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What's Inside

What's Online

Employee Handbook
Employers' top 10 employee handbook mistakes
http://bit.ly/2JyZQjk

Termination Tips
How to (honestly) break up with your employees
http://bit.ly/2VkgVyY

Employee Privacy
Get ready for spike in biometric privacy suits
http://bit.ly/31YanJJ

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FAMILY AND MEDICAL LEAVE

Recent case shows why your FMLA policies and training are so crucial

by Gregg Gerlach
Gerlach Employment Law, P.L.

How about a high five for those of us who preach the importance of implementing a good family and medical leave program that protects both employers and employees? A recent case involving Burger King underscores the point, proving that even big, sophisticated companies don't always get to have it their way when it comes to the Family and Medical Leave Act (FMLA).

Have it your way—unless court says you can't

LaShondra Moore, a shift manager who had worked at Burger King Store #3818 in Mobile, Alabama, for five years, learned on Friday, February 3, that her mother had a "life-or-death" infection requiring hospitalization and surgery. That same day, she informed her immediate supervisor, restaurant manager Chanavia Owes, that she needed a week off to care for her mother. Owes' initial response was "Take all the time you need."

There was nobody to cover Moore's Saturday shift, so she worked it herself. When Owes and the district manager, Sheila Morrissette, couldn't find anyone to cover her Sunday shift, Moore had to find her own cover. Then, about 7:00 p.m. on Sunday night, Owes informed Moore that she would have to work on Monday because Owes had pink eye. Moore texted Morrissette to ask her to find someone to cover Owes' Monday shift, but Morrissette responded, "Let [Owes] know. I have no one," and she wouldn't answer Owes' subsequent calls and texts. Somehow, Moore didn't end up working the Monday shift.

Moore was originally scheduled to work from 4:30 a.m. to 2:00 p.m. on Tuesday, February 7. Despite her circumstances, Owes texted her on Monday night, "Are you going to be able to open in the morning?" When she replied that she couldn't open Tuesday morning, Owes changed her query to a command and demanded that she open the store.

What the manager obviously didn't fathom was that Moore had helped her mother get admitted to the hospital (where she stayed for several weeks); cared for her daily; helped her eat and take medication; brought her food, clothing, toiletries, and hygiene products; helped her use the restroom; washed her clothes; kept her company; and provided psychological and emotional support. At night, she made sure her mother had everything she needed before going to bed. She also managed her mother's household needs and paid the bills.

On Tuesday, Moore overslept because she was exhausted from caring for her mother. Owes wrote her up for tardiness. Although she was originally scheduled to work Wednesday, Moore believed that her numerous requests for

AGENCY ACTION

DOL takes more steps to advance apprenticeships. The U.S. Department of Labor (DOL) has announced a Notice of Proposed Rulemaking (NPRM) along with monetary awards in its continuing effort to expand apprenticeships. In the announcement, the DOL said the NPRM would establish a process for the agency to advance the development of high-quality, industry-recognized apprenticeship programs (IRAPs). A 2017 Executive Order created the Task Force on Apprenticeship Expansion, which developed recommendations on how to best expand the apprenticeship model. The new NPRM reflects key recommendations from the task force. The DOL also announced awards totaling $183.8 million to support the development and expansion of apprenticeships for educational institutions partnering with companies that provide a funding match component. The agency also will make available an additional $100 million for efforts to expand apprenticeships and close the skills gap.

Changes made to NLRA rights poster. The DOL has announced technical changes to the National Labor Relations Act (NLRA) rights poster that federal contractors and subcontractors are required to display under Executive Order 13496, "Notification of Employee Rights Under Federal Labor Law." The update reflects a new telephone number for the National Labor Relations Board (NLRB), the agency responsible for enforcing the NLRA, as well as contact information for individuals who are deaf or hard of hearing. No other changes or updates have been made. Federal contractors and subcontractors can download the updated poster at no cost from the DOL's Office of Labor-Management Standards (OLMS) website at www.dol.gov/olms/regs/compliance/EO13496.htm.

