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## RE-EMPLOYMENT

The demobilization of armies always creates a serious problem which lasts until the ex-soldiers are absorbed into civilian life. Thus, one of the outstanding features of social policy in the present war is the guarantee of reinstatement of employment on the termination of military service. The Selective Training and Service Act of 1940[1] contemplates not only the raising of an army, but also job restoration for the men of that army.

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[23] S. 1978 (1941).

[24] *Ibid.*

[25] Linder, *Social Legislation and National Defense* (June 1941) 1 LAW GUILD REV. 16, 22.

[1] 54 STAT. 885 (1940), 50 U.S.C.A. §301 *et seq.* (Supp. 1940) Hereafter this act will be referred to by section number only. As to provisions of Servie Extension Act of 1941, *see* 55 STAT. 627 (1941), 50 U.S.C.A. § 357 (Supp. 1941).

The Act assists the selectee in his attempts at relocation by providing that upon his discharge he shall, if his superiors see fit, be given a certificate attesting to his satisfactory completion of training and service.[2] Then, if still qualified to perform the duties of his former position, he may apply within forty days for reinstatement to the job which he held before induction.[3] This job guaranty is further buttressed by the mandate that the selectee shall not be discharged without cause within one year after restoration to his position.[4]

If the employer refuses to re-employ or extend any benefit which his former employee is entitled to, the latter may request the United States District attorney to petition the District Court of the United States for a hearing.[5] The selectee is further encouraged to bring suit by provisions that no fees or court costs shall be taxed against him —apparently even when he loses or his suit is unreasonable.[6] By virtue of section 7 of the Service Extension Act of 1941, the job protection provisions of the act apply to both selectee and volunteer.[7]

While many European countries at the close of the World War compelled employers to reinstate demobilized workers in their former employment,[8] in the United States it was considered impracticable to

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[2] §8 (a).

[3] § 8 (b) "If the position was in the employ of a private employer, the latter must restore the individual to the said position or to a position of like seniority, status and pay, unless his circumstances have so changed as to make it impossible or unreasonable for him to do so." § 8 (6)B.

[4] §8 (c). (The employee is to be considered as having been on furlough and is thereby entitled to benefits, e.g. insurance, offered by the employer as a part of his established rule or practice).

[5] § 8 (e). (The court has the power to require the employer to reinstate the employee and to compensate him for loss of wages suffered by the employer's failure to comply with the mandate of the statute).

[6] § 8 (e). *See Mobilization* (1940) 54 HARV. L. REV. 278, 288. "The released service man may sue only in the District Court of the United States for which the employer maintains business." It has been suggested that such enforcement would be easier if recourse were allowed in the state courts, because of possible geographical difficulty in reaching the Federal Court. *See* (1940) 9 INT. JURID. ASS'N MONTH. BULL. 33.

[7] 55 STAT. 627 (1941), 50 U.S.C.A. § 357 (Supp. 1941).

[8] Andrews, *Re-employment and Post War Planning* (1942) 220 ANNALS 186 ("In England, demobilization was arranged according to a complicated system of priorities, taking into account the factors of age, marriage, length of service, urgency with which individuals or classes of men were needed for civilian work, and prospects of employment." *See* Agr. Tribunal of Investigation, Final Report (Eng. 1924) 230; The Imperial German government also made careful preparations for the demobilization of its armies during the progress of of the first World War. The army personnel were divided into eight broad categories, to be demobilized in turn: (1) leading persons in commercial industry (2) heads of commerce (3) independent manufacturers and farmers (4) civil servants, teachers, and R.R. employees (5) sailors and fishermen (6) skilled workers (7) unskilled workers (8) students. Plans broke down because a German defeat was not envisioned. For Japan see SHUHO, 19 July, 1939; SHOKUGYO JIHO, June, 1939. A com-

require reinstatement.[9] It is especially significant that prior to the present hostilities most European countries took measures to insure former employment to men returning home from military duties.[10] Following the example of other countries, the United States embodied reemployment provisions in its Act which appear to be based largely on provisions of the British Military Training Act of 1939,[11] and the British National Service Act of 1939.[12]

In the light of foreign experience it seems clear that the reemployment offers little promise of effective protection to the conscripted employee. A thorough analysis of the job protection provisions of the Act will at once pose problems that seem incapable of easy solution. For example, the requirement of "satisfactory" service[13] may oper-

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plete analysis of foreign laws relating to re-employment is given in *Social Legislation in Wartime—Regulation of Employment During the War* (1939) 40 INT. LAB. REV. 654.

