

Employment Law Digest

An Update from Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C. Employment Law Department

Vol. VIII, No. 1
Spring 2005

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MILITARY LEAVE RIGHTS - HOW HAVE THEY CHANGED?

As the war in the Middle East continues to create a steady flow of American soldiers being activated and released from military duty, American employers must be aware of regulations that create special protections for service members regarding their civilian jobs, and often require the re-employment of these soldiers when they return home. The Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA) is the legislation responsible for the special employment rights of men and women in the armed forces. Although most employers have become aware of the re-employment requirements of the Act over the past decade, there are additional provisions, originating both from the original language of the Act and from additions, which could trip up the unwary employer.

Congress first addressed the problem of rampant unemployment among returning soldiers in 1940, with the Selective Training and Service Act. Since that time, numerous pieces of legislation have been aimed at helping service members transition back into civilian life after periods of military service. The USERRA was enacted in 1994 to clarify existing laws relating to the re-employment rights of service members, to improve enforcement mechanisms, and to provide assistance in processing employee claims. In general, the USERRA requires employers to grant leave to any employee who either voluntarily or involuntarily leaves his civilian employment to perform military service, and then later entitles that employee to be restored to his or her former job upon completion of military service.

Eligibility for Re-Employment

USERRA requires that service members meet five general criteria in order to be eligible for re-employment. First, the service member must have been absent from their civilian job due to service in the armed forces. Second, the service member must have given their civilian employer advance notice that they were going to be absent because of military service. This requirement may be waived; however, if giving notice would be impossible, unreasonable, or precluded by military necessity. Third, the service member must not have been absent from his or her civilian job for more than five years. This five years can be accumulated through either one long tour of service or multiple shorter tours. Fourth, the service member must return to work or apply for

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re-employment in a timely manner after their conclusion of service. This “timeliness” is determined based on how long the service member was absent from his or her civilian job. For specific timetables, please consult www.dol.gov/vets. Finally, to be eligible for re-employment after conclusion of military service, the service member must not have concluded such service through a disqualifying discharge or under other than honorable circumstances.

Re-Employment Position

The USERRA requires that returning service members be re-employed in the job that they would have attained by the time of their return from service, had they not been absent. This position must include the same seniority, status and pay which the service member would have attained during the time of their absence. The actual position that the returning service member should fill depends on their length of military service.

If the employee is engaged in military service for less than 91 days, then he must be placed in the position that he would have attained by the time of his return, had he remained continuously employed. If the employee is engaged in military service for 91 days or more, then that returning service member may be placed either in the position he would have attained but for his absence, or in a different position that is of like seniority, status and pay.

Additional Rights Granted to Service Members

In addition to the re-employment protection granted by USERRA, a re-employed service member is also protected against being discharged without cause for a specified amount of time after being re-employed. If a service member is re-employed after military service lasting more than 180 days, the service member cannot be discharged from the civilian job without cause for at least one year after being re-employed. If a service member is re-employed after military service lasting between 31 and 180 days, the service member cannot be

discharged without cause for at least six months after being re-employed. Those service members who are re-employed after military service lasting only 30 days or less are not granted any such protection against discharge.

USERRA also allows service members to use their accrued vacation, annual or similar type of leave from their civilian job to cover any part of the period they are absent due to military service. This allows the service member to collect pay for their civilian job even while absent in military service. Employees may not; however, use their sick leave to cover their absence, nor may employers require the service member to use any type of accrued leave to cover their absence.

Situations in Which Re-Employment is Not Required

There are three circumstances under which an employer is not required to re-employ a returning service member. First, re-employment is not required if the employer’s circumstances have so changed as to make re-employment impossible or unreasonable. However, the employer having simply already hired another person to fill the service member’s vacated position is not enough to allow the employer to assert this defense. This would require something more along the lines of a reduction in work force that would have included the service member.

Re-employment would also not be required if it would impose an undue hardship on the employer. This would be the situation if the returning service member is not qualified for a position with the employer due to a disability. However, the employer could only claim this defense to re-employment after making reasonable efforts to help the service member become qualified.

Finally, an employer does not have to re-employ a returning service member if the position from which he or she left was a temporary one, for which



there was no reasonable expectation of continued employment.

Recent Additions to USERRA

The Veterans Benefits Improvement Act, which was enacted by Congress in December of 2004, requires all employers to provide notice of the requirements of USERRA to all persons entitled to rights and benefits under the Act. On March 10, 2005, the Department of Labor released a poster format of the required notice, which can be found at www.dol.gov/vets/programs/userra/poster.htm. Employers can meet their obligation of giving notice by posting this in a prominent place where employees customarily check for such information. Employers are permitted to provide the required notice in other ways that would minimize costs while ensuring that the full text of the notice is provided - such as handing out, mailing out, or e-mailing copies of the notice to employees.

The required notice under the Veterans Benefits Improvement Act is simply the latest in a series of compliance aimed efforts by the Department of Labor to increase employer and employee awareness of USERRA rights and obligations.