DOL increases compliance program with unions. The OLMS has announced it will continue to invest in its Voluntary Compliance Partnership (VCP) program with 43 international and national labor unions throughout the country. The goal is to strengthen the compliance performance of approximately 16,000 intermediate and local labor union affiliates. OLMS VCP staff will meet with union staff to exchange information and strategize on how to best help affiliated local unions achieve compliance with the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The VCP program focuses on mutually beneficial objectives to drive innovation, specifically increasing timely reporting, using the OLMS Electronic Forms System, ensuring protection of members' dues, and promoting best practices under the LMRDA. The LMRDA promotes financial integrity in private-sector unions through standards for union assets. ✤

time off relieved her from having to work that day. That was until midday, when Morrissette texted her, "No call no show this morning? No phone call. One more will lead to termination." Owes then piled on by giving her a final written warning.

On Wednesday night, Moore's aunt told her about something called the FMLA. Moore then asked Owes and Morrissette what she needed to do to get FMLA leave. She also provided a doctor's note detailing her mother's condition and stating that she needed time off work to tend to her mother. She had to ask her managers about the FMLA repeatedly.

Eventually, Morrissette sent Moore a text containing the e-mail address "April.thomas@gpshospitality.com." April Thomas is the company's FMLA administrator, but Moore didn't know that, and Morrissette didn't explain. Moore called Morrissette for an explanation, to which the district manager responded, "I sent you what you needed, figure it out on your own." Moore then clicked the link, but it brought up a whole lot of confusing information.

Don't expect employees to figure out FMLA on their own

On Monday, February 13, Moore was terminated without explanation. So how did Burger King defend the inevitable FMLA lawsuit? It blamed everything on Moore because she didn't contact HR. And how was she supposed to know she needed to communicate with HR about the FMLA?

When parent company GPS Hospitality Partners acquired 190 Burger King stores, including #3818, each employee was required to complete and sign a number of online documents, including a job application, a W-4, an I-9, payroll paperwork, and the 31-page employee handbook, while they were under the pressure of working a shift. On average, employees at Store #3818 took 10 minutes to complete all of those documents.

Additionally, Moore was never trained on the company's FMLA policy, nor was she ever given a hard copy of the handbook to read. As it turned out, neither Owes nor Morrissette was familiar with the FMLA policy, which is why neither of them told Moore to contact HR. As the court concluded, "[Moore] followed the notice requirement by giving notice to Owes and Morrissette; at that point, the burden shifted to Owes and Morrissette to direct [Moore] to [HR], a burden they failed to satisfy."

Moore and Burger King filed cross-motions for summary judgment, asking the court to rule in their favor without a trial. The company's request was denied. Moore's motion was granted with regard to her FMLA interference claim, but denied on her retaliation claim. As a result, her retaliation claim will move forward to trial or mediation. *LaShondra Moore v. GPS Hospitality Partners IV, LLC d/b/a Burger King.*

HR takeaways

Here's what we can learn from this case:

- Once management at any level learns an employee needs time off work because she or a family member has a

continued on page 4

ANDY'S IN-BOX

An HR takeaway from USWNT's latest World Cup victory

by Andy Rodman and Thomas Raine, Law Clerk
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

They did it again! The U.S. Women's National Team (USWNT) lived up to everyone's daunting expectations and earned a record fourth World Cup, winning all seven of their games on the field and making headlines off the field.

One of the most publicized stories surrounding the team during its World Cup run involves the players' legal battle to be paid as much as their counterparts on the U.S. Men's National Team. With the relief and elation of the final whistle at Stade de Lyon in France, it came as no surprise when the traveling American fans immediately started chanting, "Equal pay! Equal pay!" in support of this transcendent team.

In March of this year, all 28 USWNT players filed a federal lawsuit against the U.S. Soccer Federation (USSF) alleging "institutionalized gender discrimination" under the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964. The players argue in their lawsuit that discrimination permeates their pay, training, medical care, and travel accommodations compared to the men's team.

