

Employers' Obligations Under the Uniformed Services Employment And Reemployment Rights Act

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This column is sponsored by the CBA Labor Law Forum Committee to present current issues and topics of interest to attorneys, judges, and legal and judicial administrators on all aspects of labor and employment law in Colorado.

Thousands of reservists and National Guard members have been called up to military service following the events of September 11, 2001. As described in this article, these civilian soldiers have substantial job and benefit protections under USERRA.

In response to the attacks on the World Trade Center and Pentagon on September 11, 2001, the U.S. Department of Defense has called up over 60,000 military reservists and members of the National Guard to serve overseas or provide homeland defense under Operation Noble Eagle and Operation Enduring Freedom.¹ In Colorado alone, approximately 540 National Guard members and 650 reservists have been activated.² As these individuals leave their civilian jobs for tours of duty, many employers are uncertain about their obligations to these employees, or what rights these employees will have on their return from military service.

Civilian employees who are called up to military service enjoy substantial job and benefit protections pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA").³ This article discusses the major protections and obligations afforded by USERRA.

Overview of Employee Rights Under USERRA

USERRA prohibits discrimination against employees on the basis of their military service. It also attempts to minimize the disadvantages to their civilian careers as a result of their military service.⁴ USERRA accomplishes these goals in two ways. First, it prohibits employ-

ment discrimination and retaliation against eligible employees based on past, current, or future membership or service in the uniformed services.⁵ Second, it establishes reemployment rights and certain employment benefit protections for civilian employees who must leave their jobs to serve in the uniformed services.⁶

Military Leaves of Absence

Under USERRA, all public and private-sector employers are required to provide leaves of absence to eligible employees who are absent from work for military service in one of the uniformed services. "Uniformed services" covers the Army, Navy, Air Force, Marine Corps, and Coast Guard, as well as the Reserve components of these services. It also includes the Air National Guard and Army National Guard, the commissioned corps of the Public Health Service, and other persons designated by the U.S. President in time of war or national emergency.⁷ "Military service" refers to the performance of any duty in the uniformed services on a voluntary or involuntary basis, including active duty; active duty for training; initial inactive duty for training, for example, boot camp; inactive duty training, such as reserve weekends; full-time National Guard duty; and absence for examinations to determine fitness for duty, such as mandatory physical examinations.⁸

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Military Leave: Paid Or Unpaid?

Private employers must grant employees unpaid time off to perform their service obligations in the uniformed services.⁹ Although a leave for military service is generally unpaid, an employee may elect to use any accrued vacation time, annual leave, or personal time in lieu of unpaid leave for all or a portion of the employee's absence.¹⁰ An employer may not require employees to use accrued paid leave for a service-related absence.¹¹

Health Care Coverage While On Military Leave

Under USERRA, an employee whose military leave is for less than thirty-one days is entitled to continue his or her employer-sponsored health care coverage on the same terms the employee enjoyed just prior to the leave.¹² For example, if an employee was responsible for paying a portion of the health care premium just before the leave commenced, the employee will remain responsible for paying that premium during a short-term military leave of absence.

Those employees who serve more than thirty days in the military, and would lose coverage under the employer's health care plan because of their absence, must be allowed to elect continued coverage for themselves and their dependents under USERRA's coverage continuation provision. USERRA's coverage continuation provision is similar to that provided for in the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").¹³ USERRA allows employees to continue coverage at their own expense for up to eighteen months or the day after the employee fails to return to work after service, whichever comes first.¹⁴ The charge for coverage can be no more than 102 percent of the full premium (the 2 percent is to cover administrative costs).¹⁵

On timely return from military service, the employee's health insurance coverage must be reinstated without any waiting period or exclusions for preexisting conditions other than the waiting periods or exclusions that would have applied if there had been no absence for military service.¹⁶ This rule prohibiting waiting periods or excluding preexisting conditions does not apply to coverage of disabilities or injuries sustained during uniformed service.¹⁷

The requirements described above apply to group health plans that provide medical, dental, and vision care benefits through traditional indemnity arrange-

ments, health maintenance organizations, and self-insured group health plans. They also apply to medical reimbursement or "flexible spending" accounts maintained under Internal Revenue Code Section 125 plans.

