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NewsFlash!

New March 10, 2005 Requirement – Employers Must Provide a Notice to Reservists of Rights under The Uniformed Services Employment and Reemployment Rights Act By: Ruth A. Binger

Effective March 10, 2005, employers must provide a notice of the rights, benefits and obligations of employees and employers under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) to members of the Reserve and National Guard who leave, voluntarily or involuntarily, their civilian jobs for military service (“Reservists”).

Text of the Notice

The Veterans Benefit Improvement Act of 2004 (VBIA) amended the USERRA to require the employers to provide the notice “to persons entitled to rights and benefits under USERRA.” The Department of Labor has issued an interim final rule containing the text of the notice and such text is found at <http://www.dol.gov/vets/programs/userra/poster.pdf>. Employers may meet this requirement by prominently displaying a poster with the notice where they customarily place notices for employees.

Over four hundred and sixty thousand members of the National Guard and Reserves have been mobilized since the President’s declaration of a national emergency following the attacks of September 11, 2001. As service members conclude their tour of duty and return to civilian employment, Congress has attempted to ensure that service members be fully informed of their USERRA rights, benefits and obligations. It is estimated that approximately eight million employers are affected.

Guaranteed Re-employment Rights

Under the USERRA, 38 U.S.C. Section 4301 et seq., Reservists receive the broadest and strongest of employment rights available under law: 1) for a five-year period, Reservists are legally guaranteed re-employment rights to the same job with the same status and salary; 2) employers are prohibited from discriminating against Reservists based on their military service; and 3) Reservists are also entitled to the same benefits of employment from their private employers as if they had not taken a break in military service. The USERRA is purposely set up to be Reservist-friendly, so beware. The burden of proof is placed upon the employer.

Under Section 4312, members of the armed forces are entitled to re-employment if they: 1) properly notify their employers of their need for a service-related absence; 2) take cumulative absence of no more than 5 years; and 3) properly reapply or report to work after their service ends. Any attempt to have an employee waive these rights is unenforceable. Courts have found that Section 4312 creates an unqualified right to re-employment to those who satisfy the service duration and notice requirements. *Jordan v. Air Products and Chemicals, Inc.*, 225 F.Supp.2d 1206 (Pen D.C. 2002).

Guaranteed Benefit Right

Once re-employed, the service person cannot be denied any benefit of employment. The term “benefit” is de-

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defined as “any advantage, profit, privilege, gain status, account or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance plans, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment”. Section 4303(2).

Examples of Denials of Benefits

Some examples of denials of benefits of employment would include the following: 1) transferring an employee to a job requiring him to work a less regular schedule with longer workdays; 2) denial of leave and “paper suspension” recorded in employee’s personnel file but never served, as the latter was disciplinary in nature and affected employee’s status or interest; 3) harassing an employee because of his military service; 4) denying an employee the opportunity to retain previous level of seniority or to advance employee to previous level he would have obtained; 5) treating employees on reserve duty differently than employees on other types of leave with regard to vacation leave; or 6) denying a Reservist a holiday because he did not work the day before or the day after the holiday. The Supreme Court in *Fishgod v. Sullivan Drydock Repair Corp.*, 328 U.S. 275 (1946) aptly described the standard as: “The Veteran does not step back on the seniority escalator at the time he stepped off. He steps back at the precise point had he kept his position.” When you are grappling with the benefits to which a service person is entitled, visualize

the employment escalator. Additionally, USERRA also requires that reasonable efforts (such as training) be made to enable returning service members to refresh or upgrade their skills to help them qualify for re-employment.

Terminated Only for “Cause”

After being re-employed, the service person is protected further under Section 4316. Section 4316(c) provides that a person who serves for over thirty days and is re-employed under the USERRA shall not be discharged from such employment “except for cause” for certain time periods. The decision to terminate cannot be motivated, even in part, by the employee’s membership, application, or participation in the armed forces. Section 4311(c)(1). Such military service is a “motivating factor” for termination if, at the time of termination the employer was asked what were its reasons, and if it gave a truthful response, one of those reasons would be the employee’s military position or related obligations. *Robinson v. Morris Moore Chevrolet Buick*, 974 F.Supp. 571 (E.D. Tex. 1997). In fact, immediate termination following re-employment can be a factor in inferring discrimination. *Lisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002).

Conclusion

The new posting requirement should help both employers and Reservists understand the nature and extent of the rights, obligations and benefits given to returning Reservists under USERRA.

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