

2001 Assembly Bill 572

Date of enactment: **November 29, 2001**  
Date of publication\*: **December 13, 2001**

## 2001 WISCONSIN ACT 26

AN ACT *to create* 21.80, 106.54 (7), 111.91 (2) (gm), 230.32 (7) and 230.45 (1) (m) of the statutes; **relating to:** reemployment rights after national guard or state defense force service, providing an exemption from emergency rule-making procedures, and granting rule-making authority.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 21.80 of the statutes is created to read:

**21.80 Reemployment rights after national guard or state defense force service.** (1) **DEFINITIONS.** In this section:

(a) "Active service" means active service in the national guard or the state defense force under an order of the governor issued under this chapter or active service in the national guard under 32 USC 502 (f) that is not considered to be service in the uniformed services.

(b) "Employer" means a person engaging in any activity, enterprise, or business in this state employing one or more persons on a permanent basis. "Employer" includes the state and any office, department, independent agency, authority, institution, association, society, or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts. "Employer" also includes a successor-in-interest of a person employing an individual who has provided notice to that person under sub. (3) (a).

(c) "Health benefit plan" has the meaning given in s. 632.745 (11).

(d) "Qualified" means having the ability to perform the essential tasks of an employment position.

(e) "Reasonable efforts" means, with respect to an action required by an employer under sub. (4) (a) 1., 2., 3., or 4., an action that does not place an undue hardship on the employer.

(f) "Service in the uniformed services" has the meaning given in 38 USC 4303 (13).

(g) "Undue hardship" means, with respect to an action required by an employer under sub. (4) (a) 1., 2., 3., or 4., significant difficulty or expense, when considered in light of all of the following:

1. The nature and cost of the action.
2. The overall financial resources of the facility involved in providing the action, the number of persons employed at the facility, the effect of providing the action on the resources and finances of the facility, and any other impact of the action on the operation of the facility.
3. The overall financial resources of the employer, the number of persons employed by the employer, and the number, type, and location of the employer's facilities.
4. The type of operation of the employer, including the composition, structure, and functions of the employer's workforce, the geographic separateness from the employer of the facility involved in providing the action, and the administrative and financial relationship of the facility to the employer.

(2) **MORE GENEROUS RIGHTS PERMITTED.** Nothing in this section prohibits an employer from providing

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\* Section 991.11, WISCONSIN STATUTES 1999-00 : Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

employees who are called into active service with reemployment rights and benefits that are more generous to the employee than the rights and benefits provided under this section.

(3) REEMPLOYMENT RIGHTS. (a) *Prerequisites.* Subject to par. (d), any person who is absent from a position of employment because of active service is entitled to the reemployment rights and benefits specified in this section if all of the following apply:

1. Except as provided in par. (b), the person or an appropriate officer in the national guard or the state defense force has given advanced notice of the active service to the person's employer.

2. Except as provided in par. (c), the cumulative length of the absence from the position of employment and of all previous absences from a position of employment with the employer by reason of active service or service in the uniformed services does not exceed 5 years.

3. Except as provided in par. (f), the person reports to the employer or submits an application for reemployment to the employer as required under par. (e).

4. The person's service in the national guard or the state defense force has not been terminated under other than honorable conditions.

(b) *Notice not required.* No notice is required under par. (a) 1. if the giving of that notice is precluded by military necessity or is otherwise impossible or unreasonable. A determination of military necessity for purposes of this paragraph shall be made according to rules and regulations promulgated by the adjutant general or the federal secretary of defense and is not subject to judicial review.

(c) *Length of absence limit.* The periods of service in the uniformed services described in 38 USC 4312 (c) (1) to (4) and all of the following periods of active service are not included in calculating the 5-year period specified in par. (a) 2.:

1. Any period of active service beyond that 5-year period that is required to complete an initial period of obligated active service.

2. Any period of active service for which the person, through no fault of the person's own, was unable to obtain orders releasing the person from a period of active service before the expiration of the 5-year period.

3. Any period of active service that was performed to fulfill any additional training requirements determined and certified in writing by the federal secretary of the army, the federal secretary of the air force, or the adjutant general to be necessary for professional development or for completion of skill training or retraining.

4. Any period of active service that was performed by a person who was ordered to, or retained in, active service, other than for training, because of a state emergency declared by the governor, because of a war or national emergency declared by the president of the United States or Congress, because of insurrection, rebellion, riot,

invasion, or resistance to the execution of the laws of this state or of the United States, or in support of an operational mission, a critical mission, or any other requirement of the uniformed services.