Benefit Accrual While On Military Leave

While on military leave, the employee must be treated, and be entitled to the same rights, as other employees absent for reasons other than military service.¹⁸ For example, if employees on non-military leave are entitled to accrue vacation during the period of their leave, that same right must be afforded to employees absent on military leave. Likewise, an employer will be obligated to provide continued life insurance, disability insurance, and other benefits during an employee's military leave, to the extent those benefits are provided to other employees on unpaid, non-military leaves of absence. If there are differences among the rights employees on non-military leaves of absence are entitled to, the most favorable rights available must be afforded to the service member.¹⁹

Reemployment Rights After Military Leave

USERRA provides that an individual who is absent from work by reason of temporary military service is entitled to reinstatement rights and benefits if all of the following conditions are met: (1) the employee gives the employer timely advance notice of the service; (2) the cumulative length of the absence when combined with all previous absences by reason of military service does not exceed five years; (3) if the individual separates from military service, the separation was not a dishonorable discharge or a discharge under less than honorable conditions; and (4) the individual reapplies for employment in an appropriate, timely manner.²⁰

USERRA requires all employees to provide employers with advance written or verbal notice of their absence due to uniformed service.²¹ However, the notice requirement is excused when military necessity prevents employees from giving notice or circumstances make it impossible or unreasonable for employees to provide notice.²² For example, an employee who is part of a top-secret, special operations mission may be unable to provide his or her employer with advance notice about the need for leave. Under such circumstances, the employee's obligation to provide advance notice may be waived.

Under USERRA, an employee is entitled to reinstatement rights and benefits only if the cumulative period of the employee's absence from work due to military service does not exceed five years.²³ This means that an employer would be required to extend USERRA protections to an employee who might be absent from work due to military service for six months each year over a ten-year period, just as it would for an employee who is called up and is absent from the job for a five-year tour of duty. In computing the five years, certain types of service are not considered.²⁴ For example, service required beyond five years to complete an initial period of obligated service would not be included in the five-year service limitation.

Under USERRA, an employee has no right to reinstatement (or for that matter, any other benefits) if that person separated from service with a dishonorable or bad conduct discharge.²⁵ Similarly, where the individual was a commissioned officer and was dismissed for reasons of a court martial, the employee has no USERRA rights, including the right to reinstatement at the end of military service.²⁶

An employee returning from military duty must apply for reemployment within a time period that is based on length of his or her military service.²⁷ Where the length of military service is less than thirty-one days, the employee is required to return to work no later than the next day plus the expiration of eight hours after returning to his or her residence.²⁸ If the employee's military duty is between thirty-one and 180 days, the employee must submit a verbal or written application for reemployment to the employer no later than fourteen days after service has ended.²⁹ For a military tour of duty longer than 180 days, the employee has ninety days within which to reapply to the employer.³⁰ In the event the employee is ill or injured while on duty, a time period of up to two years may be applicable.³¹ Untimely reporting or reapplication does not forfeit an employee's reemployment rights after service has ended.³² However, the employee may be subject to the employer's rules on unexcused absences and he or she may be terminated on that basis.³³

To What Job is the Employee Returning?

What job is the employee entitled to on return from military duty? Again, it depends on the length of military service. If the employee's service was less than ninety-one days, the employee is entitled to the

job he or she would have held had the employee remained continuously employed, as long as the employee is qualified for the job or can become qualified after reasonable efforts by the employer to retrain the employee.³⁴ This could be the employee's old job, a promoted position, or even a demoted position, depending on what happens to the position during the employee's leave. If the employee is not qualified for that position, and cannot be qualified for the position through reasonable efforts by the employer to train the employee, he or she is entitled to reinstatement to the job held immediately prior to the military leave.³⁵

If the employee's military service was for more than ninety days, the employee is entitled to a position he or she would have held if military service had not intervened.³⁶ However, the employer also has the option of offering a different position of like seniority, status, or pay.³⁷ If the employee is not qualified to perform either of these positions, and could not be qualified after reasonable efforts, the employee is entitled to return to the position held immediately prior to the military leave, or to a position of like seniority, status, and pay that the employee is qualified to perform.³⁸