The players and the USSF will soon mediate the dispute, but the tidal wave of public support for the women has led to political support with the recent introduction of the Give Our Athletes Level Salaries (GOALS) Act in Congress. The GOALS Act would block federal funding for the men's 2026 World Cup, which will be hosted by the United States, Canada, and Mexico, until the USSF pays the USWNT players "fair and equitable wages."

Lessons for Florida employers

The momentum of the USWNT's struggle for equal pay should be a reminder to audit your own pay practices to ensure they comply with the EPA and Title VII. The EPA essentially requires that men and women receive equal pay for equal work. "Equal work" refers to jobs that are performed under similar working conditions and require substantially equal skill, effort, and responsibility.

When you're auditing your compensation practices, you should review each factor to ensure compliance. The skill required for the job is generally measured by experience, ability, education, and training. Effort is usually judged by the amount of physical or mental exertion needed to perform the job. Responsibility is the degree of accountability employees have when performing their daily tasks. If you find, after reviewing those factors, that a given job performed at the same establishment is substantially equal work, then discrepancies in pay along gender lines may conflict with EPA or Title VII mandates.

Of course, the EPA provides employers certain defenses, generally allowing pay disparities tied to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex. But one common issue to be aware of is overreliance on compensation history. If, for example, a female candidate was underpaid at a previous job, then using her past compensation as a guideline to set her new salary with your company may result in the perpetuation of historical gender bias. Whether reliance on past compensation is a "factor other than sex" (and therefore a valid defense to an EPA claim) has been a hotly litigated issue over the last few years.

It's time for a checkup! Think about auditing your payroll practices to ensure that your employees receive equal pay for equal work. But don't do it alone. Reach out to your employment counsel for guidance.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue you would like Andy to address, e-mail arodman@stearnsweaver.com or call him at 305-789-3255. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

WORKPLACE TRENDS

Tight labor market tops HR concerns, survey says. Attracting talent has surpassed regulatory compliance as the top HR concern, according to the 2019 Paychex Pulse of HR Survey, released on June 24. More than two-thirds of HR leaders reported difficulty finding and hiring quality candidates, up from 59% last year. When asked specifically about challenges related to hiring, HR professionals most often cited finding qualified candidates (49%), retaining their best employees (49%), and finding candidates who fit their company culture (42%). The survey reported that as a result of those challenges, HR teams are increasingly willing to train job candidates who may not check all the boxes for required skills. The survey showed 85% of HR leaders would be willing to train and upskill an underqualified candidate, and 78% said their organizations have already benefited from upskilling underqualified workers.

Offering choice of health benefits an employer priority. Providing or expanding benefit choices is the single highest employer priority over the next three years, says the 2019 Emerging Trends in Health Care Survey by Willis Towers Watson. To select the best benefit choices and tools to help employees navigate options, employers need to understand their workforce, but 54% of most employers participating in the survey say they don't have an effective listening strategy to understand employees' needs. Most employers (74%) reported they are confident they haven't overwhelmed employees and are offering the right number of benefit choices. But employers are less confident they are giving employees the tools they need to sort through benefit offerings. That's why over the next three years, 75% of employers plan to prioritize efforts to provide employees with tools to make smart benefit choices and personalize a benefit package.

#MeToo pushing companies to continue reviewing harassment policies. Fifty-one percent of companies reported reviewing their sexual harassment policies after #MeToo, down slightly from the 52% who reported that last June, finds a survey from outplacement and coaching firm Challenger, Gray & Christmas, Inc. Nearly 9% of companies, however, reported they are working on a sexual harassment policy, up from zero a year ago. The survey of 150 HR executives conducted at companies of various sizes and industries nationwide also reported fewer companies are comfortable with their current policies. Last year, 42% stated they were happy with their current policies. This year, 37% reported the same. Despite the impact of #MeToo on policy creation, the survey found it hasn't resulted in more women being represented in leadership positions. ✤

continued from page 2

potentially serious health condition, your organization is on notice of her need for FMLA leave.