(d) *Exceptions.* An employer is not required to reemploy a person under this section if the employer shows that any of the following apply:

1. The employer's circumstances have so changed as to make reemployment of the person impossible or unreasonable.

2. The position of employment that the person left to perform active service was for a brief, nonrecurrent period and there was no reasonable expectation that the position of employment would continue indefinitely or for a significant period of time.

3. In the case of a person who is entitled to reemployment under sub. (4) (a) 3. or 4., the accommodations, training, or effort required under sub. (4) (a) 3. or 4. would pose an undue hardship on the employer.

(e) *Return procedures.* 1. Subject to subds. 4. and 5., if a person who has been absent from a position of employment because of active service that lasted for less than 31 days, who has been absent from a position of employment for any period of time for the purpose of an examination to determine the person's fitness to perform active service, or who has been absent from a position of employment because the person was hospitalized for or was convalescing from an illness or injury that was incurred in or aggravated during the performance of that active service wishes to receive the reemployment rights and benefits specified in this section, the person must notify the person's employer of the person's intent to return to the position of employment by reporting to the employer by no later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the active service, examination, or period of hospitalization or convalescence, a period of time that allows for the safe transportation of the person from the place of active service, examination, hospitalization, or convalescence to the person's residence, and a rest period of 8 hours following that transportation period or, if through no fault of the person's own reporting to the employer within that time is impossible or unreasonable, by reporting to the employer as soon as possible after that 8-hour rest period.

2. Subject to subds. 4. and 5., if a person who has been absent from a position of employment because of active service that lasted for more than 30 days, but less than 181 days, or who has been absent from a position of employment because the person was hospitalized for or was convalescing from an illness or injury that was incurred in or aggravated during the performance of that active service wishes to receive the reemployment rights and benefits specified in this section, the person must notify the person's employer of the person's intent to return to the posi-

tion of employment by submitting to the employer an application for reemployment by no later than 14 days after the completion of the active service, hospitalization, or convalescence or, if through no fault of the person's own submitting the application within that time is impossible or unreasonable, by submitting to the employer an application for reemployment by no later than the first full calendar day on which submission of the application becomes possible.

3. Subject to subds. 4. and 5., if a person who has been absent from a position of employment because of active service that lasted for more than 180 days or who has been absent from a position of employment because the person was hospitalized for or was convalescing from an illness or injury that was incurred in or aggravated during the performance of that active service wishes to receive the reemployment rights and benefits specified in this section, the person must notify the person's employer of the person's intent to return to the position of employment by submitting to the employer an application for reemployment by no later than 90 days after the completion of the active service, hospitalization, or convalescence or, if through no fault of the person's own submitting the application within that time is impossible or unreasonable, by submitting to the employer an application for reemployment by no later than the first full calendar day on which submission of the application becomes possible.

4. The period of hospitalization or convalescence specified in subds. 1., 2., and 3. may not exceed 2 years, except that if through no fault of the person's own it is impossible or unreasonable for the person to report to the employer within the time specified in subd. 1. or to apply for reemployment within the time specified in subd. 2. or 3., that 2-year period shall be extended by the minimum period of time required to accommodate the circumstances that made it impossible or unreasonable for the person to report or apply as so required.

5. A person who fails to report to the person's employer within the time specified in subd. 1. or who fails to apply for reemployment within the time specified in subd. 2. or 3. does not automatically forfeit the reemployment rights and benefits specified in this section. Instead, the person shall be subject to the rules, policies, and practices of the person's employer pertaining to discipline for unexcused absences from work.

(f) *Documentation.* 1. A person who submits an application for reemployment under par. (e) 2. or 3. must, on the request of the person's employer, provide to the employer documentation to establish that the application was submitted within the time limits specified in par. (e) 2. or 3., that the person's cumulative length of all absences from employment with the employer because of active service or service in the uniformed services does not, except as permitted under par. (c), exceed 5 years,

and that the person's service was not terminated under other than honorable conditions.

2. An employer may not refuse to reemploy a person who fails to provide any of the documentation specified in subd. 1. because that documentation does not exist or is not readily available at the time the employer requests that documentation. If after the person is reemployed documentation becomes available that establishes that the person does not meet a requirement specified in subd. 1., the employer may terminate the person's employment and the provision of any rights and benefits afforded to the person under this section.

3. An employer may not delay or attempt to defeat a reemployment right that the employer is obligated to provide under this section by demanding documentation that does not exist or is not readily available at the time of the demand.