There are special reinstatement rights for individuals who sustain or aggravate a disability during military service. The employer is required to reasonably accommodate the returning disabled employee and allow the individual to perform the duties of the job he or she would have attained but for the military leave.³⁹ If the disabled individual is not qualified for that job, despite reasonable accommodation efforts, the employer must find a job of like seniority, status, and pay.⁴⁰ If that job cannot be found, the employer must find a position the disabled employee can perform that is the nearest approximation to the job the employee would have held but for military service.⁴¹

An employer will be excused from its obligations to reinstate the returning employee if the employer's circumstances have changed so much that reemployment is unreasonable or impossible.⁴² For example, if the position to which the employee is entitled to return has been eliminated due to a reduction in workforce, the employer will not be required to create a new job for that employee simply to comply with USERRA. Additionally, employers are not required to make efforts to qualify a returning employee for a particular position if such efforts would impose undue hardship on the employer.⁴³

An employer also is not required to reemploy an employee following his or her military leave if the job the employee left was for such a brief or non-recurrent period that there was no reasonable expectation that such employment would continue indefinitely or for a significant period.⁴⁴ For instance, an employee hired to perform a short-term, temporary position likely would not have reemployment rights under USERRA. The above-noted exceptions to reinstatement will be narrowly con-

strued in favor of the employee. Moreover, the burden of proof will be on the employer to prove their application.

Employee Benefit Rights On Return from Military Leave

USERRA provides that an employee returning from uniformed service is entitled to seniority-based benefits under what is known as the "escalator principle."⁴⁵ Un-

der the escalator principle, a returning service member steps back onto the "seniority escalator" not at the point on which he or she stepped off, but where he or she would have been but for the military leave. Regarding employee rights and benefits on return from military leave, this escalator principle can take a variety of forms. For example, if the employee with reasonable certainty would have received, but for the employee's absence, a pay raise or promotion based on length of service with the company, the employee is entitled to receive that raise or promotion on return from military leave. However, where the pay raise or promotion is based on merit and not length of service, the employee would not be entitled to the raise or promotion, because a merit-based raise or promotion is not deemed a seniority right.

Special "escalator" rules apply to defined benefit pension plans. USERRA requires that benefits under a defined benefit pension plan that accrue prior to the employee's period of military service cannot be forfeited during the employee's absence.⁴⁶ Furthermore, when the employee returns from military duty, the period of military service must be credited for all pension plan purposes, such as eligibility, vesting, and benefit accruals.⁴⁷ The employer cannot require an employee returning from military service to re-qualify for participation in the defined benefit pension plan.⁴⁸ In addition, the employer is expected to make contributions to the defined benefit pension plan on the employee's behalf

when the employee returns in amounts equal to the contributions that would have been made had the employee been actively employed during the period of leave.⁴⁹

If the employee is a member of a defined contribution pension plan, such as a 401(k) plan, the employee will have up to three times the period of uniformed service (but not more than five years) to make up any missed contributions he or she could not make because of absence due to military service.⁵⁰ The employer is required to make matching contributions only to the extent that the employee is reemployed after military service, and only to the extent the employee actually makes up the missed contributions.⁵¹

Contributions and benefits under a plan are computed on the basis of the rate of pay the employee would have earned had he or she remained at work.⁵² If this rate is not reasonably certain, the employer must use the employee's average rate of pay during the twelve-month period preceding his or her period of uniformed service.⁵³

Protections Against Discharge After Return From Military Leave

When an employee is rehired following a military leave, the employer is restricted from later terminating that employee other than for cause. Returning employees who serve in the military for 181 days or more may not be fired except for cause for one year after the date of reemployment.⁵⁴ Employees who serve from thirty-

one to 180 days may not be discharged without cause for six months after reemployment.⁵⁵

There is no restriction on an employer's ability to discharge an employee without cause where his or her military service was from one to thirty days. However, termination shortly after the employee's return from military duty may create a presumption of discriminatory treatment by the employer.⁵⁶