- Onboarding is serious stuff. Ensuring that your employees receive copies of your handbooks and policies and have time to read and ask questions about them isn't supposed to take less time than ordering a Whopper. Allow employees quality time to complete their new-hire paperwork, and provide assistance when necessary.
- Ensure line managers are trained on your FMLA policy and know when HR needs to get involved. What's your benchmark for training? Do you provide it annually, biannually, when 25 percent of your management team turns over? Calendar it!
- Beware the seductive convenience of the computerization of HR. Hand out hard copies of your handbooks, and let employees hold onto them for future reference. Not all employees work at desks with computers.
- Obtain employees' handwritten signatures on acknowledgment forms. Problems due to technological mishaps (e.g., the signature's missing!) or poor memories often arise when an employer tries to introduce electronically signed acknowledgments into evidence at trial.

Contact Gregg Gerlach at 2g@gerlachemploymentlaw.com. ✤

BUSINESS CLOSINGS

Former Tampa LSI employees granted class certification in lawsuit over layoffs

by Tom Harper
The Law and Mediation Offices of G. Thomas Harper, LLC

A federal judge in Tampa has granted class certification to a group of former employees who sued Laser Spine Institute (LSI) over the sudden closing of a Tampa medical facility in March. Let's take a closer look at the case.

Perfect storm leads to layoffs

LSI, which specialized in minimally invasive spinal procedures, operated a seven-story medical facility in Tampa's Avion Park at which it employed hundreds of people. According to newspaper reports, a perfect storm of lawsuits and lack of cash flow caused banks to withhold financing, which forced LSI to close its facilities in Arizona, Florida, Missouri, and Ohio. Media sources quoted the company's CEO as explaining that several banks that had supported the franchise-type medical centers suddenly "froze" LSI's accounts and stripped it of operating cash. When the company was unable to obtain other financing, it was forced out of business.

On March 1, 2019, LSI laid off hundreds of employees in Tampa. Three days after the layoffs, several employees hired attorneys and filed three separate class action lawsuits. Each lawsuit alleges the closings and layoffs violated the federal Worker

Adjustment and Retraining Notification Act (WARN Act). The employees who filed suit want to represent 1,000 former LSI employees in a number of states who were laid off in violation of the WARN Act.

WARN Act requirements

The WARN Act requires employers with 100 or more employees (not counting part-time employees who work fewer than 20 hours a week or new employees who have worked fewer than six months in the last 12 months) to provide at least 60 calendar days' advance written notice of a plant closing or mass layoff. A "plant closing" occurs when one or more facilities or operating units at an employment site will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period. A "mass layoff" occurs when a workforce reduction results in a loss of employment during any 30-day period for 500 or more employees or for 50 to 499 employees if they account for at least 33 percent of the employer's active workforce.

The WARN Act also applies when the number of employment losses for two or more groups of workers, each of which is smaller than the minimum needed to trigger notice, reaches the threshold level for either a plant closing or a mass layoff during any 90-day period. Thus, job losses over any 90-day period will count toward WARN Act levels unless the employer can show the employment losses are the result of separate and distinct actions and causes during that period.

The WARN Act covers private-sector for-profit and nonprofit employers as well as some public-sector and quasi-public entities that operate in a commercial context and are separately organized from the regular government. Regular federal, state, and local government entities that provide public services are not covered by the law.

The WARN Act is unique in that hourly and salaried employees as well as managerial and supervisory employees are entitled to notice of a closing or mass layoff. Owners and business partners are not entitled to notice. Employees must receive 60 days' notice of any layoffs and closings that meet the conditions set out in the law. The former employees claimed LSI didn't provide advance notice of the Tampa closing and they are therefore entitled to 60 days' pay and benefits as compensation under the WARN Act.

Storm isn't over yet

In June, the employees filed joint motions for class certification in which they asked the court to combine their lawsuits into one class action. In the motion, the employees' lawyers told the court that they represented 61 former LSI employees. After hearing arguments, U.S. District Judge William Jung granted class certification to the employees. That doesn't mean the employees have won, but the case now has class action status, meaning many former employees will likely be included in the lawsuit.