[9] *Mobilization for Defense* (1940) 54 HARV. L. REV. 278, 288. See Ferry, Rosenbaum, & Wigmore, *The Soldiers' & Sailors' Civil Rights Bill* (1918) 12 ILL. L. REV. 472 *et seq.*; Litchfield, *United States Employment Service & Demobilization* (1919) 81 ANNALS 19. *But see* Cole, *Mobilization and Demobiliation* (1932) 10 ENCYC. SOC. SCIENCES 555; Andrews, *Re-employment & Post War Planning* (1942) 220 ANNALS 186, 188 (" veteran's camps & the Civilian Conservation Corps bear mute witness to the difficulties encountered in restoring the service men to civilian life. The fact that a total of more than 200,000 World War veterans were finally enrolled in the Civilian Camps, some 23 years after the end of the war, is proof of the need of a comprehensive re-employment program.")

[10] *Labour Problems in Time of War* (1939) 40 INT. LAB. REV. 589, 596. *See Reconstruction Planning in Australia* (1942) 45 INT. LAB. REV. 2; Nash, *Reconstruction Policy in New Zealand* (1941) 38 INDUSTRY & TRADE J. 7 ("The readjustment for war is gradual, but the readjustment for peace, although gradual at the beginning, becomes an avalanche, and unless we are prepared . . . we shall have troubles greater when war is over than we are having during the war. . . . There is the problem of rehabilitation and establishment in civil life, and there is the second problem of building a new economic structure.") For reconstruction programs in other countries, see: Netherlands East Indies, STAATSBLAD VAN NEDERLANDSH INDIE, No. 557 (1939), No. 158 (1940) (as cited in (1942) 45 INT. LAB. REV. 2, 3); *Wartime Policy in British Colonial Dependencies* (1941) 44 INT. LAB. REV. 538; Roumania, (Nov. to Dec. 1941) J. OF ROYAL EMPIRE SOC.; Switzerland, (1941) 23 VICTORY (formerly DEFENSE) *passim*; Canada, *Orders in Council P. C. 7521, 19th Dec. 1940*, CANADA GAZETTE, 4 Jan., 1941; France, (1941) JOURNAL OFFICIEL 4422; India, BULLETIN D'INFORMATIONS ALLEMONDES (Berne 1941) (as cited in (1942) 45 INT. LAB. REV. 2, 5); Germany, *Work for Prisoners* (1941) REICHSARBEITSBLATT 25 Aug. pt. I, p. 368 (as cited in (1942) 45 INT. LAB. REV. 2, 5); Spain, BOLETIN OFICIAL No. 254, 11 Sept. 1941, p. 6968.

[11] 2 & 3 GEO. VI, c. 25 § 7 (1939).

[12] 2 & 3 GEO. VI, c. 81 § 14 (1939). This act imposes the duty, except for certain legal defenses, upon each employer of men called for military or naval service, to reinstate them in employment under conditions not less favorable to the men than if they had remained in continuous employment. Violations subjected the employers to a fine of not more than £50, and the court could compel the employer to pay the employee an amount equal to 12 weeks wages.

[13] § 8(a). *See* PETERSON & STUART, CONSCRIPTION MANUAL (1940) 27.

ate against those who by training or temperament are incapable of performing well the military duties imposed upon them.[14] It seems clearly unjust that an inability to become a satisfactory member of the armed forces should be used to deny a person his right to be reinstated to his former position.[15] The inclusion of a general standard such as "satisfactory" as a test by which those in authority are empowered to deny valuable rights to others opens the door to discriminatory denials of civil rights. Thus, if a man were denied his certificate, he would presumably have to exhaust his administrative remedies within the army.[16] Court review would only extend to those cases where the officer acted arbitrarily.[17] Even where an abuse of discretion exists, it is diffciult to determine what remedy is appropriate.[18] The awarding of a certificate of satisfactory service does not appear to fall within the class of a mandatory injunction.[19]

Moreover, the failure of the Act to protect "temporary" employees[20] may pave the way for further unnecessary discrimination.[21] The line between permanent and temporary employment is not always capable of sharp delineation. It is further confused by the entirely separate problem of seasonal or other periodic but regular employment.[22] There seems to be little justification for holding these positions to be impermanent within the meaning of the Act. Such employees should be entitled to the same seasonal work on their return.[23]

An even more difficult problem will arise where new workers are hired to replace men called to service. Presumably, a warning that such

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[14] *See Civil Liberties and Conscription* (1940) 1 LAW. GUILD REV. 6, 9.

[15] *See* Geraghty, *Judicial Protection of Individuals under the Selective Training & Service Act of 1940* (1941) 36 ILL. L. REV. 310, 320. The service man's interest in the content of this certificate is conflicting. If he is shown to be sound, he forfeits any right to compensation for disability under § 3(d) of the Act. If on the other hand, he is shown under a disability, he may forfeit his right to re-employment as not still qualified to perform under § 8(b).

