

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 206

INTRODUCER: Judiciary Committee, Military Affairs and Domestic Security Committee, and Senators Justice and Deutch

SUBJECT: Military Affairs

DATE: March 5, 2009 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Skelton</u>	<u>Skelton</u>	<u>MS</u>	<u>Fav/CS</u>
2.	<u>Treadwell</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>CM</u>	_____
4.	_____	_____	<u>GO</u>	_____
5.	_____	_____	<u>WPSC</u>	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill updates references to the Uniform Code of Military Justice and the Manual for Courts-Martial, to reflect the latest editions.

In addition, the bill implements additional employment protections for servicemembers who are ordered into state active duty. The bill specifies that members of the National Guard returning to work after serving on state active duty are entitled to seniority accrued prior to deployment, any additional seniority that would have been attained during the time of deployment, and any additional rights and benefits that would have accrued to the servicemember.

A servicemember must provide the employer prompt notice of his or her intent to return to work. The bill provides certain limited exceptions to the requirement that employers must allow servicemembers returning from state active duty to return to work, by relieving employers from this duty if they prove:

- a change of circumstances has occurred that makes employment of the servicemember impossible or unreasonable;

- the employment would create an undue hardship on the employer;
- the servicemember's previous employment was only for a brief, nonrecurrent period; or
- the employer had legally sufficient cause to terminate the servicemember at the time he or she left for state active duty.

Employers are precluded from discharging reemployed servicemembers upon their return to work for a period of one year, unless the discharge is for cause. Further, employers may not require servicemembers to use annual, vacation, compensatory, or similar leave for periods of deployment, but must allow the returning servicemember to use any accrued leave for time away for state active duty.

The bill also eliminates a requirement that a National Guard member must have been employed for a year before his deployment into state active duty in order to be eligible to bring suit against an employer for violating existing statutory protections, as well as the bill's new protections.

The bill creates a civil penalty of up to \$1,000 per violation as a result of a failure to comply with the provisions of ch. 250, F.S., affording protections to servicemembers, as well as for violations of federal laws protecting rights of servicemembers.

This bill amends the following sections of the Florida Statutes: 250.35, 250.482, and 250.82. The bill also creates s. 250.905, Florida Statutes.

II. Present Situation:

Federal Protection of Rights of Military Service Members

The United States has a long history of providing civil protection for the rights of military servicemembers while they are on active duty. For example, the Soldiers' and Sailors' Civil Relief Act of 1940, which traces its history back as far as the Civil War, was one of the first enactments to protect servicemembers by providing for the postponement of civil actions against servicemembers, such as repossession of property, bankruptcy, foreclosure, divorce proceedings, and breach of contract, until after the servicemember returned from overseas duty.¹

The Servicemembers Civil Relief Act (SCRA)² replaced the Soldiers' and Sailors' Civil Relief Act as current federal law. The SCRA carried over many of the previous protections afforded to servicemembers, while expanding and clarifying others. SCRA includes protection for servicemembers against:

- Default judgments;
- Evictions and distress;
- Termination of residential or motor vehicle leases; and
- Protection of life insurance policies, among others.

¹ American Forces Information Service, *Soldiers' and Sailors' Civil Relief Act of 1940: A Brief History*, available at http://www.defenselink.mil/specials/Relief_Act_Revision/history.html (last visited March 1, 2009).

² 50 App. U.S.C.A. s. 501.

The SCRA applies in civil actions and administrative proceedings in all United States jurisdictions, each of the states including the political subdivisions thereof, and all territories subject to United States jurisdiction. This federal law further provides that a service member may make application to any court which would otherwise have jurisdiction over the matter.³ Thus, state courts may exercise jurisdiction over civil matters relating to servicemembers.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

In 1994, the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted by Congress to provide employment rights to service members and prohibit employment and reemployment discrimination against persons because of their active duty, reserve, or National Guard service.⁴ Subject to certain exceptions contained in USERRA, the act requires employers to:

- Reemploy all employees who have left their jobs in order to perform military service;
- Preserve employment benefits of members of the military service; and
- Refrain from discriminating or retaliating against employees because of their military service obligations.⁵

Unlike other federal labor and employment laws, USERRA applies to all employers, regardless of the workforce size of the employer.⁶ Similarly, because USERRA applies to an individual “who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service” “on an a voluntary or involuntary basis in a uniformed service under competent authority,” the class of individuals covered under the act is extremely broad.⁷ However, while the term “uniformed service” covers the Army National Guard and the Air National Guard, the definition does not encompass active state service.⁸ As a result, USERRA standards are not applicable in the context of state active duty.