USERRA Violations: Enforcement and Litigation

Individuals who believe their rights under USERRA have been violated may file a complaint with the Veterans' Employment Training Service ("VETS") of the U.S. Department of Labor.⁵⁷ If VETS does not satisfactorily resolve the complaint, the individual may submit the complaint to the Attorney General for possible court action.⁵⁸ In addition, employees have the option of filing a private action under USERRA at any time, unless the Attorney General agrees to prosecute their case.⁵⁹

If a violation is found, USERRA provides for awards of back pay and lost benefits.⁶⁰ If the violation is determined to be willful, the employee also may be entitled to receive liquidated damages equal to the award of back pay and lost benefits.⁶¹ USERRA provides for the recovery of attorney fees, costs, and other litigation expenses by a successful employee.⁶² Courts have held that employees alleging violations of USERRA, and seeking statutory damages, are entitled to a jury trial under the Seventh Amendment.⁶³

How do employees prove that their employers discriminated against them in violation of USERRA? USERRA was enacted, in part, to overrule the U.S. Supreme Court decision in *Monroe v. Standard Oil Co.*⁶⁴ In *Monroe*, the Court held that under USERRA's antecedent, the Veterans' Reemployment Rights Act of 1968,⁶⁵ an employer violated the veterans' rights laws only where the employee could show that his or her reserve status was the sole motivation for the adverse action taken against the employee. USERRA overrules *Monroe* by providing that a violation occurs when a person's military service is a "motivating factor" in the discriminatory action, even if not the sole factor.⁶⁶

In cases where military service discrimination is alleged, USERRA applies the standard of proof set forth in *National Labor Relations Bd. v. Transportation Management Corp.*⁶⁷ Under that "but-for" test,

the employee bears the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating" factor in the adverse employment action. The employee need not show that military status was the sole reason for the employment action, only that it was one of several factors that "a truthful employer would list if asked the reason for its decision."⁶⁸ Discriminatory motivation or intent may be established by either direct or circumstantial evidence.⁶⁹

Once the employee establishes his or her *prima facie* case, the burden of proof shifts to the employer. The employer must show, by a preponderance of the evidence, that legitimate reasons, standing alone, would have induced it to take the same action.⁷⁰ Thus, an employer may avoid liability under USERRA if it can show by a preponderance of the evidence that: (1) it took the adverse action only for a valid reason; or (2) if an invalid reason played a part in the adverse action, the employer would have taken the same action in the absence of that invalid reason.⁷¹ The burden then shifts back to the employee to show the reasons given by the employer are a pretext for discrimination.

A recent Fourth Circuit decision, *Hill v. Michelin North America, Inc.*,⁷² illustrates how the standard of proof and allocation of burdens work in USERRA litigation. In *Hill*, the employee alleged that Michelin disapproved of his military reserve obligations and punished him by first transferring him to a job with irregular work schedules and long workdays and then ultimately terminating his employment. Michelin claimed that the plaintiff was transferred to the position to accommodate his reserve duties, and that the plaintiff was terminated for falsifying his timecard.

The district court granted summary judgment to Michelin and dismissed the employee's claims. The Fourth Circuit found there was a question of fact as to whether the employee's reserve status was a "motivating factor" in his transfer and that the district court therefore incorrectly dismissed the employee's claim. However, the court of appeals ultimately affirmed summary judgment, concluding that even if the employee's reserve status was a "motivating factor" in the termination, the employee failed to show that Michelin's reason for terminating the employee—the falsification of his time record—was pretext for discrimination. In *Hill*, Michelin demonstrated that it terminated all employees who falsified their timecards, re-

gardless of their participation in the reserves or military.

Conclusion

Whether the increase in the number of employees called up for active duty will result in an increase of USERRA lawsuits is unknown. The U.S. Department of Labor reports that employers are anxious to comply with their obligations under USERRA.⁷³ However, with the economy in a recession and layoffs rampant, employers may find compliance with USERRA difficult, especially regarding employers' obligations to reinstate employees returning from military leave. Employer compliance is made even more difficult by the absence of any implementing regulations for USERRA and the body of case law interpreting it that is yet to be fully developed. Therefore, USERRA remains a dangerous minefield that employers should walk through with extreme caution.

NOTES

1. Dept. of Defense News Release No. 648-01, "National Guard and Reserve Mobilized as of December 19, 2001" (Dec. 19, 2001).

