to the company's examining physician, who makes a further investigation and determines that E had actually had what appears to have been an epileptic seizure at age 4, though his parents had told him only that it was a minor case of "nervous trouble." T Company refuses to reemploy him on the ground that the office girls would be terrified if he should have an epileptic seizure at work and would be demoralized by working with him, and on the further ground that he had falsified his original application for employment by not reporting the childhood seizure.

On these facts the weight of medical opinion and the nature of the job would support the view that E is still qualified to perform the duties of his preservice position without unusual danger to the health and safety of himself and his co-workers. Studies have shown that the widespread fear of epilepsy in business and industry is largely unwarranted. As for the alleged falsification, E's answer on the application form was given in good faith and to the best of his knowledge and belief. Therefore he is entitled to reinstatement in his preservice position and does not need to resort to the disability provision in the statute. Of course, different facts might produce a different result. For example, if E had suffered frequent attacks of "grand mal" epilepsy while in military service and his job had involved working with other employees near vats of acid, he might have had to be assigned to outside plant maintenance work or office work under the disability provision, or he might not have been qualified for any job in the organization at all.

## CHAPTER XIII

### Duration of Rights

A veteran returning from active duty is protected by the reemployment statute against discharge without cause for a period of one year after he has been properly reinstated. A reservist or National Guardsman returning from a period of initial active duty for training of not less than three consecutive months has similar statutory immunity, but only for six months. There is no comparable specific period of immunity for reservists and National Guardsmen who perform weekly or weekend drills, annual tours of training duty, and other types of military training, but they are entitled to be reinstated in good faith and cannot be discharged because of their reserve status or their training obligations.

These provisions give the the employee special statutory protection that he would not have under contract or practice. Their purpose is to assure him of an opportunity to regain his former proficiency, a measure of financial stability during the period of readjustment, and a fair chance to reknit the broken threads of his civilian career. However, the statute does not give absolute immunity against discharge, or "freeze" the employee in the job, for the period of special protection. He can still be disciplined during that period, even to the extent of being discharged, if it is shown that sufficient cause exists for such action.

In the balance of this discussion and in the examples which follow, the references will be to the one-year period of protection against discharge without cause which the law accords to veterans returning from active military duty. However, the principles to be applied are exactly the same with respect to the six-month period of protection which the law provides for reservists and Guardsmen returning from initial active duty for training.

The year does not begin to run until the veteran has been fully and properly reinstated according to law. The mere fact that he has been reemployed does not make his reemployment date the starting point for his period of protection from discharge without cause if his restoration falls short of statutory requirements with respect to seniority, status, pay, or insurance or other benefits, or if it fails to accord him a missed promotion to which he has a right, with proper seniority in the new position. Furthermore, if the provision against discharge without cause is violated after the year has begun to run, its further running is suspended for as long as the violation persists, since the veteran is entitled to the full term of protection. If the veteran is called up for reserve training duty within his statutory year of special protection, the period of absence connected with that training duty does not count toward his year of protection. However, the statutory year does continue to run during periods when the veteran is not working because of a strike, a temporary layoff pursuant to an established seniority system, an absence caused by his own illness, or other normal vicissitudes of employment not attributable to his military absences. Moreover, if

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the veteran's statutory rights have been fully accorded to him but he voluntarily quits, for reasons other than additional military service, before his statutory year has expired, his statutory rights against the employer come to an end, and if he later reenters the employ of that employer he will not have any further protection under the one-year provision or any other part of the statute on account of his past military status.

The "discharge" against which the veteran is protected is not limited to actions by the employer which terminate the employment. A termination on the employee's own initiative, after and by reason of a violation of any of his statutory rights by the employer, would be considered a constructive discharge without cause. A demotion, a reduction in pay, or any other action by the employer which separates the veteran from his proper "position" or from any of its legally protected attributes of seniority, status, and pay, would be a prohibited "discharge" if effectuated "without cause." A discharge may occur without any formality or written document. Although an action may be called a layoff or furlough, it would amount to a discharge if intended as a permanent severance of employment, without recall rights or some other clear recognition of the continuance of the employment relationship.

Discharge of the veteran within his statutory year is permissible only if the employer can show that it was for "cause." The statute does not define this term, but in view of the remedial and protective purposes of the statutory year, the "cause" must be some substantial breach of duty toward the employer and the penalty must not be disproportionate to the offense. Collective bargaining agreements and past precedents may define causes for dismissal, and such definitions would be relevant though not conclusive in determining whether there is "cause" for discharge from that employment within the meaning of the law and whether the offense is of sufficient magnitude to warrant the extreme penalty of discharge, rather than some lesser disciplinary action such as a reprimand or a punitive furlough. Incompetence, careless and substandard performance of duties after an appropriate reorientation period, excessive tardiness and absenteeism, negligence, disobedience, insubordination, or other substantial reprehensible acts or faults of the veteran could amount to "cause," particularly where it can be shown that the employer has previously dismissed other employees in comparable positions for comparable transgressions. Possible resentment by the employer of the statutory compulsion to reemploy, and possible resentment by other employees or by union officials of the veteran's exercise of his statutory rights, must be allowed for and of course cannot be held against the veteran as a factor contributing to "cause." In most cases, a sufficient history of appropriate advance warnings is necessary to support a discharge within the statutory year, and the offenses relied upon must have occurred after reinstatement.

Sufficient "cause" may also arise without fault on the part of the veteran, because of an economic worsening of the employer's business. In such cases, however, it is improper to discharge the veteran until and unless he has been allowed to exercise whatever transfer, displacement, or "bumping" rights his

statutory seniority may entitle him to exercise under the established seniority system. If there is neither an established seniority system nor any other established system for determining who goes and who stays according to objective standards, as opposed to the discretion or judgment of the employer, it is improper to discharge the veteran within his statutory year as long as work continues to be done which he is at least minimally capable of performing. Generally, the same reasons that entitle him to reinstatement in preference to other employees will also entitle him to retention on the job during his statutory year in preference to them.

The Supreme Court has ruled that the end of the statutory year of protection against discharge without cause is not of itself a sufficient justification for discharging the veteran, and does not terminate the statutory protection of his seniority and seniority rights or open the door to discrimination against him as a veteran in any respect. His seniority, status, pay, and other benefits continue to be protected by law as long as the employment relationship endures.

### EXAMPLES

(1) Employee A, who has a 1960 seniority date, leaves his job with Employer N to enlist in military service for three years in 1962. He receives an honorable discharge and makes a timely application for reemployment in 1965, but N erroneously believes that voluntary enlistees do not have reemployment rights, so he rehires A as a new employee with a 1965 seniority date. In 1967 N automates his operations to such an extent that all employees with seniority dates of 1964 or later are permanently dismissed under N's labor agreement with the union. A objects to his dismissal on the ground that his seniority should date from 1960 rather than 1965.

The objection is well founded. Although A has worked for N for more than a year after returning from military service, the running of the statutory year does not end the protection of his seniority rights. Since the veteran was entitled upon reinstatement to a 1960 seniority date, the dismissal was improper as an impairment of his seniority.

(2) Reservist B is a Laborer at Plant O, where established practice under the union contract gives the senior Laborer the right to fill the next opening in the higher paying position of Fork Lift Operator. B is called up for active duty and during his absence a Fork Lift job is filled by Laborer C, who has less seniority than B. B returns from active duty and is reinstated as a Laborer on February 1, 1967. He files a grievance which results in his being awarded the Fork Lift job on June 1, 1967, with back pay for four months representing the difference in earnings between the two jobs. On April 1, 1968 there is a cutback in production and both B and C are laid off temporarily on a seniority basis pursuant to the contract with recall rights also based on their seniority. B objects on the ground that other Fork Lift Operators remain working and that it has not been a year since he was properly reinstated.

Since there is an established seniority system which governs order of layoff and since B was laid off through the nondiscriminatory operation of that system, his layoff was not improper even though it occurred within a year of his proper reinstatement. The law does not "freeze" him in the job for a year. If there had been no established seniority system, B's layoff would not have been proper because his statutory year did not begin to run until June 1, 1967, when he was first placed in the proper job.

(3) Two months after being fully and properly reinstated by P Company, which has had no union in the past, Veteran D goes out on strike with most of the other employees at the plant, with the aim of forcing P Company to recognize the union. The strike lasts three months, P Company signs a contract with the union, and D returns to work. Nine months later, and 14 months after his reinstatement following military service, D is caught engaging in fisticuffs with Employee E on company property and company time, and both of them are summarily discharged on the spot, as has always been P Company's practice in such cases in the past. It is established that E struck the first blow, after being accused of "goldbricking" by D. D alleges that his statutory rights have been violated because he had been back on the job for only 11 months and because fighting in self-defense is not sufficient "cause" for discharge within the meaning of the law.

The strike did not stop the running of D's statutory year and that year had expired before the fight occurred. Therefore D has no standing to challenge the adequacy of the "cause" under the reemployment statute, even though he could probably have challenged it successfully if the incident had occurred within his statutory year. There is no indication that the discharge was in violation of his seniority rights or other rights that are protected by law beyond the statutory year, or that it had any connection with his military service. D may of course have the basis for a valid grievance under the contract even though he has no basis for a claim under the law.

(4) Q Landscaping Service is a small one-owner, two-truck, six-employee business. The work done by all six employees is pretty much the same, and they all drive the trucks, plant trees and shrubbery, strip and lay sod, etc. During the winter months, Mr. Q usually dismisses three or four of the employees and may or may not rehire them again when spring comes. The employees retained through the winter are the ones Mr. Q considers the least expendable. Employee F leaves the six-man crew to enter military service in June 1965 and is fully and properly reinstated in May 1967 on returning from active duty. In December 1967 Mr. Q discharges F and three others. F protests to the Office of Veterans' Reemployment Rights and the case is resolved by an agreement providing for his reemployment in February 1968 without back pay. In June 1968 Mr. Q curtails his activities on his doctor's advice and discharges three of his six employees, again including F, who again protests.

F's protest is again a valid one under the law. The running of his statutory year was suspended during the period of noncompliance from December 1967 to February 1968, so by June 1968 he has had only 11

months of reemployment even though it has been 13 months since he was reemployed. The length of employment of the different employees with the firm is immaterial, since Mr. Q has not followed a system based on length of employment in deciding whom to retain over the winter and whom to discharge, and since his views as to who is least expendable are not an objective test. F cannot be discharged within his statutory year unless all of the other employees are also discharged, inasmuch as his job is substantially the same as theirs even though they may be able to do it more to Mr. Q's liking.

(5) Air National Guardsman G is an Accountant in R Corporation's Tax Department. For the second successive year, his unit is called up for two weeks of training duty in the month of March. When he returns, R Corporation permits him to return to his job, but the Personnel Director tells him that they are taking him back only because the law says they have to and that since he insists on "playing soldier" during the height of the income tax season and since his work has been somewhat careless anyway, he is "through" as of the end of the week.

Although G has no specific period of protection against discharge without cause, this discharge is contrary to law since it is rather clearly motivated by his reserve training obligation, and he has not been reemployed in good faith. There has been no showing that the alleged careless performance was sufficient by itself to warrant discharge, or that other Accountants have been dismissed for comparable degrees of carelessness. The result would be the same if the Personnel Director had told G before he left for training duty that for the reasons stated, he should not bother to report back for work when he returned. In that event, G would have been legally excused from reporting back promptly and R Corporation would have committed the additional infraction of denying G his statutory leave of absence for training duty.

(6) Veteran H is reinstated in his preservice job with S Aircraft Company as a Welder. According to S Company's labor agreement, the first case of unauthorized absence subjects the employee to a formal reprimand, the second to a one-week disciplinary layoff, and the third to dismissal, but S Company has not been strict in applying these penalties except in periods when the labor market has been tight. A few months before leaving for military service, H had taken a Friday off without permission in order to have a long weekend for a hunting trip, but no formal reprimand had been entered on his record. After reinstatement he proves to be an average employee and there are no black marks on his record until, six months after returning to work, he does the same thing again. At that time, as H knows, the company is racing to meet a delivery deadline on a missile contract and is working its plant employees on Saturday overtime. Aircraft Welders are in short supply and S Company has to work a night shift Welder two shifts a day on that Friday and Saturday, at double time rates for the second shift, in order to fill the gap caused by H's absence. When H shows up the following Monday, he is discharged for absenteeism.

On the basis of the information presented about the contract and the practice thereunder, the discharge would have to be considered too severe a



penalty and therefore not for "cause" within the meaning of the law. A formal reprimand, or possibly a one-week disciplinary layoff at most in view of the aggravated circumstances, would be as much of a penalty as the reemployment law would permit in this situation.

## CHAPTER XIV

### Vacations

The effect of the reemployment statute in determining the veteran's vacation rights has long been an unclear area in the administration of the law, and at the same time, one of the most prolific sources of disagreement between the veteran and his employer. Applicable court decisions interpreting the statute in regard to vacations and related benefits have been relatively few in number, partly because of a tendency of the parties to compromise on a case by case basis on matters which do not go to the heart of the employment relationship and do not usually affect other employees. The vacation decisions handed down by the lower courts have gone off in several different directions, either because of conflicting legal theories or because of the wide variations among the vacation systems that exist in business and industry. In 1966 and 1967, however, two decisions of the Supreme Court laid down an approach which brings some order, consistency, and logic to the solution of these problems and has required a revision of previous interpretations on vacation rights in some respects.

The statute itself does not independently create a right to a vacation or to vacation pay. Vacation rights owe their existence in the first instance to the provisions of an established employer policy or a collective bargaining agreement. The statute simply protects the veteran against loss of vacation benefits earned but not received before his departure for military service, and assures him in many situations of the right to receive the full vacation benefits which would normally have become available to him after his reinstatement if he had not been absent for military service. Except for vacation rights earned but not received before military service, he is not entitled to vacation pay that he could have received only during his military absence, unless other employees of the employer on nonmilitary leaves of absence are entitled by contract or practice to receive such pay despite their absence.

Two requirements of the reemployment statute, as interpreted by the Supreme Court, are involved in the determination of the veteran's vacation entitlement. One of these is the so-called "escalator" provision for reinstatement with the position, seniority, status, and rate of pay he would have attained if military service had not intervened. The other is the "leave of absence" provision whereby the veteran is entitled to participate in insurance or other benefits pursuant to established rules and practices relating to employees on furlough or leave of absence that were in effect with the employer when the veteran's military absence began. The "leave of absence" provision is a floor, not a ceiling, and is intended to add to the veteran's protection, not to take away from him any protection to which he is entitled under the "escalator" provision. In all respects, including vacation entitlement, the "escalator" provision places him basically in the position, on and after reinstatement, that he would have occupied if his employment had continued

without interruption by military service. The "leave of absence" provision does not detract from this, but makes it clear that the military absence does not constitute a break in the employment relationship, and assures the veteran of the additional right to be treated no worse than other employees on nonmilitary leaves of absence would be treated with respect to benefits, including vacations, that would have been receivable during the period of his military absence. The application of the "leave of absence" provision to vacation rights maturing during the military absence is subject to the further rule that the veteran, upon his return, is entitled to any previously uncollected vacation benefits or vacation pay he had fully earned, under the applicable rules and practices of the employer, before military service, except for being present on some "magic date," where his absence on the "magic date" was the result of his military service.

Most vacation questions arising under the reemployment statute fall into one of two categories. Either they are concerned with the *length* of the veteran's paid vacation in the year of his return and subsequent years, or they are concerned with his *eligibility* for a paid vacation in the year of his return or the following year. In resolving these questions on vacation rights after reemployment, the "leave of absence" provisions in the statute are not directly involved. The basic question is where the reemployed veteran would stand in regard to current vacation rights if his employment had continued without interruption by military service.

The application of this "escalator" standard is clear and simple with respect to questions concerning the *length* of the veteran's paid vacations after reemployment. For this purpose, the time he was absent because of military service counts toward his continuous service, length of employment, or years of compensated service with the employer. If the right to receive longer vacations with pay depends on having had certain minimum amounts of working time or earnings in each of a certain number of previous years, the veteran is entitled to be credited for this purpose with the working time or earnings he would have had during each of the years he was absent for military service. The length of his vacations with pay is the same as it would have been if his employment had continued without interruption by military service.

Where the question is whether the veteran is *eligible* for vacation with pay in the year of his reemployment or the following year, the application of the "escalator" standard is subject to some modification. If in fact, under the established rules and practices of the employer, vacation eligibility is based primarily on continuous service or length of employment with the employer, the veteran's military service time counts for this purpose the same as if he had not been gone. In this type of situation, the vacation pay is current pay because of current employment and prior length of service. On the other hand, to the extent that it is clear from the established contract provisions or rules

and practices of the employer that vacations are deferred additional compensation for actual work previously performed, the veteran's military service does not necessarily take the place of the actual work he did not perform, since the law does not entitle him to wages from the employer for the work he missed while absent for military service. In these situations, compliance with the law, for practical purposes, will usually be considered to exist if the veteran receives or has received prorated vacation payments reflecting his actual work in the year of his departure for military service and the year of his return.

Under some vacation systems, the vacation must be taken, if at all, within a stated span of time, such as between May 1 and September 30 of the year in question, or during a period when the plant is shut down for vacations. Where there is a rule like this to which no exceptions have been made in practice, and the veteran returns too late in the vacation-taking period to receive a full vacation, he is entitled only to that portion of his vacation and vacation pay which can still be taken within the prescribed period. If he returns after the prescribed vacation-taking period for the year in question is over, he is entitled to take a vacation for that year only if and to the extent that other employees in his type of job are permitted to take vacations outside the prescribed period. Of course, the employer cannot delay the veteran's reinstatement, after a timely application by the veteran, with the motive of depriving the veteran of a part or all of his vacation rights.

Some vacation rules and practices make special provision for returning veterans by exempting them from the usual eligibility requirements. There is of course nothing in the statute to prevent the employer from giving the veteran more than the law requires, but these special rules and practices cannot be applied in such a way as to give him less than the law requires.

Everything that has been said above with respect to the effect of the statute on the vacation rights of veterans applies equally to its effect on the vacation rights of National Guardsmen and reservists in connection with their tours of initial active duty for training.

There is a special guarantee in the reemployment statute with respect to the vacation rights of employees who have statutory leaves of absence to perform military training duty, or to report or be examined for entry into military service. These employees are entitled to return to their jobs with such vacation as they would have had if they had not been absent for such purposes. In other words, the employer cannot require them to take their vacations concurrently with their statutory leave, in whole or in part. However, such an employee can voluntarily agree with his employer to take his vacation simultaneously with his statutory leave, provided of course that he receives his normal vacation pay. The rights of these employees are discussed further in Chapter XVIII.

## EXAMPLES

(1) Carman A has seniority with Railroad P dating from March 1, 1951, but was absent for military service in the Korean Conflict from January 1, 1952 to December 31, 1953. The labor agreement provides that in order to be eligible for a vacation with pay in any year, the employee must have worked at least 110 days on the job during the preceding calendar year, and A has met this requirement in 1951 and every subsequent year except 1952 and 1953. In each of those two years, several Carmen below him on the seniority roster met the 110-day work requirement. The agreement further provides that an employee with at least 15 years of seniority shall be entitled to a third week of vacation with pay if he has met the 110-day work requirement in the preceding calendar year and also in each of 15 preceding calendar years, not necessarily consecutive. In 1966 the railroad schedules A for only two weeks of vacation with pay and tells him he will not be eligible for a third week until 1968 because 1967 will be the 15th year in which he has worked at least 110 days.

A is entitled to a three-week paid vacation in 1966. Had he not been in military service in 1952 and 1953, he would have worked at least 110 days in each of those years, and 1965 would have been the 15th calendar year in which he would have met that requirement. The increased length of vacation in this situation is based primarily on, and is essentially a reward for, length of service. It is therefore a perquisite of seniority as to which military service time must be treated as continuous service.

(2) Q Tool Works has a published and literally followed vacation policy whereby an employee with one to three years of continuous service is entitled to one week of vacation pay and an employee with three to ten years of continuous service is entitled to two weeks of vacation pay, provided in each case that the employee has worked at least 1600 hours during the twelve months immediately preceding the plant's annual vacation shutdown during the first two weeks in August. An employee who has worked 800 to 1600 hours during that period gets only half of the vacation pay he would receive if he had worked 1600 hours.

Employee B is hired February 1, 1963, leaves for military service March 1, 1964 after being given one week of vacation pay by Q Company, and is reinstated March 1, 1966 upon returning from military service. By the time of the vacation shutdown on August 1, 1966, B has worked 800 hours since returning from military service. Q Company offers him one-half of one week's vacation pay.

The offer falls short of satisfying B's statutory rights in at least one respect. Since his military service time must be counted toward his continuous service with the company, he has more than three years of continuous service and has advanced from the one-week to the two-week vacation category. B is therefore entitled to at least a full week of vacation pay in 1966, this being half of two weeks.