Reemployment

Under the provisions of USERRA, an employer must promptly reemploy service members who return from active deployment.⁹ This federal law mandates that employers rehire employees into the position they would have held if they had not been deployed.¹⁰ This provision is often referenced as the “escalator principle.”¹¹ Under this principle, a returning employee may:

³ Concurrent jurisdiction for violations of SCRA and the Uniformed Services Employment and Reemployment Rights Act (USERRA) is granted in Florida law when allowed by federal law. Section 250.82, F.S.

⁴ 38 U.S.C. ss. 4301-35.

⁵ Nancy Bloodgood and Brian L. Quisenberry, *From War to Work*, 53 FED. LAW. 38, 39 (Oct. 2006).

⁶ *Id.* (citing 20 C.F.R. s. 1002.34(a)).

⁷ 38 U.S.C. s. 4311(a) and 38 U.S.C. s. 4303(13).

⁸ *See* 38 U.S.C. s. 4303(16).

⁹ 38 U.S.C. s. 4312. Under USERRA, the servicemember must provide notice to the employer regarding leave if military circumstances do not warrant otherwise. USERRA also provides that “[t]he right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.” 38 U.S.C. s. 4312(g).

¹⁰ 38 U.S.C. s. 4313(a). *See also* 20 C.F.R. s. 1002.191.

¹¹ Bloodgood, *supra* note 5, at 40.

step back on the employment “escalator” at the point they would have reached had their job not been interrupted by their military service. The regulations explain that frequently, if not for service employees’ service and interruption from their jobs, the employees may have earned a raise or promotion. . . . Thus, the escalator principle requires the employer to rehire the employee into a position that reflects, with reasonable certainty, the pay, benefits, seniority, and other job perquisites that the employee would have attained had it not been for his or her period of service.¹²

The USERRA provides an alternative placement option for the employer to consider if the employee’s length of deployment was more than 90 days. In this case, the employer may place the employee into the escalator position or “a position of like seniority, status and pay, the duties of which the person is qualified to perform.”¹³ In order to enjoy this privilege, a servicemember must notify his or her prior employer of the intent to resume employment by submitting an employment application or reporting to work, depending upon his or her prior length of employment service.¹⁴

Exceptions to Reemployment

Reemployment for returning servicemembers is not absolute under USERRA. There are four significant exceptions to the application of the “escalator principle.” An employer may not be required to restore a servicemember to employment under USERRA’s conditions if:

- Changed circumstances make reemployment of the person impossible or unreasonable;¹⁵
- Qualifying the returning servicemember for reemployment would impose undue hardship on the employer;¹⁶
- The servicemember’s former employment was for only a brief, nonrecurrent period;¹⁷ or

¹² *Id.*

¹³ 38 U.S.C. s. 4313(a)(2)(B).

¹⁴ 20 C.F.R. s. 1002.115.

¹⁵ This exception is narrowly interpreted and “applied only where reinstatement would require creation of a useless job or where there has been a reduction in the work force that would reasonably have included the veteran.” *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49, 55 (D.C. Miss. 1981).

¹⁶ The definition of “undue hardship” includes: actions requiring significant difficulty or expense, when considered in light of:

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

38 U.S.C. s. 4303(15).

¹⁷ 38 U.S.C. s. 4312(d)(1)(C).