Conclusion

With so many Americans engaging in military service, whether through active duty or the reserves, few civilian employers are able to avoid addressing the obligations of USERRA. Civilian employers must grant leave to workers to serve in the armed forces. Upon completion of the military service, employees are also entitled to be restored to their former jobs with full seniority, or to a position with like seniority status and pay as if they had never left. In addition to guarantying re-employment, USERRA mandates that returning service members receive any general increases, length of service or cost of living pay hikes which they would have received if they had not gone on military leave. Finally, USERRA prohibits employers from discharging or discriminating in

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any term or condition of employment against any employee because of military service.

Employers who fail to comply with USERRA may find themselves liable for attorney's fees and other litigation expenses of a complaining employee. Additionally, if a court finds that the violation of the USERRA provisions were willful, an employer may be forced to pay double the amount of back pay and lost benefits owed to the employee.

This summarizes most of the basic principles of USERRA. There are other points of the law which are beyond the scope of this newsletter, and for more information please refer to the Department of Labor's web site at www.dol.gov/vets/ or contact Mike Holland at 210-342-5555. 

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Trends In the Law

Age Discrimination in Employment Act (ADEA) authorizes disparate-impact claims

A discrimination claim based on disparate treatment is one in which an individual is deliberately discriminated against. This would occur where members of one group are treated differently than members of another. A claim based on disparate impact alleges that an individual; although not necessarily deliberately discriminated against, was nonetheless adversely affected by a certain practice. A disparate impact claim involves practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another.

On March 30, 2005, the United States Supreme Court ruled that the Age Discrimination in Employment Act of 1967 (ADEA) permits recovery in disparate




impact cases, as well as those alleging disparate treatment. In *Smith v. City of Jackson*, police and public safety officers in Jackson, Mississippi, sued the City under the ADEA, claiming that the City's pay increase plan for all city employees discriminated against police officers over the age of 40. The plan granted proportionally higher raises to those police officers and police dispatchers with less than five years of tenure than it did to those with more seniority. Thus, although age was not a factor in determining the percentage pay raise each officer was to receive, the fact that most older officers had more seniority meant that they also received proportionally smaller raises.

The language in the ADEA is very similar to that found in the Civil Rights Act of 1964, except for the substitution in the ADEA of the term "age," where the Civil Rights Act says, "race, color, religion, sex, or national origin." In a 1971 case, the United States Supreme Court said that the Civil Rights Act prohibited employers from discriminating through disparate impact, as well as disparate treatment, because the language of the Act focuses on the effects of an employer's actions upon employees, rather than on the motivation for the employer's action. For more than twenty years after this case, courts allowed recovery under both the Civil Rights Act and the ADEA on disparate impact theories, until a 1993 Supreme Court case was misinterpreted as banning such recovery. Therefore, for the past twenty years, courts have not allowed claims to be brought under the ADEA when there is only disparate impact, without disparate treatment.

Although the Supreme Court explains and clarifies in *Smith v. City of Jackson*, that employees can recover under the ADEA based on disparate impact, it is not as simple as saying, "I'm over 40, and your particular practice hurts me." The ADEA is narrower and harder to bring a claim under than the Civil Rights Act because the ADEA permits employers to take actions that differentiate between employees, so long as the distinction is based on a "reasonable factor other than age." This means

that it is not an ADEA violation for an employer to engage in a practice that has a disparate impact on employees over the age of 40, so long the adverse impact is based on some reasonable factor other than age.

In fact, the Supreme Court actually held in the Jackson case that although ADEA claims can be brought on the basis of disparate impact, this particular claim by Jackson police officers must fail because the City's decision as to different pay raises was based on seniority and rank, factors that were reasonable under the circumstances and aimed at achieving the City's goal of retaining officers.

The lesson to be learned from this case is that while employers do need to be aware of the possibility of age discrimination claims based on disparate impact, this type of claim can be avoided so long as the employer has a legitimate goal and selects a reasonable way of achieving it, which is not based on age. The employer will not be liable under the ADEA simply because there may have been other reasonable ways of achieving their goal, even when the other method might have had a lesser impact on employees over 40. 

New Provision of the FACTA to take effect

As of June 1, anyone who obtains information on another through a credit report must comply with a new provision of the Fair and Accurate Credit Transactions Act of 2003 (FACTA). This applies whether the person obtaining the credit report is a business or an individual. The new "disposal provision" of the Act says that if you employ even one person - a nanny, a gardener, a housekeeper - and you get information on them either directly or indirectly through a credit check, you must destroy that information before you throw it away.

The Fair and Accurate Credit Transactions Act was originally signed into law by President Bush in December of 2003, to permanently re-authorize




many provisions originally found in the Fair Credit Reporting Act of 1996 (FCRA). If not for the passage of the 2003 Act, the national consumer protection standards established by the FCRA would have expired on January 1, 2004. The FACTA was passed to ensure that all citizens be treated fairly when applying for a mortgage or other form of credit by allowing Americans to build good credit and combat the growing problem of identity theft.