(3) Chemist C is reinstated in the Testing Laboratory at Refinery R, his preservice employer, on June 1, 1967, after absence for military service from

May 10, 1965 to May 9, 1967. Including his military service time, he has eight years of company service, and the company's vacation policy for laboratory employees with five to ten years of company service provides for figuring vacation pay at 5% of the employee's annual rate of pay on May 1. The policy also provides that the employee must be on the active payroll on May 1 in order to be eligible for a vacation, and that vacations must be taken between May 15 and September 15. C had received the full vacation payment to which he was entitled in 1965 when he left for military service. R Company offers C a 2½-week vacation without pay in 1967, on the theory that he had no payroll earnings during the twelve months ending May 1, 1967 and was not on the active payroll May 1, 1967.

C is entitled to vacation pay in 1967 equal to 5% of what his annual rate of pay on May 1, 1967 would have been if he had been present and available for work. An employee's annual rate of pay, as opposed to his actual earnings during a 12-month period, is only a measuring device and not an eligibility requirement. The fact that C was not yet back on the active payroll on May 1, 1967, when the 1967 vacation rights of the other laboratory employees presumably vested or became fixed and determinable, is immaterial, inasmuch as he did return to work within the period when 1967 vacations could be taken.

(4) Service Station Operator S has no systematic vacation policy, because his employee turnover is relatively rapid and employees do not usually stay with him very long. He occasionally grants a leave of absence without pay when an employee wants some time off for personal reasons. Attendant D is reemployed by S on returning from military service and a few weeks later he claims the right to a one-week vacation with pay on learning that for the past two years S has given paid vacations to his Chief Mechanic, who had been hired while D was in military service. However, none of the other Attendants, including one who has been in S's employ since before D was originally hired, have ever received any vacations with pay from S.

D's claim is not supported by the reemployment statute. The statute does not independently establish a vacation system where none exists by contract or practice, and there is no indication that S has any established vacation policy applicable to Attendants or that the granting of paid vacations to the Chief Mechanic was in any way discriminatory against D as a veteran.

(5) Electrician E works 1700 hours for Television Station T during calendar year 1964 before leaving for military service in October of that year. Station T's contract with E's union provides that if an employee works at least 1500 hours during one calendar year and is on the active payroll on December 31 of that year, he shall receive a three-week vacation with pay during the next calendar year. E receives a hardship discharge in April 1966 and is promptly reemployed by Station T. He claims the three weeks of vacation pay he maintains he had earned during 1964 and would have received in 1965 but for his absence in military service. Station T resists this claim on the grounds that E was not on the payroll December 31, 1964 and that no exceptions to the December 31 rule have been made for anyone else.

E's claim is valid. During 1964 he actually met all contractual requirements for a 1965 vacation except the "magic date" requirement of being on the payroll December 31, 1964, and the law excuses him from meeting that requirement because his military service was all that prevented him from doing so. Relief from "magic date" eligibility requirements for vacations otherwise fully earned before military service is something that returning veterans have under the law even though similar relief is not granted under the contract to employees who have been on nonmilitary leaves of absence. This vacation pay would be that which E would have received if he had been present in 1965.

(6) File Clerk F. completes his military service on September 15, 1966, applies to his preservice employer, U Umbrella Company, for reemployment on September 26, 1966, and is immediately put back on the payroll. He requests that before returning to work he be granted the two-week paid vacation which U Company provides for employees in his continuous service category. However, U Company also has an established rule that any vacation which is not taken between June 1 and October 1 shall be forfeited. No exceptions to this rule have been made for office employees, and the only employees for whom exceptions have been made are the plant guards and maintenance men.

F is entitled to only one week of vacation with pay in 1966 and cannot carry the other week over into the 1967 vacation-taking period. His rights under the statute do not come into existence until he applies for reinstatement, and only one week remains between the date of his application and the end of the vacation-taking period for employees in his type of position. He is subject to the October 1 cutoff date because it is among the incidents of the "position" to which he is correctly restored.

If, instead of promptly reinstating F on September 26, U Company had refused to reinstate him until October 1 or later with the aim of avoiding the granting of a 1966 vacation to him, the company's October 1 deadline could not be applied to him. Even if the company had delayed E's reinstatement on the job for bona fide reasons, such as compliance with an established two-week notice period for an employee being dismissed in order to make room for him, this would not be a valid reason for failing to reinstate E in vacation status for the first week of the other employee's notice period.

(7) Reservist G has met all contractual requirements for a three-week vacation with pay in 1967 at the V Vegetable Cannery where he works. He informs the Personnel Manager that he has been ordered to summer camp for military training duty from July 1 to July 15, 1967, and requests a leave of absence for that purpose. The Personnel Manager says, "Fine. I'll have your vacation check drawn up right away. When would you like to take your other week of vacation?"

The Personnel Manager appears to be under the misapprehension that he can require G to treat his military training duty time as vacation time. G is entitled to three weeks off for vacation in addition to his two weeks off for summer camp. He should receive his vacation pay when he takes his vacation. He is not entitled by law to any pay from the company for his two weeks

of training duty time as such. Of course, if he wants to go along with the Personnel Manager's idea, the law would not prevent him from doing so. (More information and examples relating to the vacation rights of reservists and members of the National Guard may be found in Chapter XVIII.)



## CHAPTER XV

### Other Benefits

In addition to vacations, which are discussed separately in Chapter XIV, there are numerous other benefits which form a part of the veteran's total employment status or "position" and thus come within the purview of the reemployment statute at and after the time he applies for reinstatement. Among these other features of the employment may be such benefits as holiday pay, sick pay, insurance of various types, bonuses, profit-sharing plans, stock purchase plans, pension or retirement plans, and severance pay. The reemployment statute does not independently create such benefits for the veteran, but where they have been established by contract, policy, or practice, the statute does affect the manner in which the established rules are applied to him.

The same basic approach that is followed in determining the effect of the statute on the veteran's vacation entitlement must also be followed in determining his entitlement, and the extent of his entitlement, to these other benefits. With respect to benefits maturing and enjoyable only during the period of his military absence, the veteran is to be treated like an employee who has been on a nonmilitary furlough or leave of absence. With respect to benefits maturing or enjoyable after his reinstatement, he is to be treated as if he had remained continuously employed rather than absent in military service.

An exception to this rule with respect to benefits maturing and enjoyable after reinstatement would exist where it clearly appears that the benefit in question is not in fact an incident of seniority or length of the employment relationship, but is in fact a form of additional pay for actual work previously performed. This would be the case where the amount of the individual employee's benefit varies directly, uniformly, and precisely with the number of units of work performed by him.

However, the words and labels used in a contract or a published policy are not necessarily decisive in determining whether a benefit is really in the nature of pay for actual work performed. In many benefit formulas ostensibly containing a work requirement, the work requirement is in reality only a measuring device rather than a condition of eligibility. Unless there is a clear factual showing that the ostensible work requirement is not a mere measuring device, the formula and the measurement must be applied to the reinstated veteran's future entitlement as if his actual work or earnings had continued without interruption by military service. In other words, for the purposes of the benefit formula, the law would supply the missing work or earnings. This applies, of course, only to benefits maturing or enjoyable after the date of reinstatement, and not to benefits maturing and enjoyable only during the military absence.

The same considerations that apply to reinstated veterans in these respects would apply to employees reinstated after initial active duty for training with the National Guard or the reserves. They would also apply to employees

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returning to their jobs after statutory leave for military training duty, for reporting for induction, or for being examined for induction. In the remainder of this discussion, the words "veteran" and "military service" will be used as a shorthand way of referring to all these categories of returning employees and of military training or service.

In applying many of these plans to the veteran in view of the statute, it may be important to distinguish between the financing formula and the benefit formula. The mere fact that a plan is financed out of profits toward which the veteran did not directly contribute, for example, would not justify excluding him, in whole or in part, from participation in a benefit payable after his return, where the benefit formula defines an employee's participation rights without reference to a close, direct, and uniform relationship to his individual working contribution.

Some benefit plans are "noncontributory" and financed wholly by the employer. Others are "contributory" and financed in part by the participating employees. Where the plan is contributory and the veteran meets, or is entitled to be considered as meeting, all of its eligibility requirements except for having made the specified contributions out of his own pay, he should be afforded the opportunity to make those contributions retroactively after his return, either in a lump sum (including interest or other comparable increments to date) or under some reasonable installment plan. Only if he declines or fails to make these contributions could his participation be reduced proportionately for the employee contributions or the matching employer contributions thereby remaining unmade.

The plan may involve third parties who are legal entities separate and distinct from the employer, as in the case of a health insurance plan administered by an insurance company or a pension plan administered by a board of trustees named jointly by the employer and the union. Since the reemployment statute imposes direct obligations to the veteran only upon the employer, complications may arise in resolving questions about the veteran's benefit rights where such a third party is involved. However, the employer's basic undertaking toward his employees under the plan is not necessarily limited by the terms of the contract between the employer and the insurance company or by the terms of the trust indenture in a retirement plan, and this consideration sometimes provides room for a solution. In any event, under remedial legislation such as the veterans' reemployment statute, there are few wrongs for which, in the last analysis, a court could not find a remedy.

**Holiday Pay.** Questions have occasionally arisen as to an employee's right to holiday pay where the holiday occurs during his absence for military training or service and there is an established rule, designed to discourage unauthorized "long weekends" produced by absenteeism on workdays surrounding the holiday, whereby the employee must work the last scheduled workday before the holiday, the first scheduled workday after the holiday, or both, in order to be paid for the holiday itself. Pay for a holiday on which no work is performed can hardly be viewed as pay for work done. However, it is a benefit maturing

during the military absence, and for that reason the veteran, Guardsman, or reservist is not entitled to it unless, despite the stated eligibility requirements, such payments have been made to employees who were on nonmilitary furloughs or leaves of absence on the crucial day or days.

If working the day before the holiday is enough to satisfy the stated requirement and the veteran actually works that day, before leaving for military training or service, he is of course entitled to the holiday pay even though his military training or service keeps him from being present on the normal payment date. If working the day after the holiday is enough to qualify and the veteran returns to work in time to work that day, no question would arise. If working the day before and the day after is required by the established rule and no exception to that rule has been made in practice, and if the veteran's military training or service prevents him from working either of those days, the law would not entitle him to the holiday pay.

The situation discussed above must be distinguished from the situation where there is a stated requirement that in order to be entitled to holiday pay, an employee must have been on the payroll for a certain period of time prior to the holiday in question, and the employee is reinstated at some time during that period. The function and purpose of such a requirement obviously are different from those of a "day before" or "day after" requirement. In this case, since the requirement relates solely to continuity of service, military service time would count as payroll time for the purposes of holiday pay eligibility.

**Insurance.** Questions may arise in determining the extent of the veteran's statutory rights in connection with various insurance plans or policies that are a feature of the employment. Among these plans may be those providing employees with supplemental unemployment benefits, group life or accident insurance, or group hospitalization and medical benefits for the employee or his dependents, including maternity benefits.

Unemployment insurance for veterans as well as others is the subject of separate specific legislation, and the rights and eligibility requirements applicable to the veteran in that respect are governed by that legislation rather than by the reemployment statute. However, in some industries, unions and employers have negotiated privately financed supplemental unemployment benefit ("SUB") plans which take up where the statutory unemployment compensation systems leave off, usually by continuing payments beyond the end of the laid-off employee's entitlement to statutory unemployment benefits. There may also be other forms of privately financed and operated unemployment insurance plans.

The usual basic approach under the reemployment statute would also apply here. For private unemployment insurance benefits normally receivable during the period of his military absence, the employee's statutory rights are defined by the contractual rights of other employees on nonmilitary leaves of absence. For private unemployment insurance benefits receivable after his reinstatement

(in layoff status or otherwise), his rights are the same as they would have been if military service had not prevented him from working, unless it can be shown that the benefits are in fact related to actual work performed so closely, directly, and uniformly as to be in the category of additional wages for work done rather than a benefit depending on length of attachment to the employer's work force.

With respect to the veteran's coverage for group life or accident insurance purposes, the same basic distinction between coverage during his military absence and coverage after his reinstatement would be applicable. The rule whereby after reinstatement he is to be treated as if he had been continuously present, and working to the extent he would have worked if military service had not intervened, precludes the application to him of any "waiting period" after his reinstatement before such coverage becomes effective. While the terms of the insurance plan may impose a waiting period on new employees and employees returning from leaves of absence, a reinstated veteran, for this purpose, is in the position of an employee who has been present and working.

Most questions on the insurance rights of reinstated veterans have been in the area of health benefits, including hospitalization and medical care for the veteran and his dependents and maternity benefits for his wife. These questions have often involved situations where conditions arising while the veteran was in military service, such as the pregnancy of his wife, have caused expenses to be incurred after his reinstatement, such as expenses for childbirth and other obstetrical procedures. These subsequent expenses are not covered by the "medicare" systems of the Armed Forces even though the condition giving rise to them came into existence while the veteran was in military service. Usually they are not covered by civilian group insurance plans either, because they are incurred before the veteran has served out a specific waiting period on the job following his reinstatement.

At this point it is necessary to draw a distinction between the right to insurance and the protection afforded by the insurance. After reinstatement, the veteran does have an immediate right to *insurance* without serving out a waiting period, since he would have been insured if his employment had continued without interruption by military service. However, he has no right under the reemployment statute to be considered as having had insurance for the period of his military absence, over and above the insurance, if any, which the employer's group plan provides for employees absent for nonmilitary reasons. If a condition such as his wife's pregnancy came into being during a period for which he was not insured and the policy covers expenses of pregnancy only when conception occurs while the policy is in force, the protection afforded by that insurance is not available to him with respect to that condition, even though the resulting expenses are incurred after he has returned to employment and thus to insured status. However, there could be a different result if the policy merely provides the usual 9-month waiting period and the veteran's wife was covered under the policy before his entry into military service. It

would be unnecessary to serve out a new 9-month waiting period after his reemployment.

**Bonuses, Cash Profit-Sharing Plans, and Stock Purchase Plans.** The plans discussed under this heading are those by which the employer makes outright payments or allowances to certain categories of employees at or after the end of its fiscal year or some other accounting period, or at Christmas or some other holiday, on the basis of service rendered to the enterprise by the employees during the period in question. The veteran's rights where such payments are made into a pension or retirement plan, instead of going to the employees outright, are discussed under the next heading below.

Some questions involve situations where the veteran, before leaving for military service, has contributed through actual work on the job to the earning of the benefit in question, but is absent in military service on the payment date and therefore does not participate in the payment for that year. As a minimum, the law entitles him, upon reinstatement, to receive treatment for that previous year equal to the treatment that was accorded to other employees on nonmilitary leave of absence on the payment date. In addition, if before leaving he had fully earned the right to participate under the terms of the plan, except for meeting a "magic date" requirement of being present or on the payroll on the payment date, the law will entitle him to be treated as if he had met the "magic date" requirement for that year.

Other questions involve situations where the veteran is reinstated at some time during the year for which the payment is made, and is present on the payment date for that year, but has not been present and contributing to the success of the business for the entire year. Here again, he is entitled by law to participate for that year as if he had been contributing (to the extent his seniority would have permitted him to work) for the entire year, except to the extent that an employee's participation, under the terms of the plan, depends clearly, closely, directly, and uniformly on the amount of work he has actually performed on the job during the period in question. With payments of this type, it may not be unusual for the extent of an employee's participation to depend in fact on such actual work, at least in part, rather than on mere length of attachment to the employer's work force. To the extent that this is the case, the veteran would not be entitled to share in the fruits of the work of others beyond the relative extent of his own working contribution. However, this kind of situation must be distinguished from the common kind of situation where the amount of a participant's work or earnings during the year is only a device for measuring his participation, rather than an actual pro rata condition for earning the benefit. In either event, to the extent that seniority or time in the employ is an element in the benefit formula, the veteran's military absence must be counted in full. The military absence counts as time in the employ, and it may well have to be counted also as time worked, in determining the extent of the veteran's participation for the year in which he returns.

A veteran who returns to the employment during the year for which the payment is made and before the payment date would be entitled to full participation as if he had never been absent in military service, for example:

(1) In a Christmas bonus payable in an equal amount to every employee in his job group or wage class;

(2) In a year-end group profit-sharing payment to the employees in his department, divided among them in proportion to each one's *rate* of earnings during the year, whether paid in the form of cash or in the form of shares of the company's stock;

(3) In a plan by which employees in his job classification are permitted to purchase shares of the company's stock at a price below its market value, in quantities proportionate to their annual salary rates.

This same veteran might not be entitled to full participation as if he had never been absent in military service, for example:

(1) In a group incentive bonus distributed among the employees in his department strictly in proportion to the hours they actually worked in the department, or on a given project, during the period for which the bonus is paid;

(2) In any other payment which is clearly designed to reward the actual working contributions of each individual to the results achieved by the group, instead of merely using his total earnings for the period as an indication of his *rate* of earnings where the latter is the true factor which the payment formula is intended to recognize.

The exclusion from participation of employees who had contributed to the results but had left before the payment date would be an indication that the payment is not really a form of additional wages for work done, but is designed to reward mere loyalty or length of service, and should therefore be fully participated in by the veteran who returns during the period and is present on the payment date.

**Pension and Retirement Plans.** Pension and retirement plans in business and industry are of such infinite variety that few general statements can safely be made about the rights to be accorded under such plans to employees who return with protection under the reemployment statute. They may be contributory or noncontributory. They may provide for retirement with an immediate annuity or a deferred annuity, at a fixed age or after a fixed number of years of service with the employer or in the industry. There may be exceptions permitting earlier retirement at the option of the employee or the employer or in the event of disability. The plans may be funded or unfunded. If funded, they may be financed by a lump-sum contribution of a percentage of annual profits, by a fixed amount contributed for each man-hour worked, on an "as needed" basis, or otherwise. There may be immediate vesting, delayed vesting, partial vesting, or no vesting. They may be administered by the employer, by a joint committee or board of trustees, or through an outside trustee or insurance company. "Past service" with the employer or in the industry prior to the adoption of the plan may or may not be credited, along with "future service"

after the plan is adopted. An employee's "credited service" may determine in whole or in part when he can retire, the amount of his retirement annuity, or both. The amount of the annuity may be a fixed annual sum for all employees, or a sum varying with "credited service" or some other factor, and in either case the amount may be reducible by the amount of Social Security, Railroad Retirement, or unemployment compensation benefits received.

As far as reemployed veterans are concerned, some common threads do run through all retirement plan problems. Continuity of service with the employer or in the industry is the essence, though perhaps not the entirety, of what a retirement plan is designed to reward, and the reinstated veteran's military service time must of course be counted toward his continuous service with his employer. In nearly all cases, the retirement annuity or pension is a right or benefit maturing after reinstatement, and as such, is subject to the requirement that the veteran be treated not as if he had been on a leave of absence, but as if he had remained continuously employed rather than absent for military service, except where it is shown that credits under the pension plan are, in fact, precise additional pay for units of work done.

Where the pension plan requires a certain number of years of service with the employer before the employee can become a participant, or before a stated fraction or all of the employer's contributions can "vest" in the employee, or before the employee can retire with annuity rights, the veteran's military service time must be counted toward the fulfillment of these time requirements. Where "past service" prior to the adoption of the plan is credited on the basis of years of service, the veteran's period of military leave from the employment prior to the adoption of the plan must be included in such past service.

Where an employee having no vested rights in the pension fund is dropped in order to make room for the returning veteran, it would be unlikely that any additional funding would be required in order to give the veteran such status in the plan as he would have had but for his military absence. However, the mere fact that additional funding may be needed, so as to keep the fund on an actuarially sound basis after the veteran's return, would not justify a failure to accord full pension plan status to the veteran.

Where the veteran, in order to have achieved full status in a contributory pension plan had he remained present, would have had to make contributions of his own, he must of course make those employee contributions after his return, as increased by interest, dividends, capital gains, etc., in the meantime, if he is to qualify for the full pension plan status to which he is otherwise entitled by law.

Only a careful investigation and analysis of each individual case can determine whether a particular reinstated veteran is receiving the treatment to which the reemployment statute entitles him under his employer's pension or retirement plan. The foregoing discussion and the pension examples at the end of this chapter can provide, at best, an indication of how such problems are approached under the reemployment law.

Severance Pay. Severance pay is one type of benefit discussed in this chapter on which there has been a specific interpretation of the reemployment statute by the U. S. Supreme Court. It would appear to be one of the easiest benefits to classify as additional "pay" for actual work performed, but in this case the Supreme Court held differently. Despite a clearly spelled out rule in the severance pay agreement whereby the amount of an employee's severance pay was to be computed on the basis of his "compensated service" with the employer, the Court held that the reinstated veterans were entitled to severance pay computed on the basis of their total seniority, including the periods of military absence during which they performed no "compensated service."

For two reasons the Court concluded that the severance pay was in reality a seniority benefit. First, there was no close, direct, and uniform relationship between actual time worked by the employee and the amount of his benefit, inasmuch as in an extreme case, seven days of work, properly spaced, could produce as much "compensated service" credit as could a full year of actual work on the job. Second, the essential nature of severance pay is that of compensation for the loss of the job, and the value of the job in this case varied strictly according to seniority inasmuch as seniority controlled the right to the work.