- The employer had legally sufficient cause to terminate the employee at the time he or she left for military service.¹⁸

The employer always bears the burden of proving that one of these four exceptions relieves the employer of any reemployment duties under USERRA.¹⁹

Termination After Reemployment

The USERRA provides a servicemember who is reemployed after military leave “with short-term protection against discharge except ‘for cause,’ thereby giving an otherwise ‘at-will’ employee the equivalent of contractual protection against termination.”²⁰ The duration of this protection is limited to:

- One year after the rehiring of the person, provided that the military leave was for more than 180 days; and
- 180 days after rehiring of the person, provided that the military leave was more than 30 days but less than 181 days.²¹

Enforcement Rights

The U.S. Secretary of Labor is charged with investigating complaints from servicemembers who believe that employers have violated their USERRA rights.²² After evaluation of all evidence, if the secretary determines that a violation has occurred, the secretary will first encourage a voluntary resolution with an employer to restore the servicemember’s USERRA rights. If such an agreement cannot be reached, the secretary notifies the servicemember that he or she can proceed against the employer.²³ The servicemember may request that the case be referred to the U.S. Attorney General for evaluation and enforcement.²⁴

In lieu of an evaluation by the Secretary of Labor or the Attorney General, an aggrieved servicemember may file a complaint directly against the employer.²⁵ Remedies available in successful USERRA suits include:

- Equitable and injunctive relief;
- Make-whole compensation;
- Liquidated damages in an amount equal to the make-whole compensation for willful violations; and

¹⁸ Eve I. Klein and Maria Cilenti, *When Duty Calls: What Obligations Do Employers Have to Employees Who Are Called to Military Service?*, 73 N.Y. St. B.J. 10, 11 (Nov./Dec. 2001) (citing *Jordan v. Jones*, 84 F.3d 729, 732 (5th Cir. 1996), cert. denied, 519 U.S. 976 (1996) (employer can refuse to reinstate reservist, if employer had legally sufficient cause to terminate reservist at the time he left)).

¹⁹ 38 U.S.C. s. 4312(d)(2).

²⁰ Klein, *supra* note 18, at 14.

²¹ 38 U.S.C. s. 4316(c).

²² 38 U.S.C. s. 4322(a).

²³ Klein, *supra* note 18, at 17.

²⁴ 38 U.S.C. ss. 4322, 4323.

²⁵ 38 U.S.C. s. 4323(a)(3).

- Attorney’s fees, expert witness fees, and costs.²⁶

Florida Uniformed Servicemembers Protection Act

Florida also recognizes the importance of providing civil protection for the rights of military servicemembers while they are on active duty. In 2003, the Legislature enacted the Florida Uniformed Servicemembers Protection Act (the act). It was the intent of the Legislature to ensure that those persons who serve in the Florida National Guard, the United States Armed Forces, and Armed Forces Reserves understand their rights under state and federal laws, and that all Florida residents and employers understand the rights afforded to those servicemembers “who volunteer their time and sacrifice their lives to protect the freedoms granted by” the Constitution of the United States and the Florida Constitution.²⁷

This act recognizes that the rights enumerated in SCRA and USERRA are applicable to members in every state although such provisions are not specifically identified under state law. The act further directs the Department of Military Affairs to make a document available to servicemembers and their families, either through printed or electronic means, which contains the rights and responsibilities of servicemembers set forth in the Florida Statutes. In addition, the act requires that a document containing the rights and responsibilities of servicemembers be made available to state or local organizations affected by those rights. These organizations include but are not limited to:

- Motor vehicle dealers;
- Financial institutions and mortgage brokers;
- Telecommunications service companies;
- Residential tenancies;
- Real estate salespersons and brokers; and
- Members of The Florida Bar Association who serve on a military affairs-related committee.²⁸

Employment Discrimination and Reemployment in Florida

Under existing Florida law, any servicemember who seeks or holds an employment position may not be denied employment or retention in employment, or any promotion or advantage of employment, because of any obligation as a member of a reserve component of the Armed Forces.²⁹ In addition, if a member of the Florida National Guard is ordered into state active duty,³⁰ an employer³¹ may not discharge, reprimand, or in any other way penalize a servicemember because of his or her absence by reason of state active duty.³²

²⁶ 38 U.S.C. s. 4323.