(g) *Veterans preferences.* The right of a person to reemployment under this subsection does not entitle the person to retention, preference, or displacement rights over any person who has a superior claim under s. 45.35 (4), 62.13 (4) (d), 63.08 (1) (f), 63.37, 63.39 (2m), 66.0509 (1), 230.15 (2m), 230.16 (7) or (7m), 230.21 (1m), 230.25, or 230.275.

(h) *Prohibited bases for denial of reemployment.* In determining a person's right to reemployment and other benefits under this section, an employer may not deny reemployment or any other benefits based on the timing, frequency, duration, or nature of the person's active service or service in the uniformed services so long as the requirements under par. (a) are met.

(4) REEMPLOYMENT POSITIONS. (a) *Prompt reemployment required.* 1. Subject to subds. 3. and 4. and par. (b), an employer shall reemploy a person who is entitled to reemployment under sub. (3) and whose period of active service was for less than 91 days promptly on completion of that period of active service in the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by that active service so long as the person is qualified to perform the duties of that position or, if after reasonable efforts by the employer to qualify the person to perform those duties the person is not qualified to perform those duties, in the position of employment in which the person was employed on the date on which the person's period of active service began.

2. Subject to subds. 3. and 4. and par. (b), an employer shall reemploy a person who is entitled to reemployment under sub. (3) and whose period of active service was for more than 90 days promptly on completion of that period of active service in the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by that active service or in a position of

employment of like seniority, status, and pay so long as the person is qualified to perform the duties of that position or, if after reasonable efforts by the employer to qualify the person to perform those duties the person is not qualified to perform those duties, in the position of employment in which the person was employed on the date on which the person's period of active service began or in a position of employment of like seniority, status, and pay.

3. Subject to par. (b), in the case of a person who has a disability that was incurred in or aggravated during a period of active service and who, after reasonable efforts by the employer to accommodate the disability, is not qualified due to the disability to perform the duties of the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by the active service, the employer shall reemploy the person promptly on completion of that period of active service in any other position that is equivalent to that position in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer, or, if there is no other position of employment available that is equivalent to that position in seniority, status, and pay, in a position that is the nearest approximation to that equivalent position in terms of seniority, status, and pay, consistent with the person's circumstances.

4. Subject to par. (b), in the case of a person who is not qualified to be employed in the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by the person's active service or in the position of employment in which the person was employed on the date on which the person's period of active service began for any reason other than disability incurred in or aggravated during a period of active service and who cannot become qualified to be so employed with reasonable efforts by the employer, the employer shall reemploy the person promptly on completion of that period of active service in any other position that the person is qualified to perform and that is the nearest approximation to the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by that active service, with full seniority, or if no position of employment that is the nearest approximation to that position is available, in a position of employment that the person is qualified to perform and that is the nearest approximation to the position of employment in which the person was employed on the date on which the person's period of active service began, with full seniority.

(b) *Multiple returning employees.* 1. If 2 or more persons who are entitled to reemployment under sub. (3) in the same position of employment have reported to the

employer or applied for reemployment in that position, the person who left employment first shall have the prior right to reemployment in that position.

2. A person who is entitled to reemployment under sub. (3), but who is not reemployed because of subd. 1., shall be entitled to reemployment as provided in par. (a) 1., 2., 3., or 4., whichever is applicable, in a position of employment that provides for similar status and pay as the position described in subd. 1., consistent with the person's circumstances, with full seniority.

(5) RIGHTS, BENEFITS, AND OBLIGATIONS. (a) *Seniority.* A person who is reemployed under this section is entitled to the seniority and other rights and benefits determined by seniority that the person had on the last day of employment before the person's active service began, plus all seniority and other rights and benefits determined by seniority that the person would have had if the continuous employment of the person with the employer had not been interrupted by that active service.

(b) *Continuation of benefits.* 1. Subject to subds. 2. to 5., a person who is absent from employment because of active service is considered to be on furlough or leave of absence while performing the active service and is entitled to receive all rights and benefits not determined by seniority that are generally provided by the employer to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan that is in effect on the day on which the active service began or that is established while the person is performing the active service.

2. If an employer shows that a person who is absent from a position of employment because of active service has knowingly provided written notice of the person's intent not to return to a position of employment with the employer after that active service and, in doing so, was aware of the specific rights and benefits under subd. 1. that the person would lose while absent from the position of employment, the person is not entitled to the rights and benefits specified in subd. 1. while absent from employment.

3. A person who is considered to be on furlough or leave of absence under subd. 1. while performing active service is not entitled to any benefit to which the person would not otherwise be entitled if the person had remained continuously employed.