Having concluded that by its essential nature the benefit in question was a prerequisite of seniority despite the apparent intent of the agreement to include an actual work factor in the benefit formula, the Court then applied the rule that for the purposes of such a benefit receivable after reinstatement, the veteran is entitled to be treated as if he had been continuously present and available for work, rather than as if he had been on a leave of absence. It characterized the leave of absence clauses in the statute as only a provision designed to add to the veteran's rights with respect to benefits receivable during the period of his military absence by equating his rights in that respect with those of employees on nonmilitary leaves of absence. The Court rejected the view that the leave of absence clauses were designed to reduce the veteran's rights under the "escalator" principle with respect to benefits receivable after reinstatement.

Therefore, in computing the amount of a reinstated veteran's entitlement under a severance pay plan, he is to be credited with the work he would have performed if military service had not intervened, in addition to the work he has actually performed before and after military service.

This is equally true whether the elimination of the position and the payment of the severance pay occur after the veteran has returned to work, or whether they occur while he is absent for military service. In either case, he is entitled to the amount of severance pay he would have received if he had remained present and working to the extent he would have worked if military service had not intervened. "Reemployment" rights can consist of the status of a terminated employee with rights to severance pay in lieu of the job and the



seniority that have been eliminated, if this is what the statutory reconstruction of the veteran's employment history would indicate.

### EXAMPLES

(1) Employee A is reinstated on the job by Employer P on May 1, 1967 after a two-year absence for military service. He has a five-day workweek, Monday through Friday. As a member of the active Reserves, he is ordered to summer camp for military training duty from July 1 through July 15, 1967. He leaves at the end of the day on Friday, June 30, after informing P's personnel office of his orders, and returns to work on Monday, July 17. P's labor agreement provides holiday pay for Tuesday, July 4, a non-workday, provided that the employee works on July 3 and July 5, and this requirement has been strictly followed in practice. A claims holiday pay for July 4.

The statute does not support the claim. The holiday pay is a benefit maturing during A's military absence, so his rights are determined by whether other employees absent on July 3 or July 5 would receive the holiday pay. Since they would not, neither would he.

(2) Employee B is reinstated on the job by Employer Q on May 1, 1967 after two years in military service. Memorial Day, May 30, and Independence Day, July 4, are paid holidays under the collective bargaining agreement, but that agreement also restricts holiday pay to employees who have been on the payroll continuously for at least three months immediately preceding the holiday. Q Company refuses to pay B for the May 30 and July 4 holidays on the ground that he has not met this three-month requirement.

B is entitled to holiday pay for both days. It is a benefit maturing after his reinstatement, so he must be treated as if he had been on the payroll during the specified three-month periods, instead of absent because of military service for parts of those periods.

(3) R Company's labor agreement allows sick leave at full pay for up to one week in any one calendar year if the employee has at least a year of company service, and up to three weeks in any one calendar year if he has at least five years of company service. This sick pay cannot be accumulated from year to year. Employee C, whose seniority date is February 20, 1961, leaves for military service from June 1, 1962 to May 31, 1966. After being reemployed by R Company, he suffers injuries in an automobile accident on July 4, 1966 which makes him unable to work until September 12, 1966. Some time after returning to work September 12, he presents a claim for three weeks of sick pay.

The claim is well founded. At the time of his injury, C had over five years of company service, including his military service time, so was in the three-week sick pay category.

(4) Engraver E leaves his job at T Tableware Company to enter military service. While he is gone, T Company sets up a noncontributory group hospitalization and surgical benefit plan for its employees and their dependents as

defined in a contract which T Company makes with INS Insurance Company. According to the terms of this group policy, the employee and his dependents acquire normal coverage after he has been on T Company's payroll for 31 calendar days following the date of the policy, and maternity benefits coverage after he has been on the payroll for 270 days following the date of the policy or the date of his marriage, whichever is later. Six months after the group insurance contract is signed, E returns from military service and is reemployed by T Company. Two weeks later one of his daughters enters the hospital for an appendectomy involving \$400 in surgical and hospital bills, and five months later his wife gives birth to a normal-term son at a total cost of \$700 in obstetrical and hospital expenses. INS Company refuses to pay these bills because T Company will not certify to it that E is eligible for the payments under the terms of the policy.

E is entitled to the \$400 but not to the \$700. A distinction exists between the right to insurance, which is the benefit that the law is concerned with, and the protection afforded by the insurance. The health insurance in this case does not afford protection with respect to conditions existing before the employee had a right to insurance. Mrs. E's pregnancy was a condition existing while E was still in military service. Therefore, he is entitled only to "leave of absence" rights with respect to the right to insurance for expenses associated with that pregnancy, and other employees absent from the payroll when their wives become pregnant are not covered for such expenses. On the other hand, the attack of appendicitis suffered by E's daughter occurred after his reinstatement, and therefore at a time when, but for his military absence, he would have had, under the plan, a right to insurance for the hospital and surgical expenses associated with that illness. The law does not entitle him to proceed against INS Company directly for the \$400, but if INS Company does not pay he would have statutory rights against T Company to that extent.

(5) Utility U has a profit-sharing plan whereby, at the end of each fiscal year on November 30, it contributes 10% of the year's net profits to a cash fund, which is divided among the employees who were on the payroll November 30 in proportion to their payroll earnings during the year and paid over to them in cash on or about December 15. Employees on layoff or leave of absence as of November 30 share in the distribution in proportion to their actual payroll earnings. Employees who have at least 10 years of company service by November 30 receive double shares. Foreman F, who has been in U Company's employ since July 1, 1956, is absent from his job from October 1, 1965 to October 31, 1966 because of a voluntary call-up for active military duty with the Air Force Reserve, and the only profit-sharing payment the company allows him for both years is one-twelfth of a single share for 1966.

For 1965, he is entitled to ten-twelfths of a single share, since he must be treated like an employee who is on a nonmilitary leave of absence on November 30, 1965. Even if the plan had excluded employees on leave of absence on November 30 from participation, F could not be excluded from ten-twelfths participation for 1965, because he had fully earned that much of a

share except for being on the payroll on the November 30 "magic date," and it was only his military service that prevented him from being present then.

For 1966, F is entitled to one-twelfth of a double share, rather than one-twelfth of only a single share. His military service time must be counted as company service for this purpose because the granting of double shares appears to be essentially a reward for continuity of attachment to the company rather than for actual amounts of work done, and by November 30, 1966 F had passed the tenth anniversary of his employment. However, he is not entitled to the full amount he would have received in 1966 but for his military absence, because the rest of the formula for determining the amount of an employee's share is essentially related directly and uniformly to the extent of his working contribution to the year's profits. The inclusion of earned vacation pay in payroll earnings for the year would not be enough to alter the conclusion that the distribution formula, apart from the doubling of credits for over-10-year employees, is essentially a formula for distributing additional pay for work done.

If the plan had provided for forfeiture of shares by employees who have quit or been discharged during the year, or for exclusion of such employees from participation, there would be an element of doubt as to the conclusion that the profit sharing is a form of additional pay for work done.

(6) The facts are the same as those in Example (5), except that the cash fund is distributed among the employees present or on layoff or leave of absence on November 30 in proportion to their weekly rates of pay in effect on November 30, these being 40 times the hourly rate in the case of hourly employees and one fifty-second of the annual salary in the case of salaried employees.

In this situation, F would be entitled to a full double share for 1966, instead of only one-twelfth of a double share, because the formula is using the employee's earnings only as a measuring device, and not as a reflection of his actual working contribution during the year.

(7) At V Vitamin Laboratories, there is a pension plan financed entirely by an annual company contribution, as soon as possible after the close of the company's fiscal year on June 30, of 15% of net profits to a trust fund administered by B Bank, to be invested as the bank sees fit. At the time a participant retires for age or disability, or otherwise leaves V Company's employ, a joint company-union pension committee informs the bank of the number of vested credits he has accumulated. The plan provides for two credits for each full year of employment with V Company and one credit for each full \$1000 of payroll earnings from V Company. If anyone leaves V Company's employ with less than five years of company service, he is entitled to nothing from the pension trust fund; if he leaves with five to ten years of company service, he is entitled to receive half of his accumulated share in the fund; and if he leaves after ten years he is entitled to receive his full accumulated share. His share bears the same ratio to the total amount in the fund that the total number of his credits bears to the total credits of all employees. When an

employee with over ten years of company service retires, his share in the fund is withdrawn and used to purchase a paid-up annuity for him from C Insurance Company. Retirement occurs when the employee reaches age 65 or becomes totally and permanently disabled in relation to his job at V Company after at least ten years of company service, whichever occurs sooner.

Guard G has been in V Company's employ since January 10, 1957, although his employment was interrupted by a three-year enlistment in military service from January 10, 1962 to January 10, 1965. On August 1, 1967 he is permanently blinded in both eyes as a result of a gasoline explosion at home, and is no longer able to work for V Company. The joint pension committee considers that G has seven years of company service and directs B Bank to compute his share in the pension fund accordingly, pay half of it to him outright, and strike his name from the list of participants. G consults an attorney, insists that his full share be used to purchase a paid-up annuity for him instead, and insists further that in the computation of that share he be allowed one credit for each full \$1000 he would have earned if he had remained on V Company's payroll during the three years of his military absence, plus two other credits for each of those years.

The reemployment statute clearly supports G on all counts, except with respect to the earnings credits for each \$1000 he would have earned during the three years he was absent. His military service time must be counted toward his company service, and this makes him a ten-year man eligible for an annuity purchased with his full share. It also entitles him to six more credits for company service than the committee awarded him. However, the closeness of the relationship between payroll earnings and pension credits, together with the separate allowance of credits for length of service, suggests that the earnings credits are, in essence, additional deferred pay for work previously done. Therefore, it is doubtful whether G is entitled to earnings credits for each full \$1000 that he would have earned but for his military absence, but there are no court precedents on this particular point. In view of V Company's undertaking of certain obligations to its employees by adopting the plan, it is V Company's obligation to see that G's rights are complied with, through a proper payment out of the pension fund or otherwise.

(8) Hair Stylist H leaves his position at W Wig Company to enter military service after one year in their employment, serves three years on active duty, and is immediately reinstated on the job with four years of seniority. W Company has a contributory pension plan administered through ABC Insurance Company whereby, after three years of employment, an employee becomes a participant and 5% of each subsequent salary check is deducted to help finance the plan. If an employee leaves before retirement, his contributions are refunded to him. Normal retirement occurs after 30 years of employment or at age 60, whichever occurs sooner, and the amount of the retired employee's annuity is determined by a formula based on years of employment and average annual earnings over the employee's last five years of employment. W

Company annually contributes whatever additional sums are necessary to keep the plan actuarially sound, as computed annually by ABC Company.

H, who was 22 years of age when originally hired, notices that no pension plan deductions are being made from his salary checks after reinstatement and asks why. W Company tells him that his three years in military service do not count as "employment" for the purposes of the pension plan and that he will not be entitled to retire until age 55.

H should have been reinstated as a participant, because by that time he was a four-year man in the employment and employees become participants after three years of employment. His normal retirement age should be designated as age 52, provided that he is willing to pay into the fund, in addition to the 5% deductions beginning with his reinstatement, 5% of what his earnings would have been during the year preceding his reinstatement if he had not been absent in military service, since he would have had to contribute that amount after three years of employment had he remained on the job. If he is unwilling or unable to make his contribution for that fourth year of "employment" within a reasonable time, he cannot reasonably claim to have it counted as a year of "employment" and the indicated solution would be a postponement of his normal retirement age to 53.

(9) Employee J has worked three years for X Tire and Rubber Company as a Molder at its Northville Plant at the time he leaves for two years of military service. One year after his departure, X Company discontinues all manufacturing operations at Northville and opens a new plant in Southtown, 800 miles away. It offers all Northville employees a choice between moving to Southtown at company expense, where they would start as new employees without seniority and at the wage rates prevailing in the Southtown area, and accepting termination with severance pay in an amount equal to two weeks' pay for each year of payroll service at the Northville Plant. A year of payroll service is defined as any period of 12 consecutive months during which the employee was paid for at least 30 weeks. J's rate of pay before military service had been \$120 a week, but six months after his departure the Molders there were all raised to \$140 a week in contract negotiations with the union. There were no layoffs during the year following J's departure. On applying for reinstatement and learning the details of what had occurred, J chooses to stay in Northville, as 80% of his fellow employees had done, and claims \$1400 in severance pay (ten weeks at \$140, for five years of employment), but X Company offers him only \$720 (six weeks at \$120, for three years of payroll service).

His true entitlement is to \$1120, representing eight weeks at \$140 for four years of employment. Had he not been absent in military service when the plant was shut down, he would have had four years of payroll service, his rate of pay would have been \$140 a week, and his severance pay would have amounted to \$1120, so that is the true value of the employment he lost at the time he lost it, as computed by the severance pay formula. Since 30 weeks of work produce as much "payroll service" as 52 weeks of work, the

relationship between units of actual work performed and "payroll service" is not so close, direct, and uniform as to characterize the severance pay as additional pay for actual work done. Such a characterization would be difficult in any event in view of the basic nature of severance pay as compensation for the loss of an employment relationship.

## CHAPTER XVI

### Effect of Collective Bargaining Relationships

The courts and the Department of Labor have often stated that the reemployment statute does not set up an independent seniority system or an independent system of industrial jurisprudence, but operates within or subject to any existing systems that the parties have established. It is true that one must necessarily look to the systems, rules, and practices established by the parties in reconstructing what the employee's history would have been but for his military absence, pursuant to the "escalator" principle which underlies the law, but that is all this statement means. It does not mean that the law defers to a collective bargaining agreement in the event of conflict, or that the returning veteran's only rights are those conferred or recognized by the contract.

The employer and the union may adopt, and many have adopted, contract provisions giving veterans special treatment that is equal to or more favorable than what the law would require, but they cannot bargain away the rights conferred upon the veteran by statute. The statutory reemployment obligations of the employer would take precedence over any contract provision purporting to restrict or diminish them.

These statutory obligations are, however, obligations of the employer. The statute does not directly impose any obligations upon unions except, of course, where they are themselves employers. A paid staff employee of a union is protected to the same extent as an employee of any other employer.

The employer cannot use the collective bargaining agreement, at the union's request or otherwise, as an excuse for denying to the veteran any rights or privileges he would have had if military service had not intervened, or for imposing on the veteran any conditions he would not have had to meet if military service had not intervened. The veteran is deemed to have been on a statutory leave of absence, and the only conditions he can be required to meet with respect to that leave of absence time are the conditions of eligibility specified in the law. However, with respect to the time after his reinstatement, he must be willing to comply with whatever conditions the collective bargaining agreement imposes on other comparable employees, as long as those conditions are permissible under State law and are not discriminatory against him as a veteran. A refusal to comply with such legitimate and nondiscriminatory requirements, as they relate to the period after his reinstatement, could amount to "cause" for discharge within the meaning of the statute.

Procedurally, the same basic considerations are applicable. Usually a collective bargaining relationship includes an established grievance procedure for dealing with disputes involving an application or interpretation of the contract, but the Supreme Court has made it clear that a veteran can press his complaint under the reemployment statute independently of the contractual grievance procedure, and does not have to exhaust his remedies under the

contract before doing so. The time deadlines on the various steps in the grievance procedure are not binding or even relevant as far as the pressing of a claim under the statutory procedures is concerned.

There is nothing in the law to prevent the veteran from simultaneously pursuing his contractual remedies and his statutory remedies. However, if the veteran, or the union with the veteran's specific authorization and consent, voluntarily presents his statutory claim to an arbitration tribunal for adjudication, most courts would probably hold that he has "chosen his forum" for that adjudication and cannot have it reviewed by a court except by showing that the arbitration tribunal has exceeded or abused its authority.

Of course, where the collective bargaining agreement gives veterans special reemployment rights in excess of those granted by law, the veteran would have to rely on the contractual grievance procedures to enforce those special rights. The statutory procedures are available only for enforcing statutory reemployment rights.

By collective bargaining in some industries there are situations in which an individual's only continuing employment relationship may be with a group of employers rather than with any one employer in the group. The agreement, most often a multi-employer contract, may have delegated to an employer association, a board of trustees, or the union certain employment functions and responsibilities, such as the furnishing of employees as needed, the establishment and maintenance of seniority rosters, or the administration of various kinds of benefit plans. In such a situation, a careful examination of the relevant agreements and practices is necessary to determine the veteran's rights under the reemployment statute. There is no evidence that Congress intended to exclude a veteran from reemployment rights protection merely because of such fragmentations of the employment functions and responsibilities and the courts have repeatedly said that the statute must be liberally construed to protect the veteran's civilian employment status from impairment because of his military service.



## CHAPTER XVII

### **Reservists and Guardsmen – Initial Active Duty for Training**

A person who enlists directly in the National Guard, in the Air National Guard, or in the Army, Naval, Marine Corps, Air Force, or Coast Guard Reserve, without having previously performed full military service, is subject to an initial period of active duty for training for the purpose of receiving basic military training. This period is not scheduled for less than three months, and is most commonly scheduled for six months, though it may in some cases last for eighteen months.

Except for the differences discussed in this chapter, such reservists and guardsmen have the same statutory reemployment rights on and after returning from initial active duty for training that selectees and enlistees have on and after their return from active military duty, and must meet the same conditions of eligibility. The reservist or guardsman must have left an "other than temporary" position to perform initial active duty for training. He must have performed "satisfactory" service during his initial active duty for training, though of course he does not normally receive a discharge from military service inasmuch as he still has further military obligations for a number of years as a member of the active reserve forces. He may receive a Department of Defense form showing the dates and character of his service during initial active duty for training, or the orders releasing him from such initial active duty for training may themselves contain enough information to establish his entitlement. He must be qualified to perform the duties of the job to which he is otherwise entitled. In return, he is entitled to prompt reinstatement in accordance with a reconstruction of what his employment history would have been if it had not been interrupted by the initial active duty for training. As in the case of a returning selectee or enlistee, this right encompasses promotions, wage progressions, and benefits maturing after reinstatement that he would have had. These conditions and rights are explained more fully in the chapters of this Handbook relating specifically to such matters with respect to veterans generally.

The reemployment rights provisions of the statute in regard to initial active duty for training are the only provisions toward which the discussion in this chapter is directed. The next chapter deals with the rights and obligations of the reservist or guardsman in regard to the tours of training duty which follow, and may sometimes also precede, his period of initial active duty for training. The two sets of rights and obligations are different and it is essential to know which of the two kinds of reserve duty is involved before the proper solution can be determined.

The principal difference between the eligibility requirements applicable to reservists and guardsmen performing initial active duty for training and those applicable to selectees and enlistees performing full active duty is that the

former must apply to the employer for reinstatement within 31 days after their release, instead of the 90 days allowed the latter.

The principal difference as far as rights and protection are concerned is that the statutory period of protection against discharge without cause is six months after proper reinstatement in the case of the reservist or guardsman returning from initial active duty for training, instead of one year as in the case of returning selectees or enlistees.

Where the reservist or guardsman is hospitalized "incident to" his initial active duty for training, his 31-day application period does not begin to run until his release from such hospitalization or one year after his scheduled release from that training, whichever is earlier. The hospitalization does not necessarily have to be "hospitalization continuing after discharge," as it must be in the case of a selectee or enlistee returning from active military duty. The one-year time limit is not a limit on the hospitalization as such; it merely establishes an alternate point of departure for the beginning of the 31-day application period. Thus, in an extreme case, a reservist or guardsman could be hospitalized for slightly more than a year after his scheduled date of release from training and would still have rights if he applied within one year and 31 days after that scheduled release date.

The reservist or guardsman has rights under these provisions only if he "is ordered" to an initial period of active duty for training. This has been construed to mean that he must have received orders, not necessarily written, before he leaves his position. In contrast, the selectee or enlistee going on active military duty only needs to leave his position "in order to perform" such duty; that is, with the intent or for the purpose of performing it, even if actual orders have not yet been issued.

The period of initial active duty for training does not count toward the maximum of four years before August 1, 1961 and five years after August 1, 1961 of active military duty, plus any involuntary extensions, which an eligible employee may have after leaving the employment to which he seeks restoration. These two categories of military service are entirely distinct for reemployment rights purposes, and the employee will have rights even if the sum of his initial active duty for training and his full active duty exceeds five years, provided of course that the full active duty by itself does not exceed either of the specified limitations.

Some tours of initial active duty for training may be longer than some tours of full active duty from which the veteran is discharged early for medical or hardship reasons, for example. However, it is the nature of the orders under which the military service is performed, and not the actual duration of the military service, that determines whether the employee's rights and eligibility requirements are those associated with initial active duty for training or those associated with full active duty.

There is a special provision in the statute, effective August 17, 1968, which expressly protects employed reservists and guardsmen against discrimination by their employers regardless of what kind of military duty or military obligation

is involved. Under this provision, they cannot be denied retention in employment, or any promotion or other incident of employment, because of their reserve membership or any obligations or absences which that membership entails. Since problems of this nature arise more often in connection with military training or service other than initial active duty for training, the provision is discussed further and is illustrated in Chapter XVIII on Tours of Training Duty.