[16] *Cf. Ex parte* Kusweski, 251 Fed. 977 (N.D.N.Y. 1918); *see Mobilization for Defense* (1940) 54 HARV. L. REV. 278, 284. The lone formal administrative remedy would be a complaint under Art. 121 of the Articles of War, 39 STAT. 668 (1916), 10 U.S.C.A. § 1593 (1928).

[17] *See* U. S. v. Ju Toy, 198 U.S. 253 (1905); Ng Fung Ho v. White, 259 U.S. 276 (1922) (analagous immigration cases).

[18] *See* Geraghty, *Judicial Protection of Individuals under the Selective Training & Service Act of 1940* (1941) 36 ILL. L. REV. 310, 320.

[19] A certificate showing that the selectee has completed his service, deleting the word "satisfactory," might solve the difficulty.

[20] § 8(b).

[21] *See Civil Liberties and Conscription* (1940) 1 LAW GUILD REV. 6, 9. Railroadmen, longshoremen, and thousands of others who are hired from day to day probably enjoy only a succession of temporary jobs, but unless otherwise defined, the bill denies them any job safeguards at the conclusion of their military training.

[22] *See* (1940) 9 INT. JURID. ASS'N MONTH. BULL. 13, 19, 33.

[23] Geraghty, *Judicial Protection of Individuals under the Selective Training & Service Act of 1940* (1941) 36 ILL. L. REV. 310, 321.

a job is not permanent would protect the employer from future claims under the Act in case the second employee were drafted.[24]

The right to job restoration is further conditioned on the continued qualification of the selectee "to perform the duties of such position."[25] Physical disability, lack of skill due to long absence from work, or technological improvements which necessitate highly skilled operators might tend to penalize directly a man for army service. While the change in condition of the selectee, sufficient to justify a refusal to re-employ, necessarily rests on the discretion of the court, it is argued that not even a substantial change should deny the right of reinstatement.[26] Nevertheless, the entire burden of risk resulting from change during military service is placed on the person released from active duty in the armed forces.

In order to protect employers from economic dislocations resulting from conscription, the Statute does not require re-employment where it is "impossible or unreasonable."[27] There is no indication as to whether the reasonableness of such re-employment includes the availibility of replacements at lower pay, cessation of business, a curtailment of employment due to economic conditions, or technical improvement.[28] Fortunately the courts will be aided by the Labor Board Cases in these situations.[29]

Unionization subsequent to the employees' call to service might procure difficult problems for the union, the employer, and the person released from active military service.[30] For example, what would be the result if a union, having obtained a closed shop, either arbitrarily or with cause refused to admit the returned person to membership? In an analagous situation ,it has been suggested that re-employment should not be enforced because of possible disruption in the employer-employee relationship.[31] This would be an unfortunate result inasmuch

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[24] *See* PETERSON & STUART, CONSCRIPTION MANUAL (1940) 28. It would be unwise to sanction large scale evasion of the re-employment provisions, however, by removing from their benefits, all men, who by their employment contract, agreed that their position was not permanent.

[25] § 8(b).

[26] See debates on the re-employment provisions of the Act in Cong. Rec., Sept. 7, 1940; at 17741; *id.* Aug. 9, 1940, at 15517; *id.* Aug. 23, 1940 at 16511.

[27] § 8(b) B.

[28] *See* WOFE, LABOUR SUPPLY & REGULATIONS (1923) 1, 387; DUPOY & ELIOT, IF WAR COMES (1937) *passim*; *see* Hoague, Brown, & Marcus, *Wartime Conscription & Control of Labor* (1940) 54 HARV. L. REV. 50, 94; Vitale, *Selective Service & Training Act of 1940* (1941) 15 ST. JOHNS L. REV. 346.

[29] *Cf.* Union Steel Co. v. N.L.R.B., 109 F. (2d) 587, 592 (C.C.A. 3d, 1940) (necessary reduction in employment); Matter of Phillips Granite Co., 11 N.L.R.B. 910 (1939) (discontinuance of business); N.L.R.B. v. Bell Oil & Gas Co., 98 F. (2d) 405,409 (C.C.A. 5th, 1938).

[30] *See* (1940) 7 LAB. REL. REP. 73.

[31] *Cf.* Acierno v. North Shore Bus Co., 173 Misc. 79, 17 N.Y.S. (2d) 170 (1940). It seems that an employee would be required to join such a union as a condition precedent to re-employment, if the

as it would give the union a right to thwart the purpose of the Act.[32]

Even assuming the existence of his right to re-employment, a person released from active military service, economically weakened by his service at army pay, is obviously most interested in the speed and efficiency of his remedy. Sadly enough, because of inept draftsmanship, the means provided for enforcement of his remedy are ambiguous and inefficacious.[33] No provision exists by which a federal employee can seek court review of the rejection of his application. Furthermore the state employee has no occasion to seek court review as his right to reemployment is not mandatory.[34]

Other serious loopholes in the act are failure to provide for reinstatement of those selectees rejected at induction centers,[35] and failure to provide for those who are self-employed selectees.[36]

The problem of re-employment is further complicated by the fact that in addition to the cessation of many industries, due to a war which has resulted in new adjustments of labor, the enormous business of manufacturing war supplies will decline ,and women will have become firmly entrenched in industry. Consequently, large numbers of well-paid workers now regularly employed will be thrown on the labor market.[37] Hence, jobs must be found for these persons as well as for those returning from military service.