4. An employer may require a person who is considered to be on furlough or leave of absence under subd. 1. while performing active service to pay the employee cost, if any, of any benefit that is continued under subd. 1. to the same extent that other employees who are on furlough or leave of absence are so required.

5. A person who is absent from a position of employment because of active service is entitled to receive coverage under a health benefit plan during the absence and on reemployment as provided in sub. (6).



(c) *Protection from discharge.* An employer that reemploys under this section a person whose period of active service lasted for more than 30 days, but less than 181 days, may not discharge the person within 180 days after the date of reemployment except for cause. An employer that reemploys under this section a person whose period of active service lasted for more than 180 days may not discharge the person within one year after the date of reemployment except for cause.

(6) CONTINUATION OF HEALTH CARE COVERAGE. (a) *Option to continue coverage.* Notwithstanding s. 632.897, if a person who has coverage under a health benefit plan in connection with the person's employment is absent from a position of employment because of active service, the insurer that issued the health benefit plan shall permit the person, and the person's dependents, to continue coverage under the health benefit plan until the first to occur of the following:

1. Eighteen months have elapsed since the person's absence from the position of employment began.

2. The day after the date on which the person is required under sub. (3) (e) to report to the employer or apply for reemployment.

(b) *Payment of premiums.* A person who elects to continue coverage under par. (a) and who is absent from a position of employment for 30 days or less may not be required to pay more than the employee share, if any, of the cost of the coverage. A person who elects to continue coverage under par. (a) and who is absent from a position of employment for more than 30 days may be required to pay up to 102% of the full premium for that coverage for the period of continued coverage that exceeds 30 days.

(c) *Reinstatement on reemployment.* If a person's coverage under a health benefit plan in connection with his or her employment was terminated because of the person's active service and if after returning from that active service the person is reemployed under sub. (3), coverage under the health benefit plan shall be reinstated for the person and the person's dependents immediately upon reemployment. With respect to the reinstated coverage, no exclusion or waiting period may be imposed that would not have been imposed had the coverage not been terminated because of the active service.

(7) ENFORCEMENT. (a) *Complaint.* Any person who believes that his or her employer has failed or refused, or is about to fail or refuse, to provide to the person any reemployment right or benefit to which the person is entitled under this section may file a complaint with the adjutant general, in such form as the adjutant general may prescribe by rule, summarizing the allegations that form the basis of the complaint. The adjutant general shall investigate the complaint and, if the adjutant general is reasonably satisfied that the person is entitled to the rights or benefits sought, the adjutant general shall endeavor to resolve the complaint by conference, conciliation, or persuasion. If the adjutant general is not reason-

ably satisfied that the person is entitled to the rights or benefits sought, the adjutant general may refuse to endeavor to resolve the complaint and shall notify the person who filed the complaint that the person may proceed under par. (b) 2. to enforce the person's rights under this section. If the adjutant general is not able to resolve the complaint, the adjutant general shall notify the person who filed the complaint that the person may proceed under par. (b) 1. or 2. to enforce the person's rights under this section.

(b) *Enforcement procedures.* 1. A person who receives notification under par. (a) that the adjutant general was unable to resolve the person's complaint may request the adjutant general to refer the complaint to counsel, which may include the attorney general, appointed by the governor on the recommendation of the adjutant general for the purpose of prosecuting complaints under this subdivision who shall file a complaint for appropriate relief with the department of workforce development or, if the person is an employee of a state agency, as defined in s. 111.32 (6) (a), the personnel commission.

2. Subdivision 1. does not preclude a person who has chosen not to file a complaint with the adjutant general under par. (a), whose complaint the adjutant general has refused to endeavor to resolve under par. (a), or who has chosen not to request the adjutant general to refer his or her complaint to counsel under subd. 1. from filing a complaint for appropriate relief with the department of workforce development or, if the person is an employee of a state agency, with the personnel commission.

3. The department of workforce development or the personnel commission shall process a complaint filed under subd. 1. or 2. in the same manner that employment discrimination complaints are processed under s. 111.39.

(c) *Retaliation prohibited.* An employer may not discharge or otherwise discriminate against any person for filing a complaint or attempting to enforce a right provided under this section or for testifying or assisting in any action or proceeding to enforce a right provided under this section.

(d) *Remedies.* If the department of workforce development or the personnel commission finds that an employer has failed or refused, or is about to fail or refuse, to provide any reemployment right or benefit to which a person is entitled under this section or has discharged or otherwise discriminated against any person in violation of par. (c), the department of workforce development or the personnel commission may order the employer to do any one or more of the following:

1. Take such action as will fully vindicate the rights and benefits of the person under this section.

2. Compensate the person for any loss of wages, salary, or other benefits suffered because of the failure or refusal to provide reemployment rights or benefits under this section or the discharge or other discrimination.