### EXAMPLES

(1) On October 25, 1966 Employee AZ, a member of the local National Guard unit, receives orders to six months of initial active duty for training beginning November 20, 1966. He leaves his job with K Company on October 28, 1966 without informing the employer, is released from initial active duty for training May 12, 1967 and told that a Department of Defense form will be mailed to him, and applies to K Company for reinstatement May 16, 1967, showing them copies of his original orders and his release orders. On inquiry, K Company learns that the training installation does not issue such release orders unless the guardsman's service has been satisfactory.

AZ is entitled to prompt reinstatement. He had his orders when he left the job and it was not necessary for him to notify K Company, request a military leave of absence from them, or begin his initial active duty for training within any set time after leaving the job. Sufficient evidence of the dates and character of his military service was presented to K Company.

(2) Employee BY, who works for L Company, enlists in the Army Reserve February 1, 1966 and is advised that regulations provide for calling him up for six months of initial active duty for training within 120 days of his enlistment. In the meantime, he participates in weekly training exercises at the local Army post and informs L Company of the entire arrangement. On May 20, 1966 his unit commander tells him that there will be some delay in his call-up because of overburdened basic training facilities, but that he may expect his orders about July 1, 1966. On June 24, 1966 BY leaves the job and tells L Company he is going on initial active duty for training and will be back about the first of the year. The orders are not actually issued until July 20, 1966. BY completes his initial active duty for training on January 20, 1967 and applies to L Company for reinstatement on January 23, 1967.

Although BY did not yet have his written orders when he left the job on June 24, it is clear that the impending initial active duty for training was the reason for his departure, and the advice given him by the unit commander on May 20 would be viewed as orders under the liberal construction that must be placed on the reemployment statute. Therefore BY is entitled to prompt reinstatement by L Company.

(3) CX leaves his job at M Company on August 5, 1966 when ordered to report for six months of initial active duty for training with the 999th Parachute Battalion at Camp Clover. His scheduled release date is February 4,

1967. On the way back from Camp Clover on February 1, 1967, his train is derailed and he suffers multiple fractures and internal injuries. After a month in a civilian hospital near the scene of the accident, he is admitted to a Veterans Administration hospital nearer his home and remains there for surgery and recuperation until February 17, 1968. He applies to M Company for reinstatement on February 26, 1968.

Although CX was hospitalized for more than a year after his scheduled release date of February 4, 1967, he comes within the protection of the statute because he applied within one year and 31 days after that scheduled release date. The one-year limit is not a limit on the length of the hospitalization. It was adopted simply as a means of fixing a date beyond which the employer will have no reemployment obligation if no earlier application has been made.

(4) Surveyor DW leaves his position with N Highway Engineering Company in response to orders to six months of initial active duty for training and finds the military life to his liking. However, he completes his six months, makes a timely application for reinstatement, and returns to N Company's employ. Five months later, because of family troubles and a worsening outlook in the road building industry, he enlists in the Army for four years of active duty with the Corps of Engineers. After completing this enlistment and receiving an honorable discharge, DW shops around for employment for 85 days and then applies to N Company for reinstatement. N Company offers to hire him as a new employee at the bottom of the wage scale for Surveyors, but refuses to reinstate him with statutory reemployment rights on the ground that he has spent 4½ years in military service while absent from their employ.

DW is entitled to prompt reinstatement with full statutory rights, including the salary increases he would have received if he had continued in N Company's employ. His six months of initial active duty for training cannot be added to his four years of full active duty in computing his service time under the four-year limitation, since that limitation applies only to full active duty. The answer would be the same if he had begun his four-year enlistment before or immediately after completing his scheduled six months of initial active duty for training instead of returning to work first. It would also be the same if he had not applied for reemployment within 31 days after completing the initial active duty for training, but had enlisted for full active duty within his 31-day application period. In those situations the two tours of duty would be treated as substantially continuous and the four-year enlistment would not be considered to involve a new departure from the employment.

## CHAPTER XVIII

### Reservists and Guardsmen — Tours of Training Duty

In addition to the period of initial active duty for training dealt with in Chapter XVII, or to full active duty previously performed, members of the National Guard and the Air National Guard and members of the active reserves of the Army, Navy, Marine Corps, Air Force, and Coast Guard are subject to periods of active duty training and inactive duty training under Federal orders. Included in this category are annual two-week encampments and cruises, weekly and weekend drills or training sessions, attendance at service schools for special courses of instruction, 45-day periods of duty imposed as a penalty for missing too many weekly training sessions, and the like.

Employees who participate in such training duty are protected by provisions in the reemployment statute which establish a separate set of rights and conditions of eligibility differing in certain important respects from the provisions applicable to full active duty and the provisions applicable to initial active duty for training. It is the nature of the orders under which the duty is performed, and not the actual duration of the duty, that determines which set of reemployment rights and eligibility requirements applies.

The statutory rules pertaining to reemployment rights after training duty are the same for active duty training and for inactive duty training. They are also the same whether the employee's membership in the Guard or the reserves, or his participation in the particular tour of training duty in question, is voluntary or involuntary.

The statute imposes no limit on the number, frequency, or duration of the training duty periods for which the employee has reemployment rights protection. The need for such training is determined by the armed forces, and they also determine its frequency and duration. As long as the reservist or guardsman continues to obtain the necessary orders, he continues to have statutory protection.

Neither the training duty discussed in this chapter nor the initial active duty for training discussed in Chapter XVII can be added to time spent on full active duty in determining whether the employee has exceeded the four-year limit on the aggregate amount of full active duty an eligible veteran may have after leaving the employment to which he seeks restoration. Both training duty and initial active duty for training are separate and distinct from full active duty for the purposes of eligibility for reemployment rights, and the four-year aggregate limitation applies only to full active duty.

Members of the National Guard and the Air National Guard, in addition to the duty they perform under Federal orders, may also be called up by their State Governors for special or emergency duty in parades, inaugurations, floods, fires, earthquakes, strikes, riots, prison breaks, and the like. Duty not performed under Federal orders is not within the scope of the Federal reemployment statute and does not lead to rights thereunder. However,

reemployment rights in connection with such purely State or local duty may exist pursuant to State law.

Like anyone else having reemployment rights protection under the Federal statute, the reservist or guardsman performing military training duty must leave an "other than temporary" position to perform that duty. Unlike those having reemployment rights by virtue of full active duty or initial active duty for training, he must request a leave of absence from his employer, which the employer must grant. The request does not have to be in writing or in any particular form, although a written request may facilitate proof of eligibility and prevent possible misunderstandings. The law does not specify when the request shall be made, nor does it set any limit on the time that may elapse between leaving the position and actually commencing the training duty. Of course, misunderstandings may be prevented if the employer is given sufficient advance notice to plan work schedules so as to minimize any inconvenience resulting from the reservist's absence. It is not necessary that a separate request for leave be submitted each time the employee leaves for a weekly or weekend drill; it is enough if the reservist or guardsman informs his employer in advance of his training duty schedule and of any changes in that schedule. However, the employee is not excused from the requirement of requesting leave for training duty merely because he is already on another type of leave, on layoff, or on strike.

Following his release from training duty, the reservist or guardsman is entitled to necessary travel time to return from the training site to his place of employment, plus a reasonable time thereafter if his return is delayed by factors beyond his control. After the last full calendar day he needs for such travel in the circumstances, he must report for work at the beginning of his next regularly scheduled working period, or else become subject to the employer's established disciplinary rules with respect to tardiness or unauthorized absence. A reservist or guardsman returning from military training duty does not have the 90-day application period granted to veterans returning from full active duty or the 31-day application period granted to employees returning from initial active duty for training. However, his failure to report back at the time specified in the law does not completely exclude him from statutory protection, as it does in those other cases; it merely leaves him subject to penalties no more stringent than those which would be imposed on an employee who is tardy or absent without permission.

Another difference is that the statutory provision on reservists and guardsmen returning from training duty speaks in terms of reporting back for work, rather than in terms of applying for reemployment. This difference is accounted for by the relatively short duration of most training duty leaves of absence. Reporting back for work does not necessarily imply reporting back in person; for example, a telephone call to the employer for the purpose of giving notice of renewed availability for work, or arranging the time for resuming work, would be sufficient.

Just as the employee returning from training duty does not have the latitude, in terms of time, that he would have if he were returning from full

active duty, so the employer does not have the "reasonable time after application" that he would have in the case of a veteran returning from full active duty. The statute contemplates permitting the training duty returnee to resume his proper status immediately, as soon as he has met the statutory conditions of eligibility. Since the absence is usually brief, the employer can usually schedule the employee's return and notify all concerned before the leave actually begins.

The reservist or guardsman is entitled, in the words of the statute, "to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes." This provision expressly applies the "escalator" principle to the period of absence for military training duty, so that after his special statutory leave, the reservist or guardsman is to be treated, with respect to rights and benefits enjoyable after his return, not as if he had been on a nonmilitary leave of absence, but as if he had continued working on the job to the extent he actually would have worked if he had been present to do so. As in other situations where the "escalator" principle applies, the "escalator" may have gone up, gone down, or stood still during the employee's military absence, and accordingly, his proper "position" may include a higher job, a lower job, the same job that he left, layoff status with recall rights based on his seniority, no job at all, or severance pay in lieu of a job, depending on what would have happened to him under the applicable practices if he had remained present. Most commonly, of course, it will be the same job that he left, in view of the short duration of most tours of military training duty. The employer has no option to restate the training duty reservist or guardsman in a position of like seniority, status, and pay instead of in the escalator position itself.

The word "pay" in this provision means rate of pay. The law does not require the employer to pay the employee for the time he is absent for military training duty, or even to make up the difference between his military pay and his regular earnings for that period. In this respect, of course, many employers have adopted voluntary policies or contractual obligations, or are subject to State statutes, which give reservists and guardsmen more than the statute requires.

The express inclusion of "vacation," which refers both to vacation time off and to vacation pay, in the incidents of the position that are subject to the "escalator" principle was intended primarily to assure the employee of time off for training duty leave in addition to his normal time off for vacation with pay. The employer cannot require the reservist or guardsman to count any of his statutory training duty leave as vacation time, except to the extent that there is a standard plant shutdown which coincides in whole or in part with the employee's training duty period and the employee would have been unable to schedule his vacation at a different time in any event. If the employee prefers more money to his vacation rest period, he may of course waive his statutory protection in this respect by accepting his vacation pay for his training duty

period and working through what would have been his vacation period, provided that the employer agrees to such an arrangement. The statute merely prohibits the employer from *requiring* the reservist or guardsman to treat his training duty time or pay as his vacation time or pay unless there is an inevitable overlap, in whole or in part, between the training duty period and a standard vacation period applicable to all employees in the appropriate group.

With respect to holiday pay for holidays occurring during the training duty leave of absence, the discussion of holiday pay in Chapter XV is applicable.

The time when the reservist or guardsman may report back for work without being subject to any penalty is extended if he is hospitalized incident to his military training duty. To be "incident to" the training duty, the hospitalization does not necessarily have to be caused by the training itself. It can be caused by accidents or illnesses arising out of travel or living conditions during the period covered by the employee's training duty orders. There is no time limit on the hospitalization as such, either as to when it must begin or as to when it must end; but the employee must in any event report back for work within a maximum of one year after his release from training duty. If his hospitalization ends within one year after his release from training duty, he must report back at his next regularly scheduled work period following his release from hospitalization and the expiration of necessary travel time from the place of release from hospitalization to the place of employment.

In the event of a disability sustained during military training duty which makes the reservist or guardsman unqualified to perform the duties of his "escalator" position, he is entitled to another position with the employer which will provide him with like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances, provided that there is such a position in existence and that he is qualified to perform its duties despite his disability. This statutory disability provision is the same for reservists and guardsmen returning from training duty as it is for veterans returning from full active duty. For further discussion of the disability provision, see Chapter XII.

Unlike a veteran returning from full active duty or an employee returning from at least three months of initial active duty for training, a reservist or guardsman returning from training duty has no specific period of statutory protection against discharge without cause after returning to his position. However, this does not mean that the employer is free to go through the form of permitting the employee to return to his position and then deny or take away the substance by promptly discharging him or withdrawing the proper position, seniority, status, rate of pay, vacation, or any other incident of the employment. The implications of the statutory leave must be honored and the employee's reinstatement must be carried out in good faith, although he is assured only such duration of employment as is required for good faith compliance.

A statutory amendment effective August 17, 1968 makes it clear and explicit that a reservist or guardsman cannot be discharged from his



employment, or denied any promotion or other employment benefit or advantage, because of any obligation arising out of his membership in the reserves, National Guard, or Air National Guard, or because of his absences from work that result from such obligation. The intent of this provision is to prohibit any kind of discrimination by the employer against an already employed reservist or guardsman which is motivated by his membership in the reserves or Guard or by any consequences of such membership.

### EXAMPLES

(1) Reservist AZ works in a production-line job at Plant K which closes down for 1967 vacation purposes from July 16 through July 29. The only employees who remain on the job during the shutdown are the plant guards, the maintenance men, and a skeleton office crew. Employees entitled to three weeks of vacation with pay can take their third week at any time during the year, subject to company approval of the scheduling, but AZ has only enough continuous service for a two-week vacation. The plant issues all vacation pay checks for two weeks or less on the Friday before the shutdown, and AZ get his two weeks of vacation pay at that time. However, his two weeks of summer camp with the reserves are from July 23 through August 5, so that there is a one-week overlap with the plant's vacation shutdown. AZ contends that he is entitled to an additional week off to make up for this and points out that various other employees are allowed to take part or all of their vacations outside the shutdown period.

AZ is not entitled to an additional week of time off because, being neither a guard, maintenance man, or office employee nor an employee entitled to three weeks of vacation, he is not in any of the groups permitted by company practice to take vacations outside the shutdown period. Also, he is of course not entitled to additional vacation pay because he has already received his full two weeks of vacation pay.

If he were a plant guard or maintenance man instead of a production line employee, he could have elected a vacation period which would not have conflicted with his military training duty and would have been entitled to four weeks off altogether instead of only three.

(2) Bagger B, an employee of L Lime and Phosphate Company, stays in the reserves longer than he is required to do so by law, and in furtherance of his part-time military career he volunteers to attend a five-month full-time Army training school. On receiving orders to the training school, he requests a five-month military leave of absence from L Company which is denied on the ground that his reserve membership and military school attendance are purely voluntary and show that he considers his reserve career more important than his job.

B has a statutory right to the leave of absence regardless of the fact that his participation in reserve training activities is voluntary.

(3) The workweek of Cartographer C at the M Map and Atlas Company is from Monday through Friday. C is a member of a National Guard unit which

trains Saturday and Sunday on the third weekend of every month, and he has informed M Company of this schedule. M Company receives a rush order from a mining company for some new detailed maps of Western Australia and puts all its Cartographers on a six-day schedule, Monday through Saturday, to fill this order. C absents himself as usual on the Saturday of his training duty weekend without giving any additional notice to M Company, and when he reports back for work the following Monday morning he is discharged for unauthorized absenteeism during a critical period for the company.

The discharge cannot stand. The notice C had given M Company of his training duty schedule did not have to be repeated for each recurring period of training duty so long as that schedule remained in effect. C was therefore entitled to statutory leave on the weekend in question.

(4) On June 20, 1967 Employee D receives orders to a three-week summer training cruise with his Naval Reserve unit from July 9 to 30, 1967, but does not inform his employer, Company N, of this until the end of his workweek at 5:00 p.m., on Friday, July 7. D's ship returns to port on July 29 and he leaves for home on July 30 by private automobile, but engine trouble delays him for two days and he does not report back for work until August 2. He is told that he no longer has a job in view of the short notice he had given Company N, his failure either to report back on July 31 or to telephone ahead to Company N and explain his delay in returning, and several previous instances of irresponsibility.

C is entitled to return to his position. While he might have saved himself and the company some trouble by giving earlier notice of his scheduled cruise, he did give them advance notice and that is all the law requires in the way of a request for training duty leave. His two-day delay in returning would be considered as caused by factors beyond his control and as a reasonable extension of his necessary travel time. The previous instances of irresponsibility evidently were not enough by themselves to justify discharging him, inasmuch as they had not in fact led to his discharge; and Company N cannot use his abrupt request for leave or his reasonable delay in returning as additional grounds for adverse action against him.

(5) Extrusion Helper E promptly returns to his job at O Aluminum Products Company after two weeks of military training duty at summer camp, but is discharged by the company a short time afterward on grounds of absenteeism and insubordination. It develops on investigation that his only absences from work, other than for vacations and illness, have been for summer camp and other types of military training duty, and that the alleged insubordination consisted essentially of defying a supervisor's demand that he stop taking time off to "play soldier."

The discharge is clearly contrary to the August 17, 1968 amendments to the statute and an enforceable back pay claim accrues in E's favor. The effect would be the same if, instead of waiting to discharge E until after he had returned to work, O Company had refused to permit him to return in the first place.

(6) Floor Man F obtains a leave of absence from his employer, P Printing Company, to go on two weeks of military training duty. A week after he leaves, his union goes on strike against P Company and the strike lasts six weeks. On returning from training duty, F honors the picket line, and he does not contact the company in any way until the end of the strike. According to the terms of the strike settlement, all striking employees are to be taken back with unimpaired seniority. However, P Company refuses to take F back because it has always followed a policy of dismissing employees absent without permission for more than five workdays.

F is entitled to resume work the same as other striking employees. Since they were not dismissed or otherwise penalized for their strike-related absence from work, he cannot be penalized for not reporting back for work until the strike was over. At the end of his statutory leave he acquired the status of a striking employee. Failure to report back promptly after military training duty does not exclude the employee from statutory protection; it merely leaves him subject to whatever penalties are imposed on other unexcused absentees.

(7) The facts are the same as in Example (6), except that the event which occurs a week after F's departure for military training duty is not a strike, but a layoff for lack of work which reaches Floor Men senior to F and lasts six weeks. Knowing that the layoff is in effect, F does not bother to inform P Company of his return from military training duty until he learns via the "grapevine" that the laid-off employees are about to be recalled. P Company refuses to recall F when it recalls other Floor Men both senior and junior to him, and explains that it struck his name from the rolls for failure to report to the company within five workdays after the end of his military leave.

In this situation, unlike Example (6), the law does not protect F from the application of the company's five-workday rule. Here, he was not a member of any group of absentees who were exempted from that rule by a special agreement. The layoff could have ended at any time, and his failure to report back promptly for a return to his position in layoff status, thereby giving the company knowledge of his renewed availability for work if and when there was a recall, left him subject to the penalty normally imposed by the company for unauthorized absence.

(8) Garageman G obtains a leave of absence from his employer, Q Stone Quarries, to perform two weeks of military training duty, and reports back for work the morning of the day after his timely return home. In Q Company's contract with the union, there is a clause whereby no employee is to be laid off without one week's advance notice, and Q Company tells G to start work one week later inasmuch as the employee who filled the job while he was gone is entitled to a week's notice and there is not enough work for both of them. After resuming work, G claims back pay for the week of delay.

The claim is well founded. Unlike the statutory provisions on veterans returning from full active duty, the statutory provisions on reserve training duty do not contemplate allowing the employer a "reasonable time" in which

to reinstate the employee on the job. The employee is expected to report back immediately, instead of having 90 days or 31 days to apply for reinstatement, and by the same token the employer is expected to allow him to resume work immediately. These differences from the situation of a returning veteran result from the generally short duration of training duty absences.

(9) Horse Trainer H reports back on schedule to his employer, R Racing Stables, from a two-week leave of absence for reserve training duty for which the armed services paid him \$100. His normal wages from R Company for the two weeks would have been \$250, so he claims \$150 from R Company after reading the provision in the reemployment statute for reinstatement with the "seniority, status, pay, and vacation" the reservist would have had but for his training duty. H had taken his paid vacation for the year in question before going on training duty.

The law does not support his claim. The word "pay," in the provision in question, is construed to mean "rate of pay" in view of the legislative history. If, like many employers, R Company has a voluntary policy of making up the difference in pay in situations like this, then H is entitled to the \$150 although the claim is not enforceable as a statutory right.

(10) During the last two years of his formal apprenticeship at S Steel Company, Journeyman J was a member of the National Guard. He went to summer training camp with his Guard unit for two weeks in each of those years. As a result of these absences, his completion of the apprenticeship was delayed by one month and the Journeyman seniority date assigned to him is one month later than it would have been. On the Journeyman seniority list, he is three notches lower than he would have been but for this one-month delay. He insists, over the objections of both S Company and the union, that he should be moved up the list so as to be ahead of the three men next above him.

The law entitles J to the seniority correction that he claims, once he has actually completed the requirements of the apprenticeship and attained Journeyman status. Otherwise he would not have the seniority and status he would have had but for his training duty absences. Adjusting his Journeyman seniority date after he has actually completed the apprenticeship requirements does not amount to making his military training duty a substitute for the time on the job and the training that the apprentices are required to complete.