²⁷ Section 250.81, F.S.

²⁸ Section 250.84(1), F.S.

²⁹ Section 250.481, F.S.

³⁰ In ch. 250, F.S., “state active duty” is broadly defined as “full-time duty in active military service of the State of Florida when ordered by the Governor or Adjutant General . . . to preserve the public peace, execute the laws of the state, suppress insurrection, repel invasion, enhance security and respond to terrorist threats or attacks, respond to an emergency . . . or to imminent danger of an emergency, enforce the law, carry out counter-drug operations, provide training, provide for the security of the rights or lives of the public, protect property, or conduct ceremonies.” Section 250.01(21), F.S.

Civil Remedy for Failure to Reemploy or Other Penalization

If servicemembers believe that an employer has penalized them for state active duty, they may file a civil action against the employer in the county where the employer has established its principal place of business or the county where the violation occurred, provided that:

- The Adjutant General certifies that there is probable cause to believe that there has been a violation of the law;³³ and
- The employee has been employed for a period of at least one year prior to being ordered into state active duty.³⁴

In the event the employee receives a judgment in his or her favor, the employer is liable for actual damages or \$500, whichever is greater, as well as attorney's fees and costs.

III. Effect of Proposed Changes:

Updated References to the Uniform Code of Military Justice

Under existing law, the courts-martial statute references the 2002 edition of the Manual for Courts-Martial. The bill updates this reference to the Manual for Courts-Martial to reflect the most current version of the manual, the 2008 edition. The bill also updates the reference in existing statute to the Uniform Code of Military Justice to reflect the most current version.

Reemployment Requirements for Servicemembers

The bill amends s. 250.482, F.S., the prohibition against penalizing National Guard members for state active duty, to provide that a member of the National Guard returning to work after serving on state active duty is entitled to:

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

Because the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to "state active duty," under the bill members of the National Guard who serve on state active duty will enjoy similar reemployment protections enumerated in the USERRA "escalator principle."

³¹ The statute applies to both private or public employers or "an employing or appointing authority of this state, its counties, school districts, municipalities, political subdivisions career centers, community colleges, or universities." Section 250.482(1), F.S.

³² Section 250.482(1), F.S.

³³ The Adjutant General may not issue the certification of probable cause until after his or her investigation of the issues. Section 250.482(3), F.S.

³⁴ Section 250.482(2), F.S.

Upon return from state active duty, the bill requires the servicemember to promptly notify the employer of his or her intent to return to work. Like the USERRA exceptions to the escalator principle, the right to return to work under the bill is not absolute. An employer is not required to allow a member of the National Guard to return to work if:

- a change of circumstances has occurred which makes employment of the servicemember impossible or unreasonable;
- the employment would create an undue hardship on the employer;
- the servicemember's previous employment was only for a brief, nonrecurrent period with no long-term expectation of continued employment; or
- the employer had legally sufficient cause to terminate the servicemember at the time he or she left for state active duty.

The employer bears the burden of proving that one of these exceptions exists before lawfully denying a servicemember the right to return to work after state active duty.

Discharge of Reemployed Servicemembers

The bill provides that a member of the National Guard who returns to work after serving on state active duty may not be discharged for a period of one year from the date the servicemember returns to work, unless the discharge is for cause.

Although termination for "cause" suggests a firing premised upon some misconduct of the employee, "cause" is not defined under the bill. Although USERRA protections do not apply to state active duty, the federal statute also prohibits terminations after reemployment unless "for cause" in other active duty contexts. The USERRA does not define "cause," but federal courts have concluded that the language must be "liberally construed and strictly enforced for the benefit of those who left private life to serve their country," and that the term "cause" under USERRA "must be construed and applied narrowly."³⁵ Florida courts may choose to interpret the term "cause" in a similar fashion.

Use of Leave Time for State Active Duty

Under the bill, employers may not require servicemembers to use annual, vacation, compensatory, or similar leave for periods of deployment for state active duty. However, the bill specifies that a servicemember may use any type of leave accrued prior to active state duty to cover leave taken to serve on state active duty.