As a minor prelude to the re-employment program, the handling of the men who were released from active service between September 1st and the time we entered the war provided an excellent opportunity to try out the plans formulated by the National Headquarters of Selective Service.[38] An attempt was made to coordinate a program in

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union were willing. *See* Shimsky v. Tracey, 226 Mass. 21, 114 N.E. 957 (1917).

[32] *See* Geraghty, *Judicial Protection of Individuals under the Selective Training & Service Ast of 1940* (1941) 36 ILL. L. REV. 310, 321.

[33] *See* (1940) 9 INT. JURID. ASS'N MONTH. BULL. 33. Original draft of the Conscription Act made the unlawful refusal to rehire conscripts an "unfair labor practice" within the meaning of the N.L.R.A. *Sen. Rep.* No. 2002, 76th Cong., 3d Sess. (1940). For a detailed analogy of the Draft Act to the N.L.R.A., *see Mobilization for Defense* (1940) 54 HARV. L. REV. 278, 288. "If the assistance of a district attorney is refused, the conscript must engage an attorney at his own expense, and take solace in the knowledge that court costs cannot be imposed on him." Vitale, *Selective Service & Training Act of 1940* (1941) 15 ST. JOHNS L. REV. 346.

[34] § 8(b) C. *See* Ind. Laws 1941, c. 97 (re-employment of public school teachers); *Id.* 1941, c. 46 (reinstatement of firemen and policemen).

[35] *See Civil Liberties & Conscription* (1940) 1 LAW. GUILD REV. 6, 9.

[36] *See Selective Training & Service Act of 1940 & the Lawyer* (1941) 1 LAW. GUILD. REV. 32 (a proposed amendment to § 8 (b) that the draftees who were self-employed be given subsidies to re-establish themselves, or if they wish, government employment at a rate of compensation not less than that earned prior to military service.)

[37] *See* Andrews, *Re-employment and Post War Planning* (1942) 220 ANNALS 186.

[38] *Ibid.*

connection with the National Selective Service System, The United States Employment Office, and the Local Boards. Because of the small number of men involved, this program was fairly successful.[39]

In spite of all the aforementioned problems, national re-employment planning is imperative—planning that squares with facts, yet at the same time, projects the kind of nation and world in which we wish to live. Such plans become goals, and goals are incentives to conduct. Therefore it seems wise to outline objectives for a broad re-employment program:[40]

(1) To endeavor to place each soldier in contact with a job a month before his release from active duty.
(2) To make as early contact with the soldier as possible, in order to bolster his morale by giving him tangible evidence of the activities of the government in safeguarding his employment.
(3) To utilize the services of the United States Employment Service and the affiliated Employment Services as the primary means of finding jobs for unemployed soldiers.
(4) To supplement the work of the State Employment Agencies in order to insure complete placement of soldiers by the assistance of local re-employment committees affiliated with each local board.
(5) To put the job placement of soldiers on a sound basis by insuring that each man is placed in a job for which he is suited, and seeing that the man is presented with references to utilize fully his skill and training.
(6) To see that the employer and the public generally look upon the army trained man as offering the superior type of employee.
(7) To coordinate re-employment with industry through the use of clearinghouse committees from employer organizations working jointly with local board re-employment committees.
(8) To grant financial assistance to the ex-serviceman so that he may obtain home, furniture, tools, stock, land, or other necessary things for commencing an employment or occupation.[41]

## MOBILIZATION OF MANPOWER

The Nation is waging total war. To be successful against totalitarian governments we must either mobilize both material and human resources in the manner of our opponents, or establish a more efficient alternative of our own making. Mobilization of manpower should be handled so that not only our human resources will be victoriously

[39] An Ohio theatre employee was reinstated after his discharge from army service when the district attorney prepared to sue his former employee. Indianapolis Star, March 6, 1942, p. 1, col. 4.

[40] See *Johnny Gets His Gun, Keeps His Job* (Aug. 17, 1940) BUS. WK. 15; TOBIN & BIDWELL, MOBILIZING CIVILIAN AMERICA (1940) app. 252; *Re-employment & Post War Planning* (1942) 220 ANNALS 186.

[41] From the New Zealand Rehabilitation Act of 1941, 5 GEO. VI, No. 25 (1941).