(11) Kitchen Helper K, an employee of Tavern T, belongs to the local National Guard unit, which is called up for one week by the Governor of the State to preserve law and order following a severe earthquake in the area. The tavern hires an employee to take K's place and refuses to reemploy K when he returns from this National Guard duty.

The Federal reemployment statute does not apply in this situation because K's unit was not serving under Federal orders during this tour of duty. It was functioning purely as a State militia and not as a part of the armed forces of the United States. If K is to have any reemployment rights with Tavern T, they must be derived from State law, a decree of the Governor, or a private employer policy or collective bargaining agreement.

(12) Employee L is a traveling salesman for UV Cosmetics, Inc., and often spends several days at a time on the road. To fulfill his remaining military obligation, he joins the local reserve unit, which meets every Monday evening. By skillful planning, L is able for several months to avoid conflicts between his job and his reserve meetings, but then the reserve unit changes its meeting time to Wednesday evenings and such conflicts are no longer avoidable. UV Company and L jointly attempt in vain to get L excused from the weekly meetings, and there is no other reserve unit to which he might transfer in the area. UV Company then tells L he must choose between the reserves and his job with them.

Difficult though it may be, UV Company must work out some plan or schedule that will enable it to live with L's reserve obligation. He is entitled to a leave of absence, including necessary travel time, for each Wednesday evening reserve meeting, and he cannot be dismissed because of the inconvenience this causes the employer. Any attempt to dismiss him ostensibly for other reasons would come under careful scrutiny from the government and the courts because, on the facts stated, there would be evidence that it was only a subterfuge.

(13) Maintenance Man M's reserve unit meets for training duty every Saturday morning. His employer, W Window Company, has a Machine Operator vacancy which it offers M under its policy of always promoting the senior Maintenance Man to such jobs, but since the Machine Operators must often work on Saturdays it makes the offer conditional on M's getting himself excused from the reserve meetings. M does not wish to jeopardize his status with the reserves, so W Company promotes another employee to the Machine Operator job, and M objects.

Under the August 17, 1968 amendments, W Company must grant M the promotion he clearly would have had but for his reserve obligation, and solve its Saturday staffing problem in some other way. It does not matter whether that obligation was imposed on M by law or voluntarily assumed by him.

## CHAPTER XIX

### Examination, Deferred Entrance, and Rejection

An employee who leaves an "other than temporary" position for the purpose of being inducted into, entering, or determining by a preinduction or other examination his physical fitness to enter the armed forces is entitled to be considered as having been on leave of absence for the period required to accomplish that purpose, including the round trip travel between his place of employment and the examination or induction point.

He is expected to report back to his employer at the beginning of his next regularly scheduled working period after expiration of the last calendar day necessary to return to his place of employment, or within a reasonable time thereafter if delayed by circumstances beyond his control. If he fails to meet these standards of promptness in reporting back, he does not automatically lose his statutory right to reemployment, but does become subject to the normal disciplinary rules of the employer with respect to unauthorized absences. Although the reporting back should normally be done in person, there are situations where contacting the employer by other means would be sufficient, as where a layoff situation exists, for example.

The employer's obligation to the eligible returning examinee or rejectee is to permit him to return to his position with the seniority, status, rate of pay and vacation he would have had if he had not been absent for entrance or examination for entrance into the armed forces. The employer is not required to pay the employee for the working time he misses while absent for these purposes, or to grant him benefits he would have received during such absence if he had remained on the job; but in all other respects the employee, after reporting back, must be granted whatever rights and benefits he would be enjoying if his employment had continued without such interruption. The employer cannot require the employee to count the absence in question as vacation time. The statute contemplates an immediate return to the job the employee left in these cases, and does not afford the employer the leeway of restoring the employee in a "reasonable time" or in a "like" position. There is no specific statutory period of protection against discharge without cause after the employee has returned to his position, but he must be permitted in good faith to return to it, and his dismissal shortly thereafter without clear and convincing evidence of other reasons to back it up would amount to illegal discrimination.

If the employee is hospitalized incident to examination or rejection for military service, his time for reporting back to the employer is extended accordingly, but will not be extended beyond one year from the date of the examination or rejection.

As the foregoing paragraphs indicate, the provisions of the reemployment statute with respect to examinees, would-be entrants, and rejectees are quite similar to those on reservists performing military training duty, which are discussed and illustrated in Chapter XVIII in greater detail and are, historically,

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the source of the examinee and rejectee provisions being discussed here. However, there are certain noteworthy differences.

One difference is that the examinee, would-be entrant, or rejectee does not need to request a leave of absence from his employer in order to have the statutory leave of absence. The reason for this is that such an employee normally anticipates service rather than rejection, and preservice notice to the employer has never been a condition of eligibility for reemployment rights after full active duty.

Another difference is that an examinee or rejectee who reports back to his employer with a new disability he did not have when he left does not have a statutory right to an alternative position even if the disability makes him unqualified to perform the duties of the position he left.

The preinduction or other examination may result in the employee's acceptance for military service or retention in the reserves, in his rejection, or in a postponement of the decision on his acceptability. Whatever the outcome, he has a separate right to return to his position simply as an examinee. If he is accepted for military service but not immediately inducted or sworn in, he is entitled to return to his position between returning from the examination and later leaving the position again for actual induction. If a decision on his acceptability is deferred pending further investigation, he is likewise entitled to return to his position in the interim simply as an examinee. If a delay ensues after the examination and he is ultimately either definitely accepted or definitely rejected, he can also qualify later for reemployment rights as a veteran or as a rejectee, as the case may be, whether or not he has reported or gone back to work during the period between his examination and his acceptance or rejection. If he is rejected at the time of the examination, he has reemployment rights as a rejectee.

Sometimes, on being examined at an entrance and examining station of the armed forces, the employee may simply be sent home and told to await further word from the military. In that case, he has reemployment rights as an examinee.

Sometimes he may have already passed his examination and, on reporting for actual induction or entrance into military service, may be sent home to await further word, either because the quota is temporarily filled or because the armed forces want to investigate his citizenship, his past employment in a foreign country, his arrest record, his morals, or something of the like before swearing him in. In such cases, he has interim reemployment rights as a rejectee, and whether or not he exercises those rights at that time, he can subsequently qualify for reemployment rights as a veteran if he is eventually sworn into military service, or as a rejectee if and when he receives definite official notice of rejection.

Often, in these situations, the employee returns home well in advance of the issuance of any documentary evidence of his status with the military, and the employer refuses to take him back without a substantiated explanation of his absence. Even though the law does not require the employee to give the employer advance notice of his departure for such purposes, many problems of

this nature can be avoided if such notice is given. In other cases, a joint telephone call from the employer and the employee to the entrance and examining station, for example, can provide the necessary information. The employer is of course entitled to evidence that the employee has met the statutory conditions of eligibility, though such evidence does not have to be in writing.

### EXAMPLES

(1) Assistant A leaves his day shift job at K Kitchenware Company with intent to enlist in the Army but without notifying the company. He takes a preinduction physical examination at the Armed Forces Entrance and Examining Station and is told orally that he will be notified later as to his acceptability. He returns home and reports to K Company for work at the beginning of the day shift the next morning, several days after leaving the job. K Company verifies A's explanation by calling the examining station, but refuses to return him to work because he had left without notice to the company.

K Company must promptly return A to his job with the seniority, status, rate of pay, and vacation he would have had if he had not left that job. The statutory reemployment rights of a returning examinee do not depend on whether he notified the employer of his plans to leave or obtained a leave of absence from the employer.

(2) Book Repairer B, an employee of Library L, receives orders from his draft board on June 25 to report for a preinduction physical examination on July 20 at the Armed Forces Entrance and Examining Station located in the same city. Draft calls are running high that summer and B anticipates induction soon after the examination, so he informs his employer that he needs three or four weeks to get his personal affairs in order and leaves his job on June 27. He passes the physical on July 20 but is told that current draft quotas have been filled and that he will be called for induction about September 15. He returns to the library the morning of July 21 but is told that they have made a two-year commitment to an employee hired to replace him and cannot reemploy B until he completes his two years of active military duty.

The reason given by L does not relieve it of the obligation to return B to his job as a returning examinee. However, his leave of absence rights as a returning examinee are limited to the period required to report for and receive the examination and to return therefrom, which does not include extra time for getting personal affairs in order. Thus he left the job too soon to meet this requirement. Of course, since he left the job with the intent to enter military service and since, in the circumstances, his attempt to return to work is not inconsistent with that intent, he will eventually have reemployment rights at the library as a returning veteran if he meets the other conditions of eligibility for such rights, even though he does not meet the conditions of eligibility for interim reemployment as a returning examinee.



(3) Caretaker C works in an other than temporary position for Multi-millionaire M. Wanting to join the Navy and see the world, he takes and passes the necessary preinduction physical, but is told that because of his prison record there will have to be a thorough investigation before he can be accepted. He returns home to await the outcome and does not try to return to M's employ in the meantime. Two months later the Navy notifies C in writing that his application for enlistment has been rejected, and he reports back to M the next day. M offers to help find other employment for C but refuses to take him back, stating that he waited two weeks after C left and then had to hire another caretaker, who has a large family to support while C has no dependents.

Although C failed to report back in time to qualify for rights as a retraining examinee, he has now qualified for rights as a returning rejectee and is entitled to return to work accordingly, even if M considers it necessary to dismiss the new caretaker so as to make room for C.

(4) Data Processor D is absent from his work at N National Bank on July 3 in order to take a preinduction physical examination. The bank is closed for the July 4 holiday so D reports back for work the morning of July 5. The bank's policy, rigidly adhered to in practice, is to pay its employees for holidays only if they worked both the last day before and the first day after the holiday, so D receives no pay for July 4. He protests vehemently.

Legally D was on a leave of absence on July 3 and was still on that leave of absence on July 4 when the rights of the employees to the holiday pay accrued. With respect to rights and benefits accruing and maturing during their absence for examination, returning examinees are in the same position as other employees who are on furlough or leave of absence from the employer. Therefore D is not entitled to the holiday pay.

(5) Employee E is a clerk-salesman with Organization O. He leaves this position to report for induction as ordered, but is rejected for military service on reporting, so he returns home and goes back to Organization O the next morning. The company has taken advantage of the occasion to carry out a move it has been contemplating for some time, putting another employee in E's job and transferring E to an order-filling job in its warehouse at the same rate of pay. E objects to the transfer and insists that he be permitted to resume work in his clerk-salesman job.

His complaint is legally sound and he must be permitted to return to the clerk-salesman job unless and until O Company can clearly show that the transfer would have been effected anyway for good and sufficient reasons not connected with E's absence for examination or his draft status. The law does not give the employer any option to place a returning examinee in a "like" position instead of in the position he left.

(6) Forester F leaves his job at P Pulp and Paper Company with the aim of enlisting in the Marine Corps but is rejected for physical reasons at his preinduction examination. While driving his car back home he swerves to avoid an oncoming truck, crashes into a telephone pole, and suffers leg and knee

injuries which permanently disqualify him for the climbing duties of a Forester. By education and previous experience he is qualified for any of several Wood Chemist positions in P Company's organization and he requests assignment to one of those positions, which pay approximately the same as the Forester position he left.

Unlike a veteran returning from active duty or a reservist returning from training duty, F would not be entitled as a matter of law to a job different from the one he left or would have obtained but for his absence. The statute does not establish any special disability provisions for returning examinees or rejectees.

(7) Groundskeeper G leaves his position at CC Country Club to take a physical examination preparatory to enlisting in the Air Force. He is rejected for enlistment because of faulty vision, but the Air Force doctor also finds evidence of a chronic preexisting tubercular condition and advises G to enter a hospital for treatment. On returning home G follows this advice, and six months later he is released from the hospital as completely cured. The day after this release, he reports back to CC Country Club but the club refuses to return him to work. He contends that he was hospitalized in connection with his attempt to enlist and that the law entitles him to return to his job since that hospitalization lasted less than a year after his rejection.

This hospitalization was not "incident to" G's rejection within the meaning of the law, so he has not met the statutory conditions of eligibility. The mere discovery, in the preinduction physical examination, of a preexisting condition making hospitalization advisable is not enough to create reemployment rights based on the ensuing hospitalization.

On the other hand, if, instead of chronic tuberculosis, the condition discovered by the Air Force physician had been scarlet fever or some other acute infectious disease for which local law required quarantine, or if G had suffered a heart attack or an attack of appendicitis while at the examining station and had been hospitalized as a result, the hospitalization would be considered "incident" to his examination or rejection.

## CHAPTER XX

### Enforcement Procedures

**The Office of Veterans' Reemployment Rights.** The functions assigned to the Secretary of Labor under the Military Selective Service Act of 1967 are performed through the Office of Veterans' Reemployment Rights (OVRR), formerly known as the Bureau of Veterans' Reemployment Rights, which is a part of the Labor-Management Services Administration (LMSA) in the U.S. Department of Labor.

The basic function of the OVRR is to provide information and assistance to veterans, reservists, National Guardsmen, examinees, would-be entrants, and rejectees, as well as to their employers and other interested parties, in the proper application of the reemployment statute, which now comprises Section 9 of the Act.

Where disagreements exist as to the existence or extent of a person's rights under the statute, the OVRR attempts to determine the proper solution and resolve the differences through investigation, negotiation, and mediation. The OVRR does not have power to issue rulings or decisions that are binding upon either the employee or the employer. Instead, it seeks to obtain voluntary compliance with the statute.

By far the greater portion of the disagreements coming to the OVRR's attention are resolved at this stage in a manner mutually acceptable to the parties. Where these procedures fail, the controversy, at the request of the person claiming rights under the statute, is referred to the U. S. Department of Justice, through the legal staff of the Department of Labor, for evaluation and possible litigation. Since the enactment of the first reemployment rights statute in 1940, there have been several hundred reported court decisions on statutory reemployment rights, including more than a dozen decisions by the U. S. Supreme Court.

The OVRR operates through regional and area offices of the LMSA in certain major cities throughout the country.

**Contact and Referral Points.** Veterans, employers, and other interested parties seeking reemployment rights information or assistance may of course present their requests or problems to any of the LMSA field offices in person, by mail, or by telephone. If this is inconvenient, the matter can be presented at any local Veterans' Affairs Office, State Employment Office, Veterans' Administration contact office, Selective Service office, or service office of a veterans' organization. While these offices cannot provide official or authoritative answers to reemployment rights questions, they will promptly refer the matter to the appropriate LMSA field office.

**Contractual Remedies and Arbitration.** A veteran or other claimant is entitled to prompt Government assistance through the OVRR at the outset, in determining and securing his rights under the reemployment statute. It is not necessary for him to first avail himself of an established grievance procedure or

exhaust his private remedies, even though rights or benefits under a collective bargaining agreement may be involved in the problem. This is true even where there is a collective bargaining agreement with provisions for mandatory arbitration of disputes over its interpretation.

There is nothing short of final and binding arbitration that would prevent the claimant, if he wishes, from pursuing his claim through the private contractual procedures and the statutory procedures simultaneously.

It is not the OVRB's function, of course, to interpret collective bargaining agreements as such; but the OVRB may have to ascertain the treatment received under the contract by those classes of employees to whom returning veterans are, by law, analogous.

The veteran or other claimant under the reemployment statute is not bound by any arbitration decision affecting his rights under the statute unless he has expressly indicated in advance his willingness to submit his statutory rights to arbitration, or unless he voluntarily and affirmatively becomes a party to the arbitration proceedings by testifying therein or otherwise. For example, if the union on its own motion, without obtaining the veteran's specific consent, takes to arbitration a claim involving a group or class of employees of which the veteran is a member, he will not be precluded from proceeding under the statute via the OVRB, the Department of Justice, and the courts. The fact that the union is his authorized or certified representative for collective bargaining purposes does not make it his representative for settling claims based on the reemployment statute. However, the veteran should proceed with caution where arbitration is involved, lest he be held to have chosen arbitration as his forum and to have waived his right to avail himself of the procedures provided in the reemployment statute. Moreover, insofar as it is a question of determining the facts, a court would be inclined to accept the arbitrator's findings as conclusive.

The United States Attorneys. On application by the veteran or other claimant under the reemployment statute, the United States Attorney for a district in which the employer maintains a place of business will, if reasonably satisfied of the validity of the claim, represent the claimant and act as his attorney in such litigation as the U. S. Attorney may deem advisable. If the United States Attorney feels that further attempts to secure an amicable settlement would be appropriate, he will make such attempts before filing suit in court. Regardless of the outcome, no fees or court costs will be charged to the veteran or other claimant.

In cases handled by the OVRB which the OVRB has been unable to resolve, it will, on written request by the veteran or other claimant, forward its file on the matter through established channels to the U. S. Attorney for consideration of such representation.

The veteran may go directly to the U. S. Attorney and request representation by him without proceeding through the OVRB, and U. S. Attorneys have acted on that basis on a few occasions. However, their normal practice is to

refer the matter to the OVRR for handling, investigation, and attempts at settlement before considering the need for litigation.

The services of the U. S. Attorney, like those of the OVRR, are provided without cost to the veteran or other person claiming rights under the reemployment statute.

Private Counsel. If the veteran or other claimant prefers, or if the U. S. Attorney has declined to represent him, he may proceed through his own attorney at his own expense, whether or not he has had assistance in the matter from the OVRR. Even if suit were filed through private counsel, the statute would still exempt the veteran from the payment of court costs.

United States District Courts. The reemployment statute provides that the United States District Court for a district in which the employer maintains a place of business may, after appropriate court proceedings, specifically require the employer to comply with the statute and to compensate the employee for any loss of wages or benefits suffered by reason of the employer's failure to comply. The court, in its discretion, may order specific performance only, damages only, or both. Any damages ordered will be compensatory only since the statute does not provide for punitive damages or fines. The compensatory damages awarded may be in any amount deemed appropriate by the court. The statute further provides that the court shall order speedy hearings in reemployment rights cases and advance them on the court calendar.

In an action under the reemployment statute in a United States District Court, no fees or court costs can be charged to any claimant for rights under the statute, and the only necessary defendant is the employer. For example, the employer can be sued without bringing in the veteran's union as a co-defendant, even where the employer contends that it is only the union's stand or the union contract which prevents him from complying with the veteran's wishes.

Like other decisions of the U. S. District Courts, their decisions in cases under the reemployment statute are subject to review by the U. S. Court of Appeals for the Circuit in question, and the decisions of the Court of Appeals can in turn be reviewed by the U. S. Supreme Court.

Employees of the Federal Government - The United States Civil Service Commission. Employees who leave positions in the executive branch of the Federal Government, its Territories or possessions, or the District of Columbia, and who enter upon military training or service immediately thereafter, have statutory reemployment rights that are generally similar to those who leave positions with private employers to perform military training or service. However, their reemployment rights problems and claims are processed, interpreted, and determined through the United States Civil Service Commission and not through the OVRR and the U. S. District Courts.

Employees who, immediately before entering the Armed Forces, were employed in the legislative branch or the judicial branch of the Federal Government also have generally the same statutory reemployment rights as do those who leave positions in private employment to perform military training or

service. In the case of employees in the legislative branch who are also eligible for transfer to competitive civil service positions, the U. S. Civil Service Commission has power to transfer them to such positions if it is not possible to restore them to positions in the legislative branch.

State, County, and Municipal Employees. Employees of States or political subdivisions of States, including counties, municipalities, school districts, sanitation districts, port authorities, and the like, do not have enforceable rights under the Federal reemployment statute. Rather than create possible constitutional questions, the Congress merely declared its intent and wish that the employers of these employees should grant them reemployment rights similar to the enforceable reemployment rights which the statute grants to employees of private employers and the Federal Government.

Many States, cities, and other political subdivisions of States have enacted legislation accordingly, often modeled on the Federal statute and with varying enforcement procedures in the State courts and otherwise. Although the OVRP has no authority to interpret these State and local laws and ordinances, its representatives are generally knowledgeable about such matters and can refer the complainant or the facts of his case to the proper State or local authorities for processing and disposition.

## CHAPTER XXI

### Damages

A veteran or other person entitled to rights or benefits under the reemployment statute is also entitled to compensation from the employer for any loss of wages or benefits he has suffered by reason of the employer's failure to reinstate him in full compliance with the law. This right to damages is enforceable in the Federal courts.

The right to compensation for lost wages and benefits exists in addition to the veteran's other rights under the statute, and such compensation does not diminish any of these other rights. Only a proper reinstatement in the employment can satisfy the statutory purpose of giving the veteran an opportunity to regain his skills and reestablish himself in the employment. Damages are not a dollar measure of the right of restoration; they are a measure of the veteran's losses pending full compliance with his rights.

The damages provided for in the reemployment statute are compensatory only, and not punitive. There is no intent to impose any monetary penalty on the employer beyond that of making the veteran financially whole for the losses he sustains by reason of the employer's failure to comply.

To the extent that the veteran's loss of wages or benefits is shown to result from his own conduct and not the employer's, damages do not accrue.