Although the FCRA of 1996 encouraged Americans to monitor their own credit by allowing individuals to obtain a copy of their own credit report within 30 days of their being denied credit, the FACTA added many new provisions aimed at combating identity theft. The need for such protections was made blatantly obvious to the legislature through a Gartner Research and Harris Interactive study, which reported that over 7 million people had their identity stolen in the year ending in July 2003. With the passage of the FACTA, credit reports were made even more readily available by providing every consumer the right to receive their credit report from each of the big three credit bureaus, free of charge, once every year. The Act also helps to lessen the consequences upon individuals who find themselves victims of identity theft by creating a nationwide system where victims only have to make one phone call to receive advice, set off a nationwide fraud alert, and protect their credit standing. Additionally, mortgage lenders must provide the credit score they use to determine a loan's rate, whenever a loan is granted or denied. Finally, the FACTA places requirements upon financial institutions, lenders, and credit agencies to aid in early detection of identity theft, and to stop the theft before it causes major damage.

The above provisions of the FACTA all took effect upon, or shortly after the passage of the Act in 2003. In December of 2006, the Act will take an additional step against identify theft by requiring merchants to leave all but the last five digits of a credit card number off of store receipts. Although all of these provisions of the FACTA are important for consumer protection,

employers need to be most immediately concerned about the "disposal provision," which went into effect on the first of June.

This disposal provision requires every person or organization who possesses consumer information from a credit report for any reason, to implement reasonable procedures to protect against unauthorized access to this information. So, if you employ even one person on whom you obtained credit information, you must destroy such information either by shredding or burning paper documents or smashing or wiping any computer disk before throwing it away. Because identity theft imposes such a high price on its victims - an average of \$1,495 and 600 hours spent straightening out their finances - similarly high penalties are imposed on those who fail to comply with the disposal provision. If one of your employees becomes the victim of identity theft do to your failure to destroy their credit information before disposing of it, you, as an employer, may be liable for that employees actual damages or for statutory damages of up to \$1,000 per employee. You may also be subject to a Federal fine of up to \$2,500 per victim you are responsible for, or a state fine of up to \$1,000 for each victim. If a large number of your employees are victimized due to your non-compliance with the Act, those employees may be able to bring a class action lawsuit and collect not only actual damages from you, but punitive damages as well.

To assure your compliance with the newest provisions of the FACTA, and to avoid any potential liability for identity theft of your employees, relatively inexpensive shredders are available for individuals and small businesses; and for larger businesses, there are over 2,000 companies in North America alone who specialize in records destruction. 

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Updates on the Fair Labor and Standards Act


Effective August 23, 2004, new rules set out by the Department of Labor strengthened overtime protection for workers. The new rules clarify and update ambiguous and confusing overtime regulations first created by the Fair Labor Standards Act in 1939 (FLSA), and which have not been substantially updated since 1949.

The new rules increase the number of workers who are eligible for overtime pay rates. Although the original passage of the FLSA in 1939, established minimum wages and overtime pay of 1 and ½ times a worker's regular rate, the new rules change and explain exactly which workers are eligible for overtime. Hourly workers were already guaranteed overtime pay for all hours over 40 worked in a single week, and this portion of the rule was not affected by the 2004 amendment. The focus of the recent change is on salaried workers. Under the old rule, only salaried workers earning less than \$8,060 annually or less than \$155 per week were guaranteed overtime pay. The 2004 amendment increased the number of salaried workers who are guaranteed overtime pay. Now, salaried workers earning less than \$23,660 per year or \$455 per week must be paid at overtime rates when they work over 40 hours in a week.

There are, however, certain types of salaried workers who are exempt from this rule and who are thus not guaranteed overtime pay. If a worker is paid a salary of at least \$455 per week, and is employed as executive, administrative, professional, or outside sales employees, or as a certain type of computer employee, the worker is not covered by the guaranty of overtime pay. Exemptions; however, are not determined based on an employee's job title. Instead, the exemption turns on the actual duties that the employee performs.

The exemptions from guaranteed overtime pay only apply to "white collar" workers who meet the above requirements. "Blue collar" workers and other

manual laborers are guaranteed overtime pay no matter how high a salary they may otherwise receive. In fact, this recent change in the FLSA marks the first time that the Act has specifically stated that "blue collar" workers cannot be denied overtime pay under one of the exemptions.

It is important that all employers review the overtime status of their employees to determine whether they fall within the exempt or nonexempt categories of the new FLSA regulations, and therefore, whether or not they are guaranteed overtime pay rates. If you have any questions about how these new rules might affect your business, please do not hesitate to call. 

- Joanna Ballard

UPCOMING SEMINARS

6-16-05 Lorman Education Services
Human Resource Audits

NEW DOMAIN NAME

Please note that the firm's internet URL address and our email domain name have changed:

Old URL www.thorntonsummers.com
New URL www.thorntonfirm.com

All email addresses have been changed:

Example:

Old: mholland@thorntonsummers.com
New: mholland@thorntonfirm.com



Be sure to check
our website at:

www.thorntonfirm.com

for the most recent
significant changes
in the law
that affect you.

The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.

The employment law section of the Thornton law firm represents management in a wide variety of employment law matters. Because we have offices located in Austin, Corpus Christi and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission, Texas Commission on Human Rights and Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.

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*If you, or anyone in your office, would like a copy
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