According to Judge Jung's order, the class of employees will include "all Laser Spine Institute employees throughout the United States who were not given a minimum of 60 days' written notice of termination and whose employment was terminated on or about March 1, 2019, as a result of a 'mass layoff' or 'plant closing as defined by the [WARN Act], excluding the directors and officers of Laser Spine Institute." Earlier this month, the employees filed the proposed notice that, with the court's approval, will be sent to all persons identified as part of the class. *Deanna Ali v. Laser Spine Institute, LLC, et al.*, Case No.8:19-cv-00535-T-23JSS (M.D. Fla., July 8, 2019).

Takeaway

Today's economy is strong, and large layoffs and closings are thankfully rare. But the WARN Act also applies when businesses, facilities, and plants are bought and sold, and the new owner makes changes over 30 or 90 days that trigger the law's notice requirements. Both the buyer and the seller may become embroiled in WARN Act litigation. If you're planning to close, purchase, or sell a business or lay off a large number of employees, it's a good idea to consult with an attorney about your WARN Act obligations to ensure you comply with the detailed requirements of this complicated law.

Contact Tom Harper at tom@employmentlawflorida.com. ✤

IMMIGRATION

'No-match' letters light up employers

by Richard Lehr
Lehr Middlebrooks Vreeland & Thompson, P.C.

After a seven-year hiatus, the Social Security Administration (SSA) has resumed sending "no-match" letters (or correction notices) to employers when at least one employee's name and Social Security number combination, as submitted on Form W-2c, didn't match the agency's records. The purpose is to let you know corrections are required before the SSA can post an employee's earnings to the correct record.

Don't ignore SSA's letter

After receiving a no-match letter, you have 60 days to submit a correction. Don't ignore it. Instead, you should follow through to determine whether the discrepancy is caused by an employee's unreported name change, inaccurate records, or an error in your organization's record-keeping system. In a departure from previous practice, the new version requires you to register with the SSA's Business Services Online (BSO) database to learn which specific employees are the subject of the no-match letter.

If you determine the information you initially submitted to the SSA was correct, you should notify the employee about the no-match letter and advise her in writing to contact the agency to correct and/or update the records. You should provide the employee with sufficient time to reach out to the agency and resolve the discrepancy. If there was no recordkeeping error and the employee can't resolve the discrepancy within a reasonable time and/or provide independent verification of employment eligibility, you should terminate her.

Don't respond to a no-match letter by immediately terminating the employee. Rather, you should review your records to see if a mistake was made (do so immediately). If no mistake was made, then review the issue with the employee, and provide him with a reasonable time (up to 60 days from receipt of the no-match letter) to contact the SSA and resolve the difference. We've found that when employees' Social Security "no match" cannot be resolved, they often quit rather than following through with notification to the SSA or the employer.

Expect ICE to get involved

An employer's failure to address a no-match letter or follow up with an employee about the discrepancy can result in a determination that the company constructively knew it employed unauthorized workers. U.S. Immigration and Customs Enforcement (ICE) will specifically request any no-match letters and information about how you addressed them as part of a Form I-9 audit. Therefore, you should maintain documentation of each step taken to address the discrepancies. ✤

MILITARY SERVICE

Marching orders: employers' obligations to citizen soldiers

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects military servicemembers and veterans from employment discrimination based on their service and protects their civilian jobs and related benefits upon their return from uniformed service. The concept of protecting servicemembers from being disadvantaged in their civilian careers because of their military service sounds straightforward. However, like many legal requirements, USERRA's application is often fact-intensive, with nuances that can trip up employers that don't have experience with the law. This article focuses on your obligations to "citizen soldiers" already in your workforce.