Among the employer actions that would give rise to damages are denial of reinstatement; unreasonable delay in reinstatement; reemployment at a lesser rate of pay than the veteran is entitled to by law; improper layoff, demotion, or discharge after reinstatement; and denial of proper vacation, pension, insurance, supplemental unemployment compensation, or other benefits.

Just as damages should not be awarded unless the loss and the employer's responsibility for that loss are proved, so they should not be denied where the loss and the employer's responsibility for it are proved.

Generally the measure of the veteran's damages, subject to mitigation as discussed below, is the difference between the amount of wages, benefits, or both, as the case may be, that he would have received from the employer during the period of noncompliance if his rights had been fully observed, and the amount he actually received from that employer during that period. Often the amount he would have received can be ascertained by determining what the incumbent in the veteran's proper position, or other employees in the same job classification, received during the period in question. The veteran's preservice rate of pay is not the proper measure if his rate of pay would have changed but for his absence in military training or service.

If it is established that the veteran, on the basis of regularly scheduled overtime, a seniority right to overtime, or otherwise, would have worked overtime during the period in question but for the employer's noncompliance, then appropriate overtime pay should be included in computing his damages.

If he would have been off the job in any event because of a layoff or a strike during part or all of the noncompliance period, he would not be entitled to damages for the time he would not have been working.

The reemployment statute itself contains no express provision as to interest on the amount of the lost wages or benefits. However, Federal law requires the payment of interest, at the rate allowed by State law, from the date the judgment or decree for damages is entered in the United States District Court until the date payment is made, provided of course that the award of damages has not been upset on appeal to higher courts.

With respect to the period before the date of the judgment awarding damages, the court decisions have varied widely, both as to whether such interest is included and as to the date on which, if included, it should begin to accrue. Logically, interest should accrue on each improperly withheld payment from the time it became due, and not on the total sum of the improperly withheld payments from the beginning of the noncompliance period. Often, awards of damages are not precisely computed to begin with, or the computation of interest may seem too complicated, or the claimant may not have made a specific request for interest. Whatever the reason, courts have often failed or declined to include a specific interest element in awards of damages for the period before the date of the judgment.

If the parties reach an agreed settlement involving the payment of a certain amount of damages to the veteran, but the actual payment is unduly delayed, interest accrues from the date of the agreement. Alternatively, the veteran could consider the agreement abandoned and sue for his continuing damages.

Most of the applicable court decisions have held that the veteran has an obligation to make reasonable attempts to mitigate his damages by seeking suitable employment elsewhere, and have deducted his earnings in such other employment during the noncompliance period in computing the amount of his damages. Accordingly, the Department of Labor follows this mitigation requirement in its attempts to resolve complaints without litigation.

However, the veteran is not required, in order to mitigate his damages, to accept or retain a position with the obligated employer which is inferior in seniority, status, rate of pay, or any other respect to his rightful position under the statute. He does not have to risk the defense of "waiver" that might be based on his doing so. If the veteran is reemployed by the obligated employer, but in a position paying less than is due him, the employer is liable only for the difference; but in this situation the difference merely indicates what the damages are in the first place, and is not to be viewed as the result of obligatory mitigation.

If, during the period of noncompliance, the veteran had no earnings elsewhere or his earnings elsewhere were lower than they might possibly have been, and if the employer claims mitigation in excess of the veteran's actual earnings elsewhere, the burden is on the employer to prove that the veteran could have earned larger amounts in suitable employment by exercising reasonable diligence.

The only amounts that can be applied in mitigation of the employer's financial obligation are the earnings the veteran had or should have had in employment or profit-making activity during the period of noncompliance. It



is the position of the Department of Labor and the majority view of the courts that unemployment compensation received by the veteran for this period is not deductible from his damages, inasmuch as it is paid by the State and not by the employer and inasmuch as State law may require the veteran to reimburse the State out of any back wage payments he receives from the employer. At least one court, in a judgment awarding damages, has also ordered payment effecting such reimbursement to the State.

Mitigation of damages should be computed separately for each pay period of the noncomplying employer. For example, if the veteran, in his mitigating employment, earns more in one pay period than he would have earned from the obligated employer if properly reinstated, but less in another pay period, the excess in the former does not offset any of the shortage in the latter. Similarly, earnings of the veteran by virtue of working more straight-time or overtime hours in the mitigating employment than he would have worked if properly reinstated by the obligated employer should not be applied in mitigation of the damages. Otherwise, the noncomplying employer would be deriving an unfair advantage from his own wrongdoing, and the veteran's extra work and earnings, involving time and effort that he would not have had to expend if properly reinstated, would benefit the noncomplying employer rather than the veteran himself. In effect, a part of the employer's statutory obligation to compensate the veteran for his unmitigated losses would be shifted to the veteran himself, and this is not the intent of the statutory provision for damages.

The mere fact that a veteran's statutory protection against discharge without cause expires one year after reinstatement, or that the comparable statutory protection of a reservist or Guardsman returning from initial active duty for training expires six months after reinstatement, does not in any way justify an inference that statutory damages can accrue for only one year or six months, as the case may be. Similarly, the mere fact that a reservist or Guardsman returning from military training duty, or an examinee or rejectee returning from examination or rejection, does not have any specific period of statutory protection against discharge without cause, cannot justify an inference that such an employee has no statutory right to damages where his return to work is denied, unduly delayed, or improperly accorded. The statute entitles the employee to compensation for financial loss during the entire period of noncompliance, regardless of when any period of special protection against discharge may end.

The accrual of damages ends only with full compliance by the employer, with rejection by the veteran of an offer of full rights with past damages, with express or implied waiver by the veteran of future restoration, or with express waiver by the veteran of damages beyond a certain date. Waivers as to the future do not, of course, imply any waivers as to the past, and a waiver of future restoration does not imply a waiver of previously accrued damages.

The right to damages, like all other rights under the reemployment statute, belongs to the employee and not to the Government. Thus, if the employee

sees fit to do so, he can waive or bargain away his right to damages, in whole or in part, in return for a settlement of the case that is satisfactory to him in other respects.

### EXAMPLES

(1) Five months after a legally proper reinstatement by Employer M, Veteran A is dismissed on the ground that M has been able to hire a more experienced employee for the job. M offers to pay Veteran A a sum equal to seven more month's wages in view of A's statutory protection for one year against discharge without cause.

Veteran A may bargain away his rights on this basis if he wants to, but he cannot be compelled to accept the offer since it deprives him of his right to regain his skills, reestablish himself in the employment, retain the advantages of his seniority, and have a proper chance to convince M that he deserves to be retained indefinitely. The money alone is not enough.

(2) Veteran B is reemployed by N Company at his preservice rate of pay without the benefit of a 20-cent hourly increase that all other employees in the plant received while he was in military service. Six months later he complains and N Company grants him the increase. In the meantime, however, his initial improper reinstatement has cost him \$208 in lost wages, and he claims damages of \$400 in view of this loss and the time and effort he has expended in pressing his complaint.

B is entitled only to the \$208 under the reemployment statute. The damages contemplated by the statute are only compensatory, not punitive.

(3) Two weeks after being reemployed in the proper job by O Oil Company, Veteran C is injured in a fall at home and is hospitalized for 10 days at a cost of \$250. Because of a clerical error in O Company's personnel office, C's name has not yet been certified to the insurance company for coverage under the company-financed group hospitalization plan, and the insurance company refuses to pay the bill. C pays it himself and claims \$250 from O Company.

The claim is well founded under the statute because O Company's clerical error deprived C of a full and proper reinstatement. Suppose, however, that C had been properly reinstated in the plan on returning from military service, but had failed to file a hospitalization claim at the personnel office within a 30-day deadline specified in the terms of the plan. In that event he would not be entitled to recover the \$250 from O Company, since O Company would not be responsible for his loss of benefits.

(4) P Perambulator Company, which pays its employees by the 40-hour week, refuses to reemploy Reservist D on his return from annual summer training because business is bad, although employees with less seniority are still working in D's type of job. Four weeks afterward, the whole plant is shut down for a period of six weeks for lack of orders. When production is resumed, D applies again and is rehired as a new employee, after earning \$90 a week for

the last 9 weeks by working 40 hours a week for another firm. He claims restoration of his seniority plus damages of \$390, this being the difference between his normal wages of \$120 a week at P Company for 10 weeks and the \$810 he earned in other employment during those 10 weeks. P Company then restores his seniority but resists the damage claim on the ground that D's earnings elsewhere exceeded the \$480 he would have earned from P Company before the plant was shut down. P Company also contends that D has no right to damages inasmuch as it could have dismissed him immediately after reinstating him.

D is entitled to damages in the amount of \$120 for the first week of the 10-week period and \$30 for each of the next 3 weeks, for a total of \$210. Each weekly pay period at P Company must be considered separately, with no offsetting from other weeks, and for each week D's damages are the difference between what he would have earned at P Company and what he did earn elsewhere. No damages accrued for the 6 weeks during which he would have had no earnings from P Company anyway. In the absence of proof by P Company that D would in fact have been dismissed for bona fide nondiscriminatory reasons unrelated to his military status, it must be assumed that he would have worked for P Company until reached for layoff in the plant shut-down or in line with his seniority.

(5) Because of a misunderstanding of its statutory obligations, Q Company, which pays its employees weekly, fails to reemploy Veteran E until 16 weeks after his application for reinstatement. If E had been promptly reinstated, he would have worked 40 hours a week on the day shift for Q Company at \$3.00 per hour, earning a total of \$1920 during the 16 weeks. Actually, he remains unemployed for the first 3 weeks of the 16 and draws a total of \$100 in unemployment compensation for these 3 weeks. He then finds a steady job with another employer on the night shift at \$2.00 per hour plus a 10-cent hourly shift premium, and during the following 13 weeks he also puts in 50 hours of overtime with the other employer at \$3.00 per hour, so that his 13-week earnings in the other employment are \$1040 in straight time, \$52 in night shift premiums, and \$150 for overtime worked, for a total of \$1242. Q Company offers to pay damages to E of \$578, which is the difference between the \$1920 he would have earned from them and the sum of his total receipts from wages and unemployment compensation during the 16-week period.

The offer does not fully comply with Q Company's monetary liability to E. E's damages amount to \$880, because only his \$1040 in straight-time earnings can be deducted from Q Company's \$1920 obligation. Q Company is not entitled to the benefit of the \$100 E drew in unemployment compensation, the \$52 he earned in shift premiums, or the \$150 he earned by working overtime. Overtime and shift premium earnings elsewhere are offsettable against damages only to the extent that the veteran would have worked overtime or earned shift premiums, as the case may be, if he had been properly reinstated. To achieve full compliance with E's right to back pay, Q Company would have to pay him \$880.

(6) R Rotogravure Company erroneously refuses to permit Rejectee F to return to his apprentice position on the ground that he had given no notice of his orders to report for induction and his slot had been filled by a new apprentice. He immediately gets a job with a construction firm which pays \$4.00 per hour, though his rate at R Company had been only \$3.00 per hour. The construction firm lays him off after he has worked 6 weeks and he again presses his claim for reemployment by R Company. By the time R Company is convinced of its error and agrees to take F back, 9 weeks have elapsed since he reported to R Company after rejection for military service. He claims damages for 3 weeks at \$3.00 per hour, or \$360 in all. R Company contends that the \$960 he earned in 6 weeks on the construction job is deductible from the \$1080 he would have earned in 9 weeks as a rotogravure apprentice, and that it owes him only \$120 instead of \$360.

The correct amount is \$360 as claimed. Each week stands separately and for 3 of the 9 weeks F had no earnings at all.

(7) When he left his employment at Store S to enter military service, Veteran G was receiving a salary of \$100 a week as a clerk. When he returns and makes a timely application for reemployment, the base salary of the clerks in his department is \$125 a week, the duties of the job are substantially the same as before, and some of the clerks who are working were hired during his military service. The store manager tells G he needs no more clerks and offers him a job as a general assistant at \$90 a week. G rejects the offer but is unable to find suitable employment elsewhere, despite diligent efforts, until he finally gets a job as a clerk with a competing store at \$110 a week, beginning 20 weeks after his application to S Company for reemployment. In the meantime, through the Department of Labor, he has been pressing a claim for reinstatement and back pay, and 24 weeks after his application for reinstatement, Store S offers to take him back at \$125 a week with full seniority and to pay him \$200 in settlement of his back pay claim. S Company explains that this is the difference for 20 weeks between his preservice salary and the \$90 a week he could have had by accepting their original reemployment offer. G elects to stay where he is in view of the bad feeling between S Company and himself, and to press a damage claim for as much as he can get.

The correct amount of G's damages is \$2560, consisting of \$125 a week for 20 weeks and \$15 a week for 4 weeks. His damages stopped accruing when he refused the belated offer of proper reinstatement, thereby indicating abandonment of any desire to return to Store S. The measure of his gross salary losses is not his preservice salary of \$100, but the \$125 salary in effect during the period of S Company's noncompliance. He was not required to accept employment with S Company in a position inferior to the proper one in order to mitigate his damages. The requirement of mitigation refers only to earnings, or diligent efforts to obtain earnings, in suitable employment with other employers.

(8) At T Truck Company's manufacturing plant, there is a 5-step wage rate progression within each job classification. Step 1 is the beginning rate, and

progression to Steps 2 and 3 is in practice automatic with the passage of a year's time on the job in the next lower step. Employee H enlists in military service a few days after entering the job classification in question at Step 1. He is reemployed in the job 3 years later at the Step 1 rate, which is then \$2.50 per hour, as compared to \$3.00 per hour for Step 2 and \$3.50 per hour for Step 3. He reaches Step 2 one year after his reemployment and Step 3 two years after his reemployment. Six months after reaching Step 3 he presents a claim for damages after concluding that he should have been reemployed in Step 3 in the first place, in view of the passage of time while he was in military service. T Company reluctantly concedes that it should indeed have placed H in Step 3 when he returned from military service, but contends that no recoverable damages accrued to him after his first year back on the job since his statutory guarantee expired at that time and it had no obligation to employ him thereafter.

Unless H's claim is partially extinguished under the applicable State statute of limitations, he is entitled to damages of \$1.00 an hour for the first year after his reemployment and 50 cents an hour for the second year, plus, technically at least, interest on each underpayment from the date of the underpayment to the date the damages are paid. The accrual of damages does not end simply because the veteran's year of protection against discharge without cause comes to an end.

(9) Veteran J is denied reemployment by his preservice employer, W Wrought Iron Company, because there are no openings. The current salary for his job is \$125 a week. He presents his case to the Department of Labor, and while awaiting the outcome he becomes a door-to-door magazine salesman operating as an independent contractor on a straight commission basis. Ten weeks later W Company agrees to reemploy J in his old job and pay damages, but a question arises as to the proper computation of the amount. W Company points out that J would have been on layoff for 4 of the 10 weeks on the basis of his seniority even if he had been reemployed immediately. During the last 3 of those 4 weeks he would have received \$50 a week, less any earnings elsewhere, under the company's private supplemental unemployment benefit plan. His net profits from the magazine selling enterprise were approximately \$20 in each of the 10 weeks.

J's damages consist of \$105 a week for each of the 6 weeks he would have worked, plus \$30 a week for each of the 3 weeks he would have received supplemental unemployment benefits.

## CHAPTER XXII

### Waiver of Rights, Remedies, or Defenses

Since the rights and remedies created by the reemployment statute belong to the individual employee and not to the Government, they can be waived by him, in whole or in part. However, since the purposes of the statute are social and remedial, waivers of rights or remedies will not readily be found to have occurred and doubtful cases will be resolved in favor of the veteran. The burden of proof on the question of waiver is on the party who claims that a waiver has occurred.

A veteran may waive his rights or remedies either expressly or by his conduct. An express waiver, whether oral or written, must state a present surrender of existing rights and not merely an intention to refrain from claiming rights in the future. The conduct from which a waiver is implied must be clearly inconsistent with the pursuit of the right or remedy in question. Waiver is essentially a matter of intent, and the proof of an intent to waive must be clear, convincing, and specific. The veteran must be aware of the rights he is waiving and the waiver must be a voluntary act on his part, not induced by fraud, misrepresentation, or pressure.

Only the veteran himself, or an agent he has specifically authorized to make an express waiver on his behalf, can waive any of his statutory rights. The mere fact that a union is his duly authorized agent for collective bargaining purposes, or for processing grievances under the contract, does not empower the union to waive the veteran's rights or remedies under the statute. The Department of Labor and the Office of Veteran's Reemployment Rights, though charged by law with responsibility for assisting the veteran in determining and exercising his rights under the statute, cannot waive any of those rights for him without specific authorization from him to do so.

The waiver of one right does not imply the waiver of others. The waiver of rights under a collective bargaining agreement does not imply the waiver of statutory rights. Demands by the veteran for greater rights than he actually has under the law, if made with an honest though mistaken belief that he is legally entitled to the greater rights, does not imply a waiver of the statutory rights that he actually does have.

It would be extremely rare, as a practical matter, for any contention of waiver, either express or implied, to be upheld on the basis of the veteran's conduct before military service or while in military service. His rights do not mature until after he has returned, and rights not yet matured will not readily be considered to have been waived. An express waiver of future statutory reemployment rights, if required by the employer as a condition of the veteran's preservice employment, would of course be contrary to the public policy embodied in the statute, and therefore void and of no effect. Even if the veteran, before military service or while in military service, has voluntarily

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made statements or taken actions clearly indicating his lack of any intention of ever returning to the employer, a waiver will not be implied from such statements or conduct, because the statute was intended to keep that possibility open to him until his return to civilian life.

The possibility of proving a waiver on the basis of the veteran's conduct during his 90-day application period (31 days in the case of a reservist or National Guardsman returning from initial active duty for training) is affected by whether the conduct in question occurs before or after he has applied and has obtained reemployment, or a bona fide offer of reemployment, which is in full compliance with his rights and is considered by him to be in full compliance with his rights. Until such reemployment or offer of reemployment has occurred, he can seek or take employment with other employers or do anything else that might normally appear inconsistent with an assertion of reemployment rights, and no waiver will be implied from such actions if they are followed by an application for statutory rights within the 90-day period.

After full and proper reinstatement, including any previously accrued damages, has been applied for and offered, a rejection of the offer by the veteran will amount to a waiver of his rights, unless that rejection stems from a bona fide belief of the veteran that the offer does not comply with those rights, in which case the rejection will amount only to a waiver of future damages. This is true whether the offer and rejection occur within his 90-day application period or after that period has expired. Where the reemployment offered does not fully comply with the statutory requirements or is coupled with conditions not imposed by the law itself, such as waiver of previously accrued damages, the veteran's rejection of the offer does not waive his rights.

Acceptance by the veteran of reemployment falling short of full compliance with his rights, even if made with full knowledge of the deficiency in compliance, does not constitute a waiver of any of those rights unless there is clear, convincing, and specific evidence of an intent to waive the right in question, and unless that intent was formed without misrepresentation, deception, or duress.

After the veteran has been fully and properly reinstated, he will normally be considered to have waived future statutory rights if he voluntarily quits, or if he fails to respond to a duly delivered notice of recall where he has been properly placed in layoff status. However, no waiver will be implied if such actions are motivated by a bona fide belief, correct or incorrect, that the employer has denied him his full rights or has misled him into accepting less than is his due under the statute.

Where a veteran has statutory reemployment rights with two different employers, his exercising of such rights with one of them does not waive his rights with the other unless and until it becomes physically impossible for him to exercise reemployment rights with both employers. At that point he must choose one, thereby waiving future rights with the other.

Like the substantive rights provided by the statute, the procedural remedies that it provides may also be waived by the veteran, in whole or in part, at any

time after he has become entitled to statutory protection. The statutory remedies consist of the right to sue in the United States District Court, either through the United States Attorney with his consent or through private counsel, to compel specific compliance by the employer and to recover damages for loss of wages and other benefits. For example, even after suit has been filed for correction of violations plus damages, the veteran can waive either the specific relief or the damages without also waiving the other.

The veteran does not waive his remedies in the Federal courts by attempting to obtain relief through a contractual grievance procedure. Only if he voluntarily and specifically submits his claim to statutory rights, as distinguished from his rights under the collective bargaining agreement, to final and binding arbitration, will he be considered to have "chosen his forum" and to have waived his right to proceed in the Federal courts. His voluntary personal participation in final and binding arbitration proceedings for determining his statutory rights would have the effect of a waiver of the statutory remedy. His union's submission of his statutory rights to final and binding arbitration, without his own specific authorization or voluntary personal participation, would not have that effect. In no event will a veteran's remedy in the Federal courts be waived by his participation in any grievance proceeding short of final and binding arbitration.