One-Year Employment Requirement for Civil Action

Under existing state law, a servicemember must have been employed for a period of at least one year prior to being ordered into state active duty in order to be eligible to bring a civil action for claims that he or she has been unlawfully penalized by an employer because of his or her state active duty. The bill removes the one-year employment requirement for eligibility for these protections, as well as the new protections provided to servicemembers in the bill. Therefore,

³⁵ *Duarte v. Agilent Technologies, Inc.*, 366 F. Supp. 2d 1039, 1046 (D. Colo. 2005).

regardless of the duration of the prior employment relationship, any servicemember may pursue relief for violations of these employment rights.

Civil Penalty for Violations of Laws Affecting Servicemembers

A new section is created, to be placed at the end of ch. 250, F.S. (military affairs), which authorizes the award of a civil penalty of up to \$1,000 per violation of certain provisions of state and federal law. This penalty is to be assessed in addition to any other relief or penalty that is currently provided by state or federal law. The civil penalty applies to violations of any section in ch. 250, F.S., protecting the rights of servicemembers, as well as for violations of any provision in federal law affording protections to servicemembers under which a state court has concurrent jurisdiction under s. 250.82, F.S. The bill also makes clarifying and technical changes to the concurrent jurisdiction statute.

The bill does not specify an enforcement authority to seek assessment of the civil penalty for violations of these protections. When a statute is silent regarding the mode of collection of civil penalties, the penalty may be pursued by a civil action.³⁶ It is anticipated that the civil penalty would likely be assessed by courts in civil actions brought by aggrieved servicemembers for damages and other relief afforded under provisions of ch. 250, F.S. and federal laws affording protections to servicemembers.

Effective Date

The bill provides for an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

³⁶ 36 FLA. JUR.2D *Forfeitures and Penalties* s. 66 (2008) (citing *South Carolina State Highway Dep't v. Southern Ry. Co.*, 122 S.E. 2d 422 (S.C. 1961)).

B. Private Sector Impact:

The removal of the one-year employment requirement for eligibility to pursue civil relief against an employer may cause some small business employers to reconsider the cost effectiveness of employing National Guard members in short-term or transient types of jobs.

Job protections provided in this bill may cause additional persons to choose to join the National Guard.

This bill imposes liability for civil penalties of up to \$1,000 per violation on any person who has been found to have violated the rights of servicemembers protected in ch. 250, F.S., or other provisions of federal law protecting servicemembers.

C. Government Sector Impact:

The assessment and collection of any civil penalties that inure to the state for violations of laws protecting servicemembers may result in revenue to the state. It is unknown how often this penalty will be assessed by the courts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes****CS by Judiciary on March 4, 2009:**

The committee substitute:

- Requires a servicemember returning from state active duty to provide prompt notice to the employer of his or her intent to return to work;
- Provides limited exceptions to the requirement that an employer must allow servicemembers returning from state active duty to return to work;
- Specifies that a servicemember returning from state active duty may not be discharged for a period of one year, unless the discharge is for cause; and

- Clarifies that a civil penalty of up to \$1,000 may be assessed for violations of provisions of ch. 250, F.S., affording protections to servicemembers, as well as for violations of provisions of federal law protecting servicemembers.

CS by Military Affairs and Domestic Security on February 4, 2009:

The committee substitute updates references to the Manual for Courts-Martial and the Uniform Code of Military Justice to reflect the most current versions of the manual and code.

In addition, the committee substitute clarifies that members of the National Guard returning to work after serving on state active duty are entitled to seniority accrued prior to deployment, any additional seniority that would have been attained during the time of deployment, and any additional rights and benefits that would have accrued to the servicemember. The returning worker cannot be discharged from such employment except for cause. Employers may not require servicemembers to use annual, vacation, compensatory, or similar leave for periods of deployment, and must allow the returning servicemember to use accrued leave in a normal manner. The committee substitute removes a requirement that a National Guard member must have been employed for one year before his deployment into state active duty in order to be eligible to bring suit for violations of existing statutory protections, as well as the bill's new protections.