USERRA in general

USERRA applies to members of the armed forces, military reserves, National Guard, and commissioned corps of the Public Health Service as well as any other category of servicemembers designated by the president in times of war or national emergency. Service activities covered by USERRA include voluntary or involuntary service for active duty, active and inactive duty for training, National Guard duty under federal law, and a period of time to undergo examination to determine fitness to perform such duties. Covered service also includes a period of time to perform certain funeral honors duties and service as an intermittent disaster response appointee upon activation of the National Disaster Medical System.

Generally, currently employed military personnel are entitled to USERRA reemployment rights if they (1) hold (or, in some instances, have applied for) a civilian job, (2) have given written or verbal notice to their civilian employer before leaving the job for military training or service (unless notice is precluded by military necessity), (3) have not exceeded the five-year cumulative limit on periods of service, (4) are released from service under honorable conditions, and (5) report back to their civilian job in a timely manner or submit a timely application for reemployment. Each of those elements requires further explanation.

Which employers are covered?

USERRA applies to federal, state, and local government employers, private-sector employers, and even foreign companies operating in the United States and its territories, regardless of the number of employees they have. Likewise, USERRA applies to U.S. employers operating overseas.

Under USERRA, an entity doesn't have to actually employ an individual to be deemed his "employer" if it denied him employment on the basis of his military affiliation or obligations. If an employer makes an offer of employment but subsequently withdraws the offer because the potential employee is called to fulfill a military obligation, it will be deemed his employer under USERRA.

Although true independent contractors are not entitled to USERRA's protection, employers should be aware of the dangers of improperly characterizing an individual as an independent contractor to avoid compliance with USERRA. While that issue is outside the scope of this article, misclassification of employees can lead to a host of issues well beyond any USERRA obligations you may have. Likewise, USERRA exceptions for temporary or short-term employees will likely be narrowly construed.

What kind of notice or documentation is required?

An individual who is called to perform military service (or an official representative of the uniformed service) must give the employer advance written or verbal notice of her service obligation. The notice requirement

applies to all types of training or service. Notice isn't required if it's precluded by military necessity or if giving it is otherwise impossible or unreasonable.

USERRA doesn't specify how much advance notice is required, but the U.S. Department of Defense advises National Guard and reserve members to provide their employers as much advance notice as they can. Note that notice to, not permission from, the employer is required. You cannot refuse to allow an employee to leave for military service.

After a period of military service longer than 30 days, a returning employee must provide her employer, upon request, documentation reflecting the length and character of her service and the timeliness of her application for reemployment. However, the servicemember's reemployment may not be delayed if the requested documentation doesn't exist or isn't readily available. The secretary of labor has generally determined that proof of eligibility for reemployment can be reflected in discharge papers, leave and earnings statements, school completion certificates, endorsed orders, or letters from a proper military authority.

USERRA doesn't address documentation requests or requirements for periods of military service shorter than 31 days. An employer may contact the employee's military command with questions about a specific period of service.

An employee leaving for military service doesn't have to decide or inform his employer at the time he leaves whether he will seek reemployment when he's released from service. Upon discharge from military service, the employee can decide whether to return to his preservice employer. However, he must do so within USERRA's time frames for submitting a reemployment application or returning to work.

How is the five-year cumulative period of service calculated?

Although the five-year cumulative total sounds simple, not all military service counts. USERRA generally provides reinstatement protection for "a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which [the] person seeks reemployment, does not exceed five years." However, USERRA contains a number of exceptions for military service not included in the five-year cumulative total, such as the employee's inability to obtain a discharge during that time through no fault of his own or when service exceeds five years during a war or national emergency declared by the president or Congress.

A number of the exceptions are technical, and the orders underlying the military call-up may have to be examined to determine whether the service counts toward the five-year cumulative limit. Employers should be aware that the five-year total applies to total time spent in service, not the time the employee is absent from work. Moreover, a new five-year cumulative limit commences for each new employer.

Traditional military reserve training and duty periods, such as "drill weekends" and annual training, don't count toward the five-year limit. Servicemembers can use their accrued vacation or annual leave while they're performing military duty, but they aren't required to use personal leave time.