3. Pay the person, as liquidated damages, an amount that is equal to the amount ordered under subd. 2. if the department of workforce development or the personnel commission finds that the failure or refusal to provide reemployment rights or benefits under this section or the discharge or other discrimination was willful.

4. Pay the person costs and reasonable actual attorney fees, if the person is not represented by counsel appointed under par. (b) 1.

**(8) RULES.** The department of military affairs shall promulgate rules implementing this section.

**SECTION 2.** 106.54 (7) of the statutes is created to read:

106.54 (7) The division shall receive complaints under s. 21.80 (7) (b) 1. or 2. and shall process the complaints in the same manner that employment discrimination complaints are processed under s. 111.39.

**SECTION 3.** 111.91 (2) (gm) of the statutes is created to read:

111.91 (2) (gm) Reemployment rights of employees under s. 230.32 (7).

**SECTION 4.** 230.32 (7) of the statutes is created to read:

230.32 (7) Any employee who is absent from state service because the employee is in active service, as defined in s. 21.80 (1) (a), is entitled to all reemployment rights and benefits provided under s. 21.80.

**SECTION 5.** 230.45 (1) (m) of the statutes is created to read:

230.45 (1) (m) Receive complaints under s. 21.80 (7) (b) 1. or 2. and, except as provided in sub. (1m), process the complaints in the same manner that employment discrimination complaints are processed under s. 111.39.

**SECTION 6. Nonstatutory provisions.**

(1) **EMERGENCY RULES.** Using the procedure under section 227.24 of the statutes, the department of military affairs shall promulgate the rules required under section 21.80 (8) of the statutes, as created by this act, for the period before the effective date of the permanent rules promulgated under section 21.80 (8) of the statutes, as created by this act, but not to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the department of military affairs is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

(2) **TRANSITIONAL PROVISIONS; PERSONS IN ACTIVE SERVICE ON EFFECTIVE DATE.**

(a) **Reemployment.** A person who is performing active service, as defined in section 21.80 (1) (a) of the statutes, as created by this act, on the effective date of this paragraph is entitled to the reemployment rights and

benefits provided in section 21.80 of the statutes, as created by this act, if, subject to section 21.80 (3) (d) of the statutes, as created by this act, all of the following apply:

1. The person or an appropriate officer in the national guard or the state defense force has given advanced notice of the active service to the person's employer, unless the giving of that notice was precluded by military necessity or was otherwise impossible or unreasonable as described in section 21.80 (3) (b) of the statutes, as created by this act.

2. The cumulative length of all absences from a position of employment with the employer by reason of active service or service in the uniformed services, as defined in 38 USC 4303 (13), whether before or after the effective date of this subdivision, does not exceed 5 years, except as provided in section 21.80 (3) (c) of the statutes, as created by this act.

3. The person reports to the employer as required under section 21.80 (3) (e) 1. of the statutes, as created by this act, or applies for reemployment under section 21.80 (3) (e) 2. or 3. of the statutes, as created by this act, whichever is applicable, on or after the effective date of this subdivision.

4. The person's service in the national guard or the state defense force has not been terminated under other than honorable conditions.

(b) **Health coverage.** A person who is performing active service, as defined in section 21.80 (1) (a) of the statutes, as created by this act, on the effective date of this paragraph or a dependent or personal representative of the person may elect to continue coverage under a health benefit plan, as defined in section 632.745 (11) of the statutes, as provided in section 21.80 (6) (a) of the statutes, as created by this act. If such an election is made, the health benefit plan shall remain in effect for the remaining portion of the 18-month period that began when the person left employment to perform active service or until the day after the date on which the person is required under section 21.80 (3) (e) of the statutes, as created by this act, to report to the employer or apply for reemployment, whichever occurs first.

**SECTION 7. Initial applicability.**

(1) **CONTINUATION OF BENEFITS.** The treatment of section 21.80 (5) (b) 1. to 4. of the statutes first applies to a person who is performing active service, as defined in section 21.80 (1) (a) of the statutes, as created by this act, on the effective date of this subsection, except that the treatment of section 21.80 (5) (b) 2. of the statutes first applies to a person who leaves a position of employment to perform active service on the effective date of this subsection.

(2) **HEALTH COVERAGE.** Subject to SECTION 6 (2) (b) of this act, the treatment of section 21.80 (6) of the statutes first applies to a person who leaves a position of

employment to perform active service on the effective  
date of this subsection.

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