2. Greene, "U.S. Activates Pueblo-Based Guard Unit," *The Denver Post* (Dec. 6, 2001) at A-19.

3. 38 U.S.C. §§ 4301 to 4333.

4. 38 U.S.C. § 4301.

5. 38 U.S.C. § 4311.

6. 38 U.S.C. §§ 4312 to 4318.

7. 38 U.S.C. § 4303(16). National Guard members perform both federal service (*e.g.*, during annual training; when activated into service by the President) and state service (*e.g.*, during some disasters). USERRA only applies to National Guard members when they are performing federal service. When performing state service, job protection for National Guard members is through state law. *See, e.g.*, CRS §§ 28-3-601, -609, and -610 (private employers are required to give employees up to fifteen days unpaid leave each year for duty and training, with job restoration at the end of the absence and protection of benefits during the leave).

8. 38 U.S.C. § 4303(13).

9. State employees in Colorado are eligible to receive up to fifteen days paid leave each year for National Guard service. CRS § 28-3-602. If the employee is an exempt employee under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, the FLSA requires the employer to pay the employee his or her salary when absence due to military service is less than the entire week. Typically, this will be the first and last weeks of an absence because of military service.

10. 38 U.S.C. § 4316(d).

11. *Graham v. McMillen Co.*, 925 F.Supp. 437 (N.D.Miss. 1996) (employer breached pred-

cessor statute to USERRA by requiring employee to use accrued vacation time for military leave).

12. 38 U.S.C. § 4317(a)(2).

13. P.L. 99-272. The full text of COBRA is located in IRC § 4980B and ERISA §§ 601 *et seq.* USERRA provides COBRA-like coverage continuation but is not intended to replace or amend COBRA's provisions. Instead, USERRA simply provides broader coverage than COBRA. Because USERRA does not amend or replace COBRA, the employer's COBRA responsibilities continue during the employee's military leave. Those responsibilities would include providing COBRA notices and elections to dependents in cases of death, divorce, or loss of a child's dependent status.

14. 38 U.S.C. § 4317(a)(1).

15. 38 U.S.C. § 4317(a)(2).

16. 38 U.S.C. § 4317(b)(1).

17. 38 U.S.C. § 4317(b)(2).

18. 38 U.S.C. § 4316(b)(1).

19. U.S. Dept. of Labor, Veterans Employment and Training Serv., *A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act* (Feb. 2001). Applying this interpretation of 38 U.S.C. § 4316(b) to the situation of health insurance, if the employer is obligated to continue health care coverage for twelve weeks under the Family and Medical Leave Act, 29 U.S.C. § 2614(c)(1), the employer is theoretically required under USERRA § 4316(b) to continue health coverage for twelve weeks to employees absent on military leave. Following this period, an employee may elect to continue coverage for up to eighteen months under USERRA's COBRA-like health continuation provision. 38 U.S.C. § 4317(a)(1).

20. 38 U.S.C. §§ 4304 and 4312(a). USERRA's reemployment rights apply only to non-career military service. Where an employee leaves his or her civilian job to make the military a career, the employee forsakes USERRA's reemployment rights. *Woodman v. Office of Management Personnel*, 258 F.3d 1372, 1377-78 (Fed. Cir. 2001).

21. 38 U.S.C. § 4312(a)(1).

22. 38 U.S.C. § 4312(b).

23. 38 U.S.C. § 4312(a)(2).

24. 38 U.S.C. § 4312(c)(1) through (4).

25. 38 U.S.C. § 4304.

26. *Id.*

27. 38 U.S.C. § 4312(e)(1).

28. 38 U.S.C. § 4312(e)(1)(A).

29. 38 U.S.C. § 4312(e)(1)(C).

30. 38 U.S.C. § 4312(e)(1)(D).

31. 38 U.S.C. § 4312(e)(2)(A).

32. 38 U.S.C. § 4312(e)(3).