Occasionally a question arises as to whether the employer, by reinstating the veteran or otherwise, has waived defenses that he would otherwise have against a claim by the veteran under the reemployment statute for the rights or benefits already accorded. The same general considerations that apply to alleged waivers of rights or remedies by the veteran are also applicable to alleged waivers of defenses by the employer. It is a question of intention, and the burden of proof is on the party who contends that a waiver has occurred. The court decisions dealing with alleged waiver of defenses by employers have reflected somewhat less reluctance to find a waiver than has been the case in those dealing with alleged waiver by veterans, especially where the defense has related to the identity of the employer. However, where the defense has related to the veteran's noncompliance with the statutory conditions of eligibility, or where the employer has mistakenly granted the veteran more than the statute required and has later withdrawn the rights or benefits unnecessarily granted, the courts have generally refused to go along with contentions by the veteran that the employer's mistaken original action constituted a waiver.

Mere delay, inactivity, or patience on the part of a veteran in pressing for his statutory reemployment rights does not justify the inference that he intends to waive them. He has no affirmative statutory duty to enforce his rights. Delay caused by the employer does not, of course, imply any intent to waive on the part of the veteran. The same is true of delays by Government agencies in processing the claim. Delay which is the fault of the veteran may have adverse effects on the enforceability of his claim, and these effects are the subject of Chapter XXIII below; but properly speaking, this is not a question of waiver.

Notions of "abandonment" and "estoppel" are sometimes advanced under the heading of "waiver," although they actually involve a somewhat different



principle. To support a finding of abandonment or estoppel, either against the veteran with respect to his rights or against the employer with respect to his defenses, it must be shown that the party against whom the finding is made has taken certain actions or made certain statements, without necessarily intending to waive anything, which have resulted in action by the opposing party that cannot now be reversed without unfair damage to such opposing party. In other words, "X" cannot mislead or entrap "Y" into doing something, and then, by disavowing his misleading conduct, compel "Y" to reverse the action taken, if the reversal will cause actual damage to "Y." In such a situation, "X" has "abandoned" his claim or argument or is "estopped" from asserting it, even if he did not intend to waive it.

#### EXAMPLES

(1) Employee A leaves an other than temporary position with K Company when ordered to report for induction into military service. K Company then hires Employee B in A's job, but only after requiring B to sign an agreement that he acknowledges his employment to be temporary and will not attempt to claim rights with K Company under the reemployment statute, in view of the fact that he is replacing an employee who will be entitled to return to the job. Eighteen months later B too is drafted, and the company hires C in the job. When A returns and is reemployed, C is dismissed. When B subsequently completes his military service, he applies to K Company for reinstatement but is told that he has expressly waived reemployment rights with them.

B cannot claim the job as against A, but he may be entitled by law to some other job with K Company, depending on what would have happened if he had not signed the hiring agreement and had not gone into military service. The statute expressly protects employees hired to replace other employees who are leaving or have left for military service. Their positions are not made temporary by the law because of this circumstance, and cannot be made temporary by private agreement solely because of this circumstance. If no other factors made B's position with K Company temporary within the meaning of the law, the agreement could not make it temporary either. B could not waive future reemployment rights before those rights had come into being.

(2) Employee D tells his employer, L Company, that he is quitting to enlist in the Army for 3 years and withdraws the vested portion of his account under the company's pension plan, which can only be done by quitting outright. Three years later he writes to his supervisor at L Company, stating that he has reenlisted for another 3 years and intends to make the Army his career. However, D gets a medical discharge 6 months afterward, on completing 3 1/2 years in military service altogether, and promptly applies to L Company for reemployment. L Company turns him down on the ground that by quitting and withdrawing his pension funds before entering military service, and by reenlisting during military service with the admitted intention of pursuing a career in the Army, he has waived any right to reinstatement.

There has been no effective waiver. The unexpected developments that occurred here illustrate one reason for the rule that unmatured reemployment rights cannot easily be waived. To avoid being treated as a new employee under the pension plan, D will have to reimburse the fund in view of his previous withdrawal, but that is another question, and whatever status he may have in the pension plan, his right to full and prompt reinstatement in all other respects has not been waived.

(3) Because it considers the incumbent in Veteran E's former position to be a better employee, Company M refuses to reemploy E when he returns from military service. E presses a claim for reinstatement on the job and restoration of his seniority. The complaint is resolved 2 months after his application when E and Company M agree that he will get his seniority back and will be given a job paying a little more than the one he had claimed. Soon after being reemployed, E claims damages for the wages and benefits he lost during the 2-month delay, and Company M contends that by accepting the reemployment offered, he waived any right to damages.

There has been no waiver of damages, in the absence of an expressly spelled out understanding on that point. Acceptance of one right does not imply a waiver of others, even if the thing accepted is in excess of the statutory requirements.

(4) Immediately after being released from active military duty on September 15, 1967, Veteran F applies to N Company, his preservice employer, for reinstatement. N Company is pleased to have him back and makes a reinstatement offer which complies with the reemployment statute in every respect, and it is agreed that F is to resume his employment on Monday, September 25, so as to give ample notice to G, the incumbent, who is being displaced to make room for him. In the meantime, however, F receives an attractive offer of employment from O Company, and on September 22 he telephones N Company and tells them he is going to work for O Company and therefore will not be reporting for work at N Company as agreed. N Company thereupon withdraws the termination notice it had given G. After several weeks with O Company, F finds that employment not to his liking and again visits N Company to seek reemployment. This occurs on December 1, still within 90 days of his release from military service. N Company says it will still be glad to have him back, but only as a new hire without seniority, since he has waived his right to reinstatement under the reemployment statute. F contends that he was entitled to 90 days in which to shop around among employers and that he should be reinstated with seniority over G.

While it is true that a veteran has 90 days in which to shop around among employers, it is also true that his conduct during that period can amount in some circumstances to a waiver of reemployment rights. On the facts given, the conclusion that F had waived his rights is justified. A fully proper offer of reinstatement was made. It was accepted without reservations either stated or implied. Without pressure or misrepresentation, F agreed to return to work on a specific date. Then, of his own free will, he changed his

mind, with the same effect as if he had actually resumed work and had later quit voluntarily.

(5) The facts are the same as in Example (4), except that F, instead of actually requesting reemployment immediately after returning from military service, merely asks N Company about the opportunities he will have with them if he is reemployed there, and N Company then unilaterally tells him to report for work September 25 without obtaining his voluntary agreement to do so.

In this situation, there has been no waiver and F is entitled to reinstatement with seniority. His rights did not mature until his request on December 1 for reinstatement and were not waived before that.

(6) Because of a disagreement as to whether Veteran H's preservice position with PQ Company was temporary or other than temporary and as to whether he had left it for the purpose of entering military service, PQ Company refuses to reinstate him when he makes a timely application. The Office of Veterans' Reemployment Rights investigates and eventually convinces PQ Company that it was in the wrong and should reinstate H and pay him damages. It is then discovered that H has found a better-paying job at RS Company, a competitor of PQ Company, beginning 3 weeks after PQ Company's original denial of reinstatement. PQ Company withdraws its offer of reinstatement and damages on the ground that by taking employment with a competitor, H has waived his reemployment rights.

A veteran who is denied reinstatement has a duty to mitigate his damages by seeking and taking other suitable employment if possible, and no waiver can be implied from his acting accordingly. H is still entitled to an offer of reinstatement from PQ Company and to 3 weeks' damages.

(7) Employee J leaves his position with T Company to enlist in military service for 3 years. If he had not been absent in military service, he would have been laid off in seniority order 6 months after entering military service, and would not have been recalled within 2 years, so that he would have lost his seniority and recall rights under the collective bargaining agreement. A month before J returns from military service, business picks up and Employee K is hired. When J applies, T Company reemploys him with his original seniority date. The union files a grievance on behalf of K and T Company settles the grievance by changing J's seniority date to his date of rehire. J then complains to the Office of Veteran's Reemployment Rights, which explains that the law did not insulate him from the loss of seniority he would have suffered under the contract even if he had not been in military service. However, J contends that T Company, by granting him his original seniority date when he was reemployed, has waived that defense.

T Company acted under a mistake of law in originally reinstating J with seniority, and that does not amount to a waiver of its defenses. The mistake can be corrected when brought to the company's attention.

(8) Employee AK is laid off by VW Company, with contractual recall rights based on his seniority. He then obtains nontemporary employment with

X Company, which he leaves several months later in response to induction orders. On completing his military service, he applies to VW Company for reinstatement and is reinstated in layoff status because business is still slow and he does not have enough seniority to be working there. He then applies to X Company and is reinstated on the job by them. Four months later he gets a recall notice from VW Company by registered mail.

If AK does not respond to the recall notice within the time specified, he waives his statutory rights with VW Company. If he responds and goes back to work at VW Company, leaving his job at X Company in order to do so, he waives future protection at X Company under the reemployment statute. If he is unable to work in both places at the same time, the recall notice forces him to make a choice.

## CHAPTER XXIII

### Timeliness in Asserting Claims

In applying the reemployment statute, the courts have often recognized the need of employers and employees for a reasonable degree of stability in the employment relationship, free from the uncertainties and the potential unfairness to others that would exist if a veteran could "sit on" or "sleep on" his reemployment rights claim for many years before attempting to have it enforced. Consequently, unduly belated claims for relief, even though they may originally have been valid in substance, have sometimes been rejected in court under general legal rules or principles relating to delay by the claimant but drawn from sources outside the reemployment statute itself. One of these rules is known as the doctrine of "laches" and the other is the "statute of limitations."

It must be borne in mind that a court will not consider these defenses unless they are affirmatively asserted by the employer. Of course, only a relatively few reemployment rights cases ever reach the courts, and employers are often interested in determining and acting upon the basic merits of the claim and not in taking advantage of a possible "laches" or "statute of limitations" defense. Still, the possibility of such defenses is something that must be considered in resolving reemployment rights problems short of a lawsuit.

By "laches," the courts mean undue, unreasonable, or unexcusable delay in asserting rights. If a court decides to apply the doctrine of "laches," it will simply refuse to grant relief on a claim, whether that claim is right or wrong. However, it is not enough for the defendant to show only that there has been an unjustified delay by the claimant. The defendant must also show that he has somehow been injured by this delay, as might be the case if, for example, relevant records or witnesses with good memories are no longer available, or if it would be unreasonably difficult to reverse actions taken in reliance on the original error. There is no specified period of time for determining what amounts to "laches," and the time limits in contractually established grievance procedures are irrelevant on this point. The period of inexcusable delay might be anything from a year or two to a period of many years, depending on the equities and circumstances of the particular case.

To the extent that the veteran's claim is one for money damages to compensate him for past losses, a more clearcut defense based on his delay may be invoked in court by the employer. This is the so-called "statute of limitations." A statute of limitations is a law denying relief in the courts to a claimant who has failed to begin court proceedings within a prescribed time after the alleged wrong occurred. There is no statute of limitations in the Federal reemployment statute itself. Therefore, under settled legal doctrine, the Federal courts, in enforcing reemployment rights, will follow the appropriate statute of limitations of the State where the suit is filed. Since a State usually has several different statutes of limitations, each covering a

certain kind of claim, it is sometimes difficult to determine which one is appropriate for a claim under the reemployment statute. If there is one that applies to "rights created by statute," it will normally be followed in such cases. The periods specified in such statutes will of course vary from State to State, but they are practically always stated in terms of a number of years, and five years is perhaps average or typical. As with "laches," contractual time limits on the pressing of grievances are irrelevant here.

Where the veteran's claim is for specific relief other than money damages, such as a correction of seniority, a promotion, or a longer future vacation, it is the equitable doctrine of "laches," rather than the statute of limitations with its fixed time limits, that may be brought into play against the claim. However, there has been a tendency for the courts to use the applicable statute of limitations as a general guidepost to indicate when the element of delay in "laches" is present. Thus, if the veteran presses a claim for non-monetary relief within the period specified in the statute of limitations, it is less likely that the court will reject the case on the ground of "laches."

It is possible, of course, for both "laches" and the statute of limitations to be directly involved in the same case, if the veteran is claiming both monetary and non-monetary relief.

In regard to either of these defenses, time begins to run against the veteran when the wrong occurs, or in other words, when his cause of action accrues. Generally, this is when the right in question comes into existence, is claimed by the veteran, and is denied by the employer. Where a similar wrong recurs, each recurrence can be a separate cause of action that starts a new time period running. For example, where the veteran has been denied the correct vacation pay for the last six years but there is a five-year statute of limitations, the claim for the first year may be barred by the statute of limitations but the claims for the other five years would still be enforceable.

"Laches" will not run during any period of delay for which the veteran himself is not responsible, or during which it would not be reasonable to expect him to act. For example, the employer may have failed to take a definite stand or may have misled the veteran about material facts, or the veteran may have been reemployed with incorrect seniority credit but this error may have made no difference to his actual rights or benefits until a change in the contract many years later. In any such circumstances a finding of "laches" would be unlikely. Furthermore, the running of "laches" can be stopped or suspended by any affirmative action taken by the veteran to press his claim in or out of court, such as a protest to the employer, the filing of a grievance, or a request to the Government for assistance, for any of these things would show that he is not sleeping on his rights but is being diligent in pursuing them.

The statute of limitations, on the other hand, normally continues to run until suit is filed in court. However, it may be interrupted or suspended ("tolled") for certain periods which have that effect under State law, such as a period during which the veteran is mentally incapacitated, for example. In

some cases, the employer's own misleading conduct may preclude ("estop") him from relying on the statute of limitations at all.

"Laches" and the statute of limitations do not destroy the right itself; they merely prevent its enforcement in court, if the employer pleads them as a defense and if the court is persuaded accordingly. Waiver, on the other hand, destroys the right itself, and in rare cases it may be possible for the employer to convince the court that the veteran's delay amounts to an implied waiver. To establish a waiver, however, it is necessary to show that the veteran was aware of his right and intended to relinquish it. Delay alone does not prove this. In fact, the element of intent, without which there can be no effective waiver, is usually difficult to establish on any grounds. Waiver in other connections is discussed in Chapter XXII.

### EXAMPLES

(1) Employee A's career with Company H begins in August 1958 and is interrupted by military service from August 1961 to August 1963. In August 1963 the company rehires him as a new employee without seniority. He protests this action to the company and the union at that time, and each year thereafter as the seniority rosters are published, but they decline to correct his seniority for the practical reason that no layoffs have occurred and he has been getting the same fringe benefits as everyone else in the plant. In August 1968, a new department is established and it is staffed by offering the jobs in it to the employees in the old departments in the order of their plantwide seniority until enough acceptances have been obtained. The last five of the new jobs are filled by employees hired between August 1958 and August 1963, so A loses out although he very much wants to go into the new department, since the pay there is 50 cents per hour higher. The applicable statute of limitations is three years. In May 1969 the company admits its 1963 error but refuses to act on the grounds that A has committed "laches" and that the statute of limitations bars his claim.

A's annual protests are more than enough to prevent a finding of "laches," and the statute of limitations has not run out against him because his money claim did not arise until August 1968. He is entitled to the position and the seniority he would have had in the plant and in the new department if August 1958 had been recognized as his plantwide seniority date all along. He is also entitled to damages of 50 cents per hour from the date the new department was opened until the date he is properly placed therein.

(2) J Company reemploys Veteran B on October 1, 1963 in his pre-service position in Job X, which pays \$25 less per week than Job Y, to which it is conceded that he would have been promoted, in view of his seniority, experience, and ability, if he had not been absent in military service when vacancies in Job Y arose. J Company promises B the next Job Y vacancy, and although he tells them he does not believe he should have to wait for a vacancy, he does not press the matter. Three years pass without a vacancy in

Job Y. On October 1, 1966, B again raises the matter with J Company. Receiving the same answer, he asks the Office of Veterans' Reemployment Rights for assistance in being promoted to Job Y retroactively as of the date he would have been promoted had he not been in military service, and in collecting damages of \$25 per week since October 1, 1963. The State has a six-year statute of limitations for causes of action based on statutes.

The claim is enforceable on both counts. The statute of limitations has not run on the monetary part of it, and a court probably would hold that the three-year delay does not constitute "laches" that would bar the claim for the promotion itself, inasmuch as the delay has not exceeded the period specified in the statute of limitations. The statements made by B on October 1, 1963 and October 1, 1966, together with the absence of any affirmative evidence on an intent to waive his rights, would prevent a waiver from being implied from his three years of passive acquiescence.

(3) The established vacation rules of K Company provide for paid vacations of one week after one year of continuous service, two weeks after five years of continuous service, and three weeks after ten years of continuous service, with continuous service being measured and vacation schedules published as of July 1, each year. Employee C is hired May 1, 1955, spends four years on active military duty from May 1, 1957 to April 30, 1961, and is reinstated by K Company on May 1, 1961. The company refuses to count his military service time as continuous service for vacation purposes, so he receives one-week vacations in 1961, 1962, and 1963 and two-week vacations in 1964, 1965, and 1966. On February 1, 1967 he files suit in court for an extra week of vacation pay for each of the years 1961, 1962, 1963, 1965, and 1966 on the ground that he reached five years of continuous service before July 1, 1961 and ten years of continuous service before July 1, 1965. The applicable State statute of limitations is four years, and K Company contends that the claim is barred because it has been more than four years since C learned that they were denying him credit for his military service time.

The claim, though otherwise valid, is indeed barred for the years 1961 and 1962, but it is still enforceable for the years 1963 (when, as in 1961 and 1962, he should have received two weeks instead of one), 1965 (when he should have received three weeks instead of two), and 1966 (same as 1965). Each denial of a fully proper vacation was a separate violation of his rights under the reemployment statute and gave rise to a separate cause of action. The denials that occurred on July 1 of the years 1963, 1965 and 1966 all fell within four years of the date suit was filed and therefore are not affected by the applicable statute of limitations. The two-week vacation in 1964 was proper because, even with his military service time included as it should have been, B had not yet attained ten years of continuous service at K Company.



## CHAPTER XXIV

### Supreme Court Decisions on Reemployment Rights

The full meaning and effect of the reemployment statute, as is the case with any statute, can only be understood through a knowledge of the court decisions which have interpreted and applied it in specific situations. The nature and size of this Handbook make it impossible to discuss individually the several hundred decisions interpreting the reemployment statute that have been handed down since 1940 by the United States District Courts and Courts of Appeal. However, the most important court decisions are those of the United States Supreme Court. These provide the guideposts by which the lower courts and the Department of Labor are bound in applying and administering the law. As of the publication date of this Handbook, there have been twelve of these Supreme Court decisions on statutory reemployment rights with private employers. This chapter gives, in chronological order, a brief summary of each of these decisions indicating how it has influenced the development of the law and the interpretative positions of the Department of Labor.

*Fishgold v. Sullivan Drydock and Repair Corporation*, 328 U.S. 275 (1946): In this basic case, the court laid down the "escalator" principle with respect to a veteran's seniority, holding that the statute does not give him only the seniority he had when he left, and does not give him "superseniority" over all nonveterans, but does give him the seniority he had when he entered military service plus the further seniority he would have accumulated under the collective bargaining agreement if his employment had continued without interruption by military service.

The Court further held that the statutory provision against demotion or termination without cause within one year after restoration does not insulate the veteran against being laid off within that year with recall rights pursuant to the terms of the collective-bargaining agreement, where the layoff is in accordance with his "escalator" seniority.

Other elements in the decision were the Court's declarations that the statute is to be liberally construed for the benefit of the veteran and that the statute takes precedence over the collective-bargaining agreement in case of conflict. The Court pointed out that in the Act the Congress had recognized the existence of seniority systems and seniority rights and did not seek to sweep them aside, but had undertaken to guarantee to the veteran the protection he would have enjoyed within the framework of such seniority systems, in addition to giving him special statutory protection against discharge or demotion which is not available to nonveterans.

*Trailmobile Company v. Whirls*, 331 U.S. 40 (1947): In this case there was a collective-bargaining agreement which discriminated, in regard to seniority, against all employees of one of two merged corporations, including some veterans. The Court held that this contract did not violate the reemployment statute because the discrimination was not directed peculiarly against veterans.

*Aeronautical Lodge v. Campbell*, 337 U.S. 521 (1949): The Supreme Court in this decision held that the relative seniority of a veteran can be diminished by changes in the collective-bargaining agreement during his absence for military service, if those changes are reasonable, bona fide, and not adopted as a device of hostility or discrimination against veterans as such. The changes in question gave "superseniority" to union chairmen or shop stewards in layoffs, advancing some of them above the veteran for retention purposes, but the Court stated that this did not violate the statute inasmuch as the new provisions were reasonable, customary, and nondiscriminatory and were in fact designed to assure continuity in the administration of the contract for the benefit of all the employees including the absent veteran. According to the decision, the veteran remained uninterruptedly a member of the employer's work force on whose behalf the changes in the contract were made. The case represents a further application of the "escalator" principle whereby the veteran is placed in the situation he would have reached if his employment had continued through the period of his absence for military service.

*Oakley v. Louisville and Nashville Railroad Company and Haynes v. Cincinnati, New Orleans and Texas Pacific Railway*, 338 U.S. 278 (1949): The Supreme Court's holding in these cases, which were decided on joint appeals, dealt rather comprehensively with the scope and effect of the statutory provision against discharge without cause for one year. The veterans had been reemployed, but on the basis of the "escalator" theory Oakley was claiming retroactive seniority in the different shop where he had been reemployed and Haynes was claiming a missed promotion. The employers were resisting on the ground that whatever the basic merits of these claims might be, more than a year had elapsed since the veterans were reemployed, and their protection under the statute had therefore ended.