What if a citizen soldier is released from service dishonorably?

Employees who perform military service are not protected by USERRA if they are separated from service with a dishonorable or bad conduct discharge or a discharge under "other than honorable" conditions as specified by the military branch at issue. Also, some dismissals of commissioned officers and certain instances in which servicemembers have been absent without authorization aren't covered.

What are the applicable deadlines when military duty ends?

The deadlines for reemployment requests depend on how much time is spent performing military duty. For service periods shorter than 31 days, the employee must return at the beginning of the next regularly scheduled work period on the first full day after her release from service, taking into account safe travel home plus an eight-hour rest period. For service periods longer than 30 days but shorter than 181 days, the employee must submit an application for reemployment within 14 days of his release from service. For service periods longer than 180 days, an application for reemployment must be submitted within 90 days of the employee's release.

Employers should be aware that employees who meet the eligibility criteria for reemployment must not be discharged, except for cause, during a special protection period that hinges on the time in service.

What job is the returning servicemember entitled to?

Generally, the employee "returns" to the job she *would have attained* with reasonable certainty if not for the military service that caused her absence. Commonly known as the "escalator principle," this rule asserts that but for the period of military service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) as a result of intervening events.

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8-27 Safety Culture Assessments: How to Create and Deploy Them to Drive Positive Change

8-28 Injury and Illness Recordkeeping in California: Key State Differences and Upcoming Developments

8-28 Measuring Leadership Development Effectiveness: How to Tell if Your Methods Are Working or Not

8-28 Workplace Retaliation: How to Avoid the No. 1 Charge Filed with the EEOC and Write Position Statements to Withstand Scrutiny

8-29 Multistate Employers Payroll Tax Pitfalls: How to Correct the Most Common Errors Before They Result in Costly Penalties

8-29 Setting Your Safety Committee Up for Success: Best Practices for Cultivating Advocates for Safety and Driving Engagement

9-5 A-list Risk Assessment Teams: How to Create, Train, and Manage an Effective Risk Assessment Team

9-5 Drug-Free Workplace Policies: The Impact the Legalization of Marijuana Has on Your Management Rights

9-11 ICE Raids and Audits: What's Happening Now and How to Respond

9-12 Obesity: an ADA-Covered Impairment or Not? How to Practically Manage Your Legal Obligations

9-19 Disasters—Natural and Man-Made: Strategies on How to Train Workers to Stay Safe and How to Keep Your Business Running

9-19 Prepping High-Potential Employees for Leadership Roles: How to Identify, Assess, Develop, and Engage HiPOs

The escalator principle requires that the employee be reemployed "in the position of employment in which the person would have been employed if [her] continuous employment . . . with the employer had not been interrupted by [military] service, or a position of like seniority, status, and pay, the duties of which [she] is qualified to perform." Notably, the position to which the employee returns could be no job at all if plant closings or layoffs have occurred in her absence.

Are there any exceptions to the right to reemployment?

An employer may not have to reemploy a returning servicemember if (1) circumstances have changed to an extent that makes it impossible or unreasonable to reemploy him, (2) the employee isn't qualified for a job after the employer makes reasonable efforts to qualify him, or (3) reemployment would create an undue hardship.

The "unreasonable or impossible" exception is limited, and the employer has the burden of proof. The fact that the employer hired another person to fill the position in the veteran's absence or that no openings exist at the time of the returning servicemember's application for reemployment is insufficient.

The burden of proof for the "undue hardship" exception also lies with the employer. It applies only if a returning servicemember isn't qualified for a job based on a disability or another bona fide reason. The employer must make reasonable efforts to qualify the person, and each case must be examined carefully to determine when it becomes an undue hardship for the employer to reemploy the servicemember.

Bottom line

This article provides only a brief overview of the rights of citizen soldiers and the attendant employer responsibilities. Myriad USERRA issues we haven't touched on could arise. The evaluation of an employee's military service and return to work is fact-specific. If you're faced with such a situation, you should carefully apply USERRA's guidelines. ✤

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