

Commentary

Employers with reservists may be affected in recent ruling

By BRIAN WEINTHAL

Employers in Illinois, Wisconsin, and Indiana with military reservists “in their ranks” may wish to take note of a



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recent ruling by the Midwest’s highest federal appeals court that potentially creates new benefits that businesses must provide to those who temporarily leave work to serve on active duty. In *White v. United Airlines*, the United States Court of Appeals for the Seventh Circuit found that under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), companies that provide various types of paid leave must also provide paid military leave to employees who exit their civilian positions for brief periods of time to serve on active duty. Although the Seventh Circuit did not create an exhaustive list of the types of “comparable” leave that would trigger a duty to pay reservists while they are away, the appellate court identified paid leave for jury duty and paid sick leave as two types of benefits that might activate this new obligation on the part of employers.

Under USERRA, employers cannot discriminate against military reservists and members of the national guard based on their military affiliation or status. Generally speaking, the law requires businesses to provide those who serve on active duty

with leave to fulfill their military orders. Employers must also reinstate these employees (typically to the same position) upon return to their civilian jobs.



Madison County Chairman Kurt Prenzler, right, discusses river levee levels during last year’s flooding with reserve members of the Illinois National Guard. IBJ file photo

At issue in the *White* lawsuit was a provision of USERRA that requires employers to provide workers who are called to military service with the same “rights and benefits” that are accorded to similarly situated employees who take other “comparable” forms of leave. In overturning the dismissal of the case by a lower court, the Seventh Circuit—which has jurisdiction over Illinois, Indiana, and Wisconsin—concluded that by not paying regular wages to employees who took short-term military leave, United Airlines may have violated USERRA’s guarantee of equal “rights and benefits” to reservists whose colleagues enjoyed access to other forms of paid leave, such as paid leave for jury duty and sick time. The Seventh Circuit thus revived the case and sent it back to the lower court for further proceedings. Notwithstanding its importance, several issues remain unresolved in the wake of the *White* appeal. First, the Seventh Circuit did not provide guidance on how employers must determine whether different types of leave are “comparable” to military service. The difficulty lies in the fact that not all orders to active duty are the same. While an assignment to national guard duty (such as to guard the U.S. Capitol building) might only last for a few days (similar to jury duty or sick leave), a call to active duty to serve in a foreign war or armed conflict could last for more than a year. Because there is no “comparable” type of paid leave that lasts for such an extensive period of time, it is unlikely that an employer would need to pay an employee who leaves his or her position to serve in an extended military assignment.

Another question left open by the Seventh Circuit is whether employers need to pay employees their full wages for short-term military leave, or whether they are simply obligated to pay the difference between regular wages and military pay (such that employers are not required to provide a windfall). Although the appellate court indicated that the latter answer seemed more intuitive under USERRA, the court noted that United Airlines paid its employees their full wages in addition to paid leave for bereavement and sick days, so the law could result in employers having to pay full wages for short-term military leave.

As the law continues to develop in this area, companies in Illinois, Wisconsin, and Indiana will need to think critically about the benefits they provide in relation to the number of military reservists they have on staff. The *White* opinion is expected to usher in a significant number of new class action lawsuits, and similar cases filed in Pennsylvania and California suggest that other federal jurisdictions may soon take up the question of paid military leave under USERRA.

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