The Supreme Court rejected this contention of the employers and remanded the cases to the lower courts for consideration of the basic claims of the veterans. The Court stated that a veteran's seniority status continues to be protected beyond the first year of his reemployment, and that the expiration of his year of special statutory protection against discharge or demotion does not "open the door to discrimination against him as a veteran" or to denial of the seniority status he would have had if he had remained continuously in his civilian employment.

The Court further held that the Act does not establish a one-year statute of limitations, so Haynes still had standing to file suit under the Act although three months had elapsed at his first year of reemployment.

*Huffman v. Ford Motor Company*, 345 U.S. 330 (1953): This case arose because of collective-bargaining agreements which allowed seniority credit for military service time to veterans whose military service had occurred before they first entered the company's employment. This of course was not required by the reemployment statute, and it had the effect of granting some newly hired employees greater seniority than some reemployed veterans, like

Huffman, who had left jobs with Ford to enter military service, as well as greater seniority than many nonveterans.

The Supreme Court held that the statute was not violated by these agreements, since the veterans having statutory reemployment rights protection were not deprived of the seniority standing they themselves would have had if they had never been in military service, since the agreements were not hostile devices discriminating against veterans as a class, and since there is a general public policy favoring veterans.

The Court further held that in bargaining for this special seniority credit for newly hired veterans, the union was not exceeding its authority under the National Labor Relations Act, inasmuch as the agreements could be considered to be in the general interest of the whole bargaining unit.

*Diehl v. Lehigh Valley Railroad Company*, 348 U.S. 960 (1955): The Supreme Court did not explain its decision in this case with an opinion of its own, but merely reversed the decision of the Court of Appeals on the basis of the facts disclosed in that court's opinion. The facts were that under the collective-bargaining agreement, an employee's seniority as a Carman Mechanic was determined by the order in which he completed 1160 days of experience as a Temporary Carman Mechanic. Diehl had started working as a Temporary Carman Mechanic before certain others had, but they finished their 1160 days first because he was delayed by military service. When he completed his 1160 days approximately three years after returning from military service, he claimed Carman Mechanic seniority ahead of those who started out behind him but finished ahead of him.

The Court of Appeals had held that a veteran should be treated as having been on furlough or leave of absence while in the service and that such treatment is not discriminatory against him. However, in reversing the Court of Appeals, the Supreme Court reaffirmed the escalator theory and held that a reemployed veteran who would have been promoted earlier had he remained on the job instead of entering military service is entitled, on meeting the established work requirements for the promotion, to the seniority ranking in the higher position that he would have attained if he had remained continuously on the job without the delay caused by military service.

*McKinney v. Missouri-Kansas-Texas Railroad*, 357 U.S. 265 (1958): This was the first case in which the Supreme Court dealt with the troublesome problem of applying the escalator theory to situations in which it is not clear whether the veteran, even if he had remained present, would in fact have obtained the promotion he claims. The facts before the Court did not go beyond the wording of the collective bargaining agreement, because the lower courts had not permitted the veteran to introduce evidence of custom and practice. According to the wording of the contract, preference over outsiders, in filling Group 1 positions, was given to bidders who were already employed in Group 2 positions, based upon fitness and ability and the exercise of a discriminating managerial choice. The veteran, who had left a Group 2 position to enter military service, claimed promotion to Group 1 as a statutory right,

with retroactive Group 1 seniority ahead of the outsiders who had actually filled two Group 1 openings during his military absence.

The Supreme Court rejected the claim, holding that it was not enough for the veteran to show a mere possibility that he might have applied, might have been found by the company to possess the requisite fitness and ability, and might therefore have been promoted in view of his seniority. The Court stated that where promotion actually depends not simply on seniority but on the exercise of discretion by the employer, the law does not entitle a returning veteran to demand a missed promotion. However, the Court remanded the case to the lower courts with instructions to permit McKinney to show, if he could, that by custom or practice under the contract he would necessarily have been promoted if he had remained present.

One other aspect of the decision was of great importance in the administration of the reemployment statute. The employer had contended that the claim was simply a claim under the collective bargaining agreement, to be handled like any other grievance, which in this case would mean final resort under the Railway Labor Act to the National Railway Adjustment Board for interpretation of the contract. The employer had further contended that in any event the veteran must exhaust his remedies under the contract before resorting to the reemployment statute and the enforcement procedures provided therein. The Supreme Court explicitly rejected these contentions and made it clear that a veteran has distinctively federal rights and remedies under the reemployment statute, and can avail himself of these remedies without first resorting to any other contractual or statutory grievance procedure.

*Tilton v. Missouri Pacific Railroad Company*, 376 U.S. 169 (1964): In the *McKinney* case the Supreme Court had made it clear that a veteran is not entitled to a "missed promotion," with retroactive seniority in the higher position, simply because he might have obtained it if he had remained continuously on the job. Indeed, many employers and some courts had read the *McKinney* decision as meaning that he is not entitled to the promotion unless he would have obtained it "automatically," as a seniority right, and with absolute foreseeability if he had remained present. In the *Tilton* case, the Supreme Court struck down this view and balanced the picture by holding that the veteran cannot be denied the "missed promotion" or the retroactive seniority simply because he might *not* have obtained it had he remained continuously on the job.

As in the *Diehl* case, the veterans were Temporary Carman Mechanics ("Upgraded Helpers") when they left for military service, and the collective bargaining agreement provided that an employee's seniority as a full-fledged Carman Mechanic was determined by the order in which he completed 1040 days of experience as a Temporary Carman Mechanic. The veterans did not complete their 1040 days until some time after returning from military service. When they did, they elected to acquire seniority as Carman Mechanics instead of retaining seniority as Helpers. However, the veterans were not given Carman Mechanic seniority above the Carman Mechanics who had started the 1040

days behind them but had finished ahead of them as a result of the veterans' absence for military service. They filed suit to obtain this retroactive seniority.

The court below stated that Tilton's case was distinguishable from the *Diehl* case because in *Diehl* both parties had agreed that but for military service, the veteran "would have completed" the work period on a certain date, while there had been no such agreement as to Tilton. Indeed, as the court below pointed out, advancement to Carman Mechanic was subject to many contingencies or variables such as layoffs, illness, existence of openings, continuing satisfactory work by the Temporary Carman Mechanics, and decisions by them as to whether or not to forfeit their Helper seniority by electing Carman Mechanic seniority upon completing the 1040 days. This lack of absolute foreseeability, together with an additional argument that the *McKinney* case had overruled the *Diehl* case, led the court below to rule against the veterans.

In reversing the lower court and upholding the claims of the veterans, the Supreme Court held that *McKinney* did not overrule *Diehl* and did not establish a requirement of absolute foreseeability for a veteran claiming a missed promotion with retroactive seniority in the higher position. As the Supreme Court pointed out in its opinion, the lower court's view would deprive a veteran's statutorily protected seniority rights of any real meaning because it is virtually impossible for a veteran to show that at the time he entered military service, all later circumstances that would be necessary for his promotion were absolutely certain to occur. According to the Supreme Court, the Congress did not intend the veteran's seniority rights to be defeated by possibilities of the sort referred to by the court below, and "reasonable certainty," as opposed to absolute foreseeability on the one hand and mere possibility on the other, is what is required by the Act. In the circumstances of the *Tilton* case, the Supreme Court noted that the only managerial discretion involved in the progress of a Helper to the Carman Mechanic position had been exercised in favor of the veterans before they left for military service, and that they were in fact advanced on completing their 1040 days after their return. Therefore the Court ruled in their favor, stating that the requirements for a statutory right to an advancement are met if, as a matter of foresight, it was "reasonably certain" that advancement would have occurred and if, as a matter of hindsight, it did in fact occur.

The Court added that where there is an established work requirement for a promotion, the veteran must meet that requirement before becoming entitled to the promotion, but that upon doing so, he is entitled to a seniority date in the higher position which gives him the relative standing he would have had if military service had not intervened.

*Brooks v. Missouri Pacific Railroad Company*, 376 U.S. 182 (1964): This case was decided by the Supreme Court on the same day that it decided *Tilton's*, and on the same basic reasoning. The Court cited the *Tilton* decision to support its decision in *Brooks*.

In the *Brooks* case, the collective bargaining agreement provided for separate seniority rosters at each location. *Brooks* was an Apprentice Machinist at Monroe when he left for military service and was reinstated as an Apprentice

Machinist at Monroe when he returned. Later the apprenticeship program at Monroe was discontinued, and after a two-month layoff Brooks resumed his apprenticeship at St. Louis. While still an apprentice, he requested and was granted a transfer to North Little Rock, and that is where he ultimately completed the apprenticeship. The railroad offered him seniority as a Journeyman Machinist at North Little Rock as of the date he completed the apprenticeship, or at Monroe, where there were no employment opportunities, as of the date he would have completed it but for military service.

Brooks maintained that if he had not entered military service he would have completed the apprenticeship at North Little Rock on a certain date so would have obtained earlier journeyman seniority there, and the District Court concluded that this was "probably" true. The Court of Appeals held that probability is not enough since it falls short of absolute foreseeability and predictable certainty.

Reversing the Court of Appeals, the Supreme Court accepted as sufficient the "probability" which the District Court had found. Since it had been determined to be "probable" that Brooks would have completed his apprenticeship on a certain date at North Little Rock if military service had not intervened, the Supreme Court ruled that he was entitled to Journeyman Seniority at that location, retroactive to that date.

*Accardi v. The Pennsylvania Railroad Company*, 383 U.S. 225 (1966): In this case the Supreme Court was faced for the first time with the problem of defining the scope of the "furlough or leave of absence" provisions for "insurance and other benefits" in subsection 9(c)(1) of the Act, as opposed to the "escalator" provisions for "seniority, status, and pay" which are implicit in subsection 9(b)(B) and which had been spelled out by previous Supreme Court decisions and by subsection 9(c)(2).

Under the collective-bargaining agreement, the amount of an employee's severance pay was affected by the amount of his "compensated service" with the railroad, and the railroad did not count as "compensated service" the time during which the veterans had been absent in military service. As a result, the reemployed veterans received less severance pay, on being subsequently terminated, than they would have received if their employment had continued without interruption by military service.

According to the ruling of the court below, the severance pay did not come within the concepts of "seniority, status, and pay" and the veterans therefore were not entitled to have the "escalator" theory applied in determining the amount of their severance pay. Instead, their severance pay was computed by treating their military service like a "furlough or leave of absence" during which they could not accumulate any "compensated service."

The Supreme Court, reversing the court below, held that the "escalator" theory did govern the computation of the severance pay, on the ground that the severance pay did come within the statutory concept of "seniority." In its opinion, the Supreme Court stated that the term "seniority," as used in the Act, is not to be limited by a narrow, technical definition restricting its effect

to such things as work preference and order of layoff and recall. In addition, the Court gave two special reasons for including severance pay as a perquisite of seniority in this case. First, under the contractual computation formula, it would be possible for an employee to get as much "compensated service" credit for seven days of work as for a whole year, so that there was no consistent and uniform relationship between the amount of credit received and the amount of work performed. Second, severance pay by its very nature is compensation for loss of jobs, and the value of an employee's job depends on his seniority and not on how much he has worked in the past.

Having decided that the benefit in question was a seniority benefit and was therefore to be computed under the "escalator" theory as if the veterans had remained continuously in the employment without interruption by military service, the Supreme Court did not have to deal with the question of what scope remained for the application of the "furlough or leave of absence" standard laid down in subsection 9(c)(1) of the Act. Nevertheless the Court did see fit to give some guidance on that provision, which certain lower courts had relied on in deciding certain previous cases against the veterans involved. According to the Supreme Court's *Accardi* opinion, the "furlough or leave of absence" and "other benefits" provisions were not intended to take away or diminish any protections which the veteran would have under subsections 9(b)(B), 9(c)(2), and the "escalator" theory, but were expressly designed to add to the veteran's protection with respect to benefits maturing while he was in the armed forces. As to such benefits, he is entitled to be treated like employees on leave of absence; but this "leave of absence" standard does not limit his rights with respect to benefits maturing after his reemployment.

The employer in *Accardi* had also argued that since the collective-bargaining agreement in question had been entered into more than a year after the reemployment of the veterans, the statute had no application to any rights created by that agreement. The Supreme Court, citing its earlier decision in the *Oakley* case, rejected this contention as being wholly without merit.

*Eagar v. Magma Copper Company*, 389 U.S. 323 (1967): Primarily, this Supreme Court decision represents a further refinement of what the Court had said in *Accardi*.

The claims of *Eagar* and the other veterans involved in the *Magma* case were for paid vacations for which they had performed the contractually required work before entering military service, and for holiday pay for holidays occurring before they had been back on the company's payroll for three months as required by the collective-bargaining agreement. Despite the Supreme Court's opinion in *Accardi*, the court below had held that these rights and benefits were "other benefits" subject to the "leave of absence" standard for military service time. The veterans, after fulfilling the contractual work requirement for vacation eligibility, left for military service before the contractual vacation eligibility date, and did not return from military service until less than three months before the holidays in question. Since employees on leave of absence on the vacation eligibility date did not get paid vacations, and since an

employee whose leave of absence kept him from being on the payroll for the three months preceding a holiday would not get pay for that holiday, the court below ruled against the veterans on both counts.

The Supreme Court reversed the lower court's decision and held for the veterans on both counts. As the reason for this action, the Supreme Court merely cited its decision in *Accardi* without giving any further explanation. Clearly, therefore, the Court's reasoning in *Accardi* goes beyond questions of severance pay and encompasses other rights and benefits maturing after reemployment, such as the holiday pay involved in *Magma*, for which the veteran, because of his absence for military service, has not met contract requirements as to time on the payroll. From the vacation aspect of the *Magma* case, it further appears that the "leave of absence" standard, which the Court in *Accardi* saw as a provision protecting the veteran with respect to rights and benefits maturing while he was in military service, is only a "floor," and that in cases where he had met contractual work requirements before leaving for military service, he is excused by law from meeting an additional contractual requirement of being present on a certain date in order to receive the earned benefit, even though employees on leave of absence on that date are denied the benefit in question.



**APPENDIX I**  
**Text of Statute**

**Section 9. Military Selective Service Act of 1967.** (a) Any person inducted into the Armed Forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the Armed Forces under this title for training and service shall be given a physical examination at the beginning of such training and service, and upon the completion of his period of training and service under this title, each such person shall be given another physical examination and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than 1 year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in

interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the Armed Forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within 1 year after such restoration.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the Armed Forces until the time of his restoration to such employment.

(3) Any person who holds a position described in paragraph (A) or (B) of subsection (b) shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b), subsection (c)(1), subsection (c)(3), or subsection (g) the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other approximate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy

hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party respondent to any such action.

(e)(1) Any person who is entitled to be restored to a position in accordance with the provisions of paragraph (A) of subsection (b) and who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by any Territory or possession, or political subdivision thereof, or by the District of Columbia, shall be so restored by such agency or the successor to its functions, or by such Territory, possession, political subdivision, or the District of Columbia. In any case in which, upon appeal of any person who was employed immediately before entering the Armed Forces by any agency in the executive branch of the Government or by the District of Columbia, the United States Civil Service Commission finds that—

(A) such agency is no longer in existence and its functions have not been transferred to any other agency; or

(B) for any reason it is not feasible for such person to be restored to employment by such agency or by the District of Columbia, the Commission shall determine whether or not there is a position in any other agency in the executive branch of the Government or in the government of the District of Columbia for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Commission determines that there is such a position, such person shall be restored to such position by the agency in which such position exists or by the government of the District of Columbia, as the case may be. The Commission is authorized and directed to issue regulations giving full force and effect to the provisions of this section insofar as they relate to persons entitled to be restored to positions in the executive branch of the Government or in the government of the District of Columbia, including persons entitled to be restored under the last sentence of paragraph (2) of this subsection. The agencies in the executive branch of the Government and the government of the District of Columbia shall comply with such rules and regulations and orders issued by the Commission pursuant to this subsection. The Commission is authorized and directed whenever it finds, upon appeal of the person concerned, that any agency in the executive branch of the Government or the government of the District

of Columbia has failed or refused to comply with the provisions of this section, to issue an order specifically requiring such agency or the government of the District of Columbia to comply with such provisions and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amounts received by him through other employment, unemployment compensation, or readjustment allowances: *Provided*, That any such compensation ordered to be paid by the Commission shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions, and shall be paid by the head of the agency concerned or by the government of the District of Columbia out of appropriations currently available for salary and expenses of such agency or government, and such appropriations shall be available for such purpose. As used in this paragraph, the term "agency in the executive branch of the Government" means any department, independent establishment, agency, or corporation in the executive branch of the United States Government.

(2) Any person who is entitled to be restored to a position in accordance with the provisions of paragraph (A) of subsection (b) and who was employed, immediately before entering the Armed Forces, in the legislative branch of the Government, shall be so restored by the officer who appointed him to the position which he held immediately before entering the Armed Forces. In any case in which it is not possible for any such person to be restored to a position in the legislative branch of the Government and he is otherwise eligible to acquire a status for transfer to a position in the classified (competitive) civil service in accordance with section 2 (b) of the act of November 26, 1940 (54 Stat. 1212), the United States Civil Service Commission shall, upon appeal of such person, determine whether or not there is a position in the executive branch of the Government for which he is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Commission determines that there is such a position such person shall be restored to such position by the agency in which such position exists.

(3) Any person who is entitled to be restored to a position in accordance with the provisions of paragraph (A) of subsection (b) and who was employed, immediately before entering the Armed Forces, in the judicial branch of the Government, shall be so restored by the officer who appointed him to the position which he held immediately before entering the Armed Forces.

(f) In any case in which two or more persons who are entitled to be restored to a position under the provisions of this section or of any other law relating to similar reemployment benefits left the same position in order to enter the Armed Forces, the person who left such position first shall have the prior right to be restored thereto, without prejudice to the reemployment rights of the other person or persons to be restored.

(g)(1) Any person who, after entering the employment to which he claims restoration, enlists in the Armed Forces of the United States (other than in a reserve component) shall be entitled upon release from service under honorable conditions to all the reemployment rights and other benefits provided for by

this section in the case of persons inducted under the provisions of this title, if the total of his service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by him after August 1, 1961, does not exceed five years, provided that the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(2) (A) Any person who, after entering the employment to which he claims restoration enters upon active duty (other than for the purpose of determining his physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon his relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided by this section in the case of persons inducted under the provisions of this title, if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which he was unable to obtain orders relieving him from active duty).

(B) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining his physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under paragraph (2)(A) of this subsection extended by his period of such active duty but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component: *Provided*, That with respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended the provisions of this paragraph shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(3) Any member of a reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than three consecutive months shall, upon application for reemployment within thirty-one days after (A) his release from that active duty for training after satisfactory service, or (B) his discharge from hospitalization incident to that active duty for training, or one year after his scheduled release from that training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this section for persons inducted under the provisions of this title, except that (A) any person restored to a position in accordance with the provisions of this paragraph shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this paragraph shall entitle any person to retention,

preference, or displacement rights over any veteran with a superior claim under the Veterans' Preference Act of 1944, as amended (5 U.S.C. 851 and the following).

(4) Any employee not covered by paragraph (3) of this subsection who holds a position described in paragraph (A) or (B) of subsection (b) of this section shall upon request be granted a leave of absence by his employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon his release from a period of such active duty for training or inactive duty training, or upon his discharge from hospitalization incident to that training such employee shall be permitted to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes. He shall report for work at the beginning of his next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following his release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If that employee is hospitalized incident to active duty for training, or inactive duty training, he shall be required to report for work at the beginning of his next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after his release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this paragraph is not qualified to perform the duties of his position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or his successor in interest, he shall be restored by that employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(5) Any employee not covered by paragraph (3) of this subsection who holds a position described in paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering or determining by a preinduction or other examination his physical fitness to enter the Armed Forces of the United States. Upon his rejection, upon completion of his preinduction or other examination, or upon his discharge from hospitalization incident to that rejection or examination, such employee shall be permitted to return to his position in accordance with the provisions of paragraph (4) of this subsection.

(6) For the purpose of paragraphs (3) and (4) of this subsection, full-time training or other full-time duty performed by a member of the National Guard under section 316, 503, 504, or 505 of Title 32, is considered active duty for training; and for the purpose of paragraph (4) of this subsection, inactive duty training performed by that member under section 502 of Title 32, or section 301 of Title 37, is considered inactive duty training.

(h) The Secretary of Labor, through the Bureau of Veterans' Reemployment Rights, shall render aid in the replacement in their former positions of persons who have satisfactorily completed any period of active duty in the armed forces of the United States, the Coast Guard, or the Public Health Service. In rendering such aid, the Secretary shall use the then existing Federal and State agencies engaged in similar or related activities and shall utilize the assistance of volunteers.

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