33. USERRA allows an employer to require a returning employee to present documentation establishing that the employee has timely applied for reemployment, that he or she has not exceeded the five-year service limitation, and that the employee was not dishonorably discharged from military service. 38 U.S.C. § 4312(f). Delay or refusal to provide the requested documents does not permit the employer to deny reinstatement. However, if later documentation shows that the employee did not qualify for reinstatement, the employer may terminate the employee. 38 U.S.C. § 4312(f)(3)(A). Where the employee has been absent on military leave for more than ninety-one days, the employer also may delay retroactive pension contributions until the employee submits satisfactory documentation. 38 U.S.C. § 4312(f)(3)(B).

34. 38 U.S.C. § 4313(a)(1)(A) and (B).

35. 38 U.S.C. § 4313(a)(1)(C).

36. 38 U.S.C. § 4313(a)(2)(A).

37. *Id.*

38. 38 U.S.C. § 4313(a)(2)(B).

39. 38 U.S.C. § 4313(a)(3).

40. 38 U.S.C. § 4313(a)(3)(A).

41. 38 U.S.C. § 4313(a)(3)(B).

42. 38 U.S.C. § 4312(d)(1)(A).

43. 38 U.S.C. § 4312(d)(1)(B).

44. 38 U.S.C. § 4312(d)(1)(C).

45. 38 U.S.C. § 4316(a).

46. 38 U.S.C. § 4318(b)(1).

47. 38 U.S.C. § 4318(a)(2)(A) and (B).

48. *Id.*

49. 38 U.S.C. § 4318(b)(1).

50. 38 U.S.C. § 4318(b)(2).

51. *Id.*

52. 38 U.S.C. § 4318(b)(3)(A).

53. 38 U.S.C. § 4318(b)(3)(B).

54. 38 U.S.C. § 4316(c)(2)

55. 38 U.S.C. § 4316(c)(1).

56. An unanswered question under USERRA is whether an employer may terminate an employee during these protected periods as part of a reduction in force. Whether discharge pursuant to a reduction in force is a discharge "for cause" is uncertain. The Department of Labor

takes the position that where a layoff occurs after the employee returns from military leave, the "for cause" provision does not protect the returning worker. Roberts, "Before Workers Return from Military Leave, Attorneys Warn Employers to Review USERRA," *Daily Lab. Rep. (BNA)*, No. 224, at C-1 (Nov. 23, 2001).

57. 38 U.S.C. §§ 4321 and 4322. The Department of Labor estimates that it receives approximately 1,000 formal USERRA violation complaints a year. Roberts, *supra*, note 56.

58. 38 U.S.C. § 4323(a)(1).

59. 38 U.S.C. § 4323(a)(2).

60. 38 U.S.C. § 4323(d)(1)(B).

61. 38 U.S.C. § 4323(d)(1)(C).

62. 38 U.S.C. § 4323(h).

63. *See, e.g., Spratt v. Guardian Automotive Products, Inc.*, 997 F.Supp. 1138 (N.D. Ind. 1998).

64. *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).

65. 38 U.S.C. §§ 2021 to 2026.

66. 38 U.S.C. § 4311(c)(1).

67. *National Labor Relations Bd. v. Transportation Management Corp.*, 462 U.S. 393 (1994).

68. *Kelley v. Maine Eye Care Assocs., P.A.*, 37 F.Supp.2d 47, 54 (D. Maine 1999); *see also Robinson v. Morris-Moore Chevrolet Buick, Inc.*, 974 F.Supp. 571, 576 (E.D. Texas 1997) ("Military status is a motivating factor if the defendant relied on, took account, considered, or conditioned its decision on that consideration.").

69. *Sheehan v. Dept. of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

70. Courts have approved the burden-shifting paradigm used by the Supreme Court in *Transportation Management, supra*, note 67. *See Sheehan, supra*, note 69 at 1013; *Kelley, supra*, note 68 at 54.

71. *Gummo v. Village of Depew, N.Y.*, 75 F.3d 98, 106 (2d Cir. 1996), *cert. denied*, 517 U.S. 1190 (1996). *See also Robinson, supra*, note 68 at 576 ("[A]n employer cannot meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason.").

72. *Hill v. Michelin North America, Inc.*, 252 F.3d 307 (4th Cir. 2001).

73. "Employers Doing What They Can for Reservists," *Employment Alert (West)*, Vol. 18, No. 22, at 6 (Oct. 25, 2001). ■